O/A 10-5-90

SUPREME COURT OF FLORIDA

DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs. CASE NO. 75,180

LORETTA KONNEY, etc., et al.,

Respondents.

PALM BEACH COUNTY,

Petitioner,

vs. CASE NO. 75,241

LORETTA KONNEY, etc., et al.,

Respondents.

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BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS, DEPARTMENT OF TRANSPORTATION AND PALM BEACH COUNTY

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TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

Out of State Authority

Constitutions and Statutes

STATEMENT OF THE CASE AND THE FACTS

The Attorney General as Amicus adopts the Statement of the Facts and the Case provided by the two Petitioners' Initial Brief.

SUMMARY OF THE ARGUMENT

The opinion below offends the constitutional principle of separation of powers in that it allows tort suits to invade into policy and planning level decisions of the executive branch of government. The decision to install a traffic signal, even after a governmental entity has learned that a designed intersection has become dangerous and a trap or hidden danger to the public, remains a planning level decision as this Court has decisively ruled in its decisional law.

The lower court has misconstrued the "hidden danger" exception to immunity for highway design. The sole duty under this exception is to warn of a dangerous condition through the use of inexpensive warning signs or other similar equipment, an operational function. The imposition of this duty does not violate the principle of separation of powers. This Court has flatly rejected, however, any expansion of that duty to be accomplished through changing the design, and installing a traffic signal. Such an expansion would completely absorb the general rule and would constitute a violation of separation of powers.

The distinction between warning signs and traffic signals that has been made by this Court in its earlier decisions is valid because of the great differences in cost, policy factors, and higher level decisions that are involved with

the erection of a traffic signal as opposed to warning signs. This distinction is also the mandatory line that article II, section 3 of Florida Constitution draws to preserve separation of powers of the three branches of Government.

ARGUMENT

The Attorney General as Amicus, fully concurs with the analysis in both petitioners' initial briefs. However, this amicus brief will focus for the most part on the constitutional ramifications of the decision below. Indeed, it is the Attorney General's contention that the Fourth District Court of Appeals ruling below reported as State of Florida Department of Transportation v. Konney, 14 FLW 179 (July 19, 1989) 551 So.2d 613 (4th DCA 1989) amounts to an unconstitutional interpretation of section 768.28, Florida Statutes.

The affirmance of the trial court evidentiary ruling allowing the jury to consider whether governmental entities should install traffic signals to "warn" of a dangerous conditions improperly allows the judiciary to substitute its judgment for that of policymakers in the executive branch of government. In short, the court below has violated the separation of powers principle found in article II, section 3, Florida Constitution (1968). See Kaisner v. Kolb, 543 So.2d 732 (Fla. 1989)

Article II, Section 3, provides:

> **Branches of government** - The powers of the state government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

The separation of powers doctrine was applied by this Court with regards to the issue of sovereign immunity in Commercial Carrier Corporation v. Indian River County, 371 So.2d 1010 (Fla. 1979) when it adopted the planning/operational test to divide immune acts from those governmental acts waived by Section 768.28, Florida Statutes. Although article II, section 3 of the Florida Constitution was never expressly cited in the Commercial Carrier decision, the court strongly implied that its limitation on the scope of sovereign immunity was of constitutional magnitude, particularly in its reliance on Judge Fuld's majority opinion in Weiss v. Fote, 7 N.Y.2d 579, 200 N.Y.S.2d at 413, 167 N.E.2d at 66:

> To accept a jury's verdict as to the reasonableness and safety of a plan of governmental services and prefer it over the judgment of the governmental body which originally considered and passed on the matter would be to obstruct normal governmental operations and to place in inexpert hands what the Legislature has seen fit to entrust to experts. Acceptance of this conclusion, far from effecting revival of the ancient shibboleth that "the king can do no wrong", serves only to give expression to the important and continuing need to preserve the pattern of distribution of governmental functions prescribed by constitution and statute.

