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

REPLY BRIEF ON THE MERITS

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I. The Respondent Owed Petitioner A Legal Duty.

The Fifth District Court of Appeal erred by holding that no duty of care arose when two deputy sheriffs entered the home of the decedent, Brenda Wallace, to check on her well-being. Respondent, the Sheriff of Marion County, relies on cases in which no duty arose because law enforcement took no affirmative action. *See, e.g., Miami-Dade County v. Fente*, 949 So. 2d 1101 (Fla. 3d DCA 2007); *City of Ocala v. Graham*, 864 So. 2d 473 (Fla. 5th DCA 2004); *Pierre v. Jenne*, 795 So. 2d 1062 (Fla. 4th DCA 2001). That reliance is misplaced.

Fente held that no legal duty arose when an officer investigated a burglary alarm, because investigating reports of criminal activity is a duty owed to the public at large. 949 So. 2d at 1103. Investigating criminal activity is a police power protected by sovereign immunity. *Everton v. Willard*, 468 So. 2d 936 (Fla. 1985). The deputies here were not investigating criminal activity. They undertook to aid the decedent individually, and thereby assumed a common-law duty to use reasonable care in the undertaking. *Florida First Nat'l. Bank of Jacksonville v. City of Jacksonville*, 310 So. 2d 19 (Fla. 1st DCA 1975), *rev. dismissed*, 339 So. 2d 632 (Fla. 1976).

Graham and *Pierre* are equally inapposite. Both involved a failure to act, rather than the negligent completion of an action undertaken. In *Graham*, a city

was found not liable for a police officer's failure to talk to a victim's ex-husband as promised. *Graham,* 864 So. 2d at 476. This case differs significantly from *Graham*. First, the victim in *Graham* did not rely on the officer's promise; instead, she met with her ex-husband knowing that the officer had not talked with him. *Id.* at 477. Here, the plaintiff relied on the deputies' representations concerning decedent's health status. (R.I: 116). Second, in *Graham,* the court determined as a matter of law that the evidence at trial was not sufficient to prove proximate causation. *Id.* at 477-78. The complaint in the instant case alleges that the deputies' negligence was the proximate cause of death. (R.I: 115-17). Proximate cause is a jury question. *Graham,* 864 So. 2d at 477. Since Graham turned on the plaintiff's failure to prove reliance or proximate causation, it does not support Respondent's argument that no legal duty arose here.

In *Pierre,* law enforcement officers never responded to the scene at all. *Pierre,* 795 So. 2d at 1063. No liability arose because no express "promise or assurance" was made and there was no reliance. In the instant case, deputies responded to the call, and made express representations on which the decedent's neighbor and daughter relied. Thus, *Fente, Graham* and *Pierre* do not support the lower court's determination that no duty of care arose in this case.

A. The Special Relationship Exception To The Public Duty Doctrine

Respondent misses the point by devoting much of the Answer Brief to the "public duty" doctrine and its exceptions. The public duty doctrine provides that enforcing the laws and protecting the public from criminal activity are duties owed to the public generally. *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); *Everton*, 468 So. 2d 936 (Fla. 1985). A government's duty to the public at large does not create a duty to act with care toward any one individual, unless a recognized exception to the doctrine applies. *Pollock*, 882 So. 2d at 935-36. The exceptions include situations where an officer enters a "special relationship" with someone or places them within a "zone of risk." *Pollock*, 882 So. 2d at 935-36.

The public duty doctrine does not, however, shield law enforcement from liability when a duty arises under general common law principles. "[T]he identical existing duties for private persons apply to governmental entities." *Trianon*, 468 So. 2d at 917. "A person does not, by becoming a police officer, insulate himself from any of the basic duties which everyone owes to other people . . ." *Warren v. District of Columbia*, 444 A. 2d 1, 4-9 (D.C. App. 1981). The public duty doctrine provides only that a duty owed to the general public does not ***create*** a duty to a specific individual. *Id.*

The Sheriff's duty here arose not from a duty to the general public, but from a voluntary undertaking. Under Florida law, one who comes to the aid of another, whether gratuitously or not, assumes a duty to act with reasonable care in the undertaking. *Clay Electric Co-Op. v. Johnson*, 873 So. 2d 1182 (Fla. 2003); *Estate of Massad v. Granzow*, 886 So. 2d 1050 (Fla. 4th DCA 2004); *Dept. of Highway Safety and Motor Veh. v. Kropff*, 491 So. 2d 1252, 1255 (Fla. 3d DCA 1986). Having undertaken to go to decedent's aid by performing a well-being check, the deputies voluntarily assumed a duty. Since the duty here arose from the common law "undertaker's doctrine," the public duty doctrine does not apply and the exceptions to that doctrine are irrelevant. Respondent's focus on the "special relationship" and "zone of risk" exceptions to the public duty doctrine is therefore misplaced. Respondent misses the central issue: whether a duty arose pursuant to the common law undertaker's doctrine.

