IN THE SUPREME COURT,
STATE OF FLORIDA

KELLY WALLACE, as Personal Representative of the Estate of **BRENDA WALLACE**, deceased,	**CASE NO.:** **SC08-149**
	L.T. Case No.: 5D06-4289
Petitioner,	Trial Court No. 05-2314-CA

vs.

ED DEAN, as Sheriff of Marion County,

Respondent.
_____/

On Discretionary Review From The
Fifth District Court Of Appeal

INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FLORIDA CASES

FLORIDA CASES (continued)

FLORIDA CASES (continued

FEDERAL AND OUT-OF-STATE CASES

STATUTES AND CONSTITUTIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

References to the record on appeal will indicate the volume and page number, and will be in the following format: (R.X: YY), where "X" indicates the volume number and "YY" indicates the page number.

References to the supplemental record on appeal prepared by the Fifth District Court of Appeal will be in the following format: (R-5DCA: YY), where "YY" indicates the page number.

QUESTIONS PRESENTED

I. Under Florida law, one who undertakes to aid another, whether gratuitously or otherwise, owes a duty to exercise reasonable care in the undertaking. Two deputy sheriffs entered the home of a woman who was not responding to phone calls or knocks upon the door, to check on her condition. Finding the woman unresponsive, they left without calling for medical assistance. Did the deputies owe the woman a duty to use reasonable care in performing the well-being check?

II. Governmental entities in Florida enjoy sovereign immunity from tort liability for discretionary, policy level functions, but not for operational functions. Is a Sheriff immune from liability if his deputies negligently conduct a well-being check, thereby causing a delay in medical treatment that results in death?

STATEMENT OF THE FACTS AND CASE

The Petitioner, Kelly Wallace, as personal representative of the estate of her mother, Brenda Wallace ("decedent"), brought a wrongful death action against the Sheriff of Marion County, alleging that two deputy sheriffs negligently performed a well-being check on the decedent, resulting in her death in October, 2004. (R.I: 1-5, 51-57, 113-120). 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.[1] (R.I: 136-137). The Fifth District Court of Appeal affirmed with a written opinion, holding that the deputy sheriffs who entered the decedent's home owed her no common law duty of reasonable care. (R-5DCA: 4-11).

The second amended complaint alleges that the decedent's neighbor, Marjorie Ginder, called 911 requesting assistance when repeated phone calls and knocks upon the doors and windows of the decedent's home went unanswered. (R.I: 114). Two deputy sheriffs responded to the 911 call. One deputy entered the decedent's home through an unlocked window and opened the door for the other deputy, Ms. Ginder, and Ms. Ginder's father. (R.I: 114-152). They found the

[1] The facts stated herein are taken from the second amended complaint, which are presumed to be true for purposes of a motion to dismiss for failure to state a cause of action. *Aguila v. Hilton, Inc.*, 878 So. 2d 392 (Fla. 1st DCA), *rev. den.*, 891 So. 2d 549 (Fla. 2004).

decedent in a bed in the dining room.[2] (R.I: 115). She was breathing but unresponsive. (R.I: 115). The deputies shook her vigorously and called her name loudly, but she remained unconscious. (R.I: 115).

When the neighbor suggested that an ambulance be called, the deputies rebuffed her suggestion and assured her that the decedent was only sleeping. (R.I: 115). Ms. Ginder's father suggested to the deputies that the decedent might be in a diabetic coma. (R.I: 115). One of the deputies denied that possibility, and assured the neighbors that a person in a diabetic coma will not snore. (R.I: 115). Having concluded that no medical care was needed, the deputies left without calling for an ambulance. (R.I: 116). The deputies left the door to the decedent's home unlocked so that Ms. Ginder could return to check on her again later.

Ms. Ginder reported the events and the deputies' statements to the decedent's daughter, the plaintiff herein, who had asked Ms. Ginder to check on her mother. (R.I: 116). In reliance on the deputies' assurances, neither Ms. Ginder nor the plaintiff took any further action at that time to secure medical help for the decedent. (R.I: 116). Ms. Ginder believed that the deputies routinely performed well-being checks, and she relied on the deputies' actions and statements about the decedent's condition. (R.I: 116). When Ms. Ginder found the decedent in the

[2] The Fifth District's opinion incorrectly states that the decedent 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. (R.I: 115).

same unresponsive state the next morning, she again called 911. (R.I: 117). An ambulance then transported the decedent to the hospital, where she died several days later without regaining consciousness. (R.I: 117).

The plaintiff sued the Sheriff, alleging that the deputies breached their duty to use reasonable care in conducting the well-being check and thereby caused the decedent's death. (R.I: 1-5, 51-57, 113-120). The trial court held that the Sheriff was entitled to sovereign immunity. (R.I: 136-37). The trial court also concluded that law enforcement officers have no duty to exercise reasonable care in the performance of a well-being check, and dismissed the second amended complaint with prejudice for failure to state a cause of action. (R.I: 136-37).

The Fifth District Court of Appeal affirmed, agreeing that no common law duty of care arose. (R-5DCA: 11). The district court of appeal did not consider the question of sovereign immunity.

