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IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF TRANSPORTATION,

Petitioner,

v.

Case No. 75, 180

LORETTA KONNEY, ETC., et. al.,

Respondents.

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PALM BEACH COUNTY,

Petitioner,

v.

Case No. 75,241

LORETTA KONNEY, ETC., et. al.,

Respondents.

ON PETITION TO INVOKE DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL FOURTH DISTRICT OF FLORIDA

BRIEF OF AMICUS CURIAE CITY OF TAMPA

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STATEMENT OF THE CASE AND FACTS

For purposes of this Brief, the CITY OF TAMPA, appearing as Amicus Curiae, adopts the Statement of the Case and the Facts contained in the Initial Briefs of Petitioners.

SUMMARY OF ARGUMENT

Discretionary, planning-level decisions of governmental entities are immune from liability in tort actions. Commercial Carrier v. Indian River County, 371 So.2d 1010 (Fla. 1979). Decisions relating to the installation of appropriate traffic control devices to be installed at road intersections are discretionary, judgmental, planning-level decisions which are immune from liability. 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 trap or 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 Fourth District Court of Appeal, below, conflicts with Neilson and undermines the sovereign immunity and separation of powers doctrines. The type of traffic control device to be installed at intersections must be determined by governmental entities, without the threat of scrutiny by judge or jury. There must be room for basic governmental policy decision, unhampered by the threat of tort liability. Therefore, a decision as to the installation of an appropriate traffic control device at an intersection, e.g., a warning sign rather than a flashing beacon, is a decision to be made by the governmental entity charged with the responsibility of controlling traffic at the intersection.

ARGUMENT

THE DECISION TO INSTALL A TRAFFIC CONTROL DEVICE AT AN INTERSECTION IS A PLANNING LEVEL FUNCTION TO WHICH ABSOLUTE IMMUNITY ATTACHES.

> ...[A]lthough 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 subjected to scrutiny by judge or jury as to the wisdom of their performance.

Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010, 1022 (Fla. 1979).

In 1975, the Florida Legislature enacted Section 768.28, Florida Statutes, which broadly waived sovereign immunity as a defense in tort actions. This Court determined the scope of the waiver of sovereign immunity contained in the statute in Commercial Carrier Corp. v. Indian River County, supra. In interpreting the scope of the waiver of sovereign immunity, this Court abolished the governmental-proprietary distinction and the general duty-special duty distinction. Instead, this Court adopted an analysis which distinguished between discretionary, or planning decisions, which are immune from suit and non-discretionary, or operational decisions, which are subject to suit. The underlying premise for the policy-making immunity "is that it cannot be tortious conduct for a government to govern". Department of Transportation v. Neilson, 419 So.2d 1071, 1075 (Fla. 1982). Additionally, the purpose of this Court's distinction was to ensure the integrity of the governmental

decision and prevent judicial intrusion under the separation of powers doctrine. Commercial Carrier, 371 So.2d at 1019.

Commercial Carrier and Cheney v. Dade County, 371 So.2d 1010 (Fla. 1979), both cases from the Third District Court of Appeal, were consolidated for review by this Court. The cause of action in each of the cases arose out of an automobile accident which occurred at an intersection within a county. In Commercial Carrier, it was alleged that the county's failure to properly maintain a previously existing stop sign and pavement markings at an intersection caused the accident. The pavement markings consisted of the word STOP painted on the road near the intersection. In Cheney, it was alleged that the county failed to maintain the traffic light at the intersection where the accident occurred. After recommending a four part test to distinguish between planning-level and operational-level decisions, this Court concluded that the maintenance of a traffic sign at an intersection, and the maintenance of markings painted on the road were all operational-level activities. Because these were operational activities, their negligent performance by the counties gave rise to liability. Commercial Carrier, 371 So.2d at 1022.

Of significance is the fact that Commercial Carrier did not deal with the issue of whether or not, or what type of, traffic control devices should have been installed at the intersections. Id. Instead, this precise issue was addressed in Department of Transportation v. Neilson, supra, and Ingham v. State Department of Transportation, 419 So.2d 1081 (Fla. 1982).

The Neilson case concerns a governmental entity's failure to properly control, by traffic control devices, and to properly design or upgrade, a multi-street intersection. The complaint in Neilson alleged that Patricia Neilson was driving on West Interbay Boulevard, at or near its intersection with South Westshore Boulevard in the City of Tampa. As the Neilson vehicle passed through the intersection, it collided with an oil company's truck, injuring Patricia Neilson and her passengers. Further, in paragraphs 17 and 18 of the complaint, the Plaintifs' alleged that these Boulevards along with Plant Avenue and Shell Drive merged into a common intersection, which was dangerous and hazardous because of the angles of approach, and defectively designed; that said intersection was not adequately controlled with traffic control signals and devices; and that the Defendants knew or in the exercise of reasonable care should have known of the dangerous and hazardous condition, and the Defendants should have provided the traffic control devices.

