OA 10-5-90

IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs.

LORETTA KONNEY, ETC. ET. AL.,

Respondents.

Case No. 75,180

4th DCA Case No. 88-0727

PALM BEACH COUNTY,

Petitioner,

vs.

LORETTA KONNEY, ETC. ET. AL.,

Respondents.

Case No. 75,241

4th DCA Case No. 88-0727

HILLSBOROUGH COUNTY'S AMICUS CURIAE BRIEF

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STATEMENT OF THE CASE AND FACTS

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

SUMMARY OF ARGUMENT

Governmental decisions made at the planning-level are immune from liability. Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979). Governmental decisions as to whether traffic control devices, other than signs, are to be installed to warn of a known dangerous condition along roadways are discretionary planning-level decisions immune from liability. Department of Transportation v. Neilson, 419 So.2d 1071 (Fla. 1982). The decision of the Fourth District Court of Appeal, below, conflicts with and is contrary to Neilson. A decision with respect to whether a traffic control device is installed along a roadway is a planning-level decision clothed with immunity from scrutiny by the judicial branch. The decision of the Fourth District Court of Appeal below should be quashed.

ARGUMENT

I. THE FOURTH DISTRICT COURT OF APPEAL DECISION IN DEPARTMENT OF TRANSPORTATION, ET. AL. v. KONNEY, ET. AL. SHOULD BE QUASHED AS CONTRARY TO NEILSON.

In 1973, the Florida Legislature waived the State's, its agencies', and counties', immunity from tort liability by enacting Section 768.28, Florida Statutes. Ch. 73-313, §1, Laws of Fla. This Court held, in Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979), that by the enactment of Section 768.28, Florida Statutes, the Legislature intended to waive sovereign immunity on a broad basis. Id. at 1022. However, the Court also held that even in the absence of an express 'discretionary' exception in the statute, certain discretionary governmental functions remain immune from tort liability because these functions are essential to the act of governing. Id. at 1022. The Court reasoned that the immunity for discretionary acts was grounded on the constitutional concept of separation of powers. The Court stated:

> [that] 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. Id. at 1022.

In order to identify those functions, this Court adopted the analysis set out in Johnson v. State, 69 Cal.2d 782, 73 Cal.Rptr. 240, 447 P.2d 352 (1968), which distinguished between planning

and operational levels of decision making by governmental entities. The Court also adopted the test developed in Evangelical United Brethern Church v. State, 67 Wash.2d 246, 407 P.2d 444 (1965), for distinguishing between discretionary and operational functions. Commercial Carrier Corp. at 1022. This Court, after examining the distinction between planning and operational functions, held that the maintenance of existing traffic control devices are operational level activities and suit could be filed against a governmental entity upon the failure of that governmental entity to properly maintain existing traffic control devices.

In Department of Transportation v. Neilson, 419 So.2d 1071 (Fla. 1982), the Court addressed the issue of whether a governmental entity could be held liable for the failure to install traffic control devices and held that:

> the failure to install traffic control devices and the failure to upgrade an existing road or intersection, as well as a decision to build a road or roads with a particular alignment, are judgmental, planning level functions and absolute immunity attaches. Id. at 1073 (emphasis added).

In his complaint, the plaintiff had alleged the governmental entities responsible for the maintenance of a particular intersection in Tampa, Florida, had breached its duty to the plaintiff by negligently designing that intersection and by negligently failing to provide traffic control devices at the intersection. The trial court had dismissed the complaint for failing to state a cause of action; the Second District Court of Appeal reversed the decision holding that the complaint alleged

acts falling within the ambit of operational level decision making. This Court, after reviewing the complaint, stated:

> [i]n our view, the manner in which these allegations are made points to a purported failure by the governmental entity to upgrade and reconstruct the intersection and install additional traffic control devices to meet present needs. In this respect, neither the original alignment of the roadway nor the failure to install traffic control devices at the intersection is actionable. Id. at 1078.

This Court found that such activities are basic capital improvements and are judgmental planning-level functions immune from suit. This Court further observed:

> [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. Id. at 1078.

Clearly, under Neilson, a governmental entity has a duty to warn of a known dangerous condition by the placement of warning signs and the failure to do so subjects that entity to suit. However, also under Neilson, a governmental entity's decision, irrespective of its wisdom, whether to install a traffic light or signal beacon warning of a known dangerous condition is immune from judicial scrutiny because such a decision is a planning-level decision. Until the present case, this distinction has been recognized and accepted by the courts in this State.