On December 21, 2007, the district court denied the plaintiff's motion to certify this case as one passing upon a question of great public importance, (R-5DCA: 25), and Petitioner timely sought discretionary review in this Court. (R-5DCA: 27-28). By order dated May 28, 2008, this Court accepted review.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal reversibly erred by affirming the dismissal of this wrongful death action against the Sheriff of Marion County. Review is *de novo*. The decision on review held that deputy sheriffs who responded to a 911 call and entered the home of the plaintiff's decedent to check on her well-being had no duty to use reasonable care while doing so. The deputies found the decedent lying unconscious, and when they were unable to revive her, they left without calling for an ambulance.

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), which recognized that one who undertakes to assist another, even when under no obligation to do so, thereby assumes a duty to perform the undertaking with reasonable care. That principle of law, sometimes called the "undertaker's doctrine," applies equally to governmental and nongovernmental actors. The doctrine is a well established part of Florida's common law, and was recognized by this court as early as 1909.

The Restatement (Second) of Torts, section 324A, provides that one who undertakes to render services necessary for the protection of another will be liable for negligently performing the undertaking if his negligence (a) increases the risk of harm, or (b) results in harm because of detrimental reliance by the person being

helped or a third person. This court applied the Restatement in *Clay Electric*, and held that a company that negligently maintained residential street lights would be subject to liability for the resulting death of a minor who was struck by a motorist. This court explained that the inoperative street light increased the risk of harm to pedestrians, and that the child's mother may have forgone other precautions for the child's safety in reliance on the company to maintain the street lights.

A duty arose here because the deputies' conduct increased the risk of harm to the decedent. The deputies undertook to determine whether the decedent was in need of medical attention, and their failure to use due care in doing so resulted in delayed medical care that increased the risk of harm from the decedent's existing medical condition.

A duty of care also arose here because the decedent's daughter and a neighbor, who had called 911, detrimentally relied on the deputies to conduct the well-being check with ordinary care. They also relied on assurances by the deputies that the decedent was not in a diabetic coma, but was "merely sleeping." If not for their reliance on the deputies, the daughter and the neighbor would have taken other steps to secure medical care for the decedent, and the delay in treatment would have been avoided. Because others refrained from acting, in detrimental reliance upon the deputies' affirmative assurances and undertaking, the district court of appeal erred by holding that no common law duty of care arose.

Absent from the district court's analysis was any discussion of the undertaker's doctrine. Instead, 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. No specific duty to a particular individual arises from a general public duty unless a recognized exception applies.

But the plaintiff did not assert that the Sheriff's duty to the decedent arose from his general duty to protect the public. The plaintiff conceded that the deputies owed no duty of care ***until*** they undertook such a duty by entering the decedent's home to assess her well-being. 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 decisions from this court 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 at1182. This court should therefore reverse.

The decision below did not address the question of sovereign immunity, because that issue was moot in light of the lower court's holding that no duty of care existed. This court should nevertheless address the issue because it presents a

dispositive question of law. The trial court held that the Sheriff was entitled to sovereign immunity from liability for the deputies' negligence. Governmental entities in Florida enjoy immunity for discretionary policy level functions, but not for operational functions. It is the nature of the conduct, rather than the status of the actor, that determines whether a governmental function is immune from tort liability. Discretionary acts—those involving issues of policy and planning—are entitled to immunity. Operational functions—those involving secondary decisions implementing policies or plans—are not. The performance of a routine check on a citizen's well-being is not the type of policy level discretionary function for which law enforcement officers enjoy immunity. The trial court incorrectly held that sovereign immunity bars this action, and this court should reverse and remand with instructions to reinstate the second amended complaint.

Finally, if this court reverses on the merits, it should also reverse the Fifth District Court of Appeal's order denying the plaintiff's request for provisional appellate attorney's fees, and remand with instructions that the fees be awarded, conditioned upon the plaintiff successfully obtaining a final judgment in an amount that would create a statutory entitlement to fees.

JURISDICTION

This is an appeal from a decision of the Fifth District Court of Appeal affirming the trial court's dismissal of a wrongful death claim against the Sheriff of Marion County. The trial court dismissed on two grounds: (1) that deputy sheriffs conducting a well-being check in response to a 911 call had no duty to exercise reasonable care, and (2) that the Sheriff was entitled to sovereign immunity. The Fifth District Court of Appeal affirmed on the first ground, finding no duty of care was owed. It did not reach the second ground.

Discretionary jurisdiction arises under section 3(b)(3), Article V of the Florida Constitution, because the decision below directly affects a class of constitutional officers, specifically Sheriffs. *See* § 3(b)(3), Art. V, Fla. Const.; *Everette v. Fla. Dept. of Children and Families*, 961 So. 2d 270 (Fla. 2007). Jurisdiction also arises because 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).

ARGUMENT

I. The District Court of Appeal Erred By Holding That No Duty of Care Arose When Deputy Sheriffs Entered The Home Of An Unconscious Citizen To Check On Her Well-Being And Left Without Reviving Her Or Calling For Medical Assistance.

A. Standard Of Review

The *de novo* standard of review applies to an order dismissing a complaint for failure to state a cause of action. *Siegle v. Progressive Consumers Ins. Co.,* 819 So. 2d 732, 734 (Fla. 2002); *Aguila v. Hilton, Inc.*, 878 So. 2d 392 (Fla. 1st DCA), *rev. den.,* 891 So. 2d 549 (Fla. 2004). Whether a duty of care exists in a negligence action is a question of law. *McCain v. Fla. Power Corp.,* 593 So. 2d 500, 502 (Fla. 1992). When determining the appropriateness of an order dismissing a complaint based on a finding that no legal duty existed, an appellate accepts the complaint's allegations as true. *Aguila*, 878 So. 2d at 395.

