IN THE SUPREME COURT OF FLORIDA

CASE NO: 1999-41

MICHAEL LEEDS and BARBARA LEEDS, as Personal Representatives of the Estate of SUZANNE LEEDS, deceased,

Petitioners,

vs.

STATE OF FLORIDA, DEPARTMENT OF HIGHWAY PATROL, an agency of the State of Florida,

Respondent.

ANSWER BRIEF OF STATE OF FLORIDA ON THE MERITS

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INTRODUCTION

The Petitioners, Michael Leeds and Barbara Leeds as Personal Representatives of the Estate of Suzanne Leeds, deceased, were Plaintiffs in the trial court and Appellees in the Third District Court of Appeal. In Respondent's Answer Brief we will refer to the Petitioners as Plaintiffs or by name.

The Respondent, State of Florida, Department of Highway Patrol, was the Defendant in the trial court and the Appellant in the Third District Court of Appeal. In Respondent's Answer Brief we will refer to the Respondent as "FHP" or the "State."

The symbol " R" will stand for the Record on Appeal. The symbol "TR" together with Vol. and then the page number will stand for the transcript of Trial. The symbol "D" will stand for the deposition of Daniel Banegas, one of the defendants, which was read at trial but not taken down by the court reporter. The symbol "T" will stand for the transcript of hearing on the Motion of Suzanne Leeds

to Exclude the Toxicology evidence regarding effect of cocaine taken on June 25, 1997. All emphasis is ours unless otherwise indicated.

We certify to the Court that 14 point New Times Roman is the font.

STATEMENT OF CASE

The Plaintiff's daughter, Suzanne was the driver and her friend Elissa Pollock was the passenger when the car they were occupying came in contact with a disabled tractor trailer operated by Daniel Banegas, at 4:00 A.M. on September 5, 1993.

Suzanne's car struck and then went under a disabled semi truck driven by Daniel Banegas, which was stopped in the right-hand lane of the Palmetto expressway in Dade County. The two girls had been returning from a night out on Miami Beach when Suzanne's Honda Civic struck the Banegas vehicle without either applying the brakes or swerving to avoid the accident. Plaintiffs' daughter had a clear view of the disabled truck, which was illuminated with hazard lights and street lights and there were triangle reflectors on the roadway between she and the truck at approximately 100 feet behind the rear of the trailer. Suzanne had a clear unobstructed view of the disabled tractor trailer for a distance of at least a distance 570 feet prior to the trailer as the trailer was approximately 1000 feet from the crest of the hill(T Vol. I p 143-144) on the path traveled by the Plaintiffs. There is no indication that the Plaintiffs daughter took any type of action on her own behalf to avoid this accident, which may have been as a result of the fact she had used cocaine at some point prior to the accident. (TR Vol 1; 67-69, 74, 143-144, 146,

165; Vol 2; 17, 21-22, 30-32,81; Vol 3; 16, 25, 30- 32, 34, 37, 40, 42, 122, 126, 128, 133-134, 262; D 4,7,33-34, 39, 48; T 51-52; TR 5-10)

The Plaintiffs filed a wrongful death complaint against FHP, Flash Import and Export, the owner of the truck, Daniel Banegas, the driver of the truck and Gambino Ramos, the gentleman who had hired Mr. Banegas in the Circuit Court of the Eleventh Judicial Circuit in 1995. (R 722-731) The Plaintiffs' daughter was, also, a defendant in the case filed by her passenger, Elissa but before it went to the jury Elissa's personal representative dropped Suzanne as a party. (TR Vol IV; 3)

The two cases were eventually transferred into the same division of the Court. (R732-733) and consolidated for trial purposes. (R 732-733 TR 972-1264) Between July 23 and July 31, 1998, the cases were tried before a jury. (R972-1264)

At trial Mr. Pollock's counsel set the stage so to speak and over objection argued that not only did these two girls die in the accident but so did Mrs. Pollock because she had stopped her cancer treatments because of the death of her daughter. Then the trial court allowed lay testimony to establish this as a fact. (TR Vol.1; 34; Vol.2; 50, 60, 67, 102-103)

The trial court allowed both counsel for Plaintiffs and Pollock to introduce into evidence, over objection, the internal operating procedures of FHP. The Court

allowed over objection a jury charge which advised the jury that they could consider the manual as the evidence of a standard of care that would be owed (Duty) to the Plaintiffs' decedent. The Court, further instructed the jury that FHP was responsible for patrolling the state highways, and to regulate and control and direct the movement of traffic thereon. (TR Vol 1; 106; Vol.2; 6, vol. 4; 147, Vol 5:9; Exhibit 40)

At closing argument the court allowed counsel for Mr. Pollock to argue about the deceased wife and in addition that the jury would need to make sure that it made the award sufficiently large because all at most the Plaintiff would only get 50% of whatever they awarded, indicating that it was only the State that had the money to pay a judgement. (TR Vol. 4, 160) Further, the trial court allowed argument by counsel for Pollock regarding speculation that if a blue and white unit had pulled up behind the truck it will prevent an accident all but one time one out of a million times. (TR Vol. 4, 168) The Plaintiffs, of course, benefitted from this inflammatory closing.

