IN THE SUPREME COURT OF FLORIDA

KELLY WALLACE, as Personal Representative of the Estate of **BRENDA WALLACE**, deceased,

Petitioner,

vs.

ED DEAN, as Sheriff of Marion County,

Respondent.

_____/

CASE NO.: SC08-149

Lower Tribunal
Case No.:5D06-4289

On Discretionary Review From The
Fifth District Court Of Appeal

ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

Respondent, Ed Dean, as Sheriff of Marion County, feels the case posture and essential facts have been sufficiently furnished by Petitioner's initial brief on the merits. Respondent, Ed Dean, is in general agreement and adopts the statement of the case and facts as set forth by the Petitioner, Kelly Wallace, with the following additions and modifications:

In the Second Amended Complaint the Petitioner alleged that Ms. Ginder, a neighbor of the decedent, Ms. Wallace, accepted the undertaking of checking on Ms. Wallace. (R.I: 114) Ms. Ginder was familiar with Ms. Wallace, as the Second Amended Complaint alleges she provided the Marion County Sheriff's deputies with background information regarding Ms. Wallace. (R.I: 114). The Second Amended Complaint alleges the deputies improperly evaluated the Ms. Wallace's medical condition. (R.I: 115). The Second Amended Complaint alleges that, "Ms. Wallace was breathing but completely unresponsive." The Second Amended Complaint contains no further allegations of an observable condition, which would place the Marion County Sheriff's deputies on notice that Ms. Wallace was in need of medical attention. (R.I: 115).

The Petitioner's statement of the facts fails to sufficiently explain the significance of the deputies telling Ms. Ginder that they would leave a side door open so that Ms. Ginder could check on the decedent at a later time. (R.I: 115).

Ms. Ginder did exactly that, but decided to wait until the following morning to check on the decedent's condition. (R.I: 115). The Second Amended Complaint contains no allegations that would support a finding that the deputies' actions created or increased the risk to the decedent.

QUESTIONS PRESENTED (RESTATED)

I. Under Florida Law, is there a duty of care established when a law enforcement officer engages in a well-being check if there is no "special relationship"?

II. Are the decisions made by law enforcement officers engaged in a well being check discretionary functions for which no tort liability attaches based upon the doctrine of sovereign immunity?

SUMMARY OF ARGUMENT

The Trial Court and the Appellate Court correctly concluded that the allegations within the Second Amended Complaint fail to state a claim for which relief can be granted. Respondent, Sheriff Ed Dean, owed no statutory or common law duty of care to Ms. Wallace. Under Florida law, there is no common law duty of care owed to any particular individual with respect to the enforcement of laws and protection of the public safety.

No "special relationship" was created between the Petitioner and the Marion County Sheriff's deputies who arrived at the scene. Law enforcement officers must make an express promise that specific law enforcement action will be taken to create a "special relationship". The factual allegations in Petitioner's Second Amended Complaint clearly show that Marion County Sheriff's deputies made no express promise or assurance that they would take any specified law enforcement action as a result of visiting the home. The Deputies did not promise any medical treatment or action related to medical treatment would be taken or provided.

The allegations in the Petitioner's Second Amended Complaint do not demonstrate that the actions of the Marion County Sheriff's deputies placed Ms. Wallace within a "zone of risk", which could potentially give rise to a duty of care. In this case, the law enforcement officers' actions gave the neighbor access to the residence. (R.I: 115) According to the Second Amended Complaint, Ms. Wallace

was in the same condition when the Marion County Sheriff's Deputies departed her home as when they arrived. The Marion County Sheriff's deputies neither assumed control over Ms. Wallace to the exclusion of others nor did they take her into custody. The allegations show just the opposite. The deputies elected not to assume control over the situation or Ms. Wallace. Based upon their observations and the exercise of their discretion, the Marion County Sheriff's deputies and the neighbor, Ms. Ginder, agreed she would monitor Ms. Wallace's condition and contact the authorities, if necessary. (R.I: 116) Thus, the allegations cannot support a finding that the Marion County Sheriff's deputies created a "zone of risk" that would give rise to a corresponding duty under Florida law.

The Petitioner's application of the "undertaker doctrine" to the facts of this case is overbroad and not appropriate for law enforcement officers performing discretionary functions. Under Florida law the undertaker doctrine is inapplicable to Level II discretionary functions. The District Court has rightfully refused to extend the "undertaker's doctrine" to the activities of law enforcement. To do so would necessarily expose law enforcement to endless liability. Under the Petitioner's theory, every time an officer responds to a call, conducts an investigation or creates a report, a duty would arise from that undertaking.

Even assuming that such a duty did exist, Petitioner's claims would be barred by the doctrine of sovereign immunity. Law enforcement officers responding to

well-being checks are performing discretionary law enforcement functions. This case presents the circumstances under which the public duty doctrine should apply. The public duty doctrine exception primarily protects the government against over burdensome tort liability, and allows the government decision makers the latitude to exercise its power for the public benefit. Under the Petitioner's view, little, if any, government activity would be insulated from tort liability. The doctrine of sovereign immunity has not been eroded to the extent that law enforcement officers may no longer exercise discretion while undertaking to answer a call for service without creating a cause of action for negligence. The Trial Court appropriately found Petitioner's claims barred by the doctrine of sovereign immunity. To create a duty under the circumstances of this case, will have a chilling effect upon the decision of law enforcement on whether to perform "well being checks" in the future. There is a great public benefit derived from law enforcements' performance of well being checks, which would be lost if under these circumstances the Sheriff of Marion County is held to be liable.

