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. **INITIAL BRIEF OF PETITIONERS**

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

Respondent.

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I

Certificate of Size and Style of Type

Petitioners certify that the instant brief utilizes 14 point Time New Roman.

II

Preliminary Statement

This case is before this court for review of a decision of the District Court of Appeal, Third District, reversing a final judgment rendered upon a jury verdict. Petitioners Michael and Barbara Leeds as Personal Representatives of the Estate of Suzanne Leeds, Plaintiffs and Appellees below, shall be referred to jointly as "The

Leeds" and individually by their first names. Steven Pollock as Personal Representative of the Estate of Elissa Pollock, Plaintiff and Appellee below and Petitioner in *Pollock v. Florida Department of Highway Patrol*, Case No. 1999-8, which is consolidated with this case, shall be referred to as "Pollock". Appellant Florida Highway Patrol, Defendant and Appellant below, shall be referred to as "FHP". The Decedent Suzanne Leeds shall be referred to as "Suzanne". The Decedent Elissa Pollock, shall be referred to as "Elissa". The Record on Appeal shall be referred to by the letter "R". The transcript of trial shall be referred to by the letters "Tr". The Roman Numeral following the letters "Tr" shall represent the volume of the trial transcript in which the reference appears.[1] The number following the Roman Numeral shall represent the page in the specific volume in which the reference appears.

III
Statement of the Case

The instant lawsuit is a wrongful death action arising from the tragic death of Suzanne and Elissa who were involved in a fatal automobile accident at 3:53 A.M. on September 5, 1993. The accident occurred when a Honda in which Suzanne was

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[1] Volume I of the trial transcript taken on July 27, 1998 constitutes Volume VIII of the Record on Appeal. Volume II of the trial transcript taken on July 28, 1998 constitutes Volume IX of the Record on Appeal. Volume III of the trial transcript taken on July 29, 1998 constitutes Volume X of the Record on Appeal. Volume IV of the trial transcript taken on July 30, 1998, constitutes Volume XII of the Record on Appeal. Volume V of the trial transcript taken on July 31, 1998, constitutes Volume XIII of the Record on Appeal.

driving and Elissa was the passenger, crashed in the back of an unlit tractor-trailer stalled in the right lane of State Road 826 just west of 27th avenue.

The applicable pleadings in this cause are The Leeds second amended complaint and FHP's answer thereto (R. 768-780, 790-795). The Leeds alleged that FHP owed Suzanne a duty, *inter alia*, warn motorist of dangerous conditions of and on the roadway; to timely respond to calls and reports of dangerous conditions, to conduct operations in accordance with internal operating procedures and manuals, timely respond to calls from the public and reports of dangerous conditions, and control and direct the movement of traffic on state highways (R. 777-778). The Leeds alleged that FHP Communication Policy 12.04.03 indicated that reports of incidents shall immedi-ately be dispatched to an appropriate trooper (R. 777).

FHP answered the Second Amended Complaint denying the material allegations thereof. By way of affirmative defense, FHP contended that the claim was barred by sovereign immunity as it involved a judgmental or planning level function (R. 193 ¶16). FHP also contended that there was no common law duty owed to individual citizens for the enforcement of police power functions and therefore there could be no liability of the FHP with regard to the automobile accident (R. 193 ¶16). FHP did not raise any defense to the effect that the failure of FHP to comply with its internal policies and procedures did not create a duty owed to Plaintiffs.

At the close of Plaintiffs' case, FHP moved for directed verdict (Tr. II-129-131). FHP maintained there was no evidence of a special relationship between either Suzanne or Elissa and FHP to establish the existence of a duty owed to them by FHP (Tr. II-129-130). FHP maintained that the representations made by Duty Officer Cruz to Pedrero could not create a special duty to Suzanne or Elissa (Tr. II-130). The only duty owed by FHP was to timely dispatch an officer, respond to the notification, and remove the disabled vehicle, which duty was owed to the public in general and therefore not actionable by Plaintiffs or Pollack (Tr. II-131). The trial court recognized that the purpose of the FHP was for crash prevention (Tr. II-136). FHP did not maintain in its motion for directed verdict that no duty arose from FHP's failure to comply with its own internal policies and procedures (Tr. II-129-131). To the contrary, FHP urged that the duty created was owed to public at large and not the individual Plaintiffs (Tr. II-130-131). The trial court reserved ruling on the motion for directed verdict (Tr. II-138). The trial court later denied the motion at the close of all the evidence (Tr. IV-87-88).

The jury returned a verdict which found the negligence of FHP and the driver of the tractor-trailer were equally responsible for the accident (Tr. V-40-41). The jury found that Suzanne was not guilty of any negligence (Tr. V-41). Steven Pollock was awarded damages for past mental pain and suffering of $2,491,666.00 and future

mental pain and suffering of $6,453,704.00 (Tr. V-41). Michael Leeds was awarded damages for past mental pain and suffering of $835,209.00 and future mental pain and suffering of $2,151,990.00 (Tr. V-42). Barbara Leeds was awarded past mental pain and suffering of $1,656,460.00 and future mental pain and suffering of $4,290,651.00 (Tr. V-42). The trial court entered final judgment in favor of Barbara Leeds in the amount of $2,975,000.00 and for Michael Leeds in the amount of $1,500,000.00 (R. 1277-1278).

