IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF TRANSPORTATION,

Petitioner,

v.

LORETTA KONNEY, ETC., ET AL.,

Respondents.

CASE NO. 75,180
4TH DCA CASE NO. 88-0727

PALM BEACH COUNTY,

Petitioner,

v.

LORETTA KONNEY, ETC., ET AL.,

Respondents.

CASE NO. 75,241
4TH DCA CASE NO. 88-0727

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

ANSWER BRIEF OF RESPONDENT, LORETTA KONNEY, PERSONAL REPRESENTATIVE OF THE ESTATE OF DOUGLAS KONNEY, DECEASED, ON MERITS WITH APPENDIX

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PRELIMINARY STATEMENT

Respondent, LORETTA KONNEY, Personal Representative of the Estate of DOUGLAS M. KONNEY, Deceased, will be referred to as "Respondent" or "Plaintiff". Respondent's Decedent, DOUGLAS KONNEY, shall be referred to as "Douglas Konney" or "Mr. Konney".

Petitioner, THE STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION, will be referred to as "SOFDOT" or "Defendant". Petitioner, PALM BEACH COUNTY, will be referred to as "County" or "Defendant". Petitioners, County and SOFDOT, will be collectively referred to as "Petitioners".

Amici Curiae, CITY OF WEST PALM BEACH, HILLSBOROUGH COUNTY, PINELLAS COUNTY, and CITY OF TAMPA, shall be referred to collectively as "Amici".

STATEMENT OF THE CASE

For purposes of her Answer Brief, Respondent, Konney, adopts the Statement of the Case contained in the Initial Briefs of Petitioners.

STATEMENT OF THE FACTS

While Respondent, Konney, in large part agrees with and adopts the Statement of the Facts set forth in the Initial Briefs of Petitioners, some of Petitioners' purported factual assertions are incomplete or inaccurate, and therefore require clarification.

The consistent, undisputed testimony at trial, not only from Respondent's traffic engineering expert witness, Arnold Ramos, who rendered the opinion that the subject intersection was an inherently dangerous condition and hidden trap (R:951), but from SOFDOT's district safety engineer, Gustavo Schmidt, and County's traffic engineer, Charles Walker, established that the geometry of the subject intersection was indeed unusual and unique, and that the unusual angulation, which reduced driver sight distances, increased the dangerousness of the intersection (R:779-780; 1218; 1242-1243; 1254; 1258). In addition to the inherent dangerousness arising from the unusual geometry of the intersection, its rural setting, limited sight distances, absence of artificial illumination and lack of side friction (roadside businesses, driveways, or side roads) for a substantial distance in advance of the intersection (R:547; 549; 692), rendered this intersection a condition requiring the highest level of warning (R:912-921; 945).

In its Statement of the Facts, SOFDOT tacitly acknowledges the inherent hazards created by the subject intersection, when it describes the two additional legs which were present at this intersection (SOFDOT's Brief, p.3; App.1). The "intersection" of the two roadways is actually three intersections. SOFDOT's district safety engineer Schmidt testified that these additional legs were necessitated by the unusual geometry of the intersection (R:800-801).

At the time of the subject accident, the speed limit on West Lake Park Road was 55 miles per hour (R:1401). Traffic on State Road 710 had the right-of-way through the intersection. There were no traffic signals at the intersection on the date of this accident. The speed limit on State Road 710, heading south, was 55 miles per hour approaching the intersection, and then reduced to 45 miles per hour, at approximately 1,560 feet from the mid-point of the intersection (R:926-927; 1623).

The assertion of both Petitioners that Messrs. Funk and Sylvester, the occupants of the vehicle which collided with the Mr. Konney's vehicle, "were somewhat familiar" with the subject intersection, bears close scrutiny. Since Mr. Funk was killed in the subject accident, the only testimony on this topic came from Mr. Sylvester. All he said was that he "had been down that road before when I was young" (R:597-598). While Messrs. Funk and Sylvester knew that West Lake Park Road led into Beeline Highway, as to "how far down the road the intersection was, we weren't clear" (R:613).

On the day of the accident, Douglas M. Konney was 37 years old. He had been married to Loretta Konney for almost ten years. They had one son, Ricky Konney (R:1448; 1457). Mr. Konney, as an employee of the nearby Pratt-Whitney plant, had some familiarity with the road and intersection, but his experience warrants review. Mr. Konney had in fact previously worked the night shift (4:00 p.m. - 12:00 a.m.), but had not done so on a regular basis since four to five years prior to the accident (R:1953). Since 1978 or 1979, Mr. Konney had worked the day shift (8:00 a.m. - 4:00 p.m.), except for one night a week, when he would work from 4:00 p.m. to midnight (R:1477-1479). In any event, the familiarity of drivers with the existence of the subject intersection was not shown to have anything to do with their knowledge of the inherent dangerousness of the intersection (R:968-969). In fact, warning is more important for people that routinely drive on a road than for first time users (R:1112).

As noted by Petitioners, the Funk and Sylvester vehicle was followed for a substantial period of time prior to this accident by a vehicle driven by Kenneth Parramore, an officer of the Game & Fresh Water Fish Commission (R:545). Officer

Parramore attended the State of Florida Police Officer Training Academy, and was trained to detect an impaired driver (R:542). Officer Parramore testified, without objection, that in his opinion as a police officer, he saw no evidence whatsoever that the driver of the Funk vehicle was impaired (R:550). Additionally, Sylvester did not recall seeing any signs on West Lake Park Road, including the stop ahead sign and stop sign (R:598). Further, Sylvester did not see the Konney vehicle approaching on State Road 710 prior to impact (R:600).

SOFDOT's statement that Respondent's decedent "apparently observed Funk's vehicle passing, or about to pass the stop sign, since he locked his brakes..." is at best a speculation, and unsupported by record evidence. One undisputed fact, however, does remain: the vehicles collided, resulting in two fatalities. If in fact Mr. Konney observed the Funk vehicle prior to impact, he obviously did so at a location on S.R. 710 which did not allow him sufficient time to come to a complete stop or slow sufficiently to avoid impact.

Both Petitioners mention in their Statement of Facts that the subject intersection, according to SOFDOT accident records and certain trial exhibits (Def.Ex. 2a and 2b; Pl.Ex. 33), did not meet or exceed certain statewide averages for traffic accidents, and therefore did not trigger evaluation of this facility based on accident data. In order to understand the significance of these statements, it is necessary to further review certain evidence adduced at trial.

First, the accident data described by SOFDOT is gathered, collated and computerized at the SOFDOT's Tallahassee central safety office (R:703), and is based on a review of accident reports received from police agencies statewide, including the Florida Highway Patrol, and county and municipal police agencies. The data entered into SOFDOT's central computer system does not discriminate between accidents involving only property damage or minor injury, and accidents involving serious personal injury or death (R:712; 714-715). Thus, for example, while the subject intersection may not have statistically generated a sufficient number of accidents in

1986 to exceed the statewide accident rate for similar facilities, nevertheless one out of every ten traffic fatalities in Palm Beach County in 1986 occurred at the subject intersection (R:1147-1150). County did not pursue evaluation of a facility unless the number of accidents during a given year at that location was ten or more- a number arbitrarily selected by County's traffic engineer Walker (R:1220-1223).

Second, for purposes of its statistical evaluation, the subject intersection was typed by SOFDOT as an urban intersection (R:783). SOFDOT's safety engineer Schmidt acknowledged that in 1983 the intersection was borderline rural (R:694; 784). County's traffic engineer Walker conceded that its characteristics were rural (R:1230). Respondent's expert, Arnold Ramos, a former SOFDOT District Engineer, testified that its lack of artificial lighting, rural location, and absence of side friction, necessitated evaluating this facility as a rural intersection, which would have made two prior fatalities in 1978 highly significant (R:916; 919; 958-960; 971-972).

Finally, with respect to the evidence of accident data at trial, both SOFDOT, through its safety engineer Schmidt, and County, through its traffic engineer Walker, agreed that all fatal accident reports are reviewed, and based solely on the accident report itself, a decision is made by the respective governmental entity, <u>at the local level</u>, whether or not to conduct a further field review or to undertake any form of remedial action (R:788-789; 791-792; 1218-1219; 1223-1224). Both Petitioners acknowledge that fatality rate is a useful traffic engineering tool (R:1199), yet neither Petitioner undertook significant remedial action following the 1978 fatalities at this intersection.

In any event, it was established at trial that from March 30, 1978, to and including the date of the subject accident, January 21, 1983, there were a total of 12 accidents at this intersection, producing four fatalities, and eight personal injuries (R:953-962; 1496-1500; 1504-1507). From January 21, 1983, to and including December 16, 1986, there were an additional 16 accidents, involving seven fatalities, and 14 individuals receiving personal injury (R:962-966; 1500-1504; 1507-1511).

Lastly, SOFDOT's request for a special interrogatory verdict was correctly denied by the trial court, since the only liability issue on which the jury was charged as to these Petitioners was whether or not these governmental entities were negligent in failing to properly warn Mr. Konney of a dangerous condition known to Petitioners, which was not readily apparent to him. City of St. Petersburg v. Collom, 419 So.2d 1082, 1086 (Fla. 1982). The jury answered this question in the affirmative, finding such negligence to be the legal cause of Douglas Konney's death (R:3241-3243).

SUMMARY OF ARGUMENTS

Argument I: Conflict Issue (responding to Argument I in each of the Petitioners' Briefs).

The decision of the District Court of Appeal below is wholly consistent and in accord with this Court's decisions in Collom and its progeny. Once government creates a known dangerous condition, which may not be readily apparent to one who would be injured by the condition, it has an operational-level duty to properly warn such persons of that danger. The failure to properly warn subjects government to liability for negligence at the operational level. While cases dealing with initial decisions of government to install traffic signals, or decisions to upgrade existing facilities, have held such decisions are immune, planning-level functions, these cases are completely inapplicable in situations involving known dangerous conditions requiring proper warning. Whether the appropriate warning device is a sign or a device requiring electricity is irrelevant. The adequacy of warning is the issue, which the District Court correctly held is a jury question.

Argument II: Admission of Evidence Regarding Prior and Subsequent Accidents (Responding to SOFDOT's Argument II (D) and County's Argument II (A)).

The subject intersection was an inherently dangerous condition, and Petitioners had knowledge of this dangerous condition. Prior accident data established Petitioners' knowledge of the dangerous condition. Subsequent accidents were likewise properly admitted to establish the dangerousness of the subject intersection. Respondent's traffic engineering expert testified concerning prior and subsequent accidents occurring at the subject intersection. Petitioners' responses to request for admissions propounded by Respondent also proved these claims. Respondent's expert traffic engineer testified that review of accident reports was the type of information typically relied upon by traffic engineers in undertaking their evaluations of a given location to determine the type and placement of traffic control and warning devices, a point which was conceded and acknowledged by SOFDOT's district safety engineer and County's traffic engineer.

