IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 64,419

JAMES H. PAYNE, ETC., ET AL.,

Petitioners,

vs.

BROWARD COUNTY, ET AL.,

Respondents.

DISCRETIONARY PROCEEDING TO REVIEW A DECISION
OF THE DISTRICT COURT OF APPEAL -
FOURTH DISTRICT OF FLORIDA

RESPONDENT BROWARD COUNTY'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

This proceeding has been brought to review an order of the District Court of Appeal, Fourth District, dated August 31, 1983. In that order, the appellate court set aside a jury verdict in favor of these Petitioners (Plaintiffs below), JAMES H. PAYNE, as Personal Representative of the Estate of ALLISON JEAN PAYNE, Deceased and JAMES H. PAYNE and CATHERINE JEAN PAYNE, as Allison's parents.

In this brief, the parties will be referred to by name or as Plaintiffs and Defendants. Reference to the Appendix hereto will be by A. Reference to the Record on Appeal will be by R.

The Plaintiffs sued Defendants BROWARD COUNTY, the SCHOOL BOARD OF BROWARD COUNTY and others for the wrongful death of their minor daughter, ALLISON, who was struck by a truck while crossing a road next to her school. It was alleged inter alia that BROWARD COUNTY, which had designed and built the road and drawn up plans for pedestrian signalization at the spot where students crossed the road, was negligent as to installing pedestrian or traffic controls at that location. Plaintiffs alleged that the SCHOOL BOARD improperly located a sidewalk and fence and failed to correct the dangerous condition created thereby, which caused students to cross at an unmarked spot.

The jury returned a verdict finding the City of Coral Springs fifty percent (50%) negligent, BROWARD COUNTY forty percent (40%) negligent, and ALLISON PAYNE ten percent (10%) negligent, with total damages assessed at SEVEN HUNDRED THOUSAND DOLLARS ($700,000.00). After reduction for comparative negligence and set offs for the settlement with the driver and contractor, judgment was entered in the amount of FIVE HUNDRED TWENTY-FIVE THOUSAND DOLLARS ($525,000.00) against the City and the COUNTY. BROWARD COUNTY appealed the judgment against it, and the Plaintiffs appealed from the judgment in favor of the SCHOOL BOARD. Both appeals were consolidated in one proceeding before the District Court of Appeal, Fourth District.

The District Court of Appeal found that BROWARD COUNTY'S activity was of a planning rather than operational nature, and that the COUNTY was therefore immune from suit. The court accordingly set aside the jury verdict and directed the trial court to enter judgment for the COUNTY.

POINT I

WAS THE COUNTY BUILDING OF A NEW SPIN OFF RIGHT-OF-WAY (ROCK ISLAND ROAD) AT THE PARTICULAR INTERSECTION THE CREATION OF THE KIND OF KNOWN DANGER WHICH REQUIRES A WARNING OR AN AVERSION OF THE DANGER

BROWARD COUNTY would submit to this Court that our building of this spin off right-of-way at this intersection and the facts surrounding that

construction did not create the known danger of the kind that would impose liability. The Florida Supreme Court has recently spoken to the particular point that is the subject of this certified question. In these cases Department of Transportation v. Neilson, 419 So.2d 1071 (1982) and City of St. Petersburg v. Collum, 419 So.2d 1082 (1982), Florida Supreme Court cases of 1982, the court stated several holdings. It was held that the decision to build or change a road and all the determinations inherent in such a decision are of the judgmental planning level type. The court went on to say, however, "that alleged defects would not be actionable unless a known dangerous condition is established." This is one that would not be readily apparent to one who would be injured. There was an illustration given of this legal principal in operation.

The particular illustration that I would direct your attention to is the one of the construction of a curved road. The court went on in that illustration to say that the fact that a road is built with a sharp curve is not itself a design defect which creates governmental liability. If however the governmental entity (and this is the important part) knows when it creates a curve that vehicles cannot safely negotiate the curve at speeds of more than 25 miles per hour, such entity must take steps to warn the public of the danger. It would first be submitted to this Court that nowhere in the facts of this case can it be said that BROWARD COUNTY knew when it began the construction of the spin off right-of-way at Rock Island Road that it was in fact creating a known dangerous condition to pedestrians. It is also clear

from the illustration given that the court is referring to actual knowledge of a dangerous condition THAT WOULD NOT BE READILY APPARENT (emphasis supplied). The appellate courts in this state have spoken to the specific question of what facts fall short of demonstrating actual knowledge so as to make the governmental entity liable. The particular case is Besecker v. Seminole County, 421 So.2d 1082 (5th DCA 1982), wherein that appellate court indicated that the plaintiff had alleged facts (presumed true to test the pleadings) that there had been near accidents at the particular intersection and further that Seminole County had been told by someone that a stop sign was needed but that the county had failed to install one. It was further shown that there was no admission on the part of Seminole County that the intersection was in fact dangerous or that the installation of the devices to protect the motorists was required.

