IN THE SUPREME COURT
OF FLORIDA

CASE NO.: 1999-8

THIRD DCA CASE NO. 98-02965

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,

Respondents.
_____/

APPLICATION FOR DISCRETIONARY REVIEW OF THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, CERTIFIED TO BE IN CONFLICT WITH TWO OTHER DECISIONS

_____
_____

PETITIONER, STEVEN POLLOCK, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ELISSA POLLOCK, DECEASED'S INITIAL BRIEF ON THE MERITS

_____
_____

BY: Dan Cytryn, Esquire
Florida Bar Number 318558
LAW OFFICES DAN CYTRYN,

P.A.

8100 N. University Drive
Suite 202
Tamarac, Florida 33321
Tel. No.: (954) 724-2000

PREFACE

Respondent, State of Florida Department of Highway Safety and Motor Vehicle Division of Florida Highway Patrol Troop E -- will be referred to as "FHP", "Florida Highway Patrol", or "Respondent", or "Defendant".

Petitioner, Steven Pollock, as Personal Representative of the Estate of Elissa Pollock, will be referred to as "Plaintiff".

Susan Pollock, the decedent's deceased mother, will be referred to as "Susan".

The decedent, Elissa Pollock, will be referred to as "Lisa".

"R" will refer to the page in the record where the reference is located.

The exhibits actually introduced into evidence will be referred to as "Exhibit ____".

The trial transcript will be referred to by volume and page number.

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE

On June 7, 1994, Plaintiff, Steven Pollock, as Personal Representative of the Estate of Elissa Pollock, deceased, filed a complaint in this cause (R. 1-9). On August 30, 1995, Plaintiffs Michael Leeds and Barbara Leeds, as Personal Representatives of the Estate of Suzanne Leeds, deceased, filed a complaint in a separate case, case number 95-17102 (R. 722-731). On November 17, 1995, the trial court granted an order transferring this cause and consolidating it for certain purposes. On March 6, 1997, Plaintiff, Leeds, filed a motion to consolidate both cases for trial (R. 821-824). On April 10, 1997, the trial court entered an order consolidating the cases for trial (R. 834-835). The trial began in this cause on July 23, 1998, with jury selection (R. 972-1242). The jury rendered its verdict on July 31, 1998 (Vol.5 pp. 40-42).

On November 10, 1999, in *State v. Pollock*, --So.2d--, 24 Fla. L. Weekly D2529 (Fla. 3rd DCA November 10, 1999), the Third District Court of Appeal rendered its decision reversing this cause, certifying conflict with two decisions from the Second District Court of Appeal.[1]

---

[1] constitutionality of §768 moot by the appellate court's reversal of the verdict.

STATEMENT OF THE FACTS

In its opening statement in trial, Defendant, Florida Highway Patrol, admitted that they were negligent, and said that the only dispute is "what caused the accident" (TR Vol. I p. 43).

The witness, Raul Pedrero, testified that it was somewhere between 3:00 and 3:12 a.m. when he swerved to avoid hitting the flatbed truck that was stalled on the highway (TR Vol. I p. 70). He stated that he saw that there was a flatbed truck stalled on the highway with no lights, markers, or flares. Since this was an emergency, he pulled off the highway, into a gas station, and immediately telephoned 911 (TR Vol. I pp. 69-70, 74).

Raul Pedrero explained to the dispatcher for Defendant, Florida Highway Patrol, that there was a stalled flatbed truck on the highway with no lights, warning signals, or flares, and that he almost rear-ended the truck (TR Vol. I pp. 77-78). Most of the street lights in the area were out (not working) (TR Vol. I p. 82). After he made the call, Raul Pedrero went back to the scene, but off of the roadway, waiting to see if someone would come. He waited twenty to thirty minutes, and when nobody came, he finally went home (TR Vol. I p. 82).

Paul Dixon, former communications supervisor for FHP, who was a highway safety specialist at the time of trial, explained the 911 procedure to the jury. There was a communication center where FHP received 911 calls (TR Vol. I p. 104). He testified that on the date of the incident, there was a protocol in effect to ensure that if a 911 call came in to FHP, that the call would be dispatched to a trooper (TR Vol. I p. 105). He agreed that crash prevention is part of the Florida Highway Patrol's obligations, and also that of the duty officer who admittedly received the 911 call from Mr. Pedrero (TR Vol. I p. 108).

Officer Dixon admitted that if a vehicle was stalled at 3:00 a.m. on a lane on the Palmetto Expressway with no lights on and no flashers and a call came in saying that somebody had almost struck the vehicle, he would rate that as a "fairly high" emergency situation (TR Vol. I p. 110). Dixon admitted that at the time when the 911 call came in, had it been dispatched, six to seven troopers were available to get to the scene (TR Vol. I p. 122-123, 133). Dixon further admitted that if the duty officer received the call and did not dispatch it, then that was a violation of the Florida Highway Patrol's rules and regulations (TR Vol. I p. 125). Dixon admitted that the Florida Highway Patrol had undertaken the responsibility of handling crash prevention and investigation on this particular Dade County roadway (TR Vol. 1 p. 126).

