7-4

IN THE SUPREME COURT OF
THE STATE OF FLORIDA

CASE NO. 70,543

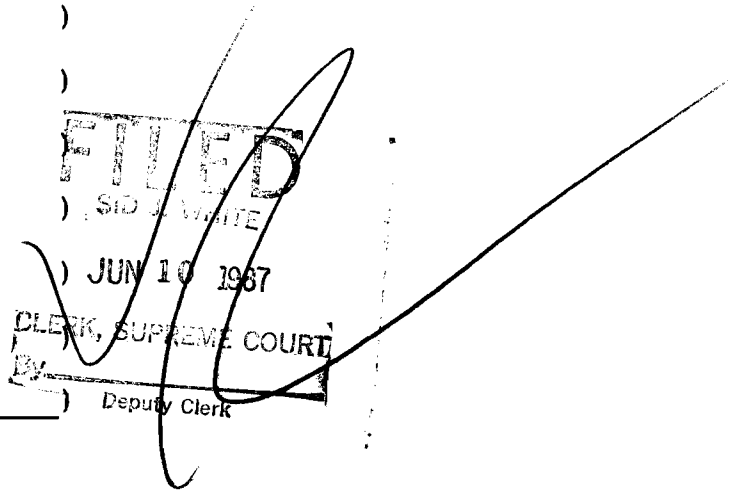
BAILEY DRAINAGE DISTRICT, a political subdivision of the State of Florida, and BROWARD COUNTY, FLORIDA, a political subdivision,

Petitioners,

vs.

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

Respondent.



BRIEF OF PETITIONER
BAILEY DRAINAGE DISTRICT

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DOES SOVEREIGN IMMUNITY BAR AN ACTION AGAINST A GOVERNMENTAL ENTITY FOR FAILING TO WARN MOTORISTS OF AN INTERSECTION KNOWN BY THE GOVERNMENT TO BE DANGEROUS BY REASON OF THE LACK OF TRAFFIC CONTROL DEVICES AND OBSTRUCTIONS TO VISIBILITY LOCATED ON THE RIGHT OF WAY?

ISSUES

I.

SHOULD THE CERTIFIED QUESTION BE ANSWERED IN THE AFFIRMATIVE WITH RESPECT TO THE BAILEY DRAINAGE DISTRICT WHERE THE DISTRICT HAD NO AUTHORITY TO SIGN OR MAINTAIN THE SUBJECT INTERSECTION.

II.

SHOULD THE CERTIFIED QUESTION BE ANSWERED IN THE AFFIRMATIVE WHERE THE BAILEY DRAINAGE DISTRICT CREATED NO DANGEROUS CONDITION AND THE CONDITION EXTANT WAS READILY APPARENT.

STATEMENT OF FACTS

On the evening of August 20, 1984, the Respondent's Decedent, Steven Aric Stark, was traveling east on S. W. 52nd Court, approaching its intersection with S. W. 178th Avenue (a/k/a Mather Boulevard) in rural unincorporated Broward County, Florida (R. 21, 1217 and 1218). The intersection of S. W. 52nd Court and S. W. 178th Avenue was not governed by any traffic control devices or signs -- it was an uncontrolled intersection (R. 878-879). Mr. Stark was fatally injured when he failed to yield to a northbound vehicle approaching from his right on S. W. 178th Avenue (p. 12 depo. Claude L. Myers, R. 1040; R. 1217.)

The Respondent claims that her Decedent's view of the intersection was blocked or impeded and that BROWARD COUNTY and/or BAILEY DRAINAGE DISTRICT were negligent in that they failed to maintain the intersection by failing to provide proper signage or other traffic control devices (R. 23-25 and 29-31) 1/

Whether or not the Decedent's view was impeded was contested, however, there is competent, record evidence that it was not. (p. 30 depo Trooper Saib, R. 900; pp. 13 and 40 Albert Davis R. 712 and 713) (A-18). Since 1980, the swales

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1/ The Respondent abandoned her claim relative to the failure of the COUNTY or BAILEY to replace a warning or stop sign which she claimed had been removed by vandals prior to the accident. Counsel agree that no prior signs had been erected at the intersection.

along South West 178th Avenue and 52nd Court were mowed eight times per year; and they had last been mowed on 178th Avenue on July 30 or 31, 1984, and on 52nd Court on July 21 or 31 (depo. James Barney, pp. 615-17 and second page of exhibits to said depo.; R. 779, 788, 790 and 801).[2/] It appears from the record that the claimed sight obstruction, if any, resulted from growth on the private property adjoining the S. W. corner of the intersection (R. 596-605) (A-18). At any rate, it has not been Respondent's position that the sight obstructions, if any, were anything more than one would normally expect to find at any rural intersection abutted by large undeveloped tracts of land.

