

EQUITY IN GOVERNMENTAL LIABILITY: A PRIMER AND NATIONWIDE SURVEY OF THE PUBLIC DUTY RULE AND GUIDANCE FOR BOTH POTENTIAL CLAIMANTS AND GOVERNMENTAL ENTITIES IN NAVIGATING ITS APPLICATION

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I. INTRODUCTION

The construction and administration of governmental entities is complex. Our local municipalities, counties, and state agencies are made up of innumerable departments that work together to keep the communities in which we all live operating efficiently. From police forces and emergency services, to street sweepers and meter maids, there are countless government officials working at the service of the people. Unfortunately, just like any other business, entity, or organization, the administration of governmental entities' duties is not carried out without fail. Accordingly, governmental entities are subject to tort litigation just like any other entity.¹ However, given the government's position, the Public Duty Rule ("PDR") ensures that governmental entities are held to the same standard of liability as any other potentially at-fault actor, but no more, and no less.²

Accordingly, legislators developed the Public Duty Rule (PDR) as a negative defense to negligence claims arising out of

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1. Oskar Rey, *A Duty to All Is a Duty to No One: Understanding the Public Duty Doctrine*, MUN. RSCH. & SERV. CTR. (Mar. 13, 2023) <https://mrsc.org/stay-informed/mrsc-insight/march-2023/understanding-the-public-duty-doctrine>.

2. *Id.*

the general administration of governmental function.³ The PDR serves to ensure that governmental entities are not held to a *higher* standard of tort liability than any other potentially liable party by requiring a claimant to prove that the facts of their alleged damage meet certain criteria establishing a special duty existing specific to them and their harm, and not just to the public at large.⁴ Proper application of the novel construction of the PDR can be perplexing for both governmental entities seeking to invoke it, and claimants seeking to overcome a PDR assertion by a governmental entity.

This Article will serve as a primer on the PDR for both governmental entities and claimants facing a PDR defense. Part II explains the PDR and its purpose. Part III discusses when a governmental entity should invoke the PDR as a defense. Part IV guides potential claimants through the steps to overcome a PDR defense, and alternatives for asserting their claim. Part V explores nationwide jurisprudence highlighting cases in which the court has sided with the plaintiff as well as instances in which the government prevailed. Part VII focuses on the Florida specific nuances of the PDR. The Article concludes with Part VIII, a fifty-state survey and resource guide for potential plaintiffs and governmental entities.

II. GENERAL OVERVIEW OF THE PUBLIC DUTY RULE AND ITS GENERAL PURPOSE

While most states recognize some form of the PDR, its premise, origin, and purpose are not widely understood. The following sections provide a precursor on the concept.

A. What is the PDR?

Merriam-Webster summarizes the PDR succinctly:

[A] doctrine in tort law: a government entity (as a state or municipality) cannot be held liable for the injuries of an individual resulting from a public officer's or employee's

3. *Id.*

4. *Id.*; Arthurs *ex rel.* Estate of Munn v. Aiken County, 551 S.E.2d 579, 583 (S.C. 2001).

breach of a duty owed to the public as a whole as distinguished from a duty owed to the particular individual.⁵

Our nation's courts have been exploring the complex concept of the public duties of governmental entities as early as 1856 with the Supreme Court's holding in *South v. Maryland*, in which the highest Court held police officers did not have a duty to protect an individual from harm unless they had a special relationship with that individual. This special relationship could be established through "interactions between law enforcement and the private citizen."⁶

Generally, the PDR recognizes that any duties and obligations incumbent upon governmental entities are extended to and owed to the general public at-large and not to any one specific person.⁷ Statutes impose innumerable duties upon governmental entities from maintaining streets and sidewalks in a safe condition,⁸ to provisions on emergency medical services and fire services.⁹ However, the legislative intent of the statutes imposing such duties was to obligate governments to provide those protections to the public at-large, not to individual citizens.¹⁰

In any cause of action for negligence, even one against a governmental entity, the plaintiff must prove the certain requisite elements: duty, breach, causation, and damages.¹¹ Most relevant in a discussion about the PDR are the elements that the plaintiff must prove: the alleged at-fault actor owed the plaintiff a duty, and the actor breached that duty. The PDR serves as a

5. *Public Duty Doctrine*, MERRIAM-WEBSTER, <https://merriam-webster.com/legal/public%20duty%20doctrine> (last visited Mar. 23, 2024).

6. *Law Enforcement Liability and The Special Relationship Doctrine*, HG.ORG, <https://www.hg.org/legal-articles/law-enforcement-liability-and-the-special-relationship-doctrine-38303>. See generally *South v. Maryland*, 59 U.S. 396, 403 (1856).

7. *Arthurs*, 551 S.E.2d at 582 (S.C. 2001) (citing *Summers v. Harrison Constr.*, 381 S.E.2d 493, 496 (S.C. Ct. App. 1989)); see also *State ex rel. Cardin v. McClellan*, 85 S.W. 267, 269–70 (Tenn. 1905).

8. S.C. CODE ANN. § 5-27-120 (2024); *Don't Get Tripped Up on Sidewalk Issues*, MUN. ASS'N OF S.C., <https://www.masc.sc/uptown/05-2022/dont-get-tripped-sidewalk-issues> (last visited Mar. 23, 2024).