ARGUMENT

The standard of review for a decision resolving a motion to dismiss based on a claim that no legal cause of action exists as alleged in the complaint is *de novo*. *Fla. Dep't of Corr. v. Abril*, 969 So. 2d 201, 204 (Fla. 2007). "This Court has held that while breach, causation, and damages are ordinarily questions for the jury,

′duty exists as a matter of law and is not a factual question for the jury to decide.′" *Id.* at 204-205 (quoting *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 503 (Fla. 1992)). The first question that must be decided is whether the Respondent, as Sheriff of Marion County, owed an actionable duty to the decedent based upon the allegations contained within Petitioner's Second Amended Complaint. Unless a duty of care arises, the issue of whether or not the doctrine of sovereign immunity bars the claim need not be addressed. *Kaisner v. Kolb*, 543 So.2d 732, 734 (Fla. 1989).

I. The Fifth District Court of Appeal Correctly Held That The Respondent Owed The Petitioner No Legal Duty

The Fifth District Court of Appeal's decision is in conformity with this Court's prior legal precedence holding, that under Florida law, there is no common law duty of care owed to any particular individual with respect to the enforcement of the laws and protection of the public safety. See *Pollock v. Fla. Dept. of Highway Patrol*, 882 So. 2d 928 (Fla. 2004); *Trianon Park Condo. Ass'n*, 468 So. 2d 912 (Fla. 1985); *City of Daytona Beach v. Palmer*, 469 So. 2d 121(1985). The Court's prior decisions have consistently held a governmental duty to protect citizens is a general duty owed to the public as a whole. *Pollock*, 882 So.2d at 935; *Vann v. Department of Corrections*, 662 So.2d 339, 340 (Fla. 1995). Thus, to maintain an action for negligence, a plaintiff must establish that the defendant

owed the plaintiff a special duty. It is the existence of a special duty on the part of the Respondent that is at issue in this appeal.

Petitioner in her brief concedes that the deputies owed no common law duty of care. However, Petitioner asserts "they undertook such a duty by entering the decedent's home to assess her well-being." This Court's opinion in *Pollock* reiterated that no duty exists in the absence of a special relationship. *Id.* at 935. In this case, the Fifth District Court of Appeal correctly held that no special relationship existed between Ms. Wallace and the Marion County Sheriff's deputies that would give rise to a duty. Petitioner seems to imply that any time law enforcement responds to the scene, an undertaking occurs that would give rise to a duty.

Florida's appellate courts that have had the occasion to directly address the issue have consistently held that a law enforcement officer's response alone does not support a finding of a "special relationship". See *Miami-Dade County v. Fente*, 949 So. 2d 1101 (Fla. 3rd DCA 2007)(law enforcement responding to a call for services after a security alarm was triggered owed no duty of care to individual); *City of Ocala v. Graham*, 864 So.2d 473 (Fla. 5th DCA 2004), (failure of officers to appropriately investigate threats was not actionable, as there was no common law duty of care owed and the necessary elements to establish a special relationship between the law enforcement officer and the tort victim did not exist);

Pierre v. Jenne, 795 So.2d 1062 (Fla. 4th DCA 2001)(negligence in the handling of a 911 emergency call did not create a special relationship even though there was direct communications between law enforcement and the victims, because no express promise or assurance was made by the 911 operator).

The allegations in the Second Amended Complaint do not establish that the deputies who responded to the home owed a general or special duty of care to the decedent. As discussed further below, the factual allegations in Petitioner's Second Amended Complaint cannot support a finding that there was a "special relationship" or "zone of risk" created by the deputies' actions. The Respondent emphasize that this case does not involve a custodial relationship or an express promise to take specific police action. Accordingly, there can be no corresponding duty as a matter of law.

A. No "Special Relationship" Existed Between The Marion County Sheriff's Deputies and Ms. Wallace

This Court has recognized "that a special duty may be established when a police officer makes a direct representation to a plaintiff, or one so closely involved with the plaintiff that their interests cannot be separated, that he or she will take a specified law enforcement action." *Pollock*, 882 So.2d at 936.

> "The following elements must be pled and proved to establish a special relationship between law enforcement and the tort victim:

> 1) an express promise or assurance of assistance;
> 2) justifiable reliance on the promise or assurance of assistance; and,
> 3) harm suffered because of the reliance upon the express promise or assurance of assistance."

