IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 64,419

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

Petitioners,

vs.

BROWARD COUNTY, ET AL.,

Respondents.

FILED

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

PETITIONERS' INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

	PAGE
TABLE OF CITATIONS	-ii-
POINTS INVOLVED ON APPEAL	-iv-
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	3
ARGUMENT	
POINT I	
THE COUNTY'S ACTION IN OPENING A NEW ROAD TO VEHICULAR TRAFFIC IN A SCHOOL ZONE WITHOUT PEDESTRIAN CONTROLS OF ANY KIND, WHERE THE COUNTY HAD PREVIOUSLY ACKNOWLEDGED THE NEED FOR PEDESTRIAN CONTROLS AT THAT CROSSING AND HAD DRAWN UP DETAILED PLANS FOR THEIR INSTALLATION, CONSTITUTED THE CREATION OF A KNOWN DANGER WHICH REQUIRED A WARNING OR AN AVERSION OF THE DANGER [FIRST AND SECOND CERTIFIED QUESTIONS].	8
POINT II	
THE COMPLAINT IN THE PRESENT CASE ADEQUATELY ALLEGES THAT THE COUNTY CREATED A KNOWN DANGEROUS CONDITION REQUIRING THE COUNTY TO WARN THE PUBLIC OR PROTECT IT FROM THE DANGER [THIRD CERTIFIED QUESTION].	14
POINT III	
THE DISTRICT COURT OF APPEAL ERRED IN SETTING ASIDE THE JURY VERDICT AND DIRECTING A VERDICT IN FAVOR OF BROWARD COUNTY.	16
POINT IV	
THE DISTRICT COURT OF APPEAL ERRED IN IMPLICITLY AFFIRMING THE DIRECTED VERDICT FOR THE SCHOOL BOARD WHERE THERE WAS EVIDENCE THAT THE LOCATION OF A SIDEWALK, FENCE AND PARKING AREA ON THE SCHOOL GROUNDS CREATED A FORESEEABLE RISK OF HARM TO STUDENTS CROSSING A DANGEROUS INTERSECTION, AND THE SCHOOL BOARD WAS NOT IMMUNE FROM LIABILITY.	20
CONCLUSION	26
CERTIFICATE OF SERVICE	27

TABLE OF CITATIONS

CASES	PAGE
A. L. Lewis Elementary School v. Metropolitan Dade County, 376 So.2d 32 (Fla. 3d DCA 1979)	24
Beefy Trail, Inc. v. Beefy King International, Inc., 297 So.2d 853 (Fla. 4th DCA 1972)	18
Bell v. State, 394 So.2d 979 (Fla. 1982)	20
Board of Public Instruction of Bay County v. Jeter, 277 So.2d 69 (Fla. 1st DCA 1973)	23
City of St. Petersburg v. Collom, 419 So.2d 1082 (Fla. 1982)	8,9,10,11,12,13 14,15,16,18,19,23
Commercial Carrier Corporation v. Indian River County, 371 So.2d 1010 (Fla. 1979)	21,23
Department of Transportation v. Neilson, 419 So.2d 1071 (Fla. 1982)	10,14,16,18,19
Florida Freight Terminals, Inc. v. Cabanas, 354 So.2d 1222 (Fla. 3d DCA 1978)	23
Gelfo v. General Accident, Fire and Life Assurance Corporation, 167 So.2d 31 (Fla. 3d DCA 1964)	20
Geller v. 2500 Collins Corporation, 130 So.2d 322 (Fla. 3d DCA 1961)	20
Harrison v. Escambia County School Board, 434 So.2d 316 (Fla. 1983)	9,14
Perez v. Department of Transportation, 435 So.2d 830 (Fla. 1983)	16,19
Ralph v. City of Daytona Beach, ___ So.2d ___, 8 FLW 79 (Fla. Case No. 62,094, opinion filed February 17, 1983)	10,19
Simonton v. Gandolfo, 4 Fla. 209 (1891)	19
Walker v. Walker, 254 So.2d 832,833 (Fla. 1st DCA 1971)	18,19
Zirin v. Charles Pfizer and Company, 128 So.2d 594 (Fla. 1961)	20

TABLE OF CITATIONS CONTINUED

PAGE

OTHER

Article V, Section 3(b)(3), Florida Constitution (1980) 3

Section 229.041, Florida Statutes 23,24

Rule 9.030(a)(2)(A)(v), Florida Rules of Appellate Procedure 3

POINTS INVOLVED ON APPEAL

POINT I

WHETHER THE COUNTY'S ACTION IN OPENING A NEW ROAD TO VEHICULAR TRAFFIC IN A SCHOOL ZONE WITHOUT PEDESTRIAN CONTROLS OF ANY KIND, WHERE THE COUNTY HAD PREVIOUSLY ACKNOWLEDGED THE NEED FOR PEDESTRIAN CONTROLS AT THAT CROSSING AND HAD DRAWN UP DETAILED PLANS FOR THEIR INSTALLATION, CONSTITUTED THE CREATION OF A KNOWN DANGER WHICH REQUIRED A WARNING OR AN AVERSION OF THE DANGER [FIRST AND SECOND CERTIFIED QUESTIONS].

