

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN
AND FOR COLLIER COUNTY, FLORIDA,
CIVIL ACTION

TIMOTHY J. DAYTON and
REGINA L. DAYTON,

Plaintiffs,

vs.

THE CITY OF MARCO ISLAND,
FLORIDA,

Defendant.

CASE NO.: 09-09951-CA

**CERTIFIED
COPY**

TRANSCRIPT OF HEARING PROCEEDINGS

HEARING BEFORE: The Honorable Hugh D. Hayes
DATE: March 23, 2010
TIME: 1:30 p.m.
LOCATION: Collier County Courthouse
3301 East Tamiami Trail
Naples, Florida 34112
REPORTER: Theresa Schiff, RPR, CRR, CSR (WI)



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P R O C E E D I N G S

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1 THE COURT: This is on the pending motion to
2 dismiss, and I have some materials and memo from
3 the defense, and so I've read those, so if you're
4 ready to proceed.

5 MR. ABBOTT: Thank you, Your Honor. May I
6 approach with one other book of materials, as if
7 you don't have enough?

8 THE COURT: Sure.

9 MR. ABBOTT: Good afternoon, Your Honor, my
10 name is Dan Abbott from the law firm of Weiss
11 Serota and Helfman. We serve as the city attorneys
12 for the City of Marco Island, and we're
13 representing the defendant City of Marco Island in
14 this lawsuit.

15 Judge, it sounds like you have read a lot of
16 this material that has been submitted. You will no
17 doubt notice that the Daytons allege that they
18 entered into a contract with a contractor by the
19 name of Kimball Hill Homes to build for them a
20 residence, and they allege that the home was
21 improperly constructed by Kimball Hill Homes. They
22 allege against the City that we didn't catch those
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1 mistakes during the construction process when we
2 did certain building inspections or, in fact, we
3 didn't do some inspections at all, and that we
4 issued a certificate of occupancy, notwithstanding
5 the fact that the home was not up to certain
6 building code provisions.

7 Judge, it's not oftentimes that I can come to
8 court with such powerful authority on exactly this
9 sort of claim.

10 The first case we want to talk about is the
11 Trianon Park case. In the notebook that I just
12 handed to Your Honor, I have attached that as Tab
13 Number 1.

14 Judge, Trianon Park is the preeminent case in
15 the overall subject of what acts of government can
16 result in liability and what acts cannot. So it's
17 a case that I oftentimes cite when I'm representing
18 governments. But in this case I don't have to cite
19 the case by way of analogy because the Trianon Park
20 was this case. The Trianon Park was an action
21 against a city alleging that a city's building
22 inspectors didn't properly inspect a building
23 during its construction and so the owner of the
24 building sued the City to seek compensation.

25 And that's the exact certified question that

1 the Florida Supreme Court answered on what my
2 Westlaw printer has labeled Page 5 of 20. I put a
3 little Post-It note there for the Court's
4 convenience.

5 You'll see at the very bottom of the first
6 column, the certified question was whether a
7 governmental entity may be liable in tort to
8 individual property owners for the negligent
9 actions of its building inspectors in enforcing
10 provisions of a building code and acted pursuant to
11 the police powers vested in that government entity.
12 We answer that question in the negative.

13 The Court goes on in explaining the basis for
14 that opinion by way of summary, and this further
15 down on that same page. The Court noted: "No
16 statutory duty for the benefit of individual
17 citizens was created by the city's adoption of the
18 building code, and, therefore, there is no tort
19 liability on the part of the city to the
20 condominium owners for the allegedly negligent
21 compliance with the building code. To hold a
22 governmental entity liable for carrying out this
23 type of enforcement activity would make the
24 taxpayers of the enforcing government entity
25 insurers of all building construction within the

1 jurisdiction of the entity. We conclude that such
2 a result was never intended by either the
3 legislature or the city in enacting the building
4 code provisions."

