IN THE SUPREME COURT OF FLORIDA

NADINE M. JOHNSON, individually and as Personal Representative of the Estate of Scott E. Johnson, deceased,

Petitioner,

v.

COLLIER COUNTY,

Respondent.

CASE NO. 66,656

PETITIONER'S INITIAL BRIEF ON THE MERITS

On Certified Conflict From The
Second District Court of Appeal

CONE, WAGNER, NUGENT, JOHNSON,
HAZOURI & ROTH, P.A.
Servico Centre East, Suite 400
1601 Belvedere Road
P. O. Box 3466
West Palm Beach, FL 33402
(305) 684-9000

RICHARD A. KUPFER, Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (Cont'd)

PREFACE

Petitioner, Nadine M. Johnson, was the plaintiff in the trial court and the Appellant before the Second DCA. Respondent, Collier County, was one of several defendants in the trial court and the Appellee before the Second DCA. Herein the parties will be referred to as "plaintiff" and "Collier County" or "The County." The following symbols will be used:

R. - Record on Appeal

App. - Appendix attached to this brief

POINT ON APPEAL

WHETHER THE SECOND DISTRICT COURT OF APPEAL ERRED IN THIS WRONGFUL DEATH (ELECTROCUTION) CASE BY CERTIFYING CONFLICT WITH EVERY OTHER DISTRICT COURT IN FLORIDA AND AFFIRMING A FINAL SUMMARY JUDGMENT FOR COLLIER COUNTY ON GROUNDS THAT THE JOB OF A COUNTY BUILDING INSPECTOR WHO INSPECTS A CONSTRUCTION SITE FOR ANY ELECTRICAL CODE VIOLATIONS IS A DISCRETIONARY ACTIVITY FOR WHICH THE COUNTY IS IMMUNE FROM LIABILITY?

STATEMENT OF THE CASE AND FACTS

In this wrongful death case the plaintiff's decedent was a construction worker who was electrocuted on October 14, 1980, while working on a construction site and operating a power drill. (R. 20-21). Plaintiff (the widow and personal representative of the decedent) sued the owner of the premises, the electrical subcontractor, the county (Collier County) who inspected the temporary electrical system before electrical power was supplied, and the manufacturer of the electric power drill. The complaint (R. 14-28) alleged that there existed several conditions in the electrical system violating the 1975 National Electric Code and the Collier County supplement to the 1975 Code including the nonuse of the "ground fault interrupter" (GFI) which was present but disabled and nonfunctional (R. 17-18, 20). The complaint alleged that shortly before the electrocution the county inspected the premises to determine whether the electrical wiring system complied with the National Electrical Code as adopted and supplemented by county ordinance, and that the county was negligent in its inspection and failed to discover and require correction of the various code violations existing in the electrical wiring. (R. 25-26).

Collier County admitted it has applicable liability insurance coverage through Aetna Insurance Co., with liability limits of $100,000. (R. 34-35). See also (R. 44-45). The County moved to limit its own liability to the

terms set forth in its liability insurance policy which was applicable to this lawsuit (R. 57-60) and the Court granted the motion and limited any judgment to the amount of the insurance limits of $100,000. (R. 61).

The County pleaded sovereign immunity as an affirmative defense (R. 51) and moved for summary judgment on grounds of sovereign immunity (R. 55-56; 352-360).

Several depositions were used by the parties to support or oppose the County's motion for summary judgment including the deposition of Edward Snyder (R. 71A-148); deposition of D. Keith Hogue (R. 149-188); the affidavit of Roy A. Martin (R. 189-192), and the deposition of William E. Curlett (R. 225-351). The facts presented herein are presented in a light most favorable to Petitioner/Plaintiff, the non-moving party against whom the County sought a summary judgment.

Edward Snyder was the Collier County electrical inspector who inspected the electrical wiring on the temporary service pole at the construction site in March, 1980, about six months before the accidental electrocution. (R. 73, 86).[1]

The County also employs seven other electrical inspectors. (R. 76). Mr. Snyder inspected the electrical wiring and approved it and put a white sticker on the box. (R. 86). It is necessary for the County electrical inspector to inspect the temporary service pole for any code violations

---

1. The County also admitted at hearing that there was a second inspection on September 10, 1980, about a month before the electrocution. (R. 388).

and then put an official decal on the box as evidence of County inspection and approval before the power company can hook up electricity to the pole. (R. 81, 128).

