IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,602

STATE OF FLORIDA, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

Petitioner,

vs.

STELLA YAMUNI, as adoptive mother, next friend and guardian of SEAN YAMUNI, a minor,

Respondent.

ON PETITION FOR REVIEW FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

BRIEF OF RESPONDENT ON THE MERITS
(With Separate Appendix)

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STATUTES

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STATEMENT OF THE CASE

HRS has omitted numerous critical procedural points at which it failed to bring to the attention of the courts below what it now asks this Court to decide.

HRS correctly states that it did bring to the trial court's attention Fla. Stat. §827.07(7) (1979) in its motions to dismiss and answers to the complaint and amended complaint. (R.10,15,77-79). HRS, however, made no mention of this statute: (1) in its motion for summary judgment (R.110-111); (2) in its memorandum in support of the motion for summary judgment (R.131-149); (3) in argument on its motion for directed verdict at the close of Plaintiff's case (T.550-557); (4) in argument on

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its motion for directed verdict at the close of all the evidence (T.668-669); or (5) in its motion for new trial or motion to enter judgment in accordance with motion for directed verdict (R.244-247). Further, HRS did not request an instruction pursuant to §827.07(7), nor was the trial court's refusal to grant HRS's motions to dismiss made a point on appeal in the brief filed in the Third District Court of Appeal. HRS rather contended that the trial court erred in not granting a summary judgment or a directed verdict on the ground of sovereign immunity.

STATEMENT OF THE FACTS

HRS's Statement of the Facts fails to set forth the evidence in a light most favorable to the judgment below, and omits much evidence which severely undermines its position in this Court. For these reasons - and mindful of Fla. R. App. P. 9.210(c) - Yamuni is impelled to offer the following facts not mentioned by HRS in its brief on the merits.

HRS correctly notes that Sue Henry received the first report of abuse to Sean on December 22, 1979, in which Eugene McNight, Desiree's uncle, stated that Sean had puncture wounds on the bottom of his foot and bruises about his left eyebrow and right ear. This was not all that McNight reported, however. He also told Henry that Sergeant Scott Partridge knew that Levitt abused Sean and Desiree, and that Partridge once helped Desiree leave Levitt. (T.590, App. 8). McNight also informed Henry that one of Desiree's friends expressed his concern that Desiree would

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move back in with Levitt "after what he [Levitt] did to the baby - put needles in his feet." (T.590, App. 8).

HRS also correctly notes that an officer did visit Levitt's home and found no reason to be concerned for Sean's immediate safety. Based on the information Officer Hall relayed to Henry, McNight's report was deemed "unfounded." No one from HRS, however, went to Levitt's home or conducted any further investigation in reference to this first of numerous reports of abuse. (T.599-605, 251).

With respect to the second report of abuse to Sean, made on Christmas Day, 1979, HRS accurately sets forth the chronology of events which culminated in the dismissal of the detention petition filed the following day. HRS fails to mention, however, several important facts surrounding that dismissal. For example, Detective Parmenter, a father of two boys and an experienced police officer, testified that when he first observed Sean lying in the crib, Sean "didn't react at all to my being there or to anybody else moving around the crib. The baby was just lying there on its back. It wouldn't move its eyes to look at you. It wouldn't watch anybody and to me that seem[ed] strange...." (T.230,231). He attributed this unusual behavior to drugs or something else Sean might have been given to make him nonreactive. (T.232).

Detective Parmenter knew at this time that Levitt had previously been involved in a drug transaction in which Levitt shot a policeman. (T.236). Detective Parmenter gave Judith

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Kaplan, the HRS intake worker, a copy of his report on the incident and told her what he had observed and what he thought was going on. (T.238). He further told her what he knew about Levitt. (T.239). Even though Detective Parmenter was aware of Levitt's history, and spent between five and six hours on the case, he was never contacted by anyone at HRS before the detention petition was dismissed. (T.240,246).

HRS fails to mention Detective Parmenter's testimony which revealed the profound impact HRS's involvement in Sean's case had on others within the system who could have helped Sean. He testified that his report was turned over to the Metro Dade Police Department's General Investigation Unit, the unit which routinely assigned detectives to conduct back-up investigations of reports of child abuse. (T.246-247). Detective Parmenter stated that the detective assigned to Sean's case "went along with the recommendation of the people at HRS and let them handle it the way they wanted to handle it." (T.248). Detective Parmenter did not personally follow up on Sean's case because he "felt the system which was built to take care of [Sean] would take care of him." (T.247).

The physician who examined Sean on December 25, 1979 reported to Mary Gordon, the HRS intake counselor who took Sean to Jackson Memorial Hospital, that the injury to Sean's foot was "[c]aused by puncture with object. No lesions. Compatible with hemorrhage. Possibly caused by puncture." (T.615). The examining physician was not certain, however, whether the puncture

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marks on Sean's foot were made by a needle or by prickers from a bush, as contended by Sean's mother. (T.620). Despite the physician's lack of certainty, however, Gordon and Kaplan still suspected child abuse; when Gordon returned with Sean from the hospital they detained Sean and had him placed in a temporary shelter. (T.219,617-618). Kaplan noted on the placement report that the reasons for detention were as follows:

> Observable injuries to [subject child's] left foot. Mother's boyfriend also abuses mother - [subject child] in harmful environment. (App. 9).

James Smart, the assistant state attorney assigned to that office's juvenile division, testified that it was HRS's function, not his, to decide whether or not a child should be detained or adjudicated a dependant. (T.640). Smart further testified that HRS is not relieved of its statutory and legal obligations to children by the fact that private citizens may initiate a dependency proceeding. (T.654).

Smart also testified that when the detention petition was dismissed on December 26, 1979, he and HRS employees were aware of Levitt's criminal history, even though no one checked Levitt's criminal record. (T.638). Smart knew that Levitt had been convicted of aggravated battery with a firearm. (T.638-639). Smart also acknowledged that beginning in December, 1979, when the first report of abuse was made, through August, 1980, when Sean's arm was amputated, HRS employees exhibited an "underlying feeling of concern" over Sean's safety. (T.644-645). Smart confirmed that the only way HRS could satisfy this concern or

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allay the suspicion of abuse was through competent and thorough investigation. This would require the caseworker to leave the phone and get out of the office to actually investigate the situation by visiting the home, contacting the parents and child, and, if necessary, neighbors. (T.645-646). Smart testified that while the state attorney's office and the police were the governmental agencies involved in the criminal aspects of child abuse, in civil cases "HRS is the [only] agency" or entity required to step in to protect children from abuse. (T.653).

At trial, Betty Nelson, the HRS court unit caseworker who recommended the dismissal of Sean's detention petition, could not even remember McNight. (T.177). McNight, however, had a vivid recollection of Nelson and their conversations. McNight testified that he spoke with Nelson when he brought Sean to the HRS offices before the petition was dismissed. (T.124-126). Contrary to the implication of HRS's statement of the facts, Nelson at that time said more than it was "difficult" to take an infant from the child's mother. Nelson informed McNight that Sean could not be taken from Desiree unless someone actually witnessed the abuse. (T.126).