Argument III: The Trial Court Properly Excluded Evidence Regarding Blood Alcohol Level (Responding to SOFDOT's Argument II(E) and County's Argument II(B)).

The trial court properly excluded the proffered testimony of a toxicologist through which Petitioners attempted to adduce testimony concerning the blood alcohol level of the driver of the vehicle which struck Mr. Konney's vehicle. First, the blood alcohol level of Mr. Funk was irrelevant to any issue in the case, since there was ample evidence of his apparently competent driving from an eyewitness. From this evidence the jury was able to determine whether the cause of this accident was Petitioners' failure to properly and adequately warn. Moreover, the blood alcohol analysis itself was clearly deficient on a number of grounds. Petitioners completely failed to establish the qualifications of the individual who purportedly drew the blood, as required by HRS guidelines and statutory mandate, and their attempts to proffer certain personnel records of that individual failed because of Petitioners' inability to meet the statutory requirements of Fla. Stat. §90.803(8), §90.803(6), or §90.902. Petitioners also completely failed to establish the method in which Mr. Funk's blood was purportedly drawn, or the claim of custody of the sample analyzed. Without this requisite predicate, any conclusions reached by the toxicologist were based upon wholly inadmissible evidence and, therefore, themselves inadmissible.

Argument IV: The Trial Court Did Not Make Prejudicial Comments to the Prospective Jury Panel (Responding to County's Argument II(D)).

Comments made by the trial court during opening remarks to the jury did not imply a lack of due care by County. In any event, County waived any such objection by its conduct during voir dire, up to and including the impaneling of the jury. No prejudice is demonstrated by County.

Argument V: SOFDOT's Motion for Directed Verdict on the Issue of Causation was Properly Denied (Responding to SOFDOT's Argument II(A)).

There was extensive expert testimony from Respondent's traffic engineering expert showing how the SOFDOT's improper selection and location of signs on State Road 710, itself adequately established a causal nexus between the signage on State

Road 710 and the subject accident. Because all reasonable doubt should be resolved in Respondent's favor, the trial court properly denied SOFDOT's motion for directed verdict.

Argument VI: The Trial Court Properly Ruled on the Admissibility of Certain Expert Testimony (Responding to SOFDOT's Argument II(B)).

Vested with great discretion regarding expert testimony, the trial court properly excluded SOFDOT's attempt to adduce a highly speculative opinion, without proper predicate, from Deputy Sheriff Bowers. The court also properly excluded what would have been, at best, cumulative testimony from one of SOFDOT's employees, who was not a registered engineer. No prejudice resulted because SOFDOT adduced expert testimony on this identical topic. Respondent's traffic engineer was properly allowed to testify as to driver perception, as not only Respondent's expert, but SOFDOT's safety engineer and other SOFDOT employees similarly testified that traffic engineers must in fact consider driver perception in evaluating a given location.

Argument VII: The Trial Court Properly Gave Standard Jury Instruction 3.1(a) (Responding to SOFDOT's Argument II(C)).

Throughout its opening statement and closing remarks, SOFDOT continually maintained that it had no duty with respect to warning of the subject intersection beyond the placement of traffic signs. The instruction given to the jury, read in the context of the charge as a whole, did not result in any prejudice to this Petitioner and was proper.

ARGUMENT

I.

THE DECISION OF THE DISTRICT COURT BELOW SHOULD BE AFFIRMED BECAUSE IT IS WHOLLY CONSISTENT WITH THE STARE DECISIS OF THIS COURT

The central issue in this case is whether or not the state, its agencies or subdivisions, may be found liable for a failure to properly warn of a known dangerous condition which the governmental entity has created, and which may not be readily apparent to one who could be injured by that condition. The District Court decision, answering this question in the affirmative, specifically relied upon the unbroken line of cases emanating from this Court's decision in City of St. Petersburg v. Collom, 419 So.2d 1082 (Fla. 1982).

While recognizing the continued viability of the so-called planning level activity exception first recognized by this Court in Commercial Carrier Corporation v. Indian River County, 371 So.2d 1010 (Fla. 1979), and reaffirmed in Collom's companion case, Department of Transportation v. Neilson, 419 So.2d 1071 (Fla. 1982) (cloaking with sovereign immunity the initial decision to install traffic control devices and refusing to require government to periodically inspect and upgrade its facilities) this Court in Collom nevertheless recognized certain specific exclusions from acts protected by sovereign immunity, enumerating several activities of government which are so-called operational level activities, the improper performance of which constitutes negligence. While recognizing the need to maintain the requisite level of separation of powers mandated by the Florida Constitution, this Court specifically found that:

> ...without substantially interfering with the governing powers of the coordinate branches, courts can require (1) the necessary warning or correction of a known dangerous condition; (2) the necessary and proper maintenance of existing improvements, as explained and illustrated in Commercial Carrier, 371 So.2d 1010 (Fla. 1979); and (3) the proper construction or installation and design of the improvement plan, as explained in Neilson, 419 So.2d 1071 (Fla. 1982).

419 So.2d at 1086 (emphasis added).

While recognizing the operational level duty to properly warn of a known dangerous condition, Petitioners and Amici nevertheless argue that this duty is limited in one of two ways: (1) the duty to warn requires only the installation of signs; or (2) if required to warn of a known dangerous condition which it creates, government's decision as to the type of warning device is a planning level function, immune from liability. The position of the Petitioners and Amici is not only wholly inconsistent with the prior pronouncements of this Court, and the broad waiver of sovereign immunity contained within Fla. Stat. §768.28, but would substantially rewrite the law of negligence.

A. Stare Decisis

In Commercial Carrier Corporation v. Indian River County, supra, this Court first recognized the broad waiver of sovereign immunity intended by the legislature by the enactment of Fla. Stat. §768.28 (1975), and rejected Indian River County's argument that no cause of action for negligence exists against the state, where the breach of duty is owed to a particular individual, not the public at large. The state had asserted that all such governmental functions were exempt from the waiver of sovereign immunity by the express wording of the statute itself. This Court's rejection of that argument was predicated on analysis of the clear language contained in Fla. Stat. §768.28(1) and §768.28(5):

> "Actions at law against the State or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligence or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the State or such agency or subdivision, if a private person, would be liable to the claimant in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act."
>
> §768.28(1), Fla.Stat. (1975) (emphasis added).

> "The State and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances..."
>
> §768.28(5), Fla.Stat. (1975) (emphasis added).

371 So.2d at 1016.

In rejecting the government's argument that since private individuals do not perform governmental functions, there is no waiver where any governmental function is involved, this Court adopted the rationale of the United States Supreme Court in Indian Towing Company v. United States, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), construing the Federal Tort Claims Act. Noting, however, that the Federal Tort Claims Act contained a specific "discretionary exception" for certain acts of government, this Court went on in Commercial Carrier to find that notwithstanding the absence of any legislatively created exception within §768.28 for discretionary functions, public policy considerations nevertheless dictated that "...certain policy-making, planning or judgmental governmental functions cannot be the subject of traditional tort liability." 371 So.2d at 1020.

This Court explicitly adopted a case by case analysis of governmental conduct to determine whether the conduct in question constituted "planning level" functions- generally requiring basic policy decisions - or "operational level" functions- generally regarded as decisions which implement policy. Id. at 1021. In adopting the "planning"/"operational" distinction, this Court acknowledged that this analysis "offers some basic guideposts, although it certainly presents no panacea." Id. at 1021.

Most recently, in Kaisner v. Kolb, 543 So.2d 732 (Fla. 1989), this Court again addressed the parameters of sovereign immunity arising under Fla. Stat. §768.28, and recognized that:

> ...the terms "discretionary" and "operational" are susceptible to broad definitions. Indeed, every act involves a degree of discretion, and every exercise of discretion involves a physical operation or act.

Id. at 736. See also, Department of Transportation v. Webb, 409 So.2d 1061 (Fla. 1st DCA 1981). While recognizing that governmental immunity derives from the doctrine of

separation of powers, not from a duty of care or from any statutory basis, this Court went on to state that the term "discretionary", used in the context of a determination of governmental liability:

> ...means that the governmental act in question involved an exercise of executive or legislative power such that, for the courts to intervene by way of tort law, it inappropriately would entangle itself in fundamental questions of policy and planning...An "operational" function, on the other hand is one not necessary to or inherent in policy or planning, that merely reflects a secondary decision as to how those policies or plans will be implemented.

Id. at 737 (citations omitted).

Applying this analysis to the facts at bar, it is clear that with respect to the failure to warn of a known dangerous condition, the basic "discretionary" decision is the initial creation of a dangerous condition. In this case, that condition is the intersection where Mr. Konney died. It could even be argued that prior to knowledge of the dangerousness of the condition, the initial decisions to place traffic control and warning devices is likewise discretionary. However, once the dangerous condition became known, government had to either correct or properly warn of the condition. In this context, the "operational" function simply involves the manner in which the warning will be carried out. Clearly such a decision does not involve a fundamental, governmental policy making decision. Even more clearly, as the District Court found, the adequacy of warning is an issue to be determined by the trier of fact.

The evidence at trial in this case clearly established that all decisions concerning the selection and placement of the warning devices at the subject intersection were made at the district level for the Department of Transportation (R:799) (there were eight districts), not at the central safety office in Tallahassee, and most certainly not by the legislature. Similar decisions by County are made by the traffic engineer Walker or his staff, not the County Board of Commissioners (R:1213; 1238-1240). Clearly the decision to implement warning does not involve such fundamental governmental decision making processes as to cloak it in governmental immunity.

As noted above, this Court has consistently held that "...without substantially interfering with the governing powers of the coordinate branches, courts can require (1) the necessary warning or correction of a known dangerous condition..." Collom, supra, 419 So.2d at 1086 (emphasis added).[1] More recently, in Kaisner, supra, this Court ruled: "Where a defendant's conduct creates a foreseeable zone of risk [inherently dangerous condition], the law generally will recognize a duty placed upon defendant either to lessen the risk or see that sufficient precautions [warnings] are taken to protect others from the harm that the risk poses." 543 So.2d at 735. Breach of the duty to provide necessary and sufficient warning creates governmental liability for negligence. As in any negligence case, the issues of foreseeability and sufficiency of warning should be resolved by the jury. Id.

B. **The Duty to Properly Warn**

While Petitioners cite numerous district court opinions which have recognized that the initial decision to install traffic signals remains an immune activity within the planning-level exception affirmed in Neilson, none of those cases involved the failure to properly warn of a known condition.[2]

As the District Court correctly found, implicit in the duty to warn is the duty to properly warn. The position asserted by Petitioners and Amici in this case is antithetical to the rationale underpinning the Collom exception. As this Court reasoned:

> [O]nce a governmental entity creates a known dangerous condition which may not be readily apparent to one who would be injured by the condition, and the governmental entity has knowledge of the presence of people likely to be injured, then the governmental entity must take steps to avert the danger or properly warn persons who may be injured by that

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[1]It is interesting to note that the Petitioner, SOFDOT, does not even cite the Collom case in its brief, which the District Court correctly recognized as controlling in the instant case.