Robert L. Bostic, a former duty officer for FHP, testified that he was working on the midnight shift on September 5, 1993 (R. 1507-1510). He testified that the three persons working 911 for FHP that morning were Wilfredo Cruz, duty officer Lamar Knight, and himself (R. 1510-1511). He testified that a disabled vehicle on the Palmetto Expressway is something he as an employee of the Florida Highway Patrol would be dealing with (R. 1513). He testified that a disabled flatbed tractor trailer in the roadway at three o'clock in the morning on the Palmetto Expressway with no lights on "would be a top priority, a red incident" for the highway patrol (R. 1529, 1534-1535). He also testified that 911 was "not busy at all" that night (R. 1558). He stated: "We were all sitting around, and it was not busy at the time" (Depo. p. 60).

At the time of this incident, FHP had in effect the FHP Communication Policy/Procedures Manual, Policy 12.04.03 General Information (Exhibit 40), which provided in relevant part procedures which were established to provide crash prevention:

> All reports of vehicle crashes or incidents received in the communications center shall immediately be dispatched to the appropriate trooper. If the reported crash or incident is within a city limit, then it shall be reported to the local police department.
>
> If there is going to be a delay in dispatching a crash or incident report due to manpower shortage, then the

> appropriate FHP supervisor shall be notified. This notification shall be documented on the dispatch card.
>
> 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.

In addition, Rule 12.00.00 entitled Crash Prevention, stated as follows:

> Crash prevention and crash investigation are the primary functions of the Florida Highway Patrol and the duty officer's role in these endeavors are of major importance. Strict adherence to this chapter will enable every officer to handle these responsibilities in an efficient and professional manner.

The relevant Florida statute states as follows:

> 321.05 **Duties, functions, and powers of patrol officers.**-- The members of the Florida Highway Patrol . . . shall perform and exercise throughout the state the following duties, functions, and powers:
> (1) To patrol the state highways and regulate, control, and direct the movement of traffic thereon;

FHP agreed that accident prevention on the state roads such as the Palmetto Expressway was the job of the Florida Highway Patrol (Vol. IV p. 62).

Officer Matthew Boyd, a police officer with Metro-Dade, was the first to arrive on the scene after the collision. He saw only one crushed reflector on the road, which he did not feel was adequate for the situation (TR Vol. I p. 144). He stated that it was FHP's responsibility to patrol that highway (TR Vol. I p. 145). He also explained that

when approaching the scene, he was not able to visualize the crash scene until he got up to the crescent, and that he had to "look down" the hill to see the crash scene (TR Vol. I pp. 154-155).

FHP Trooper Hector Gonzalez testified that although the troopers are supposed to be in contact with dispatch every thirty minutes, he did not call in his position and dispatch did not check on him for four hours that evening (TR Vol. III pp. 50-51).

At trial, Defendant, FHP, called as a witness the homicide investigator for FHP, Corporal Serafino J. Guadagni (TR Vol. III p. 99). He admitted on cross examination that there was a seven to eight foot skid mark that was consistent with having come from the Honda that the girls were in, and consistent with their vehicle attempting to brake (TR Vol. III pp. 161-162, 173-175). He admitted that the driver of the vehicle was traveling at the speed limit of fifty-five miles per hour at the time of the impact (TR Vol. III p. 184). Both deceased girls were wearing their seat belts (TR Vol. III p. 186).

Trooper William Barge, another homicide investigator employed by FHP, was called by FHP at trial (TR Vol. III p. 201). Officer Barge testified that Suzanne Leeds would have had approximately two and one-half to three seconds after seeing the stalled flatbed truck to look to her left to try to get out of the lane, or to lock up on the brakes and try to stop (TR Vol. III pp. 238-241). However, Trooper Barge admitted

that the calculation does not take into consideration the clutter, lights, other distractions, and the fact that just because a driver sees a vehicle on the road at night, does not mean that the driver realizes that the vehicle has stalled (TR Vol. III pp. 237-238). Trooper Barge admitted that the calculation also did not take into consideration the fact that the driver would have had to take the time to look in the mirror to ascertain if the lane to her left was clear to move over to avoid the hazard (TR Vol. III p. 241).

Finally, Trooper Barge testified that although the actual line of sight in daylight and clear conditions is 570 feet, that would not apply at night with a vehicle stalled on the road with "no lighting. That (570 feet) wouldn't be a real figure because they wouldn't be able to see the object. That's correct." (TR Vol. III p. 243). Finally because of the lack of sufficient lighting on the stalled vehicle, he stated that the deceased girls might not have been able to perceive the stalled vehicle in time (TR Vol. III pp. 243-244, 246).

