Filing # 84901949 E-Filed 02/13/2019 11:06:13 PM

IN THE FLORIDA SUPREME COURT

CHRISTOPHER SANCHEZ,

Petitioner

v.

MIAMI-DADE COUNTY,

Respondent.

_____/

CASE NO. SC18-793

L.T. Case No. 3D16-959

RECEIVED, 02/13/2019 11:06:26 PM, Clerk, Supreme Court

RESPONDENT'S ANSWER BRIEF OF THE MERITS

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STATEMENT OF THE FACTS

As Petitioner told the Third District Court of Appeal at oral argument, his claim against Respondent, Miami-Dade County (the "County") can be summed up as follows:

> The court: .... I'm trying to get to the heart of the claim. The negligence was not having off-duty police officers there, correct?
>
> Counsel: Say that again, you honor?
>
> The court: The negligence was not having off-duty police officers present at the party, correct?
>
> Counsel: Um, yes, your honor....
>
> The court: .... Is that a fair summary of your claim?
>
> Counsel: Um, yes, your honor....

Sanchez v. Miami-Dade County, 245 So. 3d 933, 940 (Fla. 3d DCA 2018), review granted, SC18-793, 2018 WL 4819338 (Fla. Oct. 4, 2018).

Indeed, Christopher Sanchez ("Sanchez" or "Petitioner") alleges that the County was negligent by failing to deploy two off-duty police officers to provide police protection at a private birthday party held at a County park. The host, Eli Salgado ("Salgado"), hired two guards who provided security at the party. (R. 647). Despite the presence of the guards, Sanchez, a party guest, was shot by an unidentified third-party and this lawsuit ensued.

Benito Juarez Park is owned and operated by Miami-Dade County, but can be rented out by private individuals for parties and other events. (R. 583). On August 24, 2012, Salgado purchased a Park's Foundation Membership (R. 885) which included a booklet containing a coupon for a free park pavilion or "shelter" rental. (R. 698). In addition to the booklet, Salgado received a copy of Benito Juarez Park's Facility Rental Additional Rules and Regulations. (R. 886). The facility rental rules and other County policies required Salgado to contact the Miami-Dade Police Department to obtain a permit and secure off-duty police officers if he was hiring a DJ or if he was expecting a large number of guests. Id. (R. 707-708, 841-842, 886). The police department would then determine the number of officers to assign. (R. 709, 713-715).

The County owns approximately 260 public parks and has only between 25 and 30 park security guards. (R. 2518-2519). The number of park security guards is determined by the budget. (R. 2518). On the weekends, the limited park security staff is primarily assigned parks containing beaches and marinas. (R. 733, R. 2519). There are no dedicated park security guards assigned to Benito Juarez Park. (R. 2519).

Salgado rented a pavilion at the park to host his 18th birthday party which took place on Saturday, September 22, 2012. (R. 885). Salgado's parents also attended the party. (R. 622). Salgado had approximately 200 guests at the event

and hired a DJ. (R. 613-614, 636-638). Salgado, however, failed to make arrangements with the police department for an off-duty police officer and failed to obtain a permit. (R. 716-717). Instead, he hired two private security guards to work at the party. (R. 444)

Diogenes Martin ("Martin") was a park service aide at Benito Juarez Park on the night of the event. (R. 612-625). Martin's responsibilities were to make sure the grounds and bathrooms were clean, to empty trash cans, and to provide set-up assistance. (R. 613, 623). According to Martin, none of the guests were fighting before the shooting. (R. 631). When he heard gunshots, Martin immediately called 911 and police arrived within five minutes. (R. 650-652, 2276). Sanchez was injured and this lawsuit followed. (R. 27).

Petitioner hired David Howard ("Howard") as his security expert. (R. 135, 217). According to Howard, security guards were not sufficient to provide appropriate protection at Salgado's party. (R. 2281, 2286-2288). Howard testified that Sanchez's shooting could only have been prevented by having two sworn police officers stationed at the event. (R. 2281). The reason for this, according to Howard, is because police officers have far more training than security guards and have the power to make arrests, use weapons, and summon additional law enforcement as backup. (R. 2286-2288).

The County moved for summary judgement on the basis that it owed Sanchez no duty of care and that his claims are barred by sovereign immunity. The trial court granted summary judgment in favor of the County and Sanchez appealed to the Third District Court of Appeal. The Third District affirmed the ruling of the trial court and held that the County is sovereignly immune from liability. Specifically, the court held that "the county's decision to allocate its scarce law enforcement resources to one area of the county over another is the kind of discretionary, planning, and policy decision that is protected by sovereign immunity." Sanchez v. Miami-Dade County, 245 So. 3d 933, 941–42 (Fla. 3d DCA 2018), review granted, SC18-793, 2018 WL 4819338 (Fla. Oct. 4, 2018). Petitioner now appeals that decision. The County requests that this Court affirm the decision of the Third District Court of Appeal on the basis that the County is sovereignly immune and because the County owed Sanchez no duty of care.