[2]Several of the Amici and Petitioners argue that all of the reported failure to warn cases involve facilities at which no warning was provided. While this may be factually correct, these cases do not support the position that if an operational level duty is created to warn, the decision as to how to carry out that operational duty is somehow cloaked in sovereign immunity as a planning level function. Such a position is directly in conflict with the express rationale of Collom.

> danger...The failure of government to act in this type of circumstance is, in our view, a failure at the operational level. We find that a governmental entity may not create a known hazard or trap and then claim immunity from suit or injuries resulting from that hazard on the grounds that it arose from a judgmental, planning level decision. When such a condition is knowingly created by a governmental entity, then it reasonably follows that the governmental entity has the responsibility to protect the public from that condition, and the failure to so protect cannot logically be labelled a governmental, planning-level decision. We find it unreasonable to presume that a governmental entity, as a matter of policy in making a judgmental, planning-level decision, would knowingly create a trap or a dangerous condition and intentionally fail to warn or protect the users of that improvement from risk. In our opinion, it is only logical and reasonable to treat the failure to warn or correct the known danger created by government as negligence at the operational level.

419 So.2d at 1086 (citations omitted; emphasis added).

Petitioners and Amici, while paying lip service to the operational level duty to warn, nevertheless argue that that duty extends only to the placement of signs. Alternatively, they argue that so long as any decision is made to warn, the manner in which the warning is carried out cannot be subjected to judicial or jury scrutiny. In support of this latter position, they argue that the manner in which the warning will be carried out is an immune, planning level discretionary function. Both of these positions are completely without merit.

In essence, Petitioners and Amici are saying that they can create a dangerous condition, have actual knowledge that numerous individuals have been injured or killed as a result of this condition, and fulfill their duty by undertaking any warning. Even if that warning is wholly inadequate and improper, and even if that warning does not comply with accepted standards and criteria, they contend their decision is nevertheless immune as a planning level function, and thus no tort liability exists. Neilson, Collom and Kaisner rejected this absurd notion.

Bailey Drainage District v. Stark, 526 So.2d 678 (Fla. 1988), relied upon by the District Court below, involved facts strikingly similar to the instant case. In Stark, this Court specifically held that sovereign immunity does not bar an action against a governmental entity for rendering an intersection dangerous by reason of obstructions to visibility, if that danger is hidden or presents a trap and the

governmental entity has knowledge of the danger, but fails to properly warn motorists. These are precisely the facts of the instant case, where the undisputed testimony at trial established that the highly unusual geometry of the subject intersection created diminished driver sight distances, which, coupled with numerous other existing conditions, created a hidden trap and mandated proper and adequate warning. Just as this Court relied upon Collom in its decision in Stark, the District Court below likewise relied on this Court's decisions in determining that inherent in the duty to warn is the duty to adequately warn. Evidence showed that proper warning included the installation of a flashing beacon to warn drivers in a manner more consistent with the safety of the traveling public. The District Court specifically found that allowing evidence of the type of warning required for the subject intersection did not entangle the trial court "in fundamental questions of public policy or planning which remain protected by the doctrine of sovereign immunity." State Department of Transportation v. Konney, 551 So.2d 613 (Fla. 4th DCA 1989).

In addition to liability for negligence in the discharge of its operational level duty to properly warn of known dangerous conditions, this Court has long held that the state may be held similarly liable for a failure to properly maintain. There can be no meaningful distinction between a duty to properly and adequately maintain and the duty to properly and adequately warn. This Court recognized in Neilson that maintenance must be carried out in accordance with necessary statutory standards and criteria. More recently, in Palm Beach County Board of County Commissioners v. Salas, 511 So.2d 544 (Fla. 1987), this Court found that a governmental entity may be held liable for failing to take reasonably necessary steps to protect the public safety at a road maintenance site. This Court specifically rejected the County's assertion that the minimum standards set forth in the Manual on Traffic Control and Safe Practices (the "Manual") established the only relevant standard of conduct for the County work crew in question.

At trial, the Salases had attempted to offer testimony of an expert witness that the standards of the Manual were simply minimum standards, but the trial court had granted County's motion to strike the expert's testimony regarding the appropriate standard of care, to the extent that it exceeded the mandatory language of the Manual. The Fourth District Court of Appeal reversed, Salas v. Palm Beach County Board of County Commissioners, 484 So.2d 1302 (Fla. 4th DCA 1986); this Court affirmed per curiam, with opinion.

The District Court in Salas had found that the County should not be allowed to follow blindly only the mandatory provisions of the Manual, and ignore other precautions necessary to protect the safety of motorists passing through the subject intersection. Specifically, the District Court rejected County's immunity argument, ruling that the procedures followed by the survey crew were operational in nature and, accordingly, subjected County to liability for negligence. This Court, in Salas, applying the rationale of Collom, stated:

> Although the County's initial decision of whether to utilize a left turn signal was a planning level decision, once that decision was made, the County's later decision to de-activate that signal and block off the left turn lane for road maintenance was an operational-level decision...During the time its survey crew worked at the intersection...Palm Beach County had a duty to carry out its maintenance responsibilities in a non-negligent manner and to warn the motoring public of any known hazards that the presence of the survey crew and the accompanying deactivation and blocking of the turn lane created...If the County needed to exceed the minimal safety precautions contained within the mandatory provisions of the manual in order to adequately safeguard the public, then it had the obligation to do so. Sovereign immunity principles will not shield the County from liability if it failed to perform that duty adequately.

511 So.2d at 546-547 (citations omitted; emphasis added).

The rationale of Salas applies with equal force here. Whenever government assumes a common law duty, it clearly has an obligation to carry out that duty in the same manner as any private individual under like circumstances. Avallone v. Board of County Commissioners of Citrus County, 493 So.2d 1002 (Fla. 1986). This Court has uniformly held that government has a non-delegable, operational level duty to properly

warn of a known dangerous condition. Failure to adequately discharge this duty constitutes negligence. Just as in the Salas case, County cannot hide behind the argument that it need only provide some warning, or that warning need only be through signs. SOFDOT and County must adequately warn, and that is an issue wholly within the province of the jury. Reinhart v. Seaboard Coast Line Railroad Company, 422 So.2d 41 (Fla. 2d DCA 1982).

C. The State's Semantic Smokescreen

The rationale underlying the operational duty imposed upon the state to properly and adequately warn of a known dangerous condition it has created does not turn upon artificial distinctions such as whether or not a warning sign or light is a "traffic control device". Rather, it turns on the question of whether the governmental entities' act or failure to act proximately caused the harm claimed. Petitioners' and Amici's Herculean efforts to strain the clear and express language and holdings in this Court's prior decisions are nothing but a semantic smokescreen. By labelling as a "traffic control device" one aspect of the warning matrix which Respondent's traffic engineering expert testified was required to adequately warn of the inherently dangerous condition facing the deceased drivers in this case, Petitioners attempt to immunize any warning of a known dangerous condition conveyed by something other than a traffic sign, and most especially any warning device requiring electricity. Petitioners and Amici attempt to advance this circumlocutory argument along several semantic fronts.

First, Petitioners argue that the installation of a flashing warning beacon constitutes the initial decision to install a traffic control device, such as a three light, phased traffic signal, or is an attempt to require government to upgrade its facilities, both of which are recognized as immune, planning-level functions, and neither of which were alleged in this case. These arguments ignore the fact that this case involves the failure to adequately warn of a known dangerous condition. This was the only liability issue on which the jury was charged (R:2184-2185).

Petitioners' analysis of Neilson, with specific emphasis on the cited language of the underlying Neilson complaint, set forth in footnote 2 of the decision, 419 So.2d at 1073, misses the mark. Both Petitioners quote the entire footnote in their briefs, concluding from these citations that this Court in Neilson specifically held that a claim predicated on the use of flashing warning lights is barred by sovereign immunity, since such a device constitutes a traffic control device, whose placement is, ab initio, an immune planning level function. Petitioners and Amici all fail to cite this Court's specific construction of the language in the Neilson complaint, which is dispositive of Petitioners' argument:

> In our view, the manner in which these allegations [of the complaint] 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 or the failure to install traffic control devices at the intersection is actionable...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.

419 So.2d at 1078 (emphasis added).

Respondent did not allege that Petitioners should upgrade and reconstruct the intersection, or install additional traffic devices to meet present needs. It was, however, specifically alleged and proven at trial that Petitioners had created a known trap or dangerous condition, for which there was no proper warning. Thus, Neilson does not preclude, but in fact supports the basis for this suit.

This Court clearly and specifically found in Neilson:

> 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. Clearly, this type of failure may serve as the basis for an action against the governmental entity.

419 So.2d at 1078.

Petitioners would not only ask this Court to ignore or reverse its consistent pronouncements from Collom forward, but would ask it to set the law of negligence on its head. In essence, Petitioners argue that while they may be liable for the

negligent discharge of their operational level duty to warn, the standard of conduct used to evaluate their conduct is not reasonableness. In short, they would unilaterally set their own standard, one which may not be questioned by the trier of fact. Carried to its logical conclusion, Petitioners' argument would immunize government in every instance where it undertook any warning, regardless of whether the warning was proper or appropriate.

Petitioners' arguments are nothing more than attempts to abridge or foreclose evidence that proper warning in this case required something other than a sign. No decision of this Court or any other court in this state supports Petitioners' position. As discussed, supra, an analogue of this very argument was rejected by this Court in Salas, where government attempted to limit evidence of the maintenance standards against which its conduct should be judged. There is no rational difference between evidence showing the adequacy of maintenance procedures, upheld in Salas, and evidence demonstrating the adequacy of warning, upheld by the District Court below. See also, Collom, supra, 419 So.2d at 1086.

Petitioners and Amici assert that there is some meaningful distinction between warning signs and a generic category called "traffic control devices", such that the state is required to use the former to warn of known dangerous conditions, but not the latter. This argument is a distinction without a difference.

In Perez v. Department of Transportation, 435 So.2d 830 (Fla. 1983), this Court rejected SOFDOT's argument that the placement of warning signs constituted the placement of traffic control devices under Neilson. In so doing, this Court found:

> The issue here is not the placement of traffic control devices, but instead concerns the duty to warn of a known dangerous condition. The placement of traffic control devices in general is not the same as the placement of signs warning of a dangerous condition. The placement of warning devices is a duty and "is in part an exception to the principles set forth in Neilson that an inherent defect in a plan for improvement adopted by a governmental entity cannot subject the entity to liability." Collom, 419 So.2d at 1086.