POINT II

WHETHER THE COMPLAINT IN THE PRESENT CASE ADEQUATELY ALLEGES THAT THE COUNTY CREATED A KNOWN DANGEROUS CONDITION REQUIRING THE COUNTY TO WARN THE PUBLIC OR PROTECT IT FROM THE DANGER [THIRD CERTIFIED QUESTION].

POINT III

WHETHER THE DISTRICT COURT OF APPEAL ERRED IN SETTING ASIDE THE JURY VERDICT AND DIRECTING A VERDICT IN FAVOR OF BROWARD COUNTY.

POINT IV

WHETHER THE DISTRICT COURT OF APPEAL ERRED IN IMPLICITLY AFFIRMING THE DIRECTED VERDICT FOR THE SCHOOL BOARD WHERE THERE WAS EVIDENCE THAT THE LOCATION OF A SIDEWALK, FENCE AND PARKING AREA ON THE SCHOOL GROUNDS CREATED A FORESEEABLE RISK OF HARM TO STUDENTS CROSSING A DANGEROUS INTERSECTION, AND THE SCHOOL BOARD WAS NOT IMMUNE FROM LIABILITY.

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.1-4. Reference to the Record On Appeal will be by R.___.

The Plaintiffs sued Defendants BROWARD COUNTY, the SCHOOL BOARD OF BROWARD COUNTY and others[1] for the wrongful death of their minor daughter, ALLISON, who was struck by a truck while crossing a newly opened 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 in opening the road prior to installing any pedestrian or traffic controls at that location. Plaintiffs alleged that 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.

At the close of Plaintiffs' case, the trial court directed a verdict in favor of the SCHOOL BOARD (R.1616,5108). The jury

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[1] The Plaintiffs also sued the driver and owner of the truck, the contractor who built the road and the City of Coral Springs. The driver, truck owner and contractor were dismissed during trial; the City settled post judgment. None of those Defendants are therefore party to this proceeding.

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) (R.5104). 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 (R.5109). 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. The court made no ruling at all on the Plaintiffs' appeal from the judgment in favor of the SCHOOL BOARD. The District Court did, however, certify the following questions to this Court as being a matter of great public importance:

I.

> WAS THIS [THE OPENING OF THE ROAD] THE CREATION OF THE KIND OF KNOWN DANGER WHICH REQUIRES A WARNING OR AN AVERSION OF THE DANGER?

II.

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

III.

> DID THE INSTANT COMPLAINT ADEQUATELY ALLEGE THE DANGEROUS CONDITION REQUIRING WARNING NOTICE OF THE DANGER?

(A.3).

Plaintiffs timely invoked this Court's jurisdiction to review the August 31, 1983 order. This Court has jurisdiction pursuant to Article V, Section 3(b)(3), Florida Constitution (1980) and Rule 9.030(a)(2)(A)(v), Florida Rules of Appellate Procedure.

STATEMENT OF THE FACTS

ALLISON PAYNE, age 17, was a student at Coral Springs High School. On October 24, 1978, after classes were finished (R.1225), ALLISON proceeded west along the northernmost of two sidewalks on the school grounds and, upon reaching Rock Island Road[2], a county road (R.1036) which ran north and south along one side of the school property, attempted to cross. There were no traffic signals, pedestrian signals or crosswalks where the sidewalk met the road, nor were there any such signals at the intersection of Rock Island Road and Sample Road, some 125 feet to the south (R.1318). Two Coral Springs police officers and a police aide were stationed at the corner at Sample and Rock Island to direct traffic (R.729-30).

As ALLISON started to cross, a truck driven by Steven Wallice, which had been heading east on Sample Road, turned left (north) on Rock Island Road (R.728) and struck ALLISON (R.720;1228), causing fatal injuries.

Evidence at trial revealed that the COUNTY had, through its contractor, designed and built Rock Island Road and the intersection in question (R.1109;1192).

According to Warren Gilbert, the Coral Springs Police Chief, discussions were had with the COUNTY as early as 1976 regarding the need for traffic signals at the intersection, and it was anticipated

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[2] At the time of the accident, Rock Island Road had two lanes north and south bound open to traffic, but was in the process of being expanded by two additional lanes on the west side (R.1110).

that the COUNTY would install such signals before the 1976 school year (R.1058,1061-2). BROWARD COUNTY had agreed that it was to install a traffic light as well as pedestrian signals across Rock Island Road (R.1065,1296,1035). When the COUNTY still had not installed the light by the 1978 school year, the CITY began directing traffic at the corner as an interim measure (R.1061). Chief Gilbert testified that he warned the COUNTY of the need for signals at that intersection before the 1978 school year started (R.1068), but that the COUNTY failed to install the promised signals (R.1080).

