



To: Dennis Weiner

From: Israel U. Reyes; Manuel A. Guarch; The Reyes Law Firm, P.A.; Police Legal Advisors

Approved: Craig Leen, City Attorney for the City of Coral Gables 

RE: Legal Opinion Regarding Bumpers To Move Inoperable Vehicles From Roadway

Date: October 18, 2013

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The Coral Gables Police Department has requested guidance as to the proposed revisions to Standard Operating Procedure Number 002, Departmental Vehicles, Revision 12 (hereinafter "SOP2") concerning the use of "Push Bumpers" on select vehicles as more fully described and addressed in subsection "G" of SOP2.

**I. Questions Presented:**

The questions presented and addressed by this opinion are: 1) whether the City of Coral Gables is exposed to liability if it implements the use of push bumpers to move vehicles from the roadway; and 2) if the City is in fact exposed to potential liability due to the use of push bumpers, can CGPD mitigate said liability and if so, how?

**II. Brief Answer:**

The City of Coral Gables is exposed to liability if it implements the use of push bumpers to move vehicles from the roadway. However, the CGPD can mitigate said liability as recommended below.

**III. Recommendation:**

CGPD has created a Push Bumper Release Form (Form No. PT 078), which in essence acts as a waiver of liability and authorization for the owner of a vehicle sought to be re-located through the use of a Push Bumper. It is the recommendation of this Firm that unless absolutely necessary, and no practicable alternative exists, an officer should not attempt to relocate a

vehicle with a Push Bumper absent an executed Push Bumper Release Form (Form No. PT 078). In those circumstances where the use of the Push Bumper is not warranted, officers should make every reasonable effort to warn drivers of the danger posed by the inoperable vehicle in the roadway, in accordance with the common law duty discussed herein. However, in order to encourage cooperation from the owners of the vehicles sought to be moved, officers can inform the individual from whom consent is sought that under Florida Statute Section 316.071, (2013), they may be cited for a nonmoving infraction if they refuse to move the vehicle or accept assistance in same.<sup>1</sup>

#### **IV. Background**

The relevant portions of SOP2 are excerpted below:

##### **G. Push Bumpers**

1. Policy: This policy establishes guidelines for push bumper use when applicable. Disabled vehicles in the public right of way should normally be removed from the roadway by authorized tow truck operators. However, certain occasions may arise in which disabled vehicle(s) present an immediate and significant traffic hazard and by remaining disabled in a traffic lane, may result in additional damage to property and/or serious bodily injury.
2. Procedure:
  - a. This procedure is applicable to Department personnel who have completed the CGPD in-service Vehicle Operators Course and are authorized to use vehicles equipped with push bumpers.
  - b. Departmental personnel will request authorization from a supervisor to push a vehicle off the roadway and refer to the "Push Bumper Release Form and Checklist" (Form No. PT 078) for specific detailed instructions on how to push a disabled vehicle. They will make every effort to first obtain written consent by the vehicle owner or operator on scene except during rare circumstances when the removal of the vehicle is considered an emergency, the vehicle should be moved without delay. In these instances, the officer will make every effort to have the motorist complete the form after the vehicle has been moved.

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<sup>1</sup> Florida Statute Section 316.071, states:

Whenever a vehicle is disabled on any street or highway within the state or for any reason obstructs the regular flow of traffic, the driver shall move the vehicle so as not to obstruct the regular flow of traffic or, if he or she cannot move the vehicle alone, solicit help and move the vehicle so as not to obstruct the regular flow of traffic. Any person failing to comply with the provisions of this section shall be cited for a nonmoving violation, punishable as provided in chapter 318.

c. Department personnel will immediately report any damage sustained to property or vehicle(s) involved in a push to the supervisor who authorized it. The supervisor will respond to the incident location and take digital photos of any damage noted. A State of Florida Crash Report Form will be completed by a CGPD Accident Investigator and the supervisor will complete a City of Coral Gables Accident/Incident Report which will be forwarded via chain of command to the Chief of Police. A copy of the accident report, incident report, and photos will also be forwarded to the City of Coral Gables Insurance & Safety Manager.