435 So.2d at 832 (emphasis added). While the specific allegations of the plaintiff

in Perez involved the placement of signs, this Court implicitly recognized that the placement of warning devices was part of government's non-delegable, operational level duty, when dealing with a known dangerous condition.

In this regard, the testimony of SOFDOT's district safety engineer Schmidt is particularly illuminating. Mr. Schmidt testified at length that the "traffic control device" at the subject intersection was the stop sign on West Lake Park Road, and that a stop ahead sign, rumble strips, and even a flashing beacon, were nothing more or less than warning devices, designed to reinforce the traffic control device: the stop sign (R:818-825). Several SOFDOT employees acknowledged that within the traffic engineering community, flashing beacons are commonly used warning devices, which have been shown to have a high probability of calling a driver's attention to a stop sign (R:825; 1279; 1281-1282). SOFDOT conceded that evidence of motorists failing to abide by a stop sign at a given location would suggest that maybe motorists weren't seeing the stop sign, necessitating in some instances the installation of a flashing beacon to adequately warn (R:1285-1286). County's traffic engineer Walker also conceded that the flashing beacon (red on West Lake Park Road and yellow on S.R. 710) is usually installed to supplement a stop sign (R:1247). From this evidence, it is clear that Petitioners' tortured efforts to label a flashing beacon a "traffic control device", the placement of which device is somehow immune from liability as a planning level function, is not even factually supportable. If it walks like a duck and quacks like a duck, it's a duck, not a "traffic control device". The uncontroverted evidence in this case was that the flashing beacon's function at this intersection would be to warn, not control.

There was not one word of testimony from any witness, expert or otherwise, suggesting that a flashing beacon installed at the subject intersection would constitute a regulatory device, that is, the primary traffic control device. The only testimony was that the stop sign was the regulatory device. Every other sign

and device simply provided levels of warning in order to reinforce the stop sign. The flashing beacon provides the highest level of warning.

Similarly deficient is County's reference to sections of the Federal Manual on Uniform Traffic Control Devices to support its position that the Manual's identification of the subject flashing beacon as an "intersection control beacon" makes its installation automatically immune under Neilson. The Manual's label is not dispositive of the device's function at a given location. Where, as here, an operational level duty to properly and adequately warn of a known dangerous condition arises, common law tort liability principles of negligence apply, as long recognized by this Court in Collom and its progeny. If adequate warning requires electrical beacons or rumble strips, then government must employ these devices to discharge its operational level duty.

It is also important to clear up a misconception arising from County's discussion in its Brief under Point I(A), beginning at the top of page 12. Specifically, County suggests that on cross-examination, Respondent's expert admitted that the flashing beacon is forbidden under the Manual when a stop sign is present. This is patently false. The flashing beacon which would have flashed red to drivers on West Lake Park Road and a cautionary yellow to drivers on State Road 710, can in fact be and is uniformly utilized, when necessary to properly warn, at intersections regulated by a stop sign (Plaintiff's Exhibit 18, Section 4E-3). In fact, the Manual requires a stop sign when the intersection control beacon is installed.

Again, Petitioners' argument is nothing but a semantic distinction without a difference. Clearly it is the function of the device which determines whether or not its placement is an immune activity under prevailing sovereign immunity concepts. When the beacon is used as a warning device, in a case involving the operational level duty to warn of a known dangerous condition, sovereign immunity simply has no applicability. The mere labelling of a device as a "traffic control beacon" is not

determinative of its function: here to warn, not control.[3]

This Court should carefully scrutinize the predecessor to the Federal Manual of Uniform Control Devices, the Manual of Uniform Traffic Control Devices for Streets and Highways, created and promulgated by the Florida State Road Department, the predecessor to the Department of Transportation (Plaintiff's Exhibit 20; R:3069). This manual, received in evidence, devoted an entire section to flashing beacons and, as evident from a review of Sections 7R-2 and 7R-3, clearly recognized that the type of device at issue in this case "is effective in calling the attention of drivers" to special points of hazard (App. 1). The SOFDOT's own standards recognized that the flashing beacon had particular benefits as a warning device "at intersections where sight distance is extremely limited or where other conditions make it especially desirable to emphasize the need for stopping on one street and for proceeding with caution on the other. This type of installation is effective at intersections...drivers need more notification than can be provided by the use of standard or oversized Stop signs, by Stop signs and Advance Warning signs, or by Advisory Speed signs" (App. 1, Section 7R-3). These were the precise conditions existing at the subject intersection at the time of this accident and thereafter.

Given the traffic accident history of this intersection, both before and after the subject accident, there could be no question but that Petitioners had created a known dangerous condition, and they had a non-delegable operational level duty to properly warn. The sufficiency of that warning was correctly submitted to and determined by the jury, who, in returning their verdict, not only found that the Petitioners had breached their duty to properly warn, but made a recommendation, affixed to the verdict form, that "maximum measure (sic) to be taken at this intersection to help prevent future accidents" (R:3243).

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[3]The legislature has not even typified this device as a traffic control device. Florida Statute §316.076 (1989) "Flashing Signals", describes the beacon at issue in this case;, while a separate statute, Florida Statute §316.075 (1989) deals with "Traffic Control Signal Devices" (emphasis added).

In State of Florida Department of Transportation v. Brown, 497 So.2d 678 (Fla. 4th DCA 1986), the District Court, following this Court's decisions in Payne v. Broward County, 461 So.2d 63 (Fla. 1984), Department of Transportation v. Webb, 438 So.2d 780 (Fla. 1983), and Collom, supra, found:

> Where DOT knows of a dangerous condition it has created at an intersection, which is not readily apparent to persons using the intersection, it has an operational-level duty to warn of the danger and may be subject to liability for injuries where it fails to provide an appropriate warning.

497 So.2d at 680 (emphasis added). Brown, as in the instant case, involved an intersection with a highly unusual configuration, creating substantial hazards to drivers. As in the instant case, the District Court properly found that there is an operational-level duty to provide appropriate warning.

It is axiomatic that if a common law duty to warn of a dangerous condition exists, and forms the predicate for the government's liability, then adequacy of warning is properly considered by the jury. Florida Standard Jury Instruction 3.2(c), used in premises liability negligence cases, is particularly instructive:

> A person who owns or has possession of land or premises who knows of a condition on the premises which involves an unreasonable risk of harm to another person on the premises has a duty to use reasonable care to warn such other person of the condition and the risk involved...

Florida Standard Jury Instruction 3.2(c). To suggest that government, which creates, maintains and controls a dangerous condition does not have the same duty as an owner of land would have to a discovered trespasser, would eviscerate the law of negligence and render this Court's prior decisions nugatory.

In the present case, there was expert testimony that this intersection, because of its geometry, location and absence of side friction, mandated the highest level of warning in conjunction with the stop sign. The testimony at trial established that appropriate warning included a flashing beacon.

D. **The "Capital Expenditure" Argument**

Petitioners and Amici are uniform in their outcry that affirmance of the District Court decision will expose the state in every claim to the "enormous expense of placing signals at every intersection." Such a position is not only illogical, but unsupportable. First, the only intersections or facilities which are subjected to any warning requirements are those found to be known dangerous conditions, such as the intersection where Douglas Konney and many others died. Respondent's traffic engineering expert testified at trial that the expense of installation of a flashing beacon could range between $5,000 (if Petitioners did the work themselves) and $11,000 (if performed by outside contractors) (R:970). County's traffic engineer Walker said it would have cost "a few thousand, two or three, four perhaps" (R:1250-1251). Walker also conceded that prior to the date of the subject accident, County had the economic capability and it was economically feasible to have installed a flashing red and yellow warning beacon at this intersection (R:1251).

SOFDOT argues that the decision to install such a device is made at the highest district level. There are eight districts within SOFDOT. These decisions are not made at the statewide level, but locally on a case-by-case basis, sometimes as a result of review of accident data, sometimes the result of physical inspection. Such decisions are nothing more than the implementation of a decision to warn. They are clearly not planning level activities involving fundamental policy.

SOFDOT asserts that to allow a jury of six individuals to determine the adequacy of warning at a known dangerous condition is "profoundly undemocratic" (SOFDOT's Brief at page 18). If applied with equal force to a jury's determination of whether or not maintenance procedures were properly and adequately carried out at a given location, this argument would reverse the unbroken chain of decisions from Commercial Carrier, through Neilson to the present, holding that government has an operational duty to maintain its facilities, and to reasonably and adequately carry out that duty. Palm Beach County Board of County Commissioners v. Salas, supra. Certainly

Petitioners and Amici would not suggest that there are not in fact maintenance procedures which are far more costly than the installation of a flashing beacon at the subject location.

The distinction which this Court has uniformly carved out for operational functions involving maintenance and warning of known dangerous conditions is completely logical. While on the one hand, preservation of the separation of powers dictates that a truly planning level decision-making function should be immune from liability, operational decision-making activities, which simply carry out recognized common law duties, are not cloaked in sovereign immunity. They subject government to the same standard of liability as any individual, i.e., to carry out its responsibility in a reasonable manner. The ultimate arbiters of reasonableness in the context of civil jury trials are the very six individuals whose decision making in the instant case the government finds to be "profoundly undemocratic". In a period of a little over eight years at the subject intersection, 11 human lives were lost. If public policy considerations are to enter the decision making process in this case, then surely the need to protect those human lives far outweighs the operational decision as to whether or not to spend $2,000 to $5,000 to have SOFDOT or County work crews suspend a flashing beacon over the subject intersection.

Respondent agrees that stare decisis should apply with full force and effect in this case. This Court's pronouncement in Collom, as consistently recognized by subsequent decisions of this Court and the appellate courts in this state, leads inexorably to an affirmance of the District Court's decision.

II.

THE TRIAL COURT DID NOT ERR BY ADMITTING EVIDENCE REGARDING CERTAIN PRIOR AND SUBSEQUENT ACCIDENTS.

A. Hearsay Regarding Prior and Subsequent Accidents Was Admissible Through Respondent's Expert.

During trial, Respondent's traffic engineering expert, Mr. Arnold Ramos, testified regarding eight prior and ten subsequent accidents that occurred at the

subject intersection. Petitioners argue that this testimony amounted to inadmissible hearsay evidence, as none of the witnesses or individuals who were involved in any of the accidents testified at trial.

First, it must be noted that the entire purpose of Mr. Ramos' testimony, as to both prior and subsequent accidents at the subject intersection, was to establish (a) an inherently dangerous condition, and (b) that Petitioners had actual notice of this dangerous condition. The evidentiary predicate to sustain the admissibility of prior and subsequent accidents is that they must be substantially similar to the subject accident. The entire thrust of direct examination of Mr. Ramos was to establish the requisite substantial similarity for purposes of meeting this evidentiary burden. Respondent clearly laid the proper predicate for such testimony (R:955-958; 1105), thus undisputedly establishing the admissibility of this testimony.