FHP called Captain James Brierton, the district commander who was in charge of the 911 communications center (TR Vol. IV p. 29). He conducted the investigation of this incident, where Florida Highway Patrol Duty Officer Wilfredo Cruz admitted that he erred in not dispatching a trooper to the scene (TR Vol. IV pp. 32-33).

FHP had anywhere between 38 to 41 minutes to respond to the disabled unmarked flatbed truck. Pedrero said that he made the 911 call at about 3:15 a.m. (TR

Vol. I p. 72). FHP contended that the call regarding the crash came in at 3:53 a.m. (TR Vol. I p. 131). Officer Boyd stated that he called in the incident about 4:00 a.m., and it took him about 3-4 minutes to get to the scene, which would place the time of accident at about 3:56 a.m.[2]

Captain Brierton admitted that accident and crash prevention were the job of the Florida Highway Patrol on the Palmetto Expressway (TR Vol. IV p. 62). He admitted that there were several troopers available to respond to the scene that night (TR Vol. IV p. 64).

SUMMARY OF ARGUMENT

The Florida Highway Patrol had the exclusive authority and responsibility pursuant to statute to patrol and control the highway where this crash occurred. The 911 call came in, the duty officer recognized it as an emergency, had sufficient manpower to send somebody out, stated that he was going to send somebody out, and completely forgot to do so. There were specific rules and regulations of the

[2] Officer Boyd testified that he arrived at the scene about 4 minutes from the time that he saw the puff of smoke to the scene (the accid 1 pp. 142, 152-153).

Florida Highway Patrol mandating that he dispatch a trooper to the hazard on the highway. This error is a typical ministerial operational level activity for which the government has no immunity.

This Court has held that a controlling state agency that has knowledge of a dangerous condition on a roadway has either a duty to warn of the dangerous condition, or a duty to make the dangerous condition safe. The Florida Highway Patrol, pursuant to Florida Statute, was the controlling state agency of this highway where this incident occurred. The Florida Highway Patrol neither warned of the dangerous condition nor remedied the dangerous condition, resulting in the deaths of two young women.

When the activity is operational, there is a duty of care owed by the governmental agency to all foreseeable persons injured by the act or omission. The governmental activity involved was a *Trianon* category III or IV level activity. Inputting the call into the computer was a simple ministerial act that the 911 duty officer forgot to do.

There is no special duty requirement for operational level activities (with limited exceptions for escaped prisoner cases). Public policy requires that the public have confidence that when they call 911, that their calls will be handled competently. A holding that 911 operators who negligently forget to dispatch a 911 call are immune

from suit could damage the public confidence in a 911 system and would be contrary to the legislative intent for which the 911 system was developed.

POINT I

ACTS OR OMISSIONS IN OPERATIONAL LEVEL ACTIVITIES CREATE A DUTY OF CARE TO THE PERSON INJURED BY THE ACT OR OMISSION.

In *Commercial Carrier Corporation v. Indian River County*, 371 So.2d 1010, 1015 (Fla. 1979), this Court abolished the special duty requirement for operational level activities:

> [W]e believe it to be circuitous reasoning to conclude that no cause of action exists for a negligent act or omission by an agent of the state or its political subdivisions where the duty breached is said to be owed to the public at large but not to any particular person. This is the "general duty" - "special duty" dichotomy emanating from *Modlin, supra*. By less kind commentators, it has been characterized as a theory which results in a duty to none where there is a duty to all.

This Court in *Commercial Carrier* specifically stated that there are certain things that are just simply not done by private individuals and are only performed by governmental agencies; yet there is liability imposed upon the governmental agencies for these activities. This Court stated that to hold otherwise "would be to essentially emasculate the act [§768.28] and the salutary purpose it was intended to serve." *Ibid* at 1010.

There are some established exceptions to the rule that there is no special duty requirement for operational level activities. In *Burnett v. Department of Corrections*, 666 So.2d 882 (Fla. 1996), and *Vann v. Department of Corrections*, 662 So.2d 339 (Fla. 1995), cited by the Third District Court Of Appeal, this Court reiterated that there was no common law duty to a third person harmed by the criminal acts of an escaped prisoner. However, our case is a far cry from having anything to do with the criminal acts of an escaped prisoner. In fact, our case does not have anything to do with criminal acts *or* an escaped prisoner, but rather involves simply pure negligence.