B. Officers Have A Duty To Use Reasonable Care When They Undertake To Assist A Citizen By Entering Her Home Uninvited To Check On Her Well-Being.

The Fifth District Court of Appeal erred by holding that no common law duty of care arose when two Marion County deputy sheriffs responded to a 911 call and entered the home of the decedent, Brenda Wallace, to check on her well-being. The district court held that, "if law enforcement officers undertake a well-being check, and, during the course of that check, they discover a person wholly

dependent upon them for emergency aid," they have no affirmative duty to render that aid or call for medical assistance. (R-5DCA: 9). That decision 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).

1. Duty Arising Under A Voluntary Undertaking

By holding that no duty of care was owed, the district court failed to follow a long-established tenet of Florida law known as the "undertaker's doctrine." The doctrine provides: "Whenever 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). This Court applied the doctrine in *Union Park* to find that a funeral director who undertook to organize and lead a funeral procession thereby assumed a duty to use reasonable care in doing so. *Union Park*, 670 So. 2d at 66-67. 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." *Id.* Thus, although the Sheriff's department had no legal duty to investigate the decedent's failure to answer her phone and her door, once it undertook the mission it had a duty to conduct it with reasonable care.

The doctrine is a well-established part of Florida law. *See, e.g., Horton v. Freeman*, 917 So. 2d 1064, 1067 (Fla. 4th DCA 2006)(finding that a duty of care arose when a couple voluntarily assumed the care of a minor); *Estate of Massad v. Granzow*, 886 So. 2d 1050 (Fla. 4th DCA 2004)(applying the undertaker's doctrine to impose a duty of care on a defendant who came to the aid of an intoxicated person); *Vendola v. Southern Bell Tel. and Tel. Co.*, 474 So. 2d 275 (Fla. 4th DCA 1985)(noting that this court recognized the undertaker's doctrine as long ago as 1909); *see also, Hartley*, 512 So. 2d at 1022; *Dept. of Highway Safety and Motor Vehicles v. Kropff*, 491 So. 2d 1252 (Fla. 3d DCA 1986); *Florida First Nat'l Bank*, 310 So. 2d at 19.

The doctrine applies to both governmental and non-governmental actors. *Clay Electric*, 873 So. 2d at 1186. For example, when a police officer undertakes to secure an accident scene, a duty is imposed upon him to do so with reasonable care. *Kropff*, 491 So. 2d at 1255. The First District Court of Appeal applied the 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 voluntarily assumed the undertaking, the Sheriff "had an obligation to carry it out with reasonable care." *Id.* at 1024. The First District applied the doctrine to municipal employees in *Florida First Nat'l Bank*, which held that officers who investigated complaints that specific children were being abused owed the children a duty to use reasonable care by conducting their investigation in a non-negligent manner. *Florida First Nat'l Bank*, 310 So. 2d at 27.

The doctrine was most recently defined by this court in *Clay Electric*, 873 So. 2d at 1182. There, a minor pedestrian was killed when struck by a vehicle in an area with an inoperative street light. *Clay Electric*, 873 So. 2d at 1182. In the ensuing wrongful death action against the company that maintained the lights, the trial court granted summary judgment for the defendant, finding no common law duty of care. *Id.* The district court of appeal reversed. *Id.* at 1183. This court granted review, and held that when the company undertook to maintain the lights, it assumed a common law duty to third persons to do so with reasonable care. *Id.* at 1185-86. This court explained that the defendant should have foreseen that proper maintenance was necessary for the protection of pedestrians, because children regularly walked past the area on their way to the school bus. *Id.* at 1187.

In so holding, this court relied on section 324A of the Restatement (Second) of Torts (1965).[3] Section 324A provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as 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:
>
> (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 reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts, § 324A.

This case comes within the parameters of the doctrine as expressed in the Restatement. The second amended complaint alleges that the plaintiff, Kelly Wallace ("plaintiff"), became concerned when her mother, Brenda Wallace ("decedent"), did not answer repeated phone calls. The plaintiff contacted her

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[3] The undertaker's doctrine is expressed in sections 323, 324, and 324A of the Restatement (Second) of Torts (1965). Section 323 addresses the negligent performance of an undertaking to render services, section 324 addresses the duty of one who takes charge of another who is helpless, and section 324A addresses liability to a third person for negligent performance of an undertaking. Florida cases adopting or relying on one or more of these sections include *Clay Electric,* 873 So. 2d at 1186 (applying section 324A); *Union Park*, 670 So. 2d at 67 (section 324A); *Horton*, 917 So. 2d at 1066 (citing section 323); *Kropff*, 491 So. 2d at 1255 (citing sections 323 and 324); and *Estate of Massad*, 886 So. 2d at 1051 (citing section 324).

mother's neighbor, Marjorie Ginder, and asked her to check on her mother and call 911 if she got no response. Ms. Ginder did so. Two Marion County deputy sheriffs responded to the 911 call, and gained access to decedent's home through an unlocked window. (R.I: 114-152). The deputies found the decedent lying unresponsive in a bed in the dining room. (R.I: 115). They were unable to revive her despite loudly calling her name and vigorously shaking her. (R.I: 115).