The out-of-state cases Respondent cites do not address that issue. They focus, instead, on the public duty doctrine and its exceptions. *See Braswell v. Braswell*, 410 S.E. 2d 897 (N.C. 1991)(examining the public duty doctrine in a case involving failure to protect from criminal activity); *Figueroa v. New York City Transit Authority*, 579 N.Y.S.2d 831 (N.Y. Sup. Ct. 1991)(examining the special relationship exception to the public duty doctrine); *Gilchrist v. Livonia*, 599 F. Supp. 260 (E.D. Mich. 1984)(same in the context of a failure to arrest). These

cases do not apply here because the duty here did not arise from the Sheriff's public duty. Respondent also cites *Daley v. Clark*, 638 S.E. 2d 376 (Ga. App. 2006), *cert. den.* (Ga. 2007). *Daley* held that the public duty doctrine did not shield officers from liability when they responded to the scene of a call for assistance, and failed to render aid or hindered others from rendering aid while awaiting emergency medical assistance. Thus, *Daley* does not support the decision below. Because the Fifth District Court of Appeal incorrectly applied the public duty doctrine as a shield from liability here, this Court should reverse.

B. The Zone of Risk Exception To The Public Duty Doctrine

Respondent also addresses the second exception to the public duty doctrine: a foreseeable "zone of risk." A law enforcement officer owes a duty to a private citizen when the officer creates a "zone of risk" affecting the citizen. *Pollock*, 882 So. 2d at 928; *Kaisner v. Kolb*, 543 So. 2d 732 (Fla. 1989). As noted above, the "zone of risk" analysis does not apply because the public duty doctrine does not apply. Even if the doctrine applied, however, the officers here placed decedent within a foreseeable zone of risk. As this Court explained in *Pollock*:

> A special tort duty does 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, by taking persons into police custody, detaining them, ***or otherwise subjecting them to danger***. 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.***

Pollock, 882 So. 2d at 935-36 (emphasis added).

In *Pollock*, this Court found that no duty arose because officers had "not arrived on the scene or assumed ***any degree of control*** over the situation." *Pollock*, 882 So. 2d at 936 (emphasis added). Here, the deputies did arrive at the scene and exercised control by entering the home, assessing the decedent's status, rebuffing suggestions that an ambulance be called, and making affirmative representations about the decedent's condition. Respondent implicitly concedes that the deputies assumed control over the situation, by stating that they "relinquished" control to the neighbor when they left. (Ans. Brief at 20). Because the deputies exercised some degree of control, they owed decedent a duty of reasonable care.

Similarly in *Kaisner*, the exercise of control gave rise to a legal duty when officers placed a citizen within a zone of risk during a roadside traffic stop. *Kaisner*, 543 So. 2d at 734. In the instant case, the deputies placed decedent within a zone of foreseeable risk by delaying medical assistance to an unconscious citizen who needed medical care. Thus, even if the public duty doctrine addressed in *Pollock* and *Kaisner* applied here, a duty arose under the "zone of risk" exception to that doctrine.

Respondent also argues that because *First National Bank* predates this Court's decisions in *Everton* and *Trianon*, it does not conflict with the lower

court's decision here. *See First Nat'l Bank*, 310 So. 2d at 19. But *Everton* and *Trianon* did not overturn *First National Bank;* they did not even address the undertaker's doctrine. *See Everton*¸ 468 So. 2d at 936; *Trianon,* 468 So. 2d at 912. Respondent ignores cases decided after *Everton* and *Trianon* that applied the undertaker's doctrine. *See, e.g., Kropff*, 491 So. 2d at 1255; *Estate of Massad*, 886 So. 2d at 1050; *Clay Electric*, 873 So. 2d at 1182; *Hartley v. Floyd,* 512 So. 2d 1022 (Fla. 1st DCA), *rev. den.,* 518 So. 2d 1275 (Fla. 1987). The fact that this Court dismissed review, finding no conflict between *First National Bank* and other decisions in existence at that time, has no bearing on whether *First National Bank* conflicts with the lower court's decision in this case. *See Jacksonville v. Florida First Nat'l Bank,* 339 So. 2d 632 (Fla. 1976).