5 Judge, I don't mean to belabor this case,
6 but, again, it is awfully important. The Court
7 continued on again with what my Westlaw printer has
8 labeled Page 12, and, again, it's labeled by a
9 Post-It note, and it's talking about the statutory
10 building code provisions, and the Court noted that
11 nothing contained in Chapter 553 evinces an intent
12 to give individual citizens a statutory right of
13 recovery for the government's negligent inspection
14 of their property.

15 And as we flip over to the next page, and I'm
16 about done belaboring this case, Judge. The Court
17 notes that to give effect to Trianon's position
18 would make the taxpayers of the governmental entity
19 liable to individual property owners for the
20 failure of governmental inspectors to use due care
21 in the construction requirements of the building
22 code. It would make the governmental entity and
23 its taxpayers insurers. The Court reiterates that
24 the Florida Statutes doesn't require that. And
25 here on the last provisions that I have

1 highlighted, it makes clear that if somebody has
2 hired a building construction company and the
3 building is not built correctly, their recourse is
4 against that building inspector and not against the
5 taxpayers.

6 Judge, obviously that's a Supreme Court case.
7 It is no less true here in the Second District.
8 The second case that I have labeled Tab Number 2,
9 the Johnson versus Collier County case is pretty
10 similar. Again, it's a Second District case. In
11 this case the city inspected an electrical wiring
12 system, and notwithstanding that inspection, the
13 system was faultily and somebody got electrocuted
14 by it. And so a cause of action was filed against
15 Collier County saying your inspectors were out
16 there, they missed it, it caused direct damage, and
17 that cause of action -- that was found to not
18 constitute cause of action.

19 Judge, since Trianon, clever plaintiffs'
20 attorneys have done their best to try to plead
21 around Trianon, try to get a way to sue government
22 in connection with the building permit process, and
23 it has met with universal failure.

24 The Victoria Village case that we've attached
25 as Tab Number 3, the theory in that case was, well,

1 in our case there was a certificate of occupancy
2 issued. Trianon Park really only talked about
3 building inspections, and the Victoria Village case
4 made clear that is no exception to the rule that
5 even though a government issues a certificate of
6 occupancy, it cannot form the basis of governmental
7 liability.

8 The next case, at Tab Number 4, is the Hummel
9 case. The plaintiffs in Hummel allege, well, we
10 have a different kind cause of action because we're
11 in privity with the government. We are the ones
12 that paid the government for the building permit,
13 whereas in Trianon Park the suing plaintiffs did
14 not actually -- were not in privity. They were the
15 subsequent purchasers, and the plaintiffs in Hummel
16 lost as well, and I will not belabor going through
17 the highlighted materials based on time.

18 And the last case in this regard, the
19 Friedberg case, Friedberg alleged a cause of action
20 based upon negligent misrepresentation. They said,
21 well, your inspectors told us certain things, and
22 that's different than Trianon, and that was also
23 found to not constitute a cause of action.

24 So what we have here, Judge, is a new kind of
25 clever attempt to plead around Trianon Park. The

1 theories in this case is that there's a theory of
2 liability because the City of Marco Island either
3 negligently supervised, negligently hired or
4 negligently trained its building inspectors.

5 Judge, that theory is not recognizable, and
6 the motion should be -- and the motion to dismiss
7 should be granted for no fewer than three reasons.

8 First of all, we've already discussed which
9 is the Trianon Park case. The Trianon Park case
10 and the language that I read earlier says that
11 there is no theory in tort against governments with
12 anything to do with the building inspection
13 process. In other words, the Florida Supreme Court
14 didn't say one particular negligence theory may not
15 apply and leave open the possibility that other
16 negligence theories could apply. Trianon Park says
17 there is no liability in tort for governments in
18 connection with the building inspection process,
19 and these are just different tort theories that are
20 expressly foreclosed.

