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**Kelly Wallace v. Ed Dean, Sheriff**

**SC08-149**

>> NEXT CASE ON THE COURT'S AGENDA IS WALLACE VERSUS DEAN.

>> MISS PROCTOR.

>> MAY IT PLEASE THE COURT. GOOD MORNING.

MY NAME IS SHARON PROCTOR. I'M HERE THIS MORNING WITH TRIAL COUNSEL, MARK AVERA.

>> SPEAK, INTO THE MIKE, PLEASE.

>> IS THAT A LITTLE BETTER? IS THAT BETTER?

YOUR HONOR.

I'M HERE WITH MARK AVERA. TOGETHER WE REPRESENT THE PETITIONER, KELLY WALLACE. THE FIFTH DISTRICT COURT OF APPEAL ERRED WHEN IT HELD THAT TWO DEPUTY SHERIFFS WHO ENTERED THE HOME OF BRENDA WALLACE TO CHECK ON HER WELL-BEING, HAD NO DUTY TO EXERCISE REASONABLE CARE IN PERFORMING THE WELL-BEING CHECK.

>> WHAT IS THE STANDARD HERE THAT, YOU'RE ALLEGING THAT, THE SHERIFF'S DEPUTIES HAD?

DID THEY, IN OTHER WORDS, DID THEY HAVE, REASONABLE PERSON STANDARD?

I THINK THAT'S, FIFTH DISTRICT KIND OF EQUATED AS I READ IT TO THE FACT THAT THE OTHER PEOPLE THAT WERE THERE AND NOTICED HER, THEY, WOULD HAVE HAD SOME DUTY OF REASONABLE CARE, IF THAT'S THE DUTY.

OR DID THEY HAVE A DUTY OF, OF A, OF A MEDIC, OR DO THEY HAVE A DUTY TO EXERCISE THE CARE THAT A REASONABLE MEDICAL PERSON OTHER REASONABLE DOCTOR? WHAT WAS THEIR STANDARD?

>> THE ORDINARY REASONABLE PERSON STANDARD APPLIES, YOUR

HONOR.

THEY HAD THE SAME DUTY THAT A PRIVATE CITIZEN WOULD HAVE UNDER LIKE CIRCUMSTANCES. AND THE PARAMETERS OF THAT DUTY, OF THAT CAUSE OF ACTION --

>> SO THEY, SO THE PERSON THAT IS ALLEGED HERE, TO HAVE ASKED THEM WHETHER AN AMBULANCE SHOULD BE CALLED OR NOT, HAD THE SAME DUTY?

>> YOUR HONOR, THAT VERY WELL MAY BE.

A PRIVATE CITIZEN, IF THAT NEIGHBOR HAD COME TO THE AID AND WAS MAKING A DECISION ABOUT WHETHER TO CALL AN AMBULANCE, YES.

YES, A PRIVATE CITIZEN, THE LAW OF THIS STATE, THE STATE HAS ADOPTED UNDER THE COMMON LAW AS DEFINED IN THE RESTATEMENT SECOND, WHAT IS CALLED THE UNDERTAKER'S DOCTRINE.

IT'S A COMMON LAW CAUSE OF ACTION THAT APPLIES TO BOTH PRIVATE INDIVIDUALS AND GOVERNMENT ENTITIES.

>> ON THAT ONE, YOU CAN'T HAVE IT BOTH WAYS BECAUSE IF THEY HAD WAS A DUTY TO EXERCISE ORDINARY CARE, WAS NOT ANY SPECIALIZED KNOWLEDGE THAT A MEDIC WOULD HAVE OR, EM OR SHERIFF'S DEPUTY, THEN, HOW YOU GET TO THE PART WHERE YOU PLEAD THAT THEY RELIED ON THE DEPUTY'S ASSURANCE ABOUT THE DESEED DENT'S CONDITION? SURELY IF 2 WOULD REVERSED AND MEDICS CAME AND ORDINARY CITIZEN WAS THERE AND SAID WE THINK THEY'RE FIBER-OPTIC AND DICK RELIED ON THAT, WE WOULD SAY, WAIT A MINUTE, YOU'VE GOT TO DETERMINE THE MEDICAL STATUS.

I'M INTERESTED IN HOW YOU GET IT BOTH WAYS IN THIS CASE? IF YOU'RE SAYING THEIR DUTY ONLY WAS WHAT A REASONABLE PERSON WOULD HAVE, THEN HOW CAN YOU ALSO HAVE DETRIMENTAL

RELIANCE PLED BY THE TWO PEOPLE THAT WERE THERE?

>> THE REASON FOR THE DETRIMENTAL RELIANCE, YOUR HONOR, AND THE REASON IT'S AN ORDINARY PERSON STANDARD, WHEREAS WITH A MEDIC, THERE IS OBVIOUSLY A HIGHER STANDARD FOR SOMEONE PROVIDING MEDICAL CARE THAN FOR A NORMAL PRIVATE CITIZEN WHO ATTEMPTS TO AID SOMEONE ELSE.

THE DETRIMENTAL RELIANCE IS PART OF THE UNDERTAKER'S DOCTRINE AS EXPLAINED IN THE RESTATEMENT SECOND AND AS ADOPTED BY THIS COURT, BOTH IN CLAY ELECTRIC AND --

>> I UNDERSTAND WHAT THE DETRIMENTAL RELIANCE DOCTRINE IS.

I'M WONDERING HOW IF THEY HAVE NO DIFFERENT DUTY THAN THE TWO PEOPLE THAT CAME IN THERE, THEN HOW DO YOU, HOW CAN YOU SUCCESSFULLY PLEAD THAT THEY RELY TO THEIR DETRIMENT ON THE DEPUTY'S ASSURANCE ABOUT THE DECEDENT'S CONDITION?

IN OTHER WORDS, YOU'VE GOT TO SHOW SOME DETRIMENTAL RELIANCE. IT SEEMS TO ME YOU NEED TO ESTABLISH THAT THESE SHERIFFS DEPUTIES WHERE I THOUGHT YOU WERE GOING, REALLY ARE IN A DISTINCT SITUATION.

THEY'RE NOT AN ORDINARY CITIZEN BECAUSE THEY'RE BEING CALLED PURSUANT TO A 911 CALL THAT THERE IS AN EMERGENCY GOING ON IN THIS HOUSE?

>> THAT'S TRUE, YOUR HONOR. THEY'RE THERE IN RESPONSE TO A 911 CALL.

THEIR DUTY, THOUGH IS TO USE THE CARE AN ORDINARILY REASONABLE PERSON WOULD HAVE USED IN THAT SITUATION.

>> WHY WOULD YOU CALL, AGAIN JUSTICE PARIENTE IS GOING TO THE HEART OF THIS CASE.

YOU CALL 911 BECAUSE YOU THINK THEY'RE TRAINED IN EMERGENCIES. AND WHY WOULD IT NOT BE SOMEONE

TRAINED IN DEALING WITH  
EMERGENCY.

THEY MAY NOT HAVE TO TREAT HIM  
AT THE SCENE BUT AT LEAST  
SUMMON HELP.

I THINK YOU'RE DIGGING A HOLE  
GOING BACKYARD AND DEALING WITH  
THIS, I MUST TELL YOU I DON'T  
UNDERSTAND YOUR ARGUMENT OF  
JUST A REASONABLE PERSON OFF  
THE STREET?

>> THANK YOU.

THANK YOU, JUSTICE.

I CERTAINLY DON'T WANT TO DIG  
MYSELF A HOLE.

>> THAT IS WHAT IS HAPPENING  
HERE THIS MORNING.