9. S.C. CODE ANN. § 4-21-10 (2024).

10. *Arthurs*, 551 S.E.2d at 582; Richard S. Rosen et al., *Negligence*, in 18 SOUTH CAROLINA JURISPRUDENCE § 11 (2023).

11. *Bloom v. Ravoira*, 529 S.E.2d 710, 712 (S.C. 2000); *Bailey v. Segars*, 550 S.E.2d 910, 913 (S.C. Ct. App. 2001).

negative defense that, if successfully pleaded, stops the plaintiff's claim from proceeding to an inquiry into the other negligence requisites by failing to establish a duty of care on the part of the government with respect to the plaintiff.¹² "The public duty rule insulates public officials, employees, and governmental entities from liability for the negligent performance of their official duties by negating the existence of a duty towards the plaintiff."¹³

B. What is the Purpose of the PDR?

Governmental entities are subject to tort litigation just like any other entity. However, governmental entities perform duties in safekeeping our communities for which non-governmental entities are simply not responsible.¹⁴ The PDR was developed to ensure that governmental entities' exposure to liability is relative to that of non-governmental entities in light of the extraordinary services they perform.¹⁵ The PDR serves to ensure that potential claimants provide proof of a special duty created by their interaction with the government and that the alleged resulting harm was unique to them, not merely relative to the general public at large.¹⁶ "Public Duties" are duties carried out solely by the government.¹⁷

Under typical circumstances, a plaintiff asserting that they have been wronged by someone else with a claim sounding in tort would have to prove that the alleged tortfeasor owed them a duty and breached that duty, that they were damaged as a result of the alleged tortfeasor's actions or inactions, and that the alleged tortfeasor's behavior was the cause of those damages.¹⁸ In such a scenario, that alleged tortfeasor will allegedly have done or failed to do something specific that was tortious in nature that caused the plaintiff damage. In a typical tort analysis, the alleged tortfeasor would not be in a position in which their conduct would be the focus of innumerable potential claims—there would be an

12. Rosen et al., *supra* note 10.

13. *Arthurs*, 551 S.E.2d at 582.

14. *Rey*, *supra* note 1.

15. *Id.*

16. *Id.*; *Arthurs*, 551 at 583.

17. *Rey*, *supra* note 1.

18. *Bailey v. Segars*, 550 S.E.2d 910, 913 (S.C. Ct. App. 2001) (citing *Bloom v. Ravoir*, 529 S.E.2d 710, 712 (S.C. 2000)).

existence of a legal duty of care owed to a potential claimant, and a breach of that duty of care by an alleged tortfeasor due to their allegedly tortious conduct.¹⁹ The purpose of the PDR is to acknowledge that governmental entities are in a unique position different from any other potential tortfeasor due to the types of obligations they hold, services they offer, and the immeasurable extent to which they are expected to carry out those service obligations.²⁰ Whereas an individual tortfeasor might be responsible for paying for damages to one car accident victim they rear-ended, subjecting the government to tort liability for every slip and fall on a public sidewalk could open the government up to excess tort liability and financial liability that could not be sustained.²¹

Recognizing the potential for misunderstanding or misapplications, courts have offered explanations of the overarching purpose of the PDR:

The public duty rule represents a presumption that such a statute ‘has the essential purpose of providing for the structure and operation of the government or of securing the general welfare and safety of the public,’ and thus does not satisfy the elements [required to create a duty of care].”²²

This is because, without the PDR, “[a] statute prescribing the duties of a public office does not, without more, impose on the person holding that office a duty of care towards individual members of the public in the performance of those duties.”²³

III. UNDERSTANDING THE TIMING OF THE PUBLIC DUTY RULE’S APPLICATION

The PDR is a unique defense only applicable when certain fact patterns and tortfeasors are at play. The following Part will clarify when it would be appropriate to invoke the PDR.

19. *Id.* (citing *Bishop v. S.C. Dep’t of Mental Health*, 502 S.E.2d 78, 81 (1998)).

20. *Rey*, *supra* note 1.

21. *Id.*

22. *Trask v. Beaufort County*, 709 S.E.2d 536, 539 (S.C. Ct. App. 2011) (quoting *Rayfield v. S.C. Dep’t of Corr.*, 374 S.E.2d 910, 915 (S.C. Ct. App. 1988)); *Rosen et al.*, *supra* note 10.

23. *Rayfield*, 374 S.E.2d at 915–16 (adopted in *Jensen v. Anderson Cnty. Dep’t of Soc. Servs.*, 403 S.E.2d 615 (S.C. 1991)).

A. When Would a Governmental Entity Invoke the PDR?

The PDR can only be asserted as a defense in the face of a negligence cause of action stemming from an alleged governmental breach of a statute.²⁴ The PDR is not applicable in cases in which plaintiffs are merely alleging common law negligence.²⁵ Thus, with innumerable laws on the books establishing obligations of the government, one could never create an exhaustive list of instances in which a governmental entity should contemplate asserting a PDR defense. However, from my research and work as a government lawyer, the following are some of the most common instances in which it would behoove government litigants to consider asserting a PDR defense, if the plaintiff is asserting breach of a statute:

- Building inspection services²⁶
- Emergency medical services
- Law enforcement encounters
- Fire services
- Issues with snow-covered roads²⁷
- Maintenance obligations regarding sidewalks and roadways²⁸

Also noteworthy is that Florida is one of the states in which there is an expectation for the public to be protected from criminal activity and in which the courts have mandated certain safety expectations on the part of the state's highway patrol personnel.²⁹ "Patrolling the state highways, controlling the flow of traffic, and enforcing the traffic laws are duties [Florida Highway Patrol] owes to the general public."³⁰

With the goal of the PDR to ensure that government is not held to a higher standard of liability than any other actor, cursory questions in evaluating whether the PDR applies are:

24. *Id.* at 913, 915.