21 The second reason that the motion to dismiss
22 should be granted is the premise for these three
23 claims is that the city's building officials were
24 improperly licensed. And the facts, as alleged in
25 the complaint, don't support that proposition, and

1 I have attached -- and I probably should put it at
2 the top, but it's the complaint that I put behind
3 tab number six. And you'll see, Judge, that in
4 connection with the construction process at issue
5 here, the building permit was issued on September
6 22nd of 2003, and you'll find that in Paragraph 25
7 of the complaint. And a certificate of occupancy
8 was issued on April 14th of 2006, and you'll find
9 that in Paragraph 9 of the complaint. So that's
10 the window period of time that the Daytons and the
11 City of Marco Island had dealings when the
12 government allowed the building to be constructed
13 in September of '03, and when they allowed the
14 building to be occupied in April of '06.

15 The allegations that the city officials were
16 not properly licensed are as follows: Paragraph 16
17 of the complaint alleges that an individual by the
18 name of Bob Mahar, the chief building official,
19 held a provisional license since April of 2001. Of
20 course that long predates our dealings with the
21 Daytons.

22 There is an allegation that there is a
23 Mr. Smithem, in Paragraph 20 of the complaint, and
24 it alleged that Mr. Smithem gained his provisional
25 license on August 12th of 2003. Of course that

1 also predates the issuance of the permit in
2 September of '03.

3 And then, finally, Paragraph 21 of the
4 complaint, Judge, alleges that we've got certain
5 building inspectors by the name of Yakola and
6 Konicek, and it alleges that they held provisional
7 licenses, as well.

8 Now, the allegations of the complaint is that
9 these holders of provisional licenses need to be
10 supervised by somebody with a standard license.
11 And the premise is just legally incorrect, Judge.

12 Behind Tab Number 7 of the materials that
13 I've given you is a Florida Statute, Section
14 468.609. And in Subsection 4 thereof, it says:
15 "No person may engage in the duties of a building
16 code administrator, plans examiner or building code
17 inspector pursuant to this part unless such person
18 possesses one of the following types of
19 certificates." And type A is a standard
20 certificate and Type C is a provisional
21 certificate. All of these people as alleged in the
22 complaint held their provisional certificates.

23 The allegations that these provisional
24 certificate holders needed to have been supervised
25 comes from the Florida Administrative Code, and

1 you'll find the relevant provision behind tab
2 number eight, Judge. And the provisions for
3 holders of provisional licenses is governed in
4 Subsection 1, and it says: "We issue
5 certificates." Subsection 2 says "the provisional
6 certificates are good for three years." And
7 Subdivision 5, says that the board, the state
8 agency if they want, when issuing a provisional
9 certificate, can limit the kind of work that people
10 can do. There's no allegation in this complaint
11 that these provisional certificate holders have
12 been limited by the state in what they can do.

13 Here's where the plaintiffs misread the
14 Administrative Code. In Subsection 6, there are
15 provisions for individuals who have applied for
16 provisional certification. In other words, they
17 put in their application to the state, but they
18 haven't yet gotten the provisional certificate.
19 And in Subsection 6B, it says those people need to
20 be supervised by a standard certificate holder.

21 But, Judge, that's not what we're proceeding
22 under. These people that we're talking about
23 didn't merely apply for licenses; they had been
24 issued licenses. So they're not governed by
25 Subsection 6 here. They're governed by Sections 1

1 through 5 that we have cited before, none of which
2 requires any greater supervision than these
3 individuals have.

4 Finally, Judge, the third reason the motion
5 to dismiss should be granted is that the theory
6 alleged, these negligent supervision, negligent
7 hiring and negligent training, those theories exist
8 in law, and they can even be applied to the
9 government from time to time, but here's what the
10 theory is. The theory of negligent hiring or
11 training or supervision is a theory that some
12 employees, when they act outside the course and
13 scope of their employment, usually an employer is
14 not responsible under the Doctrine of Respondeat
15 Superior. But if you knew you were hiring a bad
16 employee and then the employee acts outside the
17 course and scope of his employment, the employer
18 can be held liable for that negligent hiring act or
19 negligent supervision or negligent training. And
20 all of the cases that the plaintiff relies upon,
21 and that's the -- I think white notebook that had
22 been provided to you earlier -- clearly stand for
23 that proposition.