SUMMARY OF ARGUMENT

Petitioner's reliance on City of Belle Glade v. Woodson, 731 So. 2d 797 (Fla. 4th DCA 1999) is misguided. Woodson erroneously conflates duty with sovereign immunity, an analytical flaw this Court condemned ten years later in Wallace v. Dean, 3 So. 3d 1035, 1044 (Fla. 2009). Pursuant to Wallace v. Dean, courts must first decide the issue of duty and, if the court finds a duty, it must then determine whether the governmental entity enjoys sovereign immunity. Id. at 1040.

The County owed Sanchez no duty of care. Certain government activities are inherent in the act of governing and cannot form the basis of a common law or statutory duty of care. Trianon Park Condo. Ass'n, Inc. v. City of Hialeah, 468 So. 2d 912 (Fla. 1985). In Trianon, this Court divided government functions into four categories for the purpose of delineating when the government owes a duty of care and when it does not. The four categories are: (I) legislative, permitting, licensing, and executive officer functions; (II) enforcement of laws and the protection of the public safety; (III) capital improvements and property control operations; and (IV) providing professional, educational and general services for the health and welfare of . . . citizens. Id. at 917.

Granting or revoking permission to rent the park is a Category I governmental function because it is akin to licensing and permitting. It is purely a governmental function under Trianon and, therefore, the County owed no duty of care to Sanchez to deny or revoke Salgado's permission to use the park for failure to procure off-duty police officers in accordance with park rules. Furthermore, assignment of police officers to provide security at Benito Juarez Park for Salgado's birthday party is a Category II governmental function because it involves the protection of the public safety. Therefore, the County owed Sanchez no duty unless a special relationship existed. But clearly the record did not support a special duty and,

therefore, the County cannot be liable for negligence. See Pollock v. Fla. Dep't of High. Patrol, 882 So. 2d 928, 932–33 (Fla. 2004).

Nonetheless, even if this Court finds that the County owed a duty of care to Sanchez, sovereign immunity still bars Petitioner's negligence claim. Discretionary functions of government are generally protected by sovereign immunity. Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1022 (Fla. 1979). The assignment of police officers is a discretionary policy-making, planning or judgmental governmental function which cannot form the basis of traditional tort liability. Wong v. City of Miami, 237 So. 2d 132, 133-34 (Fla. 1970). Furthermore, the assignment of police officers falls squarely within the four-part sovereign immunity test annunciated in Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1016 (Fla. 1979) which is: (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

The amount of resources and personnel to be committed to law enforcement is a policy decision. Carter v. City of Stuart, 468 So.2d 955, 956-57 (Fla.1985). The assignment of police officers is essential to the accomplishment of that policy. See Wong, 237 So. 2d at 134 ("Inherent in the right to exercise police powers is the right to determine strategy and tactics for the deployment of those powers."). Moreover, the assignment of police officers requires the exercise of basic policy evaluation, judgment, and expertise on the part of the County because it requires the analysis of budgetary considerations, evaluation of available manpower, and a determination of where those finite resources are best utilized. Lastly, the County possesses the requisite constitutional, statutory, or lawful authority and duty to determine where its police officers will be assigned. See Miami-Dade County Code § 2-92(a) (granting the Miami-Dade Police Department the authority to "preserve the public peace, prevent crime, detect and arrest offenders, protect the rights of persons and property, and regulate and control traffic in accordance with the laws."). Because the challenged action in this case implicates a governmental policy or planning-level function under the Commercial Carrier four-part test, the County enjoys sovereign immunity.

Thus, the opinion of the Third District Court of Appeal should be affirmed on the issue of sovereign immunity. This Court should also affirm because the County owed Sanchez no duty of care.

ARGUMENT

I. PETITIONER'S RELIANCE ON WOODSON IS ERRONEOUS AS THE OPINION IMPROPERLY CONFLATES DUTY WITH SOVEREIGN IMMUNITY.

Throughout his Brief, Petitioner ignores the difference between duty and sovereign immunity and invites this Court to do the same. Relying on Woodson, Petitioner overlooks the fact that duty and sovereign immunity are two distinct concepts that must be analyzed separately.