Pierre, 795 So. 2d at 1063-64 (Fla. 4th DCA 2001). In *Pierre* the plaintiff attempted to sue the Sheriff of Broward County for negligence in the handling of a 911 emergency call. Despite the fact there was direct communications between law enforcement and the victims, there was still an absence of a special relationship, because no express promise or assurance of assistance was made by the 911 operator. *Pierre*, 795 So. 2d at 1065. Similarly, here, the deputies' actions did not create any type of express promise or assurance of assistance. The Petitioner argues, in hindsight, the deputies should have called for paramedics instead of allowing the neighbor to check on Ms. Wallace. However, this allegation doesn't create a special relationship; it merely questions their discretionary decisions. The deputies did not make any express promise or assurance that they would take any specified law enforcement action as a result of visiting the home, nor did they promise to return to the scene and take any further action. Where there are no allegations within the Petitioner's Second Amended Complaint that the officer promised to take specific action and failed to do so, the allegation cannot demonstrate that a "special relationship" existed between the decedent, Ms. Wallace, and the Marion County Sheriff's Office. The Appellate

and Trial Court, therefore, correctly ruled that a special relationship did not exist between Marion County Deputies and the Wallace family.

The Petitioner alleges a conflict between the Fifth District Court's decision in this case and the opinion in *First National Bank of Jacksonville v. City of Jacksonville*, 310 So.2d 19 (Fla. 1st DCA 1975). *First National Bank of Jacksonville* predates this Court's subsequent opinions, which specifically address the public duty doctrine, and sovereign immunity. See *Everton v. Willard*, 468 So.2d 936 (Fla. 1985); *Trianon Park v. City of Hialeah*, 468 So.2d 912 (Fla. 1985). It is also important to note that the Court initially issued a Writ of Certiorari in *First National Bank of Jacksonville*, but after reviewing the record determined the Court was without jurisdiction because there was not a "direct" conflict". See *Jacksonville v. Florida First Nat'l Bank*, 339 So. 2d 632, 633 (Fla. 1976). The Court in discharging the writ recognized the facts of the case were specific and the requisite factual similarity to establish the Courts jurisdiction was wholly absent. *Id*. at 633. The Court went on to state: "The absence of a jurisdictional foundation for our review in this case is not a mere technicality. It is a matter of constitutional significance." *Id*. at 634. However, Justice Boyd in his dissenting opinion recognized that, "local governments must be free from negligence suits brought because of a municipal employees' mistaken discretionary judgment." He went on to state:

> "The majority demonstrates compassion but fails to follow Florida law. Governments cannot right all wrongs, prevent all injustice, or solve all the problems of mankind. The courthouse doors are now open to suits for countless claims by those who feel they suffer by failure of the governments to prevent their injuries. This could lead to bankruptcy of local governments and cause more harm than good."

The facts of *First National Bank* are not similar to the facts alleged in this case. If the Court had a constitutional basis for exercising jurisdiction in *First National Bank*, it is possible, based on the courts opinion and Justice Boyd's dissent, that the appellate court's decision on which the Petitioner relies may not have been approved. See *Jacksonville v. Florida First Nat'l Bank*, 339 So. 2d 632 (Fla. 1976).

Lastly, the Petitioner alleges that lower court's decision in this case expressly and directly conflicts with *Hartley v. Floyd*, 512 So.2d 1022 (Fla. 1st DCA 1987), *rev. den.*, 518 So.2d 1275 (Fla. 1987). The *Hartley* case is clearly distinguishable and not applicable to the circumstances existing in this case. The plaintiff, in *Hartley*, called the police when her husband was several hours overdue returning from a two day fishing trip with four of his friends. *Id*. at 1023. The deputy promised to go to the boat ramp where Floyd's vehicle and boat trailer were parked and to notify the Coast Guard. *Id*. Not only did he fail to do either of those promised undertakings, he told Mrs. Floyd that he checked the boat ramp and

her husband's truck was not there. *Id.* In reliance on these assurances and representations, the wife delayed calling the Coast Guard, as she had assumed, her husband had returned and was on his way home. *Id.* at 1024. Based upon the misrepresentations and assurances made to the plaintiff, a nine hour delay occurred in the rescue operation. *Id.*

Clearly, the *Hartley* decision is distinguishable from the facts of this case. The misrepresentation by the deputy to the plaintiff caused the plaintiff to delay notifying the Coast Guard. The deputy's failure to check the boat ramp, coupled with his misrepresentation to the plaintiff that he did perform as promised, illustrated his lack of reasonable care. The instant case is distinguishable from *Hartley* in several ways. First, the Marion County Sheriff's Deputies did not agree or promise the Petitioner or the deceased anything and only responded to a well being check made by the neighbor. Secondly, once the Marion County Sheriff's Deputies arrived at the scene and they checked on Ms. Wallace by gaining access to her home through a window, they observed Ms. Wallace sleeping and no facts allege that she was in any observable urgent condition. (RI: 115) The Petitioner did not allege that the Deputies made any misrepresentations about the further care of Ms. Wallace, as was the case in *Hartley*. The factual circumstances in *Hartley* are inapposite to the facts in the case at bar. There were no promises of specific law enforcement action that would create a special relationship alleged to have

been made, but not followed through with, in this case as there was in *Hartley*. Therefore, the cases are not in conflict as the same law was applied, but to a different set of facts.