>> OBVIOUSLY, PEOPLE ARE MORE  
INCLINED TO LISTEN TO A LAW  
ENFORCEMENT OFFICER WHO IS  
COMMON RESPONSE TO A 911 CALL.  
BUT IT'S NOT NECESSARY FOR US  
TO CREATE A HEIGHTENED DUTY IN  
ORDER TO FIND --

>> IS IT HEIGHTENED DUTY TO  
EXPECT A REASONABLE LAW  
ENFORCEMENT OFFICER TO OPERATE  
AS A REASONABLE LAW ENFORCEMENT  
OFFICER?

THAT'S WHAT THEY ARE.

>> THAT'S EXACTLY RIGHT.

>> THAT IS NOT HEIGHTENED.  
THAT IS WHAT THEY ARE.

>> AND THE DUTY THAT WAS PLACED  
ON THESE OFFICERS HAS BEEN  
APPLIED TO PRIVATE CITIZENS AS  
WELL AS TO GOVERNMENTAL  
ENTITIES.

>> IF THAT IS ALL -- THE FIRST  
ISSUE IS THAT THE UNDERTAKER'S  
DOCTRINE APPLIES WHETHER YOU'RE  
A PRIVATE CITIZEN OR YOU'RE A  
GOVERNMENTAL ENTITY.

>> YES, YOUR HONOR.

>> I THINK WHERE WE'RE GOING  
OFF SKEWED HERE, IT'S NOT AS IF  
THE OFFICER IN THIS SITUATION  
WAS A NEXT DOOR NEIGHBOR WHO  
JUST HAPPENED TO COME IN.  
WHAT IS ALLEGED ABOUT, WHAT WAS  
THE 911 CALL?

WHAT WAS ASKED FOR?

>> YOUR HONOR, THE 911 CALL  
OCCURRED BECAUSE MRS. WALLACE

WAS NOT ANSWERING HER PHONE.

>> I KNOW.

WHAT IS ALLEGED TO BE -- DID  
THEY SAY WE NEED AN AMBULANCE?

WHAT WAS, WHAT WAS --

>> THEY MADE THE NEIGHBOR IS  
NOT ANSWERING.

WE DON'T KNOW WHAT'S WRONG.

CAN YOU SEND SOMEBODY?

ACTUALLY THE COMPLAINT IS ALL  
WE HAVE HERE.

SO THOSE FACTS HAVE NOT BEEN  
ADDRESSED BECAUSE THE FIFTH  
DISTRICT COURT OF APPEAL AND  
THE TRIAL COURT BOTH SAID, NOT  
ONLY HAVE YOU NOT STATED A  
CAUSE OF ACTION AGAINST THE  
SHERIFFS DEPUTIES BUT YOU  
CANNOT UNDER ANY CIRCUMSTANCE  
STATE A CAUSE OF ACTION FOR  
NEGLIGENTLY PERFORMING A BEING  
CHECK BECAUSE THERE IS NO LEGAL  
DUTY OWED.

THAT WAS THE CONCLUSION OF THE  
LOWER COURT.

THERE CANNOT BE A LEGAL DUTY  
OWED TO PERFORM A WELL-BEING  
CHECK AS A REASONABLY PRUDENT  
POLICE OFFICER OR REASONABLY  
PRUDENT PERSON COMING TO THE  
AID OF SOMEONE WHO IS  
UNCONSCIOUS WOULD DO.

SO, THE POINT IS, THEY CALLED  
FOR EMERGENCY HELP.

THE 911 DISPATCHER SENT  
EMERGENCY HELP.

IN THE FORM OF TWO SHERIFFS  
DEPUTIES.

THOSE DEPUTIES ENTERED THE HOME  
THROUGH UNLOCKED WINDOW.

ALL WENT INSIDE INCLUDING  
NEIGHBOR WHO CALLED AND THE TWO  
DEPUTIES WHO WERE THERE.

THEY COULD NOT REVIVE MRS. WALLACE.  
THEY SHOOK HER.

>> WHAT IS ALLEGED IS, AS I  
READ IT, IS A POLICE OFFICER'S  
DECISION TO ASSUME CONTROL OVER  
A PARTICULAR SITUATION OR  
INDIVIDUAL AS ACCOMPANIED BY A  
CORRESPONDING DUTY TO EXERCISE  
REASONABLE CARE.

NOW WHAT I READ THAT TO BE TO  
TRY TO GET UNDER OUR HENDERSON

CASE, THE CITE IN HERE THE POLLACK CASE.

AND AT THE POINT WHEN THE DEPUTIES OF MARION COUNTY RESPONDED TO THE SERVICE CALL, THE DEPUTIES OWED A DUTY TO DECEDENT TO EXERCISE REASONABLE CARE IN THEIR HANDLING OF THE SITUATION.

NOW THAT'S, THAT'S WHAT GAVE RISE TO MY QUESTION IS, IS WHAT IS, WHAT ARE YOU, IS BEING REFERRED TO IS REASONABLE CARE IN THEIR HANDLING OF THE SITUATION?

AND, BECAUSE WHAT I'M HAVING A DIFFICULTY DOING IS, IS, APPLYING BROADLY THE UNDERTAKER DOCTRINE TO POLICE DEPUTY THAT COME INTO A SITUATION BECAUSE WE'VE GOT CASES OUT THERE, THE BERTON CASE BEING A PRIME EXAMPLE WHICH SAYS THAT THE POLICE OFFICER DOESN'T HAVE TO STOP AND WREST SOMEBODY UNDER THAT CIRCUMSTANCE.

THAT IS DISCRETIONARY DECISION.

>> YES, YOUR HONOR, THAT IS A VERY GOOD POINT.

I'M GLAD YOU RAISED THE EBERTON CASE.

IT IS A CRITICAL DISTINCTION. THE REASON THERE IS NO DUTY IN THE EBERTON CASE.

YOU HAVE NO DUTY TO MAKE AN ARREST.

THERE THERE WAS INTOXICATED PERSON.

THE ALLEGATION WAS, YOU HAD A DUTY TO MAKE AN ARREST AND THE POLICE FAILED TO MAKE THAT DUTY TO MAKE AN ARREST.

THIS COURT SAID THAT IS A GENERAL DUTY.

THE DUTY TO ENFORCE THE LAW IS A GENERAL DUTY THAT POLICE OFFICERS OWE TO THE PUBLIC.

SO IN THAT CASE WAS RELYING UPON A DUTY THAT WOULD ONLY APPLY TO A, APPLY TO POLICE OFFICER.

WOULD NEVER APPLY TO A PRIVATE

CITIZENS.

PRIVATE CITIZENS HAVE NO DUTY  
TO ARREST ANYONE.

WHEN THE DUTY IS ONE THAT  
APPLIES ONLY TO GOVERNMENTAL  
ENTITY, SUCH THAT IT IS A  
PUBLIC DUTY, THIS COURT HAS  
SAID THERE MUST BE SOMETHING  
MORE THAN A PUBLIC DUTY.  
THERE MUST, THERE MUST BE A  
SPECIAL RELATIONSHIP WITH THAT  
PERSON.

THE PERSON MUST HAVE BEEN TAKEN  
INTO CUSTODY OR THE POLICE MUST  
HAVE CREATED A --

>> WHAT YOU'RE SAYING HERE  
THOUGH IS THAT POLICE, THAT THE  
LAW ENFORCEMENT, THE SHERIFFS  
DEPUTY HAD A DUTY TO CALL AN  
AMBULANCE.

>> YOUR HONOR, WHAT WE'RE  
SAYING HERE, WHEN THE DEPUTY  
SHERIFF UNDERTOOK TO GO  
DETERMINE WHETHER OR NOT  
MRS. WALLACE NEEDED HELP,  
THEY ASSUMED A DUTY TO CARRY  
OUT THERE WITH REASONABLE,  
ORDINARY CARE.