FHP's motion for new trial was denied (R. 1279-1281). The trial court noted in the order denying the motion for new trial that FHP stipulated at trial that it was negligent (R. 1280). The trial court also noted that there was a duty owed to Plaintiffs when the dispatcher affirmatively indicated that the FHP would be sent immediately to the scene of the disabled tractor-trailer (R. 1280).

From the final judgment and denial of the post-trial motions FHP appealed to the District Court of Appeal, Third District. On November 10, 1999, the District Court of Appeal rendered its decision reversing the final judgment of the trial court. The District Court concluded that the Plaintiff's claim was barred by sovereign immunity. The Third District held:

> The FHP argues on this appeal, among other things, that the trial court erred in failing to direct a verdict in its favor

> where, as a matter of law, it did not owe the decedents any duty greater than the duty owed to the general public to protect them. See generally Trianon Park Condo. Assoc., Inc. v. City of Hialeah, 468 So.2d 912, 914-915 (Fla. 1985).... Thus, FHP claims that save the circumstances where the police's duty is deemed operational, or where a special duty has been established between the police and the victim, there is no duty of care to an individual citizen.... We agree with the FHP that the state has no sovereign liability as a matter of established law and find the cases relied upon by the appellees to be distinguishable.
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> Slip Opinion at 5-6

The Third District also concluded that the operation of a 911 telephone system creates "a duty owed to the public as a whole and not to an individual party who may subsequently be injured by the act of a traffic offender," relying on *Laskey v. Martin County Sheriff's Department*, 708 So.2d 1013 (Fla. 4DCA), *rev. granted* 718 So.2d 169 (Fla. 1998). Slip Opinion at 10-11. The District Court concluded that FHP's "actions or inactions were not operational in nature and that no special duty was owed to the decedents so as to constitute a waiver of sovereign immunity." Slip Opinion at 11. The Third District certified conflict between its decision and *Hoover v. Polk County Sheriff's Department*, 611 So.2d 1331 (Fla. 2DCA 1993), and *Cook v. Sheriff of Collier County*, 573 So.2d 406 (Fla. 2DCA 1991). Slip Opinion at 11.

On November 24, 1999, Plaintiff invoked this court's discretionary jurisdiction

based upon the conflict certified by the District Court. This court has postponed its decision on jurisdiction and ordered that briefs be filed.

IV
Statement of the Facts[2]

At approximately 3:00 A.M. Raul Pedrero was headed home (Tr. I-69-70). While proceeding westbound on State Road 826, a limited access highway, he encountered a stalled tractor trailer in the right-hand lane on the far side of the twenty seventh avenue bridge, which had no markers, lights, or flares (Tr. I-66-67, 69, 81). Most of the street lighting in the area were out which made it even more difficult to see the tractor trailer (Tr. I-69, 82). Pedrero had to slam on his brakes and get into the left lane to avoid crashing into the rear of the tractor-trailer (Tr. I-69).

Pedrero got off the Palmetto at 37th Avenue, went to a gas station dialed 911 and spoke to Metro-Dade (Tr. I-70). He called 911 because it was an emergency (Tr. I-70, 79, 81). Metro-Dade transferred the call to FHP (Tr. I-71). Pedrero advised FHP of the problem with the stalled truck which had no lights on and no warning signs (Tr. I-71, 77-78). He told the dispatcher that he almost hit the truck (Tr. I-77). The dispatcher told Pedrero that he would "send a unit to check it out".[3] Pedrero then

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[2] The Leeds will only discuss those facts which are material to the issues raised on appeal by FHP.

[3] The 911 tape was played for the jury (Tr. I-71).

went back to 27th Avenue and sat in a parking lot waiting for FHP to show up (Tr. I-72). He waited for twenty or twenty-five (20 or 25) minutes (Tr. I-73). In that period of time he observed many vehicles having to change lanes because of the truck (Tr. I-76). When FHP did not show up after twenty five minutes, Pedrero went home (Tr. I-73, 76).

Paul Dixon is employed by FHP as a highway safety specialist (Tr. I-98). On the day of the accident he worked in the communications center at Troop E of the FHP (Tr. I-99). Subordinate to Dixon were duty officers who answered the telephone, radio, and 911 calls transferred from another agency (Tr. I-104). If the duty officer received a report of a vehicle crash it should be dispatched to the first person available (Tr. I-108-109). On September 5, 1993, there was an existing policy that any call was supposed to be documented and assigned to a trooper (Tr. I-106). If the duty officer did not dispatch a trooper in response to the call, that is contrary to the written policies of FHP (Tr. I-125).