## **V. Legal Analysis**

### ***A. Sovereign Immunity Generally***

Under the common law, law enforcement officers were considered arms of the King and, while an officer might be held liable for his or her wrongful acts, the government or that branch of the government for which he or she acted, could not be held liable on the theory that "the King can do no Wrong," or the theory of Governmental or sovereign immunity. *White v. City of Waldo*, 659 So. 2d 707 (Fla. 1st DCA 1995), *cause dismissed*, 666 So. 2d 901 (Fla. 1996). The Florida Constitution recognizes sovereign immunity of this kind which, however, it authorizes the state legislature to waive by making provision by general law for bringing suit against the state. See, Art. X, § 13, Fla. Const.; *White v. City of Waldo*, 659 So. 2d 707 (Fla. 1st DCA 1995), *cause dismissed*, 666 So. 2d 901 (Fla. 1996).

The State of Florida has waived sovereign immunity from liability in tort actions "for itself and for its agencies or subdivisions... for any act for which a private person under similar circumstances would be held liable." § 768.28 Fla. Stat. (2012). Thus, "[t]here can be no governmental liability unless a common law or statutory duty of care existed that would have been applicable to an individual under similar circumstances." *Henderson v. Bowden*, 737 So.2d 532, 534-35 (Fla. 1999).

If no duty of care is owed with respect to alleged negligent conduct, then there is no governmental liability, and the question of whether the sovereign should be immune from suit need not be reached. See *Alderman v. Lamar*, 493 So.2d 495, 497 n. 1 (Fla. 5th DCA 1986); see also *Kaisner v. Kolb*, 543 So.2d 732, 734 (Fla. 1989) ("[c]onceptually, the question of the applicability of ... immunity does not even arise until it is determined that a defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity.") (quoting *Williams v. State*, 34 Cal.3d 18, 192 Cal. Rptr. 233, 664 P.2d 137, 139 (1983)). If a duty of care is owed, it must then be determined whether sovereign immunity bars an action for an alleged breach of that duty. See *Henderson*, 737 So.2d at 535.

**B. Determination of Duty - Coral Gables has a Duty to Maintain its Roadways and to Warn of and Correct Dangerous Conditions Thereon.**

Generally, enforcement of the law and protection of public safety are discretionary duties, for which there is no common law duty of care owed to any particular individual. *Wallace v. Dean*, 970 So. 2d 864 (Fla. 5th DCA 2007), review granted, 982 So. 2d 686 (Fla. 2008). However, it is well settled that a public or private entity which owns, operates, or controls a property, including a roadway, owes a duty to maintain that property, and a corresponding duty to warn of and correct dangerous conditions thereon. *See, e.g., Bailey Drainage Dist. v. Stark*, 526 So.2d 678, 681 (Fla. 1988) (holding that where a controlling governmental agency knowingly maintains an intersection it has a duty to warn of and make safe dangerous conditions that are not readily apparent); *City of Orlando v. Heard*, II So. 182, 184 (Fla. 1892) (observing that the city must exercise due diligence in repairing defects after unsafe condition of the street or sidewalk is known or knowable); *Jauma v. City of Hialeah*, 158 So.2d 696, 698 (Fla. 3d DCA 2000) (holding that the city had a nondelegable duty to maintain its roads, sidewalks, and rights-of-way in a reasonably safe condition even where a third party created the defect); *Travelers Ins. Co. v. Metro. Dade County*, 510 So.2d 1240 (Fla. 3d DCA 1987) (ascribing duty of care to the county as the landowner-lessor of a marina); *Wojtan v. Hernando County*, 379 So.2d 198, 199 (Fla. 5th DCA 1980) (recognizing county's responsibility as a landowner to free streets and sidewalks from obstruction created by another but about which the county knew or should have known).

