

IN THE SUPREME COURT,
STATE 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.: _____

L.T. Case No.: 5D06-4289

Trial Court No. 05-2314-CA

On Discretionary Review From The
Fifth District Court Of Appeal

PETITIONER'S JURISDICTIONAL BRIEF

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STATEMENT OF THE FACTS AND CASE

The Petitioner, Kelly Wallace, as personal representative of the estate of her mother, Brenda Wallace, brought a wrongful death action against the Sheriff of Marion County, alleging that two deputy sheriffs negligently performed a well-being check on Brenda, resulting in her death. (A: 1-2). The trial court dismissed the second amended complaint with prejudice, holding that it failed to state a cause of action, and that the Sheriff was entitled to sovereign immunity. (A: 1-2). The Fifth District Court of Appeal affirmed with a written opinion, holding that the deputy sheriffs who entered Brenda's home to check on her well-being owed her no common law duty to use reasonable care in doing so. (A: 4-8).

The second amended complaint alleges that Brenda's neighbor, Marjorie Ginder, called 911 requesting assistance because repeated phone calls and knocks upon the doors and windows of Brenda's home went unanswered. (A: 2). Two deputy sheriffs responded to the 911 call. One deputy entered Brenda's home through an unlocked window and opened the door for the other deputy, Ms. Ginder, and Ms. Ginder's father. (A: 2). They found Brenda in a bed in the dining room.¹ She was breathing but unresponsive. (A: 2). The deputies shook her vigorously and loudly called her name, but she remained unconscious. (A: 2).

¹ The Fifth District's opinion incorrectly states that Brenda was "on the couch." (A: 2). The second amended complaint alleges she was in a bed that had been set up in the dining room.

When the neighbor suggested that an ambulance be called, the deputies declined to do so. (A: 2). One of the deputies denied the possibility that Brenda could be in a diabetic coma, stating that was impossible because a person in a diabetic coma will not snore. (A: 2). Having concluded that no medical care was needed, the deputies left without calling for an ambulance. (A-2). Based on the deputies' assurances, neither the neighbor nor the plaintiff, Brenda's daughter, took any further action at that time to secure medical help for Brenda. When the neighbor found Brenda was still unresponsive the next morning, she again called 911 and an ambulance transported Brenda to the hospital, where she died several days later without regaining consciousness. (A: 2).

The plaintiff sued the Sheriff, alleging the deputies breached their duty to use reasonable care in conducting the well-being check, and their negligence caused Brenda's death. (A: 3). The trial court concluded, inter alia, that law enforcement officers have no duty to exercise reasonable care in the performance of a well-being check. The Fifth District Court of Appeal affirmed, agreeing that no common law duty of care arose. (A: 8). On December 21, 2007, the district court denied Petitioner's motion to certify this case as one passing upon a question of great public importance, (A: 9), and Petitioner timely brought this petition for discretionary review.

SUMMARY OF ARGUMENT

This court has jurisdiction because the district court's opinion directly affects a class of constitutional officers, specifically the sheriffs. *See* § 3(b)(3), Art. V, Fla. Const.; *Everette v. Fla. Dept. of Children and Families*, 961 So. 2d 270 (Fla. 2007). By holding that deputy sheriffs who elect to check on a citizen's well-being have no duty to perform the check with ordinary reasonable care, the district court's opinion directly affects all sheriffs in Florida by defining the legal duties they owe to citizens whom they assist.

This court has jurisdiction on the additional ground that the opinion of the district court expressly and directly conflicts with this court's decisions in *Clay Electric Co-Op. v. Johnson*, 873 So. 2d 1182 (Fla. 2003), and *Union Park Mem. Chapel v. Hutt*, 670 So. 2d 64 (Fla. 1996), and with decisions of the First District Court of Appeal in *Florida First Nat'l Bank of Jacksonville v. City of Jacksonville*, 310 So. 2d 19 (Fla. 1st DCA 1975), and *Hartley v. Floyd*, 512 So. 2d 1022 (Fla. 1st DCA), *rev. den.*, 518 So. 2d 1275 (Fla. 1987), on the same question of law. *See* § 3(b)(3), Art. V, Fla. Const. Those cases all recognized that a common law duty to exercise reasonable care arose when someone undertook, voluntarily or otherwise, to come to the aid of another. This tenet of Florida law, sometimes referred to as the "undertaker's doctrine," applies to both governmental and non-governmental actors. *Clay Electric*, 873 So. 2d at 1186.