Mr. Snyder testified that both the National Electric Code and the Collier County Code (which adopted the National Code) required that such temporary service poles have a "ground fault interruptor" (GFI) as a safety device. (R. 84-85, 109-110, 120, 121, 129). The GFI is a device made to sense a sudden surge or fluctuation in electrical current in order to trip the whole system off to avoid an electrocution if, for example, a workmen's power tool should short circuit. (R. 107, 112). It works in a similar manner to a circuit breaker only it is much more sensitive and it trips faster at a lower amperage fluctuation or surge. (R. 112-113, 115). In fact, it is so sensitive that people in construction sometimes complain the GFI will occasionally trip just from normal electrical current in equipment (which becomes a nuisance) (R. 116).

Mr. Snyder testified that when he inspected the temporary electrical service box before power was connected he did <u>not</u> unscrew the outside plate to look underneath to see if the GFI was properly wired, and that it is <u>not</u> his custom to do so on these county inspections. (R. 79-80, 83, 85, 129, 132). The plate on the box comes off by loosening two screws with a screwdriver (R. 104, 143).

On the day after the fatal electrocution Mr. Snyder was called back to re-inspect the electrical system on the

premises. (R. 89, 122). This time he unscrewed and removed the plate covering the GFI and, he testified, the problem was immediately apparent to him as soon as he looked at it. (R. 103-104, 108, 109). The electrical wire bypassed the GFI and went directly into the "neutral," and the effect of this was to have no current passing through the GFI thus rendering it non-functional. (R. 104-105). As soon as he saw this, Snyder "red tagged" the electrical pole, meaning it cannot be further used until corrected. (R. 105, 103).

Another witness, Keith Hogue testified at deposition (R. 149, et seq.). He is a master electrician (R. 161) who has worked in this field in Collier County since 1963 (R. 154) and owns his own electric company (R. 151). He has been involved in about 500 projects in which he has installed temporary service poles during construction. (R. 161-162). He testified that there has been a practice in Collier County where some construction workers (not the electricians but the contractor or other subcontractors) would deliberately cut or bypass the GFI in the temporary service pole because it was a nuisance and kept tripping the circuit. (R. 152-154, 156). In fact, Mr. Hogue has seen this occur on about 20% of the temporary service poles he has inspected. (R. 163). Around 1972 the County sent a memo to electrical companies stating that a GFI would thereafter be required in temporary service poles and if there was any tampering with the GFI the County could revoke the license of the responsible party. (R. 158-159).

According to Mr. Hogue, it was a common practice for the County inspectors who he had dealt with to remove the front plate of the temporary service box during routine inspections to make sure the GFI was properly wired. (R. 165-166, 173). In fact, Mr. Hogue once had one of his own poles "red tagged" by a county inspector because someone had tampered with the GFI. (R. 173).

The affidavit of Roy Martin was filed with the court. (R. 189-192). He is a professional engineer with a Master of Science degree in electrical engineering and has been engaged in this field for 41 years. (R. 189). He averred that he studied the various depositions and other materials in this case along with the National Electrical Code (N.E.C.) and the Collier County Supplement to the NEC (R. 190), and in his opinion there were code violations in the temporary service box involved here which should have been detected and correction required by the Collier County electrical inspector at the time of inspection (R. 192).

The deposition of William Curlett was also filed with the Court. (R. 225-351). He was a master electrician (R. 229), with 30 years' experience in this field (R. 243), and was once an electrical inspector for another county in another state (R. 266, 290). He was present when the deceased was electrocuted and was working at the construction site putting electrical wiring in the building. (R. 227).

Mr. Curlett testified that the decedent, using the power drill, had shorted out the regular 15 amp circuit

breaker several times earlier on the same day he was electrocuted and, when the lights went out, someone had to keep resetting the circuit breaker. (R. 233-234). On the day after the electrocution the county inspector came out to the construction site and asked Mr. Curlett to open up the temporary service box. (R. 260). It was apparent that the box had not been previously opened for quite some time because the screws were rusted over with no marks on them. (R. 261-262).

