IN THE SUPREME COURT OF FLORIDA

CASE NO.: 1999-8

THIRD DCA CASE NO. 98-02966

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 REPLY BRIEF

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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.

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REPLY TO STATEMENT OF FACTS

FHP states in its Statement of Facts that Mr. Pedrero "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. I, 69)" (emphasis added) (Answer brief, p. 9). The portion in italics is a figment of FHP's imagination, as that statement is not reflected in the record.

Further, although FHP argues that 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", (Answer brief, p. 11), FHP's homicide investigator admitted at trial that there appeared to be a skid mark that came from the Honda that the decedents were in (TR. Vol. III, pp. 161 - 162).

REPLY TO ARGUMENT

In an attempt to obfuscate the issues, instead of responding to each point raised by Plaintiff on this appeal, FHP blends all of the issues together. Plaintiff chooses to address each issue separately and distinctly.

I

THERE HAS ALWAYS BEEN A COMMON LAW DUTY OWED BY ONE IN CONTROL OF PROPERTY TO WARN OF KNOWN DANGEROUS CONDITIONS AND TO REMEDY ANY DANGEROUS CONDITION

FHP had the *duty* to patrol, *control*, and regulate the movement of traffic on this highway for "public safety" §321.05, Florida Statutes (1993). The statute provided in relevant part:

> The patrol officers under the direction and supervision of the Department of Highway Safety and Motor Vehicles 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; to maintain the public peace by preventing violence on highways; to apprehend fugitives from justice; to enforce all laws now in effect regulating and governing traffic, travel, and public safety upon the public highways . . . (emphasis added).

The statute specifically states that FHP has "duties" to "control" and "patrol" for "public safety". This duty is separate from the obligation set forth in the statute to "enforce all laws". The statute, in and of itself, creates a duty of care owed to the Plaintiffs by virtue of the fact that it sets forth the duty of FHP to control this highway.

In addition to the statute, and in the alternative, the common law of this state imposes a duty of care on the person or entity in control of the premises:

> The duty to protect others from injury resulting from a dangerous condition on a premises rests on the party who has the right to control . . .

Brown v. Suncharm Ranch, 25 Fla.L.Weekly D141 (Fla. 5th DCA December 30, 1999); *Bovis v. 7-Eleven, Inc.*, 505 So.2d 661 (Fla. 5th DCA 1987); *see also, Florida Department of Natural Resources v. Garcia*, 25 Fla.L.Weekly S124 (Fla. February 10, 2000), (Justice Wells, joined by Chief Justice Harding, dissenting) [discussion on duty owed by person or entity in control of premises].

Further:

> [T]he fact that there may be joint responsibility or control over premises does not relieve a party from responsibility. A duty, and therefore liability for breach of that duty, may rest upon more than one party:
> [A]nyone who assumes control over the premises in question, no matter under what guise, assumes also the duty to keep them in repair, and the fact that others are under a duty which they fail to perform is no defense to one who has assumed control, thereby bringing others within the sphere of danger.

Craig v. Gate Maritime Properties, 631 So.2d 375 (Fla. 1st DCA 1994).

As was stated in *Trianon Park Condominium v. City of Hialeah*, 468 So.2d 912, 921 (Fla. 1985): "once a governmental entity builds or takes *control* of property

or an improvement, it has the same common law duty as a private person to properly maintain and operate the property" (emphasis added). Once FHP took control of this state road for the purpose of regulating and directing the flow of traffic, it had a common law duty equivalent to that of a private person to properly do so. This is clearly a Category III "Capital Improvement and Property *Control* Function", *Trianon*, 468 So.2d at 920, which is an operational level activity for which there is a common law duty of care.

In *Starling v. Fisherman's Pier, Inc.*, 401 So.2d 1136 (Fla. 4th DCA 1981), the court followed the Restatement (Second) of Torts §314A in holding that a person in *control* of land has an obligation to *rescue* one in danger. In *Starling*, a corporation operated a commercial fishing pier. A drunk customer was left lying near the ocean by the pier, and rolled over into the water and drowned. The court asked whether if a drunk passed out in a dangerous place, did the premises owner have a duty to take at least minimal steps to safeguard the drunk? Even though there was not one Florida case remotely on point, the court found that a duty of care was owed to the drunk to at least take some minimal steps to safeguard him.

Likewise, FHP, under the common law of this state, having control over the premises, control over the situation, and the ability to remedy it, had the basic obligation to send out a "blue and white" to prevent this tragedy from occurring.

In *Peterson v. State*, 235 N.Y.S. 2nd 397, 399 (Ct.Cl. 1962), a truck was found abandoned on a lane of a highway. A trooper was dispatched to the scene, but he made no attempt to remove the truck or warn of its presence. The court addressed two questions:

> 1) Whether the State Police have a duty to remove artificial obstructions from state highways or to provide warning of their presence, and 2) Whether, for the passive non-performance thereof, a cause of action arises in favor of an individual member of the public.

The court answered both questions in the affirmative.