The district court's opinion in the instant case expressly and directly conflicts with those cases because it held that no duty arose even though the deputy sheriffs undertook to aid Brenda Wallace by entering her home to check on her well-being. This court should exercise its discretion to review this case on the merits because the case presents a question of importance to citizens in Florida. In addition, the district court's opinion will create confusion about whether the undertaker's doctrine, recognized by this court in *Clay Electric* and *Union Park*, applies to law-enforcement officers. Petitioner respectfully requests that this Honorable Court grant review.

ARGUMENT

I. This Court Has Jurisdiction Because The Decision Below Affects A Class Of Constitutional Officers.

Jurisdiction arises under section 3(b)3, Article V of the Florida Constitution, because the Fifth District Court's opinion directly affects a class of constitutional officers, specifically the sheriffs. *See* § 3(b)(3), Art. V, Fla. Const.; *Everette v. Fla. Dept. of Children and Families*, 961 So. 2d 270 (Fla. 2007). The district court's opinion affects all sheriffs in Florida by defining the legal duties they owe to citizens whom they assist by performing well-being checks. Since sheriffs are a class of constitutional officers, this court has discretionary jurisdiction. *See* *Everette*, 961 So. 2d at 271.

II. The Decision Below Conflicts With Decisions Of This Court And The First District Court Of Appeal.

Jurisdiction also arises under the alternate ground that the decision on review expressly and directly conflicts with this court's decisions in *Clay Electric Co-Op. v. Johnson*, 873 So. 2d 1182 (Fla. 2003), and *Union Park Mem. Chapel v. Hutt*, 670 So. 2d 64 (Fla. 1996), and with decisions of the First District Court of Appeal in *Florida First Nat'l Bank of Jacksonville v. City of Jacksonville*, 310 So. 2d 19 (Fla. 1st DCA 1975), and *Hartley v. Floyd*, 512 So. 2d 1022 (Fla. 1st DCA), *rev. den.*, 518 So. 2d 1275 (Fla. 1987), on the same question of law. *See* § 3(b)(3), Art. V, Fla. Const.; *State v. Vickery*, 961 So. 2d 309, 311 (Fla. 2007). The district court did not expressly identify conflict with any of these cases, but that is not necessary to this court's jurisdiction. *Ford Motor Co. v. Kikis*, 401 So. 2d 1341 (Fla. 1981). A "discussion of the legal principles which the court applied supplies a sufficient basis for" conflict jurisdiction. *Id.* at 1342.

In *Clay Electric*, this court applied the "undertaker's doctrine," and held that "[w]henever one undertakes to provide a service to others, whether one does so gratuitously or by contract, the individual who undertakes to provide the service—i.e. the 'undertaker'—thereby *assumes a duty to act carefully* and to not put others at an undue risk of harm." *Clay Electric*, 873 So. 2d at 1186 (emphasis added). The doctrine applies to both governmental and non-governmental entities. *Id.* at 1186. This court also applied the undertaker's doctrine in *Union Park*, which held

that a funeral director who voluntarily undertook to organize and lead a funeral procession assumed a common law duty to use reasonable care in the undertaking. 670 So. 2d at 67. This court explained, “It is clearly established that one who undertakes to act, even when under no obligation to do so, thereby becomes obligated to act with reasonable care.” *Union Park*, 670 So. 2d at 66-67.