The deputies rejected Ms. Ginder's suggestion that an ambulance be called, and assured her that the decedent was only sleeping. (R.I: 115). When Ms. Ginder's father suggested that the decedent might be in a diabetic coma, one of the deputies denied that possibility, and assured the neighbors that a person in a diabetic coma will not snore. (R.I: 115). The deputies left without calling for medical assistance. (R.I: 116). When Ms. Ginder found the decedent in the same unresponsive state the next morning, she again called 911. This time the 911 operator dispatched an ambulance, which transported the decedent to the hospital, where she died several days later without regaining consciousness. (R.I: 117).

These alleged facts illustrate that a legal duty arose under sections 323 and 324A(a) & (c) of Restatement (Second) of Torts. First, a duty of care arose because the deputies increased the risk of harm to the decedent. Second, a duty of care arose because Ms. Ginder and the plaintiff detrimentally relied on the deputies

to exercise reasonable care for the decedent's safety when conducting the well-being check.

(a). Increased Risk of Harm

The complaint states a cause of action under the undertaker's doctrine because it alleges facts demonstrating that the deputies increased the risk of harm to the decedent. (R.I: 115-116). One who undertakes to render services to another "which he should recognize as necessary for the protection of the other's person…is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if …his failure to exercise such care increases the risk of harm." Restatement (Second) of Torts, §§ 323(a), *see also* § 324A(a). It does not matter whether the negligence has created a new risk or increased an existing one—liability will attach either way. § 324A, Restatement (Second) of Torts, cmt. e.

The decision below held that "the deputies took no affirmative action which contributed to, increased or changed the risk to the decedent, which otherwise already existed." (R-5DCA: 9). This Court rejected a similar argument in *Clay Electric*, explaining that the defendant's failure to maintain the street light increased the risk of harm to pedestrians. *Clay Electric*, 873 So. 2d at 1187. *Clay Electric* expressly rejected the defendant's argument that the risk was no greater than it would have been if the street lights had never been installed. *Id*. The

relevant inquiry was whether the risk was greater than it would have been if the defendant had exercised due care to fulfill the duty it assumed. *Id.*

Similarly here, the deputies assumed a duty to determine whether the decedent needed medical attention, and their failure to use due care in fulfilling that duty caused a delay that increased the risk of harm to her. Even assuming arguendo that the risk of harm to the decedent was no greater than it would have been if the deputies had not performed a well-being check,[4] the relevant inquiry is whether the risk was greater than it would have been if the deputies had performed their undertaking with reasonable care. *See Clay Electric*, 873 So. 2d at 1187. Because the delay increased the risk of harm from the decedent's existing medical condition, the complaint stated a cause of action, and this court should reverse the dismissal.

(b). Detrimental Reliance

The district court recognized that liability will attach when the plaintiff, or one closely associated with the plaintiff, detrimentally relies on the defendant to carry out an undertaking with reasonable care. (R-5DCA: 8-9). Section 324A(c) provides that liability for an undertaking arises when "harm is suffered because of reliance of the other or the third person upon the undertaking." § 324A(c),

[4] Plaintiff does not concede this assumption, but merely raises it for the sake of argument. In fact, the decedent would have been better off if the deputies had performed no well-being check at all, but had simply unlocked the door and allowed the neighbors to check on the decedent themselves.

Restatement (Second) of Torts; *see also, Clay Electric*, 873 So. 2d at 1186. When a person's reliance "has induced him to forego other remedies or precautions…, the harm results from the negligence as fully as if the actor had created the risk." Restatement (Second) of Torts, § 324A, *cmt. e.*

The second amended complaint alleged that Ms. Ginder "justifiably relied on the repeated assurance of the deputy that Ms. Wallace was merely sleeping." (R.I: 115). It also alleged that both Ms. Ginder and the plaintiff "relied on the deputies' assurances and medical evaluation," and therefore "refrained from immediately taking any further emergency action in regards to the decedent." (R.I: 116). The district court concluded, however, that the deputies did not cause anyone, "including Ms. Ginder, to detrimentally rely on the deputies' representations." (R-5DCA: 9-10).

The district court's finding of no detrimental reliance was error for several reasons. First, the court failed to accept the allegations and all reasonable inferences as true, as it must do when ruling upon the correctness of a dismissal for failure to state a cause of action. *Aguila*, 878 So. 2d at 395. Second, the question of detrimental reliance is for the jury—it is a factual issue which cannot be summarily resolved by an appellate court. *See Clay Electric*, 873 So. 2d at 1188. This court noted in *Clay Electric* that the evidence therein raised a jury question about whether the defendant, in undertaking to maintain the street lights, induced

the decedent's mother to forgo other precautions for his safety, such as walking with him or driving him to the bus stop. *Id.* The district court erred by taking the question away from the finder of fact. Because the complaint alleges detrimental reliance, it states a cause of action under section 324A of the Restatement. The decision on review incorrectly held otherwise, and this court should reverse.

2. The Public Duty Doctrine

The district court relied on the "public duty" doctrine to hold that law enforcement officers have no duty to use reasonable care when conducting a well-being check. (R-5DCA: 7). The public duty doctrine provides that enforcing the laws and protecting the public are duties owed to the public generally, not to any particular individual. *See, e.g., Pollock v. Florida Dept. of Highway Patrol*, 882 So. 2d 928, 935-36 (Fla. 2004); *Trianon Park Condo. Assoc. v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985); *City of Daytona Beach v. Palmer*, 469 So. 2d 121, 122 (Fla. 1985). No specific duty to a particular individual arises from a general public duty unless a recognized exception applies. *Pollock*, 882 So. 2d at 935-36.