During the trial, without the benefit of reviewing prior testimony heard at a lengthy hearing a year before the trial court reversed a prior ruling made and denied FHP the right to introduce evidence that Ms. Leeds' autopsy revealed that she had cocaine and cocaine metabolites in her system at the time of the crash. (TR Vol.1;

16) The year prior to trial, however, the Court denied the motion in Limine filed by the Plaintiff that attempted to keep such evidence out. (T1-88) In arriving at the decision to allow the evidence in the first instance the trial court determined that the evidence should come in because it went to the very heart of the case. (T 73-76) However, on the day of trial the Court reversed itself and without reviewing that testimony determined that the prejudice of the information outweighed the probative value and reversed his former ruling allowing said evidence and therefore the jury never heard the fact that sometime prior to the accident Suzanne had used cocaine, which may have affected her driving ability. (T Vol. 1; 73-76)

The trial court, also, refused FHP's demonstrative evidence in the form of a video that was to be used with its expert to explain reaction times. (TR Vol.2 110-112; 115-129)

At the appropriate time FHP moved for a directed verdict on the issue that no duty was owed to the Plaintiff more than what was owed to the general public at large and therefore the agency could not be liable to the Plaintiff. Said motion was denied by the Trial Court (TR Vol. 2; 129)

The case ended with a large verdict against FHP. The verdict for the Plaintiff Leeds was in the sum of $8,950,000. (TR Vol. 5; 40-42; A 1-4) The jury concluded that FHP was 50% negligent and the driver of the semi was 50%

negligent. (TR Vol 5; 40-42; A1-2) There was no negligence found on behalf of Suzanne Leeds. (TR Vol. 5; 40-42; A1-2)

Thereafter, FHP filed post trial motions for remittitur, new trial and judgment not withstanding the verdict. (R959-971) The lower Court denied all such motions on October 22, 1998 without hearing any argument on the motion. (R1279-1281)

FHP then filed its notice of appeal and argued to the appellate court the following issues (1)failure of the trial court to have directed a verdict on the issue of duty (2), the trial court's jury instructions dealing with the issue of FHP's duty, (3) the refusal to allow FHP to produce evidence of the driver of the vehicle , Suzanne's cocaine usage, (4) the failure to allow FHP's use of the video during the testimony of its expert, to explain reaction time that Plaintiff should have had in order to avoid the accident (5) the failure of the court to have granted a remittitur because the jury had to have considered evidence outside of the record, (6) the issue of the death of Mrs. Pollock, (7) the prejudicial closing argument that the amount must be large as they would receive only fifty percent of what is awarded and (8) the fact that the verdict finding no negligence on Ms. Leeds was against the manifest weight of the evidence.

The Third District Court of Appeal reversed the judgement of the jury and ordered that the judgment be entered for FHP on the issue of duty and then held the

remaining issues were moot because of its decision regarding the issue of duty.

The Plaintiff has sought this certiorari because the Third District stated that it was acknowledging conflict with the Second District Court of Appeals decisions in the cases of Cook v. Sheriff of Collier County, 573 So.2d 406 (Fla. 2nd D.C.A. 1991) and Hoover v. Polk County Sheriff's Dept., 611 So.2d 1331 (2nd D.C.A. 1993). [1]

[1] FHP denies that there is any conflict since the cases were so procedurally different.

ISSUES ON APPEAL

FHP respectfully rephrases and combines each of the Plaintiff's Points on Appeal into the following one issue:

I.

WHETHER FHP WAS ENTITLED TO A DIRECTED VERDICT ON THE ISSUE OF LIABILITY SINCE THE ONLY DUTY OWED TO THE PLAINTIFF WAS THE SAME DUTY OWED TO THE GENERAL PUBLIC AT LARGE?