The fact that there may have been near accidents at this particular intersection at Rock Island Road or that BROWARD COUNTY may have been told by numerous people that a traffic light and a pedestrian crosswalk were needed does not establish knowledge sufficient enough to be actionable. BROWARD COUNTY did not and does not admit that it created a known dangerous situation. The facts of this case are not sufficient to establish a level of actual knowledge of a dangerous condition which would not be readily apparent for which liability may attach. Further, BROWARD COUNTY would state that the facts of this particular case bring BROWARD COUNTY within an undisputed category of immunity. That is, BROWARD COUNTY'S decision

as to this particular construction of this road and traffic light was a decision which was delegated to a Broward County Official who had the duly authorized power to make the decision, the Director of the Traffic Engineering Division. It was a carefully considered decision which was made for the advancement of a basic governmental interest (i.e., to have uniform traffic engineering agreements with all municipalities). These particular facts bring this decision to not install the traffic light under the separation of powers rule for governmental immunity. There must be room for basic governmental policy decision and the implementation thereof. If the test in Johnson v. State, 69 Cal.2d 782, 73 Cal.Rptr. 240, 447 P.2d 352 (1968), and adopted by the Florida Supreme Court in Commercial Carrier Corp. v. Indian River Cty., 371 So.2d 1010, 1022 (Fla. 1979), as a means of identifying the functions, had been observed here, all the activities at issue could, under the circumstances delineated in Johnson, should be characterized as policy and planning decisions. This test has often been ignored by Florida appellate court decisions, it now requires careful scrutiny. (Paraphrased from Justice Ervin of the First District Appellate Court).

Johnson explains that only those basic policy decisions which have been committed to coordinate branches of the government are immunized from judicial review; that a basic policy decision must be a considered one, i.e., one made by the public entity's conscious balancing of risks and advantages, Johnson v. State, supra, 73 Cal.Rptr. at 249, 447 P.2d at 361, n. 8.

Liability cannot be imposed when condemnation of the act brings into question the decision of one who, with the authority to do so, determined that the acts involved should occur, or that the risk which came to fruition

should be encountered for the advancement of the governmental objective Department of Transportation v. Neilson, supra.

This particular quote is a further statement of the separation of powers type argument that was originally taken up by the Florida Supreme Court in Commercial Carrier Corporation v. Indian County, 371 So.2d 1010 (1979), where the court went on to say that it was grounded upon separation of powers which will not permit the substitution of the decision by a judge or jury for the decision of a governmental body as to the reasonableness of planning activity conducted by that body. The Commercial Carrier case cited from the California case of Johnson v. State, 447 P.2d 352 (1968). It could be seen that in developing California caselaw prior to the Johnson v. State case, the opinions were to the effect that when the employee has actually reached a considered decision knowingly and deliberately encountering the risk that gave rise to the plaintiffs complaint then sovereign immunity should remain in tact. It is the conscientiously exercised discretion in the sense of assuming certain risk in order to gain policy objectives. BROWARD COUNTY would also cite Bellavance v. State, 390 So.2d 422 (1st DCA 1980). In that case "the state had not demonstrated that the personnel involved after conscientiously balancing the risk in advantages, made a considered decision in the release of the particular individual who had caused the injuries."

BROWARD COUNTY would suggest to this Court that the facts of this case clearly show that the reason for the delay in the construction of and putting up of the traffic control device with pedestrian control mechanism, was that the City of Coral Springs would not sign a uniform traffic engineer-

ing agreement with BROWARD COUNTY. The reason they wouldn't sign the traffic engineering agreement with BROWARD COUNTY was that they wanted certain paragraphs and clauses, which would have been unique to that municipality and it was Mr. Richard Mercer's well considered decision that if BROWARD COUNTY were to effectively control traffic movement and flow in this County, that the agreements it would have with all municipalities would have to be uniform in their operation and management. The decision was made not to install the particular traffic light because we did not in fact have an agreement with the City of Coral Springs that would have enhanced the uniform traffic control function in this County. Trial Transcript Page 1266, 1267, 1270, 1271, 1272, and 1306. It is clear that the need and desire for uniform agreements with standard paragraphs for operation and management is the advancement of a clear governmental policy and BROWARD COUNTY would further state it feels that it has met any burden of demonstrating that this decision is considered.

BROWARD COUNTY would also cite the case of Wong v. The City of Miami, 237 So.2d 131 (1970), where this Court affirmed that inherent in the exercise of powers is the right to determine strategies and tactics for the deployment of those powers. BROWARD COUNTY would suggest that this decision between itself and Coral Springs was part of a predetermined strategy as to how to go about getting all municipalities in this County to sign the same uniform traffic control agreement.