25. *Id.* at 913.

26. *Rey, supra* note 1.

27. JAMES J. FAZZALARO, OLR RSCH. RPT., 2002-R-0380, SNOW ON SIDEWALKS ADJOINING STATE HIGHWAYS, 2002-R-0380 (CONN. GEN. ASSEMB. 2002).

28. *Vaughan v. Town of Lyman*, 635 S.E.2d 631, 635 (S.C. 2006); *Fickling v. City of Charleston*, 643 S.E.2d 110, 114 (S.C. Ct. App. 2007).

29. *See, e.g., Pollock v. Fla. Dep't of Highway Patrol*, 882 So. 2d 928, 935-36 (Fla. 2004); *Trianon Park Condo. Ass'n v. City of Hialeah*, 468 So. 2d 912, 922 (Fla. 1985); *Everton v. Willard*, 468 So. 2d 936, 938 (Fla. 1985).

30. *Pollock*, 882 So. 2d at 935.

- What is the actual harm of which the plaintiff is complaining?
- Who is arguably responsible for this harm?
- Would holding the government liable for this harm open the floodgates of litigation or simply hold the governmental entity accountable?

For instance, with respect to building inspection services, courts have held in favor of governments in scenarios in which a municipality issues a building permit to a contractor that performs less than acceptable work.³¹ Courts have held that issuance of permits and building inspections are standard government functions and that ensuring compliance with building codes is a public duty owed to the general public.³²

Additionally, jurisprudence is riddled with caselaw on the complicated role of law enforcement and their accepted charge to protect and serve the general public. Due to its complexity, the application of the PDR to law enforcement has produced voluminous opinions. In an attempt to summarize the PDR with respect to law enforcement, a general rule is police officers are expected to protect and serve the public at large and owe no duty to specifically protect a particular individual, unless there is some affirmative promise made to that individual.³³

Courts have held governments liable for medical issues resulting from faulty EMS services because EMS services can also be provided by private entities that would not be shielded from tort liability if they rendered similarly substandard care.³⁴ Conversely, PDR defenses have been successful in the wake of property damage claims resulting from public fire services as this is uniquely a government function.³⁵

In colder regions, the recurring issue of snow-covered roads creates a litigation opportunity for claimants alleging injuries

31. *Rey, supra* note 1.

32. *Id.*

33. Joseph M. Pellicciotti, *Police Civil Liability for Failure to Protect: The Public Duty Doctrine Revisited*, 8 AM. J. POLICE 37, 42, 45 (1989); David Basil, *A Primer on the Public Duty Doctrine as Applied to Police Protection*, 37 URB. LAW. 403, 425 (2005); Ramenda Cyrus, *Police Have No Duty to Protect the Public*, AM. PROSPECT (Apr. 18, 2022), <https://prospect.org/justice/police-have-no-duty-to-protect-the-public/>; *see also* *State ex rel. Cardin v. McClellan*, 85 S.W. 267, 269 (Tenn. 1905).

34. *Rey, supra* note 1.

35. *See Irvine v. City of Chattanooga*, 47 S.W. 419, 420 (Tenn. 1898); *Ezell v. Cockrell*, 902 S.W.2d 394, 397 (Tenn. 1995).

from slipping and falling on sidewalks or suffering a motor vehicle collision after snowfalls. Connecticut courts have ruled that due to specific statutory obligations in the state, governments can be subject to liability for failing to timely remove snow to prevent hazards, and the statute even provides caps for potential monetary exposure.³⁶

Although courts appear to be reluctant to dismiss plaintiffs' claims, which would leave them with no remedy if their case is discharged in the face of a PDR defense, a repeated issue that many municipalities face is personal injury claims resulting from slip and falls on public sidewalks and roadways. In South Carolina, the courts have held that the statutes mandating local governments to maintain their thruways in a safe condition do not create a special duty that would allow a plaintiff to overcome a PDR defense.³⁷ For instance, in *Vaughan v. Town of Lyman*, the South Carolina Supreme Court held "that the statute does not have an identifiable class of persons intended to be protected by the statute beyond the classification of the general public," and consequently the intention of the statute to protect the general public is insufficient to find a special duty.³⁸

IV. THE PLAINTIFF'S FIGHTING CHANCE

A plaintiff facing a governmental entity in tort litigation may already feel like the underdog, but countless cases across the country provide examples of instances in which plaintiffs asserted winning arguments to overcome the PDR.

A. If the PDR is Asserted by a Governmental Entity, What Does a Plaintiff Have to Do to Overcome It?

Most PDRs provide some recitation of "a [d]uty to [a]ll is a [d]uty to [n]o [o]ne."³⁹ "Under the 'public duty doctrine,' public officials are not liable to individuals for their negligence in discharging public duties as the duty is owed to the public at

36. JAMES J. FAZZALARO, OLR RSCH. RPT., 2002-R-0389, SNOW ON SIDEWALKS ADJOINING STATE HIGHWAYS, 2002-R-0380 (CONN. GEN. ASSEMB. 2002).