Richard Mercer, the COUNTY'S Director of Traffic Engineering, admitted that the COUNTY had agreed to install signals and planned to do it when Rock Island Road was finished--i.e., when any part of the roadway was opened to traffic (R.1268). Although the COUNTY opened the road to traffic prior to its completion as a four-lane road (R.1335), neither Mercer (R.1279) nor his department (R.1282-4) was notified before such opening. In fact, the yellow lane striping down the center of the road (the only markings present at the time of the accident) was apparently done only because Ralph Quick, Operations Supervisor for the COUNTY'S Traffic Engineering Division, happened to drive by and notice that Rock Island Road had been asphalted but not striped (R.1311). Quick testified that even in an interim situation such as that of Rock island Road, pedestrian travel should be considered, but that the COUNTY had done nothing in that regard on Rock Island Road prior to its being opened to traffic (R.1318).[3]

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[3] Plaintiffs' expert, Dr. William Fogarty, also testified that even if a road is still under construction, all markings should be in place if the road is opened to traffic (R.1370).

According to Mercer, the COUNTY had planned in August of 1978 to have the signals installed by the following month (R.1271). However, as late as October 23, 1978, the day before ALLISON was killed, Mercer's superior at the COUNTY was still asking him about the status of that installation (R.1273).

The sidewalk which led ALLISON from the school building to the edge of Rock Island Road was the northernmost of two parallel sidewalks on the school property and the one closest to the school building. The southernmost sidewalk ran along the edge of Sample Road up to the corner of Rock Island, and was separated from the other sidewalk by a faculty parking lot (R.1177-79) which exited onto Rock Island Road.

Daniel DeMauro, the SCHOOL BOARD'S Safety Manager, testified that it was his job to recommend locations for installation of sidewalks, crossing guards and other devices en route to and from school (R.1171). He recommended installation of the north sidewalk (R.1177) so that the students would not be crossing the faculty parking lot (R.1179), and anticipated that the students would continue west and cross Rock Island Road at that point (R.1179; 1180). He did not make any recommendations regarding channeling students in any way other than directly across Rock Island Road from the north sidewalk (R.1180).

Chief Gilbert recognized that the north sidewalk was a problem several months before ALLISON was killed (R.1068;1070), since it would cause children to cross Rock Island away from the intersection (R.1067-9). He recommended that some barrier be placed at the north sidewalk so that the children would walk down to the corner and cross at the south sidewalk (R.1067,1069). He also recommended to

the COUNTY that a pedestrian crosswalk be placed at the south sidewalk, within the intersection (R.1067,1068).

Richard Mercer of the COUNTY also suggested to the SCHOOL BOARD that extending the latter's fence along Rock Island Road and closing off the entrance to the parking lot would direct the students down to the corner where the COUNTY would provide pedestrian traffic control signals (R.1286).

The Coral Springs High School Principal, Paul Proffitt, testified that he was concerned about students crossing Rock Island Road, and made announcements over the school intercom that it was a dangerous intersection (R.1150). There were, however, no rules or regulations developed by the SCHOOL BOARD regarding where the students were to cross the road (R.1151).

Dr. William Fogarty, a civil engineer, was presented by the Plaintiffs as an expert in the area of highway design, traffic engineering and accident reconstruction (R.1354). He was asked a hypothetical question (R.356-66) which described the accident and incorporated the facts that students would proceed along the northernmost sidewalk to Rock Island Road, that there was no traffic light or pedestrian crosswalk either at that point or at the intersection, that there was no school crossing guard at the northernmost sidewalk (although there were police officers at Sample Road) and that the SCHOOL BOARD'S purpose in locating the northernmost sidewalk was for students to use that sidewalk to exit the school and cross Rock Island Road.

One of the opinions expressed by Dr. Fogarty based upon that hypothetical was that the location of the sidewalks did not meet engineering standards, since the southernmost sidewalk discharged pedestrians into the widest part of the intersection, and since the

northernmost sidewalk removed pedestrians from the center of the intersection area, and called for greater control, markings, etc. (R.1397). He explained that the sidewalk is an engineering device used to funnel pedestrians, with the expectation that they continue beyond it in the same direction (R.1369). It was also his opinion that the appropriate means for channeling students across Rock Island Road would be to close off access to the parking lot from Rock Island and relocate the pedestrian path of travel to an appropriate position across the intersection (R.1398). When asked on cross which were the most important traffic operations factors in terms of causing this accident, Dr. Fogarty testified that channeling students (via sidewalk) into an area where no crosswalk existed, and the absence of that crosswalk were tied as the number one causative factor (R.1439).

ARGUMENT

POINT I

THE COUNTY'S ACTION IN OPENING A NEW ROAD TO VEHICULAR TRAFFIC IN A SCHOOL ZONE WITHOUT PEDESTRIAN CONTROLS OF ANY KIND, WHERE THE COUNTY HAD PREVIOUSLY ACKNOWLEDGED THE NEED FOR PEDESTRIAN CONTROLS AT THAT CROSSING AND HAD DRAWN UP DETAILED PLANS FOR THEIR INSTALLATION, CONSTITUTED THE CREATION OF A KNOWN DANGER WHICH REQUIRED A WARNING OR AN AVERSION OF THE DANGER [FIRST AND SECOND CERTIFIED QUESTIONS].