STATEMENT OF FACTS

On the clear and dry Sunday morning of September 5, 1993, at approximately 3:00 A.M. Daniel Banegas was operating a semi tractor trailer, which stalled on the Palmetto Expressway in a westbound lane of traffic west of 27th Avenue, one thousand feet West of the crest or hill. ((D 26; TR Vol 3; 48; D4, 24; TR Vol 1; 67- 69, 74, 143-144, 146, 165; Vol 3; 102-103)

Mr. Banegas testified his vehicle simply stopped and he was unable to get it to start again. (D4) He put the emergency flashers on (hazard warning lights) and he placed reflector triangles in the roadway at approximately 50, 100 and 500 feet behind the truck, although it may have taken him as much as twenty minutes to do so. (D 4, 7, 8, 21, 33, 34, 39, 48) After placing these triangles Mr. Banegas went back to the cab area and attempted to fix the truck. (D23)

At approximately this same time, Mr. Raul Pedrero was traveling the Palmetto Expressway westbound near 27th Avenue. (TR Vol. 1, 64-65) He, therefore, came upon the stalled Banegas vehicle, which he described as being in the right lane of travel. (TR Vol.1; 69) Mr. Pedrero braked and moved into the left-hand lane to avoid the tractor trailer. (TR Vol. 1; 69) It took him seconds to perceive the truck and take the necessary evasive action. (TR Vol.1; 78) He did not observe the triangle reflectors behind the tractor trailer as he approached the

stalled vehicle as the reflectors they were probably placed after he passed the trailer. (TR Vol. 1; 69) Mr. Predrero exited the highway at approximately 3:15 A.M. and called 911, who switched him to the FHP dispatcher. (TR Vol. 1; 70-71,73) He advised FHP of the situation and then he returned to the area of a parking lot on 27th avenue some 700 to 800 feet away where he remained for approximately twenty minutes. (TR Vol.1; 72-74, 77) During this time he saw numerous cars take evasive action to avoid hitting the stalled tractor-trailer, all being capable of doing so. (TR Vol. 1; 62-97) At around 3:45 A.M. Mr. Pedrero went home. (TR Vol. 1; 73)

FHP's dispatcher did not enter the call into the computer for assignment. (TR Vol. 4; 30-33)

On this same evening, several FHP troopers were on Krome Avenue (many miles to the west of the place where the accident occurred) because troopers had been dispatched to that location regarding motorcycle racing. Trooper Gonzalez being one of the troopers who went to assist. (TR Vol. 3; 17-18) Routinely, when a dispatch such as motorcycle races goes out, it is overheard by all troopers and they go out to the area to assist because of the hazards of dealing with the amount of people normally at such an event. (TR Vol. 3; 20)

At approximately 4:00 A.M. Trooper Gonzalez received a dispatcher transmission informing him that he needed to go to the Palmetto and 27th Ave because of an accident. (TR Vol. 3; 21-23;135) He proceeded north to assist Trooper Avalos. (TR Vol. 3; 22-23)

Both Troopers arrived at the scene around 4:16 A.M. and secured the area (TR Vol. 3; 23, 25) Fire rescue was already on the scene and advised the troopers that both the driver and passenger in the car were deceased. (TR Vol. 3; 16,25, 177, 179, 184; Vol. 2, 17, 21-22, 30-32, 81)

Trooper Gonzalez testified from his notes that the lights from the overhead light poles were functional and the lighting at the scene adequate and good. (TR Vol. 3, 32) He found pieces of the triangle reflectors, placed by the semi driver Banegas, east of the impact site (to the rear of the trailer) and approximately 100 feet, before impact and he noted the rear of the tractor-trailer appeared to have been illuminated by its hazzard warning lights. (Vol. 3: 37, 40, 42, 122, 126)

The homicide investigator, testified that the roadway was dry and visibility was approximately seven miles at the time of the accident. (Vol. 3; 99 100, 102, 118) The area had overhead lights, which were on and the speed limit in that area was 55 mph. (TR Vol. 3; 121) The tractor trailer was 96 inches in width and weighed several tons. (TR Vol. 3; 121) It had at least one flashing light on and

reflectors had been placed in the rear of the tractor before the accident. (TR Vol. 3; 130)

Suzanne was driving a small Honda Civic. (TR Vol. 3; 123) She left no skid marks at the scene, the absence of which meant the Civic had not applied brakes nor taken any evasive action, before impact. (TR Vol. 3, 128) The Honda not only went under the trailer, it pushed its' load approximately five feet before it stopped. (TR Vol 3; 133-134) The truck was carrying a heavy piece of equipment. (TR Vol. 1; 75) The triangle reflectors had been run over by the Honda prior to impact. (TR Vol. 3, 131, 134)