As soon as the box was open, Mr. Curlett testified it was immediately apparent that the white wire which goes into the GFI had been cut by someone and bypassed the GFI and was reattached to the ground wire. (R. 262, 335). The inspector then told Mr. Curlett that nobody could use the temporary service pole until this was corrected. (R. 262). The wire leading to the GFI had actually been cut by some type of wire cutter and it had apparently been in this state for some time because a freshly cut cooper wire is shiny at the point where it is cut and then gradually turns dark; and this one had already turned very dark. (R. 295-296).

Mr. Curlett also testified that the electric code requires a GFI in a temporary service pole in order to protect the construction workers (R. 268), and that the Collier County inspector, Mr. Snyder, had been out to the construction site just a few days before the fatal accident in order to inspect electrical wiring. (R. 275-276).

The County field its memorandum in support of summary

judgment (R. 352-360) and took the position that it owed no duty to plaintiff's decedent when it inspected the temporary electrical system since there is no analogous liability on the part of any private party to enforce the electrical code under Sections 553.15 - .23, Fla. Stat.; and, in any event, the inspection was a planning level function of the County for which it was immune from liability even if it was negligently performed. The County relied on Neumann v Davis Water & Waste, Inc., 433 So.2d 559 (Fla. 2d DCA 1983) to support its position that this was a planning level function (R. 354, 356-357, 359).

Plaintiff filed her memorandum opposing summary judgment (R. 361-364) and argued that it is an operational level activity when a County actually undertakes to inspect a building to ensure compliance with electrical codes and then negligently fails to observe and require correction of an obvious code violation, which then proximately results in a fatal electrocution. This is not a case where the County, as a planning level function, decided not to inspect in the first place, unlike the Neumann case relied on by the County. (R. 362).

The trial court granted Collier County's motion for summary judgment (R. 378), entered Final Summary Judgment on February 24, 1983, and a timely appeal to the Second DCA ensued. (Supp. R. 410-412; R. 1-2).

The Second DCA affirmed the Final Summary Judgment for Collier County on grounds that, although the governmental

activity involved here does "not fit neatly into either the planning or operational level characterization," it is nevertheless "a purely governmental function for which the state historically was immune from tort liability." (See Second DCA's opinion attached as Appendix "A" to this brief.) In so holding, the Second DCA expressly noted that its decision is in direct conflict with recent decisions from every other District Court of Appeal in Florida. (See App. A, p. 5).

Plaintiff timely invoked the discretionary jurisdiction of this Court to review the certified conflict, and this Court ordered briefs on the merits to be filed.

SUMMARY OF ARGUMENT

A.

(Planning Level - Operational Level Dichotomy)

According to each of the other District Courts in Florida, it is an operational level activity when a County actually undertakes to inspect a building to ensure compliance with building or electrical codes and the inspector negligently fails to observe and require correction of an obvious code violation, which then proximately results in a fatality or personal injruy. This is not a case where a county, as a planning level function, decided not to inspect in the first place.

Even under the older and stricter "special duty" rule (the Modlin rule) which is no longer followed, the County inspector who approved usage of a temporary service pole for construction workers owed the decedent, a construction worker, a special duty of care different in kind from that owed to the general public. The element of reliance by construction workers on the County's inspection and approval of the temporary electrical hook-up and the special duty owed, makes this case even stronger than the Trianon Park case which has been pending before this Court since 1983.

This case also offers an opportunity to revisit the Commercial Carrier case and reconsider the planning level - operational level dichotomy. Some of the Florida appellate

courts and individual appellate judges have suggested that this Court should reconsider Commercial Carrier in light of the total confusion and conflict which has since followed. The present case is one example of many in which conflict has been created following the Commercial Carrier decision. Even the four-pronged Evangelical United test created in Washington and commended by this Court in Commercial Carrier, has since been further refined by the Washington Supreme Court to clarify what type of discretionary activity is immune from judicial review.