BAILEY DRAINAGE DISTRICT was created in 1967 by special act of the Legislature, Chapter 67-950, Laws of Florida. As was typical of special act drainage districts of the time, the BAILEY was given rather broad powers to acquire property and establish a drainage system within its boundary, including the power to construct and maintain roads. Id. at Section 2.

The intersection in question is located in unincorporated Broward County and within the boundaries of the BAILEY DRAINAGE DISTRICT (p. 9 depo. Steven A. Longo, R. 394; R. 1218, 13, 95, 118, 151). While the date of dedica-

[2/] In his testimony, Mr. Barney said that 178th Avenue was mowed on July 30, and that 52nd Court was mowed on July 21, but his records indicate both were mowed on July 31.

tion does not appear of record, the right-of-way for S. W. 178th Avenue was dedicated to the public long before the BAILEY was created by a dedication contained in the Florida Fruitlands Subdivision Plat which was recorded in Plat Book 2, page 17 of the Public Records of Dade County, Florida (Exhibit to February 13, 1986 depo. of Philip S. Tokich, R. 1156 and p. 5 depo. of Les Spencer, R. 610). [3/] By quitclaim deed to the BAILEY, S. W. 52nd Court west of 178th Avenue and the pertinent portions of S. W. 178th Avenue, were dedicated to the public on August 29, 1969 (R. 244).

The portion of 178th Avenue traversing the BAILEY DRAINAGE DISTRICT was functionally classified as a "county collector road" as of July 1, 1982, resulting in BROWARD COUNTY's assumption of maintenance responsibility for the roadbed and traffic engineering functions (R. 1218 and 1269-1270). The dedication contained in the Florida Fruitlands plat was considered by the COUNTY as a dedication to the public over which the COUNTY had jurisdiction (p. 5 depo. of Les Spencer, R. 610).

While no dedication to BROWARD COUNTY appears of record with respect to S. W. 52nd Court, pursuant to the legend appearing on the Broward County Function Classifica-

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[3/] As is the case with much of the land in southern Broward County this land was platted and the dedications made even prior to the establishment of BROWARD COUNTY; hence the plat appears in the Dade County Public Records.

tion Map, it was classified as a "local road" within the "County road system" (R. 1091-1094; A-5). All roads in an unincorporated area not otherwise classified as a "collector" or an "arterial" were classified as "local roads" under the COUNTY's jurisdiction (R. 354, 355, 359, 360 and 381). Because, however, there was no formal dedication and acceptance of the relevant portion of S. W. 52nd Court by BROWARD COUNTY, the COUNTY has maintained the position that it had no responsibility for that road (pp. 31 and 32, depo. of Les Spencer, R. 637 and 638 and p. 15, depo. of Lee Billingsley, R. 696), at least until February 21 through 28, 1985, when the COUNTY installed stop signs at the subject intersection (pp. 10 and 11, depo. Lee Billingsley, R. 691 and 692).

STATEMENT OF CASE

The Respondent, Personal Representative of Mr. Stark's estate, filed suit against BROWARD COUNTY and the BAILEY DRAINGE DISTRICT in the Circuit Court for the Seventeenth Judicial Circuit In and For Broward County, Florida, claiming that the County and the BAILEY were negligent in failing to maintain the subject intersection in that they failed to provide proper signage or other traffic control devices (R. 23-25 and 29-31.)

The cause came to issue on the Amended Complaint (R. 20), extensive discovery was conducted and both BAILEY and the COUNTY moved for summary judgment (R. 160, 170 and 180). The trial court entered summary judgment for Petitioners (R. 1230) citing as its basis the doctrine of sovereign immunity.