While a city is not an insurer of the motorist or the pedestrian who travels its streets and sidewalks, a city is responsible for damages resulting from defects which have been in existence so long that they could have been discovered by the exercise of reasonable care, and repaired. *Castano v. City of Miami*, 840 So. 2d 412 (Fla. 3d DCA 2003).<sup>2</sup>

Under Florida law the responsibility for the maintenance of roadways is governed by Florida Statutes Section 335.0415 (20 12), which states, "[t]he jurisdiction of public roads and the responsibility for operation and maintenance within the right-of-way of any road within the state, county, and municipal road system shall be that which existed on June 10, 1995." Under Florida Statute Section 335.04(2), (1993), which was repealed by Florida Statutes Section 335.0415 cited above, responsibility for "the operation and maintenance of the roads" fell to the Florida Department of Transportation and local governments for the roads within their respective jurisdictions. *Id.*

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<sup>2</sup> The conclusion in this opinion relates to those dangers and defects which exist upon the roads and streets maintained by The City of Coral Gables in accordance with § 335.0415, Fla. Stat. (The jurisdiction of public roads and the responsibility for operation and maintenance within the right-of-way of any road within the state, county, and municipal road system shall be that which existed on June 10, 1995.)

Therefore, at the time of the passage of Florida Statutes Section 335.0415, the City of Coral Gables was responsible for and remains responsible for "the operation and maintenance of the roads" within its jurisdiction and as such owes a duty of care to maintain the roads, and a corresponding duty to warn of and correct dangerous conditions thereon. See, e.g., *Bailey Drainage Dist. v. Stark*, 526 So.2d 678,681 (Fla. 1988); § 335.0415, Fla. Stat. (2013)

### **C. Character of the Act – Pushing a Vehicle from the Roadway**

In making the assessment of whether sovereign immunity bars an action for an alleged breach of a duty owed, it is necessary to ascertain the character of the allegedly negligent governmental act or omission. *Cook ex rel. Estate of Tessier v. Sheriff of Monroe County, Fla.*, 402 F.3d 1092, 1117 (11th Cir. 2005) (citing *Lewis v. City of St. Petersburg*, 260 F.3d 1260, 1266 (11th Cir.2001) (citing *Dep't of Health & Rehabilitative Servs. v. Yamuni*, 529 So.2d 258, 260 (Fla. 1988))).

Having established that The City of Coral Gables owes to those who would traverse its roadways a duty of care to maintain that property, and a corresponding duty to warn of and correct dangerous conditions thereon, the next step in the analysis is to determine whether the action at issue in the present opinion, the use of a Push Bumper to effectuate the removal of an inoperable vehicle, would be considered discretionary or operational in nature.

"Under Florida law, 'a governmental agency is immune from tort liability based upon actions that involve its 'discretionary' functions.'" *Id.* "A discretionary function, under Florida law, is one in which 'the governmental act in question involved an exercise of executive or legislative power such that, for the court to intervene by way of tort law, it inappropriately would entangle itself in fundamental questions of policy and planning.'" *Cook ex rel. Estate of Tessier v. Sheriff of Monroe County, Fla.*, 402 F.3d 1092, 1117-18 (11th Cir. 2005) (citing *Henderson v. Bowden*, 737 So.2d 532, 538 (Fla. 1999) (citation and internal quotation marks omitted). "An 'operational' function, on the other hand, is one not necessary to or inherent in policy or planning, that merely reflects a secondary decision as to how those policies or plans will be implemented." *Cook*, 402 F.3d 1092, 1117-18 (11th Cir. 2005) (citing *Henderson v. Bowden*, 737 So.2d 532, 538 (Fla. 1999) (citation and internal quotation marks omitted).