Conflict jurisdiction arises when an announced rule of law conflicts with other appellate expressions of law. *Nielsen v. City of Sarasota,* 117 So. 2d 731, 734 (Fla. 1960). Here, the lower court announced that when officers undertook to check on "a person wholly dependent upon them for emergency aid," they had no duty to perform that undertaking with reasonable care. (DCA Record at pg. 9). That decision 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 at1182; *Florida First Nat'l Bank*, 310 So. 2d at 19;

Hartley, 512 So. 2d at 1022. This Court therefore has conflict jurisdiction, and it should reverse the decision below.

II. The Sheriff Assumed A Duty Pursuant To The Undertaker's Doctrine.

Respondent argues that if the undertaker's doctrine applies here, then "anytime law enforcement undertakes to perform any activity, a duty of care would arise." (Ans. Brief at 20). To the contrary, a legal duty arises only if the elements of the doctrine are met. Those elements are defined in the Restatement (Second) of Torts (1965), as discussed by this Court in *Clay Electric*, 873 So. 2d at 1186. Section 324A of the Restatement 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.

A duty arose here because the necessary elements are met. First, a duty arose under sub-part (a) because the deputies increased the risk of harm to

decedent by delaying medical attention. Respondent argues that the deputies did not increase the risk of harm that would have existed had they never performed a well-being check. (Ans. Brief at 24). Respondent makes the wrong comparison by contrasting the deputies' negligent action with no action. The relevant comparison is whether the risk was greater than it would have been if the deputies had exercised due care to fulfill the duty they assumed. *Clay Electric*, 873 So. 2d at 1187. When that comparison is made, it is clear that the deputies' failure to call for medical assistance caused a substantial delay that increased the risk of harm to decedent. And although Respondent alleges that decedent was not in any observable distress, she was unconscious and could not be revived. (R.I: 115). It is for the jury, not the court, to determine whether her condition would have put a reasonable person on notice that medical attention was needed.

A duty also arose under sub-part (c) of the Restatement, because decedent's neighbor and daughter relied on the deputies' representations and assurances. The complaint alleged that 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). Respondent argues that the lower court's decision was correct because the court "found" that the "deputies did not assume control over the situation." (Ans. Brief at 23-24). The lower court was not called upon, however, to make findings. It had a duty to accept the

allegations of the second amended complaint as true. *Aguila v. Hilton, Inc.,* 878 So. 2d 392 (Fla. 1st DCA), *rev. den.*, 891 So. 2d 549 (Fla. 2004). The complaint alleges, at least by implication, that the deputies assumed control of the situation by entering the home, assessing the decedent, attempting to revive her, rebuffing suggestions, and making affirmative representations regarding decedent's condition. (R.I: 115-116). If Respondent disputes the allegations, a determination must be made by a jury. It is not the function of the trial court or the appellate court to make findings on a motion to dismiss.

Respondent also asserts that the undertaker's doctrine, as applied in *Clay Electric,* is "inapplicable to law enforcement." (Ans. Brief at 22). This Court has stated, however, that the undertaker's doctrine "applies to both governmental and nongovernmental entities." *Clay Electric*, 873 So. 2d at 1186. Governmental entities are 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). Thus, the undertaker's doctrine applies to both private and public entities. Respondent fails to offer any valid reason why it should not apply here. This Court should therefore reverse the decision below.

III. The Conduct Of A Well-Being Check Is An Operational Function Not Protected By Sovereign Immunity.

The decision whether to conduct a well being check is discretionary, but the conduct of officers during its performance is an operational level function for which the Sheriff does not enjoy tort immunity. *See Trianon*, 468 So. 2d at 921; *see also, Weissberg v. City of Miami Beach*, 383 So. 2d 1158 (Fla. 3d DCA 1980)(explaining that directing traffic was an operational level activity). In *Trianon,* this Court divided governmental functions into four categories:

> (I) legislative, permitting, licensing, and executive officer functions;
>
> (II) enforcement of laws and the protection of the public safety;
>
> (III) capital improvements and property control operations; and
>
> (IV) providing professional, educational, and general services for the health and welfare of the citizens.

Trianon, 468 So. 2d at 919. While sovereign immunity applies for the action or inaction of governmental employees in carrying out the functions described in categories I and II, "there may be substantial governmental liability under categories III and IV." *Id.* at 921.

Respondent incorrectly places the performance of a well-being check in the second category. (Ans. Brief at 26-27). The second category involves "the discretionary power to enforce the laws," and includes decisions such as whether to make an arrest or prosecute a charge. *Id.* at 919-920. The performance of a well-

being check does not fall within the second category, because it does not involve enforcing the laws or protecting the public safety.

The activities involved here properly fall within category four, which includes "general services for the health and welfare of the citizens." *Id.* at 919.

