SUPREME COURT OF FLORIDA

BAILEY DRAINAGE DISTRICT, ETC.

Petitioner,

V. CASE NO. 70,543

EVELYN STARK, ETC.,

Respondent.

_____/ DCA CASE NO. 4-86-0841

BROWARD COUNTY, ET AL.,

Petitioner,

V. CASE NO. 70,691

EVELYN STARK, ETC.,

Respondent.

_____/

BRIEF OF RESPONDENT, EVELYN STARK, AS TO PETITIONER'S, BAILEY DRAINAGE DISTRICT'S, BRIEF

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PRELIMINARY STATEMENT

Although sovereign immunity bars claims against governmental entities for failing to install traffic control devices at intersections in certain situations, does the doctrine shield BAILEY DRAINAGE DISTRICT and BROWARD COUNTY from liability for continuing to maintain an unmarked intersection with obstructions to visibility as an intersection for use by motorists, without protective measures or warnings of any kind, after collisons occur and people complain to them about the danger of motorists colliding in the intersection?

STATEMENT OF THE CASE AND THE FACTS

Mindful of Rule 9.210(c), we include a statement of the case and of the facts because BAILEY DRAINAGE DISTRICT confuses statement of facts with argument about the facts.

Steven Stark drove his car east on S.W. 5nd Court into its intersection with S.W. 178th Avenue in Broward County and Bailey Drainage District when a truck going north on S.W. 178th Avenue crashed into the passenger side of his car, fatally injuring him. (R. 1217, 1041-1048). The intersection was unmarked for motorists approaching it from any direction. (R. 878-879). Vegetation growing on the property at the southwest corner blocked the views of motorists driving east on S.W. 52nd

Court, such as Steven Stark, and motorists driving north on S.W. 178th Avenue, of each other. (R. 1010-1011, 1021-1022, 1187, 1196, 1057, 1043, 900, 580-581)

The intersection lies within the geographical limits of both BAILEY and BROWARD. (R. 1218, 13, 95, 118, 151)

A quit-claim deed to BAILEY dedicated S.W. 52nd Court, the road on which Steven Stark was driving, west of S.W. 178th Avenue, as well as S.W. 178th Avenue, to the public use. (R. 244)

Before Steven Stark's accident, BAILEY had cut the Florida holly bush growing alongside the telephone pole at the southwest corner of the intersection. (R. 1218, 785, 795-796) BAILEY patched roads within its geographical limits and painted stripes on them (R.1218, 448-453, 557-559, 576), mowed the grassy areas along the sides of the roads (R. 777-779, 787), placed two "speed limit 35 MPH" signs along the sides of S.W. 178th Avenue (R. 1218), purchased and installed other signs advising motorists (R. 551-553), and otherwise maintained roads within its jurisdiction, including S.W. 52nd Court and S.W. 178th Avenue. (R. 1218, 198-232, 342)

BAILEY also installed a large sign at the northern end of its limits, off the west side of S.W. 178th Avenue, which said that it had jurisdiction over the roads within its geographical limits. (R.395-396, 441)

The Florida Legislature, in Chapter 67-950, Laws of Florida (1967) created BAILEY DRAINAGE DISTRICT, and gave it the

power "to construct, improve, pave, and maintain roadways and roads." (Appendix 6)

Before Steven Stark was fatally injured, BROWARD COUNTY installed a "speed limit 30 MPH" sign along the side of S.W. 178th Avenue, within the limits of BAILEY DRAINAGE DISTRICT. (R.1218, 666) The part of S.W. 178th Avenue lying within the geographical limits of BAILEY was functionally classified as a county collector road as of July 1, 1982 (R.1218, 1069-70), as a result of which BROWARD COUNTY assumed maintenance responsibility for the roadbed and traffic engineering functions such as striping and signing. (R.1218)

Two accidents happened at the intersection before Steven Stark's. About two years before, Judith Metcalf drove her car east on S.W. 52nd Court and into the intersection without stopping, when a pickup truck going north on S.W. 178th Avenue crashed into the passenger side of her car. (R. 383-384) The intersection was unsigned for motorists approaching it from any direction at that time, too. (R. 383) Liza Terry, who lives within BAILEY DRAINAGE DISTRICT, described another accident occurring before Steven Stark's, at the intersection, involving a delivery truck. (R.1012)

