O/A 10-5-90

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

BRIEF OF AMICUS CURIAE, THE ACADEMY OF FLORIDA TRIAL LAWYERS, IN SUPPORT OF RESPONDENTS, LORETTA KONNEY, etc. et al.

THE ACADEMY OF FLORIDA TRIAL LAWYERS

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STATEMENT OF THE CASE AND THE FACTS

The Academy of Florida Trial Lawyers (the "ACADEMY") adopts the Statement of the Case and Facts contained in Respondents' brief on the merits. The ACADEMY does wish to emphasize for the Court certain material facts which it suggests are dispositive of this appeal.

1. Respondents' final pleading are set forth in its Second Amended Complaint as amended by agreed order. (R-2733-2734) Counts II and III of the Second Amended Complaint stated identical actions against the Florida Department of Transportation ("D.O.T.") and Palm Beach County. Respondents' pled the following actions:

> 20. The Defendant, Department of Transportation, breached its duty to the Plaintiff's decedent ... and was negligent and careless in one or more of the following ways:
>
> > A. The Defendant, Department of Transportation, knew or should have known of the inherently dangerous condition arising from the placement and alignment of the subject roadways and the intersection arising therefrom, by virtue of numerous prior similar accident [sic] occurring at the subject intersection, and thereby owed a duty to all members of the general public, including Plaintiff's decedent, to properly and adequately warn the public of this inherently dangerous condition and/or to correct same. The aforesaid dangerous condition was not readily apparent to Plaintiffs' decedent, a foreseeable user of said highway.
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> * * *

> 31. The Defendant, Palm Beach County, breached its duty to the Plaintiff's decedent ... and was negligent and careless in one or more of the following ways:
>
> > A. The Defendant, Palm Beach County, knew or should have known of the inherently dangerous condition arising from the placement and alignment of the subject roadways and the intersection arising therefrom, by virtue of numerous prior similar accident [sic] occurring at the subject intersection, and thereby owed a duty to all members of the general public, including Plaintiff's decedent, to properly and adequately warn the public of this inherently dangerous condition and/or to correct same. The aforesaid dangerous condition was not readily apparent to Plaintiffs' decedent, a foreseeable user of said highway.

(R-2733)

2. Consistent with the causes of action alleged in ¶ 20(A) of the second amended complaint as to Florida Department of Transportation and ¶ 31(A) with respect to Palm Beach County, the trial judge charged the jury as follows:

> The issues for your determination on the claim of Loretta Konney against the State of Florida, D.O.T., are whether the D.O.T. was negligent in failing to properly warn Douglas Konney of a dangerous condition known to the D.O.T. which was not readily apparent to Douglas Konney, and, if so, whether such negligence was a legal cause of the loss or injury sustained by the Plaintiff.
>
> The issues for your determination on the claim of Loretta Konney against the

> Defendant, Palm Beach County, are whether Palm Beach County was negligent in failing to properly warn motorists of a dangerous condition known to Palm Beach County which was not readily apparent to motorists, and, if so, whether such negligence was a legal cause of the loss or injury sustained by the Plaintiffs.

(R-2184-2185)

3. The jury answered the charge of the trial judge affirmatively and determined that the D.O.T. and Palm Beach County had breached their duty to properly warn of a known dangerous condition which breach was a legal cause of the loss and injury to the Plaintiff. (R-3243)

The trial judge did not present to the jury any issue dealing with failure to install a traffic control device. The jury's verdict was limited to failure to properly warn and made no finding on failure to install a traffic control device.

SUMMARY OF ARGUMENT

The D.O.T. and Palm Beach County negligently failed to properly warn of a known dangerous condition. Respondents pled these causes of action and offered proof supporting its allegations. The trial court charged the jury on these causes of action and the jury returned a verdict against the D.O.T. and Palm Beach County that both had negligently breached their duties to properly warn of the known dangerous condition.

The failure of a governmental entity to properly warn of a known dangerous condition is recognized as an operational level cause of action subject to the statutory waiver of soverign immunity provided in Section 768.28, Florida Statutes (1989). Once the statutory waiver of soverign immunity is established, the governmental entity is liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances." Section 768.25(5), Florida Statutes (1989).

Once the operational-level cause of action is established, the governmental agency is subject to the same Rules of Evidence, applicable to a private individual. Evidence tending to prove the proper standard of care required and the inadequacy of the warning provided is both relevant and admissable at trial. A trial court's evidentiary ruling permitting the introduction of evidence which demonstrated that

proper warning measures were not taken cannot affect the validity of a cause of action for failure to adequately warn nor transform operational-level negligence into planning-level immunity.