When addressing the issue of governmental liability under Florida law, this Court has "repeatedly recognized that a duty analysis is conceptually distinct from any later inquiry regarding whether the governmental entity remains sovereignly immune from suit notwithstanding the legislative waiver present in section 768.28, Florida Statutes." Wallace, 3 So. 3d at 1044. In Kaisner v. Kolb, this Court held that "[T]he question of the applicability of ... immunity does not even arise until it is determined that a defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity." Kaisner v. Kolb, 543 So. 2d 732, 734 (Fla. 1989). Likewise, in Pollock this Court concluded that "if no duty of care is owed with respect to alleged negligent conduct, then there is no governmental liability, and the question of whether the sovereign should be immune from suit need not be reached. However, if a duty of care is owed, it must then be determined

whether sovereign immunity bars an action for an alleged breach of that duty." Pollock, 882 So. 2d at 932–33.

In Wallace, this Court again stressed the distinction between duty and sovereign immunity. Wallace, 3 So. 3d at 1044. This Court explained that "[u]nder traditional principles of tort law, the absence of a duty of care between the defendant and the plaintiff results in a lack of liability, not application of immunity from suit." Id. "Conversely, sovereign immunity may shield the government from an action in its courts (i.e., a lack of subject-matter jurisdiction) even when the State may otherwise be liable to an injured party for its tortious conduct." Id. "In other words, the presence of sovereign immunity does not render the State's actions nontortious (it simply means that the State has not consented to suit in its courts with regard to certain claims). In contrast, the absence of a duty of care renders the defendant nonliable as a matter of law because his, her, or its actions are therefore nontortious vis-à-vis the plaintiff." Id. at 1044-1045.

In emphasizing, the importance of conducting a separate analyses of duty and sovereign immunity, this Court rebuked the practice of improperly conflating the two distinct concepts. Wallace, 3 So. 3d at 1040 ("[I]n opposition to Kaisner, the decision below improperly conflated the separate questions of duty and sovereign immunity"). This Court also identified decisions that erroneously conflated the two

issues, namely Miami-Dade County v. Fente, 949 So. 2d 1101, 1103-05 (Fla. 3d DCA 2007) and Seguine v. City of Miami, 627 So. 2d 14 (Fla. 3d DCA 1993).

Woodson was decided by the Fourth District Court of Appeal in 1999 and contains the flawed analysis condemned by this Court in Wallace. In a four-paragraph decision, Woodson erroneously conflates duty with sovereign immunity by holding:

> We agree with the plaintiffs that the City, in maintaining and operating the Civic Center, falls within the Trianon Park Category III. ***Thus, it does not enjoy sovereign immunity but rather has the same common law duty as a private person to properly maintain and operate the property***. That having been said, the denial of the City's motion for directed verdict was not error, the evidence being legally sufficient to support the elements of the plaintiffs' cause of action.

Id. at 797-98. (emphasis added).

Woodson's discussion of duty is sparse. More importantly, the opinion conducts no true sovereign immunity analysis. Commercial Carrier is not cited. No mention is made of the four-part test and the case says nothing about whether the city's challenged acts involved quasi-legislative, policy-making, planning or governmental functions. The opinion holds that operation of the civic center was a Trianon Park Category III function and in the very next sentence concludes that the city is not sovereignly immune. Id. The rationale for concluding a lack of immunity is based entirely on the existence of a duty. See, e.g., Woodson 731 So. 2d at 797 ("We agree with the plaintiffs that the City, in maintaining and operating the Civic

Center, falls within the Trianon Park Category III. **Thus**, it does not enjoy sovereign immunity but rather has the same common law duty as a private person to properly maintain and operate the property.") (emphasis added).

Like Fente and Seguine, Woodson conducts a Trianon analysis and then, based on that analysis alone, reaches a conclusion regarding the application of sovereign immunity. Wallace explicitly rejects this line of reasoning and Woodson is no longer good law in light of Wallace.

To the extent that there is a conflict between the decision below and Woodson, that conflict exists only because Woodson is incorrectly decided. The Woodson opinion never adequately considered the sovereign immunity presented squarely to this Court now. The Woodson opinion did not have the benefit of this Court's clarification of the relationship between the Trianon taxonomy and the Commercial Carrier four-part test. Pursuant to Wallace, the Third District Court of Appeal in the decision below correctly analyzed sovereign immunity as a concept separate from duty. The court rightly concluded that Petitioner's negligence claims are barred by the application of sovereign immunity.