Trianon Park Condo Assoc., Inc. v. City of Hialeah, 468 So.2d 912 (Fla. 1985) was a policy decision not to make governmental entities potential defendants for every defect in every building that an inspector had missed or decided not to withhold a certificate of occupancy. However, in *Trianon*, this Court specifically stated:

> The enforcement of statutes or regulations is clearly distinguishable from the legal responsibilities owed by the government as the owner and operator of buildings, and *roadways*, or other facilities *under its control* and its responsibilities in providing general or professional services. As previously mentioned, in the latter instances the government has the same duty as that imposed upon private citizens (emphasis added).

Ibid, 468 So.2d at 922.

In essence, a building inspector's negligence in inspecting a building and discovering a defect potentially involves planning level discretionary activities. It would be a virtual quagmire to try to figure out whether a building inspector was negligent in the exercise of his duties. *Trianon* clearly involved a category II activity involving "enforcement of laws and protection of the public safety". *Trianon* at 919.

A. Forgetting To Dispatch A Trooper Is A Category III Or Category IV Activity For Which There Is A Duty Owed To A Person Damaged By That Failure.

Trianon divided the concept of governmental tort activities into four categories:

> (I) legislative, permitting, licensing, and executive officer functions; (II) enforcement of laws and the protection of the public safety; (III) capital improvements and property control operations; and (IV) providing professional, educational, and general services for the health and welfare of the citizens.

Trianon, at 919.

A category III activity occurs "once a governmental entity . . . takes control of property". *Trianon* at 921. FHP had control of State Road 826 insofar as maintaining it with regard to the flow of traffic.[3] In fact, it was their statutory obligation to

[3]Captain Brierton of the Florida Highway Patrol admitted that accident and crash prevention were the job of the Florida Highway Patrol on State Road 826, the Palmetto

maintain, control, and patrol that highway.[4] *Trianon* supports the fact that FHP had "the same common law duty as a private person to properly maintain and operate the property [the highway]". *Ibid*, at 922. Once FHP fails to do so, it becomes liable to the plaintiffs.

Alternatively, or additionally, the activity of FHP can be considered the category IV provision of "general services for the health and welfare of citizens . . . ". *Trianon*, at 921. Forgetting to dispatch "is distinguishable from the discretionary power to enforce compliance with laws passed under the police power of this state". *Trianon*, at 921. For category III and IV activities, "there is a common law duty of care regarding how property is . . . operated and how . . . general services are performed." *Trianon*, at 921.

Further, the answers to at least two questions under the test set forth in *Evangelical United Brethren Church v. State*, 407 Pa.2d 440 (Wa. 1965), adopted by this Court in *Commercial Carrier* for the operational/planning test, are in the negative:

> (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which

[4] See Point III.

> would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

Commercial Carrier, 371 So.2d at 1019.

Both (2) and (3) are clearly answered in the negative, and the answer to question (1) may also be no. It is only if all of the questions are answered in the affirmative that the governmental conduct is deemed to be discretionary and non-tortious. However, in this case, at least two and maybe three of the answers to these questions are "no".

Here, FHP is in essence the "operator . . . of roadways" and provides "general . . . services" *Trianon*, at 922. As stated in the above paragraph in *Trianon*, in such instances "the government has the same duty as that imposed upon private citizens". *Ibid*, 468 at 922. This duty would be owed to all persons who might be the victim(s) of a timely failure to dispatch. See generally, *City of Pinellas Park v. Brown*, 604 So.2d 1222 (Fla. 1992) (liability imposed in negligent hot pursuit chase to persons injured as a result when they are struck by a police car or fleeing vehicle).

Trianon specifically states that the "operator of . . . roadways" "has the same duty as that imposed upon private citizens". *Ibid*. at 922. Therefore, FHP, who was

responsible for controlling the highway, owed a duty to the deceased Plaintiffs to do so with reasonable care.

There is a need to simplify the extent of the analysis required to determine whether a governmental entity is immune from suit. At this time, it is at least a two step process. The first step is determining whether the act in question is a category I, II, III, or IV level activity. After making that determination, "there may be substantial governmental liability under categories III and IV." *Trianon*, at 921. The next step is determining whether the act or omission is discretionary or operational, using the four part Evangelical Brethren test set forth in *Commercial Carrier*. This Court should simplify this entire sovereign immunity doctrine by clearly establishing that if the activity is operational, there is a duty of care owed to all persons injured by the act or omission. This will help alleviate some of the confusion and inconsistencies caused by the vague and unworkable rules of law that have not been consistently construed by the lower courts.

Other than the escaped prisoner cases, and perhaps *Trianon*,[5] both the Respondent, FHP, and the Third District Court Of Appeal have been unable to point to cases where governmental entities have been held by this Court not to owe a duty of care to third persons for their negligently conducted operational activities.

[5]Trianon most likely involved category I and II discretionary le

POINT II

THE FAILURE TO DISPATCH A TROOPER BECAUSE THE DUTY OFFICER FORGOT IS AN OPERATIONAL LEVEL ACTIVITY.

