

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 Of A Decision Of
The Fifth District Court Of Appeal

**RESPONDENT'S ANSWER TO PETITIONER'S JURISDICTIONAL
BRIEF**

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STATEMENT OF THE FACTS AND CASE

The Fifth District Court of Appeal succinctly summarized the relevant facts as follows:

“Ms. Wallace alleged that on the day of the incident, she placed numerous phone calls to the decedent, all of which went unanswered. Because she lived out of state and could not personally check on her, Ms. Wallace called Marjorie Ginder, one of decedent's neighbors, and asked her to check on the decedent. Ms. Ginder repeatedly knocked on the doors and windows of the decedent's home, and when she received no response, called 911. Two Marion County deputy sheriffs responded to the 911 call. One of the deputies entered the decedent's home through an unlocked window and let the other deputy, Ms. Ginder, and Ms. Ginder's father into the home. They discovered the decedent on the couch, breathing but unresponsive, even when the officers called her name loudly and shook one of her legs. Ms. Ginder's father suggested that the decedent might be in a diabetic coma, but, according to the complaint, the deputies told him that "one does not snore if in a diabetic coma." Although Ms. Ginder suggested that they call an ambulance, the deputies did not call for medical assistance. Instead, the deputies suggested that Ms. Ginder leave the decedent's door unlocked and return to check on her later. After the deputies left, Ms. Ginder called Ms. Wallace and told her that the decedent was sleeping. The next morning, Ms. Ginder again found the decedent unresponsive, and, once more called 911. Emergency medical personnel responded to the call and transported the decedent to the hospital where she died several days later, without regaining consciousness.”

(A: 2). The procedural history of this case is summarized below.

The trial court in and for the Ninth Judicial Circuit dismissed Petitioner's wrongful death claim with prejudice. The trial court held that:

“[B]ased on the allegations of the complaint, Sheriff Dean owed no common law duty of care to the decedent; that law enforcement officers responding to well-being checks are performing discretionary law enforcement functions; and that no "special relationship" existed between the decedent and the Marion County deputies at the time the deputies were at the decedent's home. The trial court also concluded that the claim was barred by the doctrine of sovereign immunity.”

(A: 3). An appeal to Florida’s Fifth District Court of Appeal followed. After a de novo review of the of the trial court’s order dismissing the complaint with prejudice, the Fifth District Court of Appeal affirmed the trial court’s decision. (A: 3, A: 8). In its written opinion filed November 30, 2007, the Fifth District Court of Appeal held that the deputies’ failure to act created no legal duty and therefore cannot be the basis of a negligence action. (A: 8). On December 21, 2007, the Fifth District Court of Appeal denied the Petitioner’s motion to certify this case as one passing upon a question of great public importance. In its notice to invoke discretionary jurisdiction, Petitioner seeks review of the Fifth District Court of Appeal’s decision in this case filed November 30, 2007.

SUMMARY OF ARGUMENT

Petitioner has failed to establish a basis upon which this court should accept jurisdiction. Therefore, Petitioner's request for discretionary jurisdiction should be denied. The decision of the Fifth District Court of Appeal does not "expressly affect a class of constitutional or state officers" as required for jurisdiction to be conferred under Fla. R. App. P. 9.020(a)(2)(iii). The decision of the Fifth District Court of Appeal does not change any constitutional officers' clearly established, preexisting legal duties, so constitutional officers remain unaffected by the lower court's decision.

The Fifth District Court of Appeal's decision in this case does not expressly and directly conflict with this Court's prior decisions or the First District Court of Appeal's decision in *Florida First Nat'l Bank of Jacksonville v. City of Jacksonville*. The cases cited to by the Petitioner as being in conflict either apply the same law to a distinguishable fact pattern or fail to recognize the public duty doctrine established by this Court in *Pollock v. Fla. Dep't of Highway Patrol*, 882 So. 2d 928, 932 (Fla. 2004) and *Trianon Park Condo. Ass'n v. Hialeah*, 468 So. 2d 912, 919 (Fla. 1985). In the absence of an expressed and direct conflict, there is no basis for jurisdiction pursuant to Fla. R. App. P. 9.020(a)(2)(iv).