The Honda driver should have observed the stalled tractor- trailer at least 570 feet before reaching the stalled truck when the Honda was at the crest of the hill to the rear of he truck. (TR Vol. 3; 208-210, 219) It should have taken Ms. Leeds' vehicle, assuming she had been driving the appropriate 55 miles per hour, seven seconds to travel that distance. (TR Vol. 3, 215-216)

At trial, accident reconstructions expert, Ken Bynum, testified that based on the evidence, the cause of the accident were Daniel Banegas and Suzanne Leeds, the driver of the Honda. (Vol. 3; 260-262) Suzanne Leeds would have had opportunities before she ran into the truck to have seen that the truck was stationary and avoid it. (TR Vol. 3; 262) This was additionally evidenced by the fact Mr.

Pedrero testified that numerous other vehicles had been able to see the truck and avoid the stalled vehicle. (TR Vol 3; 262) The Court refused to let anyone talk about the fact Ms. Leeds had cocaine in her system. (T 51-52)

At trial the Court reconsidered a prior ruling which had granted FHP's right to use of a video animation in conjunction with the testimony of Ken Bynum to show that the driver of the Honda had ample time to avoid the collision if she was traveling the speed limit at the time and was paying attention to the roadway ahead of her that night and denied the State the right to use such evidence.(R 914-915; TR Vol ; 110-112, 115-129) The purpose of the animation was to show that going at the lawful speed Ms. Leeds had ample time to avoid the collision. (TR Vol.2; 120) The Plaintiff's objections dealt with the lighting and the presentation of the scene. (TR Vol. 2, 120-122)

The matter ended in a verdict against FHP in excess of eight million dollars for each plaintiff.

SUMMARY OF ARGUMENT

FHP had no duty to the Plaintiff's deceased daughter to prevent her from being involved in a traffic accident other than the duty owed to the general public. The duty owed at the time of the accident to the Plaintiff was not greater than the duty owed to the public at large for which there has never been a waiver of

sovereign immunity unless there was a special relationship between the injured party and the governmental agency. No such relationship existed in this case.

The common law does not require an individual to be responsible for the conduct of others with whom they have no relationship and no statutory duty exists, to this effect.

The Third District correctly analyzed the situation and determined that without a special duty being owed to the Plaintiff a verdict should have been given to FHP.

ARGUMENT

I.

THE FHP WAS ENTITLED TO A DIRECTED VERDICT ON THE ISSUE OF LIABILITY SINCE THE ONLY DUTY OWED TO THE PLAINTIFFS WAS THE SAME DUTY OWED TO THE GENERAL PUBLIC AT LARGE

This cause is before this Court for review because the Third District Court of Appeal had determined that the Plaintiff had failed to show that a special duty was owed to his decedent daughter, however, in so holding the Third District acknowledged the instant case was factually similar to the Cook and Hoover, decisions, although procedurally they were distinguishable. Therefore, the Third

District noted a conflict and the Plaintiff filed his request for discretionary review. The procedural difference is clear. The Cook and Hoover decisions were based upon appellate review of granted motions to dismiss with prejudice. The instant case was tried and all the evidence was before the court. In neither Cook nor Hoover did the District Court actually analyze the duty issues. The Court simply held there were sufficient allegations of duty when taken as true for the purposes of a motion to dismiss.

In his Brief the Plaintiff contends that the decision of the Third District should be reversed because the acts of FHP were all operational level activities, which create a duty of care regardless of whether there is a special duty owed to the Plaintiff . In short the Plaintiffs are arguing that the acts of FHP were category IV functions as set forth in the case of Trianon Park Condominium Association, Inc., v. City of Hialeah 468 So.2d 912 (Fla. 1985) Therefore, the Plaintiffs conclude that because the acts of FHP were category IV functions liability attaches. FHP would respectfully submit that the Plaintiffs argument is misplaced and that the decision of the District Court of Appeal was correct.

In order for the Plaintiffs to hold FHP responsible for the automobile accident that killed their daughter it was incumbent upon the Plaintiffs to establish that a duty was owed to their daughter that was a separate duty apart from that duty that was

owed to the public at large. Everton v. Willard, 468 So.2d 936 (Fla. 1985) This duty may be established either by showing that there was a common law duty or that there was a statutory duty imposed upon the agency by the law makers and in the event that no such duties lie then by establishing that there was the special relationship that had been created between the Plaintiffs' decedent and FHP. Trianon: Everton [2]

In the instant case there was no common law duty and there was no statutory duty. Therefore, if any duty were owed to the Plaintiffs' decedent it would have had to have been a special duty. However, no such duty existed.