The Petitioner also attempts to distinguish decisions form other courts cited in the Fifth District Court of Appeal's decision, which lend support to the proposition that Respondent owed Ms. Wallace no duty. *See* R-5 DCA: 9, n.3. However, a careful reading of the opinions show they are relevant to the case at bar. *See Rose v. County of Plumas*, 152 Cal. App. 3d 999, 1005 (Cal. App. 3d Dist. 1984)("Absent an indication that the police had induced decedent's reliance on a promise, express or implied, that they would provide her with protection, it must be concluded that no special relationship existed and that Petitioner has not stated a cause of action."); *see also*, *Figueroa v. New York City Transit Authority*, 152 Misc. 2d 948 (N.Y. Sup. Ct. 1991)("[O]fficer's discussion with individual observed near the tracks holding a baby in her arms, who was later struck and killed by an oncoming train, did not assume, through promises or actions, an affirmative duty to act on the child's behalf, nor did the officer have knowledge that inaction could lead to harm).

In addition to the cases cited in the Appellate Court's decision, there are numerous other persuasive opinions from other States that would support a finding that Respondent owed no duty to Ms. Wallace. For example, in *Braswell v.*

Braswell, 330 N.C. 363 (N.C. 1991), a case involving the death of a mother as a result of gunshot wounds inflicted by her son's father, the Supreme Court of North Carolina held that although the son's evidence was that the sheriff indicated to the son's mother that he thought she would be safe, there was no evidence of a promise made by the sheriff which would warrant a special duty and thus the facts did not support a claim. In *Gilchrist v. Livonia*, 599 F. Supp. 260 (E.D. Mich. 1984), the district court, applying Michigan state law, held that plaintiff's claim must fail because she cannot show under any state of facts alleged that the police owed a duty any greater than that owed the public at large. In *Gilchrist*, the plaintiff's husband threatened suicide, and the plaintiff called the police. She told the four officers that arrived that her husband should be hospitalized. *Id*. at 262. The officers took his firearms, but did not take him into custody. *Id*. After they left, the husband began beating his wife, who again called the police. *Id*. Two of the original officers arrived but again refused to take the husband into custody. Shortly after they left, the husband shot himself. *Id*. In *Gilchrist* the plaintiff argued that since the defendants saw that Gilchrist was mentally ill, the police had an affirmative duty to get him psychiatric treatment. The plaintiff claimed that the officers' refusal to take Gilchrist to a hospital after being alerted to his unstable condition constituted "gross negligence" and "deliberate indifference". *Id.* at 263. The court held the police officers were not required to take persons requiring

psychiatric treatment into custody; "what is to be done under the circumstances is left to the discretion of the officer." *Id*.

Petitioner relies heavily on the opinion in *Torres v. City of Chicago*, 352 Ill. App. 3d 533 (Ill. App. Ct. 1st Dist. 2004), which she asserts is directly on point. Contrary to Petitioner's assertion, *Torres* is easily distinguished from the case at bar. In Torres, the decedent, Rivera, was located within a crime scene, which was under the control of the City of Chicago Police Department. Additionally, officers told at least one person who sought to assist Rivera to leave the area, assuming control over the scene to the exclusion of others. *Id*. at 533. Based on the above mentioned facts, the decision in *Torres* is factually distinguishable from the facts in this case.

There is no allegation in Petitioner's Second Amended Complaint that Marion County Sheriff's deputies made any express promise or assurance that they would take any specified law enforcement action as a result of visiting Ms. Wallace's home. Unlike the situation in *Torres*, the deputies in this case did not prevent others from caring for or obtaining medical care for Ms. Wallace. The deputies never promised to provide or secure medical treatment. (RI: 116) There are no facts alleging the Marion County Sheriff's deputies were dispatched to a medical emergency or that Ms. Wallace or her mother ever communicated with the Marion County Sheriff's deputies. The only communication was with a neighbor

with whom deputies communicated their opinion that Ms. Wallace was asleep. (RI: 115) The facts alleged in Petitioner's Second Amended Complaint do not give rise to a special relationship.

B. The Marion County Sheriff's Deputies Did Not Place Ms. Wallace In A "Zone of Risk"

The Fifth District Court of Appeals decision correctly held that the Marion County Sheriff deputies, took no affirmative action which contributed to, increased or changed the risk to the decedent, which otherwise already existed. A special duty of care may arise "when law enforcement officers become directly involved in circumstances which place people within a 'zone of risk' by creating or permitting dangers to exist. . . ." *Pollock,* 882 So.2d at 935. This Court has noted that "[u]nder our case law, our courts have found liability or entertained suits after law enforcement officers took persons into custody, otherwise detained them, deprived them of liberty, or placed them in danger." *Kaisner,* 543 So.2d at 734. The premise underlying this theory is that a police officer's decision to assume control over a particular situation or individual or group of individuals is accompanied by a corresponding duty to exercise reasonable care. Where the Marion County Sheriff's Deputies did not assume any degree of control over the decedent or the situation, the "zone of risk" analysis is inapplicable. See *Pollock*, 882 So. 2d at

936.[1] *See also*, *Seguine v. City of Miami*, 627 So. 2d 14, 18 (Fla. Dist. Ct. App. 3d Dist. 1993)(no special tort duty ever arose because the decedent was never in police custody and accordingly was never affirmatively placed in a zone of danger by the police).