>> DO THEY HAVE A DUTY UNDER  
THE CIRCUMSTANCES THAT  
PREVAILED THERE, TO MAKE THE  
DECISION TO CALL AN AMBULANCE?  
THAT'S WHAT YOU'RE ALLEGING  
WE'RE ALLEGING ORDINARY  
REASONABLE PERSON, FACED WITH  
THE FACT THAT THESE DEPUTIES  
WERE FACED WITH, WOULD HAVE  
SOUGHT MEDICAL ATTENTION FOR  
THIS WOMAN.

WOULD HAVE CALLED AN AMBULANCE.  
AND THE QUESTION WHETHER THE  
DEPUTIES SHOULD OR SHOULD NOT  
HAVE CALLED AN AMBULANCE IS A  
QUESTION OF NEGLIGENCE.  
THAT WOULD BE DETERMINED BY A  
JURY.

THE SHERIFF CAN CERTAINLY ARGUE  
TO THE JURY THAT WHAT THE  
DEPUTIES DID WAS REASONABLE.

>> THERE MAY BE SITUATIONS THAT  
THE FACTS ARE DEVELOPED THERE  
IS NO QUESTION OF FACT THAT,  
FOR WHATEVER REASON, AND THERE  
WOULD BE SOME SUMMARY

JUDGMENT.

WE HAVEN'T GOTTEN THAT FAR TO KNOW WHAT THE NATURE OF THE CALL WAS.

WHETHER MAYBE THE SHERIFF'S DEPUTY SAID, ALL WE HAVE RIGHT NOW ARE THE ALLEGATIONS IN YOUR COMPLAINT SOME THIS ISN'T NECESSARILY, YOU'RE SAYING, I WANT TO BE ABLE TO HAVE YOU OPEN THE COURTHOUSE DOOR. THAT DOESN'T MEAN IT IS THE DOOR TO A JURY TRIAL.

>> THAT'S CORRECT, YOUR HONOR. THERE COULD BE A MOTION FOR SUMMARY JUDGEMENT WHEN THERE'S BEEN -- AT THIS POINT THERE HASN'T BEEN AN OPPORTUNITY FOR PLAINTIFF TO TAKE DEPOSITIONS OR DEVELOP THE CASE OR GET TO THE POINT OF SUMMARY JUDGMENT.

>> HAVE YOU ALLEGED IN THIS CASE THAT THE POLICE OFFICERS TOOK CHARGE OF THE SITUATION?

>> YOUR HONOR, THERE ARE FACTS ALLEGED IN THE COMPLAINT THAT INDICATE THAT OFFICERS DID TAKE CHARGE OF THE SITUATION.

THE OFFICERS ENTERED THE HOME, ENTERED THE HOME THROUGH AN UNLOCKED WINDOW.

THE OFFICERS ATTEMPTED TO REVIVE THIS PERSON.

THEY FOUND HER UNTIL A BED IN A DINING ROOM.

THEY TO REVIVE HER, GET HER TO WAKE UP OR, SEE IF SHE WAS JUST SLEEPING AND THEY WERE UNABLE TO.

WHEN THE --

>> GO BACK A MINUTE TO THE DISCUSSION THAT WE WERE HAVING EARLY ON.

>> YES, SIR.

>> WITH REFERENCE TO WHETHER OR NOT ANOTHER CITIZEN, SAY A NEIGHBOR, FOR INSTANCE, SO, WHAT WOULD BE THE SITUATION IF THESE NEIGHBORS, INSTEAD OF CALLING 911, OR ASKING FOR THE POLICE TO COME AND CHECK, IF THEY WENT TO ANOTHER NEIGHBOR, SAID, WE'RE WORRIED ABOUT WHAT'S GOING ON AND, THEY ARE

ALL PUTTING THEIR HEADS  
TOGETHER THEN.  
SO THE OTHER NEIGHBOR THEY WENT  
TO SAYS, WELL, LET ME SEE IF  
THERE IS A WINDOW OPEN IN THE  
BACK.

ESSENTIALLY DID ALL THE SAME  
THING YOU'RE ALLEGING THAT THE  
POLICE OFFICERS DID HERE.  
NOW, IS IT, IS IT YOUR  
POSITION, THAT UNDER THE  
UNDERTAKER DOCTRINE THAT THIS  
OTHER NEIGHBOR, THAT DID THIS,  
WOULD NOW BE RESPONSIBLE UNDER  
THIS STANDARD OF REASONABLE  
CARE FOR THE CONSEQUENCES OF  
NOT MAKING GOOD JUDGMENTS ABOUT  
WHAT TO DO?

>> YOUR HONOR, THAT PRIVATE  
CITIZEN MIGHT IN FACT BE  
SUBJECT, WOULD IN FACT, IF THEY  
UNDERTAKE TO GO TO THE AID OF A  
PERSON IN NEED.

AND LET ME, THEN, YES, THEY'RE  
ASSUMING A DUTY, THAT THEY  
DON'T OTHERWISE HAVE.  
NO ONE HAS A DUTY TO COME TO  
THE RESCUE OF ANOTHER.  
BUT THIS COURT HAS SAID, IF I  
MAY QUOTE, 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, IS SUBJECT TO LIABILITY  
IF, THE THIRD PERSON, SUBJECT  
TO LIABILITY, EXCUSE ME, FOR  
PHYSICAL HARM, IF FAILURE TO  
PERFORM THAT UNDERTAKING  
RESULTS IN AN INCREASED RISK OF  
HARM, OR, IF THE HARM SUFFERED  
BECAUSE OF THE RELIANCE.

>> SO YOU ARE SAYING --

>> YES, SIR.

>> THAT THESE POLICE OFFICERS  
ARE RESPONSIBLE IN THE SAME WAY  
THAT ANOTHER NEIGHBOR MAY BE  
HELD RESPONSIBLE?

THAT THERE IS NO DISTINCTION  
BETWEEN THOSE TWO SITUATIONS?

>> BOTH SITUATIONS THERE WOULD  
BE A DUTY OF CARE THAT HAS BEEN  
RECOGNIZED BY THIS COURT

REPEATEDLY SINCE 1909.

IF YOU UNDERTAKE TO AID ANOTHER  
AND THE ELEMENTS OUT IN THE  
RESTATEMENT ARE MET, YOU HAVE  
STATED A CAUSE OF ACTION.

THERE IS A LEGAL DUTY.

PERHAPS THE JURY WOULD FIND NO  
BREACH.

PERHAPS THE JURY WOULD FIND NO  
CAUSATION.

>> IT DOESN'T HAVE ANYTHING TO  
DO ANY SPECIAL EXPERTISE THE  
POLICE OFFICERS WOULD HAVE IN  
THE SITUATION?

IT JUST HAS TO DO WITH  
REASONABLE CARE BY ANY OF  
PERSON THAT VOLUNTEERS TO HELP  
OUT?

>> THAT'S THE LAW AS EXPLAINED  
BY THIS COURT, YOUR HONOR.

>> THIS IS THE LAW THAT YOU'RE  
WRITING IN THIS CASE.

>> THAT IS THE LAW THAT QUOTED  
THIS TO COURT FROM BOTH CLAY  
ELECTRIC --

>> CLAY ELECTRIC HAD UNDERLYING  
CONTRACT, DID IT NOT?

>> PARDON ME?

>> CLAY ELECTRIC HAD A WRITTEN  
CONTRACT REQUIRING THE  
CONTRACTOR TO REPAIR THE  
LIGHTS?

ISN'T THAT TOTALLY DIFFERENT  
THAN IN CASE?