POINT II

THE DECISION TO INSTALL THE TRAFFIC LIGHT ONCE MADE CARRY WITH IT THE CONCOMITANT DUTY TO WARN UNTIL SUCH TIME AS THE LIGHT WAS OPERATIONAL

Once the decision to install the traffic light has been made, does it carry with it the concomitant duty to warn until such time as a light was operational. BROWARD COUNTY would suggest once again that the duty to warn cannot be found to have existed in this case because there cannot be found in the facts of this case that a type or degree of knowlege that is referred to in the Department of Transportation v. Neilson, supra and City of St. Petersburg v. Collum, supra that would have mandated BROWARD COUNTY'S placement of warnings before the light became operational. The fact that there might have been near accidents and that we might have been told by individuals that we should put a traffic light in there would once again not bring the particular facts of this case into the actual knowledge that is spoken of in the Department of Transportation v. Neilson, supra, City of St. Petersburg v. Collum, supra and Besecker v. Seminole County, supra.

POINT III

DID THE COMPLAINT IN THE CASE BEFORE THE COURT ADEQUATELY ALLEGE THE DANGEROUS CONDITION REQUIRING WARNING NOTICE OF THE DANGER

BROWARD COUNTY would state that the complaint did not in fact adequately allege the dangerous condition of the kind that this Court had in mind in Department of Transportation v. Neilson, supra. BROWARD COUNTY would cite as authority for that the opinion of Judge Letts in the appellate case of Broward County v. Payne, the case below in the fourth district court of appeals cited as 437 So.2d 719 (Fla. 4th DCA 1983). Judge Letts specifically asked the question, "Finally as the supreme court required in Harrison v. Escambia County School Board, 434 So.2d 316 (Fla. 1983) did the instant complaint adequately allege the dangerous condition requiring warning, notice of the danger," Judge Letts went on to say, "We have read and reread the complaint and while its 32 pages allege almost everything but the proverbial kitchen sink, its allusions to the creation of a known or dangerous condition and failure to warn do not appear to rise to the level needed under the City of St. Petersburg v. Collum, 419 So.2d 1082 (Fla. 1982), and the Department of Transportation v. Neilson, supra."

Plaintiffs complaint against BROWARD COUNTY is found in Count VI of its complaint and it includes numbers paragraphed 57 through 71 encompassing page 23 through 27 of the complaint. In none of those paragraphs can it be found that there is the allegation of the creation of a dangerous

condition which would be not readily apparent to one who would be injured or trap of the type that the Florida Supreme Court spoke of the City of St. Petersberg v. Collum, supra, and the Department of Transportation v. Neilson, supra. The requirement for the specificity in clearly delineated factual pleadings finds its basis in the following. We find it unreasonable to presume that a governmental entity, as a matter of policy in making a judgmental planning level decision, would knowingly create a trap or a dangerous condition and intentionally failed to warn or protect the users of that improvement from the risk. In our opinion it is only logical and reasonable to treat the failure to warn or correct a known danger created by government as negligence at the operational level. City of St. Petersburg v. Collum, 419 So.2d 1082. This plaintiff would have to allege specifically the existence of an operational level duty to warn the public of a known dangerous condition which, created by it and being not readily apparent, to one who would be injured constituted a trap for the unwary.

CONCLUSION

In conclusion it can be seen that Broward County's building of a new spin off right-of-way at Rock Island Road at the particular intersection where this accident occured and all the facts around that particular construction did not create the kind of known danger which would not be readily apparent to one who might be injured which would require a warning or an aversion of danger.

Second, the decision to install a traffic light once made did not carry with it the concomitant duty to warn until such time as the light was operational for the reason that the facts simply do not establish the type of dangerous condition that was not readily apparent.

The complaint before the Court while numerous in its allegations of wrong doing against Broward County are not factually sufficient enough for this complaint to meet the requisites that have been established by the established cases. It is for all of the above reasons that the actions of the Fourth District Court of Appeal should be sustained by this Court. It can be further seen that the Fourth District Court of Appeals has had no problem in delineating between factual situations which are policy and planning and those operations which are not planning. Further with the latest expressions of this Court as to the applicable law in the area of sovereign immunity there should be no further need for wailing and quashing of teeth on how to define

and apply the dictates to the Commercial Carrier Corporation v. Indian River County, case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to SOLOMON & FLANAGAN, 311 Southeast 13th Street, Fort Lauderdale, Florida 33301, Attorneys for SCHOOL BOARD; LARRY KLEIN, ESQUIRE, Suite 201, Flagler Center, 501 South Flagler Drive, West Palm Beach, Florida 33401, Co-Counsel for SCHOOL BOARD; NANCY LITTLE HOFFMAN, Attorney at Law, Law Offices of Nancy Little Hoffman, P.A., 644 Southeast Fourth Avenue Fort Lauderdale, Florida 33301; and to KRATHEN AND SPERRY, P.A., Counsel for Petitioners, 621 South Andrews Avenue, Fort Lauderdale, Florida 33301; and the Academy of Florida Trial Lawyers, Edna L. Caruso, Suite 4B, Barristers Building, 1615 Forum Place, West Palm Beach, Florida 33401, on this 2nd day of December, 1983.

John Franklin Wade

JOHN FRANKLIN WADE
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