B.

(Effect of County's Purchase of Liability Coverage)

There is an alternative reason why Collier County should not have received a summary judgment on grounds of sovereign immunity. It is undisputed that the County has $100,000 of applicable liability insurance coverage. Under Florida statutes and recent caselaw, sovereign immunity is waived as to planning level activities as well as operational activities, to the extent there is applicable liability insurance coverage protecting the governmental agency or employee. It does not matter whether the activity of the building inspector involved here is denominated as planning level, or operational level, or a hybrid.

ARGUMENT

WHETHER THE SECOND DISTRICT COURT OF APPEAL ERRED IN THIS WRONGFUL DEATH (ELECTROCUTION) CASE BY CERTIFYING CONFLICT WITH EVERY OTHER DISTRICT COURT IN FLORIDA AND AFFIRMING A FINAL SUMMARY JUDGMENT FOR COLLIER COUNTY ON GROUNDS THAT THE JOB OF A COUNTY BUILDING INSPECTOR WHO INSPECTS A CONSTRUCTION SITE FOR ANY ELECTRICAL CODE VIOLATIONS IS A DISCRETIONARY ACTIVITY FOR WHICH THE COUNTY IS IMMUNE FROM LIABILITY?

A.

(Planning Level - Operational Level Dichotomy)

As the Second District Court below noted in its opinion, its position on this issue is at odds with the positions taken by the First, Third, Fourth and Fifth Districts.

In Trianon Park Condo Assoc., Inc. v City of Hialeah, 423 So.2d 911 (Fla. 3d DCA 1982) members of a condominium association sued the city for defects in the construction of the condominium because the city building inspector approved construction which contained various violations of the South Florida Building Code, as adopted by the city. Three years after the city issued a certificate of occupancy the roof fell in. The Third DCA stated:

> ". . . we find that the City's enforcement of the established Code standards is a purely ministerial action which does not rise to the status of basic policy evaluation since the majority of the inspectors' acts involve simple measurement and

> enforcement of the building code as written rather than the exercise of discretion and expertise. [citation omitted].
>
> Although the initial determination by the city to inspect and certify construction within its boundaries is a 'planning' decision, the subsequent performance of inspection, plan review and certification is clearly an 'operational' level activity implementing that policy. Once the city undertook to inspect, review and certify construction, it was obligated to do so reasonably and responsibly in accordance with acceptable standards of care. . ."
> ID. at 913.

The Third DCA in Trianon Park certified the question to this Court where the case is now pending, as Case Number 63,115.

The Fourth DCA has also taken the same position in a case involving virtually identical facts. See The Manors of Inverrary XII Condo Assoc., Inc. v Atreco-Florida, Inc., 438 So.2d 490 (Fla. 4th DCA 1983). The Fourth DCA expressly agreed with the Third DCA in the Trianon Park case and also certified the question to this Court. (A petition for review was filed but was later voluntarily dismissed. See 450 So.2d 485 (Fla. 1984).)

The First DCA has also taken the same position. In Bryan v State, Dep't. of Business Regulation, 438 So.2d 415 (Fla. 1st DCA 1983), the state was sued for wrongful death arising out of a fatal accident when the deceased fell down an elevator shaft while attempting to exit from a stalled

elevator. The case against the state was predicated on alleged negligence in the performance of its statutory duty of inspecting the elevator and requiring correction of several deficiencies in the elevator and shaft. The First DCA agreed with the Trianon Park case, supra, and held that the decision to administer safety inspections and require certification of elevators, pursuant to guidelines, is a planning level function, but the subsequent performance of inspection and certification by state employees is an operational level activity implementing that policy. The ministerial activity of inspecting for code violations does not involve the kind of policy-making planning or judgmental functions which remain completely immune from liability. (The Bryan case is also pending now in this Court as Case Number 64,464.)