McNight and other family members also went to HRS offices to attend the detention hearing scheduled for December 26, 1979. (T.129-130). They never had the opportunity to address the court, however. (T.130). Nelson informed McNight that she was going to have the case dismissed and told him that he had been lying to her. (T.130). She also accused McNight of pursuing

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a personal vendetta against Desiree and Levitt, and she told him that his conduct constituted kidnapping. (T.130-131). With a police officer in tow, Nelson warned McNight that if he or any other family member ever again took Sean without Desiree's permission, Nelson would have him arrested for kidnapping. (T.131-153,162).

On December 26, 1979, the detention petition was filed, the allegation of abuse was "investigated," and the petition was dismissed by HRS before concerned family members had a chance to address the court. (T.195). Neither Nelson (nor anyone else from HRS) visited Levitt's home before the detention petition was dismissed. (T.183).

On January 17, 1980 the court order was entered. (T.178; App. 10). The order released Sean into his mother's custody pending further investigation of the case. The order also recited that Desiree had agreed to submit to HRS protective supervision. (T.179,207; App. 10). Before it was entered, however, Nelson had already closed Sean's case. (T.199).

Nelson testified that protective supervision is usually the product of judicial action. (T.207). Such supervision is ordered when HRS believes that a child can be returned to the home environment with no immediate danger of severe injury and that the child's continued safety can be assured with counseling, referrals and HRS supervision. (T.207). Nelson testified that since protective supervision was ordered by the Court, Sean's case should have been picked up by an HRS supervision unit.

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(T.179,182,207,208). Nelson conceded, however, that HRS never followed upon the protective supervision referred to in the court order. (T.182,207,208).

The court order also stated that Sean was released to the custody of his mother pending further investigation. (T.180; App. 10). Betty Nelson, however, testified that she did not further investigate the case to protect Sean from further abuse and that she was unaware of anyone else in her department who conducted such an investigation. (T.182).

HRS correctly notes that on December 27, 1979 - one day after the detention petition was dismissed and within five days of two documented abuse reports - it was informed that Desiree was hospitalized for attempted suicide. Stella Yamuni testified that Desiree did not attempt suicide. (T.534). Rather, Levitt had forced Desiree to swallow too many sleeping pills and he took her to the hospital when he became afraid for her safety. (T.534). This account was corroborated by Desiree, who testified that right after Christmas Levitt "shoved seven or eight [placidyl pills] down my throat." (T.578). There is no evidence that anyone from HRS questioned Desiree about the alleged suicide attempt.

HRS received an anonymous report of further abuse to Sean on January 5, 1980. (T.254-255). Mary Yeardley then visited Levitt's home. Yeardley described the situation at Levitt's home (Levitt, his ex-wife and son, as well as Desiree and Sean all living together under the same roof) as "rather bizarre."

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(T.264,266-267). Although Levitt owned an expensive, well-kept home, Yeardley acknowledged that this did not mean a thing in terms of child abuse. (T.289-290).

HRS states that Yeardley examined Levitt's home for signs of drug involvement. It should be noted that Yeardley only observed the prescription drugs that Levitt - who Yeardley described as aggressive and manipulative - saw fit to show her. (T.288-289; App. 12). She did not expect Levitt to show her any illicit drugs, such as cocaine or marijuana. (T.288-289).

Sean and Desiree were not present when Yeardley made her visit to Levitt's home. (T.255). Yeardley conceded that she never saw and talked with Levitt, Sean and Desiree together in the home setting. (T.261). Furthermore, she never discussed the case with any of Levitt's neighbors, and did not contact any of Sean's relatives. (T.261, 262).

HRS again became involved with Sean on January 7, 1980, when it received the report that as a result of a beating, Desiree had a broken rib, and Sean's eyes were red and swollen shut. (T.283, App. 13). Yeardley visited Sean and Desiree at Stella Yamuni's home and noted that Desiree said she was going to remain with her mother. (T.291). HRS did not further investigate the allegations of child abuse, although Desiree, whose eyes were completely blackened, admitted that Mark had beaten her. (T.283-284,511).

Yeardley conceded that even if Desiree had moved back in with her mother, that should not have put an end to the matter in

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terms of investigating the initial report of abuse to Sean. (T.292). Moreover, at trial, Yeardley was surprised to learn that Desiree had agreed to voluntary supervision on December 26, 1979, as reflected in the January 17, 1980 court order. (T.294). Yeardley testified that under these circumstances HRS caseworkers should have left their desks to follow up on the case regardless of where Desiree may have been temporarily residing. (T.293-295).

At the end of February, 1980, Desiree and Sean moved into an apartment provided for them by Stella Yamuni. (T.535). Desiree testified that shortly after they moved in, Levitt and his ex-wife came to the apartment and forced her and Sean into his car and took them back to Levitt's house. (T.567). After this occurred, Levitt would not allow her to go outside of the house. (T.567).

As noted by HRS, its records reflect that the next report of abuse it received was the one made by McNight on March 31, 1980. HRS also correctly notes that Yeardley testified that McNight voluntarily withdrew the report after a physician could not confirm that Sean had been abused. HRS, however, again omits critical portions of McNight's testimony.

McNight testified that in late March, 1980, his mother-in-law called him and said that Sean had cigarette burns, scratches, and bruises all over him. (T.132). McNight picked Sean up, drove on the expressway and flagged down a police officer in a marked patrol car. (T.133). McNight showed Sean to the

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officer, who responded that McNight should take Sean to the HRS abused children center. (T.133). McNight complied with the officer's directive and again was met by Nelson. (T.133). Nelson was very upset that he had brought Sean in, and she again told him that he could be charged with kidnapping. (T.133,139,162). As a result of the threats of arrest, McNight was reluctant to intervene on Sean's behalf: "She kind of put the fear of the law into me that if I took him away that these things were going to happen." (T.139,154,160).

A document dated April 26, 1980, nearly a month after the March 31 report of abuse, states that the family withdrew that report because the physician could not confirm abuse as the bruise under Sean's eye could have been caused by a fall. (T.275, App. 15-16). Yeardley testified that she did not make a home visit or conduct any follow-up investigation of this report of abuse, other than perhaps contacting the physician who saw Sean, because the report had been withdrawn. She was informed at this time by McNight, however, that Desiree again was living with Levitt. (T.284-285,293).

After the March 31, 1980, report of abuse, Sean's case again was closed and was dormant until the family once more intervened on behalf of the baby. Stella Yamuni reported on June 4, 1980, that Sean was with Levitt and Desiree and that she was concerned for Sean's safety. (T.514; App. 17-18). Yet another report of abuse was received by HRS on June 8, 1980. (App. 19). HRS finally did attempt to contact Levitt after these reports,

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mostly by phone. These efforts were unsuccessful, and HRS apparently called it quits on July 22, 1980. (T.665-666; App. at 21-22).

Yeardley testified that in a case such as this where there is a court order providing that the mother voluntarily submit to HRS supervision and dismissing a detention petition pending further investigation, the only way for HRS to supervise and investigate is to abandon the desk and telephone and actually go out and do it. (T.294-295).