37. *Fickling v. City of Charleston*, 643 S.E.2d 110, 114 (S.C. Ct. App. 2007).

38. *Vaughan v. Town of Lyman*, 635 S.E.2d 631, 635 (S.C. 2006).

39. *Rey*, *supra* note 1.

large rather than to anyone individually.”⁴⁰ Courts recognize that subjecting governments, particularly with respect to law enforcement, to liability for issues arising out of their official duties, could place public officials in untenable positions.⁴¹ Accordingly, most jurisdictions recognizing the PDR also have established some benchmark to determine whether a plaintiff has met the burden of establishing a duty specific to them, not just to the general public.

For instance, in South Carolina, if a plaintiff is seeking to recover damages from a public entity and that entity has asserted the PDR as a defense, South Carolina law provides a six-part test to apply to such claims to determine whether the plaintiff’s claim can overcome the defense.⁴² Plaintiffs seeking to overcome a PDR defense must prove that the plaintiff was placed in a unique position by the government’s conduct and that the government established a special duty that was specifically owed to the plaintiff.⁴³

The South Carolina Court of Appeals developed the following six-part test for determining when such a “special duty” exists:

- (1) an essential purpose of the statute is to protect against a particular type of harm;
- (2) the statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not cause that harm;
- (3) the class of persons the statute intends to protect is identifiable before the fact;
- (4) the plaintiff is a person within the protected class;

40. Rosen et al., *supra* note 10 (citing *Chakrabarti v. City of Orangeburg*, 743 S.E.2d 109, 112 (S.C. Ct. App. 2013)).

41. “They have also observed that such a rule would place police officials in the untenable position of insuring the personal safety of every member of the public, or facing a civil suit for damages, and that the public duty doctrine eliminates that dilemma.” *Ezell v. Cockrell*, 902 S.W.2d 394, 398 (Tenn. 1995) (citing *Landis v. Rockdale County*, 445 S.E.2d 264, 268 (Ga. 1994)).

42. *Arthurs ex rel. Estate of Munn v. Aiken County*, 551 S.E.2d 579, 583 (S.C. 2001).

43. *Id.*

(5) the public officer knows or has reason to know the likelihood of harm to members of the class if he fails to do his duty; and

(6) the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office.⁴⁴

Similarly, in New York:

A special duty will arise (1) where a municipality affirmatively assumes a duty to protect an individual that is reasonably relied upon by that person; (2) the plaintiff belonged to a class for whose benefit a statute was enacted; and (3) plaintiff was injured in a scenario where the municipality took positive control of a known and dangerous safety condition.⁴⁵

For example, some courts have held that a special relationship can be established by a police officer taking a suspect into custody or even with by enforcement's enlistment of confidential informants.⁴⁶ Other examples of special relationships courts have acknowledged include police officers working undercover,⁴⁷ civilians working as police informants,⁴⁸ witnesses to dangerous crimes,⁴⁹ or those in police protection.⁵⁰ Courts have also concluded a special duty exists when law enforcement officers voluntarily assume a duty and breach that duty,⁵¹ fail to

44. *Id.*

45. Sarah H. DeAgostino, et al., *With Ferreira v. City of Binghamton, New York Court of Appeals Preserves Public Duty Rule*, HARRIS BEACH PLLC, (Mar. 25, 2022), <https://www.harrisbeach.com/insights/with-ferreira-v-city-of-binghamton-new-york-court-of-appeals-preserves-public-duty-rule/>; see also Robert S. Kelner, et al., *Deep Duty: The Court of Appeals' Recent Decision in 'Ferreira v. City of Binghamton' and the Morass of the Special Duty Rule*, N.Y.L.J., (May 23, 2022, 12:00 PM), <https://www.law.com/newyorklawjournal/2022/05/23/deep-duty-the-court-of-appeals-recent-decision-in-ferreira-v-city-of-binghamton-and-the-morass-of-the-special-duty-rule/?slreturn=20230431085043>; see also *Ferreira v. City of Binghamton*, 194 N.E.3d 239, 247 (N.Y. 2022) (citing *Applewhite v. Accuhealth, Inc.*, 995 N.E.2d 131, 135 (N.Y. 2013)).

46. Savage, *supra* note 6.

47. Rosalise Olson, *Tort Claims Act - The Death of the Public Duty - Special Duty Rule: Schear v. Board of County Commissioners*, 16 N.M.L. REV. 423, 426 (1986) (citing *Swanner v. United States*, 309 F. Supp. 1183, 1187 (M.D. Ala. 1970)).

48. *Id.* (citing *Schuster v. New York*, 154 N.E.2d 534, 539 (N.Y. 1958)).

49. *Id.* (citing *Gardner v. Vill. Of Chicago Ridge*, 219 N.E.2d 147 (Ill. App. Ct. 1966), *rev'd in part, aff'd in part*, 262 N.E.2d 829, *cert. denied*, 403 U.S. 919 (1970)).

50. *Id.* (citing *Baker v. New York*, 269 N.Y.2d 515 (N.Y. 1966)).