Similarly, in Hollis v School Board of Leon County, 384 So.2d 661 (Fla. 1st DCA 1980), the school board had adopted a policy which called for periodic safety inspections of school buses. A bus driver ran over a little girl as she crossed in front of the bus in a blind spot which was caused by improper placement of mirrors on the bus. A proper inspection should have revealed this safety hazard. The Court held that while the initial decision to conduct inspections is a planning level decision, once implemented, it became a ministerial operational level activity and had to be carried out by the public inspector without negligence. See also Griffin v City of Quincy, 410 So.2d 170 (Fla. 1st

DCA 1982) (Held: the decision of whether the city should go into the business of providing electricity was a policy making, planning level activity; however, the implementation of that program, once adopted, was an operational level activity.)

The Fifth DCA has also taken the same position regarding the minsterial function of building inspectors. In Jones v City of Longwood, Florida, 404 So.2d 1083 (Fla. 5th DCA 1981) the Fifth DCA held that the duty of a city building inspector pursuant to a city ordinance already promulgated is an operational level activity for which sovereign immunity has been waived.

The present case involves allegations of misfeasance of a ministerial employee rather than nonfeasance of a policy making body. This case also differs from the cases involving a police officer's failure to arrest a motorist who had been drinking and who injures someone after being released by the police officer. Eg. Everton v Williard, 426 So.2d 996 (Fla. 2d DCA 1983). The duty of a police officer inherently involves the exercise of much discretion, unlike the ministerial functions of a building inspector. A system of criminal law enforcement must necessarily include the discretion of the police officer at the scene to arrest on what the officer believes to be probable cause or not to arrest, as the officer's best judgment

dictates.[2] The function of a building inspector, on the other hand, is ministerial. He is there to inspect for code violations and, if he finds them, to require correction before approving the construction.

In the present case a jury could reasonably find that inspector Snyder was negligent in a ministerial duty by not taking off two screws and removing the front plate of the temporary service box to observe whether the GFI (which was required by County Code) was properly installed (especially when it is not uncommon for some workmen to disable the GFI which may become a nuisance to them), and that but for this negligent act the plaintiff's deceased husband would be alive today.

The County also argued in the trial court and before the Second DCA that no "duty" was owed by inspector Snyder to the deceased. However, even under the older and stricter "special duty" rule in Modlin v City of Miami Beach, 201 So.2d 70 (Fla. 1967), the plaintiff here would still state a cause of action because inspector Snyder owed the deceased a special duty that was different in kind than the duty owed to the general public. In Modlin, supra, this Court held that a building inspection to enforce the building code is not a quasi-judicial or legislative function, and such a

---

2. Even that statement about the discretion of police officers may have its limits, however. See Huhn v Dixie Ins. Co., 453 So.2d 70 (Fla. 5th DCA 1984); now pending in this Court on a certified conflict as Case No. 65,454.

public officer does owe a duty of care to the public generally, however, in that case the building inspector did not owe a duty to the deceased (a patron shopping in a grocery store) which was any different from that owed to any member of the public and therefore there was no municipal liability.

This Court more recently abrogated the Modlin "special duty" rule in Commercial Carrier Corp. v Indian River County, 371 So.2d 1010 (Fla. 1979), and substituted for it the "planning level - operational level" test without the need to establish a "special duty" toward the plaintiff. However, even under the stricter Modlin rule, in the present case there is evidence that the purpose of requiring a GFI in a temporary electric service pole is specifically to protect construction workers from this type of accident resulting from a short circuit or similar danger in a power tool, extension cord, etc. (See Deposition of William Curlett, R. 268; and Deposition of Edward Snyder, R. 112). Thus, when inspecting a temporary service pole being used by construction workers during construction a special duty is owed to the construction workers in particular, separate and apart from the duty owed to the public generally. For this reason, this case is even stronger than the Trianon case now pending in this Court (where the condominium unit owners are suing the city) or Modlin, supra (where the person killed was a business visitor in the defective building).

This Court expressly noted in Commercial Carrier, supra, that Section 768.28, Fla. Stat., "evinces the intent. . . to waive sovereign immunity on a broad basis. . ." 371 So.2d at 1022. The Legislature should be presumed to know the significance of the language in the statute subjecting the government to liability "in the same manner and to the same extent as a private individual under like circumstances." The state statutory waiver of sovereign immunity enacted in 1969 contained an explicit exception for a "discretionary function;" Section 768.15 (1), Fla. Stat. (1969); as does the Federal Tort Claims Act, 28 USC §2680 however, the "discretionary function" exception was dropped from the Florida Statute in 1973 and has remained that way ever since. This certainly implies the Legislature made a conscious decision not to provide an exception for all discretionary acts.