Florida's discretionary function exception to its general waiver of sovereign immunity "is grounded in the doctrine of separation of powers," and " it would be an improper infringement of separation of powers for the judiciary, by way of tort law, to intervene in fundamental decision making of the executive and legislative branches of government, including the agencies and municipal corporations they have created." *Kaisner v. Kolb*, 543 So.2d 732, 736 37 (Fla. 1989). In sum, basic judgmental or discretionary governmental functions are immune from legal action, whereas operational acts are not protected by

sovereign immunity. *Pollock v. Fla. Dep't of Highway Patrol*, 882 So.2d 928, 933 (Fla. 2004) (citation omitted).

In the circumstances where a vehicle is inoperable or otherwise obstructing the roadway, the decision of whether or not to utilize the Push Bumper to move the vehicle or to wait for a tow truck, would be considered an "operational" function, therefore subjecting the City of Coral Gables to a suit for damages in the event that damages occur due to the negligent actions of an officer. *See, Trianon Park Condo. Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912, 920 (Fla. 1985) (citing 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)(internal citations omitted).

However, that the City of Coral Gables has the duty to maintain its roadways, does not mean that a responding law enforcement officer has the duty to use the Push Bumper affixed to his/her vehicle to effectuate the removal of the inoperable vehicle. In fact, under Florida Statutes Section 316.061, (3), the removal of a vehicle from a roadway by a law enforcement officer is permissive, not mandatory as Florida Statutes Section 316.061, (3) states, in relevant part,

(3) Employees or authorized agents of the Department of Transportation, law enforcement with proper jurisdiction, or an expressway authority created pursuant to chapter 348, in the exercise, management, control, and maintenance of its highway system, may undertake the removal from the main traveled way of roads on its highway system of all vehicles incapacitated as a result of a motor vehicle crash and of debris caused thereby. Such removal is applicable when such a motor vehicle crash results only in damage to a vehicle or other property, and when such removal can be accomplished safely and will result in the improved safety or convenience of travel upon the road.

Therefore, based on the fact that the removal of an inoperable vehicle by law enforcement is permissive and not mandatory, in the event an officer engages in the activity, they assume the duty to act carefully under the undertaker doctrine. The doctrine states that "[w]hen one undertakes to provide a service to others, whether one does so gratuitously or by contract, the individual who undertakes to provide the service-i.e., the 'undertaker' -thereby assumes a duty to act carefully and to not put others at an undue risk of harm." *Clay Elec. Coop., Inc. v. Johnson*, 873 So. 2d 1182, 1186 (Fla. 2003) (citing Restatement (Second) of Torts § 323 (1965)). The "undertaker's doctrine," applies to both governmental and nongovernmental entities. *See, e.g., Dept. of Transp. v. Neilson*, 419 So.2d 1071 (Fla. 1982); *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla.1979).

## **VI. Conclusion:**

The City of Coral Gables has a duty to maintain its roadways, which includes the duty to warn of and correct dangerous conditions thereon. The Coral Gables Police Department may use push bumpers to effectuate the removal of vehicles from the roadway, however, by doing so, CGPD assumes a duty to act carefully and to not put others at an undue risk of harm. If this duty is breached, the City is liable for damages resulting from negligence as would be any private litigant. When an officer attempts to move an inoperable vehicle from the roadway through the use of a Push Bumper, the City may be held liable if any damages result from said action as a result of the officer's carelessness or unreasonable actions. Therefore, unless absolutely necessary, or the owner of the vehicle to be moved consents, vehicles specifically designed and operated for the removal of damaged vehicles should be utilized to effect the removal those vehicles obstructing the right-of-way. In all circumstances, it is strongly recommended that officers should obtain a signed waiver and release by the vehicle owner before using the Push Bumpers.

