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. **REPLY 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 Times New Roman.

II

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

The District Court below certified conflict between a decision in this cause and that in *Cook v. Sheriff of Collier County*, 573 So.2d 406 (Fla. 2DCA 1991) and *Hoover v. Polk County Sheriff's Department*, 611 So.2d 1331 (Fla. 2DCA 1993). In *Hoover*, the Court in discussing the sheriff's obligations, noted that the sheriff had an internal policy which required the removal of the vehicle. FHP maintains that there a procedural distinction between *Cook, Hoover*, and the case at bar militates against a finding of conflict. According to FHP, since *Cook* and *Hoover* were appeals from orders granting motions to dismiss, the issue of whether a duty was owed was not before the Court. This is simply incorrect. It is settled that a motion to dismiss admits all well pleaded facts as true as well as reasonable inferences arising from those facts. *Salit v. Ruden, McClosky, Smith, Schuster, and Russell, P.A.*, 742 So.2d 381 (Fla. 4DCA 1999). However the existence of the duty is not a question of fact but a question of law. *Garcia v. Lifemark Hospitals of Florida*, 24 FLW D2387 (Fla. 3DCA 1999). As such the existence of a duty may be tested by a motion to dismiss. *Id.* Consequently, since the appellate courts in both *Cook* and *Hoover* reversed the trial court's dismissal, the courts had to determine as a matter of law that the complaint

alleged an *existent* sufficient duty. For this reason, FHP's attempt to distinguish these cases must fail. *Cook* and *Hoover* are in direct conflict with the case at bar.

Nowhere in our initial brief have the Leeds attempted to define FHP's failure to dispatch a trooper to the scene of the disabled tractor trailer under one of the categories set forth by this Court in *Trianon Park Condominium Association, Inc. v. City of Hialeah*, 468 So.2d 912 (Fla. 1985). FHP nevertheless contends that Plaintiffs position is that the inaction of FHP is within Category IV as defined by *Trianon Park*. The Leeds have made no such contention before this court. Rather, the Leeds position is that the inaction of FHP plainly falls within the rubric of an operational function. As an operational function, FHP is liable when it negligently performs this function.

FHP argues that unless FHP owed Plaintiffs a duty separate and apart from that owed to the public at large, there can be liability for FHP's failure in this case to send a trooper to the scene of the disabled tractor trailer, notwithstanding the dispatcher's promise to do so. In support of this proposition FHP relies on *Everton v. Willard*, 468 So.2d 936 (Fla. 1985). However, *Everton* is distinguishable from this cause because *Everton* involved the judgmental decision of whether or not to make an arrest. This Court specifically noted in *Everton*:

> 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 a law.

Id. at 938.

The present case is easily distinguished from *Everton* because the case at bar has nothing to do with the exercise of a judgmental power, such as an arrest. Rather the instant case is only concerned with the non-discretionary obligation to follow through on the dispatcher's statement and send a trooper to the scene of the disabled tractor trailer. It should be noted that there is no dispute that troopers were available to answer the call if the dispatcher had entered it into the computer. Since the obligation does not impinge upon a judgmental function, *Everton* does not control.

FHP's basic theory that a state agency can only be liable to a plaintiff where a special duty exists is flawed. In support of this contention, FHP relies upon *Vann v. Department of Corrections*, 662 So.2d 339 (Fla. 1995) in which this Court adopted the decision of the District Court of Appeal in *State Department of Corrections v. Vann*, 650 So.2d 658 (Fla. 1DCA 1995). As the District Court makes clear in its opinion, there has never been any obligation on the part of the state for injuries resulting from the criminal acts of escapees. See: *Department of Health and Rehabilitative Services v. Whaley*, 574 So.2d 100 (Fla. 1991). *Vann* does not control the instant case because in Vann there was no agreement by the State Agency to

specifically undertake the obligation sued upon. In the case at bar, the evidence established FHP assumed a specific responsibility when it agreed to send the trooper to the bridge on State Road 826. Once the FHP accepted this responsibility, its action created a specific obligation on the part of FHP. Its failure to comply with this specific obligation is violation of an operational duty, plan and simple. *Vann* is factually distinct from the case at bar. For this reason, *Vann* is inapposite to the case at bar. The order of the Third District Court of Appeal should be reversed and the jury's verdict reinstated.

FHP cites to this Court's decision in *Kaisner v. Kolb*, 543 So.2d 732 (Fla. 1989) as authority for the proposition that the dispatch of a trooper is a discretionary rather than an operational function. Answer Brief at 20. *Kaisner* does not support FHP's contention. In *Kaisner*, this Court discussed an law enforcement officer's civil liability and held that when a person is either in the custody of or detained by the police, the police owe a common law duty of care. *Id*. at 734. *Kaisner* does not discuss the liability of a law enforcement agency when it undertakes to do something but fails to do so through negligence. For this reason, *Kaisner* does not control the case at bar.

Finally, the FHP attempts to distinguish *City of Pinellas Park v. Brown*, 604 So.2d 1222 (Fla. 1992), as creating a special duty on the part of the law enforcement

to plaintiffs who were placed in a "zone of risk" by the affirmative actions of the police in chasing the vehicle. Answer Brief at 26-27. However, there is no language in *Brown* discussing a special duty. Moreover, if indeed *Brown* rests upon a special duty, a highly dubious proposition, then it can be argued in the case at bar that Suzanne Leeds was placed in the zone of risk by the failure of the FHP dispatcher to send a trooper after he had promised to do so. Contrary to the argument of FHP, there was credible evidence, accepted by the jury, that a trooper's vehicle, at the top of the bridge, with its blue lights flashing, would have warned Suzanne of and enabled her to avoid the hazard posed by the unlit disabled tractor trailer. The decision of the Third District should be reversed.

Point II

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

To the extent not addressed in point I of this reply brief, The Leeds rely upon the argument contained in their initial brief on this point.

III
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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IV
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 3rd day of April, 2000.

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Attorney for Petitioners.