IN THE SUPREME COURT OF
THE STATE OF FLORIDA

CASE NO: 70,543

Florida Bar #257389

BAILEY DRAINAGE DISTRICT, a political subdivision of the State of Florida, and BROWARD COUNTY, FLORIDA a political subdivision,

Petitioners,

v.

EVELYN STARK, as Personal Representative of the Estate of STEVEN ARIC STARK, Deceased,

Respondent.
_____/

AMICUS CURIAE BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS

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STATEMENT OF THE CASE AND FACTS

This case concerns governmental liability for failing to correct or warn of a dangerous condition of which it had knowledge and the ability to make safe. This brief shall argue alternatively that a governmental entity is liable whether or not it creates a dangerous condition so long as it has been informed of a hazard within its jurisdiction.

In this case, the dangerous condition was an unsigned, sight obstructed intersection with traffic volume requiring signage and/or removal of vegatation obstructing vehicular vision.

The evidence established jury issues as to: 1) Bailey's maintenance of the intersection by cutting vegatation, patching stripping, placing speed limit signs and posting signs indicating the intersection was within their jurisdiction; 2) Broward's assumption of maintenance responsibility for one road designated as a county collection road and its posting of speed limit signs; 3) Broward and Bailey's knowledge that the intersection was dangerous based on information Bailey received from citizens and Broward received from citizens and Bailey and; 4) Broward's installation of stop signs after this accident.

Stark has argued that the governmental entities are not shielded by sovereign immunity because they maintained a dangerous intersection in face of knowledge of prior accidents without instituting any protective measures.

SUMMARY OF THE ARGUMENT

Since Broward and Bailey "created" the hazard and failed to correct or warn of it despite knowledge from its constituents of the dangers, sovereign immunity should not apply.

Even if Broward and Bailey did not "create" the hazard there operational level failure to correct or warn of it despite their knowledge of dangerousness precludes their reliance on sovereign immunity as a defense.

ARGUMENT I

BROWARD AND BAILEY ARE LIABLE FOR CREATING A KNOWN DANGEROUS CONDITION THEN FAILING TO CORRECT OR WARN OF IT

Sovereign Immunity should not shield governmental entities from liability since once they know of a dangerous condition, they have an "operational" duty to correct or warn. If "operational" function has any meaning at all, it must be to correct or warn of hazards that are reported by constituents. Once government has knowledge of a hazard, its discretion not to act ends. Inaction despite knowledge of dangerousness is negligence just as it would be in any tort action.

This Court, sensitive to the foregoing concerns, first held in Department of Transportation v. Neilson, 419 So.2d 1071 (1982) that a governmental entity could be liable despite sovereign immunity for failing to warn motorists through the placement of additional traffic control devices that an intersection was hazardous.

> The failure to so warn of a known danger is, in our view, a negligent ommission at the operational level of government and cannot reasonably by arged to be within the judgmental, planning level sphere. Clearly, this

> type of failure may serve as the basis for an action against the governmental entity.

Although the above quoted language referred to an example of a governmentally created hazard its logical force extends to any known danger governmentally created or otherwise. Governmental inaction despite knowledge of the danger breaches the operational duty. This notion is buttressed by the Court's conclusion in Neilson:

> "If the complaint had alleged a known trap of dangerous condition for which there was no proper warning, such an allegation would have started a cause of action"

in which there was no mention of any governmental creation of the hazard as a prerequisite for liability.

The "creation" requirement was more specifically addressed by this Court in City of St. Petersburg v. Collom, 419 So.2d 1082 (1982) where it held that when a governmental entity creates a known dangerous condition not apparent to potential victims, it has an operational level duty to warn or protect the public therefrom.

In discussing why government should be liable for breaching that duty, the Court reasoned that although the judiciary can't mandate improvements, it can, without interferring with the governing process of coordinate branches, require:

"(1) The necessary warning or correction of a known dangerous condition."

There is no mention in that discussion of governmental "creation" but only knowledge of dangerousness which engenders the non-discretionary duty to act. Judicial recognition of that duty is not violative of the separation of power concerns inherent in sovereign immunity doctrine.

Even is this Court were inclined to maintain the requirement of governmental creation of the hazard, which Amicus will later argue it has already abandoned, the First District Court has construed creation liberally recognizing that it establishes an unnecessary doctrinal barrier to governmental liablity which derives not from creation but from inaction in the in the face of a known danger.

In Duval County School Board v. Dutko, 483 So.2d 492 (1st DCA 1986), a case very similar to Stark, the evidence established a dangerous condition created, not by government, but by heavy traffic, the absence of signals, signs, markers and barriers designating a bus stop. In addition, there was evidence of prior "near misses" and complaints to Duval County by citizens.

The Court held the "creation" requirement satisfied by school board maintenance of the bus stop without protective measures or warnings after knowledge of the danger. Here, Stark

alleges all the foregoing and that the sight obstruction by vegatation was not corrected by Bailey even though it did tend the vegatation. This latter fact makes a stronger case for "creation" in Stark than in Dutko. See e.g. Foley v. Department of Transportation, 422 So.2d 978,980,(1st 1982).

Therefore, even if the Court will not eschew the "creation" requirement, the allegations and evidence against Broward and Bailey are sufficient to satisfy it in this case.