24 The case in -- I think the plaintiffs have
25 labeled 3I -- and I know I'm running short on time,

1 Judge, so I don't know if I'm going to go through
2 all of those -- but the Farabee case, for instance,
3 this is a case where a police officer with a known
4 bad history of abuse of detainees battered a
5 citizen. And while ordinarily a government may not
6 be responsible for that sort of act outside of the
7 course and scope of employment, in this case they
8 said well, you knew you had a bad police officer on
9 the force, and since you hired him, you might be
10 responsible. And all of the other cases cited, the
11 Garcia case that's attached as Exhibit 3K to the
12 materials presented to you by plaintiff, that was a
13 case where a truck driver for a private employer
14 who had a history of violence punched somebody in
15 the face for no reason and the employer was held
16 potentially liable.

17 In the Malicki case, attached as Exhibit 3Q
18 to the plaintiffs' submission, a church was held
19 potentially responsible for the sexual assault of
20 one of its priests because the church had reason to
21 believe that the priest had those sorts of
22 proclivities.

23 I'm not going to go through all those cases,
24 Judge, but I submit to you that every single one of
25 those cases stands for that same proposition, that

1 if you hire a known bad apple and the bad apple
2 acts outside of the course and scope of their
3 employment, an employer, including a government,
4 might be held liable. But the cases don't stand
5 for the proposition that things that the courts
6 have deemed to be governmental discretionary
7 functions and that are entitled to sovereign
8 immunity somehow lose their discretionary status or
9 their sovereign immunity because you had an
10 employee that you knew that you might have problems
11 with.

12 The last bit of material that I've submitted,
13 and I think it's attached as tab number nine to the
14 materials that I've submitted to you, this is an
15 excerpt from Fljur that clearly stands for that
16 proposition. At Tab Number 9, this is Fljur on
17 government tort liability. The first paragraph
18 talks about the standard provisions that these
19 government permitting and inspections are entitled
20 to sovereign immunity.

21 And then in the second paragraph it says
22 there is no sovereign immunity barrier making a
23 claim against a governmental agency for negligent
24 retention or supervision of a building code
25 administrator who engaged in personally abusive

1 conduct.

2 And that's consistent, Judge, with the cases
3 that were provided to you by plaintiff. If we
4 hired a violent man and we knew he was a violent
5 building inspector and he went out to the Daytons'
6 home and he punched Mr. Dayton for no reason, the
7 City would be responsible for that under this
8 theory. But it goes on. However, it has also been
9 held that while a property owner stated a claim
10 against a town for negligent retention of a
11 building inspector by alleging that the inspector
12 knowingly gave false information to the property
13 owner, that he systematically maladministered his
14 department and caused injury to the property owner
15 and others who had to deal with him, and that the
16 town knew of the damages the inspector was causing
17 but allowed it to continue, the town's retention of
18 the inspector was a discretionary and fundamental
19 decision so that the town was protected by
20 sovereign immunity.

21 So, Judge, for all three of those reasons,
22 the last being that the theory alleged does not
23 expand the scope of what would be otherwise
24 discretionary sovereign immunity protected activity
25 is not expanded by a negligent hiring or retention

1 theory. For all three reasons articulated, we
2 would urge the motion to dismiss to be granted.

3 Thank you, Judge.

4 THE COURT: Okay.

5 MR. CLOUGH: Good afternoon, Your Honor.
6 John Clough of the law firm of Cheffy Passidomo on
7 behalf of Tim and Virginia Dayton who, Your Honor,
8 I would inform are in the courtroom here today.

9 THE COURT: Very good.

10 MR. CLOUGH: Your Honor, I do have the
11 pleasure of representing the Daytons in this matter
12 who worked hard and had the good fortunate of
13 building a home on Marco Island between the periods
14 of 2003 and 2006. The home is located seaward of
15 the coastal construction line, and, therefore,
16 subject to the additional forces of wind and surf
17 that other homes on Marco Island over in Collier
18 County are not subject to.

