IN THE SUPREME COURT OF FLORIDA

CASE NO: 1999-8

STEVEN POLLOCK, as Personal Representative of the Estate of ELISSA POLLOCK, deceased,

Petitioner,

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

By: SHERIDAN WEISSENBORN, FBN 165960 & CHARLES C. PAPY, JR. FBN 061053, OF
PAPY, WEISSENBORN, POOLE & VRASPIR P.A.
SUITE 214, 3001 PONCE DE LEON BLVD.
CORAL GABLES, FLA. 33134
PHONE: (305) 446-5100

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER STATE STATUTES

STATE STATUTES

OTHER AUTHORITIES

INTRODUCTION

The Petitioner, Steven Pollock, as Personal Representative of the Estate of Elissa Pollack , deceased, was a Plaintiff in the trial court and an Appellee in the Third District Court of Appeal. In this Answer Brief of Respondent we will refer to the Petitioner as Plaintiff or by name.

The Respondent, State of Florida, Department of Highway Patrol, was the State Agency who was a Defendant in the trial court and the Appellant in the Third District Court of Appeal. In this Answer Brief of the Respondent 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. The Respondent certifies that 14 Point New Times font was used.

STATEMENT OF CASE

The Plaintiff's daughter, Elissa and her friend Suzanne Leeds were killed in an automobile accident that occurred around 4:00 A.M. on September 5, 1993,when the car that Ms. Leeds was driving struck and went under the rear of a disabled tractor-trailer, which was stopped in the right-hand lane of the Palmetto expressway in Dade County. The driver, Suzanne Leeds, and the passenger, Elissa Pollack, were returning from a night out on Miami Beach when their vehicle struck the rear of the disabled truck without either applying the brakes or swerving to avoid the disabled truck. The operator of the vehicle had a clear view of the disabled truck. At the time of the accident the road way was illuminated by street lights and the disabled trailer hazard warning lights were on and the warning triangle reflectors had been placed at least 100 feet behind the rear of the trailer. The driver of the car had a clear unobstructed view of the disabled tractor trailer for a distance of at least 570 feet as the tractor trailer was located a distance from the crest of the hill on the path traveled by the Plaintiffs. Although the street was well lit from street lights and the hazard lights were on the stalled tractor -trailer, plus the triangle reflectors were at least 100 feet to the rear of the disabled semi and the Plaintiffs should have had a clear view of the disabled truck for a distance of 570 feet before impact, there is no indication that the Plaintiffs made any attempt to avoid 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, 215-216, 262; D 4,7,33-34, 39, 48)

As a result of this accident 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 and Suzanne Leeds, the driver of the vehicle, in the Circuit Court of the Eleventh Judicial Circuit R 1-9) In 1995, the family of Suzanne Leeds likewise filed a wrongful death complaint against FHP for damages for the death of their daughter. (R722-731) They, also, named Flash Import & Export, Gabino Ramos and Daniel Banegas as defendants. (R722-731)

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) However, before the case was submitted to the jury, Ms. Leeds was dropped as a party by the Plaintiff. (TR Vol. 4; 3)

At trial, during opening statement , Plaintiff's counsel, over objection, was allowed to argue and then during trial produce testimony from the Plaintiff and a relative that the Plaintiff's wife died after the death of his daughter because, in Plaintiff's opinion she had given up the will to live and she, therefore, failed to continue

to take her necessary treatments for ovarian cancer, which she had before the accident. (TR Vol.1; 34; Vol.2; 50, 60, 67, 102-103) In addition the trial court allowed the Plaintiff over objection to introduce the internal operating procedures of FHP to be able to provide the jury with an instruction as follows:

> Florida Highway Patrol's Policy and Procedures Manual has been introduced into evidence in this case and may be considered by you in determining the standard of care. However, you are advised that such an internal rule does not itself fix the legal standard of care in this case.
> The legal standard is as I am instructing you. The Court instructs you as a matter of law and in accordance with Florida Law that the Defendant Florida Highway Patrol was responsible for patrolling the state highways and to regulate, control and direct the movement of traffic thereon. (TR Vol 1; 106; Vol.2; 6, vol. 4; 147, Vol 5:9; Exhibit 40)

