OA 10-5

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs.

Case No. 75,180
4th DCA Case No. 88-0727

LORETTA KONNEY, etc., et al.

Respondents.

PALM BEACH COUNTY,

Petitioner,

vs.

Case No. 75,241
4th DCA Case No. 88-0727

LORETTA KONNEY, etc., et al.

Respondents.

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

PETITIONER, PALM BEACH COUNTY'S INITIAL BRIEF ON MERITS WITH APPENDIX

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POST OFFICE BOX 1989

Original

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PRELIMINARY STATEMENT

The Defendant/Petitioner, PALM BEACH COUNTY, shall hereinafter be referred to as "COUNTY." The Defendant/Petitioner, STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, shall hereinafter be referred to as "SOF DOT." If used together the COUNTY and SOF DOT will be referred to as "PETITIONERS."

The Plaintiff/Respondent, LORETTA KONNEY shall hereinafter be referred to as "KONNEY."

STATEMENT OF THE CASE

This proceeding is brought to review a decision of the District Court of Appeal of Florida, Fourth District, which affirmed a judgment for the Plaintiff/Respondent, KONNEY, entered pursuant to a jury verdict in the Circuit Court for Palm Beach County.

The Respondent, KONNEY, brought suit in the 15th Judicial Circuit as personal representative of the estate of Douglas M. Konney, decedent. The action sought damages for the alleged wrongful death of the decedent.

On December 18, 1987, the jury returned a verdict in favor of KONNEY and against each petitioner, finding the COUNTY 60% responsible and SOF DOT 40% responsible, accessing KONNEY'S damages at $260,000.00; $150,000.00 for the estate, $35,000.00 for LORETTA KONNEY, as survivor, and $75,000.00 for Ricky Konney, as survivor.

The COUNTY and SOF DOT thereafter served timely motions for a new trial and to set aside the verdict (R. 3244-3248), said Motions were denied by the Trial Court (R. 3266-3269). On February 23, 1988, the Court entered a Cost Judgment in favor of the Respondent/Konney, and against the Petitioners, SOF DOT and COUNTY, in the amount of $11,206.01, and a final judgment against SOF DOT in the amount of $99,400.00 and against the COUNTY in the amount of $149,100.00 (R-3270-3273).

On March 18, 1988 and on March 25, 1988, SOF DOT and the COUNTY, respectively, filed their Notices of Appeal to the Fourth District Court. On July 19, 1989, the Fourth District Court affirmed the decision of the Trial Court (App. #1). Following timely Motions for Rehearing and Certification by the Petitioner SOF DOT filed on August 3, 1989 (App. #4). District Court granted a Rehearing and entered a modified opinion on November 15, 1989 (App. #7); the decision was ultimately rendered by the Court's entry of an Order, dated November 21, 1989, denying SOF DOT'S Motion for Certification (App. #10). Thereafter, on December 11, 1989, Petitioner, SOF DOT filed its Notice of Intent to Invoke a Discretionary Jurisdiction of this Court (Case No. 75,180; App. #11). On December 20, 1989, Petitioner, PALM BEACH COUNTY, filed its Notice of Intent to

Invoke the Discretionary Jurisdiction of this Court (Case No. 75,240; App. #13). Upon Motion by the COUNTY on January 12, 1980 (App. #15) this Court consolidated the aforementioned cases for all appellate purposes and granted the COUNTY permission to adopt the jurisdictional brief filed by SOF DOT (App. #18).

On June 20, 1990, this Court accepted jurisdiction of the consolidated cases (App. #19).

STATEMENT OF THE FACTS

This suit arises out of an automobile accident which occurred at about 9:15 p.m. on January 23, 1983 at the intersection of State Road 710 (Beeline Highway) and County Road 809 (West Lake Park Road) (R: 542, 550-1).

State Road 710 and the traffic control devices governing traffic thereon were under DOT jurisdiction; County Road 809 and the traffic control devices governing traffic thereon was under County jurisdiction (R: 1784-1785). SR 710 ran generally from the Northwest to the Southeast; C809 ran generally east to west; they intersected in a manner to create two acute and two obtuse angles rather than, as is more common, four right angles (R: 689-90; App. 21).[1] In order to facilitate turning and reduce the hazard of right hand turns on a skew angle, the intersection had two additional legs as illustrated in the Appendix diagram hereto (R: 985-986; App. 21). Traffic travelling west upon C809 was governed by a stop sign at the main intersection; 488 feet in advance of the stop sign was a stop ahead warning sign; in addition, the roadway surface was painted with appropriate stop bars and markings in reflective paint (R: 937-938; 1403). The speed limit on C809 was 55 mph (R: 1401). Traffic moving south on SR 710 had the right of way through the intersection. There were no traffic signals at the intersection on the date of this accident.