51. *Id.* at 427 (citing *Mentillo v. Auburn*, 150 N.Y.S.2d 94, 96 (N.Y. 1956)).

warn of the release of a dangerous criminal after promising to do so,⁵² or most plainly when a public official actually causes the danger to the plaintiff.⁵³

Notwithstanding the aforementioned hurdles plaintiffs may have to cross for their claim to survive a PDR defense, if the law does its job objectively, plaintiffs can still obtain recourse against the government even in the face of a PDR defense. If the genuine objective of the PDR is achieved, it should not leave a plaintiff with a valid claim without making them whole under applicable legal remedies available. The goal of the PDR is not to insulate the government from *all* liability, but to ensure that the government is only held to the same reasonable standard of liability as any other at-fault actor. Accordingly, if a plaintiff's claim fails under the lens of a PDR defense, the claimant may still have a valid claim pursuant to general common law negligence, not negligence specific to the breach of a statute.

V. *PUBLIC DUTY RULE NATIONWIDE CASELAW ARSENAL*

Various courts across the country have weighed in and provided their interpretation of the application of the PDR in a myriad of fact patterns. Like with many legal concepts, there is no bright line rule or rigid opinion. But in an effort to assist governmental entities with being on alert for when they should assert a PDR defense, as well as aid potential claimants in determining if they have a viable claim against a governmental entity, the following are examples both of when the court has sided with the plaintiff as well as instances in which the plaintiff's case as presented could not survive a government's valid PDR defense.

A. Cases in Which the Government Prevailed

A North Carolina court discarded a plaintiff's claim after finding that the PDR barred the plaintiff's action asserted against a corrections officer that failed to apprehend an offender whose ankle monitor malfunctioned and subsequently murdered

52. *Id.* (citing *Morgan v. County of Yuba*, 41 Cal. Rptr. 508, 512–13 (Ct. App. 1964)).

53. *Id.* (citing *Doe v. Hendricks*, 590 P.2d 647, 651 (N.M. Ct. App. 1979)).

a woman.⁵⁴ The Supreme Court of the United States (“SCOTUS”) upheld a similar ruling in *Castle Rock v. Gonzales*, finding that law enforcement officers have no specific duty to protect an individual who is the victim of a violated restraining order.⁵⁵

In a case where a woman made multiple reports to law enforcement about break-ins and an intruder, law enforcement took no specific action, and the woman was later a victim of assault at the hands of the reported intruder. The Court of Appeals of our nation’s capital declined to opine that a special duty existed mandating the police to specifically protect her.⁵⁶

Originating from a Wisconsin case, in *DeShaney v. Winnebago County Department of Social Services*, SCOTUS upheld the state court’s decision that despite the reprehensible behavior of a parent, social workers do not owe a specific duty to protect children from harm or death at the hands of their abusive parents.⁵⁷

With the amount of car accidents to which law enforcement must report, the holdings provided by *Camp v. State of California* and *Hucko v. City of San Diego* provide interesting outcomes. In *Camp*, the court found that the reporting officers did not owe a special duty to instruct or demand a car accident victim that had suffered a spinal cord injury to stay at the scene of the accident.⁵⁸ Similarly, in *Hucko*, a motorcyclist was stopped for speeding, yet the citing officer did not perform a field sobriety test and made no inquiries into the motorcyclist’s level of intoxication.⁵⁹ Minutes later, the motorcyclist crashed after driving off the road, and the court opined that the reporting officer had no special duty to

54. *Bench Book - 5.3.7 The Public Duty Doctrine*, INTERSTATE COMM’N FOR ADULT OFFENDER SUPERVISION, <https://interstatecompact.org/bench-book/ch5/5-3-7-public-duty-doctrine> (last visited Feb. 1, 2024) (citing *Humphries v. Dep’t of Corr.*, 479 S.E.2d 27 (N.C. Ct. App. 1996)).

55. *Savage*, *supra* note 6.

56. *Id.*

57. *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 196–97 (1989).

58. *Camp v. California*, 109 Cal. Rptr. 3d 676, 678 (Ct. App. 2010); see Steven Papenfuhs & Eric P. Daigle, *Addressing Cops’ Confusion Over ‘The Public Duty Doctrine’*, POLICE1 (Jan. 3, 2012, 11:35 AM) <https://www.police1.com/police-jobs-and-careers/articles/addressing-cops-confusion-over-the-public-duty-doctrine-SDnVxWnDhgenqAXO/>.

59. *Hucko v. City of San Diego*, 224 Cal. Rptr. 552, 552 (Ct. App. 1986).

recognize the signs of his intoxication and prevent him from driving away from the scene.⁶⁰

Tennessee state courts are not inclined to find that a special duty exists that would entitle a homeowner whose home is damaged due to inefficient fire extinguishing services provided by local fire authorities to any recourse against the reporting fire department.⁶¹

B. Cases in Which Courts Opined a Special Duty Existed

Norg v. City of Seattle is a prime example of proper application of the PDR in ensuring the negative defense does not totally exempt governmental entities from liability but ensures they are being held to the same standard, no more or less, than a private at-fault actor.⁶² In *Norg*, a wife called 911 to her home after her husband suffered a heart attack.⁶³ The local government EMS reported to the wrong location, delaying treatment to her husband, and arguably causing more damage to his physical condition.⁶⁴ The court was inclined to deny the EMS's PDR defense because the duty at issue in this case was "a common law duty to exercise reasonable care in providing emergency services."⁶⁵

A special duty to act can also be created if a government official creates a danger that did not exist prior to their actions, or failed to act, or acted with indifference toward the potential claimant.⁶⁶

60. *Id.*; *Brown v. Brown*, 598 S.E.2d 728, 730–31 (S.C. Ct. App. 2004) ("Public duty rule barred statutory negligence claims in motorist's action against town after police officer allowed him to drive away from scene of traffic stop as replacement driver for driver who had been drinking alcohol, and he ran off road.")

