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

PETITIONERS' REPLY BRIEF ON THE MERITS

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PREFACE

In this brief, the parties will be referred to by name or as Plaintiffs and Defendants. Reference to the Record On Appeal will be by "R.". Any emphasis appearing in this brief is that of the writer unless otherwise indicated.

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].

BROWARD COUNTY claims that the facts of the present case do not fall within the parameters of this Court's decision in City of St. Petersburg v. Collom, 419 So.2d 1082 (Fla. 1982) for several reasons. First, the COUNTY argues that the COUNTY did not know when it began construction of Rock Island Road that "it was in fact creating a known dangerous condition to pedestrians." (COUNTY'S brief at page 3). That, of course, is not the issue. The question is whether the COUNTY'S act of opening the road with no pedestrian signalization whatever, after it had explicitly recognized the need for such signals, constituted the creation of a known danger which required a warning or an aversion of the danger.

The COUNTY places much emphasis on its claim that there was no actual knowledge of the dangerous condition, relying upon Besecker v. Seminole County, 421 So.2d 1082 (Fla. 5th DCA 1982). It was there held by the Fifth District Court of Appeal that the plaintiff

had failed to allege sufficient facts to show such knowledge, and the court affirmed dismissal of a complaint on that ground. Besecker, however, was decided prior to this Court's more definitive pronouncements in Collom, and is therefore of questionable authority. In Collom, this Court found that the complaint in the companion case of City of St. Petersburg v. Matthews stated a cause of action when it alleged that the city "knew or should have known" that the failure to place a fence along the top of a drainage creek adjacent to a park or playground frequented by children, created a dangerous condition and involved an unreasonable risk of death or serious injury. This Court specifically found that complaint to state a cause of action against the city "for creating a known dangerous condition and failing to correct that condition or otherwise reasonably warn of and protect the public from it." Id. at 1086.

Furthermore, the record in the present case amply demonstrates the COUNTY'S actual knowledge and awareness that pedestrian controls were needed at that intersection, as pointed out in our initial brief. The COUNTY agreed to install a crosswalk and pedestrian signals and had been promising to do it for several years before ALLISON was killed. These were part of a complete signalization package which the COUNTY recognized as necessary. Nonetheless, through its negligent failure to notify the proper party within its organizational structure prior to opening the road, the COUNTY did in fact open the road without even a center stripe.

The COUNTY'S protestations of ignorance cannot insulate it from liability on this record. We alleged that the CITY knew of this

dangerous condition, and the question of whether we proved that allegation is to be decided by the jury, not the court of appeal. There is certainly ample evidence by the CITY'S own acts that it was aware of the danger which it had created, and the jury's verdict should have been permitted to stand. It is equally true that the question of whether the danger was readily apparent is one for the jury. Ralph v. City of Daytona Beach, ___So.2d___, 8 FLW 79 (Fla., Case No. 62,094, February 17, 1983).

The COUNTY then goes on to argue that whether or not this was a dangerous condition, it was immunized from liability because its director of traffic engineering made 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)." (COUNTY'S brief at page 5). The COUNTY appears to be seriously arguing that its employee, Richard Mercer, consciously decided that the COUNTY should risk having school children run over on Rock Island Road so that it could get the City of Coral Springs to sign a uniform traffic engineering agrement. Incredible as it seems to this writer, the COUNTY argues that

> [t]his 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.

COUNTY'S brief at page 7. The COUNTY further argues

> [i]t is the conscientiously [sic] exercised discretion in the sense of assuming certain risk in order to gain policy objectives.

COUNTY'S brief at page 6. The COUNTY argues further

> [t]he 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.

COUNTY'S brief at page 7.

The COUNTY'S argument must be rejected on a number of grounds. First, the record citations at page 7 of the brief do not support its contention that installation of pedestrian controls was delayed because of a desire to have a county-wide traffic control package. Indeed, there was testimony in the record that the city and COUNTY were working together to signalize that particular intersection (R.1033) and that the COUNTY planned to put in the signals at that location with or without a written agreement for the entire COUNTY (R.1268,1296,1025,1035). As noted earlier, the COUNTY had promised both the SCHOOL BOARD (R.1183) and the CITY (R.1058) that traffic signals would be installed. As it happened, after ALLISON was killed the COUNTY <u>did</u> put in the signals even though there was still no final county-wide agreement (R.1294).

Aside from the fact that the COUNTY'S argument is unsupported by the facts, it should be rejected for a further and more fundamental reason. If (which we strongly doubt) the COUNTY or its employee did consciously decide to hold the safety of the Coral Springs school children hostage to its desire for a county-wide agreement, that surely cannot be the kind of "considered decision" which the California court had in mind in <u>Johnson v. State,</u> 447 P.2d 352 (Cal. 1968). This is hardly the type of capital improvement which would

require a decision at the policy-making level of county government. Indeed, Mr. Mercer testified that when the COUNTY built a road, it was a routine policy to at least install whatever striping, markings and signing may be necessary on an interim basis until it is provided for some other way in the project (R.1274-1275). It must be remembered that here, there was no pedestrian crosswalk, and not even a center stripe down the road. Ralph Quick of the COUNTY testified that when Rock Island Road was opened while still in an interim situation, there should have been some provision made for pedestrian traffic, but that was not done (R.1317-1318). According to Dr. William Fogarty, a civil engineer, the absence of a crosswalk was one of the primary causes of this accident (R.1439).

