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IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,180

4TH DCA CASE NO. 88-0727

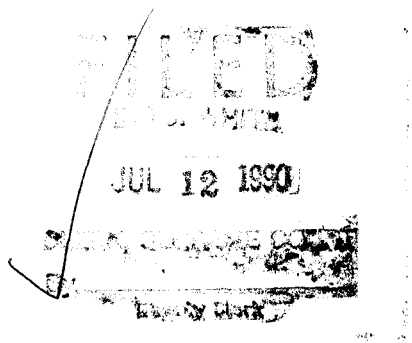
STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION and PALM BEACH COUNTY,

Appellants,

vs.

LORETTA KONNEY, Personal Representative of the Estate of DOUGLAS M. KONNEY, Deceased, R. EDWARD CAMPBELL, Administrator Ad Litem for the Estate of DOUGLAS M. KONNEY, Deceased, DOUGLAS D. FUNK, Personal Representative of the Estate of GEORGE ROBERT FUNK, Deceased,

Appellees.



AMICUS CURIAE BRIEF

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STATEMENT OF THE CASE AND FACTS

For purposes of this Brief, Amicus Curiae adopts the Statement of the Case and the Facts contained in the Initial Brief of Petitioner.

SUMMARY OF ARGUMENT

Governmental discretionary decisions at the judgmental planning level are immune from liability. Commercial Carrier v. Indian River County, 371 So.2d 1010 (Fla. 1979). Governmental decisions as to the type of traffic control devices to be installed at road intersections are discretionary, judgmental, planning-level decisions immune from liability, under Department of Transportation v. Neilson, 419 So.2d 1071 (Fla. 1982) and Ingham v. Department of Transportation, 419 So.2d 1081 (Fla. 1982), unless a known, non-apparent, hazardous condition is created against which the public is neither warned nor protected. City of St. Petersburg v. Collom, 419 So.2d 1082 (Fla. 1982). The decision of the District Court of Appeal, below, conflicts with Neilson and Ingham and is contradictory. If a known, non-apparent, hazardous condition is created by a governmental entity, the adequacy of the warning to be provided of such condition must be determined by such governmental entity pursuant to the separation of powers doctrine. Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 407 P. 2d 440 (1965).

Thus, a decision as to the type of warning or traffic control device to install at an intersection (e.g., a warning sign, instead of a flashing traffic beacon), is a decision to be made by the governmental entity charged with the responsibility of controlling traffic at the intersection, free of intervention by the judicial branch in making that decision.

ARGUMENT

The issue squarely presented in this case is whether the decision to install a flashing beacon at an intersection involves the exercise of governmental discretion at a planning or policy-making level. If it does, then the exercise of that discretion is immune from liability, unless a known hazardous or dangerous condition was created thereby against which the public was neither warned nor protected.

Although §768.28, Florida Statutes (1973), as amended, waives sovereign immunity under the conditions and to the extent provided therein, without any express exception for liability flowing from governmental discretionary actions, this Court engrafted such an exception onto the statute in Commercial Carrier v. Indian River County and in Cheney v. Dade County, which, like Commercial Carrier, involved an intersection collision, and reached the Supreme Court by Certiorari from the Second District Court of Appeal. These cases were consolidated for review by the Supreme Court. 371 So.2d 1010 (Fla. 1979). The basis for this exception was stated by Justice Sundberg writing for the majority of the Court in Commercial Carrier as follows:

"So we, too, hold that although Section 768.28 evinces

> the intent of our legislature to waive sovereign immunity on a broad basis, nevertheless, certain 'discretionary' governmental functions remain immune from tort liability. This is so because certain functions of coordinate branches of government may not be subject to scrutiny by judge or jury as to the wisdom of their performance. In order to identify those functions, we adopt the analysis of Johnson v. State, supra, which distinguishes between the 'planning' and 'operational' levels of decision-making by governmental agencies. In pursuance of this case-by-case method of proceeding, we commend utilization of the preliminary test iterated in Evangelical United Brethren Church v. State, supra, as a useful tool for analysis." Id. at 1022; Johnson v. State, 67 Cal. 2d 782, 447 P. 2d 352 (1968); Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 407 P. 2d 440 (1965).