Virtually all of the cases cited by Petitioners in support of their attempts to exclude this evidence deal with situations where either the accident report itself was being introduced into evidence, or statements of parties or non-parties to an investigating police officer were adduced. In the instant case, there was no attempt to introduce into evidence the accident reports, and Mr. Ramos was not asked about, nor did he testify concerning any statement made by any party or non-party witness in any of the accidents delineated in the accident reports which he reviewed.

With this factual and evidentiary predicate, the testimony of Mr. Ramos was clearly admissible under Fla. Stat. §90.704, which states that if an expert testifies to facts which are of a type reasonably relied upon by experts in the field to support the opinion expressed, the facts do not need to be admissible in evidence. As Professor Ehrhardt states:

> An expert may rely on facts or data that have not been admitted, or are even inadmissible when those underlying facts are "of a type reasonably relied upon by experts on the subject to support the opinion expressed...An expert may rely upon hearsay in

> forming his opinion, if that kind of hearsay is relied upon during the practice of the experts themselves when not in court."

Ehrhardt on Florida Evidence, Section 704.1, at 411-412 (2d Edition 1984). See also, Gomez v. Couvertier, 409 So.2d 1174 (Fla. 3d DCA 1982).

Petitioners' assertions that "there was absolutely no predicate testimony which established that the reports were either relied upon by experts in Mr. Ramos' field (traffic engineering) or that they were being used to support his opinions," is entirely incorrect. First, not only did Respondent's expert testify that review of accident reports is in fact one of the basic tools of the traffic engineer (R:905-906;955-956), but Petitioners' own witnesses likewise verified that traffic accident reports are regularly received and reviewed by traffic engineers in their evaluation and assessment of a given location (R:701-715; 1214-1215; 1220-1224). Respondent's expert Ramos stated that his review of accident reports included not only those generated by SOFDOT in Tallahassee, but local police departments, county sheriffs' departments, and other sources (R:906). Mr. Ramos stated that he customarily relied upon traffic reports when making evaluations regarding the placement of warning devices (R:956). On cross-examination by County, Mr. Ramos specifically stated that he relied upon accident reports in reaching his opinion in the instant case (R:1105). Thus, the "black and white" record disposes of Petitioners' argument.

Petitioners' reliance on Cahill v. Dorn, 519 So.2d 56 (Fla. 4th DCA 1988), is misplaced. In Cahill, a non-party's statements contained in a police report were found to be inadmissible hearsay. Here neither non-parties, nor parties' statements were adduced. Cahill is additionally distinguishable from the instant case in that here the 18 accident reports themselves were never put into evidence. In fact, the only documents regarding the prior and subsequent accidents placed in evidence were submitted by the Petitioners (Defendant's Exhibits 2a and 2b).

Likewise, Riggins v. Mariner Boat Works, Inc., 545 So.2d 430 (Fla. 2d DCA 1989), also relied upon by Petitioners, is inapposite. That case dealt with written hearsay

being introduced into evidence. At no point in the instant case was there an attempt by Respondent to introduce the accident reports themselves into evidence. Both Cahill and Riggins were decided under the accident report privilege, Fla. Stat. §316.066(4). That statute has no bearing in this case.

Both Petitioners cross-examined Mr. Ramos extensively on the details of each and every accident report (R:1035-1045). They now have the audacity to claim that this testimony is inadmissible hearsay. Their conduct is reminiscent of that found in City of Miami Beach v. Klein, 414 So.2d 620 (Fla. 3d DCA 1982). In that case, the city appealed following the refusal by the circuit court to grant a motion for a new trial after certain evidence from a police file was heard by the jury, but never introduced into evidence. The court held that no reversible error had occurred as the city brought out the contents of the file during the plaintiff's case, and made subsequent references to the file during trial. Like the city in Klein, Petitioners cannot now assert that Mr. Ramos' testimony was inadmissible hearsay, since they themselves questioned him extensively regarding the contents of the subject accident reports.

The trial court heard extensive argument and conducted its own extensive review of the hard copies of the accident reports prior to any of the accident evidence going to the jury. This review was to establish substantial similarity (R:375-407; 531-532), a predicate which the trial court found Respondent had met. In any event, County has completely waived any objection it might have to prior and subsequent accidents. SOFDOT has likewise completely waived any objection it might have had to prior accidents, preserving only the narrow objection that subsequent accidents were not substantially similar because of a material change in the roadway, an argument met and disposed of by Respondent's expert (R:1156). This waiver occurred at the time Respondent read to the jury, without objection, Petitioners' responses to requests for admissions propounded by Respondent. These responses specifically recited the details of each and every accident concerning which Respondent's expert

had already given testimony (R:1496-1511), including the date and time of each prior and subsequent accident, the number of individuals injured or killed, whether or not the consumption of alcoholic beverage was a contributing cause, and similar facts.

Petitioners' assertion that the testimony regarding prior and subsequent accidents foreclosed their opportunity to cross-examine the witnesses involved, thereby creating extreme prejudice, is disingenuous at best. Both Petitioners obviously had the opportunity to examine the hard copies of the accident reports and undertake any investigation necessary to prepare their answers to request for admissions relative to the subject accidents. It is incredible to believe that they could still assert that they were somehow foreclosed from testing the validity of the data contained in the accident reports, when they would necessarily have had to do so in order to provide good faith responses to Respondent's requests for admissions. Their objections are pure afterthoughts.

Clearly, Respondent's expert's testimony describing prior accidents occurring under substantially similar conditions was admissible to show that a hazardous condition existed, and that Petitioners had notice of this condition. Chambers v. Lofton, 67 So.2d 220 (Fla. 1953); Friddle v. Seaboard Coast Line Railroad Company, 306 So.2d 97 (Fla. 1974); Perret v. Seaboard Coast Line Railroad Company, 299 So.2d 590 (Fla. 1974).

B. Substantial Similarity of Subsequent Accidents Warranted Their Disclosure.

Petitioners argue that the evidence of subsequent accidents should not have been allowed as these accidents were not substantially similar to the accident in the instant case. Petitioners base this assertion on the fact that during a portion of the time after the accident, but before trial, County installed rumble strips on West Lake Park Road, thereby changing the conditions as they had previously existed. However, Respondent's expert witness Ramos unequivocally stated that the rumble strips alone, without the additional levels of warning to which he had testified,

would not have sufficiently warned of the dangerousness of the condition (R:939-941). In any event, County has waived any objection to this evidence (R:1496-1511).

In Friddle v. Seaboard Coast Line Railroad Co., 306 So.2d 97 (Fla. 1974), the standard to be followed in allowing testimony of prior and subsequent accidents was held to be that the other accidents must have occurred at the same place and under conditions which were at least "substantially similar" to the accident in dispute. Respondent's expert testified that with respect to the subject intersection and its approaches, substantial similarity meant any accident where a car or vehicle had been travelling on West Lake Park Road, went through the intersection, and struck a vehicle on Beeline Highway (R:956-957). As Respondent's expert noted, the installation of rumble strips would be insufficient warning (R:940). Moreover, these changes did not effect the substantial similarity of subsequent accidents.

In Friddle, this Court specifically adopted Judge Mager's dissenting opinion in the District Court, holding that dissimilarities between accidents are factors that go "to the weight rather than the admissibility of the evidence..." Seaboard Coast Line Railroad Company v. Friddle, 290 So.2d 85, 90 (Fla. 4th DCA 1974). For example, in Friddle, the accident in dispute occurred at night with the car travelling from east to west, while the prior accident admitted into evidence occurred during the day with the car travelling west to east. Despite these differences, evidence of the prior accident was allowed into evidence. The same result is mandated here.

Petitioners' observations concerning their cross-examination of Mr. Ramos relative to the accident occurring on February 20, 1986, again do nothing but point to the weight of the evidence, not its admissibility. The fact that alcohol was involved in a subsequent accident goes only to the weight, not to admissibility, since other evidence showed that numerous accidents had occurred with no evidence of alcohol involvement (R:1496-1511).

Petitioners claim that by allowing evidence of accidents after remedial measures had been taken, the court forced Petitioners to either reveal that these measures

were taken or to remain silent and create the false impression that these accidents were allowed to continue to happen without any concern on the part of Petitioners (County's Brief, p.23). They then go on to assert in a footnote that this "impression" was confirmed when the jury recommended that both Petitioners install the highest level of warning at the intersection. There is absolutely no evidence that the jury had such an impression. The jury's recommendation only confirms that they felt that this intersection was inherently dangerous and required the highest level of warning. Even if the jury did know of the addition of the rumble strips, there is no proof that this would have changed their opinion that this intersection required a higher level of warning.

In the instant case, the exclusion of evidence of subsequent accidents would have been reversible error. Wood v. Walt Disney World Company, 396 So.2d 769 (Fla. 4th DCA 1981); Reese v. Seaboard Coast Line Railroad Company, 360 So.2d 27 (Fla. 4th DCA), cert. dismissed, 366 So.2d 884 (1978).

III.

THE TRIAL COURT DID NOT ERR IN EXCLUDING THE BLOOD ALCOHOL LEVEL OF MR. FUNK

At trial, both Petitioners sought to have the blood alcohol level of Mr. Funk admitted into evidence. The trial judge sustained Respondent's objections and excluded the testimony of toxicologist Jay Pintacuda regarding blood alcohol level. The trial court did not err in excluding this testimony, based upon its irrelevancy and Petitioners' failure to establish:

(1) the reliability of the blood drawing method;

(2) the chain of custody; and

(3) the qualifications of the technician who drew the blood as required under HRS guidelines.

A. Blood Alcohol Level Was Irrelevant

In Seaboard Coast Line Railroad Company v. Zufelt, 280 So.2d 723 (Fla. 1st DCA 1973), the court found unfair prejudice in referring to blood alcohol level outweighed

its probative value. In Zufelt, the minor passenger's mother drove into a railroad crossing. The car was struck by a train and the minor was injured. Id. at 724. The court refused to allow evidence proffered by the railroad of the mother's blood alcohol level based upon the expected prejudicial effect of such evidence on the jury because: "To have...injected the blood alcohol test results as to the driver could have had no effect other than to open the minds of the jurors to improper speculative excursions outside the issues developed by the pleadings." Id. at 725. The court stated that the only issue for the jury was whether or not negligence on the part of the railroad was a contributing cause of the accident. Id.

Likewise, in the instant case, the admission of the blood alcohol level of Mr. Funk would have had no effect other than to prejudice the jury on the issue of intoxication, an issue which in no way was relevant to the failure of Petitioners to properly warn. There was no evidence that Mr. Funk would have acted differently, regardless of his blood alcohol level. Officer Parramore testified that Mr. Funk appeared to operate his vehicle without impairment (R:550). In fact, numerous prior and subsequent accidents occurred at this intersection without any evidence of driver intoxication (R:1496-1511).