II. THE COUNTY DID NOT OWE SANCHEZ A DUTY OF CARE.

The Third District Court of Appeal concluded that Petitioner is attempting to hold the County liable for failing to procure off-duty police officers. Sanchez, 245 So. 3d at 940. Despite this finding, the court held that "the county is shielded from

liability for not allocating off-duty police officers, and **only** because it has sovereign immunity that protects its policy and planning decisions about where to allocate its limited police resources." Id. at 944 (emphasis added). While the sovereign immunity holding is correct and should be affirmed, the Third District Court of Appeal should have also held that the County had no duty under Trianon. Therefore, the County requests that this Court affirm on the basis of duty as well as sovereign immunity. See Malu v. Sec. Nat. Ins. Co., 898 So. 2d 69, 73 (Fla. 2005) (acknowledging that the "tipsy coachman rule" allows an appellate court to affirm a decision despite a finding of error in the lower court's reasoning as long as there is an alternative basis to justify affirming the decision).

Duty is an element of negligence. Limones v. Sch. Dist. of Lee County, 161 So. 3d 384, 389 (Fla. 2015). ("We have long held that to succeed on a claim of negligence, a plaintiff must establish the four elements of duty, breach, proximate causation, and damages."). "Under traditional principles of tort law, the absence of a duty of care between the defendant and the plaintiff results in a lack of liability." Wallace, 3 So. 3d at 1044. "A duty of care is 'a minimal threshold legal requirement for opening the courthouse doors.'" Id. at 1046 (quoting McCain v. Fla. Power Corp., 593 So.2d 500, 502 (Fla. 1992). "For there to be governmental tort liability, there must be either an underlying common law or statutory duty of care with respect to the alleged negligent conduct." Trianon, 468 So. 2d at 917.

Therefore, before any other analysis, a court must determine that government owed a common law or statutory duty of care to the individual. Wallace, 3 So. 3d at 1044–45 ("A threshold matter is whether the Sheriff's deputies owed the decedent a duty of care, because, as alluded to above, there can be no governmental liability unless a common-law or statutory duty of care existed that would have applied to an individual under like circumstances"); Pollock, 882 So. 2d at 932–33 ("If no duty of care is owed with respect to alleged negligent conduct, then there is no governmental liability"); Henderson v. Bowden, 737 So. 2d 532, 535 (Fla. 1999) ('"Conceptually, the question of the applicability of ... immunity does not even arise until it is determined that a defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity"') (quoting Kaisner v. Kolb, 543 So. 2d 732, 733 (Fla. 1989)). The summary judgment record in this case makes it clear that the County did not owe Sanchez a duty of care. Trianon, 468 So. 2d at 917.

In Trianon, this Court thoroughly addressed the various activities of government that either support or fail to support the recognition of a duty of care between government and an injured party. Id. at 919-921. Trianon divided governmental functions into four categories for the purpose of delineating when the government owes a duty of care and when it does not. The four categories are: (I) legislative, permitting, licensing, and executive officer functions; (II) enforcement

of laws and the protection of the public safety; (III) capital improvements and property control operations; and (IV) providing professional, educational and general services for the health and welfare of . . . citizens. Id. at 917. The first, legislative, permitting, licensing, and executive officer functions, provide for no governmental duty.

> I. Legislative, Permitting, Licensing, and Executive Officer Functions.
>
> Clearly, the legislature, commissions, boards, city councils, and executive officers, by their enactment of, or failure to enact, laws or regulations, or by their issuance of, or refusal to issue, licenses, permits, variances, or directives, are acting pursuant to basic governmental functions performed by the legislative or executive branches of government. The judicial branch has no authority to interfere with the conduct of those functions unless they violate a constitutional or statutory provision. There has never been a common law duty establishing a duty of care with regard to how these various governmental bodies or officials should carry out these functions. These actions are inherent in the act of governing.

Id. at 919.

The second category of governmental function as defined by Trianon is Enforcement of Laws and Protection of the Public Safety:

> How a governmental entity, through its officials and employees, exercises its discretionary power to enforce compliance with the laws duly enacted by a governmental body is a matter of governance, for which there never has been a common law duty of care. This discretionary power to enforce compliance with the law, as well as the authority to protect the public safety, is most notably reflected in the discretionary power given to judges, prosecutors, arresting officers, and other law enforcement officials, as well as the discretionary authority given fire protection agencies to suppress fires. This same discretionary power to enforce compliance with the law is given to regulatory

> officials such as building inspectors, fire department inspectors, health department inspectors, elevator inspectors, hotel inspectors, environmental inspectors, and marine patrol officers. A "discretionary function exception," within which these types of activities fall, was expressly recognized in the Federal Tort Claims Act and has also been recognized as inherent in the act of governing by this Court and a majority of the other jurisdictions that have addressed this issue

Id. at 919–20.