During closing argument, the trial court allowed the Plaintiff's counsel to argue not only that the mother died because of the accident, but, also, 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 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)

During the trial, however the trial court did not allow FHP the right to introduce evidence that Ms. Leeds' autopsies revealed that she had cocaine metabolites in her system. (TR Vol.1; 16) 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 of duty but the trial court denied this request. (TR Vol. 2; 129) The case ended with a large verdict against FHP. The verdict for the Plaintiff having been returned in the sum of $8,945,370 and the verdict for the 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 **without argument** on October 22, 1998. (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 among other issues (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. (A)

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] Plaintiffs disagree that any conflict exists.

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 DUTY SINCE THERE WAS NO SPECIAL DUTY OWED TO POLLOCK AS VERSUS THE DUTY THAT WAS OWED TO THE 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 truck, which stalled on the Palmetto Expressway in a westbound lane of traffic approximately 59 feet west of 27th Avenue and somewhere between one thousand fee to 570 feet down the road from a crescent or hill in the roadway. ((D 26; TR Vol 3; 48; D4, 24; TR Vol 1; 67- 69, 74, 143-144, 146, 165; Vol 3; 102-103; 208-210; 219)

Mr. Banegas indicated that his vehicle simply stopped and he was unable to get it started. (D4) He put on the emergency flashers (hazard warning lights on the tractor and trailer) 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 the same time as the truck became disabled, at approximately 3:00 A.M., a Mr. Raul Pedrero was also traveling the Palmetto Expressway westbound. (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 slammed on his brakes and moved into the left-hand lane to miss hitting the tractor trailer. (TR Vol. 1; 69) It took him seconds to perceive the truck and take evasive action. (TR Vol.1; 78) He

did not observe the triangle reflectors behind the tractor trailer as he approached the stalled vehicle as they were probably placed after he went by the scene. (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. Some of the vehicles applied their brakes when approaching the stalled vehicle.(TR Vol. 1; 72, 74, 82, 95) Mr. Pedrero saw no accidents while he was there. (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)

Several FHP troopers were on Krome Avenue (many miles to the west of the place where the accident occurred) on this morning because troopers had been dispatched to that location regarding motorcycle racing , and even though some had not actually been dispatched there, they did go there to assist the Trooper, who had received the dispatch. (TR Vol. 3; 17-18) Routinely, when a dispatch such as motorcycle races goes out, it is overheard by all troopers and the troopers 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's driver Benages, 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 lights and the hazzard warning lights were on at the time of the impact. (TR Vol. 3; 32, 34, 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)

The Plaintiff driver and passenger were operating a small Honda Civic. (TR Vol. 3; 123) There were absolutely 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 went under the trailer pushing the tractor trailer and its load approximately five feet before it stopped. (TR Vol 3; 133-134) 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 tuck 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 a accident reconstruction 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)

A year prior to the beginning of the trial, the Plaintiff filed a Motion in Limine to Exclude Evidence of the Toxicology results at autopsy of the driver of the Honda and the testimony of the State's Toxicologist that the Plaintiff driver had cocaine and cocaine derivatives in her system, at the time of her death. (TR. 5-10) At the hearing on this Motion FHP explained that an expert would testify that the use of the cocaine by Suzanne Leeds, the driver of the Honda, played a part in the cause of the accident. (T 51-52)

The Trial Court heard the proffered testimony of Dr. Lee Hearns, the medical examiner (T 23, 24, 25, 26, 27, 47-50, 60, 61, 62,) and denied the Plaintiff's Motion. in Limine to the offered evidence of cocaine use by the Ms. Leads. The Trial Court ruled that the evidence should be admissible because it went to the heart of what occurred. (T Vol. 1, 73-76)

On the morning of trial, however, Counsel for Plaintiff, raised the cocaine issue again. (TR Vol. 1, 13-16) The Court, in a hurry to get on with the trial, reversed its ruling and precluded the cocaine evidence from being used by the State stating that the probative value was far outweighed by the prejudice. (TR Vol. 1, 16)

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 because there was no special duty between FHP and the decedent's daughter at the time of the accident. The duty owed at the time of the accident was a 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 does not require an individual to be responsible for the conduct

of others with whom they have no relationship and no statutory duty 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.