The First District Court of Appeal applied the undertaker’s doctrine to a law enforcement officer in *Hartley*, 512 So. 2d at 1022. There, a sheriff promised to check the local boat ramp for a missing husband’s boat trailer, but failed to do so. The Sheriff nevertheless reported to the wife that he had checked and saw no signs of the trailer. *Id.* at 1023-24. The First District held that, having assumed the undertaking, the Sheriff “had an obligation to carry it out with reasonable care.” *Id.* at 1024. The First District has also applied the undertaker’s doctrine to municipal employees. *Florida First Nat’l Bank*, 310 So. 2d at 19. *Florida First Nat’l Bank* held that officers who investigated complaints that specific children were being abused owed the children a duty to use reasonable care by carrying out their investigation in a non-negligent manner. *Florida First Nat’l Bank*, 310 So. 2d at 27.

The district court’s decision herein expressly and directly conflicts with the above-cited decisions. Here, the district court found that no common law duty of care arose when the deputies undertook to provide assistance to Brenda by entering

her home to check on her well-being. (A: 8). The district court relied on the public duty doctrine, which provides that enforcing the laws and protecting the public are duties which law enforcement officers owe to the public generally, and not to any particular individual. (A-4). No specific duty to a particular individual arises from that general duty unless a recognized exception applies. *See, e.g., Pollock v. Florida Dept. of Highway Patrol*, 882 So. 2d 928, 935-36 (Fla. 2004).

The petitioner did not assert, however, that the Sheriff's duty to Brenda arose from his general duty to protect the public. Petitioner conceded that the deputies owed no duty of care *until* they undertook such a duty by entering Brenda's home to assess her well-being. Absent from the district court's analysis here was any discussion of the undertaker's doctrine. Instead, the district court applied the public duty doctrine and examined its various exceptions, concluding that none applied. (A: 4-6). For example, the district court found that no special relationship arose between the deputies and Brenda because the deputies made no express promise or assurance of assistance. (A: 4-5). The court also found that the deputies did not place Brenda within a zone of risk. (A: 5-6).

The district court rejected the proposition that by undertaking to check on the well-being of "a person wholly dependent upon them for emergency aid," the deputies assumed a duty to perform that undertaking with reasonable care. (A: 6). The district court failed to recognize that the undertaker's doctrine gives rise to a

common law duty that is separate and distinct from the general duty officers owe to the public at large. Its decision therefore expressly and directly conflicts with cases recognizing that “one who undertakes to act, even when under no obligation to do so, thereby becomes obligated to act with reasonable care.” *Union Park*, 670 So. 2d at 66-67; *see also*, *Clay Electric*, 873 So. 2d at 1182; *Florida First Nat’l Bank*, 310 So. 2d at 19; and *Hartley v. Floyd*, 512 So. 2d at 1022.

This Court should exercise its discretion to review this case on the merits for two reasons. First, the case presents a question of importance to citizens in Florida, who rely on public servants that respond to 911 calls to do so in a non-negligent manner. Second, the district court’s opinion will create confusion about whether the undertaker’s doctrine, as defined by this court in *Clay Electric* and *Union Park*, applies to law-enforcement officers such as sheriffs. To avoid that confusion and protect the rights of Florida citizens, this Honorable Court should grant discretionary review.

CONCLUSION

This court has jurisdiction on two grounds. First, the decision below directly affects a class of constitutional officers, specifically the sheriffs. Second, the decision directly and expressly conflicts with decisions of this court and the First District Court of Appeal regarding whether one who undertakes to aid another thereby assumes a duty to do so with reasonable care.

This court should exercise its discretion to review this case on the merits because the decision below implicates public policy concerns regarding the rights of Florida citizens. When law enforcement officers elect to perform a well-being check, they voluntarily assume a common law duty to exercise ordinary and reasonable care while doing so. If they negligently perform their duties, resulting in harm, Florida law provides a right to seek redress. The district court's decision calls that right into question, and creates confusion in the law regarding the duties that arise when someone undertakes to aid another. Petitioner therefore respectfully requests that his Honorable Court exercise its discretion to review this matter on the merits.

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 Bruce R. Bogan, Esq., Hilyard, Bogan, & Palmer, P.A., P.O. Box 4973, Orlando, FL 32802-4973, this ____ day of January, 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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