ARGUMENT

I.

THE EVIDENTIARY RULING OF THE COURT BELOW ON THE ADMISSABILITY OF EVIDENCE TO PROVE AN APPROPRIATE STANDARD OF CARE FOR THE OPERATIONAL-LEVEL DUTY TO WARN OF A KNOWN DANGEROUS CONDITION DOES NOT IMPLICATE GOVERNMENTAL SOVEREIGN IMMUNITY BUT IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

The Petitioners have raised only one issue for conflict review; an evidentiary question on the admissability of certain evidence and testimony offered by Respondents to prove that Petitioners negligently failed to provide a proper warning of a known dangerous condition. The evidence in question was offered to prove the appropriate warning standard of care necessary and the inadequacy of the warning utilized by Petitioners. The trial court found such evidence relevant to Respondents' cause of action for operational-level negligence and admitted it at trial.[1]

Petitioners seek review of this singular evidentiary ruling. Petitioners do not challenge the relevancy of the evidence introduced by Respondents but instead claim that the introduction of this evidence transforms operational-level negligence into planning-level immunity. Petitioners argue

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[1] Petitioners do not dispute that Respondents properly pled an operational-level cause of action for failure to properly warn of a known dangerous condition, and that the trial judge properly charged the jury on this cause of action. (See Statement of Facts above).

that this Court's decision in Department of Transportation v. Neilson, 419 So. 2d 1071 (Fla. 1982) supports this transformation claim. A review of Neilson, however, reveals no such support and no evidentiary issues at all. Neilson deals solely with the adequacy of pleadings to state a cause of action for operational-level governmental negligence. Neilson does not reach the question of the admissability of evidence once the pleadings properly state a cause of action or operational-level negligence.[2]

Neilson, to the contrary, supports the adequacy of Respondents cause of action at bar. After finding the Neilson's pleadings inadequate, the Court gave direction for construction of a proper pleading:

> If 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.

Respondents followed this direction from Neilson and its complaint contained such allegations in paragraph 20(A) against the D.O.T., and paragraph 31(A) against the County. (See Statement of Facts above). Following Neilson, Respondents properly stated justiciable causes of action against Petitioners.

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[2] No such issue could have been reached in Neilson as the action appears not to have proceeded past the pleading stage, having reached this Court after dismissal of the complaints.

Petitioners, however, did not challenge the cause of action, but only the evidentiary ruling. Since the issue formed by Petitioners does not address Respondents' pleadings, resolution of this appeal does not depend upon Neilson (relied on by Petitioners and Amici), but rather upon Salas v. Palm Beach County Board of County Commissioners, 484 So. 2d 1302 (Fla. 4th DCA 1986), aff'd, 511 So. 2d 544 (Fla. 1987) eg., which actually dealt with the evidentiary issue of whether to limit introduction of evidence offered to prove a negligent failure to properly warn.

In Salas, the court answered the issue at bar and held that such evidence should be admitted, stating, "[s]overign immunity principles will not shield the County from liability if it failed to perform that duty adequately." Id. at 546. Once the pleading alleged operational-level negligence, then proof of the negligent performance of the conduct must necessarily also be operational-level and properly admissable.

This conclusion in Salas as to the proper admissability of such evidence actually finds support in dicta of the Court in Neilson. In describing the propriety of stating a cause of action for failure to properly warn, the Court stated, "[t]he failure to so warn of a known danger is, in our view, a negligent omission at the operational level of government..." Neilson, 419 So. 2d at 1078. Presumably, if the conduct in question constitutes a negligent omission at the operational-level, adducing proof of such negligence cannot

transform operational-level conduct into a planning-level immunity thereby shielding Petitioners from liability

The correctness of the Salas holding becomes evident when the issue is distilled down to the simple evidentiary question dealt with by the Fourth District, which question is dispositively resolved by the Florida Evidence Code. The Evidence Code guides the trial judge on questions of relevancy and admissability of evidence. The evidence and testimony presented by Respondents fits squarely within the definition of relevancy in Section 90.401, Florida Statutes (1989), and the definition of admissability in Section 90.402, Florida Statutes (1989). The trial judge at bar applied these rules of evidence and found the proffered items relevant and admissable without exception in the Evidence Codes. A trial judge's determination on admissability of the evidence has long been held dispositive absent a showing of error which was not made at bar. (See Buchman v. Seaboard Coastline, 381 So. 2d 229 (Fla. 1980); "We are reminded that in the absence of a clear showing of error a trial judge's determination of admissability should not be disturbed on review." Id. at 230.) Petitioners do not address the evidentiary question and have raised no argument to justify deviation from these rules of evidence.

