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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, and PALM BEACH COUNTY,

Petitioners,

v.

LORETTA KONNEY, etc., et al.

Respondent.

Case No: 75,180

4th DCA No: 88-0727

BRIEF OF RESPONDENT, LORETTA KONNEY, Personal Representative of the Estate of DOUGLAS M. KONNEY, Deceased

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

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STATEMENT OF THE CASE AND OF THE FACTS

Respondent, KONNEY, will utilize the same party denotations as contained within Petitioner, DOT'S Brief. Further, KONNEY will rely upon citations to the Appendix attached to DOT'S Brief.

It has been KONNEY'S contention throughout the trial court and Appellate proceedings, that the intersection where the accident occurred constituted a known dangerous condition, and hidden trap, not readily apparent to the motoring public, which required that the governmental entities involved (DOT and COUNTY), must have taken steps to have adequately and properly warned the public, (including the decedent) of the danger, or to avert and correct same. (App. 11-12).

KONNEY sought to introduce evidence at the trial that the appropriate and adequate warning required for this intersection was a flashing warning beacon. (App 11-12) The trial court allowed this evidence to proceed, in the context of establishing what constituted an adequate and proper warning for the known dangerous condition of the intersection, under the facts of this case. (App 11-12)

SUMMARY OF ARGUMENT

In order for this Court to have jurisdiction of this cause, the Fourth District's opinion must, on its face, expressly and directly conflict with the decision of another District Court of Appeal, or of this Supreme Court. Article V, Section 3(b)(3), Fla. Const. The opinion at bar does not directly and expressly conflict with any opinion of this Court or any other District

Court of Appeal cited in the Petitioner's jurisdictional Brief. Therefore, this Court is without jurisdiction and should deny review.

Alternatively, should this Court find a jurisdictional basis for review, this Court should exercise its discretion and deny review. The opinion at bar conforms to the exception to the Sovereign Immunity Doctrine which this Court delineated in City of St. Petersburg v. Collom, 419 So.2d 1082 (Fla. 1982), as recently reiterated and refined in Kaisner v. Kolb, 543 So.2d 732 (Fla. 1989).

ARGUMENT

The Fourth District Court of Appeal opinion at bar is imminently correct in light of the controlling precedent in this State. In Kaisner v. Kolb, 543 So.2d 732 (Fla. 1989), this Supreme Court held that Florida Statute 768.28 waives sovereign immunity for any act which an individual under similar circumstances could be held liable. On its face, this Court's opinion adopts the position that there is no meaningful distinction between "planning/discretionary" level functions or "operational" functions of government. In essence, for there to be governmental immunity, there must either be an underlying common law or statutory duty of care with respect to the alleged negligent conduct.

In Department of Transportation vs. Neilson, 419 So. 2d 1071 (Fla. 1982) and in Ingham vs. Department of Transportation, 419

So.2d 1081 (Fla. 1982), this Supreme Court pointed out that when defects exist in particular alignments in road design which create a dangerous condition which the State and its political subdivisions have knowledge of, then the State has a responsibility to take steps to properly and adequately warn the public of the danger and/or to correct or avert same. The failure to warn of a known danger under such circumstances is not within the ambit of sovereign immunity and serves as a basis for an action against the State and its political subdivisions. Neilson, supra at 1077-1078.

In Neilson, this Court specifically deferred to its simultaneous decision in City of St. Petersburg v. Collom, infra, for "issues concerning engineering design defects establishing a known hazard." Neilson, supra, at 1078.

In City of St. Petersburg v. Collom, 419 So.2d 1082 (Fla. 1982), this Court held that:

> "[W]hen a governmental entity creates a known dangerous condition, which is not readily apparent to persons who could be injured by the condition, a duty at the operational-level arises to warn the public of, or protect the public from the known danger. The failure to fulfill this operational-level duty is, therefore, a basis for an action against the governmental entity." Id. at 1083. (emphasis added)

Once KONNEY established a known dangerous condition at the subject intersection, and DOT'S and COUNTY'S duty to properly warn, correct or avert such danger, the manner of effectuating an appropriate, proper and reasonable warning more consistent with the safety of the individuals involved, governed by the specific location and the concomitant issue of appropriateness, was a

question of fact for the jury. Kaisner v. Kolb, supra at 737-738; Payne v. Broward County, 461 So.2d 63 (Fla. 1984); City of St. Petersburg v. Collom, supra.