**Hernandez, Cristina**

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**From:** Thornton Richard, Bridgette  
**Sent:** Friday, October 18, 2013 3:51 PM  
**To:** Hernandez, Cristina  
**Subject:** FW: Legal Opinion RE: Push Bumper Usage  
**Attachments:** 2010 01 - Push Bumper Opinion 10-18-13 (Final).pdf; 2010.01 Push Bumper Opinion Westcheck.rtf

Please add the attached to the opinion binder.

Bridgette N. Thornton Richard  
Deputy City Attorney for the City of Coral Gables  
405 Biltmore Way, 2<sup>nd</sup> Floor  
Coral Gables, FL 33134  
Office: (305) 460-5084  
Cell: (305) 801-5797  
Fax: (305) 476-7795

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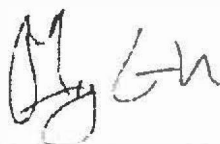
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**From:** Manuel Guarch [mailto:mguarch@reyeslawfirm.com]  
**Sent:** Friday, October 18, 2013 2:37 PM  
**To:** Leen, Craig; Weiner, Dennis  
**Cc:** Miller, Michael; Tastet, Rene; Koppel, Paul; Israel Reyes, ESQ; Thornton Richard, Bridgette  
**Subject:** Legal Opinion RE: Push Bumper Usage

Chief Weiner and Mr. Leen,  
Please see the attached Legal Opinion concerning the use of Push Bumpers.

If you have any questions or concerns, please feel free to contact us. Have a good weekend.

Regards,



Manuel Guarch, Esq.  
Associate Attorney  
THE REYES LAW FIRM, P.A.  
One Columbus Center



1 Alhambra Plaza, Suite 1130  
Coral Gables, FL 33134  
Tel: 305.403.2272  
ex: 305.403.2273  
[mguarch@reyeslawfirmga.com](mailto:mguarch@reyeslawfirmga.com)

THE REYES LAW FIRM, P.A.  
ATTORNEYS AND COUNSELORS



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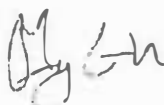
THE REYES LAW FIRM, P.A.  
ATTORNEYS AND COUNSELLORS

**LEGAL OPINION**

To: Dennis Weiner, Chief of Police  
City of Coral Gables Police Department

Via: Craig Leen, City Attorney  
City of Coral Gables

From: Israel U. Reyes, Managing Partner  
Manuel A. Guarch, Associate  
The Reyes Law Firm, P.A.  
Police Legal Advisors



Date: October 18, 2013

Re: Potential Liability for Use of Push Bumpers to Move Inoperable Vehicles from Roadway.

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The Coral Gables Police Department has requested guidance as to the proposed revisions to Standard Operating Procedure Number 002, Departmental Vehicles, Revision 12 (hereinafter "SOP2") concerning the use of "Push Bumpers" on select vehicles as more fully described and addressed in subsection "G" of SOP2.

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## **III. Recommendation:**

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#### **IV. Background**

The relevant portions of SOP2 are excerpted below:

##### **G. Push Bumpers**

1. **Policy:** This policy establishes guidelines for push bumper use when applicable. Disabled vehicles in the public right of way should normally be removed from the roadway by authorized tow truck operators. However, certain occasions may arise in which disabled vehicle(s) present an immediate and significant traffic hazard and by remaining disabled in a traffic lane, may result in additional damage to property and/or serious bodily injury.

2. **Procedure:**

a. This procedure is applicable to Department personnel who have completed the CGPD in-service Vehicle Operators Course and are authorized to use vehicles equipped with push bumpers.

b. Departmental personnel will request authorization from a supervisor to push a vehicle off the roadway and refer to the "Push Bumper Release Form and Checklist" (Form No. PT 078) for specific detailed instructions on how to push a disabled vehicle. They will make every effort to first obtain written consent by the vehicle owner or operator on scene except during rare circumstances when the removal of the vehicle is considered an emergency, the vehicle should be moved without delay. In these instances, the officer will make every effort to have the motorist complete the form after the vehicle has been moved.

c. Department personnel will immediately report any damage sustained to property or vehicle(s) involved in a push to the supervisor who authorized it. The supervisor will respond to the incident location and take digital photos of any damage noted. A State of Florida Crash Report Form will be completed by a CGPD Accident Investigator and the supervisor will complete a City of Coral Gables Accident/Incident Report which will be forwarded via chain of command to the Chief of Police. A copy of the accident report, incident report, and photos will also be forwarded to the City of Coral Gables Insurance & Safety Manager.

