IN THE SUPREME COURT OF
THE STATE OF FLORIDA

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.	CASE NO. 70,543
	DCA CASE NO. 4-86-0841
BROWARD COUNTY, et al., Petitioner, vs. EVELYN STARK, etc., et al. Respondent.	CASE NO. 70,691

REPLY BRIEF OF PETITIONER BAILEY DRAINAGE DISTRICT

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INTRODUCTION AND SUMMARY OF ARGUMENT

Whether one chooses to analyze the issues presented by the BAILEY DRAINAGE DISTRICT's petition in terms of the existence of a duty in the first instance or in terms of the doctrine of sovereign immunity for planning level functions and its "dangerous condition/duty to warn" exception, the BAILEY should not be held responsible for failure to perform a function it lacked the authority to perform.

The subject intersection was not a trap giving rise to a duty to warn because its condition was readily apparent and the omission relied upon by the Respondent is a failure to upgrade which is not actionable.

ARGUMENT

Respondent's Answer Brief conveniently blurs the distinctions between BROWARD COUNTY and the BAILEY DRAINAGE DISTRICT to conclude that they are jointly and severally responsible for traffic control on those public streets located within the geographic limits of both Broward County, and the BAILEY DRAINAGE DISTRICT. The functions and purposes of the BAILEY DRAINAGE DISTRICT and BROWARD COUNTY are clearly not identical. BROWARD COUNTY is a political subdivision of the State of Florida, having general jurisdiction within its geographic limits to perform the general governmental functions of a county in accordance with the authority and responsibility given it by the Legislature. BAILEY DRAINAGE DISTRICT is a drainage district and, while its commissioners are elected and to that extent, it must be deemed a political entity, its primary function is flood control.

Petitioner has repeatedly acknowledged that its enabling legislation (Chapter 67-950 Laws of Florida) gave it the power to construct and maintain roads within its geographic limits. The Respondent, however, chooses to view this grant of authority in a vacuum without reference to the legislative mandates of this State which divide authority and responsibility for various maintenance, traffic control and traffic engineering functions among the various governmental agencies and subdivisions of the State of Florida.

Among these legislative mandates are two which Petitioner submits control this appeal. Florida Statutes Section 316.006 assigns jurisdiction for traffic control among the state, municipalities and counties. It speaks in terms of original jurisdiction and grants no jurisdiction to drainage districts. The Florida Transportation Code (F.S. Chapter 334-339) divides all public roads into four systems and assigns maintenance responsibility and tort liability accordingly. The Transportation Code did not carve out any special category for drainage district roads as it did for state highways, state park roads, county roads and city streets. See F. S. §335.01(2) (1977).

At page 2 of her Brief, Respondent sets forth a list of maintenance functions from time to time performed by the BAILEY DRAINAGE DISTRICT. This list includes such things as patching and striping roads, placing two speed limit signs on 178th Avenue (the main thoroughfare within the geographic limits of the BAILEY DRAINAGE DISTRICT), and mowing grass and trimming brush in the swales abutting the roads. Respondent concludes from the BAILEY's enabling legislation grant of authority to construct and maintain roads and her list of maintenance functions performed by the BAILEY that it had the authority and the duty to place traffic control signs at the intersection where this fatal accident occurred. In accomplishing this deft leap of logic, Respondent ignores the clear provisions of

Florida Statute §316.006(3), the opinion of the Attorney General for the State of Florida, appearing at 1981 Op. Atty. Gen. Fla. 061-18 March 4, 1981, and the opinion of the 5th DCA in McFadden v. County of Orange, 12 FLW 61 (Fla. 5th DCA January 2, 1987).

In Section 316.006(3), the Legislature gave counties "original jurisdiction ... to regulate, warn or guide traffic." In Opinion 061-18, supra, the Attorney General opined that Chapter 316 meant what it said and that only counties and not water control districts had authority to post and maintain traffic control devices on roads within the county and the district. Finally, while the choices were between Orange County and the Department of Transportation, the 5th DCA in McFadden, supra, likewise determined that Chapter 316 meant what it said when it allocated traffic control functions between counties and the DOT. Indeed, the court in McFadden was not simply addressing the question of jurisdiction to erect traffic control devices in the first instance, but jurisdiction to erect traffic control devices or warning signs where their absence created a hazard or trap and held:

> 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. 12 FLW at page 63.

It is interesting to note that among the maintenance functions performed by the BAILEY, which Respondent catalogs, there is no reference to the BAILEY ever having posted stop, yield or other intersectional traffic control devices, nor is there any such reference in the record. To the contrary, as observed by the Respondent in the second paragraph appearing on page 4 of her Answer Brief, the BAILEY had asked BROWARD COUNTY to place stop signs on the streets within the DISTRICT where they intersected with Southwest 178th Avenue. One might ask why, if the BAILEY were exercising such vast maintenance functions, it did not post the intersections, but instead requested assistance from the COUNTY in posting them. The answer would appear obvious. Chapter 316 Florida Statutes assigned that function to the COUNTY. 1/

In her attempts to rebut Petitioner's argument that maintenance responsibility for the subject intersection was transferred to BROWARD COUNTY by Florida's Functional Classification System, the Respondent cites to Florida Statute §335.04(4) which refers to "other political subdivisions". In so doing, Respondent ignores the categories of road systems defined by the Legislature in Florida Statutes §335.01(2) (1977). There are only four designated systems:

1/ Even if one conceded that the BAILEY came under a duty to warn when it became aware of the prior accidents alleged, it arguably discharged that duty when it asked BROWARD COUNTY to post the intersection.