Thus, while Neilson may involve the dichotomy of "planning" versus "operational" level functions, Neilson did not involve a failure to warn of a known dangerous condition not readily apparent to persons who could be injured. This Court recognized specifically:

> "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." Neilson, supra, at 1078 (emphasis added).

Where the duty is to properly and adequately warn and/or avert or correct a known dangerous condition, there should be evidence admissible regarding what is proper and adequate. In Palm Beach County Board of County Commissioners v. Salas, 511 So.2d 544, 547 (Fla. 1987), this Court found that the adequacy of the warning is the important governing factor. The case at bar clearly fits within the exception to the Sovereign Immunity Doctrine carved out by this Court in City of St. Petersburg v. Collom, supra.

In Payne v. Broward County, supra, this Court acknowledged its continued adherence to the principle that a governmental entity has a duty to warn of a known trap. In Payne (after recognizing the Collom exception) the Court stated:

> "The only question, then, is whether the conditions created a known danger not readily apparent to potential victims or constituted a hidden trap for pedestrians. We conclude that they did not." Id. at 65.

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Therefore, this Court found that the facts of Payne did not fit within the Collom exception, while simultaneously acknowledging the continued viability of the Collom exception. Payne, supra, at 66.

In Perez v. Department of Transportation, 435 So.2d 830 (Fla. 1983), this Court (in rejecting a similar argument to that which is made by DOT herein), noted:

> "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 known dangerous condition. The placement of warning devices is a duty and is in part an exception to the principals set forth in Neilson that an inherent defect in a plan for improvement adopted by a governmental entity cannot subject the entity to liability." Id. at 832. (emphasis added)

In Perez, this Court put aside distinctions which might rest on whether a specific warning is a "traffic control device" or a "sign", but focused rather on whether the duty to warn of a known dangerous condition had been properly fulfilled. Id. at 832. Although the Court went on to generally differentiate between traffic control devices and warning signs, it did not hold that warning devices cannot meet the exception threshold of Collom, supra:

> "The placement of warning devices is a duty and, is in part, an exception to the principle set forth in Neilson, that an inherent defect in a plan for improvement adopted by a governmental entity cannot subject the entity to liability. . . ." (cite omitted) (emphasis added) Perez, supra, at 832.

In Bailey Drainage District v. Stark, 526 So.2d 678 (Fla. 1988), this Court was presented with a certified question from the Fourth District Court of Appeal as to whether sovereign

immunity bars an action against a governmental entity for failure to warn motorists of an intersection known by the government to be dangerous by reason of the lack of traffic control devices and obstructions to visibility located on the right-of-way. In addressing the certified question, this Court held:

> "We hold, however, in response to the certified question, sovereign immunity does not bar an action against a governmental entity for rendering an intersection dangerous by reason of obstructions to visibility if the danger is hidden or presents a trap and the governmental entity has knowledge of the danger but fails to warn motorists. Where a governmental entity knowingly maintains an intersection right-of-way which dangerously obstructs the vision of motorists using the street in a manner not readily apparent to motorists, it is under a duty to warn of the danger or make safe the dangerous condition. (cite omitted.) The failure to do so is a failure at the operational level." Id. at 681.

In State Department of Transportation v. Brown, 497 So.2d 678 (Fla. 4th DCA 1986), rev. denied, 504 So.2d 766 (Fla. 1987), as in the instant case, the DOT was aware of the dangerous condition, created by an intersection's highly unusual configuration, and had taken no adequate steps to properly warn the motoring public of it or to correct or avert it. The Court stated:

> "Where DOT knows of a dangerous condition that 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 failed to provide an appropriate warning." (cites omitted.) Id. at 680. (emphasis added.)

Reinhart v. Seaboard Coast Line Railroad Company, 422 So.2d 41 (Fla. 2d DCA 1982), pet. for rev. denied, 431 So.2d 989 (Fla. 1983), involved inadequate warning at a railroad crossing. The Court rejected DOT'S argument, (which is similar to the one at

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bar), that DOT is immune from liability for failure to warn of a dangerous condition because of its decision not to place extra warning at an intersection. The Court held that once the DOT became aware of a dangerous condition, it has the duty, at the operational level, to warn the public of or to protect them from the known dangerous condition. The adequacy of the warning device in an issue of fact for the jury.