61. *Ezell v. Cockrell*, 902 S.W.2d 394, 398 (Tenn. 1995) (citing *Irvine v. City of Chattanooga*, 47 S.W. 419, 419 (Tenn. 1898)) ("There, this Court held that a city is not liable to a citizen whose home is destroyed by fire through the negligence or inefficiency of the city's fire department because the duty to extinguish fires is a public one, not owed to any individual in particular.")

62. *Norg v. City of Seattle*, 491 P.3d 237, 243 (Wash. Ct. App. 2021).

63. *Id.* at 239.

64. *Id.*

65. *Id.* at 245.

66. *Savage*, *supra* note 6. In 1981, the District of Columbia Court of Appeals affirmed the lower court's holding in *Warren v. District of Columbia* and noted in dictum that "a course of conduct, special knowledge of possible harm, or the actual use of individuals in the investigation" imposes a special duty. *Warren v. District of Columbia*, 444 A.2d 1, 3 (D.C. 1981). A year later in 1982, the Seventh Circuit Court of Appeals in *Bowers v.*

VI. THE PDR IN THE SUNSHINE STATE

Florida has incorporated the premise of the PDR into its state's statutory law.⁶⁷ Florida Statute 768.28 provides the basis in the law for governmental tort liability in Florida, while also outlining the specific guidelines for instigating litigation against Florida governmental entities, including timing and notice requirements and financial exposure caps.⁶⁸

Additionally, various Florida courts have summarized the PDR for decades using a variety of phrases, but the overarching theme still remains, "a duty to all is a duty to no one."⁶⁹ Courts have consistently held that "municipalit[ies] or its agents may not be held liable to specific individuals for the failure to furnish them with police protection."⁷⁰ Moreover, in 1995, the Florida Supreme Court held "[a] governmental duty to protect its citizens is a general duty to the public as a whole, and where there is only a general duty to protect the public, there is no duty of care to an individual citizen which may result in liability."⁷¹ Florida courts are clear that "a governmental entity is not liable for the commission of a tort for breaching of a duty owed to the public at large."⁷²

A. Prevailing Florida Case on PDR

For whatever reason, the Florida Supreme Court has been reluctant to recognize the PDR *by name*. However, in the words of Shakespeare, "a rose [b]y any other name would smell as sweet."⁷³ Despite the Court's reluctance to *namely* acknowledge

DeVito affirmed the dismissal of the plaintiff's claim on other grounds, but the majority added in dictum that liability could arise when "the state puts a man in a position of danger from private persons and then fails to protect him." *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

67. FLA. STAT. § 768.28 (2023).

68. *Id.*

69. *Rey*, *supra* note 1; see William N. Drake, *The Rescue of an August Body of Law: Florida's Public Duty Doctrine*, 80 FLA. BAR J. 18, 20–21 (2006).

70. William N. Drake, Jr. & Thomas A. Bustin, *Governmental Tort Liability in Florida: A Tangled Web*, 77 FLA. BAR. J. 8, 12 (2003) (quoting *Stafford v. Barker*, 502 S.E.2d 1, 3 (N.C. Ct. App. 1998)).

71. Drake, *supra* note 69 at 18, 20 (quoting *Vann v. Dep't of Corr.*, 662 So. 2d 339, 340 (Fla. 1995)).

72. *Lewis v. City of St. Petersburg*, 98 F. Supp. 2d 1344, 1349 (M.D. Fla. 2000), *aff'd in part, rev'd in part*, 260 F.3d 1260 (11th Cir. 2001).

73. WILLIAM SHAKESPEARE, *THE TRAGEDY OF ROMEO AND JULIET* act 2, sc. 2, I. 46–47.

the rule, a litany of Florida cases examine the premise of the PDR with *Pollock v. Florida Department of Highway Patrol* providing precedent similar to most PDRs in other jurisdictions.⁷⁴

Despite its later rejection, the *Modlin* Court paved the way for *Pollock* years earlier when it held:

It is a well recognized principle of tort law that a fundamental element of actionable negligence is the existence of a duty owed by the person charged with negligence to the person injured. However, there is also a doctrine of respectable lineage and compelling logic that holds that this duty must be something more than the duty that a public officer owes to the public generally.⁷⁵

In the tragic *Pollock* case, two teenage girls were instantly killed after their vehicle collided with an unlit tractor-trailer that was stalled on the highway.⁷⁶ An hour before the unfortunate collision, another driver had called highway patrol to notify authorities of the stalled vehicle obstructing the roadway, as well as at least one other driver notifying authorities that he and others had to take urgent evasive action to avoid a collision with the stalled vehicle.⁷⁷ The girls' families filed suit against the Florida Highway Patrol citing the entity's failure to comply with its own policy to dispatch law enforcement to the scene of stalled vehicles.⁷⁸