Activities falling within Category II are generally performed for the public at large and do not result in a duty owed to an individual absent a showing of a "special duty of care." Pollock, 882 So. 2d at 935. A "special duty" only arises "when law enforcement officers become directly involved in circumstances which place people within a zone of risk by creating or permitting dangers to exist, by taking persons into police custody, detaining them, or otherwise subjecting them to danger." Id. The activities alleged by the Petitioner herein fall within Trianon categories I and II, licensing and permitting and protection of the public. Therefore, the County owes no duty.

A. GRANTING OR REVOKING USE OF THE PARK IS A CATEGORY I GOVERNMENTAL FUNCTION FOR WHICH THE COUNTY OWES NO DUTY OF CARE.

Petitioner argues that the County either (1) should not have permitted Salgado to rent the park because he failed to comply with the rules by not procuring off-duty police officers to work the event or (2) should have revoked permission when it discovered that Salgado failed to procure off-duty police officers. Either way,

Petitioner impermissibly attempts to hold the County liable for issuance of, or refusal to issue, licenses, or permits. Because this is a classic Category I governmental function, the County owed no duty to Petitioner and is not liable for any injuries he sustained.

In applying the Trianon taxonomy, the First District Court of Appeal held that the state had no duty to the parents of children at a day-care center to monitor the center's compliance with a permit restriction prohibiting the owner's spouse from visiting the day-care facility. Brown v. Dep't of Health & Rehab. Services, 690 So. 2d 641, 644 (Fla. 1st DCA 1997). In Brown, a husband and wife applied to the Florida Department of Health and Rehabilitation Services (HRS) for a day-care license. Id. at 642. A check of HRS records revealed that the husband had a documented history of sexual abuse. Id. As a condition to granting the license, the husband agreed with HRS that he not visit the day-care. Id. HRS failed to enforce that provision and the husband visited the day-care on a regular basis. Id. Ultimately, the husband was arrested and convicted for sexually battering children at the facility. Id. The trial court granted a motion to dismiss in favor of HRS and the plaintiff appealed. Id. at 643. In affirming, the First District held that "[i]n both permitting and enforcement, there is a general duty to the public as a whole which does not constitute a duty to a particular individual. Id. at 644. Thus, HRS owed no common-law duty to the plaintiffs to monitor compliance with the permit condition." Id.

Likewise, in Huff v. Goldcoast Jet Ski Rentals, Inc., the Fourth District Court of Appeal held that the city owed no duty to a sailor who was injured in a no-wake zone even though the city had licensed the operation of a personal watercraft rental business. Huff v. Goldcoast Jet Ski Rentals, Inc., 515 So. 2d 1349, 1350-51 (Fla. 4th DCA 1987). In that case, the plaintiff alleged that "by licensing Goldcoast to operate a Jet Ski rental business in the waterway adjacent to a no wake zone, the City created a dangerous condition of which it had knowledge" and that "the City knew or should have known that Jet Skis rented from Goldcoast would be operated in the no wake zone in such a fashion as to create a wake dangerous to other boaters in the zone and that this danger was not apparent to the average boater using the waterway." Id. at 1349. In holding that the issuance of the license was a Trianon Category I governmental function, the court reasoned that "[t]o hold that, by issuing an operational license, the City thereby becomes exposed to liability because it knew or should have known that some person might operate a ski or a boat at such a speed as to create a wake and endanger other boaters is an unjustified quantum leap we decline to take." Id. at 1350–51.

Here, the County permitted the use of its park. Like the government defendants in Brown and Huff, the County did not owe Sanchez a duty under Trianon to enforce the provision requiring Salgado to procure off-duty police officers. Pursuant to Trianon, the County is not liable for issuing, or not revoking, Salgado's

license to use Benito Juarez Park because it owes no duty of care when it engages in that kind of Category I function.

B. THE COUNTY'S DECISION NOT TO ASSIGN OFF-DUTY POLICE OFFICERS TO THE PARK IS CATEGORY II GOVERNMENTAL FUNCTION FOR WHICH THE COUNTY OWES NO DUTY OF CARE.

Plaintiff alleges that the County had a duty to assign off-duty police officers to provide security at Salgado's birthday party. This Court has long held that governmental entities owe no duty to provide police protection to specific individuals in the absence of a "special relationship." Pollock, 882 So. 2d at 935; Wallace, 3 So. 3d at 1048 – 49. In Wong, this Court upheld the decision of the Third District Court of Appeal finding no governmental liability for withdrawing police forces despite knowledge of a potential riot. Wong, 237 So. 2d at 132-134. In Wong, a rally featuring civil rights speakers was scheduled in Miami on a particular date. Id. at 133. Business owners in the area bordering the rally requested additional police protection which the city initially provided. Id. As the rally went on, the mayor removed the officers, and a riot ensued causing damage to certain business owners. Id. In affirming the decision, this Court reasoned:

> [I]t is inherent in the right to exercise police powers is the right to determine strategy and tactics for the deployment of those powers. . . . The sovereign authorities ought to be left free to exercise their discretion and choose the tactics deemed appropriate without worry over possible allegations of negligence. Here officials thought it best to withdraw their officers. Who can say whether or not the damage sustained by petitioners would have been more widespread if the

> officers had stayed, and because of a resulting confrontation, the situation had escalated with greater violence than could have been controlled with the resources immediately at hand? If that had been the case, couldn't petitioners allege just as well that That course of action was negligent?