FHP WAS ENTITLED TO A DIRECTED VERDICT ON THE ISSUE OF DUTY SINCE THERE WAS NO SPECIAL DUTY OWED TO ELISSA POLLOCK AS VERSUS THE DUTY THAT WOULD BE OWED TO THE 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 purposes of a motion to dismiss.[2]

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 support of this contention the Plaintiff argues that the special duty requirement for operational level activities was abolished in this Court's decision in Commercial Carrier v. Indian River County, 371 So.2d 1010(Fla. 1979). He also argues then that FHP activities should fall either into a category III, capital improvement and property control functions, or a category IV classification, providing professional and educational and general services, as set forth by this Court in the case of Trianon Park Condominium Association, Inc., v. City of Hialeah 468 So.2d 912 (Fla. 1985) The Plaintiff's theory regarding a category III classification is that FHP was in essence the operator of and had control of the roadways and highways of the state and, therefore, was charged with the duty of an owner of premises. In this instance to maintain the Palmetto Expressway in a reasonably safe condition and warn of known dangers and correct any dangerous conditions.

[2] In both Cook and Hoover there were allegations premised on a statute and an ordinance and in Hoover the Plaintiff, also, claimed that the Sheriff's internal policies were violated.

Plaintiff's theory regarding a category IV classification is simply that FHP was providing general services for the health and welfare of the citizens.

The State and FHP respectfully submit that the Plaintiff does not understand the law as set forth by this Court in the area of sovereign immunity. In addition the Plaintiff attempts to readdress the issues before this Court in the case of Laskey v. Martin County Sheriff's Department, case no: 92, 931 in Points IV and V of his Brief, which issues relate to what this Court should determine with regard to the 911 system and the imposition of tort liability of the sovereign if an operator of the system is negligent. It should be noted that in the instant case the 911 system did what it was supposed to do and relayed the call to FHP. Therefore, no actions of the 911 system were involved in the trial of this case and clearly there was no negligence of the 911 system that proximately caused the Plaintiff's damages. It is respectfully submitted that for all of the reasons herein below contained the decision of the Third District Court of Appeal should be affirmed.

First and foremost, in any tort action against a governmental agency the first question that must be answered is whether a duty of care exists, which question is a law question for the court to decide. Trianon; McCain v. Florida Power Corp., 593 So.2d 500 (Fla. 1992) If no duty exists at common law then one may perhaps be created by a statute or by a special relationship between the parties. Trianon; Everton

v. Willard, 468 So.2d 936 (Fla. 1985) Moreover, the law is clear 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. Kaisner v. Kolb, 543 So.2d 732 (Fla. 1989)

Secondly, 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) In the instant case the injuries were caused to this Plaintiff's decedent not by the affirmative acts of FHP, but rather, by the acts of Ms. Leeds and possibility the acts of Mr. Banegas (the acts of others). Hence, it was incumbent upon the Plaintiff to establish by the evidence that some special duty was owed to Plaintiff's daughter at the time of her death by the State Agency. No evidence was introduced at the Trial of any duty owed to plaintiff different from the duty owed to the general public, therefore the District Court correctly determined that Judgement should be entered for FHP on the claims of the driver and passenger in the Honda. See Trianon, Everton, Modlin, Vann V. Department of Corrections, 662 So.2d 339 (Fla. 1995).

