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UNDERTAKER'S DOCTRINE
By Ted Babbitt

The Undertaker's Doctrine in Florida has nothing to do with burying people. It relates instead to the responsibility of one who undertakes by contract or gratuitously to aid one in peril and fails to act as a reasonable man in carrying out that aid. The recent Florida Supreme Court opinion of Wallace v. Dean, 34 Fla. L. Weekly S52 (Fla. Jan. 22, 2009) explains the current Florida law both with respect to the Undertaker's Doctrine as well as the parameters of sovereign immunity.

The plaintiff in that wrongful death action suffered a dismissal of her claim with prejudice when she sued the Sheriff of Marion County for the actions of his Deputy in answering a call to come to the aid of plaintiff's decedent who had been found unconscious in her home. The Deputies, when asked to do so, failed to call an ambulance and assured the plaintiff and her mother's neighbors that her mother was merely sleeping despite the fact that they had literally screamed at her and shaken her violently enough to move her across her bed.

The case involved two issues. First, whether the Sheriff had any duty to act nonnegligently as to plaintiff's decedent and, second, if such a duty existed and negligence ensued, did sovereign immunity bar the action.

The Fifth District had affirmed the Circuit Court's order of dismissal on the theory, inter alia, that the Deputy's actions were merely passive nonfeasance rather than an act of negligence and at the most "poor judgment." The Supreme Court made short work of that argument stating:

> "A failure to conform to the standard [of care] is negligence, therefore, even if it is due to clumsiness, stupidity, forgetfulness, an excitable temperament, or even sheer ignorance. An honest blunder, or a mistaken belief that no damage will result, may absolve the actor from moral blame, but the harm to others is still as great, and the actor's individual standards must give way in this area of the law to those of the public. In other words, society may require a person not to be awkward or a fool."

In answering the question of whether or not the Sheriff, through his Deputies, had a duty to plaintiff's decedent, the Court explained the underpinning of the "Undertaker's Doctrine." At S55, the Court held:

> "As this Court recognized over sixty years ago in *Banfield v. Addington*, '[i]n every situation where a man undertakes to act,. . . he is under an implied legal obligation or duty to act with reasonable care, to the end that the person or property of others may not be injured.' 104 Fla. At 667, 140 So. At 896. . . .
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> Voluntarily undertaking to do an act that if not accomplished with due care might increase the risk of harm to others *or* might result in harm to others due to their reliance upon the undertaking confers a duty of reasonable care, because it thereby 'creates a foreseeable zone of risk.' *McCain v. Florida Power Corp.*, 593 So. 2d 500 (Fla. 1992); *Kowkabany,* 606 So. 2d at 720-21. . . ." (Emphasis supplied by Court.)

Here the Sheriff's agents, responding to a 911 call, entered the decedent's home and assessed her safety and assured her neighbors and her daughter by phone that she was only asleep and didn't need medical attention. In fact, she

was in a diabetic coma and died after being taken to a hospital the next day. At S56 the Court explains why this subjects the Sheriff to liability under the Undertaker's Doctrine.

> "[w]here. . . the actor's assistance has put the other in a worse position than he was in before, either because the actual danger of harm to the other *has been increased by the partial performance, or* because *the other, in reliance upon the undertaking, has been induced to forego other opportunities of obtaining assistance*, the actor is *not free to discontinue his services where a reasonable man would not do so*. He will then be required to exercise reasonable care to terminate his services in such a manner that there is no unreasonable risk of harm to the other, or to continue them until they can be so terminated." (Emphasis supplied by Court.)

Having determined that the allegations of the complaint satisfactorily raised an issue which stated a cause of action because the Deputies' actions created a duty to nonnegligently perform their responsibilities, the Court next turned to the question of whether the action was nevertheless barred by sovereign immunity. To answer that question, the Court returned to the four part test contained in <u>Commercial Carrier Corp. v. Indian River County</u>, 371 So. 2d 1010 (Fla. 1979). That test requires at least one negative answer to one of the following four questions. First, does the challenged act, omission or decision necessarily involve a basic governmental policy, program, or objective? Second, is the questioned act, omission or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective?

Third, does the act, omission, or decision require the exercise of basic policy evaluation, judgment and expertise on the part of the governmental agency involved and finally, does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision? See Commercial Carrier, 371 So. 2d at 1019. Clearly a yes answer is required to both the first and fourth questions but the Court found that as to the second and third questions the answer would be a decidedly clear "no." The Court reasoned as to the second question that performing a safety check more diligently would not in any way change the course or direction of the policy performing those checks and the Deputies did not have to exercise planning level evaluation or judgment. At S57, the Court held:

> "Based upon our review of these questions, we hold that the alleged actions of the deputies' were undertaken, within the scope of their employment and were clearly operational in nature. Subjecting the Sheriff to responsibility and accountability in this case does not involve judicial scrutiny of any discretionary, quasi-legislative policy-making or planning; instead, such a legal inquiry will merely require the trier of fact to determine – consistent with traditional principles of Florida tort law – whether the deputies should have acted in a manner more consistent with the safety of the decedent. *See Kaisner*, 543 So. 2d at 737-38. The traditional principles of tort law implicated in this case in no way present a nonjusticiable political question."

The Court was careful to explain that the test of whether actions of a governmental employee are discretionary and, therefore, immune from suit or

operational and, therefore, not immune from suit, therefore, does not relate to the dictionary definition of discretion. Every voluntary act of a human being involves some discretion. Instead the test is as stated by the Court at S57:

> ". . . discretion in the *Commercial Carrier* sense refers to discretion at the *policy making or planning level*." (emphasis supplied). '*Planning level functions* are generally interpreted to be those requiring basic policy decisions, while *operational level functions* are those that implement policy." (Emphasis supplied by Court.)

This four to three decision of the Florida Supreme Court explains and clarifies the Undertaker's Doctrine as well as the limits of sovereign immunity in Florida.