On Friday, January 23, 1983, George Funk with a friend Mark Sylvester, drove down to Gulfstream race track in Hallandale, Florida from Stuart, Florida in Funk's Thunderbird (R: 588-589). While there, according to Sylvester, Funk consumed two beers and, perhaps, a hot dog over the course of 2-3 hours (R. 592-593; 610). They left the track at 5:30 - 6:00 p.m., and, after some difficulty in locating I-95 they proceeded north on US-1 to a bar in Lake Worth (R. 601, 604). According to Sylvester, they each had only one drink at the bar and left after about an hour, driving north to Northlake Boulevard (R. 594,

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[1] For purpose of simplification in reciting the facts, the northwest direction of SR 710 will be referred to as north and the southeast direction as south.

596). Thereafter, they drove west on Northlake (C809), intending to reach SR 710 and travel northwest to 711 and from there to 76 before heading back east to their destination (R. 596, 605-608). Both Funk and Sylvester were somewhat familiar with the C809 - SR 710 intersection (R. 597, 613).

As Funk and Sylvester travelled on C809 west of Military Trail, they were followed by Kenneth Parramore, a game officer (R: 545). Although Parramore did not observe their vehicle weaving, it did slow down and speed up on several occasions with no apparent purpose over the last two miles before it reached the intersection (R: 548, 565-566). He observed Funk and Sylvester in sustained conversation up to 1/4 mile from the intersection -- after which he did not have occasion to see if they were still talking (R. 548, 569). The speed of the Funk vehicle was between 45-55 mph (R. 546). When Parramore was several hundred feet from the main intersection, he observed the glow of headlights from a car (Konney) headed south on SR 710 (R. 552-553, 569-570). At that point he was several car lengths behind Funk and began to slow down for a right turn (R. 570). Funk continued into the intersection, ignoring the stop sign without slowing and without applying his brakes (R. 550-1). Parramore had no trouble seeing the stop sign, which was clearly visible that night (R. 567, 573, 648-649).

Douglas Konney was an employee at Pratt-Whitney; he had, over the preceding years, worked on both the first (8:00 a.m. - 4:00 p.m.) shift and the second (4:00 p.m. - 12:00 a.m.) shift (R. 1477, 1953-1954). On the date of the accident, he had been working the second shift and got off at about 9:00 p.m.; he was headed home in his Camaro (R. 1479). He always drove SR 710 to and from work, night and day (R. 1955-1956).

As Konney approached the intersection, he apparently observed Funk's vehicle passing or about to pass the stop sign and applied his brakes, leaving 35 and 41 foot skid marks prior to the impact between the two vehicles (R. 631, Def.'s Ex. 4). Konney was killed in the collision; Funk, complaining afterward of chest pains, died that night in the hospital; Sylvester survived with less serious injuries.

Parramore, observing the accident, called for police and emergency

assistance and returned to the scene within 5 minutes of the accident (R. 554-555). He smelled the strong odor of alcohol in and about the Funk vehicle when he checked on the condition of Funk and Sylvester (R. 558; 584-585). There was no spilled or broken alcohol containers in the car and Sylvester denied that they had any alcohol with them (R. 570, 595, 612, 635-636).

The investigating officer, Deputy Charles Bowers, had blood drawn from Funk at the hospital (R. 632, 650, 1537-1565, 1942-1945). It indicated a blood alcohol level of .095 at the time of drawing; at the time of the accident it would have been higher (Pintacuda's deposition).

The DOT accident records indicated that the section of SR 710 which included the main intersection and two legs (1/3 of a mile length) was far below the statewide accident rate averages for such sections of two-lane roads (Pl.'s Ex. 33; Def.'s Ex. 2 a & b; R: 841, 856-61). From 1973-1977, there were no recorded accidents on the section; in 1978-1982 there were a total of 12 accidents at the intersection (Pl's. Ex. 2 a & b). The accident rates for these latter years were 3.546, 1.209, 3.448, 0 and 5.174 accidents per million vehicle miles. The statewide average ran between 11.116 and 12.412 for these years (Pl.'s Ex. 33). Thus in all prior years the accident rate was significantly less than 1/3 of the statewide average, except for 1982 when it was about 40% of the statewide average.

Since C809 was a county road, the traffic count upon that road was not included in the average daily traffic count for section of SR 710. The inclusion of this additional traffic passing through the intersection would lower the computed accident rate even further (R. 862-864).

The DOT identifies potentially dangerous sections (whether straight sections, curved sections or intersections) of the state road system through use of a computer generated list called a High Accident Section List. The List for the DOT'S 4th District, which encompasses Palm Beach County, includes about 200 such sections each year (R. 840). On no year did this intersection appear on the list (R.782).