The Third District Court Of Appeal seems to acknowledge that if the failure to dispatch was an operational level activity, there would be a duty of care owed; however it finds that the acts or inactions were not operational level activities:

> Based upon the foregoing we find 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.

State v. Pollock, --So.2d--, 24 Fla. L. Weekly D2529 (Fla. 3rd DCA November 10, 1999). The Third District Court Of Appeal's finding that the failure to dispatch is not an operational level activity is erroneous. The FHP duty officer's inaction was clearly an operational level activity. Even if the *establishment* of a 911 system is a category II activity, numerous aspects of the 911 system activity are category III or IV functions.

The decision whether to dispatch a call may be discretionary, however, once the decision is made to dispatch the call, and the 911 operator simply forgets, that clearly becomes an operational level omission.

For example, if the 911 operator failed to dispatch the call because:

(a) she fell asleep immediately after getting the call, or

(b) she forgot to dispatch the call, or

(c) she did not follow an established internal procedure to immediately dispatch an officer to a vehicle stalled in the middle of a highway with no lights on in the middle of the night, or

(d) she did not contact another police agency to see if they had extra officers available for dispatch even though her internal rules and regulations required her to do so,

those are examples of activities for which a sovereign would not be entitled to sovereign immunity, and which would clearly be operational.

If the call is not dispatched because, for example:

(a) the 911 operator has no officer available, or

(b) the 911 operator decides to dispatch an officer to a more important call,

those decisions are most likely planning level decisions which would be entitled to sovereign immunity, unless, for example, the 911 operator failed to follow operational

procedures that were set forth in either a statute or the sovereign's own rules and regulations.

Laskey v. Martin County Sheriff's Department, 708 So.2d 1013 (Fla. 4th DCA), rev. granted, 718 So.2d 169 (Fla. 1998), is distinguished somewhat from our case. In *Laskey*, the opinion does not reflect why the 911 operator failed to dispatch the 911 call. On the other hand, in our case, the Third District Court Of Appeal opinion reflects that the call was not dispatched because the dispatcher simply forgot to enter the call into the 911 system. The *Pollock* opinion reflects that "the evidence at trial showed that officers were available to answer the call had it gone out" (slip op. p. 3).

The omission was a simple ministerial act, and was an operational level activity. There was nothing discretionary or planning about "dropping the ball" and forgetting to dispatch a 911 call to a trooper.

In *Rupp v. Bryant*, 417 So.2d 658, 665 (Fla. 1982), this Court held that the duty to supervise high school students "is generally ministerial in nature" "because the duty does not involve discretion in the policy making sense . . . ". If supervising high school students is ministerial and "does not involve discretion in the policy making sense", clearly inputting a 911 call into the computer is ministerial and does not involve the planning/discretionary level activity of the dispatcher.

POINT III

THERE HAS ALWAYS BEEN A COMMON LAW DUTY ON THE PART OF A GOVERNMENTAL ENTITY IN POSSESSION *OR CONTROL* OF A ROADWAY TO MAINTAIN IT IN A REASONABLY SAFE CONDITION, TO WARN OF KNOWN DANGERS ON THE ROADWAY, AND TO CORRECT ANY DANGEROUS CONDITIONS.

Section 321.05, Florida Statutes (1992) provides in relevant part:

> §321.05 Duties, functions, and powers of patrol officers.-- The members of the Florida Highway Patrol . . . shall perform and exercise throughout the state the following duties, functions, and powers: (1) To patrol the state highways and regulate, control, and direct the movement of traffic thereon;

Pursuant to statute, FHP had the ultimate responsibility to patrol, control, and regulate the traffic conditions on this highway. No other entity, state or private, had that obligation on this roadway. FHP became aware of the dangerous condition on its roadway by virtue of the 911 call.

In *Bailey Drainage District v. Stark*, 526 So.2d 678, 681 (Fla. 1988), this Court held that where the controlling governmental agency has knowledge of a dangerous

condition on a roadway, whether the governmental agency created it or not, it has a commensurate:

(1) "duty to warn of the danger".[6]

(2) or "make safe the dangerous condition".[7]

In *Bailey*, this Court stated that even though the governmental agency did not create the dangerous condition, because the governmental agency had the responsibility for maintaining the property, it would be liable to any third person for the breach of that duty. Further, in *Department of Transportation v. Nielsen*, 419 So.2d 1071, 1078 (Fla. 1982), this Court stated:

> The failure to so warn of a known danger is, in our view, a negligent omission at the operational level of government and cannot reasonably be argued to be within the judgmental, planning-level sphere. Clearly, this type of failure may serve as the basis for an action against the governmental entity.