Robert Bostic was working as an FHP dispatcher in Troop E on September 5,

1993 (Bostic p. 12).[4] Bostic was working the north end console at that time (Bostic p. 13). Duty Officer Cruz answered the first call about a stalled vehicle on the Palmetto Expressway (Bostic p. 15). Bostic first learned that the call about the stalled vehicle had come into the communications center after he received a call from Metro-Dade concerning a double traffic homicide on State Road 826 involving a tractor-trailer and a vehicle (Bostic p. 17). At that time, Cruz admitted to Bostic that he had gotten a call approximately a half an hour earlier concerning a tractor-trailer broken down on the roadway (Bostic p. 19). No trooper had been sent in response to the call because Cruz failed to enter the call in the computer (Bostic p. 24). If it had been entered, there would be an entry in Bostic's status screen that he had a call pending which there was not (Bostic p. 24). If Bostic had seen such an entry he would have sent a trooper (Bostic p. 24). At no time prior to the report of the double homicide had Cruz informed Bostic about a stalled tractor-trailer on the Palmetto Expressway (Bostic p. 25). Bostic testified that a disabled tractor-trailer in the roadway would rate as a top priority for the assignment of a trooper (Bostic p. 31).

James Brierton is a captain with FHP (Tr. IV-27). In 1993 he was in charge of the communication center for Troop E (Tr. IV-29). Duty Officer Wilfredo Cruz made

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[4] Portions of the videotaped deposition of Robert Bostic, an FHP duty officer who was on duty on the night of the fatal accident, were shown to the jury. This deposition shall be referred to as "Bostic".

a mistake in failing to enter the information that was taken from Mr. Pedrero into the computer (Tr. IV-32-33). As a result a trooper was not sent out (Tr. IV-33, 64). Troopers were available to answer the call if it had gone out (Tr. IV-64).

Crash prevention and investigation are primary functions of FHP troopers (Tr. I-108). A vehicle stalled in the outside lane of the expressway with no lights or flashers would rate fairly high as a life threatening situation (Tr. I-110).

In September of 1993, FHP policy required a trooper to be in touch with the duty officer every thirty (30) minutes (Tr. I-111). The reason that duty officers call the troopers every half an hour is to find out the location of the troopers (Tr. I-129, III-50).

On the night of the fatal accident, Troopers Kurnick and Avalos were concerned with a reckless driver at 2:40 a.m. (Tr. I-113-114). They cleared at 3:40 a.m. (Tr. I-114). Trooper Dunigan left the station at 2:52 a.m. (Tr. I-115). There is no indication in FHP's records as to where he went (Tr. I-115-116). Trooper Nunez was located on Southwest 8th Street, in service, on patrol, and available to answer the call in question (Tr. I-117). Trooper Gonzalez's last location was given at 12:32 a.m. and his next entry is 4:15 a.m. (Tr. I-118). According to the records three and a half (3 ½) hours went by and no one from dispatch spoke to Trooper Gonzalez (Tr. I-118). Trooper Jones, at 1:57 a.m. was at 103rd Street and State road 826 (Tr. I-121).

According to the FHP printout Troopers Kurnick, Avalos, Dunigan, Nunez, Gonzalez, Jones, and possibly Alter were available to respond to Pedrero's 911 call (Tr. I-122-123).

Further recitation of the facts is reserved to the argument portion of this brief to prevent duplication.

V
Points Involved on Appeal

Point I

WHETHER THE FAILURE OF THE FHP DISPATCHER TO INPUT PEDRERO'S INFORMATION CONCERNING THE STALLED TRACTOR-TRAILER TOGETHER WITH THE FAILURE TO SEND A TROOPER TO THE SCENE OF THE STALLED TRACTOR-TRAILER INVOLVE AN OPERATIONAL RATHER THAN DISCRETIONARY FUNCTION WHICH DOES NOT IMPACT THE SPECIAL DUTY DOCTRINE?

Point II

WHETHER FHP OWED SUZANNE A DUTY EXISTENT UNDER THE COMMON LAW AND FLORIDA STATUTES?

VI
Summary of the Argument

I

The FHP's failure to dispatch a trooper is an operational function for which sovereign immunity has been waived. The decision was not judgmental. It did not involve an allocation of resources since multiple troopers were available to take the call. Moreover, the dispatcher agreed to send a trooper but simply forgot to enter into the computer so that no trooper was dispatched. Under these circumstances the negligence of FHP in the case at bar related to an operational function for which sovereign immunity has been waived. There is no need to establish a special duty since the FHP's negligence related to an operational function. The final judgment of the trial court should be reinstated by this Court.

II

The evidence in this case established that FHP assumed the obligation to send a trooper to the scene of the disabled tractor-trailer in response to the 911 call by Pedrero. Having assumed the obligation, it had a duty to exercise reasonable care in its performance of the obligation.

A duty is also owed as a result of the State's ownership of the limited access highway where the accident took place and the state's control of the highway through FHP. The evidence established that the State through FHP had notice of the stalled tractor-trailer located in the right lane of a limited access highway with its lights off and with no reflectors or other warnings. FHP had an obligation to warn other motorists

of the hazard posed by the tractor-trailer. This it failed to do. A private citizen would be liable for a failure to warn invitees and business guests of latent which are known to him. Under §768.28, Fla. Stat., the State is also liable for this failure. There is a common law duty owed by the State to Suzanne and The Leeds. The final judgment of the trial court should be reinstated by this Court.