One of the reasons Stella Yamuni did not inform HRS that Desiree and Sean were leaving for Guatemala in early July, 1980, after Desiree had again been beaten and Sean had again been burned by cigarettes, was because she thought Desiree and Sean would be staying in Guatemala. (T.544). Another reason she did not contact HRS or the police, however, was that she "kind of gave up. [She] didn't know what to do. [She] called sometimes. [She] tried to tell them the evidence and they didn't do very much." (T.544).

While Desiree and Sean were in Guatemala, Levitt convinced her that she should come back to Florida because her parents were not going to allow her to return from Guatemala. (T.570). Desiree testified that upon her return from Guatemala Levitt tricked her into coming to his home and then forced her to stay. (T.571). She further testified that throughout the period that she lived with Levitt she was drugged up and sedated. He even installed special locks to ensure that she could not leave.

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(T.577-579). She also stated that marijuana was smoked in the household, and that sundry other drugs, such as percodan and quaaludes, were used. (T.577-579).

Levitt also would pull Desiree's hair and beat her with his hands, fists and feet, whenever she did not do exactly what he told her to do. (T.579). Because of these beatings, her eyes were red and she was bruised and lacerated. (T.579). Deborah Levitt, the ex-wife, also was a target of Levitt's wrath, and as a result was "always" bruised. (T.579-580). Levitt on occasion would threaten Desiree by putting his .357 Magnum extra long barrel to her head, and habitually handcuffed her to the bed. (T.580). Because Desiree was constantly sedated, she assumed that Levitt spent time with Sean when she was not around. (T.580).

Desiree's description of Levitt comported with Yeardley's: she likened him to Charles Manson - an aggressive, tough, manipulative individual who could control others with his mind. (T.582).

Desiree did not recall any instance that HRS visited Levitt's home and saw the drugs he had given her or the manner in which she was treated. (T.583). She did, however, recall one occasion that HRS did stop by his home. At that time HRS personnel demanded to see Desiree, although Levitt did not permit them to enter his home. (T.583). Levitt told Desiree what to do and say and allowed her out of her room. After four or five minutes Levitt sent her back to the room and told the HRS people to

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leave. (T.583).

As a result of the abuse to Sean, his right arm was amputated between the shoulder and the elbow. (T.382, R.600). Because of Sean's tender years, the remaining bone in his upper right arm will continue to grow through maturity, thereby causing problems with the stump that remains. (R.602,607-608). Sean has already undergone one surgical procedure in which the protruding bone was sawed off, and similar procedures likely will have to be repeated in the future. (R.608). Further, because of his age, Sean will probably go through many prosthetic devices over the years. (R.524).

POINT INVOLVED

The question certified by the Third District Court of Appeal is as follows:

HAS THE STATE OF FLORIDA, PURSUANT TO SECTION 768.28, FLORIDA STATUTES (1983), WAIVED SOVEREIGN IMMUNITY FOR LIABILITY ARISING OUT OF THE NEGLIGENT CONDUCT OF AN HRS CASE WORKER? (App. 1).

SUMMARY OF ARGUMENT

The purpose of sovereign immunity is to allow government agencies to perform their functions without unnecessary interference from the courts. The function of HRS pertinent to this case is the prevention of child abuse. As a result of the negligence of HRS caseworkers when he was a baby under their protection, Sean Yamuni will live the rest of his life as an amputee. Imposing upon the state a small measure of tort liability for Sean's

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injury will not interfere with the state's efforts to protect children from child abuse. Sovereign immunity does not and should not apply to bar Sean's claim.

The conduct for which HRS was held liable by a jury involved the performance of professional services, not the failure to properly enforce laws enacted to protect the public from child abuse. HRS thus owed Sean a common law duty of care. Moreover, after HRS, the agency with prime responsibility for protecting abused children, undertook to act on behalf of Sean and deterred others from intervening on the baby's behalf, it was obliged to provide reasonable care in the performance of its undertaking. The court order releasing Sean into the custody of his mother conditioned on HRS protective supervision and pending further investigation by HRS singled Sean out from the rest of society for protection and thus created a special duty of care owed by HRS to Sean.

The statutory framework involved in this case also evinced the intent to create a duty owed by HRS to Sean to conduct an investigation of the repeated reports of abuse to Sean.

HRS's negligent investigation and supervision was conducted on the operational level of government. The conduct for which HRS was held liable involved the failure to perform specific procedures for the protection of helpless children, and does not involve the type of discretionary activity justifying application of the sovereign immunity doctrine.

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ARGUMENT

Yamuni respectfully submits that the question posed by the Third District Court of Appeal must be answered in the affirmative. With the enactment of §768.28, the Florida legislature declared that "[t]he state...shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances." Fla. Stat. §768.28(5) (1979). In the instant case, the Third District Court of Appeal concluded that HRS owed Sean a statutory and common law duty of care, and that its negligent conduct occurred on the operational level of governmental activity. (App.2-6). Under such circumstances, the state surely is liable for the negligence of HRS caseworkers, see, e.g., Miller v. Department of Health and Rehabilitative Services, 474 So.2d 1228 (Fla. 1st DCA 1985); Emig v. Department of Health and Rehabilitative Services, 456 So.2d 1204 (Fla. 1st DCA 1984), and the question certified should be answered in the affirmative.

In support of its position that the certified question should be given a negative answer, HRS contends that the negligent conduct found by the jury in the instant case was discretionary and therefore the state is absolutely immune from liability. While HRS in essence recasts the certified question as whether or not the trial court erred in entering judgment on the jury verdict, there can be little doubt that under the unique facts of this case, §768.28 clearly constitutes a waiver of soverign immunity.

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A. Common Law Duty Owed to Sean

Relying on this Court's decision in Trianon Park Condominium Association v. City of Hialeah, 468 So.2d 912 (Fla. 1985), HRS contends it owed Sean no common law duty of care because its negligence involved enforcement of the law and protection of the public safety. Trianon, 468 So.2d at 919. HRS's contention, however, proceeds from erroneous premises and accordingly should be rejected by this Court. Additionally, there can be no doubt that under the facts of this case (1) HRS voluntarily assumed a duty of care to Sean; and (2) HRS had a special duty to Sean imposed upon it by the January 17, 1980 court order.

i. The services performed by HRS for abused children are properly characterized as professional, educational, and general services for the health and welfare of citizens.