In its opinion, the District Court of Appeal did not separately frame the questions it was certifying to this Court, but instead included them within a paragraph of its opinion, as follows:

> In the case at bar the County built a new spin-off right-of-way (Rock Island Road) at the ill fated intersection which it is suggested contributed to the accident. Was this the creation of the kind of known danger which requires a warning or an aversion of the danger? Did the decision once made of the need to install the traffic light carry with it the concomitant duty to warn until such time as the light was operational? Finally, as the Supreme Court required in Harrison, did the instant complaint adequately allege the dangerous condition requiring warning notice of the danger?

Slip Opinion, pages 2-3 (A.2-3).

To facilitate discussion, Petitioners have taken the liberty of combining the first two certified questions and restating them as set forth above. The third certified question, dealing with the sufficiency of the complaint's allegations, is the subject of Point II of this brief.

Essentially, the questions certified ask this Court to determine whether the facts of the case as proved at trial fall within the parameters of this Court's decision in City of St. Petersburg v. Collom, 419 So.2d 1082 (Fla. 1982). Should this Court answer that question in the affirmative, then the third question posed by the District Court of Appeal is whether such facts were sufficiently

alleged in the complaint as required in Harrison v. Escambia County School Board, 434 So.2d 316 (Fla. 1983) [Point II infra].

This Court held in Collom that the failure to correct or warn of a known danger created by a governmental entity is negligence at the operational level for which liability may be imposed. That opinion stated:

> We hold that when a governmental entity creates a known dangerous condition, which is not readily apparent to persons who could be injured by the condition, a duty at the operational level arises to warn the public of, or protect the public from, the known danger. The failure to fulfill this operational-level duty is, therefore, a basis for an action against the governmental entity [emphasis in original].

Id. at 1083. This Court went on to say that

> ...once a governmental entity creates a known dangerous condition which may not be readily apparent to one who could be injured by the condition, and the governmental entity has knowledge of the presence of people likely to be injured, then the governmental entity must take steps to avert the danger or properly warn persons who may be injured by that danger [emphasis in original].

Id. at 1086. The Collom court concluded that

> ...a governmental entity may not create a known hazard or trap and then claim immunity from suit for injuries resulting from that hazard on the grounds that it arose from a judgmental, planning-level decision.

Id. at 1086.

At the time this case was pleaded and tried, and even when briefed to the District Court of Appeal, this Court had not yet issued its Collom opinion. Accordingly, neither the pleadings nor the jury instructions could have been framed so as to fit within this Court's current pronouncements regarding the duty of a governmental entity to correct or warn of a dangerous condition which it has created. However, the facts of this case, as developed

at trial, do clearly reflect the type of situation encompassed within this Court's holdings in Collom as well as Department of Transportation v. Neilson, 419 So.2d 1071 (Fla. 1982) and Ralph v. City of Daytona Beach, ___ So.2d ___, 8 FLW 79 (Fla. Case No. 62,094, opinion filed February 17, 1983).

The facts of this case clearly demonstrate that BROWARD COUNTY was aware of the dangerous condition which would result when it opened Rock Island Road to vehicular traffic. The need for signalization had been recognized by the COUNTY two (2) years before this accident occurred (R.1057-1058,1061-1062). Furthermore, the COUNTY had promised to install pedestrian signals across Rock Island Road as well as a traffic light at the intersection when any part of the road was opened to traffic (R.1065,1268-1269,1271,1296). Both the SCHOOL BOARD (R.1173-1176,1182) and the Chief of Police of the City of Coral Springs (R.1048,1054,1057,1068,1079-1080) repeatedly warned the COUNTY of the need for signals at that crossing before the 1978 school year started, but still the COUNTY failed to install the promised signals (R.1080). It had promised once again to have the signals installed by September of 1978 (R.1272). Again this was not done, and ALLISON PAYNE was killed the following month. After that tragedy, the COUNTY did install the signals (R.1294).

The opening of the road without any signalization was a simple example of bureaucratic negligence at the operational level. One COUNTY department opened the road without notifying the traffic engineering department, and prior to even striping the road. The COUNTY admitted that whenever a road is opened to traffic, even though not fully completed, pedestrian travel should be considered

(R.1279,1318). It further admitted that it had done nothing in that regard prior to opening the road (R.1280,1318). The road was, in fact, given a center stripe only because the Operations Supervisor happened to drive by and see that it had been opened without any markings whatever (R.1311).

We respectfully submit that these facts constitute a failure to correct a known danger created by government which, according to Collom, is negligence at the operational level for which liability may be imposed.