The Respondent instituted an appeal of the summary judgment in the District Court of Appeal in and for the State of Florida, Fourth District. The Fourth District reversed the trial court's summary judgment and, per opinion filed April 8, 1987, certified the following question to this Court as an issue of great public importance:

> DOES SOVEREIGN IMMUNITY BAR AN ACTION AGAINST A GOVERNMENTAL ENTITY FOR FAILING TO WARN MOTORISTS OF AN INTERSECTION KNOWN BY THE GOVERNMENT TO BE DANGEROUS BY REASON OF THE LACK OF TRAFFIC CONTROL DEVICES AND OBSTRUCTIONS TO VISIBILITY LOCATED ON THE RIGHT OF WAY? (A-1)

Both BROWARD COUNTY and the BAILEY filed petitions for rehearing which were denied per Order of the Fourth District entered May 4, 1987.

On or about May 5, 1987, the BAILEY filed its notice to invoke this Court's discretionary jurisdiction and BROWARD COUNTY filed theirs on May 29, 1987.

INTRODUCTION

In the District Court, the Respondent's entire focus was on whether or not BROWARD COUNTY and/or the BAILEY created a known dangerous condition rendering them subject to liability notwithstanding Florida's doctrine of sovereign immunity. In so doing, Respondent short circuited the analysis which must be conducted with respect to tort actions. In particular, the Respondent overlooked, at least with respect to the BAILEY, that in order for a cause of action to exist against the BAILEY, there must have been some duty owing from the BAILEY to the Respondent. Indeed Respondent's focus is convenient in that it has allowed her to rely on cases dealing with duties arising when one creates a known dangerous condition, rather than those cases dealing with whether, under the relevant facts, the BAILEY owed Respondent a duty in the first instance. If no such duty was owed, one need not reach the sovereign immunity issue, much less the dangerous condition exception to sovereign immunity.

While the trial court appears to have relied on the creation issue in rendering summary judgment for the COUNTY and the BAILEY, it is axiomatic that the decisions of a trial court should be affirmed if there is any theory which will support its judgment. Cohen v. Mohawk, Inc., 137 So.2d 222 (Fla. 1962).

Under the State Uniform Traffic Control Law (F.S. Chapter 316), the BAILEY had no authority to post the subject intersection. Chapter 316 vests original jurisdiction for such functions in BROWARD COUNTY. Under the State Transportation Code, maintenance responsibility and tort liability (if any) were transferred to BROWARD COUNTY. Since the BAILEY lacked the authority to perform the functions the Respondent alleges were required to render the intersection safe, it cannot be found to have owed or breached a duty to Respondent.

These statutory provisions are also relevant to an inquiry as to whether a duty arose on the part of the BAILEY as a result of the claimed "known dangerous condition." If the BAILEY lacked authority to perform the functions which the Respondent claims gave rise to the dangerous condition, clearly it cannot be said to have created the condition.

As alluded to by Judge Dell in his specially concurring opinion, (A-4) the Petitioner respectfully suggests that, based on the record in this cause, the District Court has improperly phrased the question certified to this Court. A reading of the question could lead one to the mistaken conclusion that Broward County and/or Bailey had knowledge of the condition creating the alleged dangerous intersection. The record in this cause, viewed in the light most favorable to Respondent (as Petitioner agrees that it must), shows at most that the Bailey and the County

had knowledge of two prior accidents at this intersection. And while common sense dictates that both entities had knowledge that the intersection was uncontrolled by any traffic control devices, there is not one scintilla of evidence that either entity had notice of a sight obstruction, if one in fact existed.

It is respectfully suggested, therefore, that for this Court's answer to the certified question to be responsive to the issues present in this case, that question must be divided into two issues:

1. Does sovereign immunity bar an action against the governmental entity for failure to warn motorists of an intersection known by the government to be dangerous by reason of the lack of traffic control devices; and

2. Does sovereign immunity bar an action against the governmental entity for failure to warn motorists of an intersection known by the government to be dangerous by reason of obstructions to visibility located on the right-of-way. 4/

4/ In rephrasing the question as suggested above, Respondent does not admit that there was a site obstruction, that such obstruction was in the right-of-way, or that it had knowledge of same.

ARGUMENT

I.

THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE WITH RESPECT TO THE BAILEY DRAINAGE DISTRICT, BECAUSE THE DISTRICT HAD NO AUTHORITY TO SIGN OR MAINTAIN THE SUBJECT INTERSECITON.