The Plaintiffs attempt to overcome their failure to prove a special relationship in various ways. One way is by claiming that FHP's acts were not discretionary. Another way in which they try to alleviate this special duty requirement is by trying to establish that the internal operations manual of FHP created a statutory duty. Yet, another way is to claim that FHP was the owner of the highway, and, therefore, it owed the traditional landowners duties. It is respectfully submitted that the only way in which the Plaintiffs could have carried their burden was to show that a special duty existed between Suzanne and FHP at the time of the crash and because they

[2] The existence of a duty is of course a matter of law for the Court to decide. Trianon; McCain v. Florida Power Corp., 593 So.2d 500 (Fla. 1992)

could not do so they were not entitled to recover from FHP.

This Court has consistently stated that §768.28 Fla. Stat. does not create new duties of care so in interpreting the duty question the courts are required to look only to the common law or the statutory law that has been passed as previously stated. Kaisner v. Kolb, 543 So.2d 732 (Fla. 1989) Furthermore, it is the well-established law of this state that in order for there to be governmental tort liability, **in instances where the plaintiff is injured as a result of the negligence of another there must be a special duty of care owed to the individual who has been injured as versus the duty owed to the public at large.** Trianon; Everton; Modlin v. City of Miami Beach, 201 So.2d 70 (Fla. 1967); Vann v. Department of Corrections, 662 So.2d 339 (Fla. 1995).

It is the common law that no duty is imposed upon an individual to act for the protection of others irrespective of the gravity of the danger to which the other is subjected and the insignificance of the trouble, effort, or expense of giving him the aid or protection. *Restatement (Second) of Torts§ 314* and *comment c thereto.* Likewise, the common law provides that a person is not required to prevent harm to a claimant from the misconduct of third persons. § *315 Restatement (Second) of Torts*. Hence, at common law there was clearly no duty owed to the Plaintiffs for the injury sustained by their daughter in the instant case because there would have

been not duty to come to Suzanne's aid nor was there any duty to protect her from any harm that would result from the misconduct of a third person. In this case the harm that would be caused to her by Banegas' violation of the traffic laws. The Plaintiff, however, would ask this court to create a new duty and impose liability on FHP and, hence, the tax payers. The Plaintiffs ask this Court to impose this duty even though there is absolutely no proof that the collision would have been avoided had a trooper been dispatched to the scene of the accident when the phone call from Pedrero came into the communications center and regardless of the fact there was no proof presented by the Plaintiff that established that had FHP done so the accident would not have occurred.[3]

The Plaintiffs argue that a law enforcement unit is liable without a special duty being owed to the injured party, if the action is not discretionary. They have misapprehended the law. This Court reiterated its language in Everton in the Vann case wherein at 938 it is stated as follows:

> **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**

[3] No expert testified that had a trooper gone to the scene this accident would have been avoided. The only such evidence was a speculation on the part of the Plaintiff that only one out of a million times would an accident occur if a blue and white had been at the scene, while there was evidence a trooper being there does not always prevent an accident. (TR Vol. 3; 48)

in liability.

It is important to note that Vann involved the death of an individual who had been murdered by an escaped convict. If ever there were a situation where there was no discretion, it would be under the facts in Vann and yet this Court determined that there would be no liability even though the Corrections Department had failed to keep the convict in its custody. Hence, under the Plaintiffs theory of this case the result in Vann should have been different. Surely, there was no discretion or judgmental decision to make in order to keep the convict in custody. The Department's obligations were clear. Yet, this Court recognized that there was no duty that was owed to Mrs. Vann.

In their Brief the Plaintiffs rely upon the case of Hartley v. Floyd, 512 So.2d 1022 (Fla. 1st D.C.A. 1987), which this Court refused to consider and argues that the denial of a finding that sovereign immunity did not apply in the instant case was consistent therewith. The Plaintiffs are in error. In Hartley, the Plaintiff established a special duty was owed to Mrs. Hartley. The District Court pointed out that the deputy sheriff advised the window of the deceased that they would check the boat ramp and also advised her later that they had checked the ramp and that her husband's truck was not there, all of which was untrue. The District Court determined the sheriff owed a duty to Mrs. Floyd not to lie to her about checking

the boat ramp because that prevented her from starting a search for her husband and the fishing party he had been with until it was too late to save Mr. Floyd. Mr. Floyd's truck was apparently still at the dock.