The decision below misconstrues the public duty doctrine, treating it as a shield from liability. It is not. "A person does not, by becoming a police officer, insulate himself from any of the basic duties which everyone owes to other people, but neither does he assume any greater obligation to others individually." *Warren v. District of Columbia*, 444 A. 2d 1, 4-9 (D.C. App. 1981). The doctrine provides

only that a duty owed to the public generally does not ***create*** a duty to any specific individual. *Id.*

That distinction is illustrated by this Court's decision in *Trianon*. 468 So. 2d at 912. The plaintiffs in *Trianon* were condominium unit-owners seeking damages against the City of Hialeah building inspectors for negligence in inspecting their building. The plaintiffs attempted to establish liability based upon "an alleged general duty to enforce the building code." *Trianon,* 468 So. 2d at 921. This court held that the general duty did not give rise to a duty owed to the plaintiffs individually. *Id.* "[F]or 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." *Id.* at 917. Thus, if a tort duty does not otherwise exist by statute or common law, an official's duty to the general public will not create a legally cognizable tort duty. *Id.*

The plaintiff here did not allege, however, that the Sheriff's duty to the decedent arose from his general duty to protect the public at large. The plaintiff conceded that the deputies owed no duty to the decedent ***until*** they undertook such a duty by entering her home to assist her. Because the duty here arose from the common law undertaker's doctrine, not from the general duties that officers owe to the public at large, the public duty doctrine and its exceptions do not apply. The

district court therefore erred by relying on the doctrine to find no duty was present here, and this court should reverse.

3. Foreseeable Zone of Risk Analysis

Finally, the decision below should be reversed because it misconstrues prior decisions from this court regarding legal duty and a foreseeable zone of risk. The decision below relies on *Henderson v. Bowden*, 737 So. 2d 532 (Fla. 1999), in which this court explained that a common law duty of care arises whenever one affirmatively creates a foreseeable zone of risk. *Id.* A duty arose there when deputy sheriffs, during the course of a roadside stop, directed an intoxicated passenger to drive to a nearby store. *Henderson* did not address the undertaker's doctrine. Although *Henderson* held that a duty of care exists when deputies create a foreseeable zone of risk, it did not hold that affirmatively creating a zone of risk is the only way in which a duty can arise. *Id.* at 536. *Henderson* quoted with approval the following passage from *Prosser and Keeton on the Law of Torts,* stating that it illustrates the duty the law imposes:

> If there is no duty to go to the assistance of a person in difficulty or peril, there is at least a duty to avoid any affirmative acts which make his situation worse. When we cross the line into the field of "misfeasance," liability is far easier to find. ***A truck driver may be under no obligation whatever to signal to a car behind him that it may safely pass; but if he does signal, he will be liable if he fails to exercise proper care and injury results.*** There may be no duty to take care of a man who is ill or intoxicated, and unable to look out for himself; but it is another thing entirely to eject him into the danger of a street or railroad yard; and if he is injured there will be liability. But

> further, if the defendant does attempt to aid him, and takes charge and control of the situation, he is regarded as entering voluntarily into a relation which is attended with responsibility.

Id. at 536, *quoting* W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts*, § 53, at 378 (5th ed. 1984)(footnotes omitted)(emphasis added). The deputies here, like the truck driver, had no duty to "signal." Once they did so, by indicating that it was safe to leave the decedent alone because she was "merely sleeping," (R.I: 115), they became subject to liability for negligence. Moreover, the decision below overlooked the fact the deputies did, in fact, place the decedent within a foreseeable zone of risk by inducing others to rely on their assurances to the decedent's detriment. Because the decision below misconstrued *Henderson* regarding duty and a foreseeable zone of risk, this court should reverse.

4. Decisions From Other States

The decision on review also cites three out-of-state cases for the proposition that no duty to render aid to another exists when law enforcement officials are on the scene but have not undertaken a rescue. (R-5DCA: 10, at n. 3), *citing Rose v. County of Plumas*, 199 Cal. Rptr. 842 (Cal. Ct. App. 1984); *Figueroa ex rel. Figueroa v. New York City Transit Auth.*, 579 N.Y.S.2d 831 (N.Y. Sup. Ct. 1991); and *Garofalo v. Lambda Chi Alpha Fraternity*, 616 N.W.2d 647 (Iowa 2000). In *Rose*, a California appellate court affirmed the dismissal of a complaint alleging that police officers who investigated a bar room brawl were negligent for failing to

call an ambulance for a patron who was obviously injured. *Rose*, 199 Cal. Rptr. at 844. *Rose* held, however, that the plaintiff was free to amend the complaint to state a cause of action under the principles that had recently been announced by the California Supreme Court in *Williams v. State*, 664 P.2d 137 (Cal. 1983).

In *Williams*, the California high court applied section 323 of the Restatement (Second) of Torts to determine the duty police officers owe when they come to the aid of stranded or injured motorists. *Id.* at 139-140. The court stated that one who comes to the aid of another "is under a duty to exercise due care in performance and is liable if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking." *Id.* at 139. The court explained that the rule applies to police officers just as it would to private citizens. *Id.* at 140, n.3. The district court's reliance on *Rose* for the proposition that a law enforcement officer who undertakes to assist a private citizen has no duty to carry out the undertaking with reasonable care is therefore misplaced.