>> YOUR HONOR, THIS COURT  
QUOTED WITH APPROVAL THE  
RESTATEMENT SECTION, 24-A IN  
CLAY ELECTRIC.

IT ALSO QUOTED THAT IN THE  
UNION PARK WHERE THERE WAS NO  
CONTRACT.

THAT WAS FUNERAL DIRECTOR  
DIRECTING TRAFFIC AND DID SO  
NEGLIGENTLY AND THIS COURT  
QUOTED AGAIN THE UNDERTAKER'S  
DOCTRINE, RESTATEMENT SECOND,  
SECTION 324-A.

>> WHEN DID THE OFFICER'S  
ACTIVES HERE BECOME AN  
UNDERTAKING?

IT SEEMS TO ME AT  
LEAST AT THE BEGINNING WHEN THE  
911 CALL CAME IN, IT WAS A  
DISCRETIONARY DECISION OF THE

OFFICERS TO GO TO THE SCENE TO  
SEE WHAT WAS HAPPENING.  
SO AT WHAT POINT DO YOU  
MAINTAIN THIS BECAME AN  
UNDERTAKING, THAT THE OFFICERS  
TOOK CONTROL OF THE SITUATION?  
WHATEVER YOUR ARGUMENT IS HERE?  
AT WHAT POINT DID THAT HAPPEN?  
>> ACTUALLY, YOUR HONOR, WHEN  
THEY ENTERED THE HOME TO ON  
THIS WOMAN, TO COME TO HER AID,  
AT THAT POINT YOU WOULD LOOK AT  
THE ELEMENTS THAT HAVE BEEN  
LAID OUT FOR DOCTRINE, THE  
UNDERTAKER'S DOCTRINE, HAVE  
EACH OF THOSE ELEMENTS BEEN  
ALLEGED HERE.

WHEN THEY COME INTO HER HOME TO  
FIND OUT IF SHE NEEDS HELP THEY  
USE AD DUTY TO USE REASONABLE  
CARE.

>> I THINK YOUR ARGUMENT IS  
WHAT JUSTICE LEWIS ASKED  
EARLIER AND WHAT I'M STILL  
CONCERNED ABOUT IS THAT THE  
CONCEPT OF THE UNDERTAKER'S  
DOCTRINE UNDER 324-A MAY BE  
WHAT IS USED IN THIS SITUATION  
BUT THE ACTUAL DOPE OF THE  
OBLIGATION TO -- SCOPE OF THE  
OBLIGATION TO ME IS VASTLY  
DIFFERENT WHEN A 911 CALL IS  
MADE AND POLICE OFFICERS COME  
OUT PURSUANT TO CONDUCT A  
WELL-BEING CHECK.

WE DON'T KNOW, MAYBE THE  
PROCEDURES ARE GOING TO SHOW  
THAT A WELL-BEING CHECK, THAT  
EVERYTHING THEY WERE SUPPOSED  
TO DO, THEY FOLLOWED, WHICH WAS  
THE PROTOCOL.

OR MAYBE IT'S GOING TO SHOW  
THEY ARE TRAINED WHEN SOMEONE  
IS UNCONSCIOUS AND KICK THEM A  
FEW TIMES IMMEDIATELY CALL AN  
AMBULANCE.

WE DON'T KNOW THAT.  
TO SAY WE'RE GOING TO MEASURE  
IT AS IF YOU CALLED JOE SMITH  
FROM ACROSS THE STREET, TO COME  
OVER, I THINK DIMINISHES YOUR  
CASE SUBSTANTIALLY IN TERMS OF  
WHAT WE'RE DEALING WITH HERE.

>> YOUR HONOR, IS SAYING THERE

IS ACTUALLY A HIGHER DUTY.

>> DUTY OF REASONABLE CARE  
UNDER THE CIRCUMSTANCES THESE  
CIRCUMSTANCES ARE THEY CALLED  
THE POLICE, THEY CALLED 911 TO  
COME OUT BECAUSE THEY HAVE  
SPECIAL EXPERTISE IN  
DETERMINING WHETHER SOMEBODY  
NEEDS ADDITIONAL ASSISTANCE OR  
NOT.

>> WHEN WOULDN'T YOU CONSIDER  
THE EXPERIENCE AND TRAINING  
WHOEVER IS DOING IT,  
DETERMINING WHETHER REASONABLE  
CARE WAS DONE?

>> YES.

>> WHETHER POLICE OFFICERS OR  
DOCTOR RESPONDING? LOOKING AT  
WHAT THEIR EXPERIENCE AND  
TRAINING WOULD BE?  
IF THEY'RE NOT TRAINED IN  
ANYTHING, WOULDN'T YOU CONSIDER  
THAT?

>> YES, YOUR HONOR, YOU WOULD  
CONSIDER THAT.

THAT WOULD GO INTO THE  
REASONABLE PERSON STANDARD.  
IN MEDICAL MALPRACTICE IS THE  
STANDARD, WHAT WOULD A  
PREVAILING PROFESSIONAL IN  
THEIR POSITION HAVE DONE.  
SO THAT GOES TO MEASURING  
NEGLIGENCE IF YOU WILL FOR THE  
JURY TO DECIDE WHAT THESE  
OFFICERS DID WAS REASONABLE.

>> ON CAUSATION, WHAT DID SHE  
DIE OF?

>> THE RECORD CONTAINS THE  
COMPLAINT, WHICH ALLEGES THAT  
SHE DIED AS A RESULT OF THE  
DELAY CAUSED BY THE NEGLIGENCE.

>> THAT'S ALL IT SAYS, BUT WHY  
DID SHE DIE?

>> WE TAKE THOSE FACTS.

THAT'S WHAT WE HAVE.

WE TAKE THOSE FACTS AS TRUE FOR  
PURPOSES OF A MOTION TO  
DISMISS.

HAD THEY CALLED MEDICAL CARE,  
AT THAT TIME SHE WOULD NOT HAVE  
DIED.

THAT IS WHAT IS ALLEGED.

THAT'S WHAT WE TAKE AS FACT.

WHEN WE'RE DECIDING HAVE THEY

STATED A CAUSE OF ACTION OR  
NOT.

IS THERE A LEGAL DUTY OWED OR  
NOT.

>> THE RECORD DOESN'T INDICATE  
THE MEDICAL REASON?

>> IT DOES NOT, YOUR HONOR.

>> YOU HAVE A GREAT HURDLE  
THERE BECAUSE THE ISSUE IS,  
WOULD SHE HAVE DIED ANYWAY.  
BUT WE'RE NOT HERE BECAUSE OF  
THAT.

BEING GRANTED SUMMARY JUDGEMENT  
ON THAT BASIS.

>> EXACTLY, YOUR HONOR.

THAT WOULD BE SOMETHING TO BE  
ADDRESSED WHEN THERE HAS BEEN  
SOME EVIDENCE DEVELOPED.

IT'S A QUESTION OF WHETHER A  
DUTY IS OWED.

THE REASON THIS IS IMPORTANT --  
I'M SORRY.

>> YOU HAVE EXCEEDED YOUR TIME.  
IF YOU WANT TO MAKE ONE  
CONCLUDING STATEMENT.

>> THANK YOU, YOUR HONOR.