VII
Argument

Point I

THE FAILURE OF THE FHP DISPATCHER TO INPUT PEDRERO'S INFORMATION CONCERNING THE STALLED TRACTOR-TRAILER TOGETHER WITH THE FAILURE TO SEND A TROOPER TO THE SCENE OF THE STALLED TRACTOR-TRAILER INVOLVE AN OPERATIONAL RATHER THAN DISCRETIONARY FUNCTION WHICH DOES NOT IMPACT THE SPECIAL DUTY DOCTRINE

With regard to the waiver of sovereign immunity for operational functions, the need to establish a special duty was abolished by *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla. 1979). There this court indicated:

> Predicating liability upon the "governmental-proprietary" and "special duty-general duty" analyses has drawn severe criticism from numerous courts and commentators. Consequently, we cannot attribute to the legislature the intent to have codified the rules of municipal sovereign immunity through enactment of section 768.28, Florida

> Statutes (1975)....Were it the intent of the legislature merely to make the law of municipal sovereign immunity applicable to the state, its agencies and political subdivisions, there would have been no need to include municipalities within the operation of the statute. Consequently, we concluded that *Modlin* and its ancestry and progeny have no continuing vitality subsequently to the effective date of section 768.28.

Id. at 1016.

In *Everton v. Willard*, 468 So.2d 936, 938 (Fla. 1985), this court indicated that the existence of a special duty was relevant only were the case involved a basic judgmental or discretionary governmental function as opposed to an operational function:

> 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. This discretionary power is considered basic to the police power function of governmental entities and is recognized as critical to a law enforcement officer's ability to carry out his duties. [Citations Omitted]. We recognize that, if a special relationship exists between an individual and a governmental entity, there could be a duty of care owed to the individual. This relationship is illustrated by the situation in which the police accept the responsibility to protect a particular person who has assisted them in the 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 protection of the individual may arise.

In its opinion below, the District Court of Appeal recognized that where the duty is

deemed operational, the special duty doctrine is inapplicable. Slip Opinion at pp. 5-6.[5] For the reasons which follow, the instant case involves an operational rather than a discretionary function of the government. There is no need to establish a special duty in the case at bar.

Initially, there is no question in this cause that FHP was negligent. Counsel for FHP conceded FHP's negligence during his opening statement (Tr. I-52). On the record he could not have taken any other position. Briefly summarized, the facts are that FHP was advised by Pedrero of the problem with the stalled truck with no lights or reflectors in the right westbound lane of State Road 826 (Tr. I-71). This was a high priority call for FHP which is concerned with traffic safety (Bostic 36, Tr. I-110). The dispatcher advised Pedrero that FHP would send a unit to check it out (Tr. I-71). The call was not entered in the computer by the dispatcher and no trooper was ever sent (Tr. IV-32-33, Bostic 24). The failure to dispatch a trooper after receipt of the call concerning the disabled vehicle with the lights out was against the written policies of

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[5] The Third District's decision in *Simpson v. City of Miami*, 700 So.2d 87 (Fla. 3DCA 1997) also has bearing on the instant case. There the court was concerned with the actions of a police officer in failing to secure a domestic violence injunction violator in a police cruiser. The officer released the violator who subsequently murdered the complainant/victim. *Simpson* involved a non judgmental police function since the statute required the arrest of a violator of a domestic violence injunction. The opinion does not discuss the need for a special duty to be owed to the victim in order for there to be actionable negligence. Sovereign immunity is inapplicable to such claims.

FHP (Tr. I-125).[6] Multiple troopers were available to respond if the call had gone out and would have been at the scene of the tractor-trailer long before Suzanne (Tr. I-122-123, IV-64). The Third District in its opinion below noted that "officers were available to answer the call had it gone out." Slip Opinion at 3, ftn. 3. Forty-five (45) minutes later, Suzanne's vehicle proceeding westbound in the outside lane of State Road 826, at the speed limit, crashed into the back of the unmarked, unlit tractor-trailer.[7]

This case does not involve a decision concerning strategy and tactics in the deployment of police powers. *See: Wong v . City of Miami*, 237 So.2d 132 (Fla. 1972)(City is not responsible for injuries that occur during a riot due to the removal of officers). Nor does the instant case involve damage arising from the failure to exercise a discretionary or judgmental function of a police officer. *See: Everton v.*

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[6] FHP Policy 12.03 states:

> All reports of vehicle crashes or incidents received in the communications center shall immediately be dispatched to the appropriate trooper...
>
> No matter how the information is received, a duty officer should learn how to quickly edit given information into the official standards and then broadcast it.

[7] On these facts, the trial court denied the motion for summary judgment, motion for directed verdict, and motion for new trial finding a duty was owed by FHP to Suzanne and Elissa.

Willard, supra.(Judgmental decisions made by police officers in enforcing the law are not subject to tort liability); *Ellmer v. City of St. Petersburg,* 378 So.2d 825 (Fla. 2DCA 1979)(Failure to provide adequate police protection). What this case does involve is the failure of FHP to comply with its common law duty and its internal policies to warn of a latent hazard of which it had knowledge by sending a trooper in response to the call.[8] This negligence resulted in the tragic accident which took the lives of Suzanne and Elissa. The order should be affirmed.