For various reasons it has been submitted by some Florida appellate courts that the time has come for this Court to revisit the Commercial Carrier case and reconsider the planning level - operational level dichotomy. The present case is one of many examples of the rampant conflict that has been created in Florida, ever since Commercial Carrier was decided, by different courts trying to apply an amorphous standard to review government torts. The conflict has become so hopeless and irreconciliable as to even cause one District Court to announce its intention in every sovereign immunity case to certify the question to this

Court in order to "show us the way until the law is clarified or Commercial Carrier is receded from." Carter v City of Stewart, 433 So.2d 669, 670 (Fla. 4th DCA 1983).

The practical difficulty is that almost all acts performed by governmental employees at all levels involve at least some judgment or choice, and the Courts are agonizing over where exactly to draw the line on close cases. Even the four-pronged test first created in Washington State in Evangelical United Brethren Church v State, 67 Wash 2d 246, 407 P.2d 440 (1965), and commended by this Court in Commercial Carrier, supra, as a preliminary test to identify governmental decision-making activity, has now been further refined by the Washington Supreme Court in King v City of Seattle, 525 P.2d 228, 233 (Wash 1974). Washington, our prototype, now requires "the state. . . to make a showing that. . . [its] policy decision, consciously balancing risks and advantages, took place. The fact that an employee normally engages in 'discretionary activity' is irrelevant if, in a given case, the employee did not render a considered decision." ID. at 525 P.2d 233.

Indeed it has been recently submitted most persuasively by Chief Judge Ervin, dissenting in Davis v State of Fla., Dep't. of Corrections, 460 So.2d 452 (Fla. 1st DCA 1984), that as long as the standard for determining governmental liability remains dependent on degrees of discretion, uncertainty and confusion will persist. Judge Ervin urged that this Court should overrule Commercial Carrier and

simply give effect to the legislative directive to impose liability on the government "in the same manner and to the same extent as a private individual under like circumstances." As Judge Ervin points out, the statute construed this way, to mean exactly what it says, still has many built in safeguards to protect against an indiscriminate raid on the public treasury. The State and its subdivisions can purchase liability insurance; if there is no liability insurance recovery in court is limited to $100,000 per person/$200,00 per incident; punitive damages are forbidden; prejudgment interest is forbidden; attorney's fees are limited to 25% of the judgment; and the government is not liable for acts of employees which are malicious, willful or wanton, or in bad faith.

This case presents a good opportunity for this Court to reconsider Commercial Carrier. However, even if this Court should not want to revisit Commercial Carrier at this time, the present case should still have easily survived a summary judgment under the Commercial Carrier case and its progeny.

This Court in Commercial Carrier expressly rejected the notion that the legislature intended to carve out a broad general exception for all discretionary acts. This Court noted that all governmental functions, no matter how seemingly ministerial, could be characterized as embracing the exercise of some discretion, but this does not mean a blanket rule of immunity should apply. Rather, it is

only those functions that impact on the free exercise of the operation of government which will continue to be vested with immunity.

To allow the present type of lawsuit to proceed to a jury would not have such an impact on the free exercise of the operation of government. The Second DCA below, in its opinion, wrote that "the government cannot become the insurer of those injured when its laws and regulations are broken or safety measures it imposes are ignored." (App. A, p. 5). We agree with that statement, but that is not what this case is all about. This case involves a municipal inspector who is supposed to inspect and certify a temporary service pole before it is electrified for use by construction workers. This case involves a construction worker who is trained to rely on the inspector's certification to mean that the temporary service pole can be safely used. This case involves a municipal inspector who did not do his job when he visited the job site and a construction worker who is now dead because of it. This case does not rely on the admittedly over-broad proposition that the government should insure that its laws and safety codes will never be broken or ignored.