371 So.2d at 1018 (Emphasis supplied).

Six years later this Court confirmed that one of the basis of the Commercial Carrier decision was the "Constitutional doctrine of separation of powers." Trianon Park Condominium v. City of Hialeah, 468 So.2d 912, 918 (Fla. 1985). In that opinion, article II, section 3 was specifically cited. The Court further stated that:

> Judicial intervention through private tort suits into the realm of discretionary decisions relating to basic governmental functions would require the judicial branch to second guess the political and police power decisions of the other branches of government and would violate the separation of powers doctrine.

In Kaiser v. Kolb, supra, this Court made it absolutely clear that governmental immunity is mandated and derives solely from article II, section 3, of the Florida Constitution and "not from a duty of care or statutory basis." Id.

In effect the limited interpretation of section 768.28, Florida Statutes, by this Court in Commercial Carrier and its more recent decision amounts to a saving interpretation of that statute from constitutional infirmities. To recede from the controlling case here, Department of Transportation v. Neilson, 419 So.2d 1071 (Fla. 1982), which interprets Commercial Carrier and immunizes the decision as to whether to install traffic signals, would violate the constitutional principle of separation of powers.

Historically, this Court has always vigorously upheld the constitutional principle of separation of powers. A good example of this Court's expression of the vitality of the separation of powers principle is Pepper v. Pepper, 66 So.2d 280 (Fla. 1953). In Pepper this Court was faced with an order from the lower court that in effect modified the length of a statutory residency requirement in a divorce action. The Court reversed, finding that the lower court's order violated article II, section 3 of the constitution as being an "unlawful encroachment of legislative powers" and stating:

> The courts have been diligent in striking down acts of the Legislature which encroached upon the Judicial or the Executive Departments of the Government. They have been firm in preventing the encroachment by the Executive or Judicial Departments of the Government. The Courts should be just as diligent, indeed, more so, to safeguard the powers vested in the Legislature from encroachment by the Judicial branch of the Government.
>
> The separation of governmental power was considered essential in the very beginning of our government, and the importance of the preservation of the three departments, each separate from and independent of the other becomes more important and more manifest with the passing years.

> Experience has shown the wisdom of this separation. If the Judicial Department of the Government can take over the Legislative powers, there is no reason why it cannot also take over the Executive powers; and in the end, all powers of the Government would be vested in one body. Recorded history shows that such encroachments ultimately result in tyranny, in depotism, and in destruction of constitutional processes.
>
> The Judicial Department is not concerned with the wisdom of such legislation as that involved in the present litigation. Whether divorces should be granted, and if granted, only for the cause of adultery; whether the residence requirement should be three months, six months, or two years, are matters for the Legislature to decide; and when the decision has been made, it becomes incumbent upon the Judicial branch to enforce it.
>
> The tendency to reach out and grasp for power in the sphere of governmental activity; for one branch of the Government to encroach upon, or absorb, the powers of another, is the means by which free governments are destroyed. For those who read and listen with discernment, examples of such despotism and tyranny immediately appear in the world today. <u>It is the duty of the Judicial Department, more than any other, to maintain and preserve those provisions of the organic law for the separation of the three great departments of Government.</u>

66 So.2d 283-284 (emphasis added).

In the instant case, not only is the lower court trying to invade the province of the legislature by modifying Section 768.28, Florida Statutes, as interpreted by this court, but it is also invading the sphere of executive branch by allowing the judiciary to second guess discretionary, planning level decisions made by executive officials. Instead of being the "least intrusive branch," the branch of government with a "duty more than any other to maintain and preserve the organic provisions of law relating to the three branches of government," Pepper, supra; rather, the court below, in ruling that the jury could have considered evidence that governmental entities should have erected traffic signals to "warn of impending dangers," has improperly fused the powers of all three branches of government into one.

This same type of error was precisely what this Court corrected in Webb v. Hill, 75 So.2d 596 (Fla. 1954). There the lower court granted a temporary injunction against the State Road Department to halt the letting of bids to build a segment of a state road that the Legislature had designated in Wakulla County. Local citizens and political officials were unhappy with the exact alignment of the road chosen by the State Road Department, the timing of construction, and budgetary concerns.