Figueroa also does not support the decision below. 579 N.Y.S.2d 831. *Figueroa* discussed the undertaker's doctrine, but found no duty arose where an officer had taken no action to assist a woman who later committed suicide. 579 N.Y.S.2d 831. *Figueroa* explained that the court "could not expect the police officer … to know that inaction might lead to harm." *Id.* at 834. The instant case

is distinguishable, because a reasonable person in the deputies' position would have known that "inaction might lead to harm." *Id.*

Garofalo is also distinguishable. 616 N.W.2d at 647. It held that a fraternity brother who allowed a drunken pledge to "sleep it off" on the couch in his room did not thereby assume a duty of care under section 324 of the Restatement (Second) of Torts, because the defendant never "took charge" of the pledge. 616 N.W.2d at 655-56. Although section 323 of the Restatement applies to actors who take charge of one who is helpless, section 324A does not include the same "taking charge" element. Restatement (Second) of Torts §§ 324 & 324A. Furthermore, a jury could find that the deputies did "take charge" of the decedent's situation by entering her home to assist her, trying to revive her, rebuffing suggestions by the neighbors that medical care was needed, and making affirmative representations about her condition. The out-of-state cases relied upon therefore do not support the decision rendered.

The district court failed to cite out-of-state cases holding that a duty arises from a voluntary undertaking to assist another. *See, e.g.*, *Anderson v. City of Chattanooga*, 978 S.W.2d 105 (Tenn. Ct. App. 1998)(finding that although a city police department had no duty to provide an escort for a funeral procession, "having undertaken to do the job ... the City is obligated to do it adequately and safely"); *Williams*, 664 P.2d at 141 (noting that a governmental entity assumes a

duty of care, in the same way that a private actor would, when it "voluntarily assumes a protective duty toward a certain member of the public and undertakes action on behalf of that member, thereby inducing reliance …"); *Glanzer v. Shepard*, 135 N.E. 275, 276, 233 N.Y. 236 (N.Y. 1922)(stating "[i]t is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to a duty of acting carefully, if he acts at all."); *Torres v. City of Chicago*, 816 N.E.2d 816 (Ill. App. 1 Dist. 2004).

Torres is most directly on point. 816 N.E.2d at 816. There, police officers responded to a 911 call reporting a shooting. Although the officers called ambulances for two gun-shot victims, they failed to investigate witness reports that a third man inside the building had also been shot. When one officer discovered the third man lying in the bathroom, he left him there, thinking he was drunk. Although the officers finally discovered the man's injuries and called for another ambulance, it was too late and the man died. His personal representative brought a wrongful death claim, and the trial court granted summary judgment for the city, finding its officers owed the man no duty of care. *Id.* at 817.

The appellate court reversed, holding that although the city had no duty to respond to the 911 call, by voluntarily undertaking a response the city assumed a duty to use reasonable care. *Id.* The court relied on section 323 of the Restatement, and found that the city was subject to liability because the delay

increased the risk of harm. *Id*. at 818, *citing* Restatement (Second) of Torts § 323. The court explained that "where a defendant delays in sending for aid and the other person's condition worsens, resulting in his or her death, the defendant may be liable under a wrongful death statute." *Id.*

In both *Torres* and the instant case, officers actually responded to a 911 call and examined persons who were helpless. In both cases the officers determined—incorrectly—that no medical attention was needed. *Torres* held that once the officers responded to the 911 call, they had a duty to carry out their investigation in a non-negligent manner. *Id.* at 818. That included a duty to obtain medical care for a citizen in need. Notably in *Torres*, the officers did nothing to worsen the gunshot victim's condition. *Id.* They merely delayed in obtaining medical help. Because the delay itself increased the risk of harm from the existing injury, the ***failure*** to act was sufficient to give rise to liability. *Id.*

Similarly here, the Sheriff is subject to liability because the deputies increased the risk of harm to the decedent when they failed to summon medical help. Although the deputies did not worsen her condition directly, their negligent failure to call for aid caused a delay that allowed her condition to worsen to the point of death. The comments to section 324 of the Restatement make clear that liability can arise when inaction causes "aggravation of an original harm which would have been avoided if the actor had exercised reasonable care for the other's

safety." Comment (c), Restatement (Second) of Torts § 324. Because the deputies increased the risk of harm to the decedent from her existing medical condition, the district court wrongly concluded that no duty was owed. This court should therefore reverse.

6. Public Policy Considerations

This 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. Neither logic nor reason supports the holding below, which imposes a lesser duty on law enforcement officers who come to the aid of another than would be imposed on private citizens who undertook the same assistance. The legislature has determined that the state and its agencies "shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances." § 768.28(5), Fla. Stat. (2004). By passing the waiver of sovereign immunity, the legislature expressed a public policy that "allowing citizens injured by the tortious acts of state agents to sue for damages resulting from their injuries outweighed the state's interest in being exempt from suit." *Vargas v. Glades General Hosp.*, 566 So. 2d 282, 284-85 (Fla. 4th DCA 1990).

The district court improperly allowed concern about protecting taxpayer dollars to lead it to limit liability in a way that the legislature has not, and in a way that directly contradicts precedent from this court. *See Union Park*, 670 So. 2d at

66-67; *see also, Clay Electric,* 873 So. 2d at 1182. The district court understandably sought to avoid expanding governmental liability. But no expansion would occur here, because the undertaker's doctrine is already a well-established part of Florida's common law. *Union Park*, 670 So. 2d at 66-67. Governmental entities are already subject to liability when their conduct brings them within the parameters of the doctrine.