Petitioners argue that Zufelt has given way to Brackin v. Boles, 452 So.2d 540 (Fla. 1984), which held that Fla. Stat. §316.066 (the successor to Fla. Stat. §317.171 in effect at the time of Zufelt) did not bar the introduction of blood test results in a civil trial. Petitioners claim Zufelt was ultimately decided upon the exclusionary provisions of Fla. Stat. §317.171 (County's Brief, p.24). A closer reading of Zufelt reveals that the court went on to state: "There is a more compelling reason for upholding the action of the trial judge," namely the prejudicial effect of such evidence on a jury. 280 So.2d at 725.

Petitioners also contend that in Zufelt the blood alcohol level was excluded because of "insufficient and indeed conflicting evidence regarding causation." Petitioners state that in the instant case it was a jury question whether or not the

accident was caused by Mr. Funk or the negligence of Petitioners. The only issue to which Mr. Funk's negligence was relevant was whether his actions constituted a supervening or intervening cause. The jury was charged with numerous issues relative to Mr. Funk's potential causation (R:2188-2191), yet the jury found that Petitioners, not Mr. Funk, proximately caused the accident through their negligence (R:3241-3243). There was ample evidence submitted to the jury as to Mr. Funk's consumption of alcohol and driving conduct, due to the eyewitness testimony of Mr. Sylvester and Officer Parramore. The level of Mr. Funk's blood alcohol content was irrelevant and indeed prejudicial to Respondent and, therefore, properly excluded.

Assuming, arguendo, that Mr. Funk's condition was found to be a supervening/ intervening cause, Petitioners could still be held liable for his actions. In order to hold an original tortfeasor liable for actions of an intervening third party, it is not necessary that the original tortfeasor foresee the precise injury the intervening party's negligent action causes, or the precise manner in which the injury occurs. Crislip v. Holland, 401 So.2d 1115, 1117 (Fla. 4th DCA), rev. denied, 411 So.2d 380 (Fla. 1981). It is sufficient that the resulting injury is within the scope of damages or risk created by the original tortfeasor's negligence. Id. Respondent presented evidence from SOFDOT's own safety engineer that it was foreseeable that impaired drivers would be using the subject roads (R:792-793). Given the location and geometric configuration of this unique intersection, it was a probable result that impaired and non-impaired drivers alike would fail to get adequate warning of the intersection and stop sign. Prior and subsequent accident data demonstrate the validity of this premise.

Under Fla. Stat. §90.403, evidence is inadmissible if it is of such a nature that its probative value is substantially outweighed by the possibility of unfair prejudice, confusion of issues, and misleading the jury. The decision to exclude evidence after weighing its probative value against its prejudicial effect is one for the trial court and will not be overturned unless there is a clear abuse of discretion.

Trees v. K-Mart Corp., 467 So.2d 401, 403 (Fla. 4th DCA 1985). In weighing probative value against unfair prejudice, it is proper for the trial court to consider the need for the evidence against the tendency of the evidence to suggest an improper basis to the jury for resolving questions. Ehrhardt on Florida Evidence, Section 403.1 at 99-104 (2d Edition, 1984).

Given the strong, adverse public sentiment regarding driver intoxication, evidence of Mr. Funk's blood alcohol level would have been extremely prejudicial and, therefore, was correctly excluded by the trial court. The extent of this prejudicial sentiment was clearly demonstrated during voir dire (R:277-282). The trial court, armed with this knowledge, properly excluded this evidence.

B. Petitioners Failed to Establish Reliability of Blood Drawing Method.

Petitioners claim that their failure to establish whether an alcohol versus a non-alcohol wipe was used in the blood drawing process does not in and of itself bar evidence of blood alcohol level (County Brief, p. 28). They cite Johnson v. Florida Farm Bureau Casualty Insurance Co., 542 So.2d 367 (Fla. 4th DCA 1988), in which evidence of the defendant's blood alcohol level was admitted even though it could not be established whether an alcohol or non-alcohol wipe was used by the physician who drew the blood. However, in Johnson there was evidence of both the hospital's and the physician's routine practice. In the instant case, there was no proof of the hospital's routine practice or, more importantly, no proof of the routine practice of the person who purportedly drew the blood. Clearly, Johnson is inapplicable to the instant facts.

Petitioners next contend that the vial received by the toxicologist, Jay Pintacuda, came from a standard non-alcohol wipe collection kit and this fact somehow establishes the method used in drawing the blood. Whether or not the vial was from a standard blood alcohol collection kit does not establish whether an alcohol or non-alcohol wipe was used for the collection of blood. This testimony does not establish the standard practice of the person who drew the blood or the hospital where it was

drawn. It is clear that the record, including the proffered record, is absolutely devoid of any testimony relating to how the blood was drawn, who placed the markings on the vial, whose blood was in the vial, what procedure was used to draw the blood, whether deputy sheriff Michael Waites even witnessed the blood being drawn, etc. It is difficult to conceive of a more unreliable predicate for purported admissibility of this evidence.

Petitioners further contend that the person who drew the blood was HRS certified as required by HRS guidelines. In support of this position, Petitioners allude to their proffer of the testimony of a Mrs. Carpenter, who at the time of trial was the personnel director of the hospital where Mr. Funk's blood was purportedly drawn. Her proffered testimony was an effort to get into evidence certain alleged personnel records of a Mrs. Edelbery, the woman Petitioners claimed had actually drawn the blood from Mr. Funk, and who was deceased by the time of trial.[4] Mrs. Carpenter's proffered testimony established that during the relevant time period (1983), she was only an assistant personnel director (R:1800). At the time of the trial, she was not even aware that Mrs. Edelbery had died (R:1799)! The trial court properly excluded the proffered testimony and documents on a number of bases:

(1) Mrs. Carpenter was never shown to be the records custodian of the subject records. Her testimony clearly established that the records were not even prepared by the hospital, but by the decedent, Mrs. Edelbery (R:1800).[5]

(2) The records which Petitioners attempted to proffer were:

(a) not self-authenticating under Fla. Stat. §90.902;

(b) not public records under Fla. Stat. §90.803(8); and

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[4]Mrs. Carpenter was not listed as a witness on the pretrial stipulation, in violation of the trial court's pretrial order. The purported personnel records were never listed as exhibits, supplemental or otherwise.

[5]Petitioners did not bother to depose Mrs. Edelbery during the four years this case was pending prior to trial, or to find out if she was alive until a few days before trial and years after the accident. They cannot now plead error in the exclusion of evidence they neglected to properly obtain.

(c) not qualified as business records under Fla. Stat. §90.803(6) (R:1798-1800).

Thus, it is clear that the proffered testimony and documents were all properly excluded, lacking any credible evidentiary predicate.

The case most factually on all fours with the instant case is Riggins v. Mariner Boat Works, Inc., supra, 545 So.2d 430, where the District Court, reversing the trial court, held that a toxicologist's testimony that relied on an inadmissible laboratory report to conclude that an individual's blood alcohol level was in excess of the legal limit was itself inadmissible evidence. In its analysis, the court noted that the toxicologist had merely based his opinion on a laboratory report which was found to be inadmissible because (1) the report was not established as a business record pursuant to Fla. Stat. §90.803(6) (1987) and (2) neither the medical examiner (who actually drew the blood) nor the lab technician (who performed the alcohol test) was available to testify at trial. In the instant case, the purported attempt to proffer employment records of the individual who drew the blood failed for lack of compliance with Fla. Stat. §90.803(6) (R:1798-1800); and the qualifications of the individual purportedly drawing the blood were never established because that individual was unavailable to testify at trial. The same result reached in Riggins is mandated in this case.

C. Petitioners Failed to Establish The Chain of Custody.

Petitioners contend that Deputy Michael Waites' purported presence in the hospital emergency room while blood was being drawn from Mr. Funk and his turnover of blood to Deputy Charles Bowers establishes chain of custody. This is completely incorrect. Deputy Waites did not testify that he observed the blood being drawn, did not testify that he observed it being put in a vial, and did not testify that he observed the vial being labelled. In short, the only thing he said was that he left the hospital with a vial marked "Funk" (R:1537-1540).

Petitioners state: "What was important in this case, as in Johnson v. Florida Farm Bureau, supra, is that a police officer was able to testify that a qualified statutorily authorized individual drew the blood and that he/she was present during the entire procedure." (County Brief, p. 29). But this did not occur in the instant case. Deputy Waites was not able to testify about the method that was utilized in drawing the blood. He did not testify that he had any knowledge of the qualifications, if any, of the person who drew the blood. He did not testify he saw blood drawn from Mr. Funk and put in the vial he gave to Deputy Bowers. He was able to testify to no more than simply being present in the emergency room at the time blood was purportedly drawn. Petitioners completely failed to establish a proper predicate to admit the unsupported and clearly circumstantial evidence regarding chain of custody.

D. Petitioners' Failure to Establish the Qualifications of The Technician Who Drew the Blood under H.R.S. Guidelines.

There was no evidence admitted at trial regarding the qualifications of Ann Edelbery, the deceased person who allegedly drew Mr. Funk's blood. While it is true that Petitioners attempted to offer evidence of Edelbery's qualifications through proffered records, these records were not admitted into evidence as they were hearsay. See Issue III(B), infra. Fla. Stat. §316.1933(2)(A) requires that a duly licensed clinical laboratory technologist or technician draw blood for the purpose of determining alcohol content. Petitioners' reliance on Kuyawa v. State, 405 So.2d 251 (Fla. 3d DCA 1981), is misplaced. The holding in Kuyawa does not change the fact that the person drawing the blood must be a licensed technologist. Id. at 252, n.2. Because Edelbery's qualifications were never established or admitted into evidence, there was no proof as to whether or not she was properly licensed.[6]

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[6]Petitioners argue that Beasley v. Mitel of Delaware, 449 So.2d 365 (Fla. 1st DCA 1984), does not apply to the facts of the instant case. In Beasley, blood was drawn by a funeral director, who was not a licensed clinical technician as required by Fla. Stat. §316.1933(2)(A), so evidence of the blood alcohol tests was excluded. Petitioners argue that Beasley is not controlling, as Edelbery was a licensed technician. The trial court is only permitted to rely on documentary evidence or testimony actually admitted into evidence. Since no such testimony or evidence

Petitioners argue incorrectly that strict compliance with Fla. Stat. §316.1933(2)(A) is not required in a civil proceeding. Fla. Stat. §316.1934(2) states: "Upon the trial of any civil or criminal action or proceeding...the results of any test administered in accordance with §316.1932 or §316.1933 and this section shall be admissible into evidence..." (emphasis added). Fla. Stat. §316.1932 is clear as to what triggers strict adherence to HRS guidelines: "The tests...shall be administered at the request of a law enforcement officer substantially in accordance with rules and regulations which shall have been adopted by the Department of Health and Rehabilitative Services." Once Deputy Bowers requested that blood be drawn for a criminal investigation (R:1538), the HRS Guidelines were in effect.