#### **V. Legal Analysis**

##### ***A. Sovereign Immunity Generally***

Under the common law, law enforcement officers were considered arms of the King and, while an officer might be held liable for his or her wrongful acts, the government or that branch

of the government for which he or she acted, could not be held liable on the theory that “the King can do no Wrong,” or the theory of Governmental or sovereign immunity. *White v. City of Waldo*, 659 So. 2d 707 (Fla. 1st DCA 1995), *cause dismissed*, 666 So. 2d 901 (Fla. 1996). The Florida Constitution recognizes sovereign immunity of this kind which, however, it authorizes the state legislature to waive by making provision by general law for bringing suit against the state. See, Art. X, § 13, Fla. Const.; *White v. City of Waldo*, 659 So. 2d 707 (Fla. 1st DCA 1995), *cause dismissed*, 666 So. 2d 901 (Fla. 1996).

The State of Florida has waived sovereign immunity from liability in tort actions “for itself and for its agencies or subdivisions... for any act for which a private person under similar circumstances would be held liable.” § 768.28 Fla. Stat. (2012). Thus, “[t]here can be no governmental liability unless a common law or statutory duty of care existed that would have been applicable to an individual under similar circumstances.” *Henderson v. Bowden*, 737 So.2d 532, 534-35 (Fla. 1999).

If no duty of care is owed with respect to alleged negligent conduct, then there is no governmental liability, and the question of whether the sovereign should be immune from suit need not be reached. See *Alderman v. Lamar*, 493 So.2d 495, 497 n. 1 (Fla. 5th DCA 1986); see also *Kaisner v. Kolb*, 543 So.2d 732, 734 (Fla. 1989) (“[c]onceptually, the question of the applicability of ... immunity does not even arise until it is determined that a defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity.”) (quoting *Williams v. State*, 34 Cal.3d 18, 192 Cal. Rptr. 233, 664 P.2d 137, 139 (1983)). If a duty of care is owed, it must then be determined whether sovereign immunity bars an action for an alleged breach of that duty. See *Henderson*, 737 So.2d at 535.

***B. Determination of Duty - Coral Gables has a Duty to Maintain its Roadways and to Warn of and Correct Dangerous Conditions Thereon.***

Generally, enforcement of the law and protection of public safety are discretionary duties, for which there is no common law duty of care owed to any particular individual. *Wallace v. Dean*, 970 So. 2d 864 (Fla. 5th DCA 2007), *review granted*, 982 So. 2d 686 (Fla. 2008). However, it is well settled that a public or private entity which owns, operates, or controls a property, including a roadway, owes a duty to maintain that property, and a corresponding duty to warn of and correct dangerous conditions thereon. *See, e.g., Bailey Drainage Dist. v. Stark*, 526 So.2d 678, 681 (Fla. 1988) (holding that where a controlling governmental agency knowingly maintains an intersection it has a duty to warn of and make safe dangerous conditions that are not readily apparent); *City of Orlando v. Heard*, 11 So. 182, 184 (Fla. 1892) (observing that the city must exercise due diligence in repairing defects after unsafe condition of the street or sidewalk is known or knowable); *Jauma v. City of Hialeah*, 758 So.2d 696, 698 (Fla. 3d DCA 2000) (holding that the city had a nondelegable duty to maintain its roads, sidewalks, and rights-of-way in a reasonably safe condition even where a third party created the defect); *Travelers Ins. Co. v. Metro. Dade County*, 510 So.2d 1240 (Fla. 3d DCA 1987) (ascribing duty of care to the county as the landowner-lessor of a marina); *Wojtan v. Hernando County*, 379 So.2d 198, 199 (Fla. 5th DCA 1980) (recognizing county's responsibility as a landowner to free streets and sidewalks from obstruction created by another but about which the county knew or should have known).