In Perez v. Department of Transportation, 435 So.2d 830 (Fla. 1983), this Court recognized the distinction between the placement of traffic control devices and the placement of signs

warning of a known dangerous condition. In Department of Transportation v. Webb, 438 So.2d 780 (Fla. 1983), this Court held that the Florida Department of Transportation was immune from suit for failing to upgrade a railroad intersection or to install traffic control devices. In Payne v. Broward County, 461 So.2d 63 (Fla. 1984), this Court held that the decision whether to install a traffic control light at an intersection was a planning-level decision clothed with immunity. In Palm Beach County Board of County Commissioners v. Salas, 511 So.2d 544 (Fla. 1987), this Court held the initial decision by the County to utilize a left turn signal at an intersection was a planning-level decision. In Bailey Drainage Dist. v. Stark, 526 So.2d 678 (Fla. 1988), this Court again reaffirmed Neilson by holding that the decision to install a traffic control light was a planning-level decision. In Robinson v. Department of Transportation, 465 So.2d 1301 (Fla. 1st DCA 1985), the First District Court of Appeal held that the Florida Department of Transportation's initial decision to utilize a left turn signal was a planning-level decision. In Reinhart v. Seaboard Coast Line R. Co., 422 So.2d 41 (Fla. 2d DCA 1982), the Second District Court of Appeal held that the failure to erect warning signs was an operational level decision. In Conover v. Board of County Commissioners of Metro Dade County, 527 So.2d 946 (Fla. 3rd DCA 1988), the Third District Court of Appeal held that the decision to install pedestrian control devices was a planning-level decision immune from suit.

The present case squarely conflicts with Neilson and its progeny. The Fourth District Court of Appeal upheld the trial court's decision to allow evidence of the lack of a traffic control device, specifically a flashing traffic control beacon, which, under the Plaintiffs' contention, was the warning device required at this intersection. Under the principles enunciated in Commercial Carrier Corp. and Neilson with respect to this issue, it was improper for the jury to consider whether there should have been a traffic beacon at the intersection in the present case. In short, the Fourth District Court of Appeal allowed a jury to review a basic fundamental discretionary decision exercised by a governmental entity which involved a fundamental question of public policy and planning.

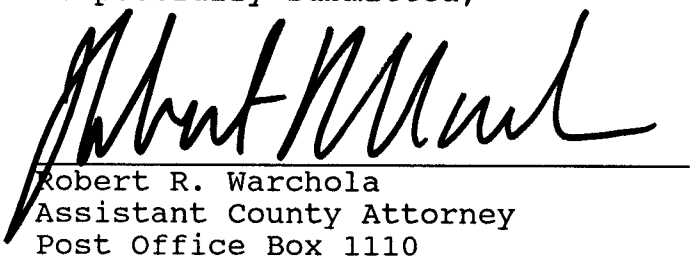
The decision to install a traffic light or signal beacon takes into account many considerations, one of which is cost. Obviously, the allocation of a governmental entity's limited resources involves basic governmental objectives and policies. The decision whether to install a traffic light or signal is essential to the realization of those objectives and policies. These decisions are not secondary decisions designed to implement objectives or policies, rather they are considerations of the basic policies and objectives themselves. Governmental entities must examine many areas where their resources are needed. Many needs are often met; all the needs are never met. But these decisions, however unwise, must be left to the governmental entities and not the judicial branch. The decision whether to install traffic control devices must be left in the hands of the

governmental entity and not passed to a trier of fact to examine the wisdom of the decision.

CONCLUSION

The decision below should be quashed as contrary to the principles established in Nielson with respect to the installation of traffic control devices.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of Hillsborough County's Amicus Curiae Brief has been furnished by Federal Express Mail to Sid J. White, Clerk of Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399 on this 14th day of July, 1990, and copies have been furnished by U. S. Mail to Michael B. Davis, Esquire, Davis, Hoy & Diamond, P.A., P.O. Box 3797, West Palm Beach, FL 33402; to Richard Martens, Esquire, 515 North Flagler Dr., Ste. 1900, West Palm Beach, FL 33401; to R. Edward Campbell, Esquire, 11000 Prosperity Farms Dr., Ste. 203, Palm Beach Gardens, FL 33410; to Christopher D. Mauriello, Esquire, Palm Beach County Attorney's Office, P.O. Box 1989, West Palm Beach, FL 33402; to Stephanie W. Werner, Esquire, Broward County Attorney's Office, 115 South Andrews Ave., Ft. Lauderdale, FL 33301; to Charlene V. Edwards, Esquire, Assistant City Attorney, City of Tampa, 315 East Kennedy Blvd., Fifth Floor, Tampa, FL 33602; V. Lynn Whitfield, Esquire, Assistant City Attorney, City of West Palm Beach, P.O. Box 3366, West Palm Beach, FL 33402; and to Thomas Santurri, Esquire, P.O. Box 13410, Pensacola, FL 32591 on this 16th day of July, 1990.

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