It is clear from an analysis of the cases decided after Commercial Carrier that, under the guidelines adopted in that case for determining whether any given governmental action involves the exercise of discretion at the planning or policy-making level, the decision as to what type of traffic control devices should be installed at intersections involves the exercise of discretion at that level and under the separation of powers doctrine is immune from liability, unless under the rationale of City of St. Petersburg v. Collom, supra, a known hazardous condition, not readily apparent to one who could be injured by it, is thereby created against which the public is neither warned nor protected.

In Commercial Carrier, it was alleged that a stop sign previously located at the intersection was missing and the painted word "STOP" on the pavement at the intersection had been worn away. In Cheney, it was alleged that the County negligently maintained a traffic light. After stating that the governmental activity involved in maintaining a traffic signal light, a traffic

sign and traffic markings is operational level activity, Justice Sundberg noted:

> "We do not deal in these cases with the issue of whether or not, or what type of, traffic control devices should have been installed at the particular intersections. Accordingly, we express no opinion with respect to whether liability could be imposed on the governmental bodies involved for failure in the first instance to place traffic control devices at the intersections." Id. at 1022.

Thus the Court left the issue presented in the Konney case for resolution on another day.

The issue thus left unanswered in Commercial Carrier, and now presented in Konney, has been answered in Department of Transportation v. Neilson, 419 So.2d 1071 (Fla. 1982) and in Ingham v. Department of Transportation, 419 So.2d 1081 (Fla. 1982).

In Neilson, the Complaint alleged that the Plaintiff was driving her vehicle on West Interbay Boulevard at or near its intersection with South Westshore Boulevard in Tampa, and that as her vehicle passed through the intersection, it collided with a Belcher Oil Company truck, resulting in serious injuries to the Plaintiff and her husband and children. The Complaint further alleged that these Boulevards, together with Plant Avenue and Shell Drive, merged into a common intersection which, because of the angles of approach, was dangerously and defectively designed and was not adequately controlled with traffic control devices and signals. The Trial Court, both initially and after reversal and remand, dismissed the governmental entities from the suit on the ground they were immune from this type of action. The Second District Court of Appeal reversed in view of the Supreme Court's

intervening opinion in Commercial Carrier and after remand and dismissal by the Trial Court for the second time, again reversed. This Court quashed the holding of the Second District Court of Appeal.

In Neilson, after referring to the adoption in Commercial Carrier of the four-pronged test set forth in Evangelical United Brethren Church, supra, this Court stated: "...the four-pronged test...was adopted to assist in distinguishing between" operational and discretionary judgmental, planning-level decisions, and concluded that its decision was consistent with the four-pronged test. Id. at 1075 and 1076. The Court then reviewed several cases where traffic control methods were held to constitute judgmental, planning-level decisions to which immunity attached, stating that:

> "As stated, the issue to be decided in this case is whether decisions concerning the installation of traffic control devices, the initial plan and alignment of roads, or the improvement or upgrading of roads or intersections may constitute omissions or negligent acts which subject governmental entities to liability. We answer in the negative, holding such activities are basic capital improvements and are judgmental, planning-level decisions." Id. at 1077.
>
> The Court concluded that:
>
> "To hold otherwise...would supplant the wisdom of the judicial branch for that of the governmental entities whose job is to determine, fund, and supervise necessary road construction and improvements, thereby violating the separation of powers doctrine". Id. at 1077,

and quoted approvingly from Evangelical United Brethren Church:

> "The reason most frequently assigned is that in any organized society there must be room for basic governmental policy decision and the implementation thereof, unhampered by the threat or fear of sovereign tort liability, or, as stated by one writer, 'Liability cannot be imposed when condemnation of the acts or

> omissions relied upon necessarily brings into question the propriety of governmental objectives or programs or the decision of one who, with the authority to do so, determined that the acts or omissions involved should occur or that the risk which eventuated should be encountered for the advancement of governmental objectives.' Peck, The Federal Tort Claims Act, 31 Wash. L. Rev. 207 (1956)". Id. at 1075.

In Neilson, this Court developed the concept that a design defect inherent in the overall plan for a project that the governmental entity has directed to be built, as distinguished from a defect not so inherent, is not actionable unless a known dangerous condition is thereby established against which the public is neither warned nor protected. The Court made clear its view that:

> "Such decisions as the location and alignment of roads...and the placing of traffic control devices are not actionable because the defects are inherent in the overall project itself." Id. at 1078.