The general common law held that there was no duty 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 general common law provided that there was no duty imposed upon an individual 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 Plaintiff for the injury sustained in the instant case. The Plaintiff, however, would ask this court to create a new duty and impose liability on FHP because it failed to prevent harm to the Plaintiff's daughter, which harm had been actually created by virtue of Mr. Banegas's tractor trailer having broken down and Ms. Leeds having failed to avoid a collision with that vehicle by claiming that it was FHP's duty to make sure a trooper went to the scene 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] What the Plaintiff is asking is that this Court impose upon the taxpayers liability for every accident that occurs on a highway because FHP does not go to the accident immediately and clear the highway; make the taxpayers the insurers of all who are injured on the highway even if not by an FHP vehicle. The

[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.

intent of § 768.28 Fla. Stat. was never to insure the public from harm created by others nor to impose new duties on law enforcement.

There has never been, in law, an obligation imposed on government to enforce regulations or statutes designed to promote public convenience, the general 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 and 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) Hence, governmental liability, as often addressed by this Court, is still largely confined to situations where there is some special relationship created by the plaintiff and the government . See Vann; Trianon, supra.

To overcome the need for having to prove a special relationship the Plaintiff argues that this Court has abolished the special relationship duty in the Commercial, carrier case. This is simply not so. In this Court's recent pronouncement in Vann, this Court stated at page 938:

> **A government duty to protect its citizens is a general duty to the public as a whole, and where there is only a general duty to protect the public there is no duty of care to an individual citizen which may result in liability.**

Another example of the failure of this Court to have abolished the special

relationship test is the decision in Everton,[4] wherein this Court stated at page 938 "we recognize that, if a special relationship exists between and individual and a governmental entity, there could be a duty of care owed to the individual." A special relationship is illustrated by:

> ... the situation in which 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 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. *id.* at 938. The 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.

In the instant case, while it is obvious that a tragedy occurred on September 5, 1993, there simply was no duty owed to the Plaintiff's decedent to have prevented the

[4] Also decided after the decision in Commercial Carrier

accident from occurring. . There was no special relationship created between the Plaintiff's daughter and FHP and clearly the law provides that there is no duty owed to her to deploy officers to the scene of a broken down truck regardless of the fact that there was a potential danger and regardless of the fact FHP received such a call. See Wong vs. City of Miami 237 So.3d 132 (Fla. 1970)[4] To hold otherwise would be to impose on the taxpayers of the State a liability every time a truck or car breaks down on the highway or every time an accident occurs and there is not enough response time to clear the highway before another accident occurs. This is not the law nor should it be the law that the police are responsible for the failure to prevent an accident occurring on the highway because of knowledge that a situation exists and could result in injury.

The Plaintiff seeks to avoid the special relationship requirement by stating the actions of FHP were a Category III, Trianon classification because FHP is in essence the "operator. . . . .of the roadways and provides general services. The duty of the FHP is not the same as an owner of property as we have no way to prevent bad driving on the behalf of drivers and no way to keep vehicles from being disabled on

---

[4] The strategy and the tactics of whom to deploy and when to deploy the police powers is inherent in the right to exercise those powers and, hence, the sovereign is to be left free to choose the tactics deemed appropriate without worry over possible allegations of negligence. Wong; Everton

the highways.[5]

FHP's duties and obligations clearly fall within a Category II Trianon classification, to wit; enforcement of the laws and public safety.

In arguing that FHP owed a duty to the Plaintiff's decedent because of its control of the highway, Plaintiff relies upon City of Pinellas Park vs. Brown, 604 So.2d. 1222 (Fla., 1992). This case, however, arises not out of the misconduct of a third person perpetrator, but rather from the direct involvement of the police placing all motorists in danger because of the police high speed chase creating the risk as versus only knowing about the risk and not then deploying an officer to the scene. In short, the police because of their affirmative acts, in Brown, owed those who may come in contact with the cars in the chase a special duty not to harm by their own acts whereas in the instant case no such duty existed because there were no affirmative acts undertaken by FHP which put the decedent in danger of harm. The danger of harm was due to the stalled vehicle already in the travel lane of traffic and not placed there by FHP and the inability of Ms. Leeds to avoid the accident although others had been able to do so. There is not nor has there ever been a duty to go to the aid of a person in difficulty or peril but there has been a duty to avoid any affirmative acts which make