The District Court of Appeal asks this Court, "Was this the creation of the kind of known danger which requires a warning or an aversion of the danger?" That question must surely be answered in the affirmative. The COUNTY created the situation by designing, building and opening the road without any pedestrian or vehicular signalization whatever. As to whether the situation was a "known danger", the record is replete with evidence that the COUNTY had repeatedly been warned that this was a problem area, and had acknowledged the need for signalization by drawing up plans for a complete package of pedestrian and vehicular controls to be installed in that area. The character or degree of danger created by the opening of an unmarked road next to a large school is one of which this Court could take judicial notice. Certainly the Police Chief (R.1067,1068) and the School Principal (R.1150) recognized that it was dangerous, and Plaintiffs' expert testified that the absence of a pedestrian crosswalk at the spot where the sidewalk met the road was a primary cause of the accident (R.1439).

Next, the appellate court asks, "Did the decision once made of the need to install the traffic light carry with it the concomitant duty to warn until such time as the light was operational?" We believe that one may properly equate the decision that signals were needed with a recognition that a road without such signals would be dangerous -- particularly where, as here, the COUNTY well knew that it was students from the school who would be crossing the road at the point where the signals were to be installed. This Court has made it very clear that when such a condition is knowingly created by a governmental entity, that entity "has the responsibility to protect the public from that condition, and the failure to so protect cannot logically be labeled a judgmental, planning-level decision." Collom, supra at 1086.

This Court illustrated that situation by the example of a road with a sharp curve which could not be negotiated by an automobile traveling more than twenty-five (25) miles per hour. The Court pointed out that the planning of such a road would not impose liability; however, if the governmental entity knew that automobiles could not negotiate the curve at more than twenty-five (25) miles per hour, an operational level duty would arise to warn motorists of the hazard. Collom, supra.

We do not here attempt to affix liability on the COUNTY for any defect in its proposed signalization package. We do claim, however, and will discuss further in Point III, infra, that the COUNTY'S opening of the road was a purely bureaucratic error at the operational level which would impose liability. For the purpose of this certified question, however, even if there is no liability for the COUNTY'S opening of the road without signals, there is surely

under Collom a clear duty to warn the students not to cross at the unsafe and unmarked spot where the sidewalk led the students to the edge of the road. The second certified question must thus also be answered in the affirmative, since if the COUNTY recognized the danger of an unmarked crossing yet failed to implement its signalization plan, it at the very least had a duty under Collom to place warning signs until it installed the signals.

POINT II

THE COMPLAINT IN THE PRESENT CASE ADEQUATELY ALLEGES THAT THE COUNTY CREATED A KNOWN DANGEROUS CONDITION REQUIRING THE COUNTY TO WARN THE PUBLIC OR PROTECT IT FROM THE DANGER [THIRD CERTIFIED QUESTION].

The third question certified by the District Court of Appeal was, "Finally, as the Supreme Court required in Harrison, did the instant complaint adequately allege the dangerous condition requiring warning notice of the danger?" (A.3). The court then went on to answer its own question by stating that it had "read and reread the complaint" but that its allusions to creations of dangerous conditions and failure to warn of them did not appear to rise to the level required by Harrison. We believe that the District Court of Appeal's concern about the sufficiency of the complaint in the present case was unfounded, since the operative facts as alleged were sufficient under Neilson and Collom even if not framed in the words of art now prescribed by this Court. Again, it must be remembered that the complaint was drafted long before this Court issued its pronouncements in Neilson or Collom.

We respectfully submit that this is not at all a case like Harrison v. Escambia County School Board, supra, where the complaint was found wanting because it merely alleged "unusual traffic hazards" and contained no specific allegations of fact. In marked contrast, the present complaint alleged inter alia that at the time of the accident the COUNTY knew that the area was inadequately designed in that there were no lines, markings, warning signs or pedestrian controls (R.3691); that the entire area was dangerously and inadequately designed (R.3692); that it knew that students would be crossing at the

area where ALLISON PAYNE was killed (R.3692); that the COUNTY failed to provide adequate warnings, signs, crosswalks or other protective devices to students walking westbound, and knew that such failure placed the students in a perilous condition subject to hazardous traffic in the area (R.3692); and that the COUNTY failed to provide interim safety measures when Rock Island Road was opened to traffic, including warning signs, crosswalks, traffic control devices, etc. (R.3693).

In sum, the present complaint clearly alleges, although perhaps not in the prescribed language, that the COUNTY knew it would be dangerous to the students to open the road in its present condition, and failed to take steps to protect or warn them. The Plaintiffs should not now be completely out of court because their complaint failed to incant the magic language, particularly since, as pointed out in Point I, *supra,* the evidence at trial clearly revealed facts which fall within *Collom* and its progeny.

POINT III

THE DISTRICT COURT OF APPEAL ERRED IN SETTING ASIDE THE JURY VERDICT AND DIRECTING A VERDICT IN FAVOR OF BROWARD COUNTY.