However, the Court noted that:

> "The failure to so warn of a known danger is, in our view, a negligent omission at the operational level of government and cannot reasonably be argued to be within the judgmental, planning-level sphere." Id. at 1078.

In the instant case, which involves substantially the same allegations as considered in Neilson, the Plaintiff contends that the Defendant was negligent in the choice and location of several existing warning signs and in the failure to install a flashing light type of traffic control device as a further warning of the alleged dangerous condition at the intersection involved. Under Neilson, it is clear that the governmental decision as to the type of traffic control device to be used is a judgmental planning-level decision and thus immune from liability unless a

hazardous condition is created against which the public is neither warned nor protected.

To conclude, as did the District Court of Appeal in the instant case, that under Neilson the decision as to

> "whether or not a governmental entity installs a traffic control device is a discretionary planning-level decision protected from tort liability by the doctrine of sovereign immunity," [551 So.2d 613, 614 (Fla. 4th DCA 1989)],

and then to hold that the decision is not protected from suit for tort liability because the warning device selected did not warn of the danger posed as adequately as a flashing beacon would have, is contradictory. If the decision not to install a flashing beacon or other type of traffic light or signal is insulated from tort liability by the doctrine of sovereign immunity then, under Neilson (which the lower Court purports to follow), it is not subject to judicial review. However, the District Court of Appeal then proceeds to review this decision. Implicit in the lower Court's decision is recognition that the device (warning signs) selected did in fact warn of the hazard posed by the intersection:

> "Inherent in the duty to warn is the duty to adequately warn. The trial judge properly admitted evidence showing a flashing beacon should have been installed at the intersection to warn drivers in a manner more consistent with the safety of the travelling public." (Emphasis added). Id. at 614.

In holding that the duty to warn means to warn adequately, and then admitting evidence that the warning selected was inadequate and a flashing beacon should have been installed, the lower Court in the instant case involved itself in reviewing a governmental

discretionary, judgmental-level decision.

In "failure to warn" cases where the governmental entity was held liable, the governmental entity was found to have failed to provide any (as distinguished from inadequate) warning of the hazardous or dangerous condition. Zolkowski v. Department of Transportation, 549 So.2d 1077 (Fla. 4th DCA 1989) (failure to warn of dangerous condition caused by curbing on bridge resulting in bicyclist falling and sustaining injuries); Bailey Drainage District v. Stark, 526 So.2d 678 (Fla. 1988) (failure to warn of danger caused by brush overgrowth obstructing visibility at intersection resulting in motorist being injured in collision); Palm Beach County v. Salas, 511 So.2d 544 (Fla. 1987) (failure to warn of danger caused by left-turn lane being blocked off for road work but with left-turn signal continuing to function, resulting in motorist sustaining injuries in collision during attempt to make left turn); Robinson v. Department of Transportation, 465 So.2d 1301 (Fla. 1st DCA 1985) (failure to warn in situation similar to that in Palm Beach County v. Salas, supra); Department of Transportation v. Webb, 438 So.2d 780 (Fla. 1983) (failure to warn of danger at railroad intersection resulting in accident and injuries); Perez v. Department of Transportation, 435 So.2d 830 (Fla. 1983) (failure to warn of dangerous condition on bridge resulting in accident and injuries); Reinhart v. Seaboard Coast Line R. Co., 422 So.2d 41 (Fla. 2d DCA 1982) (failure to warn of dangerous condition at railroad crossing resulting in bicyclist falling and sustaining injuries).

In the instant case, the duty to warn of the hazard created by the intersection was not ignored by the Defendant governmental entities. Warning signs were installed. The question therefore raised is not whether warning was given of the hazard but whether, in the judgment of the judiciary, it was adequate. Under Neilson, the decision not to install a flashing beacon is a discretionary decision at the planning level to be determined by the governmental entity directing the project, immune from the threat of tort liability in the exercise of that discretion, so long as warning is provided of any known, non-apparent, dangerous condition thereby created. To conclude otherwise would render nugatory the Court's holding in Neilson.