[5] "DOT" is the owner and charged with the duties claimed by Plaintiff to be charged to FHP. See Chapter 334 Fla. Stat.;§ 337.29 Fla. Stat.(1993) and § 20.24 Fla. Stat.

a situation worse, which in short means that once one volunteers to take an action then there is a commensurate duty to do so in a reasonable fashion to prevent harm to those who may forseeably be injured from that action. In the instant case, however, FHP did not create that zone of risk and it did not affirmatively come to the aid of another and do so negligently. It's actions require a special relationship with the Plaintiff. Vann.

It is pure speculation that the presence of a trooper would have been able to prevent this accident.

There are two qualifications to be met 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 laws. Everton, Trianon, Wong.

In a further attempt to impose a duty where one does not exist the Plaintiff argues(in Point III) that because § 321.05 Fla. Stat. provides that it is the duty and function of FHP to patrol the state highways and regulate, control, and direct the

movement thereon that this made FHP legally obligated to warn of the stalled vehicle or move it. There was testimony that the vehicle was not operational and there was no evidence produced that a trooper could have moved the vehicle before the accident occurred.

The instant case is not similar to the case of Bailey Drainage Dist. v. Stark 526 So.2d 678 (Fla. 1988) in that the Bailey Court made it clear that where the condition may not be readily apparent to one who could be injured by a dangerous condition known to the government because the government is maintaining the property, the Government may owe a duty to warn. There was always a duty at common law of a property owner to warn of a hidden danger. This is not the situation in the instant case. Bailey does not involve police powers it involves ownership of property(FHP is not the owner) that was improperly maintained. It simply gives no support to the Plaintiff.

In Point V of his Brief the Plaintiff contends that the concept of special relationship only applies to discretionary planning level activities not operational activities and because the relaying of a message is not discretionary but ministerial the Plaintiff had no burden to establish a duty because it was automatic. The problem is that he does not understand that the waiver of sovereign immunity requires a individual person to have a common law or statutory duty to perform a certain function not that

any individual can be held responsible. There must be a duty to act and in the common law there was no corresponding duty. The only duty that the Plaintiff attempts to find to allow him the right to recovery is the duty imposed by the internal operating manuals of FHP. Internal policies and procedures do not have the force and effect of a statute or a regulation and they only provide guidance to the employee and do not mandate a duty to be followed. Schweiker v. Hansen, 450 U.S. 785, 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981); Jacobo v. United States, 853 F.2d 640 (9th Cir. 1988); Swath v. Williams, 174 Ind. App. 369, 367 N.E. 2d 1120(1977); and Mervin v. Magney Construction Co., 416 So.2d 121 (Minn 1987)

The Plaintiff, also, argues that for every wrong there should be a remedy. We know that is not the law as it is only negligence which is the proximate cause of an accident which is actionable. However before negligence can be considered a duty must be owed and the duty must be breached.

But for the waiver of sovereign immunity there would be no remedy for any injury by any branch of the government. More importantly the Plaintiff had a remedy it was to sue the truck driver and Ms. Leeds.

The Plaintiff would finally argue that where the sovereign undertakes to operate a 911 emergency system this is operational and there is a common law duty to perform non-discretionary acts in a reasonably safe manner. That would be all well and good

if there were some real common law duty to provide emergency services to a citizen individually separate and apart from the duty to the citizens as a whole, which there is not. Trianon The mere fact there is such a system does not give rise to liability there must be some obligation imposed in law either common law or statutory that mandates that every call be relayed and there is no such law that requires same. Furthermore, it is not the 911 system and a failure of an operator to relay to the appropriate agency that is involved in this case. The case before the trial court and this court is a situation where the law enforcement agency albeit because of a lack of communication did not address itself to a stalled vehicle on the highway. The simple fact remains that there was no obligation in law for the dispatcher to deploy a trooper because that is clearly a discretionary act of the agency based on manpower and determination of need, which can not be questioned. See Wong,; Everton; Trianon.