People living in BAILEY DRAINAGE DISTRICT complained about the intersection to persons at BAILEY, and BROWARD, after the two accidents and before Steven Stark's accident. (R. 1013-1016, 1018, 662-663) BROWARD COUNTY disputes receipt of any of these complaints. (R. 1077-1078)

Neither BAILEY nor BROWARD put up any warning signs for motorists using the intersection before Steven Stark's accident. (R. 689) However, after it, BROWARD put up a stop sign at the intersection for eastbound motorists using S.W. 52nd Court, as well as stop signs at all other streets intersecting S.W. 178th Avenue within BAILEY's geographical limits. (R. 1073)

Before Steven Stark's accident, Frank Dickinson, who was then administrator for BAILEY, asked BROWARD for help to place stop signs on streets within BAILEY intersecting S.W. 178th Avenue. (R. 934) BROWARD did not install any stop signs on intersecting streets, before Steven Stark's accident. (R. 690) The director of the traffic engineering division of BROWARD did not feel that it was BROWARD COUNTY's responsibility. (R. 690)

By affidavit filed before the hearing on BAILEY's and BROWARD's motions for summary judgment, Miles Moss testified that the Manual on Uniform Minimum Standards for Design Construction and Maintenance for Streets and Highways says that any property not under the highway agency's jurisdiction through direct ownership or other regulations shall be considered as an area of total sight distance obstruction; that areas which contain vegetation that cannot easily be removed by regular maintenance activity should be considered as sight obstructions; that large or numerous poles or supporting structures for lighting, signs, signals, or other purposes may constitute sight obstructions, and that the adverse effect upon sight distance created by poles and signs near intersections should be carefully investigated; that

regulatory signs inform highway users of traffic laws or regulations and indicate the applicability of legal requirements that would not otherwise by apparent; and that these signs shall be erected wherever needed to fulfill this purpose. (R. 236-237) The Manual specifically defines the use of the word "shall" as a mandatory condition (R. 236)

Miles Moss gave his opinion in his affidavit that the use of a regulatory stop sign, as required in the Manual is one method that would have resolved the problem of how members of the public could safely utilize the intersection, and would have warned members of the public of the dangerous condition existing there. (R. 237)

These are the salient facts. EVELYN STARK sued BAILEY DRAINAGE DISTRICT and BROWARD COUNTY for negligence causing her son's death, alleging that they failed to correct or warn of a known dangerous condition existing at the intersection which they created and which was not apparent to unwary motorists. (R.20-32) In her amended complaint, STARK alleges that BAILEY and BROWARD continued to maintain the unsigned intersection as an intersection, without protective measures or warnings of any kind, after motorists had wrecked within it and neighbors had complained, alerting BAILEY and BROWARD to the danger existing there, before her son's accident. (R.20-32)

After answering EVELYN STARK's amended complaint (R.99-10-2), BAILEY and BROWARD moved for summary judgment

(R.160, 170), which Judge Linda Vitale granted on sovereign immunity grounds. (R.1230-1231)

EVELYN STARK appealed the summary judgment to the Fourth District Court of Appeal. (R. 1232)

The Fourth District Court of Appeal reversed the summary judgment, certifying 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? (Appendix 4)

SUMMARY OF ARGUMENT

Neither BAILEY DRAINAGE DISTRICT nor BROWARD COUNTY put up a stop sign or any other kind of warning device at the intersection, before Steven Stark's fatal accident. Both knew, before Steven Stark was killed, that the intersection was unmarked. Vegetation blocked the view of crossing motorists of one another. BAILEY had trimmed a Florida holly bush next to a telephone pole at the intersection. BAILEY had asked BROWARD for help in installing stop signs. At least two accidents happened there before Steven Stark's and people living within BAILEY DRAINAGE DISTRICT complained about the intersection to persons at BAILEY and BROWARD. Therefore, BAILEY and BROWARD knew there was a danger not at once clear to motorists that cars and trucks driving through the unmarked intersection may crash into each other.

Accordingly, BAILEY and BROWARD had a duty to warn people driving their cars and trucks through the intersection of the danger of collision.

Nevertheless, neither BAILEY nor BROWARD did anything to try to warn motorists of the danger of crashing into another car or truck driving through the unmarked intersection.