19 Your Honor, we have made it a -- we have
20 filed a complaint alleging three theories. Counsel
21 for the City of Marco Island articulated that those
22 theories are negligent hiring, negligent
23 supervision and negligent training. Your Honor,
24 and the basis of those allegations are that to the
25 extent that the City of Marco Island through its

1 building department was exercising a discretionary
2 function -- and that discretionary function was, of
3 course, discussed in the Trianon case that counsel
4 has cited to the Court today. That discretionary
5 function predisposes that the person exercising
6 that discretion are not only competent to act,
7 proficient to act, but are certified and licensed
8 to act.

9 Your Honor, in the allegations that we have
10 made in our complaint, we've not alleged that there
11 was a negligent inspection. And, again, the cases
12 cited by counsel for the City of Marco Island
13 articulate only a -- the fact where the act of the
14 inspection is being challenged. Something was
15 wrong with the inspection, and that goes to all of
16 the cases. Even the city -- the case of Johnson
17 versus Collier County, the issue in that case was
18 the inspection, that something should have been
19 picked up that was not.

20 In none of those cases cited by the City of
21 Marco Island is there the allegation that the
22 person conducting that inspection was not qualified
23 to perform that inspection. And, in fact, if you
24 look at the Florida Statute 468, and we've cited
25 that section in our response in opposition at page

1 three, there's a good discussion in 468.603 that
2 defines a building inspector as a person who is
3 qualified to inspect. Likewise, a plans examiner.
4 A plans examiner is a person who is qualified to
5 determine if a -- if the plans submitted, in fact,
6 are in compliance with the Florida building code.

7 But more importantly, Your Honor, at 468.607,
8 there's a statutory section entitled certification
9 of building code administration and inspection
10 personnel. And in that section, Your Honor, it
11 requires -- it mandates that a municipality acting
12 through its building department must hire and
13 retain persons possessing valid certification
14 issued in accordance with this park.

15 In this case, Your Honor, we have made the
16 allegation throughout the complaint that the City
17 of Marco Island failed to do that, that they had
18 persons acting on behalf of the City of Marco
19 Island that were not qualified to act, and,
20 therefore, they should not be given the blanket
21 protection afforded by Trianon and its progeny to
22 a discretionary act.

23 Your Honor, in our response and opposition,
24 we discuss at some length this dichotomy between
25 how one treats a discretionary function of

1 government as was discussed in Trianon and its
2 progeny from an operation conduct of a city.

3 And, Your Honor, we cited the case. We've
4 cited the Court to several cases. And all stand
5 for the singular proposition that negligent
6 training, negligent supervision, and negligent
7 retention against a municipality is a recognized
8 operational function of government for which
9 sovereign immunity and Trianon and its progeny do
10 not apply.

11 The first of those cases that we cited to
12 Your Honor is a case actually involving a building
13 official. And that is the case cited at Tab W of
14 our materials. A case entitled Slonin versus West
15 Palm Beach. It's Fourth District Court of Appeals
16 in 2005. Your Honor, in that case the trial court
17 granted the city's motion to dismiss plaintiff's
18 theory of negligent hiring, training, supervision
19 and retention claims, finding that those claims
20 fell within the city's planning level function and
21 therefore protected by sovereign immunity.

22 Your Honor, the appellate court in the Slonin
23 case and, again, at Tab W in our materials, made
24 specific reference to the Trianon decision and
25 stated that after considering Trianon, which is

1 considered the benchmark for municipal liability,
2 it held that there is not a sovereign immunity
3 barrier from making a claim against a governmental
4 agency for negligent retention or supervision.
5 Counsel made the point of saying, well, in those
6 cases, Your Honor, there's an issue with physical
7 torts.