The Second Amended Complaint does not allege the Marion County Sheriff's deputies took custody or control over Ms. Wallace. The only actions taken by law enforcement were to enter the home at the request of a neighbor, and check on the occupant. (RI: 115) The Marion County Sheriff's deputies determined that, in their opinion, the occupant was asleep. (RI: 115) The deputies' made the decision not to exercise control over the situation; instead, they elected to leave a side door open to the residence and allow the neighbor access to monitor Ms. Wallace and make any requests for assistance as she deemed necessary. (RI: 116) The deputies neither assumed custody over Ms. Wallace nor did they assume control of the home. (RI: 116)

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[1] Plaintiff appears to be trying to contort the custody/control concept from *Pollock* to apply to the very different facts of this case. See at 935-36. The line of cases cited in *Pollock*, however, all involve a police officer taking custody or control of an individual who is later injured based on an order or action of the police officer. *Id*. *Pollock* does not stand for the proposition that a mere inspection at the scene somehow creates a duty of care that would make the Marion County Sheriff's Office liable every time it responded to a scene. Otherwise, every inspection would create a duty of care because every inspection requires the inspector to be at the scene of the inspection. This overly expansive interpretation of *Pollock* would eviscerate the holdings in *Trianon* and *Neumann*, both of which indicate that a theory of negligent inspection is not cognizable.

Even if one assumes the actions of the Marion County Sheriff's deputies exerted sufficient control to create a special relationship, a tort duty with regard to an individual does not arise absent actions by law enforcement officers which directly place an individual within a "zone of risk." *Pollock*, 882 So. 2d at 935. The "zone of risk" is created by permitting dangers to exist by virtue of taking persons into police custody or otherwise subjecting them to danger. This case is tantamount to situations where law enforcement officers are alleged to be responsible for failing to rescue.

Petitioner relies upon this Court's decision in *Henderson v. Bowden*, 737 So.2d 532 (Fla. 1999) to argue that a duty arose based on a foreseeable zone of risk. *Henderson* is inapplicable to the facts as alleged in this case. *Henderson* was a wrongful death action that involved the Hillsborough County Sheriff's Office's roadside detention of a vehicle, in which the decedent was a passenger. *Id*. at 533. After the deputies arrested the driver of the vehicle, for driving under the influence, they instructed an intoxicated person to drive the vehicle to a nearby gas station. *Id*. at 533. This Court held "the sheriff's deputies created a risk that, but for the roadside detention and decisions made during the detention, would not have otherwise existed." *Id*. at 536.

The allegations in this case are distinguishable from the facts presented in *Henderson*. First, the Marion County Sheriff's deputies did not take any actions

that created a risk to Ms. Wallace. Furthermore, unlike the situation in *Henderson*, the Marion County Sheriff's deputies did not assume control over the situation. The deputies never placed Ms. Wallace in custody and never directed or controlled Ms. Wallace, who remained in her own home. Furthermore, the Marion County Sheriff's deputies did not create the risk. Despite the conclusory allegation that the deputies assumed control because they entered the home, the factual allegations clearly establish that all control was relinquished to the neighbor, Ms. Ginder. (RI: 116). There are no factual allegations that would support a finding that there was a custodial relationship or actions taken by the deputies that created a zone of risk that did not already exist. Therefore, the Marion County Sheriff's Deputies did not owe Ms. Wallace a duty of care.

II. The Undertaker's Doctrine Is Inapplicable To The Facts Alleged In This Case

The Petitioner has made an overbroad application of the "undertaker doctrine' to the facts of this case. Under Petitioner's analysis, anytime law enforcement undertakes to perform any activity, a duty of care would arise. This view fails to consider the public duty doctrine under Florida law. This Court has previously noted the lack of a common law duty of care for exercising a discretionary police power function must be distinguished from those circumstances, where there has always been a common law duty, such as in the operation of a motor vehicle. *Trianon.,* 468 So.2d at 920. The Petitioner, in

reaching her argument that a duty of care existed, has heavily relied upon the Court's decision in *Clay Electric v. Johnson*, 873 So.2d 1182 (Fla. 2003). The Petitioner's use of *Clay Electric* is overbroad and inapplicable to law enforcement and its discretionary decision-making. In *Clay Electric,* the electric cooperative was sued by the family of a 14 year old boy who was killed after he was struck by a motor vehicle in an area where a street light was inoperative. *Id.* at 1184. A negligence claim was filed against Clay Electric, for their failure to maintain street lights. *Id.* The Trial Court granted a motion for summary judgment on behalf of Clay Electric, which was later affirmed by the district court. *Id.* This Court addressed the issue of whether Clay Electric owed a legally recognized duty to maintain the street lights. Obviously, the case does not involve any type of a law enforcement function or discretionary decision-making process by a law enforcement officer. This Court held that *Clay Electric* assumed a specific, legally recognized duty to act with due care in maintaining the street lights. *Id.* at 1186. The Court's decision in *Clay* was based in part upon the Restatement of Torts, §324(a).[2]