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so long that they could have been discovered by the exercise of reasonable care, and repaired. *Castano v. City of Miami*, 840 So. 2d 412 (Fla. 3d DCA 2003).<sup>2</sup>

Under Florida law the responsibility for the maintenance of roadways is governed by Florida Statutes Section 335.0415 (2012), which states, “[t]he jurisdiction of public roads and the responsibility for operation and maintenance within the right-of-way of any road within the state, county, and municipal road system shall be that which existed on June 10, 1995.” Under Florida Statute Section 335.04(2), (1993), which was repealed by Florida Statutes Section 335.0415 cited above, responsibility for “the operation and maintenance of the roads” fell to the Florida Department of Transportation and local governments for the roads within their respective jurisdictions. *Id.*

Therefore, at the time of the passage of Florida Statutes Section 335.0415, the City of Coral Gables was responsible for and remains responsible for “the operation and maintenance of the roads” within its jurisdiction and as such owes a duty of care to maintain the roads, and a corresponding duty to warn of and correct dangerous conditions thereon. *See, e.g., Bailey Drainage Dist. v. Stark*, 526 So.2d 678, 681 (Fla. 1988); § 335.0415, Fla. Stat. (2013)

### ***C. Character of the Act - Pushing a Vehicle from the Roadway***

In making the assessment of whether sovereign immunity bars an action for an alleged breach of a duty owed, it is necessary to ascertain the character of the allegedly negligent governmental act or omission. *Cook ex rel. Estate of Tessier v. Sheriff of Monroe County, Fla.*, 402 F.3d 1092, 1117 (11th Cir. 2005) (citing *Lewis v. City of St. Petersburg*, 260 F.3d 1260,

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<sup>2</sup> The conclusion in this opinion relates to those dangers and defects which exist upon the roads and streets maintained by The City of Coral Gables in accordance with § 335.0415, Fla. Stat. (The jurisdiction of public roads and the responsibility for operation and maintenance within the right-of-way of any road within the state, county, and municipal road system shall be that which existed on June 10, 1995.)

1266 (11th Cir.2001) (citing *Dept of Health & Rehabilitative Servs. v. Yamuni*, 529 So.2d 258, 260 (Fla. 1988))).

Having established that The City of Coral Gables owes to those who would traverse its roadways a duty of care to maintain that property, and a corresponding duty to warn of and correct dangerous conditions thereon, the next step in the analysis is to determine whether the action at issue in the present opinion, the use of a Push Bumper to effectuate the removal of an inoperable vehicle, would be considered discretionary or operational in nature.

“Under Florida law, ‘a governmental agency is immune from tort liability based upon actions that involve its ‘discretionary’ functions.’” *Id.* “A discretionary function, under Florida law, is one in which ‘the governmental act in question involved an exercise of executive or legislative power such that, for the court to intervene by way of tort law, it inappropriately would entangle itself in fundamental questions of policy and planning.’” *Cook ex rel. Estate of Tessier v. Sheriff of Monroe County, Fla.*, 402 F.3d 1092, 1117-18 (11th Cir. 2005) (citing *Henderson v. Bowden*, 737 So.2d 532, 538 (Fla. 1999) (citation and internal quotation marks omitted). “An ‘operational’ function, on the other hand, is one not necessary to or inherent in policy or planning, that merely reflects a secondary decision as to how those policies or plans will be implemented.” *Cook*, 402 F.3d 1092, 1117-18 (11th Cir. 2005) (citing *Henderson v. Bowden*, 737 So.2d 532, 538 (Fla. 1999) (citation and internal quotation marks omitted).