Id., at 134 (Fla. 1970).

This Court has repeatedly recognized lack of duty in police powers cases. In Rodriguez v. City of Cape Coral, this Court held that neither the city nor its police officer could be held liable for failing to take an obviously intoxicated person into protective custody where the person was later struck and killed by a motorist. Rodriguez v. City of Cape Coral, 468 So. 2d 963, 964 (Fla. 1985). Likewise, in Pollock, this Court held that Florida Highway Patrol did not have a duty to remove stalled vehicles from the roadway or otherwise maintain the highway in a safe condition. Pollock, 882 So. 2d at 935. Relying on Trianon, this Court concluded that "[p]atrolling the state highways, controlling the flow of traffic, and enforcing the traffic laws are duties FHP owes to the general public, as opposed to an individual person." Id. at 935. Moreover, in Everton v. Willard, this Court found no duty of care owed to the family of a motorist killed by a drunk driver to whom a deputy sheriff issued a citation rather than arrest fifteen minutes before he caused a fatal accident. Everton v. Willard, 468 So. 2d 936, 938-39 (Fla. 1985). In applying Trianon, the Court said "[t]he victim of a criminal offense, which might have been prevented through reasonable law enforcement action, does not establish a common

law duty of care to the individual citizen and resulting tort liability, absent a special duty to the victim." Id. at 938. The Court reached a similar conclusion in Carter v. City of Stuart, 468 So. 2d 955, 956-57 (Fla.1985) (no duty to enforce dog catcher ordinance) and Duvall v. City of Cape Coral, 468 So. 2d 961 (Fla.1985) (no duty to enforce drunk driving statute). Likewise, the County did not owe Sanchez a duty to assign off-duty police officers to Salgado's birthday party even if the presence of law enforcement might have prevented the shooting.

"The responsibility to enforce the laws for the good of the public cannot engender a duty to act with care toward any one individual, unless an official assumes a special duty with regard to that person." Pollock, 882 So. 2d at 935. Sanchez cannot establish that a special relationship existed between him and law enforcement officers. A "special relationship" only arises "when law enforcement officers become directly involved in circumstances which place people within a 'zone of risk' by" (1) "creating or permitting dangers to exist", (2) "by taking persons into police custody", (3) "detaining them," (4) "or otherwise subjecting them to danger." Pollock, 882 So. 2d at 935; Wallace, 3 So. 3d at 1048. "It is not enough that a risk merely exists or that it is foreseeable. Instead, the defendant's conduct must create the risk or control the situation before liability may be imposed." Jordan v. Nienhuis, 203 So. 3d 974, 978 (Fla. 5th DCA 2016). Here, a special relationship never formed between Sanchez and any County official. Police officers only became

involved after the shooting and, therefore, could not have placed Sanchez within the zone of risk. Likewise, Sanchez was not in custody, detained, or otherwise subjected to danger by the direct involvement of police. Because the assignment of off-duty police officers is a Trianon Category II function and Petitioner has not established a "special relationship, the County did not owe Sanchez a duty of care. Thus, the County cannot be liable to him for his injuries.

C. ASSIGNING OFF-DUTY POLICE OFFICERS TO A PARK IS NOT A CATEGORY III CAPITAL IMPROVEMENT AND PROPERTY CONTROL FUNCTION.

The third category of governmental functions under Trianon involve capital improvement and property control. Concerning Category III functions, this Court held:

> As this Court has made clear in prior cases, there is no liability for the failure of a governmental entity to build, expand, or modernize capital improvements such as buildings and roads. A governmental entity's decision not to build or modernize a particular improvement is a discretionary judgmental function with which we have held the courts cannot interfere. On the other hand, once a governmental entity builds or takes control of property or an improvement, it has the same common law duty as a private person to properly maintain and operate the property.

Trianon, 468 So. 2d at 920–21 (internal citations omitted).