Likewise, in our case, even though FHP did not create the dangerous condition on the roadway, they had the sole obligation to patrol and control this highway, and

---

[6] Plaintiff's Third Amended Complaint alleged that FHP had a duty to "warn motorists of dangerous conditions of and on the roadway" (R. 291).

[7] Plaintiff's Third Amended Complaint alleged:
the stalled flatbed becoming a hidden danger or trap,
Defendant's employer forgot to dispatch the vehicle,
asleep after taking the call". (R. 293).

once they knew of the dangerous condition, they had the obligation to either warn of the dangerous condition, or remove it. Because of FHP's negligence, the dangerous condition was not eliminated and no warning was given, and the crash occurred.

POINT IV

PUBLIC POLICY REQUIRES CONFIDENCE IN THE 911 SYSTEM WHICH BEGINS WITH THOSE MAINTAINING THE 911 SYSTEM BEING RESPONSIBLE FOR THEIR NEGLIGENCE.

The 911 system is an essential part of services provided by the government to its taxpayers. The taxpayers have a right to expect that the 911 system will be adequately run and maintained. Public confidence in the 911 system is essential for a reasonable level of comfort in cases of an emergency. Children are taught before they enter grade school that in case of emergency, to "dial 911". At minimum, those governmental agents who neglect their ministerial duties while operating a 911 system should be liable to those who are injured as a result of their negligence. The 911 act provides in relevant part:

> 365.171 Emergency telephone number "911." -- . . . The Legislature hereby finds and declares that it is in the public interest to shorten the time required for a citizen to request and receive emergency aid . . . Such a simplified means of procuring emergency services *will result in the saving of life*, a reduction in the destruction of property, and quicker apprehension of criminals. It is the intent of the Legislature to establish and implement a cohesive statewide emergency telephone number "911" plan which will provide citizens

> with rapid direct access to public safety agencies by dialing the telephone number "911" with the objective of reducing the response time to situations requiring law enforcement, fire, medical, rescue, and other emergency services. (emphasis added).

The Third District Court Of Appeal agreed with the court in *Laskey* that "to hold otherwise would result in a liability being imposed in absurd scenarios". *Laskey*, 708 So.2d at 1014. That might be true in *Laskey* where there is a significant proximate cause problem, in that very little time ("several minutes") had gone by between the time of the call, and the collision. Further, proximate cause problems in *Laskey*, such as how the sheriff's department was going to stop a vehicle proceeding the wrong way on a highway, epitomize the expression: "hard cases make bad law". However, such problems are not present in the instant case. FHP had between thirty-eighty to forty-one minutes to respond with a "blue & white" to the scene of this flatbed tractor trailer stalled on a lane of a highway with no lights on at 3:00 A.M. It was admitted in our case that there were sufficient personnel on duty to dispatch to the scene, and that FHP had sufficient time to get there to prevent the collision. This the Florida Highway Patrol failed to do. Public policy dictates that Florida Highway Patrol should be held liable for their operational level negligence.

POINT V

THE CONCEPT OF A SPECIAL RELATIONSHIP APPLIES ONLY TO DISCRETIONARY PLANNING LEVEL ACTIVITIES, NOT TO THE OPERATIONAL LEVEL ACTIVITY THAT OCCURRED IN THIS CASE.

The concept of a special relationship is only applied to discretionary planning level activities as an exception to the general rule that a sovereign is immune for discretionary planning level activities. *Everton v. Willard*, 468 So.2d 936 (Fla. 1985). The concept of a special relationship does not apply to operational level activities because for operational level activities "the government has the same duty [of care] as that imposed upon private persons". *Trianon*, 468 So.2d at 922. The concept of a special relationship vis-a-vis a governmental entity was first discussed by this Court in *Everton v. Willard*, 468 So.2d 936 (Fla. 1985) in the context of the discretionary level decision regarding whether to arrest a drunk driver. This Court held that a decision concerning whether to arrest somebody was a discretionary level decision immune from suit.

The fiction of a "special relationship" was in essence a privity requirement concerning whether a promise was made to the victim which would take the

discretionary level activity and create privity between the victim and the governmental actor in order to impose liability on the part of the government for the acts of its agent.

Even for discretionary level activities, the courts have watered down the special relationship requirement by not mandating that the promise be made directly to the decedent or injured party. In *Hartley v. Floyd*, 512 So.2d 1022 (Fla. 1st DCA 1987), the promise was made not to the decedent, *but to his spouse*. The court held that once the deputy agreed to perform a specific task, the discretionary level activity ceased, and it became an operational level activity to which he owed a duty of care. The special relationship concept was further limited in *St. George v. City of Deerfield Beach*, 568 So.2d 931 (Fla. 4th DCA 1990), where the 911 call was made by the *ex*-wife, not the decedent.