A. Signage.

The major thrust of Respondent's position has been that the government entities failed to warn of an intersection made dangerous by the failure to erect traffic control signs. It cannot be denied that BAILEY's enabling legislation gave it the power to construct and maintain roads, but Appellant overlooks the clear proscriptions of F.S. §316.006. In particular, § 316.006(3), (A-8) provides:

> Jurisdiction. -- Jurisdiction to control traffic is vested as follows:
>
> * * *
>
> (3) Counties. -- Counties shall have original jurisdiction over all streets and highways located within their boundaries, except all state roads and those streets and highways specified in subsection (2), and may place and maintain such traffic control devices which conform to the manual and specifications of the Department of Transportation upon all streets and highways under their original jurisdiction as they shall deem necessary to indicate and to carry out the provisions of this Chapter or to regulate, warn, or guide traffic. (emphasis added.)

The "subsection" (2) exceptions relate to streets and highways within the boundaries of chartered municipalities. There is no exception for drainage districts. [5/]

In defining street or highway for purposes of Chapter 316, the Legislature provided:

> Street or Highway. The entire width between the boundary lines at every way or place of whatever nature when any part thereof is open to use of the public for purposes of vehicular traffic....316.003(54), (A-7).

There is no requirement that the street or highway be dedicated or accepted by the municipality, county or state in order for it to come within their respective "original" jurisdiction.

Indeed, the provisions of Chapter 316 have led the Attorney General to opine that as between Palm Beach County and an independent water control district, only the County and not the water control district has authority to post and maintain traffic control devices on certain roads within the county and the district including "roads which are part of a complex network of substandard, public, shell rock roads in

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5/ The exceptions provided in F.S. §316.008, (A-9) relative to retained powers of "local authorities" do not apply because: (a) 316.003(20), (A-6) defines local authorities only as officers and officials of counties and municipalities and; (b) the reservations to local authorities do not include the type of control, stop, yield or warning signs on the streets or highways herein involved.

unincorporated areas of Palm Beach County, some created by posting and viewing, some created by dedication of easements, some built by water control districts, some dedicated by subdivision plats." 1981 Op. Atty. Gen. Fla. 061-18 March 4, 1981.

Respondent has cited Ralph v. City of Daytona Beach, 471 So.2d 1 (Fla. 1983) for the proposition that the duty to warn stems from duties imposed as a result of the right to control. In so doing, Respondent makes the BAILEY's point. As a result of F.S. Chapter 316 and the Functional Classification system, BAILEY had no right to control the functions of which the Appellant complains. They had neither authority to post the intersection nor maintenance responsibility and, therefore, had no duty to the plaintiff's decedent in the first instance and no duty to warn in the second.

In December of 1986, the Fifth District Court of Appeal addressed the question of the authority of a governmental entity in conjunction with an analysis of the duty owed by the governmental entity in general, as well as in connection with the duty to warn of or cure a dangerous condition. In McFadden v. County of Orange, 12 F.L.W. 61 (Fla. 5th DCA Jan. 2, 1987), the plaintiff's decedent (pedestrian, minor child) was struck and killed at an intersection. The plaintiff's personal representative filed suit against Orange County and the DOT alleging that the

sequencing and timing of the lights at the crosswalk, including a pedestrian cross signal were faulty and created a known dangerous condition. The evidence in the record revealed:

> ...Orange County had responsibility for the maintenance of the signals pursuant to a maintenance agreement between Orange County and Florida Department of Transportation (DOT). Orange County could make minor modifications in the timing, that is, Orange County could add a few seconds to a movement or reduce by a few seconds the time allotted, but it could make no changes in the phasing, indications, or deflections of the signals. Orange County had no authority to change the timing of the lights at the intersection to alter the red/green phasing on Fairbanks. Only DOT could do this. Id. at 62.

On these facts, the Fifth District held:

> In suggesting that the governmental entity has a duty to warn of a known hazard or trap, even where the entity has not created the danger, the dissent does not address the question of the power or the legal authority of the entity to give such warning. Only DOT has authority to erect "signs, signals, markings and other traffic control devices" on a state highway. Section 335.09, Fla. Stat. (1985). Any traffic sign erected on a state highway by someone other than DOT is unauthorized, and thus prohibited by Section 316.0765. We should not attach liability to a governmental agency for failure to do that which it is legally prohibited from doing. Thus we find no operational level duty to warn imposed on Orange County. Id. at 63.