Petitioner contends that the County breached a duty in operating Benito Juarez Park. In support, Petitioner cites Butler v. Sarasota County., 501 So. 2d 579 (Fla. 1986); Woodson, 731 So. 2d at 797-798; Cunningham v. City of Dania, 771 So. 2d

12, 16 (Fla. 4th DCA 2000); Collazos v. City of West. Miami, 683 So. 2d 1161 (Fla. 3d DCA 1996); and Hill v. City of North Miami Beach, 613 So. 2d 1356 (Fla. 3d DCA 1993). However, none of these cases find a duty on the part of government to utilize law enforcement officers as a security force on government property.

Butler v. Sarasota County is distinguishable from the case at bar because it deals with a county's duty to operate a public swimming area, not the assignment of police officers. Butler v. Sarasota County, 501 So. 2d at 580. In that case, the county undertook to operate a beach and failed to provide life-guards. Id. at 579. Under the circumstances, the county's liability was the same as a similarly-situated private property owner. Id. Meaning that a private entity that owned a swimming area would be obligated to provide lifeguards. By contrast, a private property owner cannot assign law enforcement officers to police its property. Here, Petitioner seeks to hold the County liable for failing to provide a function that only government can offer – the deployment of sworn law enforcement officers who can enforce the laws and make arrests. Collazos v. City of West Miami does not address police, but rather deals with the city's failure to provide adequate adult supervision during an after-school program. Collazos v. City of West Miami, 683 So. 2d at 1162-63. It is another example of a situation where the court found that a governmental entity owed a duty because it operated its premises in a way that a private landowner would.

Hill v. City of North Miami Beach is likewise distinguishable. While Hill is a negligent security case, the claim is that the city failed to suspend the park privileges of a known violent actor and that the city failed to take "other steps" for the protection of park users. Hill v. City of North Miami Beach , 613 So. 2d at 1358. The opinion does not address law enforcement nor does it hold that the city had a duty to assign police to the park. Id.

Woodson, which is relied upon heavily by Petitioner throughout his Initial Brief, does not address whether government has a duty to provide police protection on its property. Woodson, 731 So. 2d at 797-798. Instead, the allegation in Woodson was that the city breached its duty to properly maintain and operate its civic center by not providing adequate security for a teen dance where the city knew that these dances regularly involved disorderly conduct. The issue in Woodson was the sufficiency of security and, from the opinion it is unknown what, if any, security the city provided for the civic center. But a major difference between Woodson and the case at bar is that the issue in Woodson was not whether the city owed a duty to provide police protection at the dance. The Woodson plaintiffs do not allege, as the Petitioner does here, that the municipality had a duty to provide police officers in order to avoid liability for future harm caused by a third-party.

Finally, the facts in Cunningham v. City of Dania, are the closest to those here, but Petitioner misconstrues the Fourth District's holding. Cunningham is a negligent

security case where the plaintiff sued the City of Dania, which owned the park and the Sheriff of Broward County as the chief law enforcement officer. Cunningham, 771 So. 2d at 13. The plaintiff alleged that the city failed to provide adequate security, although the opinion does not state what measure of security that would have been. Id. The claim against the sheriff was that he failed to staff police at the park. Id. at 16. While the court permitted the claim to proceed against the city, the case against the sheriff was dismissed. Id. at 13-16. In affirming the trial court's decision to dismiss the sheriff, the Fourth District Court of Appeal held:

> Lastly, the facts alleged against [the sheriff] clearly refer to category II functions. A law enforcement officer's duty to protect the citizens is a general duty owed to the public as a whole. See Everton v. Willard, 468 So.2d 936, 938 (Fla.1985). The victim of a criminal offense which might have been prevented through reasonable law enforcement action does not establish a common law duty of care to the individual citizen and resulting tort liability. There has never been a common law duty of care owed to an individual with respect to the discretionary judgmental power granted a police officer to make an arrest and to enforce the law.

Id. at 16.

Petitioner here is not accusing the County of failing to provide some general measure of security. Rather, his claim against the County is one about police protection - just like Cunningham's claim against the Broward County Sheriff. According to Petitioner's security expert David Howard, Sanchez's shooting would not have happened if the County had assigned two police officers to work at the party. (R. 2281). In Howard's opinion, private security guards would not have been

enough because security guards do not have the same training or the same powers as police officers. (R. 2286-2288). Examples given by Howard are that security guards cannot generally use weapons, they cannot make arrests, nor can they summon law enforcement as back-up. Id. In summary, according to Howard, "[police] with their training, the tools that the policemen have at their disposal, the communication, the ability to have more policemen respond, just so much more that they can do than a security guard." (R. 2292 – 2293). Petitioner's entire case rests on the premise that the only appropriate measure of security was for the County to assign two police officers to provide law enforcement protection at Salgado's birthday party. Because assignment of police is inherent in the act of governing, failure to assign police cannot form the basis of tort liability. A landowner does not owe a common law duty to staff his premises with police. Therefore, the County has no duty under Category III to do so either. Deployment of police is a duty government owes to the general public and not to any one individual. Because Petitioner seeks to hold the County liable for inherent governmental functions, his claim fails on the element of duty. Therefore, this Court should affirm on the basis that the County had no duty.