The denial of the defense of sovereign immunity under the circumstances of the instant case is consistent with Florida precedent. In *Hartley v. Floyd*, 512 So.2d 1022 (Fla. 1DCA), *rev. den.* 518 So.2d 1275 (Fla. 1987), when the plaintiff's husband failed to come from a fishing trip, the plaintiff called the Levy County Sheriff's Department. The Department promised that someone would go to the boat ramp to see if the husband had returned. No one did so. On these facts the First District concluded that sovereign immunity was not a defense to the plaintiff's negligence claim against the sheriff:

> The decision whether to comply with Mrs. Floyd's request that the sheriff's office determine if her husband's truck and trailer were still at the Cedar Key boat ramp was initially a

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[8] Under Florida Law, internal policies and procedures are relevant in defining a deviation from the appropriate standard of care. *Steinberg v. Lomanick*, 531 So.2d 199 (Fla. 3DCA), *cert. den.* 539 So.2d 436 (Fla. 1989).

> discretionary judgmental decision for which there would be no liability if Deputy Legler had decided not to comply with the request and had so advised Mrs. Floyd. However, once he advised her that he would comply with her request to inspect the boat ramp and told her he would contact the Coast Guard, *he had a duty to perform these tasks with reasonable care*. His negligent failure to perform the tasks once he agreed to do so can be a basis for holding the sheriff liable. [Citations Omitted]. Once Deputy Legler agreed to perform the tasks his actions thereafter ceased to be discretionary actions and became merely operational level activities which must be performed with reasonable care and for which there is no sovereign immunity.
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> The sheriff also argues that Everton holds that he is not liable for a citizen's injuries unless he owed the citizen some special and distinct duty beyond the general duty that he owes the public at large. While this is a correct statement of law it is not applicable to the facts in this case where *notwithstanding the absence of any preexisting special duty to Mrs. Floyd,* the sheriff's office agreed to perform certain activities at her request. *Once again, having assumed the undertaking the sheriff's office had an obligation to carry it out with reasonable care*. The sheriff's office negligently failed to perform the assumed responsibilities, and the sheriff can therefore be held liable for his negligence.

Id. at 1024.
(Emphasis Added)

The instant case is substantially similar to *Floyd*. Duty Officer Cruz agree to send out a trooper to the scene of the disabled tractor-trailer but simply failed to enter it into the computer. As a result no trooper was dispatched. There is substantial evidence that

troopers were available to answer the call with regard to the stalled tractor-trailer in ample time to have prevented the accident if only the duty officer had entered the call in the computer and sent the trooper I-122-123, IV-64).[9] As in *Floyd*, having assumed the duty to dispatch a trooper, Cruz had an obligation to exercise reasonable care in carrying out the obligation. His failure to comply with this obligation is negligence which is not subject to the defense of sovereign immunity.

Also instructive is *Hoover v. Polk County Sheriff's Department,* 611 So.2d 1331 (Fla. 2DCA 1993), an appeal from an order dismissing the plaintiff's complaint

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[9] If there had not been troopers available, then this case would involve the question of allocation of the state's scarce resources, which could implicate a discretionary function. In *City of Pinellas Park v. Brown*, 604 So.2d 1222 (Fla. 1992), this court indicated that the defense of sovereign immunity applies when the claim is predicated upon a governmental entity's allocation of its scarce resources:

> To fall within the Kaisner exception, the serious emergency must be one thrust upon the police by lawbreakers or other external forces, that requires them to choose between different risks posed to the public. In other words, no matter what decision police officers make, someone or some group will be put at risk; and officers thus are left no option but to choose between two different evils. It is this choice of risks that is entitled to the protection of sovereign immunity in appropriate cases, because it involves what essentially is a discretionary act of executive decision-making.

Id. at 1227.

for failure to state a cause of action.[10] There a fatal accident occurred involving an abandoned vehicle which was illegally parked. The complaint alleged the sheriff's department knew of the abandoned vehicle for thirteen (13) days yet failed to remove it from the dangerous position as required by the department's policies and Florida Statutes. The Second District reversed the trial court's dismissal of the action:

> Because the appellants have alleged in their complaint that the sheriff and the county were aware of this vehicle, that it constituted a dangerous obstruction to the deceased's use of the roadway, and *that the policies of both the sheriff and the county required removal of the vehicle*, we conclude Cook establishes that the appellants have stated causes of action against the sheriff and the county, and we reverse the dismissal of the complaint.

Id. at 1333.
(Emphasis added)

Despite the lack of an allegation of a special duty owed to the plaintiff, in *Hoover*, the Second District determined that the complaint set forth a claim for actionable negligence against the sheriff's department.

Before the District Court of Appeal, FHP relied upon *Laskey v. Martin County Sheriff's Department*, 708 So.2d 1013 (Fla. 4DCA 1998), which is presently pending before this Court. *Laskey* involved the failure to dispatch a 911 call concerning a

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[10] As noted previously, The Third District certified that its decision in the instant case is in conflict with *Hoover*.

vehicle proceeding the wrong way on an interstate highway. Several minutes after the call, the plaintiff's husband was killed in a head-on collision with the vehicle. While the *Laskey* court determined that the operation of a 911 system is a category two law enforcement function under *Trianon Park Condominium Association, Inc. v. City of Hialeah*, 468 So.2d 912 (Fla. 1985), for which sovereign immunity has not been waived, *Laskey* does not control the case at bar. First, there is no indication in *Laskey*, that the dispatcher agreed to send out a police officer. Second, there is no showing that a police officer was available to respond to the call. Third, there is no showing that an available officer could have arrived in time to prevent the accident. For these reasons, *Laskey* does not control the case at bar, regardless of whatever decision this Court renders on the 911 issue.[11]