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[2] §324(a) of the Restatement sets forth the standard in assessing liability as follows:

1. One owner take gratuitously or for consideration, to render services to another, which he should recognize is necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

Clay Electric is inapplicable to law enforcement and its discretionary decision-making. The Court's opinion in *Clay Electric* does not contain any discussion or consideration of a discretionary function by law enforcement officers. In fact, the language in the opinion would indicate that the Court found the failure to maintain the streetlights to be operational in nature. ("[L]ong before the present accident took place, the City of Jacksonville determined that the 8500 block of Collins Road needed lighting, and streetlights subsequently were installed.") *Id*. at 1187.

Petitioner's brief alleges a direct conflict between the Fifth District Court of Appeal's decision in this case and the Court's opinion in *Clay Electric*. The Petitioner further alleges that the opinion of the Fifth District Court of Appeal creates confusion on whether the "undertaker's doctrine" applies to law enforcement officers. Contrary to Petitioner's view, there is no direct conflict, but *Clay Electric* does not involve the discretionary decisions of law enforcement officers. The Petitioner is attempting to apply a prior decision of this Court to facts which are inapposite, which the Appellate Court properly rejected. Additionally,

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a) his failure to exercise reasonable care increases the risk of such harm, or
b) he has undertaken to perform a duty owed by the other to the third person, or
c) the harm is suffered because of the reliance of the other or the third person upon the undertaking.

the Fifth District Court of Appeal's opinion correctly rejects any argument in favor of creating a duty of care for all activities a law enforcement officer performs. Under Petitioner's analysis, anytime law enforcement undertakes to perform any activity, a duty of care would arise. However, this Court in *Pollock* ruled that a duty of care arises only when a special relationship is established by taking persons into custody, detaining them, or otherwise subjecting them to danger. *Pollock*, 882 So. 2d at 935. The Deputies in this case made no representation to Ms. Wallace of any future activity by law enforcement and made no promises that any type of future medical care or treatment would be forthcoming. Thus, there was no special relationship that could give rise to a duty. Petitioner, in her brief, states that "the district court concluded, however, that the deputies did not cause anyone, including Ms. Ginder, to detrimentally rely on the deputies' representations." (Petitioner's Brief p.17). A reading of the paragraph in its entirety shows the comment is taken out of context. It was the deputies' decision <u>not</u> to assume control over the situation which led the Appellate Court to conclude that there was no detrimental reliance. In determining that there was no detrimental reliance, the court found that: 1) the deputies took no affirmative actions that contributed to, increased or changed the risk to Ms. Wallace that already existed; 2) no zone of risk was created; 3) deputies did not assume control over the situation; 4) no express or

implied promises to render aid were made; and, 5) deputies did not prohibit Ms. Ginder, her father or Ms. Wallace from calling an ambulance. R-5DCA:8-9.

Even if one assumes that a common law duty of care may arise during the performance of a discretionary activity, such as performing a well-being check, the factual allegations do not show that law enforcement actions increased the risk of harm that would have existed had the deputies never responded to the scene and performed the well-being check. The family was out of town and the neighbor did not have access to the residence until deputies responded. (RI: 114). Obviously, if deputies never responded, there would have been no access to the premises until family members returned from their out of town trip. (RI: 114). Furthermore, the Petitioner's Second Amended Complaint makes no allegation that deputies increased the risk of harm to Ms. Wallace by failing to call an ambulance. Thus, assuming that §324 of the Restatement of Torts applies, the Petitioner is unable to meet the first standard for assessing liability in such cases.

This Court in *Pollock* articulated those circumstances under which law enforcement officers will be held to have a legal duty to an individual. *Pollock*, 882 So.2d at 935-936. A legal duty can only arise when there is a "special relationship" between the plaintiff and law enforcement or the officers place the plaintiff in a "zone of risk". *Id.* The Petitioner failed to allege facts in the Second Amended Complaint that would establish the existence of a special relationship.

Instead, Petitioner's theory appears to be that anytime a police officer conducts a well being check by responding to a residence the Sheriff's Office would be liable if they failed to identify an individual's need for medical treatment or failed to dispatch an ambulance. This theory fails to recognize the public duty doctrine. Simply put, the factual allegations do not establish a legal duty owed to the Ms. Wallace by the Marion County Sheriff's deputies under the legal precedence set forth by this Court.