8 Well, in the Slonin case, Your Honor, the
9 appellate court made the point of saying that when
10 remanding this case back to the trial court that
11 the jury -- that there must be a finding of
12 negligent hiring retention, excluding the assault
13 and battery claims, and so, Your Honor, recognized
14 that point, and notwithstanding that point said
15 that a government municipality could be held liable
16 for the torts of negligent retention, training and
17 supervision not withstanding Trianon.

18 Your Honor, we've also cited at Tab I, the
19 Middle District Court opinion of 1998, Farabee
20 versus Rider. Your Honor, in that case there was
21 an overturnment and a remand of a trial court's
22 motion to dismiss where -- finding that where the
23 issue is how supervisory and training policies are
24 implemented are operational functions of
25 government, its therefore sovereign immunity is

1 waived and plaintiff has met her burden on a motion
2 to dismiss.

3 Similarly, Your Honor, in this case the
4 Daytons have alleged that the persons exercising
5 their discretionary function -- that Marco Island
6 in appointing, in allowing those persons to operate
7 -- again, Your Honor, it's an operational function
8 of government, to the extent the sovereign immunity
9 and Trianon and its progeny do not apply.

10 Your Honor, at Tab T we cited the Court to
11 the case of Moore versus State of Florida, which is
12 a First District Court of Appeal opinion at 2003.
13 And, again, similarly the appellant's argument was
14 centered on the manner in which the Florida
15 Wildlife Commission policies were implemented.
16 Again, the appellate court said these were
17 operational in nature, and, therefore, not subject
18 to the sovereign immunity protections expounded by
19 the Trianon court and its progeny.

20 Lastly, Your Honor, at Tab U, we cited the
21 case -- a First District Court of Appeal opinion at
22 2005, to Mosby versus Harrell. In that case, Your
23 Honor, the trial court dismissed a claim for
24 negligent hiring, negligent supervision. And the
25 appellate court affirmed the dismissal but remanded

1 the case back to the trial court because the
2 appellate court could see where -- if pled
3 properly, there would be a claim for negligent
4 hiring, supervision and retention. And so,
5 therefore, the appellate court in Mosby versus
6 Harrell remanded the case back to the trial court,
7 overturned a dismissal with prejudice to allow the
8 plaintiff to allege the elements of the negligent
9 hiring, supervision and retention.

10 Your Honor, with the Court's indulgence, I
11 would like to approach and show the legislative
12 history -- the legislative history of Chapter 553,
13 which I think is important for the Court's
14 consideration today. Your Honor, in enacting
15 Chapter 553, and, again, this is the summary that I
16 have provided to the Court, it said -- and I'm
17 going to quote from this summary. "It is hereby
18 declared to be public policy of the state that in
19 order to safeguard the life, health, property and
20 public welfare of its citizens, the certification
21 of building inspection personnel is a matter
22 affecting the public interest, and that any person
23 so employed shall establish his competency and
24 proficiency to be certified as provided herein."

25 Again, the question is, before the Court can

1 give this wide berth, this pass to a local
2 government in the conducting of its inspections,
3 those entities, those persons conducting the
4 inspections have to be qualified. The legislature
5 was very clear about that in both 468 and 553, that
6 to afford them this wide berth in the conducting of
7 their inspections, this discretionary function of
8 government, the persons performing the task have to
9 be up to the task.

10 And, Your Honor, in our complaint, we have
11 alleged that four persons, in the name of Bob
12 Mahar, Michael Smithem, Mr. Yakola and Mr. Konicek,
13 did not possess the requisite certifications, did
14 not demonstrate the requisite competence nor the
15 proficiency to act in the capacity to which they
16 were appointed, and to which they act in the case
17 of the Daytons. And, Your Honor, we gave the
18 specific example of Michael Smithem throughout the
19 complaint. The person that was the plans examiner
20 for the Daytons. We've demonstrated, based upon
21 looking at -- doing a public records request, that
22 Mr. Smithem was on notice by his superiors that
23 there was something wrong with the way that he was
24 conducting inspections, that he needed to give more
25 time and attention to that.