The Fourth District's opinion at bar is in accord with the prevailing case law, and demonstrates on its face that it is not in conflict with any other District or Supreme Court opinion. It specifically recites that KONNEY proceeded to trial on allegations of DOT'S and COUNTY'S failure to adequately and properly warn of a known dangerous condition created by visibility conditions and the layout of the subject intersection. This theory of liability is uniformly recognized by this Court as being within the Collom exception to the Sovereign Immunity Doctrine.

Unlike some prior cases, Respondent was not attacking the underlying planning level decision as to what to install at any given intersection. Instead, Respondent asserted and proved that the Defendants had created a known dangerous condition or hazardous trap, and therefore had a duty to adequately and properly warn the motoring public, including the Plaintiff's decedent of the condition; which duty they failed to adequately fulfill.

The District Court expressly followed this Court's opinion in Payne, supra, that a governmental entity has a "concomitant duty to warn if the absence of a traffic control device creates a

trap or known danger not readily apparent to persons in or about the intersection". (App. 12) The District Court relied on Bailey, supra, recognizing that this Court had previously held that knowingly maintaining an intersection with a trap or hidden danger caused by obstructions to visibility subjects a governmental entity to a duty to warn of the danger.

Most significantly, the District Court found that inherent in the duty to warn is the duty to adequately warn in a manner more consistent with the safety of the motoring public. This common law precept pervades and is fundamental to the underlying action.

A careful reading of the allegations in the Neilson Complaint demonstrates the disparity between those facts and the case at bar. Neilson did not involve the adequacy of warning of a known dangerous condition. Neilson at 1078. The artificial distinction propounded by Petitioner, DOT, between flashing warning beacons (as a traffic control device) and signs, does not exist in the context of the underlying facts and analysis contained in the opinion at bar. Nor does such a contrived and strained reading of this Court's controlling precedent render the District Court's opinion in conflict. Accordingly, there is no express and direct conflict in the Fourth District Court of Appeals opinion in this case, with Neilson, or any other case cited in the Petitioner's Brief. There is no jurisdiction, pursuant to Article V, Section 3(b)(3), Fla. Const., and DOT'S petition should not lie. Department of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983).

South Florida Hospital Corporation v. McCrea, 118 So.2d 25 (Fla. 1960).

In McCrea, this Court found that there was no conflict in the opinion below with the purportedly conflicting opinion of the Supreme Court, in that:

> "The principle or point of law pronounced in the opinion under examination does not create contradictions in the case law of this state, but on the contrary there are harmonious tones from (the asserted conflict cases)." Id. at 31.

A careful reading of the facts and cases cited within the District Court's opinion at bar, shows that this opinion is in harmony with this Court's controlling position regarding sovereign immunity. It is submitted that Neilson, supra, and its progeny, read in the light of Kaisner v. Kolb, supra, conclusively demonstrate that there is no direct conflict in the instant opinion, as required by Article V, Section 3(b)(3), Fla. Const.

CONCLUSION

The District Court specifically followed this Court's pronouncements on the Sovereign Immunity Doctrine, determining that KONNEY had established that a known dangerous condition existed at the subject intersection, not readily apparent, and, therefore, the allowance of certain evidence regarding what the requisite warning should have been at the subject intersection to adequately warn drivers in a manner more consistent with the safety of the travelling public, did not entangle the Trial Court in fundamental questions of public policy or planning. Therefore,

there is not direct or express conflict, and this Court should find that it has no jurisdiction and deny the review sought.

Alternatively, if this Court should find that there is a jurisdictional basis, pursuant to Article V, Section 3(b)(3), Fla. Const., this Court should decline to exercise that jurisdiction, in that the Fourth District Court of Appeal's opinion clearly falls within the Collom exception, as clarified in this Court's recent opinion in Kaisner v. Kolb, supra.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by mail, this 10th day of January, 1990, to MICHAEL B. DAVIS, ESQUIRE, Davis, Hoy & Diamond, P.A., P.O. Box 3797, West Palm Beach, Florida 33402; and CHRISTOPHER MAURIELLO, ESQUIRE, P.O. Box 1989, West Palm Beach, Florida 33402.

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