The district court also expressed concern that enforcing a duty on law enforcement officers to exercise reasonable care when they conduct well-being checks could affect their willingness to continue performing such services. (R-5DCA: 10). There is no evidence to support that fear. A duty to exercise reasonable care arises each time law enforcement officers make an arrest, take a person into custody, assume control of an accident scene, use firearms, or drive vehicles. Yet, it does not appear that law enforcement officers have decreased the frequency of such acts merely because they are accompanied by a duty of reasonable care.

Finally, 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. Uniform application of the law enhances the predictability of outcomes in litigation and promotes the public's trust in the court system. *See Murphy v. International Robotic Systems, Inc.*, 766 So. 2d 1010, 1026

(Fla. 2000)(noting that consistent application of procedural rules promotes expeditious and uniform resolution of disputes). Although this Court has delineated clear parameters of the undertaker's doctrine in *Clay Electric* and *Union Park*, the decision on review failed to follow that precedent. By erroneously holding that the deputies did not owe a duty of care towards the decedent, the decision on review creates confusion in the law. What was previously termed a "clearly established" area of the law has now become unsettled. *Union* Park, 670 So. 2d at 66-67.

By accepting review, this court has an opportunity to correct the district court's error and uphold the continuing viability of the undertaker's doctrine. Petitioner therefore respectfully requests that this court reverse the decision below, and remand with instructions to reinstate the second amended complaint.

II. The Conduct of a Well-Being Check By Deputy Sheriffs Is An Operational Level Function For Which The Sheriff Does Not Enjoy Sovereign Immunity.

A. Standard Of Review

"Generally, the standard of review of an order dismissing a complaint with prejudice is *de novo*." *Palumbo v. Moore*, 777 So. 2d 1177 (Fla. 5th DCA 2001). Whether the Legislature has waived sovereign immunity with respect to particular governmental activity is also a question of law reviewed *de novo*. *See Glenney v. Forman*, 936 So. 2d 660 (Fla. 4th DCA 2006)(applying a *de novo* standard to

review a dismissal with prejudice grounded on a finding that the action was barred by sovereign immunity).

B. Sovereign Immunity Does Not Bar This Claim Because Conducting A Well-Being Check Is An Operational Level Function.

The Fifth District Court of Appeal did not reach the issue of sovereign immunity because it found that no duty of care was owed to the decedent. This court should nevertheless consider the issue because it is dispositive. *See Savona v. Prudential Ins. Co. of America*, 648 So. 2d 705, 707(Fla. 1995). Once this court accepts jurisdiction to resolve a legal issue in conflict, it has jurisdiction over all issues in the case. *See, e.g., Murray v. Regier*, 872 So. 2d 217, 223 n. 5 (Fla. 2002). Because the trial court ruled at the pleading stage that this wrongful death claim is barred by sovereign immunity, this court is presented with a question of law, and is on an equal footing with the lower courts. Rather than reversing and remanding this case for a decision by the Fifth District Court of Appeal on the issue of sovereign immunity, it would promote judicial economy for this court to decide the matter while the case is before it.

The Sheriff is not entitled to immunity from liability here because the deputy sheriffs were engaged in operational level functions, which are not protected by sovereign immunity. *Mosby v. Harrell*, 909 So. 2d 323 (Fla. 1st DCA 2005). The issue of sovereign immunity for a governmental entity does not arise unless a

common law or statutory duty would have applied to an individual under like circumstances. *Kaisner v. Kolb,* 543 So. 2d 732 (Fla. 1989); *Brown v. Miami-Dade County*, 837 So. 2d 414 (Fla. 3d DCA 2001). Once a duty has been found to exist, the court must then determine whether the challenged governmental activities are entitled to sovereign immunity. *Mosby*, 909 So. 2d at 326-27.

In general, discretionary, policy level acts are immune from suit, whereas operational functions are not. *Id.* at 328. "Discretionary" acts are those involving the exercise of executive or legislative power in fundamental questions of policy and planning. *Id.* Operational functions, on the other hand, are not necessary to or inherent in policy; they merely reflect a secondary decision implementing those policies or plans. *Id.* Activities involving "basic discretionary judgment in the enforcement of the police power" are immune from liability. *Trianon,* 468 So. 2d at 923 (Fla. 1985); *see also, Eder v. Department of Highway Safety and Motor Veh.*, 463 So. 2d 443 (Fla. 4th DCA), *rev. denied,* 475 So. 2d 694 (Fla. 1985)(holding a trooper's decision to issue citations rather than direct traffic at a non-functioning traffic light was discretionary and immune from suit); *Sintros v. LaValle*, 406 So. 2d 483 (Fla. 5th DCA 1981)(holding that operating motor vehicle during police chase was an operational activity not entitled to sovereign immunity); *Weissberg v. City of Miami Beach*, 383 So. 2d 1158 (Fla. 3d DCA 1980)(explaining that directing traffic was an operational level activity).