Contrary to HRS's assertion, liability in the instant case was not predicated on the exercise of powers and duties involving the enforcement of the laws regarding child abuse and the protection of the public. HRS does not address the fact that this case was tried in part on its admitted failure to provide the protective supervision referred to in the January 17, 1980, court order. There can be little doubt that protective supervision of the sort contemplated by the court order involves activities for which there has long been a common law duty of care. In similar circumstances, Florida courts have held that HRS as well as private entities/individuals could be held liable for negligent supervision. See Zink v. Department of Health and

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Rehabilitative Services, 11 F.L.W. 2336 (Fla. 5th DCA Nov. 6 1986); Miller v. Department of Health and Rehabilitative Services, 474 So.2d 1228 (Fla. 1st DCA 1985); Emig v. Department of Health and Rehabilitative Services, 456 So.2d 1204 (Fla. 1st DCA 1984), petition for review dismissed, 475 So .2d 693 (Fla. 1985); Nova University v. Wagner, 491 So.2d 1116 (Fla. 1986); Latorre v. First Baptist Church, 11 F.L.W. 1695 (Fla. 3d DCA August 5, 1986); Sorrells v. Mullins, 303 So.2d 385 (Fla. 3d DCA 1974). Other jurisdictions are in accord. See, e.g., National Bank of South Dakota v. Leir, 325 N.W. 2d 845 (S.D. 1982) (defendants liable for, inter alia, negligent follow-up of children in foster care); Little v. Utah State Division of Family Services, 667 P.2d 49 (Utah 1983) (state liable for, inter alia, failure to properly supervise child placed in foster home); Bartels v. County of Westchester, 429 N.Y.S. 2d 906 (App. Div. 1980) (complaint alleging plaintiff child was injured as a result of, inter alia, county employee's negligent supervision stated claim); Barnes v. County of Nassua, 487 N.Y.S. 2d 827 (App. Div. 1985) (county could be liable for death of infant in foster care due to, inter alia, negligent supervision).

HRS should find no refuge in cases where the state acted solely under the police power. The entire juvenile court system has been set up, not for purposes of punishment of wrongdoers, but to protect and promote the welfare of children. See generally, e.g., Santosky v. Kramer, 455 U.S. 745, 766, 102 S. Ct. 1388, 71 L.Ed. 2d 599 (1982). As this Court has so cogently

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pointed out, "Dependency proceedings exist to protect and care for the child that has been neglected, abused or abandoned. ...[T]here are numerous types of juvenile dependency proceedings, but all concern the care, not the punishment of the child." In Interest of D.B., 385 So.2d 83, 90 (Fla. 1980). Thus, New York, which makes the same distinction between actions under the police power and those under the general welfare power as did this Court in Trianon, has held that negligent supervision of a dependent child by a state Social Services agency comes under the general welfare power. Bartels v. County of Westchester, 429 N.Y.S. 2d 906, 908 (App. Div. 1980). The court in Bartels rejected the agency's claims that it owed no statutory or common law duty, and was protected by sovereign immunity. This Court should do the same here.

ii. HRS, by its conduct, undertook a duty owed to Sean

"It is well settled that an action undertaken, even gratuitously, must be performed in accordance with an obligation to provide reasonable care." State of Florida, Department of Highway Safety & Motor Vehicles v. Kropff, 491 So.2d 1252 (Fla. 3d DCA 1986); see Restatement (Second) of Torts §§ 323, 324 (1965 & App. 1986). In Kropff, the plaintiff was injured because a Florida Highway Patrol trooper was negligent in failing to secure an accident scene. Evidence was presented that the trooper violated generally accepted principles of accident investigation techniques as well as Florida Highway Patrol guidelines, general

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orders, and policies.

On appeal from the judgment entered on the jury verdict finding the state negligent, the state contended that it owed no statutory or common law duty to the plaintiff with respect to the trooper's conduct. Relying on Florida case law and Sections 323 and 324 of the Restatement (Second) of Torts, the court had little difficulty in dismissing the state's argument: "Once trooper Carr undertook to secure the initial accident, he was required to do so with reasonable care." Id. at 1647. Accord, Chambers-Castanes v. King County, 669 P.2d 451, 457 n.3 (Wash. 1983); Bartels, supra, 429 N.Y.S.2d 906.

The same is true in the instant case. HRS did not refuse to act, but responded to the reports of abuse, albeit negligently. Moreover, the police deferred to HRS's supposed expertise in child abuse matters, and Sean's family was discouraged by HRS from taking Sean's safety into their own hands. It cannot be denied that HRS's affirmative, though negligent, conduct increased the risk of harm to Sean and Sean's severe injuries resulted from reliance upon HRS. HRS accordingly is subject to liability for its negligent undertaking under traditional tort principles. See, e.g., Restatement (Second) of Torts § 323 (1965).

iii. HRS owed Sean a special duty of care

Even if this Court concludes that HRS's conduct involved enforcement of the law or protection of the public safety (which

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Yamuni denies) the fact remains that HRS owed Sean a special duty to use reasonable care.

In Everton v. Willard, 468 So.2d 936 (Fla. 1985), this Court noted the general rule that "there has never been a common law duty of care owed to an individual with respect to the discretionary judgmental power granted a police officer to make an arrest and to enforce the law." Id. at 938. Citing Schuster v. City of New York, 5 N.Y. 2d 75, 154 N.E. 2d 534, 180 N.Y.S. 2d 265 (1958), the Court was careful to note, however, that "if a special relationship exists between an individual and a governmental entity, there could be a duty of care owed to the individual." Id.; see also Trianon, supra, 468 So.2d at 917 n.2.

In the instant case, clearly a special relationship existed between Sean and HRS giving rise to a special duty. The court order, dismissing the dependency petition pending further investigation by HRS and providing for voluntary supervision by HRS, singled Sean out as a person in need of special protection and created a duty of care owed by HRS. Moreover, as noted above, HRS did not simply refuse to respond to the reports of abuse to Sean; HRS instead undertook to "investigate" some of the reports.

Those in a position to save Sean from Desiree and Levitt did not attempt to do so in large part because of HRS's conduct. Detective Parmenter did not follow up on Sean's case because he believed the system designed to protect abused children would take care of Sean. (T.247). HRS is the bulwark of that

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system. Detective Parmenter further testified that the detective in the investigative unit assigned to Sean's case deferred to HRS, letting them handle the case as they saw fit. (T.248). Betty Nelson told Mr. McNight that Sean could not be taken from Desiree absent an eyewitness account of abuse. (T.126). She also warned him on at least two occasions that he or any other concerned member of the family would be arrested for kidnapping if they intervened on Sean's behalf by taking the baby from Desiree. (T.139,162). This naturally made him pause before coming to Sean's aid. (T.139,154,160).

Under these circumstances, where HRS (1) affirmatively undertook to comply with its statutory mandate, (2) deterred others from intervening on behalf of a helpless baby, and (3) was required by a court order to further investigate the case and render protective supervision, the law must recognize that a special duty of care was owed to Sean.

The special duty doctrine is not new to Florida governmental immunity jurisprudence. For example, in a case with facts very similar to those of the instant case, the court held that a municipality could be held liable for negligent investigation of reports of child abuse, even in the absence of a court order such as the one in the instant case, where persons in a position to help the abused children mistakenly relied on municipal employees to do their job correctly. Florida First National Bank v. City of Jacksonville, 310 So.2d 19 (Fla. 1st DCA 1975), writ quashed, 339 So.2d 632 (Fla. 1976).