The trial court in Neilson, initially and on remand, dismissed the governmental entities from the suit on the ground of sovereign immunity. On appeal the second time, the Second District reversed, holding that the complaint alleged negligent acts which fell under the operational-level of decision making. Upon review, this Court quashed the district court's holding. Justice Overton, writing for the majority, stated the issue to be decided in Neilson as:

> ...[W]hether 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.

Neilson, 419 So.2d at 1077.

This Court answered the question in the negative, finding that such activities are basic capital improvements and are judgmental, planning-level functions.

> In our view, decisions relating to the installation of appropriate traffic control methods and devices or the establishment of speed limits are discretionary decisions which implement the entity's police power and are judgmental, planning-level functions.

Id.

In analyzing the issue presented, the Neilson Court reviewed its decision in Commercial Carrier and the four prong test from Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 407 P.2d 440 (1965). This Court reiterated the reason for sovereign immunity as quoted in Commercial Carrier 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). (emphasis theirs)

Neilson, 419 So.2d at 1075.

The Neilson Court distinguished its facts from those of a case alleging a known trap or dangerous condition for which there is no proper warning at all. This Court stated that the failure to so warn of a known danger is a negligent omission at the operational-level of government which may serve as the basis for an action against a governmental entity. Id. at 1078. See, City of St. Petersburg v. Mathews, and City of St. Petersburg v. Collom, 419 So.2d 1082 (Fla. 1982).

The Plaintiffs' contentions in Neilson are substantially the same as the contentions presented herein. Loretta Konney brought this action against the State Department of Transportation and Palm Beach County, as the result of a two vehicle automobile accident at the intersection of State Road 710 and County Road 809. Plaintiff Konney contended that the intersection constituted a dangerous condition due to the angle of intersection of the roads. Further, Plaintiff Konney contended that the Department of Transportation and Palm Beach County were 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 dangerous condition. The evidence before the trial court established that both the County and Department of Transportation had provided warning and traffic control signs at the intersection. The County had a speed limit sign, a stop ahead warning sign and a stop sign controlling and warning traffic on County Road 809. The Department of Transportation had a speed limit sign reducing speed to 45 miles per hour, a sideroad

warning sign and a crossroad warning sign controlling and warning traffic on State Road 710.

The Fourth District affirmed the trial court's decision admitting evidence at the trial to show that a flashing beacon should have been installed at the intersection to warn drivers in a manner more consistent with the safety of the traveling public. It is apparent from the opinion in Konney that the warning signs posted at the intersection in question did warn of the hazard posed by the intersection. The appellate court has opened the door to judicial review with respect to the adequacy of the warning-inadequate, less adequate, adequate, more adequate, most adequate. In effect, the Fourth District determined that a governmental agency has an operational level duty to install a traffic control device as a warning of an allegedly dangerous condition. Undoubtledly, the decision in Konney conflicts with this Court's prior decision in Neilson.

Under Neilson, the failure to provide warning of an allegedly dangerous and hazardous condition by the installation of a flashing light or other traffic control device is not actionable because it implicates a planning-level decision. The Fourth District in Konney cites the holding in Neilson, but then reaches a contrary result, although the allegations are substantially similar, i.e., the failure to warn of hazardous conditions through the installation of traffic control devices. Neilson, 419 So.2d at 1078.

As in Neilson, clearly, the governmental entities' decisions in Konney as to the type of traffic control device to be used is a judgmental planning-level decision which is immune from liability, unless a hazardous condition is created against which the public is not warned. In Konney, the public was warned through the use of traffic signs. The Fourth District's holding undercuts the premises of the sovereign immunity and the separation of powers doctrines.

In the decisions addressing the issue presented here, a distinction has been drawn between the installation (or failure to install) of signs warning of dangerous or hazardous conditions and the installation (or failure to install) of traffic control devices such as signals or lights. The failure to install signs warning of dangerous or hazardous conditions has been regarded as operational in nature and therefore subject to liability. Department of Transportation v. Webb, 438 So.2d 780 (Fla. 1983) (placement of railroad crossing signs determined to be operational-level function and not immune from suit); Perez v. Department of Transportation, 435 So.2d 830 (Fla. 1983) (placement of warning signs in order to warn of a known dangerous condition did not constitute placement of traffic control devices for which immunity attaches); Reinhart v. Seaboard Coast Line Railroad Company, 422 So.2d 41 (Fla. 2nd DCA 1982) (the failure to install a warning sign is an operational-level function). The failure to install traffic control devices such as signals or lights has been regarded as a judgmental, planning-level function for which immunity attaches. Bailey Drainage District v. Stark, 526 So.2d