THE DISTINCTION THAT IS  
IMPORTANT HERE BECAUSE A DUTY  
WOULD HAVE BEEN OWED BY A  
PRIVATE CITIZEN, UNDER THE  
UNDERTAKER'S DOCTRINE AS  
DEFINED BY THIS COURT, THE PUBLIC  
DUTY DOCTRINE THAT THE SHERIFF  
RELIES UPON WHICH SAYS, THAT  
THE WAIVER OF SOVEREIGN  
IMMUNITY DOESN'T CREATE ANY NEW  
TORTS, DOES NOT

PROVIDE A SHIELD OR PROTECTION  
HERE BECAUSE THE PLAINTIFF IS  
NOT RELYING ON ANY SPECIAL  
PUBLIC DUTY BUT ON A DUTY  
THAT'S BEEN WELL-ESTABLISHED BY  
THIS COURT THAT APPLIES BOTH TO  
GOVERNMENT AND TO  
NON-GOVERNMENT.

WE WOULD ASK THE COURT TO  
REVERSE THE FIFTH DISTRICT  
COURT OF APPEAL.

THANK YOU, YOUR HONORS.

>> THANK YOU.

MR. BOGAN.

>> I'M BRUCE BOGAN,  
REPRESENTING SHERIFF OF MARION  
COUNTY TODAY.

>> MR. BOGAN, CAN WE TALK ABOUT WHAT THIS CASE IS ABOUT AND SEE HOW WE CAN SEPARATE THIS OUT. WE KNOW, DO WE NOT, FROM FLORIDA LAW, 911 CALL IN OF ITSELF IS NOT GOING TO CREATE A DUTY?

>> CORRECT.

>> BUT HERE WE HAVE, TROUBLING ABOUT THIS, WE HAVE THE CALL FOR EMERGENCY.

IT COULD BE ANYTHING.

AND IF A DECISION IS MADE NOT TO FOLLOW THROUGH, THAT'S DISCRETIONARY.

DO WE AGREE WITH THE THAT TO THIS POINT?

>> DEPENDING ON A WELL-BEING CHECK --

>> I DON'T KNOW ABOUT WELL-BEING.

KEEP USING THIS WORD, WELL-BEING CHECK.

SOMEBODY CALLING THERE IS PROBLEM.

THAT'S WHAT I'M CONCERNED WITH.

DECISION IS MADE NOT ONLY GOING OUT BUT THEY GO THROUGH A WINDOW AND APPEAR TO TAKE CONTROL OF THE SCENE, IF YOU WILL.

AND THAT IS A BODY, IN A BED, AND AS I UNDERSTAND THE {GAGS}S, MAYBE I'M WRONG, YOU CAN CORRECT ME.

THIS IS WHAT I WANT TO TALK ABOUT WHAT THIS CASE IS ABOUT, WHERE, THE NEIGHBORS, START SUGGESTING SOMETHING BUT THE OFFICER SAYS, OR IF I AM GETTING THIS WRONG TELL ME, NO, THEY DON'T SNORE OR SOMETHING, IF, IF THEY ARE IN A COMA OR SOMETHING TO THAT NEXT OR PUSHED THEM AND SHOOK THEM AND, YELLED AT THEM AND NOTHING HAPPENED.

IS THAT A FAIR CHARACTERISTIC, CHARACTERIZATION?

>> OF THE FACTS IN THE COMPLAINT, YES, THEY DID RESPOND BY GOING INSIDE. FOUND HER, THEY SAY TO BE SLEEPING ON A BED IN THE LIVING

ROOM.

THEY SHOUTED HER NAME AND SHOOK HER.

AND THE NEIGHBOR DID SUGGEST SOMETHING TO THE LANGUAGE WHICH HAVE MENTIONED ABOUT A DIABETIC COMA.

AND THEIR RESPONSE WAS, THAT PEOPLE IN A DIABETIC COMA DON'T SNORE.

SOMETHING TO THAT EFFECT.

>> WHAT I'M LOOKING HERE, WE DO HAVE THE AUTHORITY OF THE LAW CALLED INTO A CIRCUMSTANCE AND CALL IT WELL-BEING, CALL IT EMERGENCY, CALL IT WHAT YOU WILL, CIRCUMSTANCE WHICH LAW ENFORCEMENT HAS BEEN SUMMONED. THEY HAVE ENTERED INTO THAT SCENE AND ACTIVELY ENGAGED IN SOME KIND OF CONDUCT.

IS THAT CORRECT TO THIS POINT?

>> I DISAGREE THAT THEY CONTROLLED THE SCENE.

>> I DON'T WANT TO USE THAT WORD.

THEY HAVE COME INTO AND THEY HAVE ENGAGED THEMSELVES IN THE SCENE OF EVENTS FOR WHICH A CALL FOR HELP HAD BEEN MADE?

>> THEY WENT INTO THE HOME.

THEY FOUND THE PERSON WHO, THE NEIGHBOR WANTED THEM TO FIND.

>> OKAY.

>> THEY --

>> WHY DID THAT NOT, WHY DID THAT NOT, ONCE THEY DO RESPOND, THEY DO RESPOND TO THE CALL, THEY DO GO INTO THE HOUSE, THEY DO ENCOUNTER THE PERSON ABOUT WHOM THIS EMERGENCY CALL WAS MADE, WHY DO THEY NOT HAVE SOME SPECIAL RESPONSIBILITY WITH REGARD TO THAT?

NOW THEY MAY HAVE SATISFIED IT IN THIS CASE, BUT WHY WOULD THAT NOT FALL UNDER THE SPECIAL DUTY OF EMERGENCY PERSONNEL SUMMONED TO, ACTUALLY IN THE HOME?

THIS IS NOT OUT ON A ROADWAY SOMEPLACE.

THIS IS IN A HOME.

>> IN ACCORDANCE WITH THE

COURT'S PRIOR DECISIONS IN POLAK  
AND HENDERSON --

>> POLAK, WAS POLAK THE

--

>> FLORIDA HIGHWAY PATROL BUT  
THEY DIDN'T RESPOND THERE.

>> FLORIDA HIGHWAY PATROL  
RECEIVED A 911 CALL, THE DISPATCHER  
PROMISED THE PERSON WHO WAS A  
WITNESS TO --

>> THEY SAID THEY'RE ON THE WAY, BUT  
THEY NEVER SHOWED UP.  
THEY DID NOT ACT.

>> THAT "WE WILL BE SENDING  
SOMEONE TO TAKE CARE OF" --

>> AGAIN, THEY DID NOT ACT.  
YOU AGREE THEY DID NOT ACT.

>> THAT THEY -- DID NOT SEND A  
FHP TROOPER TO THE SCENE, THERE  
WAS AN ALLEGATION THAT THE  
FAILURE TO DISPATCH SOMEONE IN  
THAT CASE --

>> I UNDERSTAND WHAT THE  
ALLEGATION WITH THOSE WAS.

I WAS ON

THE COURT WHEN IT WAS DECIDED.  
I KNOW EXACTLY WHAT THEY WERE.

AGAIN, IF THAT HIGHWAY PATROL  
TROOPER HAD COME TO THE SCENE,  
HAD DONE NOTHING AT THAT  
SCENE, DOES THAT MEAN THAT  
THAT WOULD NOT HAVE ALTERED  
THE RESPECTIVE DUTIES?

>> IF THE HIGHWAY PATROLMAN  
RESPONDED TO THE SCENE, I GUESS  
IT DEPENDS ON WHAT HE DID  
ONCE HE ARRIVED THERE.

>> RIGHT.

ISN'T THAT WHAT WE  
ARE TALKING ABOUT HERE?  
IT DEPENDS ON WHAT HE DID.

>> ACCORDING TO THE COURT  
DECISIONS IN RULING IN POLAK  
HENDERSON, WHETHER AN EXPRESS  
PROMISE OR ASSURANCE OF  
ASSISTANCE WAS GIVEN AND  
JUSTIFIABLE RELIANCE ON THAT  
PROMISE OF ASSISTANCE IS  
ESSENTIALLY ELEMENTS LOOKED AT  
IN DEERING, WHETHER OR NOT A  
SPECIAL RELATIONSHIP HAD BEEN  
ESTABLISHED.