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Baker v. City of New York, 25 A.D. 2d 770, 269 N.Y.S. 2d 515 (App. Div. 1966), a New York case decided after Schuster, also is on point. In Baker, the plaintiff obtained from the Domestic Relations Court an order of protection directing her estranged husband to leave her alone. The plaintiff also was given a certificate which provided that any peace officer upon presentation of the certificate by the plaintiff would be authorized to arrest the husband for violation of the order's terms and to aid the plaintiff. Id. at 517. On one occasion the plaintiff presented the certificate to a peace officer, but no action was taken. Later, plaintiff and her husband were at court, and she asked another peace officer if she could wait in his office because she was afraid of her husband. He refused, and fifteen minutes later the plaintiff was shot by her husband. Plaintiff's negligence action against the City was dismissed by the trial court.

On appeal the appellate court reversed. The court had little difficulty dismissing the argument that the case was governed by the rule that liability cannot be predicated on the failure to provide general police protection. Id. at 518. Relying in part on Schuster, the court noted that municipal liability could be predicated on a relationship creating a duty to use due care for the benefit of a particular person or class of persons. Id. The court found such a relationship in the facts before it: "Plaintiff...was a person recognized by the order of protection as one to whom a special duty was owed....Plaintiff

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was thus singled out by judicial process as a person in need of special protection to her." Id. (emphasis added); see also Sorichetti v. City of New York, 65 N.Y. 2d 461, 482 N.E. 2d 70, 492 N.Y.S. 2d 591 (Ct. App. 1985).

In Bartels v. County of Westchester, 76 A.D. 2d 517, 429 N.Y.S. 2d 906 (N.Y. App. Div. 1980), the court also was faced with a situation analogous to the case at bar. There a baby who had been remanded to the Department of Social Services and its Foster Care Program was severely scalded because of the carelessness and unfitness of the foster parents. The plaintiff alleged that the county was negligent in selecting the foster parents and in failing to remove the child from the home upon notice of maltreatment by the foster parents. Id. at 909. The county defended, inter alia, on the ground that it owed plaintiff no special duty. Id. at 908.

The appellate court agreed with the plaintiff that the county did indeed owe the child a duty of care. After the court determined that the statutory framework imposed a statutory duty on the county, see id. at 908-09, the court then addressed the common law duty of care the county assumed once it acted on behalf of the child. "It is well settled that one assuming to act, though not under a duty, must act with care, especially when looking after children." (Citations omitted). Here, the appellants undertook to care for the infant plaintiff, and this duty, once assumed, had to be carried out with due regard for the child's safety." Id. at 909. See also De Long v. County of

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Erie, 60 N.Y. 2d 296, 457 N.E. 2d 717 (1983); Chambers-Castanes v. King County, 100 Wash. 2d 275, 669 P.2d 451 (1983).

Appellee respectfully submits that Bartels, City of Jacksonville, and Baker clearly demonstrate that HRS owed Sean a special duty to use reasonable care in investigating the repeated reports of child abuse. As in City of Jacksonville, persons in a position to come to Sean's aid relied on HRS and were deterred by HRS from taking the matter into their own hands. As in Bartels, once HRS decided to act on behalf of Sean, as opposed to the general public, it assumed to act with reasonable care for his protection. Most importantly, as in Baker, the court order providing for further investigation and that Desiree submit to HRS supervision singled Sean out for special protection.

B. Statutory Duty Owed to Sean

Contrary to HRS's contention, the statutory framework involved in the instant case - unlike the statutes in Trianon Park Condominium Association v. City of Hialeah, 468 So.2d 912 (Fla. 1985) and the other cases cited by HRS - clearly evinced the legislative intent to impose on HRS a duty owed to Sean.

The Florida legislature designated HRS as the agency with prime responsibility for improving child abuse prevention efforts, Fla. Stat. §827.07(11) (1979), and has mandated that anyone who knows or has reasonable cause to suspect that a child has been abused or neglected must make a report to HRS. Fla. Stat. §827.07(3) (1979) Failure to comply with this section is a

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criminal offense. Id. §827.07(18). Further, in 1979, the legislature set forth in no uncertain terms its intent in enacting and revising the laws relating to the detection and prevention of child abuse and neglect:

> 827.07 Abuse of Children.--
>
> (1) LEGISLATIVE INTENT.--The intent of this section is to provide for comprehensive protective services for abused or neglected children found in the state...to prevent further harm to the child or any other children living in the home and to preserve the family life of the parents and children, to the maximum extent possible, by enhancing the parental capacity for adequate child care.

An Act Relating to Child Abuse, Ch. 79-203, Laws of Florida (effective July 1, 1979).[1/]

The legislature, however, did more than (1) require that reports of suspected abuse and neglect be made to the HRS; (2) prescribe that failure to so report could result in the imposition of criminal sanctions; and (3) unequivocally declare its

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1/ HRS relies on Fla. Stat. §415.501(1) (1983) to support its position that the laws enacted specifically for the protection of helpless babies such as Sean were really enacted for the benefit for all Florida citizens and thus, under Trianon, will not support a statutory duty owed to Sean. HRS's reliance on this statute to support its position is misplaced. First, §415.501(1) was enacted by Chapter 82-62 in 1982, after the events giving rise to this suit occurred. Second, HRS ignores the preamble to Ch. 82-62, which poignantly underscores the legislature's overriding concern with the inefficacy of child abuse prevention efforts, the alarming increase in instances of child abuse, and the weighty and long-term societal costs associated with child abuse. See Ch. 82-62, Florida Session Law Service at 339-340 (West 1982); (App. 28-29). Third, HRS offers no reason why an intent to benefit all citizens necessarily means that the specific beneficiaries of that legislation are owed no duty.

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intent that abused and neglected children were the specific beneficiaries of the comprehensive legislation dealing with child abuse. The legislature also imposed on HRS certain mandatory duties to ensure that HRS would fulfill its purpose of protecting abused and neglected children:

> (10) CHILD PROTECTIVE INVESTIGATIONS.--
>
> (a) The department shall be capable of receiving and investigating reports of known or suspected child abuse or neglect 24 hours a day, 7 days a week. If it appears that the immediate safety or well-being of a child is endangered, that the family may flee or the child will be unavailable for purposes of conducting a child protective investigation, or that the facts otherwise so warrant, the department shall commence an investigation immediately, regardless of the time of day or night. In all other child abuse or neglect cases, a child protective investigation shall be commenced within 24 hours of receipt of the report.
>
> (b) For each report it receives, the department shall perform an onsite child protective investigation to:
>
> 1. Determine the composition of the family or household....
>
> 2. Determine whether there is indication that any child in the family or household is abused or neglected, including a determination of harm or threatened harm to each child; the nature and extent of present or prior injuries, abuse, or neglect, and any evidence thereof; and a determination as to the person or persons apparently responsible for the abuse or neglect.
>
> 3. Determine the immediate and long-term risk to each child if the child remains in the existing home environment.

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> 4. Determine the protective, treatment, and ameliorative services necessary to safeguard and ensure the child's well-being and development and, if possible, to preserve and stabilize family life.

Fla. Stat. §827.07(10) (1979).

In addition to this statutory imperative, HRS followed the legislature's lead and undertook to compile an intake manual for delinquency and dependency juvenile programs. The manual provides in part that "[i]t is the intent of [HRS] to interpret [Fla. Stat. §827.07] literally. A child who has been reported as a victim of abuse...must be given the protection of an onsite response by staff." (App. 24). The manual further states that it is inappropriate and unacceptable to try to screen out the existence of child abuse by desk review or telephone calls. (App. 24). Time limits for commencement of investigations also are delineated. (App. 24-25).