Instead, BAILEY and BROWARD continued to maintain or keep the intersection open as an intersection for use by motorists, without protective measures or warnings to motorists of any kind. BAILEY's and BROWARD's failure to so warn motorists

is negligence at the operational level; sovereign immunity does not relieve them from liability for their failure to perform their duty.

ARGUMENT

SOVEREIGN IMMUNITY DOES NOT 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.

In Department of Transportation v. Nielson, 419 So.2d 1071 (Fla. 1982), this Court said that "(a)s we read it, the Nielsons' complaint alleges the failure to ... warn of hazardous conditions through the installation of traffic control devices" at an intersection, and that the failure to install traffic control devices at the intersection was not actionable. 419 So.2d 1071, at page 1078. However, this Court also said that "(i)f the complaint had alleged a known trap or dangerous condition for which there was no proper warning, such an allegation would have stated a cause of action," and that the failure to so warn is a negligent omission at the operational level of government, which serves as the basis for an action against the governmental entity. Id., at 1078.

After Nielson, this Court said in Payne v. Broward County, 461 So.2d 63 (Fla. 1984), that although the decision to install traffic control devices is immune, it "carries with it the concomitant duty to warn ... if the absence of such traffic light creates a trap or creates a known danger not readily

apparent to persons in or about the intersection." 461 So.2d 63, at page 66.

What we struggle with in reconciling Nielson and Payne is determining when an unmarked intersection is a dangerous condition for which there is no proper warning. This Court said in Nielson that the decision to install traffic control devices is a planning-level decision, and therefore not actionable. But, in Department of Transportation v. Webb, 438 So.2d 780 (Fla. 1983), this Court approved the First District Court of Appeal's rejection of the argument that deciding where, when, or how to take safety measures at a crossing known to be dangerous necessarily involves planning and is, therefore, immune. This Court found the district court's opinion, reflecting that the failure to place warning signs at a railroad crossing known to be dangerous is an operational-level function, negligent, tortious, and not immune, consistent with Nielson, supra.

Therefore, if an intersection, unmarked and uncontrolled by any traffic device, presents a danger of collision, known to the government, and not at once clear to people driving cars and trucks through the intersection, then the government must warn; it cannot argue that placing a warning sign is a planning-level function, protected by sovereign immunity.

Lack of a traffic control device at an intersection can add to the facts showing a dangerous condition. If the government knows those facts then it knows of the danger and has a duty to warn. By showing that BAILEY and BROWARD kept the intersec-

tion open for use by motorists, without placing warning signs, and with the knowledge, STARK satisfies the requirement that the governmental entities "create" the dangerous condition. Duval County School Board v. Dutko, 483 So.2d 492 (Fla. 1st DCA 1986).

The following facts apparent from the record show that motorists driving through the intersection were in danger of colliding with each other, which BAILEY and BROWARD knew:

(1) vegetation growing on the property at the southwest corner blocked east- and north-bound motorists' views of one another (R.1010-1011, 1021-1022, 1187, 1196, 1057, 1043, 900, 580-581);

(2) cars and trucks drove through the intersection;

(3) No traffic signals, signs, or barriers were in place before Steven Stark's accident (R.878-879);

(4) prior accidents happened (R.383-384, 1012);and

(5) people complained to BAILEY and BROWARD about the intersection. (R. 1013-1016, 1018, 662-663).

Prior accidents at the intersection show that a dangerous condition, i.e., of cars and trucks colliding, existed. Reinhart v. Seaboard Coastline Railroad Co., 422 So.2d 41 (Fla. 2nd DCA 1982) This Court held, in Anderson v. Southern Cotton Oil Co., 73 Fla. 432, 74 So. 975 (1917), that an automobile is a dangerous instrumentality because it is peculiarly dangerous in its operation. 745 So. 975 at page 978. Operation of cars and trucks through the intersection combines with visual obstructions and lack of traffic controls to produce the danger of collision within the intersection.

Before the hearing on BAILEY's and BROWARD's motions for summary judgment, EVELYN STARK developed these facts. She also showed that neither BAILEY nor BROWARD did anything before her son's accident to warn motorists driving through the intersection of the known danger of collision.