III. THIS ACTION IS BARRED BY SOVEREIGN IMMUNITY.

Even if this Court finds that the County owed Petitioner a duty, it should affirm the Third District's opinion on the basis that Petitioner's claim is barred by

sovereign immunity. This Court has held that "the separation-of-powers provision present in article II, section 3 of the Florida Constitution requires that "certain [quasi-legislative] policy-making, planning or judgmental governmental functions cannot be the subject of traditional tort liability." Wallace, 3 So. 3d at 1053. As the Third District Court of Appeal held in the decision below, allocation of police officers to patrol County properties is one of these functions. Sanchez, 245 So. 3d at 940. (citing Carter, 468 So.2d at 957 ("The city has the right to set its priorities in reference to law enforcement."); Wong, 237 So.2d at 134 ("[I]nherent in the right to exercise police powers is the right to determine strategy and tactics for the deployment of those powers.... The sovereign authorities ought to be left free to exercise their discretion and choose the tactics deemed appropriate without worry over possible allegations of negligence.").

The test to determine whether a government actor is protected by sovereign immunity is the four-part analysis found in Commercial Carrier:

> (1)Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision? If these preliminary questions can be clearly and unequivocally answered in the affirmative, then the challenged act,

> omission, or decision can, with a reasonable degree of assurance, be classified as a discretionary governmental process and nontortious, regardless of its unwisdom. If, however, one or more of the questions call for or suggest a negative answer, then further inquiry may well become necessary, depending upon the facts and circumstances involved.

Commercial Carrier, 371 So. 2d at 1019.

Applying the test to the facts of this case, all questions are answered in the affirmative. The challenged act, omission, or decision necessarily involves a basic governmental policy, program, or objective. Here the challenged act is the County's decision not to assign two off-duty police officers to provide law enforcement protection for a birthday party at Benito Juarez Park. This Court has long held that the amount of resources and personnel to be committed to law enforcement is a policy decision. Carter, 468 So. 2d at 957.

The assignment of police is essential to the realization or accomplishment of that policy as opposed to one which would not change the course or direction of the policy. Indeed, this Court has held that "inherent in the right to exercise police powers is the right to determine strategy and tactics for the deployment of those powers." Wong, 237 So. 2d at 134.

Likewise, the assignment of police officers requires the careful consideration and balancing of many factors, including budget, manpower, and need. It is a complicated process to determine where those finite resources are best utilized.

These policy decisions are made by those with expertise about the needs of the County and policing in general.

Finally, the County possesses the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision. Miami-Dade County's law enforcement functions are carried out by the Miami-Dade Police Department. See Masson v. Miami-Dade County, 738 So. 2d 431, 432 (Fla. 3d DCA 1999), cause dismissed, 743 So. 2d 13 (Fla. 1999). The Miami-Dade Police Department has the authority to "[p]reserve the public peace, prevent crime, detect and arrest offenders, protect the rights of persons and property, and regulate and control traffic in accordance with the laws of this State and the ordinances of this County." Miami-Dade County Code § 2-92(a). Therefore, the County, through its police department, has the sole ability to assign police officers to a particular location.

The County is not liable because it owed Petitioner no independent duty of care under Trianon. However, should the Court determine that the County owed Sanchez a duty, the County's decision concerning the assignment of police is a discretionary policy-making decision for which the County is sovereignly immune from liability. Therefore, the opinion of the Third District Court of Appeal should be affirmed.

CONCLUSION

There is no liability on the part of the County because (1) the County owed the Petitioner no duty of care and (2) the County enjoys sovereign immunity. This Court should affirm the decision of the Third District Court of Appeal for both reasons.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been served through the Court's E-Filing Portal on this 13th day of February, 2019 to: Pamela Beckham, Esq., Beckham & Beckham, P.A., 1550 NE Miami Gardens Drive Suite 504, Miami, FL 33179, service@beckhamlaw.com; Ronald D. Rodman, Friedman, Rodman & Frank, P.A., 3636 West Flagler Street, Miami, Florida 33135, ronrod.frf@gmail.com; frflawservice@gmail.com; stephanie.frf@gmail.com.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief has been prepared in Times New Roman 14-point font and complies with the requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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