Based on the foregoing authorities, the duty officer's obligation to send a trooper in response to Pedrero's call to 911 is an operational rather than a discretionary function. It did not involve the exercise of judgment. It did not involve an allocation of scarce resources since the evidence established ample troopers were available to take the call. The dispatcher agreed to send the trooper but simply failed

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[11] Pollack, argues to this court in his initial brief, that certain aspects of a 911 system are operational and others are planning level, and this case implicates only the operational aspects of a 911 system. If this court deems it necessary to reach this point, Plaintiffs join in Pollack's argument and incorporate by reference into this brief.

to enter the call into the computer. As an operational function, The Leeds did not need to establish the existence of a special duty in order for the state's sovereign immunity to be waived.

Point II

FHP OWED SUZANNE A DUTY EXISTENT UNDER THE COMMON LAW AND FLORIDA STATUTES

The Waiver of Sovereign Immunity Act, §768.28(1), Fla.Stat. establishes the circumstances under the State waives its defense of Sovereign Immunity:

> To the extent set forth in the Act, sovereign immunity is waived and the State is liable "under circumstances which the State or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this State."
>
> §768.28(1), Fla.Stat.

By this point, The Leeds will establish that a private person would be liable in negligence for the type of inaction of which the FHP is guilty of in the case at bar. For this reason, The Leeds contend that there is no sovereign immunity defense to FHP's negligent omission in failing to send a trooper to the scene of the disabled tractor-trailer after receiving notice of the tractor-trailer.

A

The District Court bottomed its argument as to the lack of any duty owed by

FHP to Suzanne on the fact that there could be no liability as a result of FHP's failure to comply with its own internal non-discretionary rules and policies requiring it to dispatch a trooper to the area where the tractor-trailer was stalled.[12] Slip opinion at 9. In support of its decision, the District Court cited *Wanzer v. District of Columbia*, 580 A.2d 127 (D.C.App. 1989). In *Wanzer*, suit was brought against the District of Columbia for breach of a duty to provide ambulance service due to the failure to train or supervise the EMS dispatcher. The appeals court affirmed the dismissal of plaintiff's complaint because plaintiff could not establish the existence of a special duty special duty of care beyond the general duty owed to the public at large. Contrary to the facts of the case at bar, the dispatcher in *Wanzer* never agreed to send an ambulance when called by plaintiff's decedent who complained of a headache. The appeals court held that the EMS procedures and protocols were insufficient to create

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[12] The only issue raised by FHP with regard to the defense of sovereign immunity at the trial level and before the District Court of Appeal was that there was no special duty owed by FHP to Suzanne and for this reason sovereign immunity was not waived with regard to the instant claim. This was the position of the FHP in its Motion for Directed Verdict (Tr. II-129-131), in its Motion for Judgment Notwithstanding the Verdict and for New Trial (R. 959-971) and in its briefs filed before the District Court of Appeal. At oral argument, the District Court of Appeal raised the issue of whether FHP could be liable to the Plaintiff for a breach of its internal procedures. In other words, the Third District went beyond the issues raised *and briefed* by the parties. *The Third District completely overlooked FHP's admission that it owed a duty to timely dispatch an officer and remove the vehicle* (Tr. II-131).

a special duty to a protected class. As established in point I of this brief, in the case at bar there was no need to establish a special duty because the function which the dispatcher failed to perform was operational in nature. *Wanzer* does not control.

The District Court's decision on the effect of an internal policy is in direct conflict with *Hoover v. Polk County Sheriff's Department, supra.* at 1333, where the Second District held:

> Because the appellants have alleged in their complaint that the sheriff and the county were aware of this vehicle, that it constituted a dangerous obstruction to the deceased's use of the roadway, *and that the policies of both the sheriff and the county required removal of the vehicle*, we concluded Cook [v. Sheriff of Collier County, 573 So.2d 406 (Fla. 2DCA 1991] establishes that the appellants have stated causes of action against the sheriff and the county, and we reverse the dismissal of the complaint.

(Emphasis Added)

The holding in *Hoover* is that a duty can be based on an internal policy of the sheriff. The District Court of Appeal held below that a duty cannot be based on an internal policy of a governmental entity. The District Court of Appeal, distinguished *Hoover* because "the second district reversed the granting of a motion to dismiss without making a determination as to whether there was a duty owed to plaintiff that would allow for recover." Slip Opinion at 8. The Third District overlooked that the existence of a duty is a question of law for the court. *McCain v. Florida Power Corp.*, 593

So.2d 500 (Fla. 1992). In other words, if an internal policy cannot support the existence of a duty, than the complaint in *Hoover* did not allege a duty. For this reason, *Hoover* is in direct conflict with the opinion of the Third District in the case at bar. This court has jurisdiction over the matter.[13]

This Court had occasion to consider the relationship between an internal policy of a governmental entity and a duty existent to a third party in *City of Pinellas Park v. Brown*, 604 So.2d 1222 (Fla. 1992). There the Pinellas County Sheriff's Department and the City of Pinellas Park each had a written general policy requiring the discontinuance of "caravan type" police pursuits. The complaint alleged the police pursuit which led to the plaintiff decedent's death violated the written policies. In finding the existence of a duty owed by the various governmental entities to the decedent, this Court noted:

> Moreover, this conduct cannot be honestly characterized either as "policy" or planning," because it was contrary to both. See Department of Transportation v. Neilson, 419 So.2d 1071 1077-1078 (Fla. 1982). In fact, the plaintiffs

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[13] In *Jollie v. State*, 405 So.2d 418 (Fla. 1981), this court held that it had conflict jurisdiction with regard to a per curiam affirmance with a case citation, where the cited case is pending before this court for review. In the case at bar, the District Court below also substantially relied upon *Laskey v. Martin County*, *supra*.. As noted previously in this brief, this court accepted jurisdiction in *Laskey* and the case has been orally argued and is pending for decision. Therefore, based upon the reasoning contained in *Jollie*, this court also has conflict jurisdiction over the case at bar.

> have alleged that each of the police agencies *had adopted a policy to the contrary*. Accordingly, the actions of the police are not entitled to sovereign immunity.
>
> *Id.* at 1226.
> (Emphasis Added)

This Court's opinion in *City of Pinellas Park* strongly suggests that a governmental entity's internal policy can form the basis of a duty in a negligence action. For this reason, the decision rendered below is in conflict with this Court's decision in *City of Pinellas Park v. Brown, supra.*. This Court should consider to follow its decision in *City of Pinellas Park* with regard to the relationship of a governmental entity's internal policies and the existence of a duty.

B

The District Court of Appeal, Third District in its decision found that evidence of an internal violation of a state agency's policies and procedures was insufficient to establish a duty owed by the agency and therefore no duty was owed by FHP to Suzanne. That the District Court below addressed this issue is curious since FHP always conceded the existence of a duty to respond to the call and send a trooper, but argued below that it was a general duty which was not actionable by The Leeds (Tr. II-131).[14] In concluding that FHP owed Suzanne no duty, the District Court of Appeal

[14] The Leeds will establish that the duty owed by the FHP arises from the common law and the FHP's statutory authority.

overlooked that if this cause involved a non-governmental entity there clearly would be liability for a negligent failure to exercise reasonable care, even if the obligation undertaken by Duty Officer Cruz was considered gratuitous in nature. In other words, once Cruz agreed to send the trooper, he had to utilize reasonable care in performing this promise. The Florida Supreme Court in *Union Park Memorial Chapel v. Hutt*, 670 So.2d 64 (Fla. 1996) recognized Restatement (Second) of Torts §324A is the law of this state. §324A states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person 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...., if a) his failure to exercise reasonable care increases the risk of such harm.

This Court has applied this principle to government entities. *Slemp v. City of North Miami*, 545 So.2d 256 (Fla. 1989); *See also: Hartley v. Floyd*, *Supra*. ;[15] *Cook v. Sheriff of Collier County*, 573 So.2d 406 (Fla. 1DCA 1991). Stated differently an action undertaken from the benefit of another must be performed in accordance with the duty to exercise due care. *Kaufman v. A-1 Bus Lines, Inc.*, 416 So.2d 863 (Fla. 3DCA 1982); *Barfield v. Langley*, 432 So.2d 748 (Fla. 2DCA 1983). By failing to

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[15] The discussion of *Hartley* in Point I of this brief is equally applicable to this point.

enter the information into its computer and in failing to dispatch the trooper to the scene of the disabled tractor-trailer, FHP did not act in accordance with its obligation to use due care and is liable in damages for such failure.

The second common law duty implicated by the case at bar arises from the State of Florida's ownership of State Road 826 and §321.05, Fla. Stat. which sets forth the functions of FHP. It is black letter law the owner of land has the duty to give business visitors or employee invitees timely warning of latent perils "known to the defendant which were not known by plaintiff or which by the exercise of due care could not have been known by plaintiff." *Hickory House, Inc. v. Brown*, 77 So.2d 249 (Fla. 1955). A land owner has the duty of a land owner to warn its invitees of latent perils which are known or should be known to the owner but which are not known to the invitee or which by the existence of due care would not be known by him. *Rice v. Florida Power and Light Company*, 363 So.2d 834 (Fla. 3DCA 1978), *cert. den.*, 373 So.2d 460 (Fla. 1979). Applying this rule to the instant case, the tractor trailer disabled in the right lane of State Road 826 constituted a latent peril because of the lack of lighting on the vehicle, the lack of lighting in the area (Tr. I-69,82), and its positioning on the downside of the Westbound lanes of the 27th avenue bridge thereby obscuring the tractor-trailer from all drivers proceeding westbound (Tr. I-156, 161-162). The State through FHP had knowledge of the tractor trailer (Tr. I-81). Under

these circumstances the FHP had a duty to warn all users of the highway of the hazard.[16] *See:* §321.05, Fla. Stat. ("The...Florida Highway Patrol shall...patrol the state highways and regulate, control and direct the movement of traffic thereon"). Based these facts, The Leeds contend that FHP would liable if it had been a private person.