Kaisner v. Kolb, 543 So.2d 732 (Fla. 1989), cited by the District Court of Appeal in its decision in the instant case, is not relevant to the issues considered in the instant case. In Kaisner, the Court considered whether or not the actions of police officers in stopping a motorist for an expired inspection and having the motorist pull into the curb lane of a St. Petersburg street, were discretionary governmental acts for which the governmental entity was immune from tort liability. Those acts allegedly resulted in injuries to the motorist when another vehicle struck the officer's car, propelling it into the motorist's car. The Court concluded that the police officer's actions did not involve discretionary-level decisions, but rather were operational-level actions.

Neither is Payne v. Broward County, 461 So.2d 63 (Fla. 1984),

also cited by the District Court of Appeal in its decision in the instant case, relevant to the issue in the instant case. In that case, the street on which a pedestrian fatality occurred was opened when it was only partially completed and before traffic signals were installed. This Court affirmed the holding of the Fourth District Court of Appeal that sovereign immunity insulated the County from liability for its failure to install a traffic light, although the decision to provide a traffic light had been made but, at the time the accident occurred, had not been implemented. Its affirmance was based in part on the finding that the duty to warn or protect the public from known, non-apparent hazards did not arise because police had been assigned to control traffic at the intersection near which the accident occurred.

CONCLUSION

Governmental entities must be able to set policy unencumbered by concerns that their judgment in doing so may be subject to tort liability. Determination of the type of traffic control devices to be used to control traffic and provide warning of hazards at intersections involves consideration of various elements, one of which is cost. A governmental entity must allocate its funds to a wide range of governmental needs. Thus, the determination of the type of traffic control devices and warnings to be provided at intersections reflects a policy decision as to the expenditure of government funds. The governmental entity should not have to base

such determination on speculation as to the likelihood and extent of tort liability that might result from such determination. To conclude otherwise subjects a legislative or quasi-legislative determination to judicial review contrary to the separation of powers doctrine.

The conflict between extending immunity to a discretionary decision as to whether a traffic control device (such as a flashing beacon) should be installed at an intersection, and subjecting that decision to liability on the ground that such device should have been installed to adequately warn of a perceived danger, can and should be resolved by recognizing that the separation of powers doctrine requires adequacy of the warning device to be determined by the responsible governmental entity.

Because the resources available to government are limited, spending priorities must be set in accordance with governmental plans and policies. The separation of powers doctrine vests authority to establish those priorities with the governmental entity responsible for establishing those plans and policies.

Again, the statement of the Washington Supreme Court in Evangelical United Brethren Church (quoted approvingly in Neilson and Commercial Carrier) is instructive in this regard:

> "...'Liability cannot be imposed when condemnation of the acts or omissions relied upon necessarily brings into question the propriety of governmental objectives or programs or the decision of one who, with the authority to do so, determined that the acts or omissions involved should occur or that the risk which eventuated should be

encountered for the advancement of governmental objectives.' Peck, The Federal Tort Claims Act, 31 Wash. L. Rev. 207 (1956)." (Emphasis added). Neilson, 419 So.2d at 1075.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing AMICUS CURIAE BRIEF has been furnished by U. S. mail to MICHAEL B. DAVIS, ESQUIRE, P. O. Box 3797, West Palm Beach, Florida, 33402, RICHARD MARTENS, ESQUIRE, 515 North Flagler Drive, Suite #1900, West Palm Beach, Florida, 33401, CHRISTOPHER D. MAURIELLO, ESQUIRE, P. O. Box 1989, West Palm Beach, Florida, 33402, R. EDWARD CAMPBELL, ESQUIRE, 11000 Prosperity Farms Drive, Suite #203, Palm Beach Gardens, Florida, 33410, STEPHANIE W. WERNER, ESQUIRE, Assistant County Attorney, Broward County, 115 South Andrews Avenue, Ft. Lauderdale, Florida, 33301, CHARLENE V. EDWARDS, ESQUIRE, Assistant City Attorney, City of Tampa, 315 East Kennedy Blvd., Fifth Floor, Tampa, Florida, 33602, ROBERT R. WARCHOLA, ESQUIRE, Assistant County Attorney, Hillsborough County, P. O. Box 1110, Tampa, Florida, 33601, V. LYNN WHITFIELD, ESQUIRE, Assistant City Attorney, City of West Palm Beach, P. O. Box 3366, West Palm Beach, Florida, 33402, and THOMAS SANTURRI, ESQUIRE, P. O. Box 13410, Pensacola, Florida, 32591, this 11th day of July, 1990.

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