>> -- ARGUING THIS SPECIFIC  
CASE, AND THAT IS, YOU KNOW,

WHATEVER WE DECIDE -- OF COURSE, HAS TO APPLY IN A WIDE RANGE OF SITUATIONS. LET ME GIVE YOU A HYPOTHETICAL BECAUSE THIS OFTEN IS THE WAY WE TRY TO WORK OUR WAY THROUGH SITUATIONS.

SO INSTEAD OF A -- WHAT WE HAVE HERE, LET'S ASSUME EVERYTHING WAS THE SAME BUT WHEN THEY GOT INSIDE, OKAY, THERE WAS A KNIFE STICKING OUT OF THE RIGHT SHOULDER OF THIS PERSON.

AND SHE WAS BLEEDING. BUT SHE WAS -- BLEEDING BUT BREATHING, AND REGULAR BREATH OR WHATEVER, THERE WAS A KNIFE STICKING OUT OF THE RIGHT SHOULDER.

AND SHE WAS BLEEDING. AND THEN ALL THE SAME STUFF HAPPENED.

THAT IS, THAT THEY TOLD THE NEIGHBORS WE THINK SHE IS ALL RIGHT, AND DON'T WORRY ABOUT IT.

SHE WILL WAKE UP EVENTUALLY AND BE OKAY. AND THEY LEFT.

NOW, IS THERE ANY POTENTIAL LIABILITY ON THE PART OF POLICE OFFICERS IN THAT SITUATION?

>> WELL, OBVIOUSLY, THAT IS A DIFFERENT CASE -- >> I KNOW IT'S A DIFFERENT CASE, I AGREE.

I'M ASKING YOU THE THRESHOLD QUESTION: IS THERE POTENTIAL LEGAL LIABILITY ON THE PART OF THE POLICE OFFICERS IN THE SITUATION I JUST DESCRIBED TO YOU?

>> WELL, WHAT YOU HAVE DESCRIBED IS, OBVIOUSLY, APPARENT MEDICAL DISTRESS IN THIS CASE, THERE IS NO ALLEGATION IN THE COMPLAINT THAT SHE WAS IN APPARENT MEDICAL DISTRESS.

>> WHERE -- WHAT DUTY THEN IS THERE FOR THE POLICE OFFICER -- BECAUSE YOU SEEM TO BE SAYING

"GOLLY, THAT SOUNDS AWFUL BAD, AND I THINK PROBABLY," YOU KNOW, SO -- WOULD YOU AGREE WITH ME THAT IF THE POLICE OFFICERS -- LEFT THE SCENE WITH THE KNIFE IN THE SHOULDER AND THE PERSON BLEEDING, AND THEN THE PERSON DIES FROM LOSS OF BLOOD LATER, COULD THE SHERIFFS DEPARTMENT BE HELD LIABLE?

>> I DON'T THINK SO BECAUSE OF THE FACT THE NEAR -- THE NEAR -- IN YOUR HYPOTHETICAL YOU INDICATE IT WASN'T SIMPLY A CALL FOR A WELL-BEING CHECK, LIKE WE HAVE HERE, OR WHAT HAS IT, A CALL THAT --

>> THERE WAS A CALL FOR WELL-BEING, IT WAS ALL THE SAME, YOU KNOW, THAT SHE IS NOT RESPONDING BUT WHAT THEY FOUND WHEN THEY GOT IN THERE WAS -- ASLEEP, UNCONSCIOUS, BREATHING, THE KNIFE IN THE SHOULDER, THAT IS ALL, AND THE BLEEDING.

>> I DON'T BELIEVE THEY HAVE COMMON LAW DUTY OF CARE --

>> THE FINDING THAT THEY COULD JUST WALK OUT AND THEY WILL HAVE NO POTENTIAL LIABILITY?

>> NO COMMON LAW DUTY OF CARE UNDER THOSE CIRCUMSTANCES, ASSUMING THEY DID NOT EXERCISE A CONTROL AND CREATE A SPECIAL RELATIONSHIP --

>> BUT I GUESS THIS IS WHERE AND WE COULD BE GOING IN A CIRCLE, LET ME ASK YOU MAYBE A DIFFERENT SIDE OF THE QUESTION, WHICH IS A 911 CALL. YOU ARE SAYING THERE IS THERE WAS A WELL-BEING CHECK, AND YOU KNOW THAT IS -- MUST BE SOME TERM THAT YOU ARE FAMILIAR WITH.

I'M NOT.

LET'S ASSUME 911, "PLEASE GET ME" -- YOU KNOW, "PLEASE SEND AN AMBULANCE."

EMT COMES, AND THEY ADMINISTER CPR, AND THE PERSON DIES. AND THE QUESTION IS DID THEY ADMINISTER THE CPR NEGLIGENTLY.

IN THAT SITUATION IS THERE --  
DO YOU GET PAST THE FIRST  
BASE INTO THE STADIUM?  
ARE YOU ABLE TO ALLEGE THAT  
THERE WAS A BREACH OF A DUTY  
OF REASONABLE CARE BECAUSE  
THEY CAME OUT AND THEN THEY  
PERFORMED THEIR DUTIES,  
AMBULANCE, MEDICS, EMT, WHAT WE  
ARE LOOKING AT HERE, WHAT WE  
DON'T KNOW WITH THIS RECORD IS  
THAT WHAT YOU ARE SAYING, THERE  
IS A SPECIES OF CALLS WHERE  
THE SHERIFFS DEPUTIES REALLY ARE  
DOING THOSE KIND OF -- AS A GOOD  
CITIZEN THING, NOT REALLY PART  
OF THEIR DUTIES, AND THEY CAN  
DO IT HOWEVER WAY THEY WANT,  
BUT IT DOESN'T -- UNDER NO  
CIRCUMSTANCE CAN THEY EVER  
ONCE THEY COME OUT, AND THEY  
SEE THE PERSON AND THEY MAKE  
AN ASSESSMENT CAN THEY BE  
LIABLE FOR WHAT THEY DID OR  
FAILED TO DO IN MAKING THAT  
ASSESSMENT?

>> UNLESS, AS THE COURT HAS  
PREVIOUSLY INDICATED, THEY HAVE  
ESTABLISHED A SPECIAL  
RELATIONSHIP --

>> THAT IS WHAT -- HOW IS THE  
SPECIAL RELATIONSHIP NOT --  
YOU SEE, BECAUSE EVEN IN  
COLLEGE WHICH OF COURSE I --  
DISSENTED IN, THE IDEA WAS  
THAT THERE WASN'T --  
NOW THERE WAS A THIRD PERSON,  
IT WASN'T THE PERSON THAT  
CALLED, SOMEBODY ELSE GOT --  
KILLED OR INJURED, HERE,  
THOUGH, THE VICTIM IS LYING  
THERE, AND THE RELATIONSHIP  
THAT IS BEING ALLEGED IS  
BETWEEN THE POLICE OFFICER AND  
THAT EVENTUAL VICTIM WHO IS  
BEING, YOU KNOW, SHAKEN, AND  
YOU KNOW YELLED AT, AND POKED  
AND ISN'T AWAKENED.  
THAT IS THE RELATIONSHIP.  
AND CERTAINLY IF IT HAD BEEN A  
DOCTOR THAT HAD BEEN CALLED IN  
WE WOULDN'T BE EVEN SITTING  
HERE, OR EVEN IF IT WAS A  
GOVERNMENTAL DOCTOR, I MEAN, SO

I'M HAVING A HARD TIME UNDERSTANDING BASED ON WHAT IS PLED HOW THERE IS NOT ENOUGH TO SHOW THEY HAVE ASSUMED CONTROL OF THE SITUATION AND ACTED AFFIRMATIVELY SO AS TO AT LEAST STATE A CAUSE OF ACTION, BECAUSE THAT IS ALL WE ARE TALKING ABOUT HERE.