State v. Strong, 504 So.2d 758 (Fla. 1987), is likewise inapt. This Court held: "The legislature did not intend this statutory safeguard of the implied consent law to apply to all blood tests offered as evidence." Id. at 759. In the instant case, the blood was drawn at the request of a police officer for the purpose of a criminal investigation. This is distinguishable from Strong, in which the blood was drawn for medical purposes only and not in furtherance of a criminal investigation. Fla. Stat. §316.1932(f)(2) states that blood drawn for medical purposes only is an exception to the requirement that the blood be drawn in compliance with the statutory guidelines. Petitioners failed to demonstrate that the blood drawn in this case fell within the purview of this statutory exception.

Thus, it is clear that Petitioners did not even remotely satisfy the numerous evidentiary predicates required to sustain the admissibility of testimony regarding the blood alcohol analysis of the subject blood sample, notwithstanding that in any event its prejudicial effect would have far outweighed any relevancy.

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existed as to Edelbery's qualifications, it follows that the statutory guidelines were not followed.

IV.

THE TRIAL COURT DID NOT MAKE ANY PREJUDICIAL COMMENTS TO THE PROSPECTIVE JURY PANEL

County argues that introductory comments made by the trial court, expressing concern for the comfort of the jury reflected her bias against County. Read fairly, these comments were nothing more than the judge's inquiry about the comfort of the jury, a concern demonstrated throughout the trial by her continued search for a larger courtroom (R:64). County is most concerned about the judge's remark to the jury that they were in a portion of the courthouse that supposedly contained asbestos. She then said: "But since the folks in Palm Beach County perhaps are not worried about it, we just have to work here." (R:27, emphasis added). Despite their concern about these remarks, both Petitioners allowed the venire panel to be seated without raising any timely objections to the comments made (R:30).

County argues that the trial court's comments must be considered against the backdrop of newspaper and other media attention purportedly assailing County for asbestos in the courthouse. The fact that there may have been public or media attention to a certain issue has not been held by any court in this state to raise the presumption that all jurors on the venire were aware of such media attention. In point of fact, neither Petitioner availed itself of the opportunity during voir dire to examine the panel on their knowledge of such media, in an effort to establish a predicate for a challenge for cause.

Later in voir dire, during a side bar conference, County raised its first objection to the statements made by the judge. The court apologized for making the remarks and asked County, "Do you think we need to take action on it at this point?" Counsel for County responded, "...I don't believe it's necessary to strike the panel at this particular time..." (R:70). The judge then stated that she was going to strike the entire panel unless a curative instruction was found (R:71). At this time, County did not elect to move to strike the panel. It was not until a break during Respondent's voir dire examination that Petitioners jointly moved to strike

the panel (R:138). The court denied the motion, but asked if they wanted a curative instruction (R:139). Petitioners declined a curative instruction (R:139). By their actions, Petitioners waived their right to strike the panel and to seek reversal on the basis of the trial court's comment.

Comments made throughout the jury selection process by both the trial court and Petitioners demonstrated their efforts to elicit impartiality from the jurors. The trial court explained that "[n]othing I do or say during the course of the trial other than explaining the law to you should have any effect whatsoever on your verdict" (R:408). County made rehabilitative statements throughout voir dire regarding jurors' fairness, such as: "Is there anyone here who feels that because Palm Beach County has been made a defendant in this lawsuit, that they must have done something?..." (R:329). County even rehabilitated a prospective juror who had filed a prior lawsuit against County (R:345).

Both Petitioners accepted the jury without qualification or objection (R:362-370). The jury was sworn and impanelled without exception. At that point, Petitioners were obviously not concerned about any bias created by the trial court's comments, and in fact waived any objection to the panel.

Petitioners argue at length the alleged relationship between the trial court's comments and the verdict, in which County was found to be 60 percent negligent and SOFDOT 40 percent negligent. County cites Crews v. Warren, 157 So.2d 553 (Fla. 1st DCA 1963), which actually held that an adverse verdict is but one of the factors to be considered in finding the existence of a prejudicial effect. However, County admits: "It goes without saying that absent a tape recorded statement of jury deliberations, there is no certain method to determine what facts, if any, the jury relied upon in finding the County more at fault" (County's Brief, p. 35). Respondent agrees. County states that the disparity in the verdict was based upon facts "outside the evidence." When a verdict goes against a party, that party naturally believes that the verdict is unfair and not based upon the facts as it saw them. Clearly,

County has failed to establish any prejudice from the trial court's comments, or that these comments constitute harmful and reversible error. These comments were not misleading comments on the evidence or on any party's liability.

V.

THE TRIAL COURT PROPERLY SUBMITTED THE ISSUE OF CAUSATION TO THE JURY UNDER THE FACTS OF THIS CASE, AND PROPERLY DENIED SOFDOT'S MOTION FOR DIRECTED VERDICT BASED ON SIGNAGE ON STATE ROAD 710

In passing on the directed verdict issue before it, this Court must evaluate the evidence in the light most favorable to Respondent. Any reasonable doubt must be resolved in her favor. If any reasonable interpretation of the evidence supports her claim, SOFDOT's motion should be denied. Reinhart v. Seaboard Coast Line Railroad Company, supra, 422 So.2d at 44. One need not even interpret Arnold Ramos' testimony to recognize that he stated explicitly that SOFDOT's negligent placement of signs more likely than not caused the accident: "[I]t is confusing and more than likely a motorist approaching that area would be confused" (R:978). Mr. Ramos testified that taken altogether, the absence of a speed reduction ahead sign or the placement of either the intersection sign or the crossroad sign had something to do with this accident (R:979). Mr. Ramos clearly testified that proper warning would have prevented the accident (R:952).

Mr. Ramos also testified that studies have shown a direct correlation between the placement and priority of signs and reduced property damage and loss of life (R:975). Mr. Ramos testified the subject signage did not constitute good engineering standards (R:988) and overall was inadequate and improperly placed (R:922; 934-937), clearly allowing the jury to imply a causal nexus. Fla. Stat §90.301.

The jury's finding of no comparative negligence by Mr. Konney demonstrates that he was not speeding. Because the 45 mile per hour sign was not utilized in conjunction with a reduced speed ahead sign, which Mr. Ramos testified should have been done (R:975), the jury most certainly could have drawn the logical implication that SOFDOT's failure to install a reduced speed ahead sign in conjunction with the

lowered speed limit sign would cause Mr. Konney not to see or not to see timely that he was required to reduce speed. Mr. Ramos testified that had Mr. Konney changed his speed, there would have been no impact (R:981). The jury was able to consider this testimony, along with his earlier testimony that the reduced speed ahead sign was necessary to give effect to the 45 mile per hour sign, but only if placed far enough in advance of the intersection to allow for meaningful comprehension and execution, all of which are factors equalling causation.

SOFDOT's cases are easily distinguishable. In Gooding v. University Hospital Building, Inc., 445 So.2d 1015 (Fla. 1984), the Court found no medical malpractice where the expert witness could not testify if the failure to diagnose and treat an abdominal aneurysm before the patient went into cardiac arrest caused his death. In Lopez v. Florida Power & Light Co., 501 So.2d 1339 (Fla. 3d DCA 1987), the electrocuted avocado picker, a man with sophisticated technical skills, was using a 16 foot metal pole in the daytime in his own backyard with nearby overhead wires readily apparent to him. In contrast, Mr. Konney was travelling 55 miles per hour, or 80 feet per second, at night. Mr. Ramos testified that even one such as Mr. Konney, who was familiar with the intersection, might not appreciate the dangers (R:950).

More analogous is State Department of Transportation v. Brown, supra, 497 So.2d 678, where the District Court refused to grant a directed verdict to SOFDOT. That case involved a collision at a dangerous intersection. The court held that SOFDOT "had a duty to warn Brown, and that its breach of that duty was, at a minimum, a contributing cause of the accident." Id. at 680. In Brown, there was similarly no evidence that the plaintiff was aware of the particular hazards created by the layout, or even that he knew the intersection's configuration "created any type of unusually dangerous condition." Id. The court noted expert testimony demonstrating that the driver "might be thoroughly familiar with the intersection but still not appreciate the danger it presented unless he was warned in some manner, and that appropriate warnings would have prevented this accident." Id.

The instant case also has few parallels to Alene's Enterprises, Inc. v. Early, 475 So.2d 267 (Fla. 4th DCA 1985). No witness in that case could testify that the defendant knew the glass would break apart when the plaintiff lifted it. In the instant case, Mr. Ramos testified repeatedly as to the factors which probably caused the accident (R:978-980). The trial court properly charged the jury with determining legal cause (R:2184).

In Stahl v. Metropolitan Dade County, 438 So.2d 14 (Fla. 3d DCA 1983), Judge Hubbard spelled out, in scholarly detail, the law of Florida on proximate and legal causation. The court in Stahl recognized that:

> Given the debatable nature of proximate cause issues in most such cases, it is not surprising that the courts have held that such issues are generally for juries to decide using their common sense upon appropriate instructions, although occasionally, when reasonably people cannot differ, the issue has been said to be one of law for the court.

Id. at 21 (citations omitted). Just as the court in Stahl, not knowing precisely why the deceased young boy left the bicycle path on which he was riding for his fatal collision with an automobile, refused to grant summary judgment on causation for the defendant, the trial court was eminently correct in refusing to grant the directed verdict sought by SOFDOT because Mr. Konney never lived to tell why he was not able to avoid his fatal crash. The jury was then entitled to weigh the evidence and reach its own conclusions.

VI.

THE TRIAL COURT PROPERLY RULED ON THE ADMISSIBILITY OF CERTAIN EXPERT TESTIMONY

A. Deputy Bowers' Testimony Upon Matters of Accident Reconstruction and Investigation Was Proper.

Deputy Bowers never gave an engineering opinion. Bowers was a traffic homicide investigator for the Palm Beach County Sheriff's Office and a deputy sheriff (R:609). Assigned to the traffic division, he investigated and reconstructed traffic accidents

ranging from basic minor parking lot accidents to fatalities (R:621-622). By his conservative estimate, he had investigated approximately 1,000 accidents prior to the Konney accident (R:625).[7] Bowers' job duties and responsibilities in the reconstruction and investigation of an accident included determination of its contributing causes. He had previously investigated intersectional accidents. As part of this determination, he would render an opinion as to contributing factors involved (R:625-626).

In 1983, in order to comply with the Florida Traffic Accident Report forms in use, he was required to determine whether an "engineering study" was necessary. He would check the box ("engineering study needed") found on the standard Florida Traffic Accident Report, if in his opinion it was pertinent (R:628).

Bowers was the homicide investigator for this case (R:629). He testified that he had collected physical evidence at the scene, including skid marks, and that he determined whether roadway conditions contributed to this accident (R:631-632).