In an arguably controversial decision, the *Pollock* court provided the standard for the recognized special exception to the PDR in Florida.⁷⁹ The *Pollock* Court held that “[t]he responsibility to enforce the laws for the good of the public cannot engender a duty to act with care toward any one individual, unless an official assumes a special duty with regard to that

74. See, e.g., *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130, 132 (Fla. 1957); *Modlin v. City of Miami Beach*, 201 So. 2d 70, 75 (Fla. 1967); *Com. Carrier Corp. v. Indian River County*, 371 So. 2d 1010, 1015 (Fla. 1979); *Trianon Park Condo. Ass'n v. City of Hialeah*, 468 So. 2d 912, 918 (Fla. 1985); *Pollock v. Fla. Dep't of Highway Patrol*, 882 So. 2d 928, 935–36 (Fla. 2004); *Everton v. Willard*, 468 So. 2d 936, 938 (Fla. 1985); *Vann v. Dep't of Corr.*, 662 So. 2d 339, 340 (Fla. 1995).

75. *Modlin*, 201 So. 2d at 75 (citations omitted); see also *Pollock*, 882 So. 2d at 932.

76. *Pollock*, 882 So. 2d at 930.

77. *Id.* at 931.

78. See *id.*

79. *Id.* at 935–36.

person.”⁸⁰ Two of these recognized exceptions occur “where law enforcement officers become directly involved in circumstances which place people within a ‘zone of risk’ by creating or permitting dangers to exist.”⁸¹ Specifically, the Court concluded that the governmental entity’s policies and procedures failed to create an “independent duty of care.” Further, the Court found no specific duty owed to the decedents by the highway patrol to maintain the highway, remove stalled or abandoned vehicles, patrol the state highways, control the flow of traffic, or enforce the traffic laws, which the Court opined are all “duties [the Florida Highway Patrol] owes to the general public, as opposed to an individual person.”⁸²

Despite Florida courts failing to name the PDR, between Florida Statute 768.28 and the *Pollock* decision, there is clear legal precedence that makes the rule relevant to Florida tort litigation.

B. Florida’s Discretionary Function Exception

A Florida-specific discussion of the PDR would not be complete without mention of Florida’s Discretionary Function Exception. In light of the PDR’s premise in seeking to not hold the government to a higher standard of tort liability than any other non-government tortfeasor, an understanding of how Florida distinguishes between operational and governmental functions could be beneficial to a PDR analysis in some instances.

Florida is specific about distinguishing between discretionary functions and operational functions, noting that the government is not liable in tort actions involving “discretionary functions,” like policy and decision-making.⁸³ A distinction is then drawn between discretionary functions and operational functions like negligently operating a motor vehicle, which Florida Courts have concluded is a merely operational function.⁸⁴

80. *Id.* at 935.

81. *Id.*

82. *Id.* at 935 (citing *Trianon Park Condo. Ass’n v. City of Hialeah*, 468 So. 2d 912, 921 (Fla. 1985)).

83. *Cook ex rel. Est. of Tessier v. Sheriff of Monroe Cnty.*, 402 F.3d 1092, 1117–18 (11th Cir. 2005).

84. *Kaisner v. Kolb*, 543 So. 2d 732, 738 (Fla. 1989); *State Sovereign Immunity and Tort Liability Chart in All 50 States*, MATTHIESEN, WICKERT, & LEHRER, S.C. (Feb. 15,

A discretionary function under Florida law is one in which “the governmental act in question involved an exercise of executive or legislative power such that, for the court to intervene by way of tort law, it inappropriately would entangle itself in fundamental questions of policy and planning.”⁸⁵ An operational function under Florida law, however, “is one not necessary to or inherent in policy or planning, that merely reflects a secondary decision as to how those policies or plans will be implemented.”⁸⁶

In *Lewis v. City of St. Petersburg*, the estate of a motorist shot and killed by Florida law enforcement officers filed a suit citing negligent training of the police staff.⁸⁷ The *Lewis* Court held that while employers are responsible for the foreseeable torts of their employees while in the course and scope of their employment, the estate’s claims were rooted not in the agency’s failure to implement a training program but rather in its “policy decisions regarding what to include in the training of its police officers.”⁸⁸ The Court came to this conclusion by reasoning that the choice of training is rooted in governmental discretion:

A city’s decision regarding how to train its officers and what subject matter to include in the training is clearly an exercise of governmental discretion regarding fundamental questions of policy and planning. Because Lewis challenges the reasonableness of basic policy decisions made by the City, the “discretionary” function exception to the [Florida’s] waiver of sovereign immunity applies and her claim is barred.⁸⁹

Thus, discretionary functions of the government would likely meet the requisites of public duties and be subject to both the PDR and the Florida discretionary function exception. A potential claimant’s attorney would need to review the facts of the alleged tort against both the PDR and the Discretionary Function Exception to determine whether there was a tort stemming from operational, rather than discretionary, function that resulted

2023), <https://www.mwl-law.com/wp-content/uploads/2018/02/STATE-SOVEREIGN-IMMUNITY-AND-TORT-LIABILITY-CHART-00219770x9EBBF.pdf>.