Further, in distinguishing Ralph v. City of Daytona Beach, 471 So.2d 1 (Fla. 1983), the Fifth District noted:

> Thus, in Ralph, it was alleged that the governmental agency did create the hazard on the beach and had the power to correct it. This power and authority if not the creation gave rise to the duty to warn.
>
> * * *
>
> Because the undisputed evidence shows that Orange County neither created the condition complained of, nor had any power or authority to alter the condition, no operational level duty to warn existed. Id. at 62. (emphasis added)

As is seen, the state's uniform traffic control law as expressed in Chapter 316, leaves no room for the Respondent's concept of joint responsibility. The Statute (316.006) vests original traffic control jurisdiction over the subject roads in the county. Clearly, if the BAILEY had no "jurisdiction" or authority to post the stop, yield or warning signs, the absence of which Respondent complains, it cannot be responsible for not posting them.

In this regard, it is interesting to note that Respondent argues that the failure to post the intersection is what created the dangerous condition giving rise to the duty to post. If BAILEY had no authority to post, it can neither have created the dangerous condition nor could it

have breached a duty arising from the dangerous condition by failing to post.

Indeed, it would appear that it was this circumstance that led to the Fourth District's expression of difficulty in this case when it observed:

> We admit to some difficulty in discerning the difference between an intersection that may be dangerous because it lacks any traffic signs, such as a sign warning that a motorist should proceed with caution because the intersection is uncontrolled and unmarked, and a "dangerous condition" for which there was no proper warning." The Neilsen opinion suggests that sovereign immunity bars an action for the former situation while permitting one for the latter. It is difficult to see the rationale for holding the government responsible when it fails to warn of an intersection made dangerous by the absence of a stop sign, while immunizing it from liability for failing to place a stop sign at an intersection that will be unsafe without it. (A-3)

B. Maintenance.

Commencing with the 1977 version of Florida's Transportation Code (F.S. Chapters 334-339), Florida embarked on a plan to functionally classify and transfer title and responsibility for roads throughout the state to various governmental entities. In furtherance of this plan, all public roads were divided into four systems:

> (a) the state highway system
> (b) the state park road system
> (c) The county road system
> (d) the city street system. (F.S.

§335.01(2) (1977), (A-10).

Under §335.04 (1977), (A-11), the Department of Transportation was directed to functionally classify roads and develop a plan for transfer of responsibility between state and local governments no later than July 1, 1982, at which time all transfers not accomplished would automatically be deemed to have occurred. The designation of responsibility under this 1977 version of the functionbal classification scheme was based on a concept of ownership or title. Title was to be transferred in accordance with the functional classification of the various roads and under §337.29(3) (1977), (A-12):

> Title to all roads transferred in accordance with Section 335.04 shall be in the governmental entity to which said roads had been transferred, upon the recording of a right-of-way map by the appropriate governmental entity in the public land records of the county or counties in which such right-of-ways are located. Liability for Torts shall be in the governmental entity having title as provided herein. (emphasis added)

In 1978, the Legislature made amendments to the functional classification scheme. Among these amendments, the Legislature abandoned the concept of ownership or title for determining responsibility and tort liability. To this end, the 1978 version of F.S. §337.29(3), (A-13) was amended to read in pertinent part, "Liability for Torts shall be in

the governmental entity having operation and maintenance responsibility as provided in §335.04(4)." (emphasis added)

Each year the Legislature has made certain fine tuning amendments to the functional classification scheme. However, all versions after 1978 retained the provision in §337.29 that assigns tort liability on the basis of maintenance responsibility, albeit with an amendment that recognizes sovereign immunity. The 1984 version of §337.29(3), (A-17) reads in pertinent part:

> To the extent that sovereign immunity has been waived, liability for torts shall be in the governmental entity having operation and maintenance responsibility as provided in §335.04(2). 6/

The scheme existing in August 1984, the date of this accident was as follows:

> A. §334.03(17), (A-14) defined road as including: streets, sidewalks, alleys, highways and any other way open to travel by the public including the road bed, right-of-way....
>
> B. §335.01, (A-15) divided all roads which were open and available for use by the public and dedicated to the public use into four systems. (1) the State Highway System, (2) the State Park Road

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6/ Since the July 1, 1982, automatic transfer date established in the 1977 version of §335.04 had already passed, the Legislature substituted §335.04(2), (A-16) for §335.04(4) (1978) which provided for continuing reclassification and reassignment of the various roadways throughout the state.

System (3) the County Road System (4) the City Street System.