The decision below creates confusion by comingling the doctrines of sovereign immunity and legal duty. Conceptually, the question of sovereign immunity does not arise until it is determined that the defendant owed a duty of care to the plaintiff. *Kaisner*, 543 So. 2d at 734; *Trianon*, 468 So. 2d at 917. In evaluating whether a common law duty arose here, the district court failed to differentiate between cases that found no liability on the basis of sovereign immunity and those that were based on a finding of no legal duty. For example, addressing the public duty doctrine and its exceptions, the court cited *City of Ocala v. Graham*, 864 So. 2d 473, 476-77 (Fla. 5th DCA 2004), and quoted, "***sovereign immunity*** may disappear and liability may be imposed when a special relationship exists between the government actor and the tort victim." (R-5DCA: 7)(emphasis added).

While discretionary decisions are generally considered immune from liability, not all law enforcement decisions involving discretion are entitled to sovereign immunity. *Kaisner*, 543 So. 2d at 736; *see also, Henderson*, 737 So. 2d at 538-39 (holding that an officer's decision to direct a passenger to drive to a nearby convenience store during a roadside detention was operational, and thus not protected by sovereign immunity); *Mosby*, 909 So. 2d at 323. "It is 'the nature of the conduct, rather than the status of the actor,' that determines whether the function is the type of discretionary function which is, by its nature, immune from

tort liability." *Trianon,* 468 So. 2d at 918, *quoting U.S. v. Varig Airlines,* 467 U.S. 797, 813; 104 S.Ct. 2755, 2765 (1984).

This Court has recognized that the terms "discretionary" and "operational" are susceptible to broad definitions. *Kaisner,* 543 So. 2d at 736. "Indeed, every act involves a degree of discretion, and every exercise of discretion involves a physical operation or act." *Id.* Thus, where a driver was injured by a passing motorist during a routine traffic stop, this court held the government was not entitled to sovereign immunity, stating:

> While the act in question in this case certainly involved a degree of discretion, we cannot say that it was the type of discretion that needs to be insulated from suit. Intervention of the courts in this case will not entangle them in fundamental questions of public policy or planning. ***It merely will require the courts to determine if the officers should have acted in a manner more consistent with the safety of the individuals involved.***

Id. at 737-38 (emphasis added). The court explained that the issue "involved neither the policies themselves nor the decision to order petitioners to the roadside….The problem was the way these decisions were implemented, which our courts indeed may review in an action for negligence." *Id.* at 738.

Likewise, the instant action addresses neither the advisability of the Sheriff's policies, nor the discretionary decision to apply those policies to a given situation. The plaintiff does not allege negligence in a discretionary decision, such as whether to respond to a 911 call. The plaintiff does not take issue with the

deputies' decision to perform a well-being check. The question is simply whether the deputies were negligent in the way they implemented that decision once it was made. Because the deputies' conduct while performing the well-being check was purely operational, the Sheriff is not shielded from liability by the doctrine of sovereign immunity. Accordingly, the trial court erred by dismissing the present action on sovereign immunity grounds, and this court should reverse and remand with directions that the claim is not barred by sovereign immunity.

III. If This Court Reverses On The Merits, It Should Also Reverse The Order Denying The Petitioner's Motion For Appellate Attorney's Fees In The District Court Of Appeal.

The plaintiff sought an order in the district court provisionally awarding her appellate attorney's fees, based on a proposal for settlement served on the Sheriff pursuant to section 768.79, Florida Statutes (2004).[5] When a party is entitled to attorney's fees in the trial court pursuant to a proposal for settlement, that entitlement extends to include reasonable attorney's fees for appellate proceedings in the same action. § 59.46, Fla. Stat. (2006); *see also, Mark C. Arnold Construction Co. v. National Lumber Brokers, Inc.*, 642 So. 2d 576 (Fla. 1st DCA 1994)(awarding appellate fees pursuant to section 768.79, Florida Statutes); *Motter Roofing, Inc. v. Leibowitz*, 833 So. 2d 788 (Fla. 3d DCA 2002)(same).

[5] In accordance with Rule 1.442(d), Florida Rules of Civil Procedure (2006), the proposal is not a part of the record because it was served on defendant but not filed with the court.

Florida's appellate courts have granted fees provisionally when entitlement to appellate fees and costs is dependent upon the outcome in the lower court after remand. *See, e.g., Joyner v. International Real Estate Group, Inc.*, 937 So. 2d 259 (Fla. 5th DCA 2006); *Washington v. Fleet Mortgage Co.*, 631 So. 2d 364 (Fla. 1st DCA 1993). Given the district court's decision to affirm dismissal of the complaint, it correctly denied the motion for fees because the plaintiff could not have prevailed on remand. But if this court reverses the decision below, it should also reverse the district court's order denying plaintiff's motion for provisional fees. An award of fees is mandatory when the requirements of section 768.79 have been met. Petitioner therefore respectfully requests that this court reverse the fee order, and remand with instructions to the district court to grant the plaintiff's motion for provisional fees, conditioned upon the plaintiff ultimately obtaining a final judgment in an amount sufficient to create a statutory entitlement to fees.

CONCLUSION

The decision below 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.

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. Sovereign immunity does not bar the right, because the specific manner in which law enforcement officers perform a well-being check is not a discretionary, policy-level function. 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 reverse the decision below, and remand with instructions to reinstate the second amended complaint.

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**., attorney for Respondent, Hilyard, Bogan, & Palmer, P.A., P.O. Box 4973, Orlando, FL 32802-4973, and **Mark A. Avera, Esquire**, Avera & Smith LLP, 2814 SW 13th Street, Gainesville, FL 32608, co-counsel for Petitioner, this ____ day of July, 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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