>> WELL, IN THIS CASE THE DEPUTIES, THERE IS NO ALLEGATIONS THE DEPUTIES DID NOT PROMISE OR -- EXCUSE ME -- THAT THEY PROMISED TO RENDER AID IN ANY FACTS, THEY DIDN'T PROMISE THAT I -- THEY WOULD SEND AN AMBULANCE THEY DIDN'T PROMISE THEY WERE GOING TO TAKE FUTURE ACTION.

>> YOU HAVE TO HAVE MAGIC WORDS, YOU HAVE TO SAY "I PROMISE"?

I MEAN THEY WENT OUT.

>> I'M NOT SAYING THOUGH -- SAY YOU ARE PROMISING, BUT CONSISTENT WITH POLAK THEY MADE NO GUARANTEES OR PROMISES OF SPECIFIED ACTION IN THE FUTURE, THEY DID NOT --

>> DIDN'T THEY -- LET'S LOOK AT THIS REALISTICALLY.

I MEAN THEY GET THERE, THEY CAN'T WAKE THIS LADY UP. ONE PERSON SAYS CALL AN AMBULANCE, THEY ARE DISSUADED FROM DOING SO, THE OTHER PERSON SAYS MIGHT BE A DIABETIC, COMA, NEGATE THAT SAYING SHE WOULDN'T BE SNORING, THAT ISN'T TAKING CONTROL OF THE SITUATION?

IF THE OFFICER SAID YOU KNOW, DO WHATEVER IT IS YOU THINK IS IN YOUR BEST INTERESTS -- AND LEFT, WE MIGHT MAY HAVE A DIFFERENT SITUATION. BUT, HERE, THEY ATTEMPTED TO AROUSE HER, MAKE STATEMENTS THAT YOU KNOW, IN ONE VIEW, THE DISSUADING OTHER PEOPLE AT THE SCENE FROM DOING ANYTHING.

WELL, THEY DID NOT PREVENT ANYONE FROM CALLING AN AMBULANCE.

THEY IN FACT ENABLED THE CARETAKER OR AGENT

OF THE DAUGHTER TO NOW HAVE ACCESS TO THE HOME. AND ESSENTIALLY IT IS IN THE COMPLAINT, THEY SAID THAT -- THAT THEY -- WOULD ALLOW THE SIDE DOOR TO BE OPENED, COULD COME BACK CHECK ON HER LATER. WE DIDN'T CONTROL OR PROMISE OUT -- THE CIRCUMSTANCES UNDER WHICH THEY WOULD MONITOR CONDITIONS.

THEY COULD HAVE COME BACK FIVE MINUTES LATER, THEY COULD HAVE CALLED AN AMBULANCE AS SOON AS THEY LEFT.

WE DIDN'T CONTROL WHAT THE CIRCUMSTANCES WERE ONCE WE ENTERED THE HOME AND MADE THE ACCESS AVAILABLE TO THEM. WE SIMPLY ENABLED THEM AND GAVE THEM ACCESS TO THE HOME.

>> I GUESS WHAT IS DISTURBING TO ME, POLICE OFFICERS AT THE SCENE ALLEGEDLY HAVE MORE EXPERTISE IN THESE KIND OF EMERGENCY SITUATIONS THAN THE ORDINARY CITIZEN, AND YOU TELL AN ORDINARY CITIZEN NOT A DIABETIC COMA, WOULDN'T BE SNORING, DOESN'T LOOK LIKE A SITUATION NEEDS AN AMBULANCE, WOULDN'T AN ORDINARY CITIZEN RELY ON POLICE IN THAT SITUATION.

>> HE OR SHE MAY OR MAY NOT. I MEAN IN THE CIRCUMSTANCES THE ALLEGATION IS THEY DID NOT CALL AN AMBULANCE, OBVIOUSLY, BUT CERTAINLY THEY ALSO TOLD THEM THAT THEY WOULD --

>> THE DEPUTIES EXPRESSED -- IMPLIEDLY MADE INCORRECT MEDICAL DIAGNOSES, CALLED OUT AS HAVING EXPERT MEDICAL EXPERIENCE, DENIED REQUESTS FROM ACCEPTED AGENTS FOR PLAINTIFF FOR AN AMBULANCE BASED ON SAID DIAGNOSIS. THAT IS THE OBVIOUS.

>> OKAY.

>> SO I'M STILL CONFUSED HERE AS TO WHAT WE ARE DEALING WITH AS FAR AS THE STANDARD IS CONCERNED.

I UNDERSTAND THE  
HENDERSON CASE.  
I WROTE THE HENDERSON CASE.  
IT WAS A SITUATION IN WHICH THE  
ASSUMPTION OF CONTROL WAS  
POLICE OFFICERS DIRECTED THE  
MOVEMENT OF THE CAR BY THE  
INTOXICATED DRIVER, BUT HERE  
WE'VE GOT SORT OF A HYBRID  
SITUATION  
IN WHICH YOU ACCEPT THAT WHAT  
THE ALLEGATION IS IS THAT THEY  
ARE SAYING THAT OTHER THAN  
WHAT I JUST READ TO YOU, THAT  
THE LAW ENFORCEMENT OFFICER  
HAD A DUTY TO CALL AN  
AMBULANCE.  
IS THAT THE  
ALLEGATION?

>> THE ALLEGATION IS  
OUTSIDE A COMMON LAW DUTY OF  
CARE, ONCE WE ARRIVED THERE  
IN DEALING WITH THIS  
INDIVIDUAL ON A WELL-BEING  
CHECK.  
THE DISTRICT COURT OF APPEAL  
GRANTED OR -- EXCUSE ME -- THE TRIAL  
COURT GRANTED A DISMISSAL  
BASED ON THE FACT IT FAILED TO  
STATE A CAUSE OF ACTION.  
THERE WAS NO COMMON LAW DUTY OF CARE,  
THE FIFTH DISTRICT COURT OF  
APPEALS AGREES THERE WAS NO  
COMMON LAW DUTY OF CARE AS  
RELATES TO THE ACTIVITIES OF  
A LAW ENFORCEMENT OFFICER  
BECAUSE IN THE CIRCUMSTANCES  
OF THIS CASE A SPECIAL  
RELATIONSHIP HAD NOT BEEN  
ESTABLISHED ONCE THE OFFICERS  
ARRIVED, AND IF THEY DID  
NOTHING THAT WORSENERED THE  
PLAINTIFF'S PLIGHT --

>> TWO PARTS, YOU HAVE, BECAUSE  
ONE IS -- WHAT THEIR DUTY IS  
ON A CHECK SUCH AS THIS, AND I  
THINK THAT THAT WE'VE BEEN  
OVER THAT, AS TO WHETHER THIS  
HEIGHTENED BECAUSE THERE --  
THEY'VE GOT EXPERTISE, SEEMS  
THAT HAS TO BE DEVELOPED IN  
THE RECORD, THE SECOND PART AS  
TO WHETHER ANYONE RELAYED TO  
THEIR DETRIMENT MAYBE GOES