> Providing professional, educational, and general services for the health and welfare of citizens is distinguishable from the discretionary power to enforce compliance with laws passed under the police power of this state. These service activities, such as medical and educational services, are performed by private persons as well as governmental entities, and common law duties of care clearly exist.

Id. at 921. Since "common law duties of care" exist with respect to private persons who undertake to aid another, the Sheriff does not enjoy sovereign immunity for similar undertakings if they are negligently performed.

Respondent asserts that the deputies were engaged in discretionary level decision making, citing *Trianon* and *Everton.* Both cases are distinguishable. *Trianon* involved a decision by city building inspectors regarding whether to enforce the building code in a particular instance. *Trianon*, 468 So. 2d at 919. "How a governmental entity, through its officials and employees, exercises its discretionary power ***to enforce compliance with the laws***…is a matter of governance, for which there never has been a common law duty of care." *Id*. at 919 (emphasis added). *Everton* also involved a discretionary decision about whether to enforce the law. *Everton*, 468 So. 2d at 937. There, a deputy stopped an intoxicated driver, but then permitted him to continue driving. This Court held

that "the decision of whether to enforce the law by making an arrest is a basic judgmental or discretionary governmental function that is immune from suit…" *Id.* at 937. This Court expressly limited *Trianon* and *Everton* to governmental decisions about whether to make an arrest or enforce the laws:

> We note as we did in *Trianon* that this is a narrow issue relating to the discretionary judgmental decision of making an arrest under the police power of a governmental entity.

Everton, 468 So. 2d at 939.

The instant case does not involve a discretionary decision about whether to enforce the laws or make an arrest. The narrow issue decided in *Trianon* and *Everton* does not arise here. This case involves the manner in which deputies conducted a well-being check, not the discretionary decision whether to conduct it. When negligence arises in the implementation of a policy, rather than in the policy decision itself, sovereign immunity does not shield the governmental entity from liability. *Kaisner*, 543 So. 2d at 737-38.

As this Court explained in *Kaisner*, "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 738. Similarly here, it will not entangle the courts in a fundamental question of public policy to determine whether the deputies should have acted in a manner more

consistent with the decedent's safety. Because the deputies' conduct while performing a routine well-being check was purely operational, Respondent is not shielded from liability. *Kaisner*, 543 So. 2d at 737-38; *see also, Henderson v. Bowden*, 737 So. 2d 532, 538-39 (Fla. 1999); *Mosby v. Harrell*, 909 So. 2d 323 (Fla. 1st DCA 2005). Accordingly, the trial court erred by dismissing this case on sovereign immunity grounds, and this Court should reverse.

IV. There Is No Evidence Of A Chilling Effect When The Law Imposes A Duty On Officers To Use Reasonable Care.

Respondent argues that reversing the decision below will have a chilling effect on well-being checks, and asks this Court to eliminate a long-standing common law duty to use reasonable care when coming to the aid of another. The presumed "chilling effect" is not apparent in other spheres of law enforcement. Law enforcement officers have not stopped taking people into custody just because a duty arises when they do so. Nor have they stopped making traffic stops, issuing citations, driving vehicles, or using firearms.

The duty imposed on Respondent is not burdensome. The duty to exercise ordinary, reasonable care is imposed on every citizen. It is the public policy of this state that when someone harms another by negligently breaching that duty, the courts will be open to provide redress. *See Vargas v. Glades General Hosp.*, 566 So. 2d 282, 284-85 (Fla. 4th DCA 1990). When the deputies assumed the undertaking of checking on the decedent's well-being, they assumed an obligation

to perform that undertaking with reasonable care. The lower court erred by holding otherwise, and this Court should reverse.

V. A Provisional Award Of Appellate Attorney's Fees Is Appropriate And Supported By Florida Law.

A provisional award of appellate attorney's fees is appropriate when a party may become entitled to fees after remand pursuant to a previously served proposal for settlement under section 768.79, Florida Statutes (2004). *See Joyner v. International Real Estate Group, Inc.*, 937 So. 2d 259 (Fla. 5th DCA 2006); *Tiede v. Satterfield,* 870 So. 2d 225, 230 (Fla. 2d DCA 2004)(Stringer, J., *concurring); Skylink, Inc. v. Titus,* 745 So. 2d 377, 377 (Fla. 4th DCA 1999); *Washington v. Fleet Mtg. Co.*, 631 So. 2d 364, 365 (Fla. 1st DCA 1994).

CONCLUSION

The decision below conflicts with decisions of this court and the First District Court of Appeal, creating confusion in the law regarding the extent to which the "undertaker's doctrine" applies to governmental entities. 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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Sharon H. Proctor, Esquire
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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 October, 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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