The Supreme Court quashed the temporary injunction noting that it would not make the law and interfere with the legislature's plenary power to designate state roads or the executive department's discretionary authority as to how and when state roads should be built.

Although the Webb decision is not a tort suit, it illustrates why judicial intervention into the executive branch is unwise. The Court noted that there are a constant differences of opinion between local citizens and officials as to how a road should be built and where it should be aligned. The Webb Court focused on the expertise of larger executive and administrative bodies and their ability to serve the general welfare as opposed to the local and provincial interests strongly voiced in the Court. The Court summarized this position as follows:

> It should not be forgotten that our government is divided into three departments: the legislative, executive and judicial. The Legislature determines the public policy of the state as to what roads shall constitute a part of the state highway system. The authority to determine when and how these roads shall be built is vested in the executive or administrative department of the government by the Legislature and the courts should not substitute their judgment with reference to these matters for that of the legislative or executive departments.

75 So.2d at 605.

This Court in Kaiser v. Kolb recognized in the tort setting "that the judiciary is ill-equipped to interfere in the fundamental processes of the executive and legislative branches." 543 So.2d at 739. (Fla. 1989). Judicial inadequacy stems from the fact a court is limited to deciding cases and controversies. Juries are limited to considering the scope of evidence. In

contrast, the executive branch of government must look at the big picture, allocate and ration resources, and respond to the will of the majority of the people.

A jury doesn't care if there are two dangerous intersections and funds available to install a light only at the more dangerous intersection. If an accident occurs at the less dangerous intersection, all the jury cares about is that the intersection is dangerous and that the plaintiff is hurt. The jury doesn't care that a traffic signal installed in one location may make another section of the road more dangerous. Such policy arguments may sound like so much excuse making when argued by a government lawyer to the jury. The jury is not the proper body to protect article II, section 3 of the Constitution.

Also, as in Webb, the act in question here, the failure to erect a caution signal at an intersection, is part and parcel of the determination of when and how to build a road. The Neilson court clearly indicated that the traffic signalization is an inherent part of the roadway design at an intersection.

The "when" part of the decision was immunized in Payne v. Broward County, 461 So.2d 63 (Fla. 1984), where the court maintained its holding that the decision as to whether to place warning signals was a planning level function although an operational duty was held to exist to otherwise warn of a

dangerous condition in the interim between the decision to install the device and its installation. See also Bailey Drainage District v. Stark, 526 So.2d 678 (Fla. 1988).

The Fourth District Court of Appeal has attempted to justify the evidentiary ruling by the trial court and resulting jury verdict by relying on the exception to Neilson found in City of St. Petersburg v. Collum, 419 So.2d 1082, 1085 (Fla. 1982), that if a governmental entity creates a known dangerous condition, not readily apparent, then the governmental entity must take steps to warn the public of the danger. This reliance is misplaced for a number of reasons.

First, the exception is not applicable as the absence of a design or public improvement[1] per se is always open and obvious to the public. The lack of traffic signal in this case is no less obvious than the lack of sidewalks or traffic signals in Payne where this Court found immunity. The net result is that the Plaintiff/Respondent is attacking nothing more than the decision itself, a planning function shielded by separation of powers, article II, section 3, Florida Constitution.

Second, the theory advanced by the plaintiff below was also raised in the pleadings of Nelson, that warning of a known dangerous condition should be accomplished through the erection

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[1] As opposed to a misleading or deceptive condition in an existing design. cf. Zokowski v. Department of Transportation, 549 So.2d 1079 (Fla. 4th DCA 1989).

of the traffic signals. Neilson completely rejected this theory. The Fourth District Court of Appeal does not have the authority to overrule a decision of this Court. Hoffman v. Jones, 280 So.2d 431, 434 (Fla. 1973)

Third, the Plaintiff/Respondent's reasoning on liability is circular. The Plaintiff/Respondent cannot require warning of a dangerous condition by requiring the design or change of design as the warning. The duty to warn is separate and apart from the discretionary decision to design. Payne supra.