The Leeds are not urging a concept foreign to governmental entities upon this court. It has long been the law of this State that a municipality has a duty to a person using its streets to keep those streets in a reasonably safe condition and to warn persons using the streets of known dangerous conditions. *Town of Palm Beach v. Hovey*, 115 Fla. 644, 155 So. 808 (1934); *Trumpe v. City of Coral Springs*, 326 So.2d 192 (Fla. 4DCA), *cert. den.* 336 So.2d 549 (Fla. 1976).[17] A county has been

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[16] The evidence established that if a trooper had been present at the scene prior to the accident, the trooper would have parked his cruiser with its lights flashing at the crest of the bridge to warn other drivers.

[17] Also instructive is *Lowman v. City of Mesa*, 125 Ariz. 590, 611 P.2d 943 (Ct.App. 1980). There the City of Mesa, Arizona failed to remove a car which was parked on a city roadway. Eighteen (18) hours later an automobile driven by the plaintiff struck the unattended vehicle. The court held:

> Any duty of the police by virtue of the Code to remove such a vehicle is one owed to the public generally and the failure of the police to remove a vehicle in violation of that duty would not ordinarily give rise to liability to a member of the public injured by the failure to remove it. <u>However, the City has a common law duty owed to all users of City streets to keep them reasonably safe for travel, and to warn</u>

recognized to have the same duty. *Welsh v. Metropolitan Dade County*, 366 So.2d 518 (Fla. 3DCA), *cert. den.* 378 So.2d 347 (Fla. 1979). Logically, the State should have the same duty with regard to its roads and/or property. *See: Bailey Drainage District v. Stark*, 526 So.2d 678 (Fla. 1988). There is no reason to differentiate between a municipality and a county and their roads on the one hand and the State and its roads on the other. Therefore, the State should be liable to warn individuals using its streets and highways of known hazards and dangerous conditions. *See: State Department of Transportation v. Nielson*, 419 So.2d 1071 (Fla. 1982)(Failure to warn of a known danger is omission at operational level of government). There is substantial evidence in this case which was accepted by the jury that the State failed to meet this obligation.

Support for The Leeds' position is drawn from the decision of the Nevada Supreme Court in *State v. Eaton*, 101 Nev. 705, 710 P.2d 1370 (1985).[18] In *Eaton*,

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> the users of any actual dangers known to the City or which should have been known to the City in the exercise of reasonable care.
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> 125 Ariz. 593, 611 P.2d 946.
> (Emphasis Added)

[18] *Eaton* also involved an extension under Nevada law concerning the negligent infliction of emotional distress. That portion of the *Eaton* holding was overruled by the subsequent Nevada Supreme Court case of *State Department of Transportation v. Hill*, 114 Nev. 810, 963 P.2d 480 (1998). *Hill* does not effect the portion of *Eaton* relied upon by The Leeds in the case at bar.

an severe icing condition caused a traffic accident on an interstate highway to which a state trooper responded. The trooper arrived on the scene and informed the highway patrol dispatcher that the freeway was solid ice and requested sanding trucks. The trooper failed to place cones or flares to warn other oncoming motorists of the icy conditions. The Eaton vehicle was approaching the site of the accident when Mr. Eaton lost control of the vehicle due to the ice and was involved in a serious accident which caused the death of their minor child. On these facts the Nevada Supreme Court held:

> Appellant contends that the district court erred by admitting evidence on the failure of State employees, the highway patrol troopers, to place flares or otherwise warn motorists of the black ice. The State's pretrial motion in limine to exclude such evidence was denied. The State argues that the placement of warning flares is a discretionary act. Therefore, the State suggests it is immune from liability for the failure of its employees to place warning flares. NRS 41.032(2). We disagree. This Court has held:
>
> > The State has a duty to exercise due care to keep its highways reasonably safe for the traveling public. Inherent in this duty of care is the alternative duty to either remedy a known hazardous condition on its highways or give appropriate warning of its presence.
>
> [Citation omitted].
>
> *State v. Kallio*, 92 Nev. 665, 667, 557 P.2d 705, 706 (1976). In the case at bar, the State through its highway

> patrol knew of the black ice on the western slope of Golconda Summit one (1) hour before the *Eton* accident occurred. Furthermore, a highway patrol trooper was on the scene twenty (20) minutes prior to the accident but did nothing to warn oncoming motorists of the hazard. The icy road was not sanded until after the fatal crash. Under these facts, the State could be held liable for failure to warn motorists of this known hazard.
>
> 101 Nev. 708-709, 710 P.2d 1373.
> (Emphasis Added)

A state can be liable for the failure of the highway patrol to warn motorists of an existing hazard. This is precisely what happened here. The final judgment rendered by the trial court in favor of The Leeds should be reinstated.

VIII
Conclusion

Based upon the foregoing cases, statutes, and arguments, Petitioners Michael and Barbara Leeds respectfully request that this Court reverse the decision of the District Court of Appeal, Third District, and remand this case with instructions that the final judgment entered by the trial court be reinstated.

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IX
Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing information was mailed to Sheridan Weissenborn, Esquire, PAPY, WEISSENBORN, POOLE & VRASPIR, 201 Alhambra Circle, Suite 502, Coral Gables, Florida, 33134, and to Dan Cytryn, Esquire, LAW OFFICES OF DAN CYTRYN, P.A., 8100 North University Drive, Suite 202, Tamarac, Florida, 33321, this 7th day of January, 2000.

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Attorney for Petitioners.