The manual also details the proper focus of the investigation. For example, the manual provides that an intake counselor must continue to build on the information acquired in the initial interview in order to determine (1) the validity of the report of abuse or neglect; (2) whether the child is in immediate danger; and (3) what services can be offered to assure the child's immediate protection, if necessary, or to help the family strengthen its own ability to deal with the situation. (App. 26). Furthermore, when investigating the report of abuse or neglect "[a]ll members of the household should be seen together and, when indicated, singly." (App. 26). When parents are unable

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or refuse to furnish the required information, or when the danger to the child cannot be evaluated without appropriate outside information, neighbors, relatives, or other agencies are to be contacted. (App. 26). The manual also notes that parents often attempt to focus on who made the report instead of the content of the report. (App. 27).

Given the foregoing statutory framework as well as HRS's interpretation of the proper manner in which to fulfill its duties, HRS owed Sean the duty of investigating the numerous reports of abuse to him in a reasonable, non-negligent fashion. Yamuni agrees with HRS's reading of Trianon that the mere existence of a regulatory statute imposing certain duties on a governmental entity does not automatically give rise to a cause of action for a particular individual or group. See Trianon, 468 So.2d at 921-22. The instant case, however, is readily distinguishable from Trianon.

In Trianon, this Court noted that the relevant statute did not evince an intent to grant an individual a right of recovery. Id. at 922. Rather, the stated purpose and intent of the statute was to "'allow reasonable protection for public safety, health, and general welfare for all the people of Florida at the most reasonable cost to the consumer.'" Id. (quoting Fla. Stat. §553.72 (1979)) (emphasis this Court's). Here, however, the legislative intent clearly singled out, from the rest of society, otherwise helpless abused and neglected children for special protection. Fla. Stat. §827.07(1) (1979). Additionally, HRS is

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statutorily entrusted with "prime responsibility for strengthening and improving child abuse and neglect prevention and treatment efforts." Id. §827.07(11). As a result, anyone knowing of or having reasonable cause to suspect abuse must make a report to HRS or risk a criminal penalty. Id. §827.07(3) & (18). Furthermore, HRS is required by law to perform onsite investigations of each report of abuse, and HRS itself has set forth in comprehensive fashion precisely how the investigation is to be conducted. Id. §827.07(10). From the foregoing it is clear, unlike the situation in Trianon and the other cases cited by HRS, that the statutory framework currently under review is "different than other acts of the legislature which seek to protect by regulation the welfare of society." Trianon, 468 So.2d at 922.

HRS devotes nearly three pages of its brief on the merits to the contention that the District Court should have considered Fla. Stat. §827.07(7) (1979) in determining whether §§827.01-827.09 imposed on HRS a duty owed to Sean, and that this statutes immunizes it from liability in this case. This contention, however, is untenable as HRS has not preserved for review the issue of the statute's applicability, and even if the issue were preserved, the statute nonetheless is of no avail to HRS.

As noted supra, p.1-2, HRS did not even mention §827.07(7) in its motion for summary judgment, in its motions for directed verdict, or in its post-trial motions. Nor did HRS argue on appeal to the Third District Court of Appeal that the trial court erred in not granting the motions to dismiss which

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were based in part on §827.07(7). Having waived the issue in the trial court, and having elected to attack the trial court's judgment solely on the basis of sovereign - not statutory - immunity, HRS cannot now be heard to claim that the statute immunizes it from liability. See Conde v. Marlu Navigation Co., 495 So.2d 847 (Fla. 3d DCA 1986) ("[T]o obtain appellate review, alleged errors...must be raised clearly, concisely, and separately as points on appeal"); Wagner v. Nottingham Associates, 464 So.2d 166, 169 (Fla. 3d DCA), petition for review denied, 475 So.2d 696 (Fla. 1985); see also Dober v. Worrell, 401 So.2d 1322, 1323-24 (Fla. 1981). ("[A]n appellate court will not consider issues not presented to the trial judge either on appeal from an order of dismissal (citations omitted), or on appeal from final judgment on the merits (citations omitted"); 9 C. Wright & A. Miller, Federal Practice and Procedure §2533, at 581 (1971) ("Statement of one ground [as support for a motion for directed verdict] precludes a party from claiming later that the motion should have been granted on a different ground.").

In any event, HRS fails to mention the evolution of Fla. Stat. §827.07(7) and the legislative history Yamuni has been able to unearth regarding the statute. For example, subsection (2) of Fla. Stat. §827.041 (1963), entitled REPORTS BY PHYSICIANS AND INSTITUTIONS, required physicians to make reports of suspected child abuse. If the physician was on staff at a hospital or other institution when he came across the suspected abuse, the physician was required to report to the person in charge of the

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institution, who in turn was required to make the report of abuse. Fla. Stat. §828.041(4) (1963) provided that anyone participating in the making of a child abuse report or participating in a judicial proceeding resulting from the report would be presumed to be acting in good faith and in so doing would be immune from civil or criminal liability.

From 1963 through 1978 the child abuse statutes were amended several times and the class of persons required to make reports of suspected child abuse was expanded to include any person, including nurses, teachers, and social workers, who had reason to believe that a child had been subjected to abuse. See Fla. Stat. §828.07(4)(a) (1978 Supp.). Similar to the 1963 version of the statute, the 1978 version also required physicians who discovered suspected abuse while performing staff services for a hospital, clinic or similar institution to make the report to the person in charge of the institution, who in turn was required to report or cause a report to be made to HRS. Id. Fla. Stat. §828.07(10) (1978 Supp.) provided that anyone participating in the making of a report, the taking of photographs or x-rays, the taking of a child into custody pursuant to the statute, or participating in a judicial proceeding was "presumed prima facie to be acting in good faith" and in so doing was immune from civil or criminal liability that otherwise would be incurred.

In 1979, Section 827.07 underwent substantial revision with the enactment of Chapter 79-203. As part of that revision, Fla. Stat. §827.07(10) (1978 Supp.), the immunity provision, was

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renumbered and amended to read: "Any person, official, or institution participating in good faith in any act authorized or required by this section shall be immune from any civil or criminal liability which might otherwise result by reason of such action." Fla. Stat. §827.07(7) (1979).

HRS contends that the 1979 version of the immunity provision compels the conclusion that the legislature did not intend to create a statutory right of recovery against anyone-including HRS - who participated in good faith in any activities set forth in the statute. This reading of the statute is not supported by any authority, is belied by the fact that the various immunity provisions since 1963 clearly were designed to deprive persons accused of abuse of recourse against their accusers, provided the latter acted in good faith, and is contrary to the legislature's intent in amending Fla. Stat. §827.07(10) (1978 Supp.): "Except for removing 'prima facie to be acting in good faith,' this subsection is substantively the same as §827.07(10) (1978 Supp.)." (App. 32). Nothing in the language used in Section 827.07(7), its legislative development, or legislative history indicates that helpless victims of abuse such as Sean should be deprived of the right to recover from the state for injuries due to the admitted negligence of those under a statutory and common law duty to protect them from harm.