1 Your Honor, we have since learned since the
2 filing of the complaint, that Mr. Smithem actually
3 had to have his provisional license removed because
4 he was never able to satisfy the building
5 commission in his application.

6 Your Honor, again, this goes back to the
7 people that were doing the inspections, the people
8 that were examining the plans to find that they
9 were in accord with the Florida Building Code were
10 not competent in the disciplines required to be
11 afforded this carte blanche that is afforded local
12 government under the theory espoused by Trianon.

13 Your Honor, this is not a simple negligent
14 inspection case, as the City of Marco Island wants
15 to label and lump it into other cases where the
16 acts, the granting of a certificate of an
17 occupancy, the act of inspection was negligently
18 performed, or that based upon their failure to
19 catch something in the Johnson versus Collier
20 County case, that someone was electrocuted. No.
21 This is much deeper than that, Your Honor. In this
22 case the complaint alleges that the very people
23 selected by the City of Marco Island in
24 implementing the policies of the legislature and
25 the Florida Administrative Code were not competent

1 to act and should not be afforded the discretion in
2 which to act. And, Your Honor, that's the basis
3 for our claim. And we'd ask the Court on those
4 bases, and, again, this is a motion to dismiss --
5 to deny the motion to dismiss and allow this case
6 to go forward and allow the parties to conduct
7 discovery.

8 THE COURT: Okay. Well, first of all, I
9 would say thank you to both counsel for providing
10 the materials in advance of the hearing, and I had
11 an opportunity to review those and basically the
12 cases that were provided in the defense notebook
13 this afternoon are pretty much consistent with
14 their arguments, and, of course, there are a couple
15 more of these Second District cases that they were
16 able to share and I was able to review during the
17 arguments.

18 I think, of course, though, that the key gold
19 star, so to speak, that we still have to follow is
20 Justice Overton's opinion in the Trianon Park case.
21 And I appreciate the distinction that plaintiffs
22 have attempted to present in their pleading, but I
23 think that the all encompassing language from the
24 Florida Supreme Court really will not help them
25 create a cause of action. And I won't go through

1 the whole opinion because you both have cited to
2 it, and it's in our memoranda for the record and
3 for the court reporter. But I mean just to
4 reiterate one of the comments that Justice Overton
5 wrote in their establishment of duties by the state
6 to the citizens, you know, he says, "we hold" --
7 and this is on Page 915 of the Westlaw citation.
8 It says, "we hold that there has never been a
9 common law duty to individual citizens for the
10 enforcement of police power functions. And
11 further, we find that no statutory duty for the
12 benefit of individual citizens was created by the
13 city's adoption of the building code, and,
14 therefore, there is no tort liability on the part
15 of the city to the condominium owners for the
16 allegedly negligent exercise of the police power
17 function of enforcing compliance with the building
18 code. To hold a government entity liable for
19 carrying out this type of enforcement activity
20 would make the taxpayers the insurer," and that's
21 the same language they used over and again.

22 It's such a far reaching and all encompassing
23 statement from the Florida Supreme Court that I
24 think, quite frankly, it's difficult to get around
25 that. And it's not my role, quite frankly, as a

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trial judge to, you know, try to get around it or to disregard it. It is what it is, and that's what we have to follow.

So I will grant the motion to dismiss, and pretty much based on the Florida Supreme Court's opinion.

All right. I'll ask counsel for the defense to prepare an order. You have your court reporter's record. You can supplement it in any way you like. I will give her your notebooks if she wants them, and when you prepare the order, then send it in to me for signing. Okay.

(Whereupon, the proceedings concluded at 2:05 p.m.)

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COURT CERTIFICATE

STATE OF FLORIDA
COUNTY OF COLLIER

I, Theresa Schiff, Registered Professional Reporter and Certified Real-Time Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

Dated this 2nd day of April, 2010.


Theresa Schiff, RPR/CR/CSR/(WI)