Plaintiffs believe that the appellate court overlooked the dispositive issue in this case. As its opinion reveals, that court viewed the case as turning on the question of whether the failure to install a traffic signal constituted a planning or operational function (A.1), or whether any delay in installing a signal "extends the planning immunity cloak during the hiatus" (A.2). Rather, the issue to be determined was whether the COUNTY'S negligence in opening a road to vehicular traffic prior to installing any of the pedestrian control features which it had long recognized were necessary, and had been promising to install, could subject it to liability.

The COUNTY'S liability was not predicated upon its failure to install a particular traffic signal, which under Department of Transportation v. Neilson might entitle the COUNTY to immunity. Similarly, this was not a question of whether the COUNTY should have upgraded a road or improved signals as in Perez v. Department of Transportation, 435 So.2d 830 (Fla. 1983) or in Neilson, supra. The operative question here is whether the COUNTY can be held liable for opening a new road right next to a school, which it had recognized created a dangerous intersection in need of signalization, without installing any of the planned-for signals.

Even without addressing the question of whether the facts here involve the creation of a known dangerous condition by BROWARD COUNTY, so as to bring the case within Collom, supra, we believe that the activity which should subject the COUNTY to liability was

its simple bureaucratic negligence in opening the road before it was signalized. This should, indeed, be considered an operational function.

Richard Mercer, the COUNTY'S Director of Traffic Engineering, admitted that the COUNTY had planned to install the signals when Rock Island Road was finished, and before any part of the roadway was opened to traffic (R.1268). Although the COUNTY opened the road to traffic prior to its completion as a four-lane road (R.1335), neither Mercer (R.1279) nor his Department (R.1282-1284) was notified before such opening. The only markings at the time of the accident consisted of a yellow lane down the center of the road. Even that marking would not have been present had not the COUNTY'S Operations Supervisor happened to drive by and noticed that the road had not been striped (R.1311). The COUNTY had continually postponed installation of the signals, while continuing to promise both the SCHOOL BOARD (R.1183) and the CITY (R.1058) that the signals would be installed.

Again, the COUNTY'S liability was predicated not upon its decision to signalize the intersection at all, or even its decision to install the particular type of signals called for in its plans. Rather, it was the COUNTY'S failure, after undertaking such signalization, to carry out that task prior to opening its road to vehicular traffic.

We believe that the jury could properly have found the COUNTY liable for opening Rock Island Road without incorporating any of the safety features it had already planned for and promised both the City of Coral Springs and the SCHOOL BOARD that it would install before the 1978 school year. It was Richard Mercer's job (operational by his own admission, R.1262-1265), to see to it that crosswalks were

painted, striping done, signals put in and so forth; yet another COUNTY department opened the road without notifying him. Plaintiffs' expert told the jury that traffic engineering standards require that all markings be put in place any time a roadway is open to travel, and that the lack of crosswalks and other pedestrian signals was a primary causative factor in this case.

We thus believe that the District Court of Appeal should have affirmed on the basis that the COUNTY'S opening of the road was simple bureaucratic negligence at the operational level, for which liability would lie, and that the jury properly returned a verdict against the COUNTY. In the event this Court finds that such activity was not properly within the operational sphere, however, we respectfully believe this Court should quash the Fourth District's opinion for its failure to affirm on the alternative basis that the COUNTY created a known danger which it failed to correct and of which it failed to notify the students using the admittedly dangerous road, for the reasons set forth in Point I above.

Finally, the District Court of Appeal erred in finding that the complaint failed to sufficiently allege the creation of a known dangerous condition, as argued in Point II, supra. Even if the complaint did not contain the "magic words" used in Collom and Neilson, the evidence at trial clearly revealed facts which would fall within the parameters of those cases. The issues thus tried should have been treated in all respects as if they had been raised in the pleadings, Beefy Trail, Inc. v. Beefy King International, Inc., 297 So.2d 853 (Fla. 4th DCA 1972). Furthermore, a judgment should not be reversed solely on the ground of a defective pleading unless there has been a miscarriage of justice. Walker v. Walker,

254 So.2d 832,833 (Fla. 1st DCA 1971); Section 59.041, Florida Statutes. See also Simonton v. Gandolfo, 4 Fla. 209 (1891), holding that a jury verdict will not be disturbed on appeal on account of mistakes in the pleadings, where it can be inferred that the jury passed upon the true merits of the case.

Even if the appellate court was of the opinion that the absence of language specifically alleging a duty to correct or warn of a known dangerous condition warranted setting aside a jury verdict, at the very least Plaintiffs should have been granted leave to amend. As this Court held in Perez v. Department of Transportation, supra, where the complaint was filed prior to Neilson, Collom or Ralph, an opportunity should be given to file an amended complaint to specifically allege the failure to warn of a known dangerous condition under the law as it now stands.

POINT IV

THE DISTRICT COURT OF APPEAL ERRED IN IMPLICITLY AFFIRMING THE DIRECTED VERDICT FOR THE SCHOOL BOARD WHERE THERE WAS EVIDENCE THAT THE LOCATION OF A SIDEWALK, FENCE AND PARKING AREA ON THE SCHOOL GROUNDS CREATED A FORESEEABLE RISK OF HARM TO STUDENTS CROSSING A DANGEROUS INTERSECTION, AND THE SCHOOL BOARD WAS NOT IMMUNE FROM LIABILITY.