The statutes involved in the instant case delineated the entity responsible for Sean's protection, and delineated the entity to whom Sean's family had to defer. The statutes also set

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forth how the legislative intent to protect helpless infants from their abusers was to be implemented, and HRS followed the legislature's lead by adopting a detailed and comprehensive intake manual in order to carry out its statutory obligations. Under these circumstances, it is respectfully submitted, the statutes must be read as evincing an intent to create a duty owed by HRS to Sean.

C. Operational vs. Planning Function

HRS was under both a statutory and common law duty to exercise reasonable care in investigating the reports of abuse to Sean and in providing protective supervision. In Trianon, this Court suggested that the operational-planning analysis set forth in Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 407 P.2d 440 (1965), and adopted by the Court in Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979), should be employed to determine governmental liability where a statutory or common law duty exists. Trianon, 468 So.2d at 918-19.

In Commercial Carrier Corp. the Court stated that even though Fla. Stat. §768.28 evinced the legislative intent to waive sovereign immunity on a broad basis, certain discretionary governmental functions nonetheless "may not be subjected to scrutiny by judge or jury as to the wisdom of their performance." Commercial Carrier Corp., 371 So.2d at 1022. To identify these functions the Court adopted the analysis of Johnson v. State, 69

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Cal. 2d 782, 73 Cal. Rptr. 240, 447 P.2d 352 (1968), which distinguished between the "planning level" of governmental decision-making (immune), and the "operational level" of governmental decision-making (not immune). Commercial Carrier Corp., 371 So.2d at 1022. The Court also commended utilization of the preliminary four-pronged test enunciated in Evangelical Brethren. Id. at 1019.

Applying this test to the instant case, Yamuni contends that the second and third Evangelical Brethren questions "call for or suggest a negative answer" and thus HRS is not immune from suit.

Contrary to HRS's assertion, it is clear that the questioned acts, omissions, or decisions involved in the instant case would not change the course or direction of the protective services program provided by HRS. In State of Florida, Department of Highway Safety & Motor Vehicles v. Kropff, 491 So.2d 1252 (Fla. 3d DCA 1986), the Third District was faced with a similar situation. As noted above, in that case the plaintiff was injured as a result of a state trooper's negligent failure to follow generally accepted principles of accident investigation techniques, as well as Florida Highway Patrol guidelines, general orders, and policies. The Third District had little difficulty rejecting the state's contention that under Commercial Carrier Corp. the trooper's actions were discretionary in nature. Characterizing the trooper's conduct as involving the performance of a specific procedure for the protection of the public - and

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therefore operational - the court held that the state was not immune from suit. Similarly, in Bellavance v. State, 390 So.2d 422 (Fla. 1st DCA 1980) rev. denied, 399 So.2d 1145 (Fla. 1981), the court concluded that the decision to release a mental patient would not materially affect the ends and purposes of the Baker Act, and thus held that the state was not immune from suit for injuries sustained by the plaintiff at the hands of the released patient. See also Emig v. Department of Health and Rehabilitative Services, 456 So.2d 1204 (Fla. 1st DCA 1984), petition for review dismissed, 475 So.2d 693 (Fla. 1985) ("A decision as to whether to notify proper authorities after an an escape of dangerous delinquents [would not] jeopardize the youth detention center program.") HRS's negligent investigation of the repeated reports of abuse to one baby and its failure to provide protective supervision pursuant to court order would not change the direction of the policy, program or objective set forth by the legislature in the statutes governing the protection of abused children.

Reddish v. Smith, 468 So.2d 929 (Fla. 1985), does not compel a different result. This Court noted that the complaint in that case was based on the classification and assignment of a prisoner (an exclusive governmental function) not the possible negligence of state employees having an operational level duty to supervise the inmate and keep him confined at the time he escaped. The instant case, however, was tried on the theory that HRS employees negligently failed to provide Sean the protective

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supervision set forth in the court order, negligently failed to conduct the further investigation set forth in the court order, and negligently failed to comply with the relevant statutes and its own intake manual in responding to the repeated reports of abuse to Sean. Unlike the situation in Reddish, this case simply does not involve an "adminstrative process" properly characterized as an "inherent feature of the essential governmental role" assigned to HRS.

HRS also erroneously relies on several recent decisions by this Court and two decisions from the Fifth District Court of Appeal in support of its contention that the third Evangelical Brethren question must be given an affirmative answer.

City of Daytona Beach v. Palmer, 469 So.2d 121 (Fla. 1985), Everton v. Willard, 468 So.2d 936 (Fla. 1985), Carter v. City of Stuart, 468 So.2d 955 (Fla. 1985), and Trianon Park Condominium Association v. City of Hialeah, 468 So.2d 912 (Fla. 1985), all were cases in which there was no duty of care owed to the plaintiff. The same is true in Alderman v. Lamar, 493 So.2d 495 (Fla. 5th DCA 1986) and Rhodes v. Lamar, 490 So.2d 1061 (Fla. 5th DCA 1986). In the instant case, however, HRS clearly owed Sean both a common law and statutory duty.

Austin v. Hale, 711 S.W. 2d 64 (Tex. App. 1986), is distinguishable and does not support HRS's position. First, in Austin the issue was whether or not the DHR employee could be held personally liable for the alleged negligent investigation of a report of child abuse. In the instant case, no HRS employee is

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subject to personal liability, and the policy concerns underguiding that decision simply do not exist here. Austin, 711 S.W. 2d at 67. Second, Austin involved only one report of child abuse; in this case, HRS received numerous reports of abuse to Sean over a period of months. Third, §827.07(10) does not repose in HRS caseworkers the degree of discretion contemplated by the statute under review in Austin. Fourth, in Austin, there was no court order requiring further investigation and providing for protective supervision.

HRS's reliance on Tango v. Tulevich, 61 N.Y. 2d 34, 471 N.Y.S. 2d 73, 459 N.E. 2d 182 (1983) also is misplaced. Like Austin, Tango involved personal liability of the defendant probation officer. The Court noted that municipalities, on the other hand, surrendered their tort immunity long ago. Tango, 459 N.E. 2d at 185. Further, in Tango the defendant exercised the discretionary authority she possessed as the supervisor of her Department. In the instant case, however, the caseworkers' conduct was in clear violation of a statutory mandate and the HRS intake manual - which statute and manual the caseworkers were not simply free to ignore "according to his view of what is necessary and proper." Id. at 185.