C. §334.03(6), (A-14) defined the County Road System as consisting of:

> . . .all collector roads in the unincorporated areas and all extensions of such collector roads into and through any incorporated areas, all local roads in the unincorporated areas and all urban minor arterial roads not in the State Highway System. (emphasis added)

D. §337.29(3), (A-17) assigned tort liability based on maintenance responsibility.

In the instant case, BROWARD COUNTY stipulated and the Functional Classificational Map indicates that 178th Avenue was functionally classified as a county collector road as of July 1, 1982 (R. 378 and 1218). It was, therefore, within the COUNTY's jurisdiction and pursuant to §337.29(3) (1984) tort liability was in the COUNTY and not the BAILEY DRAINAGE DISTRICT. While the COUNTY has not so stipulated with respect to S.W. 52nd Court, it is shown on the Broward County Functional Classification Map with this legend note:

> All local roads (not otherwise identified) within the municipal limits are included on the city street system. Those outside the municipal limits are included on the county road system. (R. 378), (A-5).

As such, S. W. 52nd Court was also within the County road system and tort liability for it was assigned to the COUNTY and not the BAILEY DRAINAGE DISTRICT.

Respondent urges that, notwithstanding the functional classification scheme, there remains some basis for imposition of liability on both the COUNTY and the BAILEY. Respondent urges that §335.04(4) assigns maintenance responsibility to the BAILEY and, therefore, 337.29(3) assigns it tort liability. Respondent's position is based on the mistaken belief that geographic location within the BAILEY, or title to the road in the BAILEY, determines maintenance responsibility. Clearly, this is not the case. Both roads were designated as being within the County road system. The Statute does not provide for a "drainage district road system" or an "other road system", only, state, park, county and city. Likewise, the whole concept of "transfer" envisioned by the Legislature, belies the concept of joint liability absent maintenance agreements between governmental entities.

In Leialoha v. City of Jacksonville, 64 So.2d 924 (Fla. 1953), this Court was called upon to visit a similar question arising under an analogous statute which transferred maintenance responsibility for a municipal collecting link road from the City of Jacksonville to the State Road Department (§341.64). In Leialoha, the plaintiff sued the City of Jacksonville for injuries sustained in an

accident allegedly caused by the city's failure to maintain a road within its municipal limits. The circuit court granted Jacksonville's motion for summary judgment and the Supreme Court affirmed holding:

> Section 341.64, FSA was enacted in 1941, and a reading of its contents with the context, drives one to the conclusion that the legislature removed the maintenance and repair of connecting roads from municipalities to the State Road Department and in so doing, relieved the municipality of responding in damages for injuries occurring thereon. Id. at 925.

The plaintiff in Leialoha, just like the Respondent herein, relied on those cases providing for the general historical liability of a city for torts. The Court rejected this reasoning and stated:

> These cases treat the historical liability of a municipality for tort but here we are confronted with a case in which the tort took place on a city street that the legislature had removed from liability by placing it in the hands of the State Road Department for maintenance and repair, so the cases relied on have no application. Id.

It is for this proposition of traditional liability that Respondent has relied on the Fourth District's opinion in City of Tamarac v. Garchar, 398 So.2d 889 (4th DCA 1981). While the court devoted a good deal of time to the issue of a governmental entity's duty, the Garchar case is clearly distinguishable. First, Garchar involved a 1974,

prefunctional classification accident (i.e. prior to the transfer of responsibility and tort liability set forth above). Second, in Garchar, the city had been active in the creation of a known dangerous condition. It designed a road that channeled traffic onto the median strip, Id. at 893, and then placed a large coral boulder on the strip in the very path of the traffic which the road design funneled onto the median. In the instant case, no misdesign is alleged and despite Respondent's continued assertion that the COUNTY and/or BAILEY created a known dangerous condition, she never explains what the dangerous condition was, much less how either of the Appellees created it. (See Part II, infra).

II.

THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE BECAUSE THE BAILEY DRAINAGE DISTRICT CREATED NO DANGEROUS CONDITION AND THE CONDITION EXTANT WAS READILY APPARENT.

As with any current sovereign immunity issue, we begin our analysis with Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979). Commercial Carrier established as a test for sovereign immunity, the concepts of planning level functions as opposed to operational level functions. The former retaining immunity and the latter being within the ambit of the waiver afforded by Florida Statutes §768.28. In Commercial Carrier and its companion case, Cheney v. Dade County, the court was faced with failure to maintain existing traffic control devices and found such maintenance function to lack immunity as an operational level function. 371 So.2d at 1022. The court specifically refrained from expressing an opinion as to the classification of the governmental entity's decisions with regard to placement of traffic control devices in the first place. Id.