In our case, the call was made by a bystander, who is obviously further removed than a spouse of a victim or a former spouse. The court in *St. George* came to the correct decision, but through erroneous reasoning. The actual basis for the decision should have been that the 911 operator "mishandled this call and failed to dispatch the police or paramedics to the scene" (*Ibid*, at 931), which was an operational level activity. Once the *ex*-wife was advised that the call would be dispatched, as long as there was sufficient personnel to timely dispatch, the duty to

dispatch became a ministerial one which the dispatcher had an obligation to do. Failing to do so constituted a breach of the duty of care.

As was stated in *Edelstein v. City of Coral Gables*, --So.2d--, 24 Fla. L. Weekly D2123, (Fla. 3rd DCA December 15, 1999) quoting *Town of Manalapan v. Rechler*, 674 So.2d 789, 790 (Fla. 4th DCA 1996), "an act is deemed ministerial when `there is no room for the exercise of discretion"'. In our case, duty officer Cruz had available troopers, had rules and regulations requiring him to dispatch a trooper, decided to send a trooper, and forgot to do so. The breach of this ministerial operational level negligence is clearly actionable. As far back as *First National Bank of Key West v. Filer*, 145 So. 204, 206 (Fla. 1933), this Court stated:

> Whenever there is a wrong there is a remedy. And the general test to determine whether there is a liability in an action of tort, is the question whether the defendant has by act or omission disregarded his duty. This applied to public officers who may become liable on common-law principles to individuals who sustain special damages from the negligent or wrongful failure to perform imperative or ministerial duties. Dillon on Municipal Corporations (5th Ed.) vol. 1, p. 762; 22R. C.L. pars. 160-162, pp. 483, 484.
>
> This court has recently stated in no uncertain terms that public officers must use due diligence in discharging their duties, particularly where rights of individuals may be jeopardized by their neglect.

There is a need to simplify the analysis in arriving at whether a wrong is actionable against a governmental entity. The correct way is for this Court to emphatically state that governmental entities have no immunity for the operational level activities of their agents or employees.

POINT VI

WHERE A SOVEREIGN UNDERTAKES TO OPERATE A 911 EMERGENCY SYSTEM, THERE IS A COMMON LAW DUTY TO PERFORM NON-DISCRETIONARY ACTS IN A REASONABLY SAFE MANNER.

In *Slemp v. City of North Miami*, 545 So.2d 256 (Fla. 1989), this Court agreed with the dissent of Judge Nesbitt of the Third District Court Of Appeal in *Slemp v. City of North Miami*, 515 So.2d 353 (Fla. 3d DCA 1987), that it did not matter that the city had no statutory or common law duty. The court held that once the city undertook to provide a storm sewer pump, the city assumed a duty to exercise reasonable care in its operation. Likewise, in our case, once FHP assumed the duty to operate the 911 system, it had a duty to exercise reasonable care in its operation. It is axiomatic that an action undertaken for the benefit of another, even gratuitously, must be performed in accordance with an obligation to exercise reasonable care. *Barfield v. Langley*, 432 So.2d 748, 749 (Fla. 2d DCA 1983).

In *Hartley v. Floyd*, 512 So.2d 1022 (Fla. 1st DCA 1987), the sheriff's department was held liable for failing to notify the Coast Guard of a spouse's overdue

boat. The sheriff's department agreed to notify the Coast Guard, but failed to do so, and her husband drowned. The court stated:

> 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 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. *State, Department of Highway Safety v. Kropff,* 491 So.2d 1252 (Fla. 3d DCA 1986); *Padgett v. School Board of Escambia County,* 395 So.2d 584 (Fla. 1st DCA 1981). 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.

Hartley was decided on the basis that even if the sheriff did not have a duty, once he assumed the undertaking "the sheriff's office had an obligation to carry it out with reasonable care". *Id*. at 1024. Likewise, in our case, once FHP undertook to have a 911 system, it had an obligation to exercise reasonable care in its operation. Having failed to do so, it is liable to the Plaintiffs.

As this Court stated in *Union Park Memorial Chapel v. Hutt*, 670 So.2d 64, 67 (Fla. 1996), citing the earlier decision in *Barfield v. Addington*, 104 Fla. 661, 667, 140 So. 893, 896 (1932):

> [i]n every situation where a man undertakes to act, . . . he is under an implied legal obligation or duty to act with reasonable care, to the end that the person or property of others may not be injured.

In addition to the duties set forth above, duty officer Cruz had the obligation, pursuant to FHP's own rules and regulations, to immediately dispatch a trooper to the scene. These rules and regulations were as follows:

> All reports of vehicle crashes or incidents received in the communications center shall immediately be dispatched to the appropriate trooper. If the reported crash or incident is within a city limit, then it shall be reported to the local police department.
>
> If there is going to be a delay in dispatching a crash or incident report due to manpower shortage, then the appropriate FHP supervisor shall be notified. This notification shall be documented on the dispatch card.
>
> No matter how the information is received, a duty office should learn how to quickly edit given information into the Official Standards, and then broadcast it.