III. The Doctrine Of Sovereign Immunity Protects The Sheriff From Tort Liability For The Discretionary Decisions Of Deputies Performing A Well-Being Check

Decisions made by law enforcement during well being checks are discretionary functions for which no tort liability can attach. If this Court has reached the conclusion that no duty of care existed, then it is not necessary to reach the sovereign immunity analysis. See *Pollock* 882 So.2d at 932. Even if a common law duty of care is found to exist, the doctrine of sovereign immunity applies. The court of appeals did not address the issue of sovereign immunity in this case, because it held that Respondent's did not owe a duty to the Ms. Wallace. This Court's decision in *Trianon Park Condominium Association v. City of Hialeah,* 468 So.2d 912 (Fla. 1985) is the principal authority when determining whether the government is entitled to sovereign immunity for its decision-making process. To clarify the concept of governmental tort liability, this Court placed

governmental functions and activities into four categories.[3] In *Trianon*, the Court expressed the parameters of governmental responsibility within this framework:

> "There is no governmental tort liability for the action or inaction of governmental officers or employees in carrying out the discretionary governmental functions described in categories I and II, because there has never been a common law duty of care with respect to these legislative, executive, and police power functions, and the statutory waiver of sovereign immunity did not create a new duty of care."

In deciding *Pollock* this Court reiterated this fundamental principle of law. *See Pollock*, 882 So. 2d at 935 n.7; (quoting *Trianon*, 468 So. 2d at 918). It is clear that this Court gave great deference to creating sovereign immunity for law enforcement activities, which can be characterized as discretionary police power functions. In *Trianon* this Court determined that "certain discretionary functions of government are inherent in the act of governing and are immune from suit." *Trianon,* 468 So. 2d at 918. The court in *Trianon* expressly states that this "discretionary function" doctrine applies to "arresting officers, and other law enforcement officials, and would therefore bar any liability where these officers exercised this discretion. *Id*. at 919.

[3]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 in property control operations; and (IV) providing professional, educational, and general services for the health and welfare of the citizens. *Trianon 468 So.2d* at 919.

In *Everton v. Willard*, 468 So.2d 936 (Fla. 1985), a case that involved a officer's decision not to arrest a driver for DUI, this Court held that there was no distinction between the immunity afforded the police officer making the determination of whether to arrest an individual for an offense and the discretionary decision of the prosecutor of whether to prosecute an individual or the judge's decision of whether to release an individual on bail or to place him on probation. *Id*. at 938. The Court noted in its opinion that all of these decisions are basic discretionary, judgmental decisions. *Id*. at 938; see also *Daley v. Clark*, 282 Ga. App. 235 (Ga. Ct. App. 2006)(deputies and officers who arrived on scene prior to the arrival of emergency medical technicians, hindered students' efforts to administer CPR, refused the students' pleas to assist the student and failed to render emergency aid were entitled to immunity, because their actions were discretionary). Law enforcement officers' decisions as to what precautions, if any, should be employed are clearly a discretionary police function for which there can be no tort liability. *Seguine,* 627 So. 2d at 19. Police face decisions of this nature on a daily basis and "such delicate law enforcement decisions are best left to the discretionary judgment of the police without entangling the courts through our tort law in such fundamental law enforcement policies -- even where, as here, that judgment might in hindsight be arguably faulted either in whole or in part." *Id*.

In this case, the trial court correctly determined that the discretionary decisions made by law enforcement officers at the scene of the Wallace home were within sovereign immunity. Similar to those decisions law enforcement officers must make every day in the course of their duties, the deputies at the Wallace home were confronted with the decision as to whether or not the conditions presented required further action or interference within Ms. Wallace's home. The deputies chose not to intervene and take further action once they gained access to the home and provided similar access to the neighbor, who requested the well-being check. (RI: 115-116). In the case at bar the deputies made the discretionary decision not to call paramedics at that time, but to allow the occupants condition to be monitored by the neighbor, Ms. Ginder. (RI: 116) Under these circumstances, the discretionary decision of deputies to allow the neighbor to check on Ms. Wallace's condition and call 911, if necessary, is within a level of decision-making that is considered immune from tort liability.

The Petitioner, in hindsight, now wishes to criticize the decision-making of deputies at the scene and hold them responsible for their discretionary decisions. Even if, in retrospect, the officers' decision turned out to be incorrect, the Marion County Sheriff's Office cannot be held liable in tort for this exercise of the officers' discretion. The decision on how to respond to this request for service and the decisions made by the deputies at the scene were discretionary and should not be the

subject of tort litigation. The Petitioner is inviting a judge or jury to second guess the reasonableness or adequacy of the police action in this matter. The Petitioner is also seeking damages that would effectively make the Marion County Sheriff's Office an insurer of individuals physical well being. Such an attempt violates Florida law and must be rejected by this Court. Accordingly, there is no basis to permit a tort suit to review the sufficiency of the Marion County Sheriff's Office's discretionary exercise of its police powers.

IV. Creating a Duty Of Care Will Have a Chilling Effect On The Future of "Well Being Checks"

The Trial Court below expressed concern that holding law enforcement liable for alleged negligence claims, arising from the performance of a well-being check, would place a chilling effect upon the decision to provide such services. This same concern was expressed by Justice Anstead in his concurring opinion in *Pollock*, 882 So.2d at 939.

> "The very real and practical question is whether this valuable public service could or would be provided if every response put the government at risk for damages to the victims of the emergency if the response was not adequate. To date, however, our case law suggests that the government can make the public policy decisions to provide emergency services without the government also assuming liability for the reasonableness of the response in each of the thousands of incidents that occur each day in Florida."