Florida's discretionary function exception to its general waiver of sovereign immunity “is grounded in the doctrine of separation of powers,” and “it would be an improper infringement of separation of powers for the judiciary, by way of tort law, to intervene in fundamental decision making of the executive and legislative branches of government, including the agencies and municipal corporations they have created.” *Kaisner v. Kolb*, 543 So.2d 732, 736–37 (Fla. 1989).



In sum, basic judgmental or discretionary governmental functions are immune from legal action, whereas operational acts are not protected by sovereign immunity. *Pollock v. Fla. Dept of Highway Patrol*, 882 So.2d 928, 933 (Fla. 2004) (citation omitted).

In the circumstances where a vehicle is inoperable or otherwise obstructing the roadway, the decision of whether or not to utilize the Push Bumper to move the vehicle or to wait for a tow truck, would be considered an “operational” function, therefore subjecting the City of Coral Gables to a suit for damages in the event that damages occur due to the negligent actions of an officer. *See, Trianon Park Condo. Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912, 920 (Fla. 1985) (citing 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)(internal citations omitted).

However, that the City of Coral Gables has the duty to maintain its roadways, does not mean that a responding law enforcement officer has the duty to use the Push Bumper affixed to his/her vehicle to effectuate the removal of the inoperable vehicle. In fact, under Florida Statutes Section 316.061, (3), the removal of a vehicle from a roadway by a law enforcement officer is permissive, not mandatory as Florida Statutes Section 316.061, (3) states, in relevant part,

(3) Employees or authorized agents of the Department of Transportation, law enforcement with proper jurisdiction, or an expressway authority created pursuant to chapter 348, in the exercise, management, control, and maintenance of its highway system, may undertake the removal from the main traveled way of roads on its highway system of all vehicles incapacitated as a result of a motor vehicle crash and of debris caused thereby. Such removal is applicable when such a motor vehicle crash results only in damage to a vehicle or other property, and when such removal can be accomplished safely and will result in the improved safety or convenience of travel upon the road.

Therefore, based on the fact that the removal of an inoperable vehicle by law enforcement is permissive and not mandatory, in the event an officer engages in the activity, they

assume the duty to act carefully under the undertaker doctrine. The doctrine states that “[w]henver one undertakes to provide a service to others, whether one does so gratuitously or by contract, the individual who undertakes to provide the service-i.e., the ‘undertaker’-thereby assumes a duty to act carefully and to not put others at an undue risk of harm.” *Clay Elec. Co-op., Inc. v. Johnson*, 873 So. 2d 1182, 1186 (Fla. 2003) (citing Restatement (Second) of Torts § 323 (1965)). The “undertaker’s doctrine,” applies to both governmental and nongovernmental entities. *See, e.g., Dept. of Transp. v. Neilson*, 419 So.2d 1071 (Fla. 1982); *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla.1979).

#### **VI. Conclusion:**

The City of Coral Gables has a duty to maintain its roadways, which includes the duty to warn of and correct dangerous conditions thereon. The Coral Gables Police Department may use push bumpers to effectuate the removal of vehicles from the roadway, however, by doing so, CGPD assumes a duty to act carefully and to not put others at an undue risk of harm. If this duty is breached, the City is liable for damages resulting from negligence as would be any private litigant. When an officer attempts to move an inoperable vehicle from the roadway through the use of a Push Bumper, the City may be held liable if any damages result from said action as a result of the officer’s carelessness or unreasonable actions. Therefore, unless absolutely necessary, or the owner of the vehicle to be moved consents, vehicles specifically designed and operated for the removal of damaged vehicles should be utilized to effect the removal those vehicles obstructing the right-of-way. In all circumstances, it is strongly recommended that officers should obtain a signed waiver and release by the vehicle owner before using the Push Bumpers.