In addition, Rule 12.00.00 entitled Crash Prevention, stated as follows:

> Crash prevention and crash investigation are the primary functions of the Florida Highway Patrol and the duty

> officer's role in these endeavors are of major importance. Strict adherence to this chapter will enable every officer to handle these responsibilities in an efficient and professional manner.

Once duty officer Cruz received the call, and agreed to send a trooper, and there were available troopers, that task became an operational level ministerial task which he had a duty to execute with reasonable care. When he failed to do so, he breached the duty.

In *Weissberg v. City of Miami Beach*, 383 So.2d 1158 (Fla. 3rd DCA 1980), the City of Miami Beach required a utility company to employ an off-duty policeman to direct traffic at the intersection where repairs were being performed. The officer who was hired decided to take a break and rest in the shade on the side of the road. A two car collision occurred because of visibility problems caused by Southern Bell equipment while the officer was sitting on the side of the road taking a break. The court held that this "inattentive police officer" might "have led to this accident". *Ibid*, at 1159. The court held that since a "procedure had been *established* to provide police officers to direct traffic at the worksite", the city, through the police officer, owed a duty to exercise reasonable care, because the police officer was engaged in operational level activities.

In *Cook v. Sheriff of Collier County*, 573 So.2d 406 (Fla. 2d DCA 1991), one of the cases upon which conflict was certified, the court held that a complaint that alleged that the sheriff failed to follow procedures set up to operate a 911 system stated a cause of action against the sheriff for wrongful death. The court held that the failure to relay the information concerning a fallen stop sign called in two days before an incident was actionable.

In *Hoover v. Polk County Sheriff's Department*, 611 So.2d 1331 (Fla. 2d DCA 1993), the other case that conflict was certified on, the court held that a complaint for wrongful death that alleged that the sheriff's failure to remove an abandoned vehicle which was allegedly parked less than two feet from the edge of the roadway stated a cause of action for violation of its own policies which required removal of the vehicle.

Finally, in *State v. Kropff*, 491 So.2d 1252 (Fla. 3d DCA 1986), an action for negligence was brought against the highway patrol for the acts of a trooper who was negligent in failing to secure an accident scene, resulting in the plaintiff being struck by oncoming traffic in a second accident. The court held that once the trooper "undertook to secure the site of the initial accident, he was required to do so with reasonable care". *Ibid* at 1255. That was because "it is well settled that an action undertaken, even gratuitously, must be performed in accordance with an obligation to provide reasonable care." *Ibid* at 1255. The court held that a "governmental entity is

not immune from liability where . . . a member of its police force fails to use reasonable care in the performance of an operational level function." *Ibid*, at 1255.

CONCLUSION

Petitioners request that this court quash the decision of the Third District Court Of Appeal, and remand this cause for further proceedings.

Respectfully submitted,

_____

Dan Cytryn, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed to: Sheridan Weissenborn, Esquire, Papy & Weissenborn, P.A., 3001 Ponce de Leon Blvd., Suite 214, Coral Gables, Florida 33134, Jay M. Levy, Esquire, Freshman, Freshman, & Traitz, P.A., 2 Datran Center, Suite 1701, 9130 South Dadeland Blvd., Miami, Florida 33156, James J. Traitz, Esquire, Freshman, Freshman, & Traitz, P.A., 2 Datran Center, Suite 1701, 9130 South Dadeland Blvd., Miami, Florida 33156, and Joel S. Perwin, Esquire, Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., 25 W. Flagler Street, Suite 800, Miami, Florida 33130 this _____ day of _____ 1999.

LAW OFFICES DAN CYTRYN, P.A.
Attorney for Petitioner
8100 N. University Drive
Suite 202
Tamarac, Florida 33321
Tel. No. (954) 724-2000
Florida Bar No. 318558

_____

am\pollock\brief.3

IN THE SUPREME COURT
OF FLORIDA

CASE NO.: 1999-8

THIRD DCA CASE NO. 98-02965

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,

Respondents.
_____/

APPLICATION FOR DISCRETIONARY REVIEW OF THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, CERTIFIED TO BE IN CONFLICT WITH TWO OTHER DECISIONS

_____

APPENDIX TO PETITIONER'S INITIAL BRIEF ON THE MERITS

_____

BY: Dan Cytryn, Esquire
Florida Bar Number 318558
LAW OFFICES DAN CYTRYN,

P.A.

8100 N. University Drive
Suite 202
Tamarac, Florida 33321
Tel. No.: (954) 724-2000

APPENDIX

INDEX