At the conclusion of Plaintiffs' case, the trial court directed a verdict for the SCHOOL BOARD (R.1616,5108). Plaintiffs appealed the resulting final judgment, which appeal was consolidated with the COUNTY'S appeal, and both were briefed and orally argued together. In its decision of August 31, 1983, however, the Fourth District Court of Appeal failed to address or dispose of the appeal with respect to the BROWARD COUNTY SCHOOL BOARD. Although that omission was called to the court's attention in a Motion For Rehearing, the court denied the motion without further comment.

We must therefore assume that the Fourth District Court of Appeal intended to affirm the judgment in favor of the SCHOOL BOARD. Since the entire case is now before this Court, it may of course address this additional issue even though not specifically certified by the appellate court. Zirin v. Charles Pfizer and Company, 128 So.2d 594 (Fla. 1961); Bell v. State, 394 So.2d 979 (Fla. 1982).

In directing a verdict for the SCHOOL BOARD, the trial court of necessity found that under no view of the evidence, or of reasonable inferences therefrom favorable to the Plaintiffs, could there be any basis for recovery. Geller v. 2500 Collins Corporation, 130 So.2d 322 (Fla. 3d DCA 1961); Gelfo v. General Accident, Fire and Life Assurance Corporation, 167 So.2d 31 (Fla. 3d DCA 1964). Plaintiffs contend that the trial court erred in this determination, and that this cause should have gone to the jury.

The SCHOOL BOARD'S argument below was twofold; first, that its decision as to the location of the sidewalk was a planning function, entitling it to immunity under Commercial Carrier Corporation v. Indian River County, 371 So.2d 1010 (Fla. 1979); and second, that its location of the sidewalk, even if negligent, was not the cause of the accident (R.1603-1610). The trial court granted the motion based on its view that the Plaintiffs had not demonstrated a prima facie case of negligence on behalf of the SCHOOL BOARD (R.1616).

On none of these grounds can a directed verdict for the SCHOOL BOARD stand. The trial court's stated ground, to be upheld, would require a total absence of any evidence or reasonable inferences tending to show that the SCHOOL BOARD breached its duty of care in its placement of the sidewalk or parking area. Deciding questions of negligence is, of course, almost always a question of fact unless there is a total dearth of any evidence of wrongdoing. Here, however, the Plaintiffs' expert did testify that the location of neither sidewalk met engineering standards (R.1397), and that the north sidewalk (where ALLISON was killed) had the effect of funneling the students to a point at the edge of Rock Island Road where they were too far removed from the intersection area for safety without the addition of greater controls at that point.

The high school principal recognized that this was a dangerous intersection and so warned the students (R.1150). Although he voiced his concerns to various SCHOOL BOARD officials (R.1146,1150) no attempts were made to direct the students in crossing this dangerous intersection, either by rule (R.1151) or crossing guard (R.1166).

The dangerous condition created by the placement of the north sidewalk was also apparent to Chief Gilbert of the Coral Springs

Police Department, who recognized that it would cause children to cross away from the intersection. He recommended a barrier at that location so that the children would walk down to the intersection to cross (R.1067-69).

Richard Mercer, the COUNTY'S Director of Traffic Engineering, also recognized the problem and suggested to the SCHOOL BOARD that extending its fence along Rock Island Road and closing off the entrance to the parking lot would direct the students down to the corner where pedestrian traffic signals were to be located (R.1286). This was also one solution advocated by Dr. Fogarty (R.1398).

It was the job of the SCHOOL BOARD'S Safety Manager, Daniel DeMauro, to recommend locations for installation of sidewalks, crossing guards and other devices en route to and from school (R.1171). He testified that he fully anticipated that students would continue west across Rock Island Road at that point, rather than going down to the corner (R.1179,1180), but made no recommendation that students be channeled in any way other than directly across the road (R.1180). He defended his choice of location on the basis of his opinion that a sidewalk in the south location (along Sample) would cause a problem with students walking across the faculty parking lot (R.1179).[4]

On these facts, there is ample basis for a jury to find that the location of the sidewalk and parking area presented a hazard to students leaving the campuss -- a hazard forseseeable by the SCHOOL

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4 The reasonableness of that decision was, of course, for the jury to decide.

BOARD. The evidence also tended to establish a violation of certain Department of Education regulations (discussed further below) which had the force of law,[5] a violation of which would constitute negligence per se. Florida Freight Terminals, Inc. v. Cabanas, 354 So.2d 1222 (Fla. 3d DCA 1978).

There was, furthermore, evidence that the sidewalk's location played a contributing role in causing ALLISON'S death -- enough evidence to create a question for the jury. In addition to the fact that reasonable minds could conclude that the location where ALLISON crossed was too far away from the police officers for effective control, Dr. Fogarty specifically testified that in his expert opinion the channeling of the students via the north sidewalk was a primary causative factor (R.1439).