It must be conceded by the Plaintiff that even if the call had been dispatched to a trooper there was no obligation for the trooper to go to the scene if something else were deemed more important to him even if same occurred on his way there. It must, further, be conceded by the Plaintiff that assuming the trooper had been sent there is no evidence that the trooper would have been able to prevent the accident. For that matter there is no evidence that had the dispatcher sent a trooper to the scene that the trooper would have gotten to the scene before the accident or that the trooper even if

he were there would have been able to sufficiently warn Ms. Leeds to have caused her to miss either his car or the truck. It is simply illogical to think that where the emergency service entity such as fire departments or law enforcement officers are under no duty to act that they become insurer of the general public and responsible for their injuries because there was a failure of a 911 operator to relay the message, which had it been relayed, would not have caused liability.

In support of his position that the failure of the 911 system to dispatch an officer should be deemed actionable the Plaintiff argues that for every situation where a man undertakes to act he is under an implied legal obligation or duty to do so with reasonable care to the end that the person or property of others may not be injured. The Plaintiff then relies upon the cases of Union Park Memorial Chapel v. Hutt, 670 So.2d 64 (Fla. 1996); Hartley vs. Slemp v. City of North Miami, 545 So.2d 256 (Fla. 1989); State v. Kropff, 491 So.2d 1252 (Fla. 3rd DCA 1986); Barfield v. Langley, 432 So.2d 748 (Fla. 2nd D.C.A. 1983) and Weisseberg v. City of Miami Beach, 383 So.2d 1158 (Fla. 3rd D.C.A. 1980) 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, which was non existent because we are dealing with traditionally police powers that were always in the hands of the government. Moreover, this theory of the plaintiff is only valid where the physical harm was actually caused by the failure to exercise

reasonable care because the volunteer so to speak created the risk of harm or worsened the risk of harm. This is a zone of harm argument, which is not what happened in the instant case. The harm was not created by FHP nor was the risk of harm increased by the acts of FHP nor was the harm suffered in reliance upon the undertaking by the decedents.

The Plaintiff is basically asking the Court to declare that in any instance where an employee of the state makes a mistake the state is responsible for the acts regardless of whether the state's employee created the risk by the negligent act or not. He is, further, asking the Court to put aside traditional law and create a new duty where one never existed before and that is to make the citizens responsible to motorists if the law enforcement people do not immediately take action to clear a highway from an obstruction regardless of the expense or of how many other people may need the same services of the law enforcement agency so that we become involved if we adopt his theory with interfering with the separation of power because clearly a ruling that the police must clear a stalled vehicle or send an officer out to the scene would out of necessity be dictating to the executive branch of government that it must spend more dollars to maintain a sufficient force to make all highways safe at all times. This is not the purpose of § 768.28. Governmental matters are to remain sovereign where appropriate.

How, when and where the police deploy officers should remain inviolate. There can be no other way because the crippling effect that would be imposed on law enforcement if they were to be responsible for every thing that occurs because they did not deploy an officer is too enormous to imagine. The legislature did not intend to make the taxpayers responsible to motorist from the acts of others and themselves or to be the insurers of all citizens for injuries that occur on the highways of the state. Yet, that is exactly what this Plaintiff would ask this court to do. The Plaintiff would ask this court to carve out a new governmental tort for failure to protect from the harm created by others, which would mean that every time a citizen is injured by a criminal that might have been prevented through reasonable law enforcement action that the state is liable for the injury. This would open the citizens up to multifarious claims and would interfere with the ability of the state employees to do their job without inappropriate distractions. No such intent was ever meant by the legislature when it waived sovereign immunity.

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 21st 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,

PAPY, WEISSENBORN, POOLE & VRASPIR, P.A.
Attorneys For Appellant, State of Florida
3001 Ponce De Leon Boulevard, Suite 214
Coral Gables, Fla., 33134
Phone: (305) 446-5100

BY:_____
SHERIDAN K. WEISSENBORN
Fla. Bar No: 165960