County objected to Bowers' testimony as calling for an "engineering" opinion. However, SOFDOT did not object, nor did it join in the objection in any respect (R:633). Respondent then asked: "What was the basis of your feeling that there was an engineering study necessary at that particular location?" County then objected on the same grounds. Once again, however, SOFDOT failed to object, or in any way join in the objection (R:633). In order for SOFDOT to have preserved this issue for appeal, it had to make a timely objection to the introduction of evidence during the trial. SOFDOT has waived its objection. Swan v. Florida Farm Bureau Insurance Company, 404 So.2d 802, 803 (Fla. 5th DCA 1981) (despite having filed a motion in

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[7]At the time of trial, Bowers was a six-year veteran of the Sheriff's Office. For the past five years he had been a homicide accident investigator (R:622). Before joining the Sheriff's Office, he served six years as an officer with the Riviera Beach Police Department. After two years of road patrol in Riviera Beach, he spent four years in accident reconstruction and investigation (R:622-623). Bowers also had an educational background in accident reconstruction and investigation. In 1975, he went through the police academy with 320 hours by the Florida Standards Board (R:623-624). In 1978 he attended a 40-hour accident reconstruction course and an 80-hour accident investigation course. In 1982 he took an 80-hour traffic involvement course, and in 1984 he attended an 80-hour accident reconstruction course (R:624).

limine, party failing to object at trial did not comply with rule requiring contemporaneous objection to the introduction of evidence in order to preserve the issue for appellate review).

In its cross-examination of Bowers, SOFDOT clearly showed that when Bowers checked the box on the Traffic Accident Report to recommend the need for an engineering evaluation of the intersection he was not rendering an engineering opinion (R:638-639). Bowers stated that someone should look into this to see if there was a problem "based on my opinion and observation on that particular night, yes" (R:639). The trial court was well within her discretion to permit such testimony. Zwinge v. Hettinger, 530 So.2d 318, 324 (Fla. 2d DCA 1988) (trooper could testify as to causation based upon his observation of the road conditions and his years of accident investigation); Dragon v. Grant, 429 So.2d 1329, 1330 (Fla. 5th DCA 1983) (experienced investigator/trooper allowed to give expert testimony on where he concluded the point of impact had occurred). Fla. Stat. §90.702, permits a witness to qualify as an expert "by knowledge, skill, experience, training, or education..." Deputy Bowers certainly met this standard.

B. SOFDOT Had Adequate Cross-Examination to Determine the Basis for Bowers' Aforementioned Opinion.

SOFDOT's questions to Deputy Bowers obviously called for him to speculate. Respondent's objection was properly sustained on these grounds (R:639-640). Despite the proffer, it is evident that Deputy Bowers was not testifying as to anything beyond his determination of the contributing factors in this accident. He was fulfilling his duties and responsibilities in trying to derive all contributing factors to the accident, including roadway conditions. SOFDOT has clearly not shown prejudice as a result of the trial court's proper evidentiary rulings. There was no resulting harmful error. On cross-examination, before the jury, Deputy Bowers testified that it was speculation on his part as to whether the engineering changes relating to signs and lights which he recommended after the accident would have had anything to do with avoiding this accident (R:646). SOFDOT made its point to the jury.

C. Hall's Testimony Relating to Sign Use and Placement Was Properly Excluded.

The trial court has the authority to exclude cumulative evidence. Fla. Stat. §90.612(1). A trial court may also limit the number of expert witnesses to testify as to the same fact. Stager v. Florida East Coast Railway Company, 163 So.2d 15, 17 (Fla. 3d DCA 1964). There is no error that can be committed by a trial court in excluding cumulative evidence, Rogers v. State, 511 So.2d 526, 530 (Fla. 1987), nor has any prejudice been shown.

SOFDOT did not list Hall as an expert on its pretrial stipulation (R:2751-2777a), but designated Bruce Friedman, Palm Beach County's expert, as its expert, the night before trial (R:1577). Mr. Friedman testified extensively (R:1834-1879) about those matters for which SOFDOT now claims severe prejudice because of the "preclusion" of Hall. Friedman covered everything in SOFDOT's proffer for Hall.

The trial court simply wouldn't let Hall testify as an expert as to why signs were placed at certain locations or why the signs found at the accident scene met the criteria of the MUTCD (R:1619). Clearly Hall, who was not an engineer, could not render an opinion about the MUTCD, which expressly stated that its use and interpretation is for traffic engineers (Plaintiff's Exhibit 18, p. 1A-3). Hall's job was only to make recommendations to the district engineer, who had to approve and decide whether or not to place signs or warnings devices (R:1580-1581). Mr. Friedman testified for SOFDOT (R:1834-1838; 1856-1879) on its conformity with the MUTCD and other standards, so SOFDOT suffered no prejudice. The trial court was vested with considerable discretion in determining Hall's qualifications. No abuse of that discretion has been shown to warrant reversal on this issue. Reinhart v. Seaboard Coast Line Railroad Company, supra, 422 So.2d at 44.

D. Ramos' Testimony as to Driver Perception and Appreciation of Dangers Was Properly Before the Jury.

Arnold Ramos testified within the sphere of his expertise. SOFDOT points out that "Ramos was a civil engineer, he was not a human factors engineer." (SOFDOT's Brief at p.29). Mr. Ramos testified, without objection, that as a traffic engineer,

when evaluating a given location to determine the type and placement of traffic control devices and warning devices, he had to consider human perception (R:906-907). SOFDOT's safety engineer Schmidt testified that perception and reaction time were an integral part of traffic engineering (R:815-816). SOFDOT's objections, coming after Ramos' testimony on that very issue (R:906), were waived. Fla. Stat. §90.104(1)(a). SOFDOT's objection (R:968-969) was even after Ramos testified, without objection, that an intersection could still be a trap to one familiar with it (R:950). The objection was raised for the first time when the question was repeated (R:968-969). Therefore, any arguable "error" was harmless and not grounds for reversal. Swan v. Florida Farm Bureau, supra, 404 So.2d at 803.

VII.

THE TRIAL COURT DID NOT ERR IN GIVING STANDARD JURY INSTRUCTION 3.1(A) (PREEMPTIVE CHARGE ON DUTY OF CARE), AS THERE WAS AN ISSUE AS TO THE DEFENDANTS' DUTY OF CARE LITIGATED AT TRIAL

The court was correct in giving the preemptive charge on duty of care in Standard Jury Instruction 3.1(a). Had it been omitted, the jury might have not appreciated the duty SOFDOT genuinely owed Mr. Konney to use reasonable care. SOFDOT's duty was an issue raised in the pretrial stipulation (R:2751-2777a). Respondent presented it in her opening statement (R:482; 485), yet SOFDOT never conceded this duty. SOFDOT's argument that the trial court overemphasized a duty which it did not dispute is contradicted by the record.

In SOFDOT's opening statement, it made no reference to any duty owed by SOFDOT to Mr. Konney. In its closing argument, SOFDOT did not concede any duty owed to Mr. Konney (R:2090-2091). SOFDOT argued at length about Mr. Konney's familiarity with the intersection and his understanding of the conditions which he encountered (R:2105), suggesting that SOFDOT and Mr. Konney had equal opportunity to appreciate the risk. SOFDOT made no concessions that it, as owner of the highway, owed any duty to Mr. Konney. County, by contrast, stated that it had certain responsibilities to drivers on its roads (R:2120), yet never objected to use of this instruction (R:2007). In

this context, the court's instruction was also important to make clear to the jury that both defendants, each controlling a different highway, owed a duty to Mr. Konney. The court's instruction can thus be viewed as no more than an honest effort to keep the jury from assuming incorrectly that blame might only lie with one defendant, not both.

Without the court's 3.1(a) instruction, the jury may not have appreciated the duty which County and SOFDOT by law owed Mr. Konney. Cf., L.K. v. Water's Edge Association, 532 So.2d 1097 (Fla. 3d DCA 1988) (where instruction not given in sexual assault case, jury misled on duty owed by condominium association and plaintiff entitled to new trial). Nothing in trial court's instructions expanded Petitioners' duties beyond those contested at trial. Immediately after the questioned preemptive charge, the court stated: "The issues for your determination on the claim of Loretta Konney against the State of Florida, DOT, are whether the DOT was negligent in failing to properly warn Douglas Konney of a dangerous condition known to the DOT 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" (R:2184). On the other hand, the omission would have harmed Respondent. See, Bell v. Harland Rayvals Transport, Ltd., 501 2d 1321, 1322-3 (Fla. 4th DCA 1986) (where issue of defendants' responsibility or duty to use reasonable care for plaintiff is raised, the 3.1(a) instruction is proper). SOFDOT and County cannot show the prejudice or harm required to reverse the verdict, Fla. Stat. §59.041; any error was extremely harmless.

CONCLUSION

For the reasons set forth in Argument I, it is clear that the decision of the District Court of Appeal, Fourth District, should be affirmed. Since the issue presented in Argument I was the only issue addressed in the District Court's opinion, for the arguments and authorities cited herein, the District Court's decision should be affirmed in all respects.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. Mail, this 9th day of August, 1990, to MICHAEL B. DAVIS, ESQUIRE, Post Office Box 3797, West Palm Beach, Florida 33402, CHRISTOPHER D. MAURIELLO, ESQUIRE, Assistant County Attorney, Post Office Box 1989, West Palm Beach, Florida 33402, EDWARD CAMPBELL, ESQUIRE, 4114 Northlake Boulevard, Suite #202, Palm Beach Gardens, Florida 33410, STEPHANIE W. WERNER, ESQUIRE, Assistant County Attorney, Broward County, Governmental Center, Suite 423, 115 South Andrews Avenue, Fort Lauderdale, Florida 33301, CHARLENE V. EDWARDS, ESQUIRE, Assistant City Attorney, City of Tampa, 315 East Kennedy Boulevard, Fifth Floor, Tampa, Florida 33602, SUSAN H. CHURUTI, ESQUIRE, Pinellas County Attorney, 315 Court Street, Clearwater, Florida 34616, ROBERT R. WARCHOLA, ESQUIRE, Assistant County Attorney, Hillsborough County, Post Office Box 1110, Tampa, Florida 33601, V. LYNN WHITFIELD, ESQUIRE, Assistant City Attorney, City of West Palm Beach, Post Office Box 3366, West Palm Beach, Florida 33402, FRANC DORN, ESQUIRE, Department of Legal Affairs, Office of the Attorney General, The Capitol - Room 1502, Tallahassee, Florida 32399-1050, THOMAS R. SANTURRI, ESQUIRE, Attorney for Escambia County, Post Office Box 13410, Pensacola, Florida 32591 and PHILLIP C. GILDAN, ESQUIRE, Attorney for Academy of Florida Trial Lawyers, 1645 Palm Beach Lakes Boulevard, Suite 1200, West Palm Beach, Florida 33401.

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