ARGUMENT II

BROWARD AND BAILEY ARE LIABLE BECAUSE THEY KNEW OF A DANGEROUS CONDITION WHICH THEY HAD THE POWER THE CORRECT OR WARN OF AND FAILED TO DO SO.

This Court has struggled with the "creation" requirement from its inception. This is evident in the Neilson and Collom opinions. Amicus would argue that this Court eliminated the "creation" requirement sub silentio in Department of Transportation v. Webb, 409 So.2d 1061 (1st 1981) affirmed as modified 438 So.2d 780 (1983).

Neither opinion in Webb demonstrates that the Department of Transportation created the dangerous railroad crossing. Nonetheless, this Court affirmed their liability based on the failure to place warning signals at a railroad crossing known to be dangerous as consistent with its opinions in Commercial Carrier, Neilson and Collom.

This Court again rejected, sub silentio, the "creation" requirement in Perez v. Department of Transporation, 435 So.2d 830 (1983). That case involved worn steel grating on a bridge

which caused a vehicle to slide into Biscayne Bay. The Department of Transporation did not create the wear on the grating, it was created by normal use. This Court reversed the District Court of Appeal affirmance of Summary Judgment for the Department of Transporation reasoning that Department of Transportation had a "duty to warn of a known dangerous condition". Further, the Court quoted Collom and Neilson, respectively, the former mentioning "creation", the latter, quoted above, simply requiring inaction despite knowledge of the hazard. Perez at 832. The case was remanded to permit Plaintiff to allege, "a failure of the duty to warn of a dangerous condition."

Judge Sharp, dissenting in McFadden v. County of Orange, 499 So.2d 920 (5th DCA 1986) challenged the propriety of the "creation" requirement. He argued that even if Orange County did not create the crossing light hazard in that case it had the duty to warn because it knew of the hazard.

> "Even though a governmental entity does not create a hazard or trap making normal passage or use of streets hazardous, liability may be imposed where the street is within the entity's sphere or responsibility, and the hazard, or danger is known to the entity and not obvious to the traveler. In Ralph v. Daytona Beach, 471 So. 2d 1 (Fla. 1983) rehearing denied (Fla. 1985), the governmental entity did not create the traffic hazard on the beach but failed to warn or take any steps to correct it."
>
> . . .

> No where in Ralph or any other case has the Supreme Court required that the governmental entity created the hazardous condition.
>
> To excuse the liability merely because the governmental entity did not create the hazard, given the entity's common law duty to make its streets safe for ordinary use and passage, results in absurdities."

This Court adopted the four prong test of Evangelical United Brethren Church v. State, 407 P2d 440 (WA 1965) in Commerical Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979) which it intended to be dispositive on the applicability of sovereign immunity to governmental behavior. Application of this test to these facts reveals that sovereign immunity should not protect Broward and Bailey for their failure to correct or warn of the known dangerous intersection.

> (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy program or objective?

No. The failure to correct or warn of a dangerous condition of which government has received knowledge from the citizenry does not concern any basic government policy, program or objective but rather the duty of government to respond to citizen complaints of danger within its jursidiction.

> (2) Is the questioned act, omission or decision essential to the realization or accomplishment of that policy, program or objective as opposed to one which could not change the course or direction of the policy, program or objective?

No. Bailey and Broward's failure to correct or warn of the dangerous intersection is not essential to the realization of any program and its correction of or warning about the intersection would not change the course of any policy.

> (3) Does the act, omission or decision require the exercise of basic policy evaluation, judgment and expertise on the part of the governmental agency involved?

No. It did not require basic policy evaluation but simple common sense for Broward and Bailey to correct or warn of the dangerous intersection after being put on notice of the hazard by their constituents and each other.

> (4) Does the governmental agency involved possess the requisite constitutional, statutory or lawful authority and duty to do or make the challenged act, omission or decision?

Yes. This issue has been fully addressed in Respondents Brief.

In conclusion, whether this Court finds the appropriate standard of liability to be: 1) failure to remedy a known hazard created by government; 2) failure to remedy a known hazard within governmental jurisidiction or; 3) the Evangelical Brethren test, this Court should conclude that sovereign immunity should not apply, affirm the District Court opinion and remand for trial. Amicus finally submits that the "creation" require-

ment be discarded as doctrinal obiter dicta since whether government creates the hazard or not it has an obligation to rectify hazards within its jurisdiction of which it has knowledge.

CONCLUSION

Amicus respectfully requests that this Court answer the certified question in the affirmative and remand this case to the Trial Court for trial on the merits.

CERTIFICATION

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to: Harry S. Raleigh, Jr., Esquire, and Bryan Duke, Esquire, Post Office Box 14636, Fort Lauderdale, Florida 33302, Michael D. Steward, Esquire, 600 N.E. Third Avenue, Fort Lauderdale, Florida 33304 and Catherine Jackson Lerman, Esquire, Suite #100, 1995 East Oakland Park Boulevard, Fort Lauderdale, Florida 33306 and Michael Egan, Esquire, Post Office Box 1386, Tallahassee, Florida 32302-1386 on this 5th day of August, 1987.

Respectfully submitted:

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