Clearly there was a special relationship that existed between Mrs. Floyd and the sheriff when the sheriff agreed to check, causing her not to do so because she relied upon his promise to do so to her detriment. In the instant case we have no such promise or reliance to Suzanne. The only duty that was owed to her was a general duty owed to the general public. The Plaintiffs attempt to claim otherwise, however, by claiming that because Officer Cruz had indicated to Mr. Pedrero that he would send someone out to the scene that was a sufficient special relationship between FHP and Suzanne, lest the relationship was between Pedrero and FHP, not with any detrimental reliance by Suzanne. The act of going to the scene is discretionary. See Kaisner vs. Kolb 543 So.2d. 732 (Fla. 1989). Whether there were or were not available officers, therefore, [4] is not supportive of Plaintiffs' position because the Plaintiffs are asking this Court to impose liability for all law enforcement cases declaring that there was a duty to protect all motorists.

There has never been, in law, an obligation imposed on government to enforce regulations or statutes designed to promote public convenience, the general

[4] The theory espoused by the Plaintiffs.

prosperity, public welfare, or those designed to promote public safety or health and legislative enactments for the benefit of the general public do not automatically create independent duty to either an individual citizen or a specific class of citizens. Trianon, supra.; *Everton;* Burnsed v. Seaboard Coastline Railroad Company, 290 So.2 13 (Fla. 1974) This is why this Court still recognizes that governmental liability is largely confined to situations where there is some special relationship created by the plaintiff and the government . See Vann; Trianon, supra.

A special relationship may be illustrated where the police accept a responsibility to protect a particular person who has assisted them in an arrest or prosecution of criminal defendants and the individual is in danger due to that assistance. In such a case, a special duty to use reasonable care in the prosecution of the individual may arise. Everton, 938

This Court held in Everton at page 938 that:

> **a law enforcement officer's duty to protect citizens is a general duty owed to the public as a whole and the victim of a criminal offense, which might have been prevented through reasonable law enforcement action does not establish a common law duty of care to the individual citizen resulting in tort liability absent a special relationship.**

This Court went on to discuss that the majority of the jurisdictions have adopted this policy, which is not surprising given the fact that the common law did not

impose a duty upon an individual to protect one from harm that might be caused by the misconduct of another. § 315 Restatement. Plaintiffs in this case overlook the fact that what is really at issue is the failure to protect through reasonable law enforcement.

In Wong vs. City of Miami 237 So.3d 132 (Fla. 1970) this Court held that the strategy and the tactics of whom to deploy and when to deploy the police powers is the inherent right of the sovereign and hence the sovereign must be left to be free to choose the tactics deemed appropriate without worry over possible allegations of negligence. An instance where deployment may prevent harm and yet this Court recognized that the police powers may not be interfered with by finding responsibility for injury. The Plaintiffs, however, wish to make the failure to deploy a unit to the scene to protect a citizen who was like any other citizen actionable and claim strategy and tactics were not at issue. The right to send a trooper or not must not be interfered with because it is clearly an inherent police power left to the discretion of FHP and trying to carve out exceptions would cripple the ability of FHP to run free of worry about what is going to happen if I do this as versus that. There would be no rational basis to carve out an exception albeit the Plaintiffs have suffered a great loss.

In support of their position, the Plaintiffs argue that the internal policies and

procedures should be deemed formulating a duty which otherwise does not exist in law. They argue that FHP had a common law duty and its internal policies imposed upon FHP a duty to warn of a latent hazard of which it had knowledge. At no time has there ever been a duty imposed upon law enforcement to warn of a latent danger as if law enforcement were an owner of land. Plaintiffs' argument is simply misplaced. Plaintiffs argue, however, that this is exactly the duty imposed upon FHP, a duty to warn of a latent danger. However, just in case this Court does not believe there is a duty to warn of a latent danger the Plaintiffs fall back on a theory that there was a statutorily imposed duty by virtue of the internal operating procedures of FHP.

In support of their statutorily imposed duty, the Plaintiffs rely upon the Hoover case for the proposition that internal policies may create a duty or standard of care. Hoover does not stand for such a proposition. The District Court made no ruling with regard to whether the internal procedures did or did not create such a duty. No analysis was made at all in this regard in Hoover. The only analysis the District Court made was that until proven otherwise the complaint sufficiently alleged facts to overcome a motion to dismiss. What the Court said was that they agreed there was no common law duty to remove the abandoned vehicle, which had caused the accident. However, because there were allegations of a duty raised by

county rules and the rules of the sheriff the complaint should not be dismissed. They relied upon their decision in Cook, wherein the Court stated that because there were no policies before it on the motion they could not determine whether there was an obligation imposed upon the sheriff to relay information. No determination was made concerning whether internal policies did or did not create a duty.