The reality is the potential situations in which law enforcement are asked to respond are numerous and they must be afforded the latitude of the discretion without a common law duty of care arising under any circumstance. Fortunately, the Courts have not extended a common law duty of care which the Petitioner now seeks to impose upon the Respondent. But, instead, the Court chooses to follow the philosophy as noted by Justice Anstead in his concurring opinion as follows:

> "The potential situations are endless, and, of course, no one wants to see these tragedies. But, the reality is, they are possible every time 911 is called, and that is the specter we face if we are to recede from our prevailing law. So, of course, the police and other emergency responders have a duty to respond to emergencies and they carry a heavy burden each time they are called. To date, however, we have declined to recognize the government's liability in tort each time a call for help is received."

Pollock, 882 So.2d at 939.

Petitioner's theory would create a duty of care where none has existed before and would be contrary to binding precedent that establishes that the exercise of the police power is a Category II function that is immune from suit. Likewise, this theory would eviscerate the public duty doctrine by making the Marion County Sheriff's Office liable every time a call for services. Furthermore, if such claims are allowed to stand, the public treasury will be sapped. As the Fifth District Court of Appeal stated in its opinion below:

> "If law enforcement agencies are found to have liability under these circumstances, they may stop making well-

> being checks, thereby avoiding any liability. If they do respond, in order to avoid liability, they likely would direct that everyone be transported to the hospital, further taxing local hospitals and emergency services. Both outcomes harm the public. Though some of the decisions made by law enforcement in the course of making well-being checks may be wrong, overwhelmingly, the results of such checks are helpful and should be continued."

(R-5DCA: 10-11).

Under the circumstances, the decision as to whether or not law enforcement agencies provide the service of performing a well-being check in the future will be affected by the outcome of this case. Government decision-makers need the latitude to exercise their powers for the public benefit, the public policy decision to provide well being checks will undoubtedly be chilled, if every response puts the government at risk for damages. Both the Appellate and Trial Court correctly recognized this concern in making its decision to affirm the dismissal of Petitioner's Second Amended Complaint with prejudice.

V. This Court Should Take No Action With Regard To Attorney's Fees As There Is No Basis For The Appellate Court To Award Attorney's Fees Pursuant to Florida Statute § 768.79

Petitioner's Proposal for Settlement, served pursuant to Florida Statute §768.79, and Rule 1.442 of the Florida Rules of Civil Procedure, does not entitle Petitioner to fees unless a judgment is rendered in her favor. Furthermore, the amount of the judgment must exceed the amount of the proposal by 25%. Petitioner's request for attorney's fees and costs pursuant to Florida Statute §768.79

is premature. Petitioner's ability to recover her attorney's fees is contingent upon a future condition. None of the contingencies have occurred in this case, and may never occur. Therefore, it is premature for the Court to address the issue of attorney's fees pursuant to Florida Statute §768.79 until a judgment is rendered in the case.

In support of her request for Attorney's Fees on a "provisional basis," Plaintiff cites to the cases of *Joyner v. International Real Estate Group*, 937 So.2d 259 (Fla. 5th DCA 2006) and *Washington v. Fleet Mortgage Corp*., 631 So.2d 364 (Fla. 1st DCA 1993). Neither of those decisions support the award of a provisional attorney's fee by the Appellate Court. Neither case involves an award of a fee contingent upon the Plaintiff prevailing on appeal and then prevailing at the Trial Court below in an amount sufficient to trigger an attorney's fee award under Florida Statute § 768.79. Furthermore, Florida Statute §768.79 is in derogation of the common law rule that each party pay its own attorney's fees, and is therefore strictly construed. *Willis Shaw Express, Inc. v. Hilyer Sod*, Inc., 849 So. 2d 276 (Fla. 2003). The statute does not provide for a "provisional" award of attorney's fees. Therefore, the Court should take no action pertaining to attorney's fee based upon a Proposal for Settlement, as a judgment has yet to rendered that would establish Petitioner's entitlement to fees and costs pursuant to Florida Statute § 768.79.

CONCLUSION

The Petitioner cannot establish that the Respondent owed Ms. Wallace a duty of care. The factual allegations in the Second Amended Complaint do not give rise to a special relationship. Even if this Honorable Court finds that Respondent owed a duty to Ms. Wallace, her claims are barred by the doctrine of sovereign immunity. Based upon the foregoing argument and authority, the Respondent, ED DEAN, respectfully requests this Honorable Court affirm the Fifth District Court of Appeal's decision.

Respectfully submitted:

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Bruce R. Bogan, Esq.
Fla. Bar No. 599565

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by U.S. Mail, postage prepaid, to Sharon H. Proctor, Esq., 48 Northmoor Circle, Lake St. Louis, MO 63367, and Mark A. Avera, Esq.,/James P. Gainey, Esq., Avera & Smith, LLP, 2814 SW 13th Street, Gainesville, FL 32608, this _____ day of September, 2008.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that this brief was generated in 14-point Times New Roman font in compliance with the font requirements of Rule 9.210, Florida Rules of Appellate Procedure.

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