Thus, the third Evangelical Brethren question also must be given a negative answer. There can be little doubt that the HRS caseworkers in the instant case did not reflect upon basic policy when they failed to provide the protective supervision and further investigation required by the court order, and when they

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failed to comply with the relevant statutes and the HRS intake manual in responding to the repeated reports of abuse to Sean. The conduct for which HRS was held liable in the instant case was performed at the operational level, and HRS thus is not immune from suit. See Kropff, supra, 491 So.2d 1252 (negligent failure to properly secure accident scene operational activity since it involved the performance of a specific procedure for the protection of the public); Emig v. Department of Health and Rehabilitative Services, 456 So.2d 1204 (Fla. 1st DCA 1984), petition for review dismissed, 475 So.2d 693 (Fla. 1985) (HRS employee's decision not to notify authorities of escape by juvenile from detention center did not involve basic policy, judgment and expertise); Bellavance, supra, 390 So.2d 422 (decision to release inmate of mental institution did not require basic policy, judgment, and expertise); Rodriguez v. Commercial Insurance Co., 449 So.2d 375, 377 (Fla. 3d DCA 1984) ("The creation of the system [for dissemination of traffic violation data] is a planning function but the daily utilization of the system is an operational function not protected by sovereign immunity.").

In the instant case, HRS failed to comply with the mandatory duties set forth by the legislature, failed to adhere to mandatory standard operating procedures as established in its own intake manual, and failed to measure up to the applicable standard of care. In short, HRS, in negligently failing to correctly implement policies which had previously been determined, was acting in an operational, non-immune capacity. Moreover,

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whatever discretion HRS employees may have had not to comply with the statutes and intake manual in investigating Sean's case was effectively stripped from them by order of the court on January 17, 1980.

Decisions from other jurisdictions reinforce this conclusion. In Commercial Carrier Corp., 371 So.2d at 1021-22, the Court adopted the analysis of Johnson v. State, 447 P.2d 352 (Cal. 1968). The Johnson case, therefore, provides a particularly appropriate point of reference. In that case, the California Supreme Court was presented with the issue of whether a parole officer's failure to warn foster parents that the 16 year old he asked them to take in had homicidal tendencies was actionable in a suit against the state. The Court noted that judicial abstention is appropriate "in areas in which the responsibility for basic policy decisions had been committed to coordinate branches of government." Id. at 360 (emphasis in original). With this principle in mind, the Court held:

> Once an official reaches the decision to parole to a given family...the determination as to whether to warn the foster parents of latent dangers facing them presents no such reason for immunity; to the extent that a parole officer consciously considers pros and cons in deciding what information, if any, should be given, he makes such a determination at the lowest, ministerial rung of official action. Judicial abstinence from ruling upon whether negligence contributed to this decision would therefore be unjustified; coupled with the administrative laxness that caused the loss in the first instance, it would only result in the failure of governmental institutions to serve the injured individual.

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Id. at 362 (emphasis added).

Similarly, in National Bank of South Dakota v. Leir, 325 N.W. 2d 845 (S.D. 1982), suit was brought against social workers for negligent placement and supervision of two children in a foster home. The plaintiff alleged that the "social workers' neglect and violations of [the] Department's rules and regulations made possible the continuing sexual and physical abuse of D.C. and B.M." Id. at 846. The trial court granted the defendants' motion to dismiss on the basis of sovereign immunity.

On appeal, the defendants maintained that they were immune since they were exercising discretionary, as opposed to ministerial, functions. The South Dakota Supreme Court disagreed, and reversed the trial court. The Court noted that several jurisdictions have held that the placement, maintenance, and care of children in foster care are ministerial activities not sovereignly immune. Id. at 849. The Court concluded:

> In the present case, the actions for which social workers claim immunity involve the placement and follow-up of these children in foster care. The care and placement of children is an important function and there is strong likelihood that serious harm will result to members of the public if it is performed incorrectly. (citations omitted). Although some discretion in its literal sense is involved in foster care, social workers do not make policy decisions involving foster care placement. The criteria for placement and standards for follow-up of foster children are already established. Social workers are merely required to carry out or administer these previously established standards. The placement and follow-up of children in foster care according to preestablished

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> standards is a routine, ministerial function. (citations omitted). Since the actions for which social workers claim immunity are ministerial in nature, we hold that the doctrine of sovereign immunity does not extend to preclude a suit based upon these actions.

Id. at 849-50 (footnote omitted). Accord, Bartels v. County of Westchester, 76 A.D.2d 517, 429 N.Y.S. 2d 906 (N.Y. App. Div. 1980).

HRS, relying on Fla. Stat. §827.07(10)(b) (1979), argues that the conduct of its employees involved basic policy decision and it is therefore immune from suit. HRS further contends that a caseworker made a "policy decision" when he decided to use the telephone instead of making home visits to the Levitt household. This argument is untenable.

As an initial matter, it should be noted that the alleged policy decision to screen out abuse reports by telephone occurred some six months after the first report of abuse to Sean. Moreover, §827.07(b)(1) states that the critical first step in the effort to protect helpless children is an immediate onsite investigation. The HRS intake manual explicitly states that it is unacceptable to attempt to screen out the existence of child abuse by telephone or desk review. (App. 24). Section 827.07(b)(2-4), cited by HRS, presupposes that the caseworker has conducted the mandatory onsite investigation.

The evidence was uncontroverted that while Desiree and Sean were with Levitt, she was beaten, bruised, sedated, and often handcuffed to the bed. (T.577-580). The evidence was also

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uncontroverted that HRS employees were on notice of Levitt's criminal record and they even expressed an underlying feeling of concern for Sean's safety. Furthermore, a court order was entered which stated that Desiree submitted to protective supervision by HRS and which dismissed the detention case pending further investigation. Sean's case, however, was never transferred to a supervision unit as Betty Nelson testified it should have been transferred, and HRS employees admitted that the "further investigation" required by the court order was never conducted. Instead, HRS became involved only when reports of abuse were called in by concerned family members. Even then, rather than conducting the mandatory home visits with all relevant actors present, HRS employees were content to use the telephone to screen out the reports of abuse.

Had HRS employees complied with the Court order, and had they conducted the required home visits under the proper circumstances, the abuse to Desiree and Sean, as well as the environment in which they were kept, would have been apparent.

In the instant case HRS was found liable for the negligence of caseworkers in attempting to perform a specific procedure for the protection of a helpless baby. The conduct involved accordingly involved the performance of an operational level function, and HRS is thus not immune from suit.

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CONCLUSION

The doctrine of sovereign immunity is a necessary shield which allows government agencies to function as they should without unnecessary intervention of the tort system. HRS was not functioning as it should when it negligently allowed Sean Yamuni to lose his arm through child abuse.

Sean was under HRS supervision and protection pursuant to statute, court order, and HRS's own undertaking. HRS was explicitly required to protect Sean from the very evil which caused his injury. The jury found that HRS failed abysmally, and as a result, at the age of 14 months, Sean's arm had to be amputated.

The state's battle against child abuse will not be hindered one iota if HRS is compelled to compensate Sean, at least in part, for his loss. If Trianon and its progeny require a different result, they should be revisited by this Court for the reasons set forth in the dissents in all of those cases.

The question posed by the court below should be answered in the affirmative. The decision below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on the Merits (With Separate Appendix) was mailed this 20th day of January, 1987, to: JOAN S. BUCKLEY, ESQ., Walton, Lantaff, Schroeder & Carson, 900 Alfred I. duPont Building, 169 East Flagler Street, Miami, Florida 33131; and GEORGE, HARTZ & LUNDEEN, P.A., 25 Southeast 2nd Avenue, 1111 Ingraham Building, Miami, Florida 33131.

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