It appears there are no Florida cases on point regarding the force and effect of internal agency protocols, procedures or employee manuals and whether they should be construed to create any duties owed to others. The Third District looked to other jurisdictions for this proposition. See page 9 of their decision below. It is respectfully submitted that although there is no case on point in Florida the other jurisdictions are in accord with Florida law in that only the Florida legislature has the exclusive authority to determine the extent to which any Department may adopt rules which would have the force and effect of law. See Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1978)

It is axiomatic, therefore, that fundamental and primary policy decisions shall be made by the legislature. Askew, supra. Moreover, in order to be deemed a rule which is operative and binding the power to promulgate said rule must be defined from some statutory base and such a rule may not enlarge, any provision of any Florida statutes. Department of Health and Rehabilitative Services v. Florida

Psychiatric Soc., Inc, 382 So.2d 1280 (Fla. 1st D.C.A. 1980); Seitz v. DuVal School Board, 366 So.2d 119 (Fla. 1st D.C.A. 1979); Witner v. Department of Business Regulation, Division of Pari-Mutuel Wagering, 662 So.2d 1299 (Fla. 4th D.C.A. 1995) Additionally, although an agency may be afforded discretion in issuing orders pursuant to broadly based statutory objectives (such as internal operating manuals for employees) orders may not be employed to prescribe substantive standards of general applicability for which the Administrative Procedures Act would require rules. See Department of Revenue v. Vanjaria Enterprises Inc., 675 So.2d 252 (Fla. 5th D.C.A. 1996)

A rule must be promulgated in accordance with §120.54 (1987) A rule is defined in § 120.52(16) Fla. Stat. (1987) A rule is:

> 'A statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure or practice requirements of an agency and includes any form which imposes any requirement.' An unpromulgated rule constitutes an invalid exercise of delegated legislative authority and is, therefore, unenforceable. (Emphasis in quote is the court underlying is ours)

Vanjaria at 255

Thus, in order to make the internal operating procedures valid and enforceable and, hence, a basis for formulating policy that would create a duty it was incumbent upon FHP to go through the procedures contained in Chapter 120

for rulemaking otherwise there would be no legal effect. There was no testimony in this case to establish that this procedure was followed in the promulgation of the policy and obviously it was not as they are not contained in the Administrative Code. Hence, they are not law and can not create a duty owed to the public because they were not legislatively or quasi- legislatively promulgated. More importantly they could not be deemed as having waived sovereign immunity since only the legislature may do that. Hess v. Metropolitan Dade County, 467 So.2d 297 (Fla. 1985)

No independent duty could have been created by the adoption of an employees manual and that is exactly what the Plaintiffs are seeking to do. FHP would ask this Court to adopt the holding of the Third District in this regard since under Florida law the manual does not carry the force and effect of law and since other jurisdictions recognize that internal operating procedures do not carry the force and effect of law as was stated by the District Court below.

In further support of their position that the internal rules should be deemed as forming a duty the Plaintiffs rely upon City of Pinellas Park vs. Brown, 604 So.2d. 1222 (Fla., 1992). In Brown, however, this Court's determination did not rely upon the internal procedures of the police regarding a chase nor did the injuries arise out of the misconduct of a third person perpetrator. In Brown, the actual injury was

caused when the police chased a suspect through an intersection and the plaintiffs were injured. This Court determined that the direct involvement of the police placed the plaintiffs in a zone of risk, which the police had created by their affirmative acts of the chase. Therefore, a special duty was owed to those people who were in harms way to protect them not from the misconduct of others but from themselves. In the instant case the affirmative acts of FHP did not place the Plaintiffs' decedent in danger, The danger was the stalled vehicle already on the highway and FHP did not affirmatively act. The injury was caused by the violation of the traffic laws of Banegas. The issue of the internal policies was not really addressed in Brown. Therefore, any reliance thereon for the proposition that the internal rules created a duty is simply misplaced.

In their quest to find a duty Plaintiffs contend that the common law provided that he who undertakes to render services, either gratuitously or for consideration, which he should recognize as necessary for the protection of a third persons or his things is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking. They then argue that the dispatcher was gratuitous in agreeing to send a trooper, therefore, he had to use reasonable care to make sure the trooper was sent. In furtherance of this contention they rely upon the cases of Union Park Memorial Chapel v. Hutt, 670 So.2d 64

(Fla. 1996); Hartley,; Slemp v. City of North Miami, 545 So.2d 256 (Fla. 1989); Cook; Kaufman v. A-1 Bus Lines, Inc, 416 So.2d 863 (Fla. 3rd D.C.A. 1982); and ; Barfield v. Langley, 432 So.2d 748 (Fla. 2nd D.C.A. 1983) These cases, however, do not overcome the fact that the situation involved in the instant case required a special duty to be owed to the Plaintiff because the harm came as a result of the acts of another and not FHP. The Plaintiff then argues that in some of these cases a governmental entity was involved. That is true in Slemp a city was involved. The City, this Court held, could be held liable to property owners of the negligent maintenance of a storm sewer pumping system that it built. This action falls under a category III classification set forth in Trianon, and the injury arises out of the activity of the City in building or maintaining the facility as an owner of property.