The Court in Neilson and Collum indicated that the governmental entity had the option to warn or correct the dangerous condition. However, this Court has never stated that a governmental entity has had to correct, (i.e., redesign,) the dangerous condition. Again, the duty to warn is the sole duty that this Court has required of governmental entities where a dangerous condition has arisen from a design. The Court has respected the separation of powers doctrine and has allowed the governmental entity in their discretion to correct or redesign in lieu of warning.

One of the most disturbing aspects of the opinion below is that a constitutional principle was breached for the benefit of an evidentiary ruling to pursue adequacy of warning. The Plaintiff still had the theory before the jury as to the choice and location of the warning signs. Also, it seems that the Plaintiff could have argued that there should have been more signs or flagmen. Adequacy of warning could have been addressed without allowing evidence attacking the underlying design.

Moreover, it is clear as counsel for Palm Beach County amply argued that this Court never required the duty to "warn" to be discharged through the installation of traffic control signals at intersections. Rather, the Court has limited the duty to "warn" to the placement of signs, warning barricades, flagmen, pavement stripings and other similar measures. See Payne supra. See also, Department of Transportation v. Webb, 438 So.2d 780 (Fla. 1983).

While at first blush it may appear to be a close distinction between traffic signals and warning signs, the distinction is decisive. There are much different fiscal and policy factors as the petitioners points out in the design of an intersection, which are planning discretionary functions subject to constitutional protection, and the operational function of opening a warehouse and posting signs, barricades or traffic cones. It is the proper place for the Court to continue to draw the line necessitated by article II, section 3 of the Florida Constitution where Neilson did.

One final consideration is that since the Commercial Carrier and Neilson decisions have been rendered there have been no legislature enactments or attempts to widen the scope of the waiver of sovereign immunity. This is all the more reason for the Court to strictly adhere to the doctrine of stare decisis. See Starke, supra at 682 (Erlich, J., concurring).

As Justice Erlich aptly put it in his dissenting opinion in Trianon:

> . . .I believe we open ourselves to charges of judicial legislation when, six years after construing a statute based on legislative intent, this Court reverses its reading of that statute in spite of the fact that the legislature has given no indication that the original construction was erroneous.

468 So.2d at 926.

Commercial Carrier and Neilson have now been on the books for 8 and 11 years respectfully.

Moreover, the 1990 Legislature has just recently created the Florida Tort Claims Study Commission, Committee Substitute for House Bill 1451, Laws of Florida (1990). That thirteen member committee includes at least one representative for each branch of government, local and county governments and a host of other interests. One of the topics to be studied includes the "scope of the current waiver of sovereign immunity". Id. The act further provides that "On or before January 1, 1991 the commission shall prepare a written report of its recommendations and deliver a copy to the Governor, the President of Senate, and the Speaker of the House of Representatives.

The formation of this Commission is ample reason for this Court to affirm its precedent and allow this commission to later

review the scope of sovereign immunity. Surely the representation of all branches of government will go a long way towards soothing the separation of powers issue by providing a measure of comity amongst the three branches of Government[2] . It would also remove the Court's problem of having to legislate. At a minimum, the Court should not consider overrule existing precedents until the Commission has submitted its findings and the Legislature has acted upon them.

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[2] Although it appears that this Committee would have to recommend an amendment to the Constitution if they desire to achieve a result reached by the Court below.

CONCLUSION

The decision below should be reversed, the judgment of the trial court vacated, and the cause remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **MICHAEL B. DAVIS, ESQUIRE**, Post Office Box 3797, West Palm Beach, Florida 33402; **FLETCHER N. BALDWIN, III, ESQUIRE**, 515 North Flagler Drive, Suite 1900, West Palm Beach, Florida 33401; **CHRISTOPHER MAURIELLO, ESQUIRE**, Post Office Box 1989, West Palm Beach, Florida 33402 and to **EDWARD CAMPBELL, ESQUIRE**, 4114 Northlake Boulevard, Suite 202, Palm Beach Gardens, Florida 33410, this 16th day of July, 1990.

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