Once again, the COUNTY'S negligent act in opening a road such as this to vehicular traffic without any provision whatever for controlling pedestrian traffic, when it knew and realized that this was necessary, is precisely the type of act which should subject the COUNTY to liability. The following testimony illustrates that it was indeed an instance of a case of bureaucratic negligence at the operational level:

> Q. Did you not feel the light was desirable there despite any requirements as to traffic load, the standard requirement of traffic flow?
>
> A. [Mr. Mercer] We felt that once Rock Island was completed, and with the development in the area going to the North of Sample Road, the signal would be justified. And the City had made repeated requests to have it there. So we felt we should go ahead and plan the installation of it.
>
> * * *
>
> Q. So if I'm correct, then, the decision was made in January of '78 that a traffic light would be installed,

and from that point on movements were made towards the actual, ultimate installation of the light?

A. That's correct.

* * *

(R.1271).

Mr. Mercer testified that he was not consulted before the road was opened to traffic, and that he was not sure which department had opened the road (R.1279). He was asked:

Q. Is it true it's within the purview of the County's responsibility when it opens a road permitting traffic to enter an intersection of a road, that the County design some safeguards for traffic and pedestrians within that area before its opened?

A. Well, we're certainly not in the business of trying to open unsafe facilities; no.

Q. In this particular case you put a yellow line-the County put a yellow line down the middle of Rock Island.

A. Yes.

Q. You're not aware of anything else that was done for the benefit of the pedestrians across Rock Island Road; are you?

A. Not at this stage; no.

* * *

Q. In looking at this photograph with regard to pedestrians crossing Rock Island Road, anywhere in that photograph in an east to west or west to east direction, do you see any safeguards on that road for pedestrians?

A. There are no specific traffic control devices related to pedestrians, if that's what you're talking about; no.

(R.1280).

Mr. Mercer was further asked:

Q. Isn't it a departure from good engineering practice and standards for a governmental authority who has an engineering division and a traffic engineering division, to open a road to the public without consulting its traffic engineers to see whether it should be open and under what circumstances it should be opened?

(R.1281).

* * *

THE WITNESS: I think I -- you know, speaking from my own personal perspective, there are many instances when I wish we had a little better internal co-ordination than we do on these types of things. But I think the fact that the center line is here is indication that at least we were asked to go out and do something prior to the --

(R.1283)

* * *

THE WITNESS: No sir. My own personal point of view, sure I wish they would confer with us on all projects more than they do.

Q. There have been many times when they haven't done that; isn't that true?

A. It happens; yes.

Q. It happened in this case; did it not?

A. Well, the situation wasn't brought to my attention before the road was opened, if that's what your question is.

(R.1284).

We submit that the facts of this case illustrate precisely that type of situation which should impose liability upon a governmental entity. The COUNTY well knew that it would be dangerous to open a road right next to the school with no pedestrian controls, and had committed itself to provide those safeguards. Nonetheless, a COUNTY official permitted the road to be opened to vehicular traffic without taking even the most minimal precaution of painting a crosswalk across the road. Even the most tortured reasoning cannot fit this case into the mold of a "considered decision" at the discretionary level of government. The COUNTY should be held answerable for the tragic consequences of its negligence, and we respectfully urge this Court to so rule.

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].

In responding to the question of whether the complaint adequately alleged the creation of a known dangerous condition, the COUNTY does not analyze the complaint at all but contents itself with a flat assertion that there was no such allegation in the complaint. The COUNTY goes on to conclude that

> 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.

(COUNTY'S brief at page 10). We must disagree with that assessment of the law; it is not vague legal conclusions which were required to be pleaded, but rather ultimate facts which would support such conclusions. As was pointed out in our initial brief at pages 14 and 15, Plaintiffs did specifically allege that the COUNTY created the road; that it knew the area was inadequately designed in the absence of any lines, markings or pedestrian controls; that it knew the students would be crossing at that area; that the COUNTY knew that such failure to provide any warnings, crosswalks or other protective devices to students would place them in a perilous condition; and that the COUNTY opened the road without providing any interim safety measures such as warning signs, crosswalks and so forth (R.3691-3693).

These allegations are clearly sufficient under Harrison v. Escambia County School Board, 434 So.2d 316 (Fla. 1983) and the certified question dealing with that subject must be answered in the affirmative.

CONCLUSION

For the reasons set forth above and in Plaintiffs' initial brief, each of the certified questions requires an affirmative answer. The District Court of Appeal decision should therefore be quashed, and that court directed to affirm the judgment below in favor of these Plaintiffs and against BROWARD COUNTY.

Respectfully submitted,

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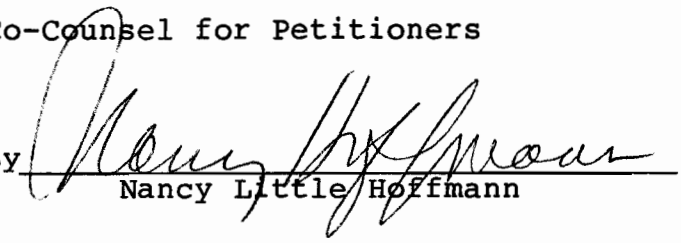
By 
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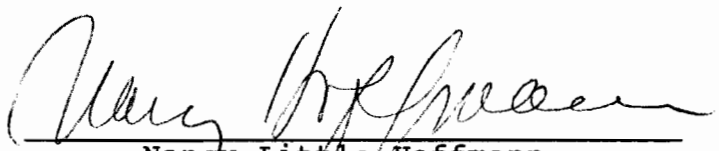
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were served by mail this 27th day of December, 1983, upon: EDNA L. CARUSO, P.A., Attorney for THE ACADEMY OF FLORIDA TRIAL LAWYERS, Suite 4B, Barristers Bldg., 1615 Forum Place, West Palm Beach, FL 33401; 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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