If the Legislature desires to immunize the Government in these types of cases then it can and should do so by enacting specific legislation which is an exception to the broad waiver of sovereign immunity statute. In fact, such a bill is now pending in the Legislature. Senate Bill 163,

sponsored by Senator Myers, proposes to amend Section 553.73 (5) to provide that governmental building inspections do not create any warranties and no governmental agency or employee shall be liable for any defect or illegal condition in a building unless the government inspector had actual knowledge of such a defect or condition and still failed to require its correction. (See App. B). Whether this or a similar bill will or will not become enacted is unknown, however, it demonstrates that this is not currently the law as even the Legislature itself recognizes, but the Legislature has the ability to make it the law if it is deemed socially desirable to do so.

The Second DCA below also noted in its opinion that; "the record here discloses the claims being pursued against other parties against which the plaintiff may have recourse, giving her remedies other than suit against the County." (App. A, p. 5). Some of those "other parties" have their own ideas about plaintiff's recourse against them. But most importantly we would respectfully submit that the plaintiff's possible claims against other alleged joint tortfeasors is completely irrelevant to the sovereign immunity issue before the Court, and should have had no part to play in guiding the Second District's analysis.

It is respectfully submitted the Second DCA erred by affirming the summary judgment for Collier County on grounds of sovereign immunity. The Second DCA's opinion should be disapproved in favor of the decisions from the other four

District Courts in conflict and the cause remanded for further proceedings. The same disposition can also be arrived at for an alternative reason, discussed in the next part.

B.

(Effect of County's Purchase of Liability Coverage)

Once this Court has jurisdiction to resolve a certified conflict, this Court can reach other issues in the case which are not involved in the conflict. Bould v Touchette, 349 So.2d 1181 (Fla. 1977).

There is an alternative reason why Collier County should not have received a summary judgment on grounds of sovereign immunity. Collier County admitted it has applicable liability insurance coverage through Aetna Insurance Co., with liability limits of $100,000. (R. 34-35; 44-45). The County moved to limit its own liability to the terms set forth in its liability insurance policy which was applicable to this lawsuit (R. 57-60) and the trial court granted the motion and limited any judgment to the amount of the insurance limits of $100,000. (R. 61).

Section 768.28 (10), Fla. Stat (1979) provides that laws allowing a governmental agency to purchase insurance are not restricted in any way; and Section 286.28 (2) provides that governmental immunity is waived to the extent that there is applicable liability insurance coverage.

Just a few weeks ago it was held by the Fifth District that, under this statute, sovereign immunity is waived as to planning level activities as well as operational activities, to the extent that there is applicable liability insurance coverage protecting the governmental agency or employee. Avallone v Board of County Commissioners of Citrus County, 10 FLW 478 (Fla. 5th DCA, Feb. 21, 1985). Cf. Ingraham v Dade County School Bd., 450 So.2d 847 (Fla. 1984).

Accordingly it does not matter whether the activity of the building inspector involved here is denominated as planning level, or operational level, or as a square peg which does not easily fit into either mold; since it is not disputed that there is at least $100,000 of applicable liability insurance coverage protecting Collier County. This provides an alternative reason why the County was not entitled to a summary judgment, without even reaching the question discussed in the opinion of the Second DCA below.

CONCLUSION

The Second DCA erred by affirming the summary judgment for Collier County on grounds of sovereign immunity. The Second District's opinion should be disapproved in favor of the decisions from the other four District Courts in conflict, and the cause should be remanded for further proceedings.

Respectfully submitted,

CONE, WAGNER, NUGENT, JOHNSON,
HAZOURI & ROTH, P.A.
Servico Centre East, Suite 400
1601 Belvedere Road
P. O. Box 3466
West Palm Beach, FL 33402
(305) 684-9000
Attorneys for Petitioner

By _____
RICHARD A. KUPFER

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true copy of the foregoing has been furnished, by mail, this 22nd day of March, 1985, to: JOHN W. MACKAY, ESQ., 3202 Henderson Blvd., Suite 204, Tampa, FL 33609; and J. TERRENCE PORTER, ESQ., P. O. Box 280, Ft. Myers, FL 33902.

By _____
RICHARD A. KUPFER