678 (Fla. 1988) (holding in Neilson that a decision to install a traffic control light is planning-level is reaffirmed); Palm Beach County Board of Commissioners v. Salas, 511 So.2d 544 (Fla. 1987) (the decision to utilize a left turn signal is planning-level for which immunity attaches); Payne v. Broward County, 461 So.2d 63 (Fla. 1984) (the decision to install a traffic light is a planning 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); Ingham v. State Department of Transportation, 419 So.2d 1081 (Fla. 1982) (defects in construction of state road, the median and the intersection, and failure to install additional traffic control devices was not actionable because each was a judgmental, planning-level function to which absolute immunity attaches); Conover v. Board of County Commissioners of Metropolitan Dade County, 527 So.2d 946 (Fla. 3rd DCA 1988) (the decision to erect pedestrian traffic signals was planning-level decision to which absolute immunity attaches); Robinson v. State Department of Transportation, 465 So.2d 1301 (Fla. 1st DCA 1985) (decision to utilize a left turn signal was planning-level decision).

Moreover, prior to Konney, in cases where the governmental entity was held liable for failure to warn of a known dangerous condition, the governmental entity did not provide any warning of the dangerous condition (as distinguished from inadequate warning). See, Bailey Drainage District v. Stark, supra. (failure to provide any warning of danger caused by brush overgrowth obstructing visibility at intersection resulting in motorists

being injured in collision); Perez v. Department of Transportation, supra (failure to warn of dangerous condition on bridge resulting in accident and injuries); Department of Transportation v. Webb, supra (failure to warn of danger at railroad intersection resulting in accident and injuries); 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).

In Konney, the governmental entities provided numerous warning signs. However, no traffic control light was placed at the intersection. The trial court permitted the jury to determine that a governmental entity has a duty to utilize a flashing traffic light to provide warning of an allegedly dangerous condition. The Fourth District erred in affirming the trial court's decision because the decision not to install a traffic control device, such as a flashing beacon, is a judgmental planning-level decision to be determined by the governmental entity. This planning-level decision is immune from tort liability, as long as warning is provided of any known trap or dangerous condition thereby created. Department of Transporation v. Neilson, supra.

CONCLUSION

The purpose of this Supreme Court's distinction between planning-level and operational-level functions of governmental entities in determining the existence of sovereign immunity is to prevent judicial intrusion into planning-level decisions. Governmental entities must be free to set policy unencumbered by concerns that their judgment and plans may be subject to tort liability. Decisions regarding the type of traffic control devices to be used at intersections involves several considerations, one of which is available funding. Further, traffic control is within the police power of the governmental entity.

The Fourth District's decision in Konney, conflicts with Neilson and it subverts the policy upon which Neilson was decided. Under Konney, a governmental entity would be subject to liability for all intersectional accidents, unless a traffic light of some type was installed at the intersection. Such a holding impugns the integrity of governmental decisions, violates the doctrine of separation of powers, and does not provide room for basic governmental policy decisions.

WHEREFORE, based upon the foregoing argument, reasoning, and citation of authority, the CITY OF TAMPA, as Amicus Curiae, respectfully requests that this Court quash the decision of the Fourth District Court of Appeal upon this issue.

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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, ESQ., P.O. Box 3797, West Palm Beach, FL, 33402 , RICHARD MARTENS, ESQ., 515 N. Flagler Dr., Suite #1900, West Palm Beach, FL 33401, CHRISTOPHER D. MAURIELLO, ESQ., P.O. Box 1989, West Palm Beach, FL 33402, R. EDWARD CAMPBELL, ESQ., 11000 Prosperity Farms Dr., Suite #203, Palm Beach Gardens, FL 33410, STEPHANIE W. WERNER, ESQ., Assistant County Attorney, Broward County, 115 S. Andrews Ave., Ft. Lauderdale, FL 33301, ROBERT R. WARCHOLA, ESQ., Assistant County Attorney, Hillsborough County, P.O. Box 1110, Tampa, FL 33601, V. LYNN WHITFIELD, ESQ., Assistant City Attorney, City of West Palm Beach, P.O. Box 3366, West Palm Beach, FL 33402, THOMAS SANTURRI, ESQ., P.O. Box 13410, Pensacola, FL 32591, and SUSAN H. CHURUTI, COUNTY ATTORNEY, 315 Court St., Clearwater, FL 34616 on this 16th day of July, 1990.

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