85. *Henderson v. Bowden*, 737 So. 2d 532, 538 (Fla. 1999) (citing *Dep’t of Health & Rehab. Serv. v. Yamuni*, 529 So. 2d 258, 260 (Fla. 1988)).

86. *Id.*

87. *Lewis v. City of St. Petersburg*, 260 F.3d 1260, 1261 (11th Cir. 2001).

88. *Id.* at 1266.

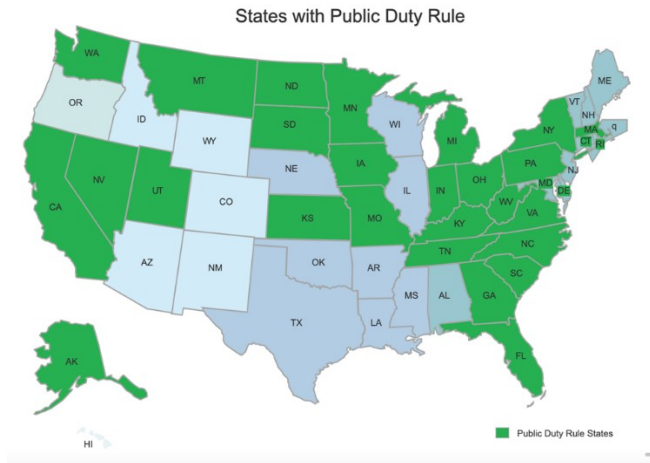
89. *Id.*

from a breach of a duty specifically owed to that individual and not the public at large.

VII. CONCLUSION

The goal of the preceding research was to clarify a complex concept in the realm of governmental liability and provide guidance to claimants and governmental entities alike in understanding the application of the PDR to their litigation. A substantial review of the relevant laws on the books across the country revealed that as of 2023, thirty states and the District of Columbia recognize some version of the PDR to provide some liability insulation to governmental entities.⁹⁰ The following are resources aimed at aiding potential plaintiffs seeking recourse against the government and governmental entities in evaluating the application of the perplexing and complicated PDR to their case and in their government defense practices.

VIII. ADDENDUM



- A. Potential Plaintiff Seeking to Sue the Government in Tort
 - 1. Has the potential plaintiff been harmed in some way by the government?

90. See map of 50 states survey created by author *infra* pt. VIII.

2. Did the government have a duty not to cause the harm the plaintiff suffered?
3. Was that duty established by general common law?
 - a. If so, proceed with negligence cause of action under common law.
 - b. If no, continue with analysis.
4. Was the duty established by a statute?
 - a. If so, does your state recognize the Public Duty Doctrine?
 - i. Look up the specific criteria for your state.
5. If so, do you meet the general criteria of establishing the existence of a special relationship that would overcome a PDR defense?
 - a. The General Criteria for Establishing a Special Relationship, according to *Arthurs* are:
 - (1) an essential purpose of the statute is to protect against a particular type of harm;
 - (2) the statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not cause that harm;
 - (3) the class of persons the statute intends to protect is identifiable before the fact;
 - (4) the plaintiff is a person within the protected class;
 - (5) the public officer knows or has reason to know the likelihood of harm to members of the class if he fails to do his duty; and
 - (6) the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office.⁹¹
6. Proceed with negligence claim against the government and assert facts that support your special duty exception if a PDR defense is raised.

B. Governmental Entity Seeking to Invoke PDR Defense

1. Is a civilian claiming to have suffered some wrong at the hands of your governmental entity?
2. Does the lawsuit allege tortious conduct stemming from common law negligence?

91. *Arthurs ex rel. Estate of Munn v. Aiken County*, 551 S.E.2d 579, 583 (S.C. 2001).

- a. If so, prepare to defend under your state's applicable torts claims act and do not assert a PDR defense.
3. If the answer to Q 2 is no, does the alleged tortious conduct stem from an alleged breach of a statute?
4. Does the statute being asserted:
 - a. Mandate a duty to act or mandate some particular service obligation on the part of the government;
 - b. Carve out a specific exception for the plaintiff's harm; OR
 - c. Carve out a specific exception for a class of persons to which the plaintiff fits?
5. Would your entity owe the alleged duty to the general public at large?
6. Has the plaintiff established that a special relationship exists that should subject your entity to liability?
 - a. The Criteria for Establishing a Special Relationship
 - i. an essential purpose of the statute is to protect against a particular type of harm;
 - ii. the statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not cause that harm;
 - iii. the class of persons the statute intends to protect is identifiable before the fact;
 - iv. the plaintiff is a person within the protected class;
 - v. the public officer knows or has reason to know the likelihood of harm to members of the class if he fails to do his duty; and
 - vi. the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office.⁹²
7. If not, assert a PDR defense in both a responsive pleading, motion for summary judgment, and renew that motion at trial if necessary.

The PDR is a unique legal construction only frequently referenced by attorneys engaged in some form of government litigation. However, whether representing the plaintiff or potential government tortfeasor, clear comprehension of the applicability of the PDR to a fact pattern is crucial to preserving

92. *Id.*

evidence, developing compatible arguments and defenses, and accurately preparing a case. The preceding outline serves as a roadmap to guide litigants through the initial evaluation of a PDR claim.