(a) The State Highway System

(b) The State Park Road System

(c) The county road system

(d) The city street system.

There is no "other political subdivision road system" nor "drainage district road system". Indeed, it is submitted that the reference to other political subdivisions in Section 335.04(4) was placed there only to allow for the maintenance agreements referred to in the very next sentence of that same subsection. That is to say, in assigning maintenance responsibility to four types of governmental entities, the Legislature did not choose to abolish the ability of those four entities to enter into contracts whereby "other political subdivisions" of the state could maintain the roads within their geographic limits. There was no such maintenance agreement between BROWARD COUNTY and BAILEY DRAINAGE DISTRICT.

Perhaps in recognition of the weakness of her argument in rebutting these statutory assignments of authority, Respondent asserts that there was a common law duty placed upon the BAILEY because it exercised the grant of authority contained in its enabling legislation by performing maintenance functions with respect to the roads within its geographic limits. For this proposition, Respondent cites Avalon v. Board of County Commissioners of Citrus

County, 467 So.2d 826 (Fla. 5th DCA 1985) and City of Tamarac v. Garchar, 398 So.2d 389 (Fla. 4th DCA 1981). Neither case is instructive. Garchar involved a 1974, prefunctional classification, accident (i.e. prior to the transfer of responsibility and tort liability set forth in the Functional Classification Scheme). Secondly, in Garchar, the City had taken affirmative acts which created a known hazardous 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 or other affirmative act is alleged and despite Respondent's continued assertion that the COUNTY and/or the BAILEY created a known dangerous condition, she never explains what the condition was or how it was created other than that they failed to erect traffic control signs.

Likewise, Petitioner's reliance on Avalon is misplaced. In speaking to the waiver of sovereign immunity contained in Florida Statutes §768.28, this court held that:

> A governmental unit has the discretionary authority to operate or not operate swimming facilities and is immune from suit on that discretionary question. However, once the unit decides to operate the swimming facility, it assumes the common law duty to operate the facility safely; just as a private individual is obligated under like circumstances.

This holding represents nothing more than a restatement of the proposition for which Respondent cites Ralph v. City of Daytona Beach, 471 So.2d 1 (Fla. 1983) that the duty to warn stems from the duties imposed as a result of the right to control. As a result of F.S. Chapter 316, the BAILEY had no right to control the posting of traffic signs, the absence of which Respondent claims rendered this intersection dangerous.

Indeed, the result is no different if one adopts the specially concurring opinion of Justice Shaw in Avalon. That is to say, even if Florida Statutes §768.28 completely waived sovereign immunity for both planning and operational level activities, if the governmental entity against whom liability is sought to be imposed lacked the authority to perform the function concerning which a plaintiff complains, that entity should not be held liable. The analysis is one regarding duty. If an entity lacks authority to perform a function, it cannot be said to have had the duty to perform it.

While Respondent is quick to cite this Court's opinion in Payne v. Broward County, 461 So.2d 63 (Fla. 1984) for the proposition that where the failure to install traffic control devices creates a trap or known danger, such failure also creates a duty to warn, Respondent totally fails to address the holding or the outcome in the Payne case. In Payne, this Court found that the conditions on

Rock Island Road were no greater than those facing any pedestrian seeking to cross any street at midblock. Id. at 65. Respondent has failed to describe any condition existing at the intersection where this accident occurred that rendered the intersection more dangerous or hazardous than any other rural, uncontrolled intersection.

In like manner, Respondent relies on this Court's opinion in Department of Transportation v. Neilson, 419 So.2d 1071 (Fla. 1972) without taking into account the portion of the Neilson opinion which clarified the Court's definition of operational level maintenance set forth in Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979). In Neilson, this Court made it clear that operational level maintenance did not include the need to "upgrade a road by means of such things as . . . changing the means of traffic control." 419 So.2d at 1079.

Commencing in the trial court, through her appeal in the Fourth District and into this Court, Respondent has been steadfast in defining the act of the COUNTY and the BAILEY that created a known dangerous condition as:

> . . . continu[ing] to maintain or keep the intersection open as an intersection for use by motorists, without protective measures or warnings to motorists of any kind. Page 7, Brief of Respondent.

This is clearly a charge that the governmental entities failed to upgrade the intersection after they knew accidents had occurred.

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.

Likewise, no duty of BAILEY arose when it learned of prior accidents because there was no danger at the intersection which was not inherent in any rural, uncontrolled intersection; and the solution to the alleged dangerous condition was to upgrade the intersection by the placing of traffic control devices which the BAILEY lacked authority to post.

Consequently, the BAILEY requests that this Court quash the opinion of the Fourth District with respect to the BAILEY DRAINAGE DISTRICT.

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. STEWART, ESQ., Attorney for Appellant, 600 N. E. Third Avenue, Fort Lauderdale, FL 33304 this 6 day of July, 1987.

Harry S. Raleigh, Jr.

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