BAILEY replies to the certified question mainly by arguing that it cannot be liable because it had no authority to put up a warning sign or maintain the intersection. See BAILEY's brief, pages 11 - 22. In other words, BAILEY says that even though it did all sorts of things which admittedly show that it had the right to control and maintain roads within its geographical limits, it is not liable for negligently exercising that right because it never really had the right in the first place. Without the right, there can be no concomitant duty to breach. BAILEY asserts that Section 316.006(3), Florida Statutes (1983) gives only BROWARD COUNTY the right to place warning signs, and the liability for torts rests only with BROWARD under 337.29(3). BAILEY's analysis is wrong.

The intersection falls within the geographical limits of BAILEY, as well as BROWARD. When the Legislature created BAILEY DRAINAGE DISTRCT, it gave it the power in section 2(1), Chapter 67-950, Laws of Florida, "to construct, improve, pave, and maintain roadways and roads;" (Appendix 6) STARK developed facts showing that BAILEY exercised that right. In doing so, BAILEY assumed a common law duty to do so safely. Avallone v. Board of County Commissioners of Citrus County, 467 So.2d 826

(Fla. 5th DCA 1985), City of Tamarac v. Garchar, 398 So.2d 889 (Fla. 4th DCA 1981) Failure to perform its duty results in liability.

BAILEY is a political subdivision of the State of Florida. Section 335.04(4), Florida Statutes (1983) provides, materially:

> "(4) The department and counties, cities, and other political subdivisions shall have the responsibility for the operation and maintenance of the roads under their respective jurisdictions, except as otherwise provided by law.... " (emphasis added.)

337.29(3) says, materially:

> "(3) Liabilty for torts shall be in the governmental entity having operation and maintenance responsibility as provided in Section 335.04(4)...."

Therefore, 335.04(4) gives BAILEY the duty to operate and maintain roads within its jurisdiction, and 337.29(3) makes it liable in tort if it fails to. If these statutes make BAILEY and BROWARD both responsible, then so be it. They can work it out between themselves if they choose. Concurrent or shared responsibility better serves the public need for safe roads than allowing BAILEY to control and maintain roads without having responsibility for its actions.

The Fourth District Court of Appeal, in Garchar, supra, noted that notwithstanding the technical distinctions between county roads and city streets, when a governmental entity voluntarily assumes a duty to care for the area in question and has done so for a substantial period of time before the accident,

it thereby assumes responsibility for its actions. 398 So.2d 889, at page 894. As this Court pointed out in Ralph v. City of Daytona Beach, 471 So.2d 1 (Fla. 1983), the duty to warn stems from duties imposed as a result of the right to control.

Therefore, BAILEY DRAINAGE DISTRICT, had the right to control the intersection. BAILEY acted as if it had the right, before Steven Stark's fatal accident, and thereby assumed responsibility for its actions and a concomitant duty to warn people exposed to the dangerous condition at the unmarked intersection. Failure to so warn results in liability. Nielson, supra.

For these reasons, we ask this Court to answer the certified question "No", affirm the opinion of the Fourth District Court of Appeal in reversing the summary judgment, and remand this case to the trial court for trial by jury.

CONCLUSION

Before the hearing on the motions for summary judgment which BAILEY DRAINAGE DISTRICT and BROWARD COUNTY filed, EVELYN STARK developed facts showing that they failed to warn motorists of the danger of collision in the unmarked intersection, known by the governmental entities by reason of the lack of traffic control devices, obstructions to visibility, prior accidents, and complaints. STARK showed that BAILEY and BROWARD continued to maintain or keep the intersection open as an intersection for use by motorists, without measures or warnings of any kind to protect the motorists from the danger of crashing into one another.

Sovereign immunity does not bar EVELYN STARK's claim against BAILEY and BROWARD for their negligence in creating an unreasonable risk of collision in the unmarked intersection.

We ask this Court to find that sovereign immunity does not shield the defendants from liability for their negligence. We ask this Court to affirm the opinion of the Fourth District Court of Appeal reversing the summary judgment entered by the trial court, and remand the case to the trial court for jury trial.

Respectfully submitted,

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By 
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 18th day of June, 1987, to Harry S. Raleigh, Jr., P.O. Box 14636, Fort Lauderdale, FL 33302; and Alexander Cocalis, Esq., Governmental Center, Suite 423, 115 South Andrews Avenue, Fort Lauderdale, FL 33301.

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