In *Anderson v. Muniz*, 508 N.Y.S.2d 567 (App. Div. 1986), the court held that where the police discovered a disabled vehicle on the roadway, the officer had a *duty* to all persons traveling on the roadway in the area of the disabled vehicle to warn passing motorists of the disabled vehicle.

In *Harris v. City of Pleasant Valley*, 748 S.W.2d 688 (Mo.Ct. App. 1988), the plaintiff was killed when he collided with a stalled semi-tractor trailer that was disabled. The evidence was that the city had been informed of the disabled truck. The appellate court held that the entity in control, the city, had the duty to keep the streets clear of obstructions of which they had notice.

In *Lowman v. City of Mesa*, 611 P.2d 943 (Ariz. Ct. App. 1980), the court held that the city was liable where a driver struck a stalled vehicle. The court held that even

though the police officers testified that they did not have actual notice of the stalled vehicle, the entity could be held liable for its failure to warn or remove the danger.

In *Clark v. Polk County*, 25 Fla.L. Weekly D355 (Fla. 2d DCA February 9, 2000), the court found liability where a person called a 911 emergency line and twelve to fourteen hours later a stop sign that had been knocked down was not repaired. In a decision concurred in by Justice Peggy Quince, sitting as an associate judge, the court did not even address the issue of duty, but simply addressed the issue of proximate cause in reversing a directed verdict for Polk County.

All of these cases stand for the same proposition that where the entity in control of the premises has knowledge of a dangerous condition, a duty of care will be imposed, and where the entity in control fails to remedy the dangerous condition by removing it, or warning of the danger, liability may be imposed.

II

IN ADDITION TO THE COMMON LAW DUTY OF CARE OWED IN THIS CASE, AND THE SEPARATE STATUTORY DUTY OWED, FLORIDA HIGHWAY PATROL RULES AND REGULATIONS THAT WERE VIOLATED MAY CREATE A DUTY OF CARE OWED TO THIRD PERSONS

Lee v. Department of Health and Rehabilitative Services, 698 So.2d 1194 (Fla. 1997) provides authority for the additional proposition that the failure of governmental employees to follow their assigned duties constitutes a breach of the duty of care, and that rules and duties can create a duty of care. This Court in *Lee* found that liability could be imposed upon HRS because "HRS employees were negligent in failing to properly follow rules and carry out their assigned duties". *Id.*, 698 So.2d at 1198. This Court held that if the HRS employees "acted negligently in carrying out their assigned responsibilities", this would constitute operational negligence. *Id.*, 698 So.2d at 1199. This Court found a duty of care from HRS rules and from the employees' assigned duties.

Likewise, in our case, the failure of the duty officer to dispatch an officer violated FHP's own rules and regulations. FHP's rules created a duty of care, and the employee's failure to follow the rules constituted operational negligence. *See also, City of Pinellas Park v. Brown*, 604 So.2d 1222 (Fla. 1992) [implying that violation of *oral* hot pursuit *policy* might be relevant in considering whether duty existed to unknown but foreseeable third persons]; *Weissberg v. City of Miami Beach*, 383 So.2d 1158 (Fla. 3rd DCA 1980) (violation of established *procedure* by officer where he chose to rest instead of directing traffic creates duty of care to persons injured by the failure of the officer to follow procedure); *Walston v. Florida Highway Patrol*, 429 So.2d 1322 (Fla. 5th DCA 1983) (failure of trooper to follow what he was taught may constitute negligence); *Soccarras v. City of Philadelphia*, 552 A.2d 1171 (Pa.Commw.Ct. 1989) (police department directive considered in finding duty owed by police to render assistance to motorists in need of assistance); *Bridges v. City of Memphis*, 952 S.W.2d 841 (Tenn.App. 1997) (violation of fire fighting *procedures* set forth in fire department manual may constitute negligence).

III

SINCE A COMMON LAW DUTY OF CARE IS OWED BY FLORIDA HIGHWAY PATROL TO THE DECEDENTS, THE ISSUE OF A "SPECIAL RELATIONSHIP" OR "SPECIAL DUTY" IS NOT RELEVANT TO THIS CASE

Special relationships or special duties only come into play when there is no common law or statutory duty of care. See *Everton v. Willard,* 468 So.2d 936 (Fla. 1985). The requirement of demonstrating a special relationship was abolished by this Court in *Commercial Carrier Corporation v. Indian River County,* 371 So.2d 1010 (Fla. 1979), in situations where there is a common law or statutory duty of care. As stated in Point I, there was a common law duty of care owed by the fact that the Florida Highway Patrol controlled the highway at issue, FHP had actual knowledge of the danger, and they ignored their obligation to perform a ministerial act, i.e., dispatch a trooper.