Finally, judgment for the SCHOOL BOARD should not have been upheld based on its claim that it engaged in only discretionary or planning level activities for which it would be immune under Commercial Carrier. In the first place, there was evidence from which the jury could find that the BOARD was negligent in its maintenance of the parking area and sidewalk by failing to correct what had been recognized as a dangerous condition (R.1286). In the second place, the SCHOOL BOARD'S location of the sidewalk in such a way as to discharge the students at a dangerous location clearly constituted the creation of a known dangerous condition, and its failure to either correct that situation or warn the students should subject it to liability under Collom, supra. We believe that the SCHOOL BOARD should

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[5] Sec. 229.041, Fla. Stats.; Board of Public Instruction of Bay County v. Jeter, 277 So.2d 69 (Fla. 1st DCA 1973).

be held liable to these Plaintiffs under the same rationale that would have subjected the COUNTY to liability, as argued under Point I, supra.

In the present case, the discretionary nature of the act in question is further belied by the fact that the SCHOOL BOARD was under a mandatory duty to see to it that the location of walkways, parking areas and driveways do not create a hazard to students. Section 6A-2.96 of the Florida Administrative Code contains regulations by the Department of Education requiring inter alia that:

> (5) The location of walkways, parking areas and driveways shall not create a hazard to students.
>
> * * *
>
> (8) The board and administrator shall annually review the traffic control and safety device needs of each facility in the district and shall initiate and assure all necessary changes indicated by such review.
>
> * * *
>
> (11) All parking areas shall be defined for orderly parking and shall be kept hazard-free....

These regulations, as noted earlier, have the force of law and are binding on the SCHOOL BOARD. Sec. 229.041, Fla. Stats.

Where the SCHOOL BOARD is under a mandatory duty to locate its walkways, parking areas and driveways so as not to create a hazard to students, its decision as to where to locate them is no longer (if it ever was) a discretionary one, and liability will follow if it in fact negligently locates a walkway so as to create a hazard.

In A. L. Lewis Elementary School v. Metropolitan Dade County, 376 So.2d 32 (Fla. 3d DCA 1979), the court first expressed its opinion that the fixing of traffic zones was a discretionary policy matter, but then went on to note that since the county was required by statute

to fix such zones, its failure to install and maintain traffic signals was removed from the realm of governmental discretion. That rule should apply here with equal force.

Plaintiffs respectfully suggest that there was ample evidence on both the issues of negligence and proximate cause to send this case to the jury. Furthermore, the directed verdict should not have been upheld on any theory of governmental immunity for the reasons set forth above. The judgment below should have been reversed, and we respectfully urge this Court to so rule.

CONCLUSION

For the reasons set forth above, each of the certified questions require an affirmative answer, and the opinion of the District Court of Appeal should accordingly be quashed. We therefore respectfully request this Court to direct the District Court of Appeal, Fourth District, to affirm the judgment in favor of these Plaintiffs and against BROWARD COUNTY.

We furthermore request that the Court of Appeal be directed to reverse the judgment in favor of the BROWARD COUNTY SCHOOL BOARD for the reasons above expressed, and to remand the cause for a new trial as to that Defendant.

Respectfully submitted,

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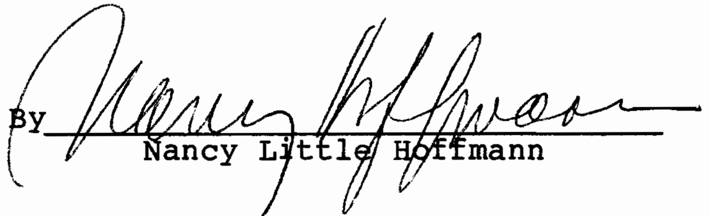
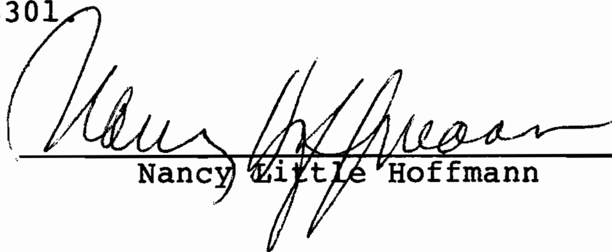


By ________________________
Nancy Little Hoffmann

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were served by mail this 15th day of November, 1983, upon: SOLOMON & FLANAGAN, 311 S.E. 13th St., Fort Lauderdale, FL. 33301, Attys. for SCHOOL BOARD; LARRY KLEIN, ESQ., Suite 201, Flagler Center, 501 S. Flagler Dr., West Palm Beach, FL. 33401, Co-Counsel for SCHOOL BOARD; and JOHN FRANKLIN WADE, ESQ., Atty. for BROWARD COUNTY, Room 248, County Courthouse, 201 S.E. 6th Ave., Ft. Lauderdale, FL. 33301.



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