ALONG WITH THE FIRST PART,  
WHICH IS -- THE  
FIFTH DISTRICT AS A  
MATTER OF LAW COULDN'T BE  
DETRIMENTAL RELIANCE, TO ME  
THAT IS A MIXED QUESTION OF  
LAW OR FACT, BECAUSE IF THEY CALLED  
A -- YOU KNOW, 16-YEAR-OLD BABYSITTER  
IN THE HOUSE, THE  
BABYSITTER SAID I THINK  
GRANDMOTHER IS OKAY, MAYBE  
THAT WOULD NOT BE REASONABLE  
TO RELY ON THE 16-YEAR-OLD OR  
SOMEBODY, BUT IF IT WAS A  
NURSE'S AIDE IN THE HOUSE, THEN  
THAT WOULD BE REASONABLE.  
NOW WE ARE TALKING ABOUT THESE  
ARE POLICE OFFICERS THAT ARE  
CALLED IN, PRESUMABLY NOT JUST  
TO SEE IF THE PERSON IS  
BREATHING, BUT THEIR  
WELL-BEING, THE VERY FACT OF  
WHATEVER THAT MEANS.  
AND SO IT SEEMS THAT THE  
QUESTION IS DETRIMENTAL  
RELIANCE IS ONE THAT NEEDS TO  
BE DEVELOPED ON THIS RECORD,  
THAT WE CAN'T SAY AS A MATTER  
OF LAW THAT THERE WAS NO  
DETRIMENTAL RELIANCE, HOW DO WE  
-- YOU KNOW, I DON'T -- WE  
CAN'T RELY ON POLICE TO MAKE A  
REASONABLE ASSESSMENT WHETHER  
SOMEBODY IS DEAD, ALIVE OR IN A  
COMA.

>> WELL, I THINK IT GOES IN  
PART AND PARCEL WHETHER OR NOT  
BY MAKING WHAT WE DID THERE AT  
THE TIME OF THE INCIDENT WAS  
AN EXPRESS PROMISE OR  
ASSURANCE OF SOMETHING THAT  
LED TO JUSTIFIABLE RELIANCE ON  
PROMISE.

WE DIDN'T PROMISE HER  
ANYTHING.

WE ESSENTIALLY MADE AN  
ASSESSMENT OF THAT AND STATED  
THAT APPARENTLY SHE WAS  
SLEEPING.

WE DIDN'T MAKE HER  
CONDITION WORSE, WE DIDN'T  
IMPROVE HER CONDITION.

WE --

>> BACK OVER TO WHAT I SAID, IT

DOESN'T HAVE TO BE AN  
INCREASED RISK.

IT HAS TO BE  
EITHER THAT OR DETRIMENTAL  
RELIANCE, UNDER THE UNDERTAKER  
DOCTRINE WE ARE GOING IN  
CIRCLES.

I'M SAYING ON  
THIS RECORD I DON'T KNOW HOW  
WE CAN STATE AS A MATTER OF  
LAW THERE COULD BE NO  
DETRIMENTAL RELIANCE, BASED ON  
WHO THE PEOPLE WERE THAT  
CALLED, AND WHO THE PEOPLE  
WERE THAT CAME.

AND WE'RE JUST GOING TO -- YOU  
KNOW, YOU SAID YES, YOU CAN, YOU  
CAN SAY THAT NO, AS A MATTER OF  
LAW, NOBODY SHOULD HAVE TO --  
SHOULD RELY ON WHAT THE POLICE  
OR DEPUTIES SAY EXISTS IN -- YOU  
KNOW, WITHIN A HOUSE WHEN A  
WELL-BEING CHECK IS DONE.  
THIS IS TOTALLY GRATUITOUS, WITHOUT  
RESPONSIBILITY ATTACHED TO IT.

>> ACCORDING TO THE  
PLAINTIFF, IF WE'RE HELD TO THE  
SAME STANDARD DEGREE OF CARE, I'M  
ASSUMING THE INDIVIDUAL THERE  
INSIDE OF THE HOME AS US WOULD  
ALSO BE HELD TO A SIMPLY  
REASONABLE ORDINARY STANDARD OF  
CARE.

>> I THOUGHT YOUR ARGUMENT WAS  
BECAUSE IT IS A DISCRETIONARY  
ACT IT --

>> IS.

>> ON THAT POINT, I THINK YOUR  
ARGUMENT IS THAT THE SHERIFFS  
OFFICER DEPARTMENT IS UNDER NO  
OBLIGATION TO DO A WELL-BEING  
CHECK; IS THAT RIGHT?

>> THAT IS ABSOLUTELY CORRECT,  
THEY HAVE NO DUTY --

>> IT SEEMS THAT DECISION  
ITSELF BY THE DEPARTMENT WOULD BE  
EXERCISE OF DISCRETION -- AND  
THE CARING -- ARE WE GOING TO DO  
IT OR NOT -- THAT DECISION IS  
A DISCRETION ACT -- BUT MAKES  
THIS "WE ARE GOING TO DO THIS,"  
ONCE YOU ARE GOING TO DO IT  
IT WOULD BE MORE OPERATIONAL,  
IS THAT NOT CORRECT?

OR AM I WRONG?

>> ONCE YOU ARRIVE AT THE SCENE I DON'T THINK IT AUTOMATICALLY BECOMES OPERATIONAL UNLESS IN PERFORMANCE OF IT YOU HAVE ESTABLISHED A RELATIONSHIP.

I THINK YOU CAN STILL, AS POINTED OUT IN EBERTON AND OTHER CASES, YOU CAN PERFORM LAW ENFORCEMENT FUNCTIONS UNDER CATEGORY TWO STILL HAVE DISCRETIONARY IMMUNITY AS RELATES TO THE DECISION YOU MAKE, YOU CAN ARRIVE AT THE SCENE OF THE INCIDENT AND MAKE A DISCRETIONARY DECISION.

IT DOESN'T NECESSARILY ALWAYS EQUATE TO FINDING OF DUTY OF CARE A FINDING OF LIABILITY, SO I THINK THAT IS THE KEY THAT DISTINCTION THAT -- I'VE BEEN TRYING TO MAKE HERE TODAY IS THAT, YOU KNOW, THE SHERIFFS OFFICE, THEY HAVE DISCRETION WHEN THEY ARRIVE THEY SHOULD BE ABLE TO MAKE A DECISION WITHOUT THE FEAR OF LIABILITY AS IT RELATES TO ANYTHING THAT THEY MAY DO ON A CALL, WHETHER IT BE A WELL-BEING CHECK, WHETHER IT BE, YOU KNOW, YOUR NEIGHBOR IS CALLING BECAUSE THE MUSIC IS TOO LOUD, CAT IN A TREE, THE POSSIBILITIES ARE ENDLESS, SO --

>> TO GO BACK THEN TO JUSTICE ANSTEAD'S QUESTION, WHEN HE GAVE YOU THE HYPOTHETICAL ABOUT THE KNIFE, THERE HAD BEEN A KNIFE THERE, THE POLICE WOULD STILL NOT HAVE ANY OBLIGATION, BECAUSE TO COME TO THAT SCENE AS A DISCRETIONARY CALL, AND NO MATTER WHAT THEY DO, ONCE THAT -- UNLESS THEY MAKE SOME EXPLICIT PROMISE THAT THERE IS NO LIABILITY.

>> UNLESS THEY SAY -- ESTABLISH A SPECIAL RELATIONSHIP WITH THE INDIVIDUAL IN THE COURSE OF

RESPONDING TO A CALL THERE IS  
NO COMMON LAW DUTY OF CARE.

>> THANK YOU VERY MUCH --

>> MY TIME IS UP.

>> YOU HAVE EXCEEDED YOUR  
TIME.

>> THANK YOU.

>> THANK YOU, BOTH OF YOU, FOR  
YOUR ARGUMENTS HERE TODAY.

THE COURT WILL BE IN RECESS FOR FIVE  
MINUTES.

BEFORE THE LAST CASE.