In *Laskey v. Martin County Sheriff's Department,* 708 So.2d 1013 (Fla. 4th DCA 1998) review granted, 718 So.2d 109 (Fla. 1998), the court stated that absent a special relationship, there is no common law duty "for one person to come to the aid

of another or to intervene in the misconduct of a third person to prevent the possibility of harm to another". What the court overlooked is that there is a common law duty of care owed to a third person when the entity in control of a premises fails to remedy a dangerous condition and warn of it, when the entity has a statutory duty of care, or when a governmental entity violates its own rules and procedures. More importantly though, Restatement §315, repeatedly referred to by FHP in its brief (pp. 18, 20 - 21), does not apply to our case. There was no "misconduct" as contemplated by the Restatement (Second) Torts §315 to bring that section into play in this case.[1] Having a vehicle stall out on a highway is not the type of misconduct contemplated by §315.

Further, the special duty doctrine has been abolished or limited by many courts, including this Court. See *Commercial Carrier Corporation v. Indian River County, supra* (abolishing the special duty requirement for operational level activities); *Hudson v. Town of East Montpelier*, 638 A.2d 561, 566 (Vt. 1993) ("we decline to adopt this doctrine, which in recent years has been rejected or abolished by most courts

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[1] Restatement (2d) of Torts §315 states:

> There is no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

considering it"); *Jean v. Commonwealth*, 610 N.E.2d 305 (Mass. 1993) (abolished); *Austin v. City of Scottsdale,* 684 P.2d 151 (Ariz. 1984) (noting that the doctrine was abolished in *Ryan v. State*, 656 P.2d 597 (Ariz. 1982); *Bailey v. Town of Forks*, 737 P.2d 1257 (Wash. 1987) (noting that the doctrine of special relationship was only allowed to bar a plaintiff's claim in one state court decision).

Plaintiff further urges that the four categories set forth in *Trianon* allegedly to distinguish operational level activities from discretionary level activities should be abolished as unmanageable, indistinguishable, and incomprehensible.

IV

FHP'S FAILURE TO ACT WAS A PROXIMATE CAUSE OF THE CRASH

FHP argues: "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) (Answer brief, p. 17). In *McCain v. Florida Power Corporation*, 593 So.2d 500, 503 (Fla. 1992), this Court stated that proximate cause can be found:

> [i]f prudent human foresight would lead one to expect that similar harm is likely to be substantially caused by the specific act or *omission* in question. In other words, human experience teaches that the same harm can be expected to recur if the same act or *omission* is repeated in a similar context (emphasis added).

Clearly, it can be expected that if 911 operators ignore 911 calls, other crashes like this will occur. Further, FHP's statement that the incident was caused "not by the affirmative acts of FHP" has no legal relevance (Answer brief, p. 17). *McCain* and basic common law do not require "affirmative acts" to find proximate cause, omissions can also constitute proximate cause. *McCain,* 593 So.2d at 503.

Finally, FHP continually argues that the trial court erred in allowing Plaintiff's counsel to argue in closing that if a "blue and white" unit had been timely dispatched to the scene, the incident would not have occurred (Answer brief, pp. 4, 26 - 27). It is common sense that a police vehicle with its lights flashing at 3:00 A.M. is likely to prevent this type of crash from occurring. That is one of the reasons that police vehicles have flashing lights, i.e., to warn persons to slow down, and of potential impending danger.

In *Ritter v. State*, 344 N.Y.S. 257, 269 (Ct.Cl. 1972), the court agreed with Plaintiff's position of the effect of flashing lights from a police cruiser:

> The Court . . . may assume that if a State Police car with lights flashing or with set-out flares was in position, adequate warning would have resulted in slower speed and a quicker realization of the danger ahead.

The issue of proximate cause, mentioned for the first time by FHP in its answer brief filed in this Court, is not, and should not, be considered as an issue on this appeal. Further, the issue of proximate cause is clearly a jury question.

V

PUBLIC POLICY REQUIRES THAT THIS COURT FIND THE FLORIDA HIGHWAY PATROL LIABLE FOR ITS NEGLIGENCE IN THIS CASE

As argued in the initial brief, this Court should find liability in this case to maintain the public's confidence in the 911 system. FHP's argument that a reversal of the Third District's holding would create liability on the state every time there is an obstruction on the highway is not true. Under Plaintiff's position and the facts of this case, liability would be imposed only where the governmental entity:

1. Controls the area where the dangerous condition is located,

2. Knows or should know of the danger,

3. Has sufficient manpower to dispatch to the danger,

4. Has sufficient time to reach the danger, and

5. Neglects to send an employee to remove the danger or warn of the danger despite actual or constructive knowledge.

As Justice Leander Shaw stated in his dissent in *Everton v. Willard*, 468 So.2d 936, 954 (Fla. 1985), some courts' "[f]ears that the waiver of sovereign immunity will lead to financial insolvency of government entities is not well founded".

CONCLUSION

Plaintiff requests that this Court quash the opinion of the Third District Court Of Appeal, and hold that there was a common law and statutory duty of care owed to the plaintiffs in this case.

Further, Plaintiff requests that the four categories set forth for the first time in *Trianon* should be abolished.

Respectfully submitted,

_____

Dan Cytryn, Esquire

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that the Reply Brief on the Merits served by Petitioner, **STEVEN POLLOCK**, as Personal Representative of the Estate of **ELISSA POLLOCK**, deceased, is typed in the font 14 point Times New Roman.

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 _____, 2000.

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