Against this background, the First District visited a similar question in Harrison v. Escambia County School Bd., 419 So.2d 640 (1st DCA 1982). In Harrison, the plaintiff's eleven year old son was struck and killed when he stepped backward into the path of an oncoming car.

Harrison sued the driver and the School Board alleging that the School Board negligently placed the school bus stop in an unsafe location and failed to place signs warning motorists of the location of the bus stop. The Third District utilized the Commercial Carrier test and found that the School Board's decisions regarding placement of the bus stop and the decision not to place the traffic control or warning sign were policy making, planning or judgmental, governmental functions rather than operational and found that sovereign immunity was not waived by F.S. §768.28. On rehearing, the First District certified the question to this Court as passing on questions of great public importance, and this Court approved, finding that the plaintiff failed to allege sufficient facts to bring himself within the known dangerous condition exception to planning level immunity. 434 So.2d. at 320 (Fla. 1983).

In 1982, in Department of Transp. v. Neilson, 419 So.2d 1071 (Fla. 1982), this Court faced the precise issues now before this Court. Neilson involved an intersectional collision. The Neilsons sued the owner of the other vehicle, the DOT, Hillsboro County and the City of Tampa. They alleged that the governmental entities were negligent in designing the intersection, failing to install adequate traffic control signals, designing, constructing and maintaining confusing control devices and failing to warn motorists that the intersection was dangerous. The trial

court dismissed the governmental entities, the District Court reversed and this Court quashed the opinion of the District Court and held that the failure to install traffic control devices and/or to upgrade an existing road or intersection and the decision to build roads with a particular alignment are judgmental, planning-level, functions to which immunity attaches.

In revisiting its opinion in Commercial Carrier, the Neilson court reiterated its holding that a failure to maintain existing traffic devices and roads was not immune but took pains to refine its definition of maintenance:

> We caution, however, that maintenance of a particular street or intersection means maintenance of the street or intersection as it exists. It does not contemplate maintenance as the term may sometimes be used to indicate obsolescence and the need to upgrade a road by means of such things as widening or changing the means of traffic control. 419 So.2d at 1078. (emphasis added)

The immunity issue in the case before this court is practically identical to that presented in Neilson. Despite Respondent's repeated assertion that the COUNTY and BAILEY created a dangerous condition, she never describes how it was created. She says that the intersection had no stop signs -- Neilson held that function to be immune. She next tries to explain how the condition was created, by stating:

> They did this by keeping the intersection as it existed when prior accidents occurred and after neighbors complained to them about the danger and without protective measures. Page 6, Brief of Appellant below.

This is likewise not creation. Indeed, it is the same failure to upgrade as was deemed not to be within the definition of maintenance in Neilson. 419 So.2d at 1078.

Nor does the existence of the brush on property adjoining the road constitute "creation" of a dangerous condition. Viewed in the light most favorable to the Respondent, there was a site obstruction on property adjoining S. W. 52nd Court. The swales themselves were properly cut by the BAILEY and had been cut less than a month prior to the accident.

In viewing the issue, one must remember that the Respondent's decedent was struck when he failed to yield the right-of-way to a vehicle approaching from his right at an uncontrolled intersection (F.S. §316.121). The Respondent has never claimed that her decedent failed to yield because he could not see the intersection and, therefore, did not know he was about to cross it. Indeed, the record belies any such suggestion (A. 18 and 19). In reality, the condition of which the Plaintiff complains is an uncontrolled intersection in a rural area of the county. While uncontrolled intesections may said to be less safe than controlled intersections, there is nothing about this rural,

uncontrolled intersection that raises the normal danger associated with such an intersection to the status of a known dangerous condition which is not apparent to the public in general. The decision to construct the intersection and not place traffic control devices remains immune in Florida.