ARGUMENT

- I. The Fifth District Court of Appeal’s decision does not “directly affect” a class of constitutional officers, because the constitutional officers’ clearly established, preexisting legal duties remain unchanged.**

Admittedly, the Court of Appeal’s decision addresses the legal duties of a class of constitutional officers, Sheriffs. However, it does not “expressly affect a class of constitutional or state officers” as required for jurisdiction to be conferred under Fla. R. App. P. 9.020(a)(2)(iii). The Fifth District Court of Appeal’s decision is in conformity with the 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*, 882 So. 2d 928; *Trianon Park Condo. Ass’n*, 468 So. 2d 912 (Fla. 1985). A duty of care does not arise in the absence of a “special relationship” between the individual and law enforcement. *Id.* In this case, the Fifth District Court of Appeal correctly found that no “individual duty” or “special relationship” existed between the deceased and the deputies who arrived at the scene. The Fifth District Court of Appeal’s decision does nothing to change the well-established law defining the duties owed by law enforcement. It has not “expressly affected” a group of constitutional officers. Therefore, discretionary jurisdiction should be denied.

II. The Fifth District Court of Appeal’s decision in this case does not expressly and directly conflict with the prior decisions of this Court or any District Court of Appeal.

For several reasons, the decision below does not conflict with the cited decisions from this Court and the First District Court of Appeal. Under Florida law, there has never been a common law duty of care with respect to enforcement of the laws and protection of the public safety. A duty of care does not arise in the absence of a “special relationship” between an individual and law enforcement. In this case, the Fifth District Court of Appeal correctly found no “special relationship” existed between the deceased and deputies who arrived at the scene.

This Court’s prior decisions have consistently held a governmental duty to protect citizens is a general duty to the public as a whole. *Pollock*, 882 So.2d at 935; *Vann v. Department of Corrections*, 662 So.2d 339, 340 (Fla. 1995). There is no duty of care to an individual citizen, which may result in liability. *Id.* Florida’s appellate courts that have had the occasion to directly address this issue, have consistently held that law enforcement officer’s owe no duty to an individual absent 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.).

Petitioner in her Jurisdictional Brief alleges a direct conflict with this Court's opinion in *Clay Electric v. Johnson*, 873 So.2d 1182 (Fla. 2003). The Petitioner alleges 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, the Fifth District Court of Appeal's opinion correctly rejects any argument in favor of creating a duty of care for any activity a law enforcement officer performs. 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 arises. This view fails to consider the public duty doctrine under Florida law. *Clay Electric* is inapplicable to law enforcement and its discretionary decision-making. This Court's opinion in *Clay Electric*, does not address the public duty doctrine and contains no discussion or consideration of a discretionary

function by law enforcement officers. The Petitioner is attempting to apply a prior decision of this Court to facts which are inapposite and the court below properly rejected. The Fifth District Court of Appeals decision correctly noted 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:6).

The Petitioner alleges a conflict between the lower court’s decision in this case and *First National Bank of Jacksonville v. City of Jacksonville*, 310 So.2d 19 (Fla. 1st DCA 1975). This case predates this Court’s decisions, which addressed the public duty doctrine, and sovereign immunity related to law enforcement activities. See *Everton v. Willard*, 468 So.2d 936 (Fla. 1985); *Trianon Park v. City of Hialeah*, 468 So.2d 912 (Fla. 1985). Nonetheless, the *First National Bank* decision is factually distinguishable. The facts in *First National Bank* show law enforcement made express promises or assurances of assistance and thereby created of a special duty under current law. The Respondent in this case made no promises or assurance or undertook any action that could establish a special relationship.

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 Plaintiff's 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, 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. The Petitioner did not allege 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. An issue of law is not in direct conflict between this case and *Hartley*. The same legal standard was applied in both cases, but to two entirely different sets of facts.

CONCLUSION

The Petitioner cannot establish a basis for this Honorable Court to exercise discretionary jurisdiction. For the foregoing reasons, this court should decline to exercise discretionary jurisdiction over this case.

Respectfully submitted:

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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 _____, 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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