When one recognizes that this issue of evidence does not implicate the fundamental dichotomy between planning-level activities and operational-level activities, it becomes clear

that the Respondents' stated jurisdictional conflict evaporates. In retrospect, the Respondents and Amici appear less interested in resolving a supposed conflict with Neilson, than in persuading the Court to retreat from the Court's holdings in Neilson and Salas recognizing the cause of action for failure to properly warn of a known dangerous condition. If a governmental agency can preclude an injured party from presenting evidence of the standard duty of care required of a governmental entity for a recognized cause of action, then it becomes virtually impossible to prove breach of that duty. Without the ability to present proof the cause of action dies, effectively accomplishing indirectly what Salas held could not be accomplished directly; eg., escape of responsibility for operational-level negligence.

Not only does Petitioners' argument eviscerate this Court's prior holdings, but it contradicts directly the express statutory language adopted by the legislature in Section 768.28, Florida Statutes (1989). The statute provides that in those instances where soverign immunity is waived, the governmental agencies are liable for tort claims, "in the same manner and to the same extent as a private individual under like circumstances...." Section 768.28(5), Florida Statutes (1989). Petitioners cannot suggest that evidence of the proper standard of care would be inadmissable in a trial against a private individual. Since the propriety of Respondents'

governmental tort claim has been acknowledged, the decision of the Fourth District admitting Respondents' evidence comports fully with the requirements of Section 768.28, Florida Statutes.

Petitioners take pains to remind the Court of the principles of stare decisis and statutory interpretation, but then in effect ask the Court to violate these same principles. If the legislature had disapproved of this Court's decision in Salas, it had the power of correction in its own hands. To retreat now from the Court's acknowledged operational-level failure to warn doctrine would require reexamination of the entire planning/operations analysis, which is neither warranted nor necessary for the resolution of the evidentiary issue at bar.

The Fourth District stated this case succinctly. The admissability of evidence of Petitioners' negligent failure to warn "did not entangle the court in fundamental questions of public policy or planning which remain protected by the doctrine of sovereign immunity." The Fourth District should be affirmed.

CONCLUSION

The ACADEMY respectfully urges the Court to adopt the position of the Respondents and affirm the Fourth District Court of Appeal.

Respectfully submitted,

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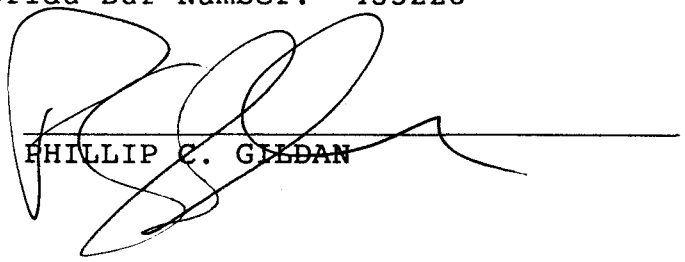

By: _____
PHILLIP C. GILDAN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing instrument has been furnished by mail to MICHAEL B. DAVIS, ESQUIRE, P.O. Box 3797, West Palm Beach, Florida 33402, RICHARD MARTENS, ESQUIRE, 515 N. Flagler Drive, Suite 1900, West Palm Beach, Florida 33401, STEPHANIE W. WERNER, ESQUIRE, Assistant County Attorney, Broward County, 115 S. Andrews Avenue, Fort Lauderdale, Florida 33301, FRANZ ERIC DORN, Deputy Assistant Attorney General, Department of Legal Affairs, The Capitol - Suite 1502, Tallahassee, Florida 32399-1050; 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, THOMAS SANTURRI, ESQUIRE, P.O. Box 13410, Pensacola Florida 32591, and SUSAN H. CHURUTI, County Attorney, 315 Court Street, Clearwater, Florida 34616, 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, CHARLENE V. EDWARDS, ESQUIRE, Assistant City Attorney, Fifth Floor - City Hall, 315 E. Kennedy Boulevard, Tampa, Florida 33602 and EDWARD CAMPBELL, ESQUIRE, 4114 Northlake Boulevard, Suite 202, Palm Beach Gardens, Florida 33410, this 9th day of August, 1990.

Attorney

4563P/lm