In Hartley, a sheriff's department was involved. In Hartley, as already stated there was a special relationship created between the widow and the sheriff. There was a reliance upon the representations made by the sheriff. In Cook, the only other case cited involving a governmental entity, we have no knowledge what would occur since the duty issue was never decided although the court clearly indicated there was generally no duty under the common law or under the statutory law to report a road sign condition or a duty to repair the sign or to warn motorists of said problem and that the sheriff had no right to control or possess the sign as to be deemed to have

created a dangerous condition. The other cases deal with individual citizens and the duties that may be owed to them. However, one thing is true in each of these other cases and that was there was a special owed to the claimant because of the undertaking that occurred for the specific benefit of that person and the reliance by the injured person that there would be a safe undertaking. This is not so in the instant case.

The Plaintiffs, also, seek to impose a common law duty on FHP by claiming that by implication FHP is the owner of the Palmetto and it is black letter law that an owner of property owes a duty to a business invitee to timely warn of latent perils known to defendant which were not known to the invitee or which by the exercise of due care could not have been known by a plaintiff. This argument is simply without merit in this case.

First and foremost there is no way that one could claim that a stalled vehicle in a highway is a latent peril open and obvious would be more like it. Assuming, however, that one would find this to be a latent peril there is still no obligation of FHP to warn as was even recognized by the Second District in Cook . There is no duty of a law enforcement officer to warn Moreover, by law the Palmetto is not owned by FHP. Thirdly, the duty to warn is not applied to law enforcement where there is no duty to protect a specific individual but only the public at large where it

did not create the dangerous condition. . See Wells v. Stephenson, 561 So.2d 1215 (Fla. 2nd D.C.A. 1990) ; Alderman v. Lamar, 493 So.2d. 495 (Fla. 5th D.C.A.1986); Vickers v. Martin County 545 So.2d 974 (Fla. 4th D.C.A. 1989) There is simply no duty by law enforcement to warn of a known danger. The distinction in the cases relied upon by the Plaintiffs, but for the case of State of Nevada v. Eaton[4] 710 P. 2d 1370 (Nev. 1985) is that in those cases the dangerous condition was caused by the entity having ownership or possession of the property. That is not the situation in the instant case.

There are two qualifications to be met, in Florida, before governmental liability attaches when a third party creates the situation and those are that there must be a special duty owed to the claimant that is not owed to the public and the other is that the action that caused the injury must not be judgmental or discretionary. The first hurdle must be met before one even reaches the second. In the instant case there was no special duty owed to this Plaintiff that was not the duty owed to the public at large because a law enforcer's duty is to the public at large. See Vann. Clearly how or when to employ officers is discretionary with the enforcer of the

[4] Eaton appears to be a case where it is not stated other than the fact that he State was sued as the owner whereas an earlier Nevada Supreme Court case arising out of ice on the road dismissed Highway Patrol and only kept DOT as a defendant the Court saying therein that the state and the Department of Highways could be sued but not the Highway Patrol because it did not own the property. See **Andolino** v. State of Nevada, 624 P. 207 (Nev. 1981).

laws. Everton, Trianon, Wong. Therefore, the decision below was a correct decision.

CONCLUSION

It is respectfully submitted that the Third District Court of Appeal was correct in its reversal of the trial court's failure to have granted FHP a directed verdict. There was absolutely no duty owed to the Plaintiff that would escape the police power function of FHP and, therefore, the decision below should be affirmed.

In the event that this Honorable Court were to rule otherwise, it is requested that the case be remanded to the District Court to make a determination on the other issues that were deemed moot by virtue of its decision that there was no duty owed to the Plaintiff other than what was owed to the public at large.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was

furnished to the following by U.S. Mail on this 25th day of February, 2000: DAN CYTRYN, ESQ., 8100 N. University Dr., Suite 202, Tamarac, Fla. 33321 and JAY LEVY, ESQ., 2 Datran Center, Suite 1701, 9130 South Dadeland Blvd., Miami, Fla. 33156.

Respectfully submitted,

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