In City of St. Petersburg v. Collum, 419 So.2d 1082 (1982), this Court made its foremost definitive statement with respect to the known dangerous condition exception to planning level immunity. More particularly, the Court held:

> ...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.
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> * * *
>
> The failure of government to act in this type of circumstance is, in our view, a failure at the operational level. We find 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. When such a condition is knowingly created by a governmental entity, then it reasonably follows that the governmental entity has the responsibility to protect the public from that condition, and the failure to so protect cannot logically be laveled a judgmental, planning-level decision. Id. at 1086. (emphasis added)

This then brings us to the crux of this issue. Did the BAILEY, or for that matter, the COUNTY knowingly create a trap or a dangerous condition not readily apparent and inentionally fail to warn of it?. Based upon the record in this case, the answer can only be no. This accident occurred at an uncontrolled intersection in rural BROWARD COUNTY. The record does not reveal when the roads were constructed, but clearly, they were built many years before the accident. The area surrounding the intersection and indeed all of the BAILEY DRAINAGE DISTRICT is composed of large tracts of land, portions of which are undeveloped or in pasture. Prior to the accident in question, there had been two accidents at this intersection, spanning a period of at least two years. There was no suggestion in the record that the intersection was any different at the time of this accident than on the day it was constructed. There is no suggestion that the BAILEY knew it was dangerous when it was constructed. There are no acts of creation asserted by the Plaintiff other than those appearing at page 6 of her Brief below, where she states that the Defendants created the condition "by keeping the intersection as it existed" after becoming aware of prior accidents. This is not the knowing creation of a dangerous condition required by Collum. It is precisely the "need to upgrade" which Neilson said was immune, Supra at p. 25.

In Paneque v. Metropolitan Dade County, 478 So.2d 414 (3d DCA 1985), a pedestrian was struck by an auto while crossing a street. She sued Dade County for failure to warn of the danger or to install safety measures. The trial court entered summary judgment for the County and the 3d DCA affirmed, holding that there was no danger that was not readily apparent. Stated another way, there was no particular danger not inherent in crossing any street.

Indeed, it is suggested that it was this precise issue that led Judge Anstead to observe for the majority in this case:

> In our view, a good argument could be made that a modern road intersection unmarked with warning signs or traffic control devices of any kind is a dangerous condition per se, given the recognized status of a motor vehicle as a dangerous instrumentality. Motorists traversing such intersections do so at their peril. (A-3)

That is to say, an uncontrolled intersection, and particularly an uncontrolled intersection in a rural area, is a dangerous condition known to the public at large. If such danger is known to the public at large, it cannot constitute a trap giving rise to a duty to warn. To rule otherwise would constitute a mandate that all uncontrolled intersections in the State of Florida must be posted with stop, yield, or warning signs.

In Payne v. Broward County, 461 So.2d 63 (Fla. 1984), plaintiff's decedent was struck and killed when she crossed Rock Island Road at midblock. Plaintiff sued the COUNTY, alleging negligence in delaying the installation of a planned stop light, opening the road before completed as planned and failing to warn of a known dangerous condition. This Court reversed a jury verdict in favor of the plaintiffs and certified several questions to this Court. 437 So.2d 719. This Court concluded that the conditions at the location of the accident created neither a known danger not readily apparent to pedestrians, nor a hidden trap for pedestrains. This Court held:

> As a matter of law, neither the pleadings nor the evidence establish that the danger Allison faced was any greater than that facing any pedestrian seeking to cross any street at midblock. The pleadings and evidence show that the county had not installed a traffic light, that Rock Island Road had been opened without a center line...and that plans had been made to upgrade pedestrian and vehicular control, but they had not been implemented. However, regardless of the circumstances which resulted in the intersection being in the state it was the day of the accident, no liability may be imposed if those circumstances failed to create a known danger not readily apparent to potential victims, or a trap, and there was no such hidden danger or trap. 461 So.2d at 65.

CONCLUSION

The BAILEY DRAINAGE DISTRICT owed no duty on the facts of the instant case because under F. S. Chapter 316, it had no authority to post signs at the subject intersection and under the State Functional Classification Scheme, maintenance responsibility and, therefore, tort liability, if any, had been transferred to BROWARD COUNTY.

No duty of BAILEY arose from a known dangerous condition because there was no danger at the intersection not inherent in any rural, uncontrolled intersection, and BAILEY did not create what the Respondent attempts to define as a dangerous condition.

Consequently, the certified question should be answered in the affirmative and the opinion of the Fourth District Court of Appeal quashed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by United States Mail to ALEXANDER COCALIS, ESQ., Attorney for Broward County, Governmental Center, Suite 423, 115 South Andrews Avenue, Fort Lauderdale, FL 33301, and MICHAEL D. DTEWART, ESQ., Attorney for Appellant, 600 N. E. Third Avenue, Fort Lauderdale, FL 33304 this 9th day of June, 1987.

Harry S. Raleigh

HARRY S. RALEIGH, JR.