KONNEY contended that the DOT and COUNTY should have installed a

flashing traffic control beacon at the intersection which would flash red for traffic on C809 and yellow on SR 710 (R.939). KONNEY also contended that the COUNTY should have installed rumble strips on C809 at the approach to the intersection (R.939). Finally, KONNEY criticized the location and type of signing on each roadway.

SUMMARY OF ARGUMENTS

The COUNTY raises four (4) separate points on appeal which individually and taken together resulted in harmful error at the trial below.

(1) The COUNTY joins with SOF DOT in arguing that the trial judge erred by allowing KONNEY to submit that a flashing beacon should have been installed at the intersection in question. This was a basic discretionary decision which also involved a capital improvement and therefore sovereign immunity barred such argument. Additionally, this case does not center upon the "known dangerous condition" exception recognized in Florida to a claim of sovereign immunity since the flashing beacon in this case was designed and classified as a traffic control device, not a warning device.

(2) Over objection the trial judge allowed KONNEY'S expert to testify as to 18 prior and subsequent accidents occurring at the intersection in question.

KONNEY'S expert relied solely upon the written police accident reports to argue that a dangerous condition existed at the intersection and that these other accidents were substantially similar to KONNEY'S. The COUNTY objected to the grounds that these reports were hearsay and that an inability to cross-examine the suppliers of the information was extremely prejudicial.

Additionally, many of these other accidents occurred after the COUNTY installed rumble strips on the roadway. The installation of rumble strips was a remedial measure taken subsequent to KONNEY'S accident. It was part of the two-tier warning system (rumble strip and flashing beacon) which KONNEY contended would have made the intersection safe at the time of Mr. Konney's accident (R. 481, 941). Accidents occurring subsequent to the installation of rumble strips were, therefore, not substantially similar to KONNEY'S accident since this was a material change in condition.

(3) The trial judge erred by excluding the testimony of toxicologist, Jay Pintacuda, and the disclosure of the alcohol level of one of the drivers (Mr. Funk). This evidence which was the crux of the PETITIONERS' case was excluded on reliability and authenticity of the blood drawing and

testing procedure. Moreover, since Mr. Funk was a driver of the vehicle that collided with and killed Mr. Konney his actions (including alcohol consumption) went directly to this issue of causation and were extremely relevant.

(4) At the trial below the judge made prejudicial opening remarks to the jury including a comment inferring lack of due care by PALM BEACH COUNTY which was a named defendant in this lawsuit. Since the comments were made before the jury was sworn, the judge abused her discretion by not dismissing the venire after an objection was made by counsel. The comments which centered around poor courthouse conditions were not only recounted a number of times by the judge but were reinforced by strong media attention to the issue.

I

ISSUE PRESENTED UNDER THIS COURT'S POWER TO INVOKE DISCRETIONARY REVIEW

THE TRIAL JUDGE ERRED IN ALLOWING EVIDENCE OF THE NEED FOR A FLASHING BEACON AT THE INTERSECTION IN QUESTION

During the pretrial hearings the trial judge heard arguments from SOF DOT and the COUNTY to exclude evidence regarding the need to install a flashing beacon at the intersection in question. (R. 4-22; 29-35; 86-105).

There has never been a flashing beacon at the intersection nor has a decision to install one been made prior to Konney's accident. The Petitioners argued that the statutory waiver of sovereign immunity did not extend to evidence of a flashing beacon since:

(A) A flashing beacon installed at the intersection in question is a traffic control device.

(B) Installation of a flashing beacon has specifically been found to involve a major capital expenditure.

(C) Installation of a flashing beacon involves a decision at the planning level versus operational level of government.

(A) A Flashing Beacon Installed at the Intersection is a Traffic Control Device

Originally, the trial judge granted the Petitioner's Motion to exclude any evidence regarding the decision or need for a flashing beacon. (R. 22). She later reversed herself when KONNEY argued that the case sub judice is distinguishable from this Court's decision in **Department of Transportation v. Neilson, 419 So.2d 1071 (Fla. 1982)**, since the flashing beacon in this case is a warning device not a traffic control device (R. 105).

In a similar vein KONNEY argued that the instant case was more aligned with **Perez v. Department of Transportation, 435 So.2d 830 (Fla. 1983)**, since **Perez** involved an allegation of a known dangerous condition. (R. 16-17).

In **Neilson**, however, the plaintiff alleged the need for a flashing beacon at the intersection in order to warn of hazardous conditions. Specifically, paragraph 17 of the plaintiff's complaint in **Neilson** alleged that the intersection because of its geometry was:

> dangerous and hazardous to motorists traversing the streets merging into said intersection; that said streets merging into said intersection were not adequately controlled with traffic control signs and devices, to wit: red, green and yellow traffic signals positioned in such a manner as to govern the flow of traffic to said intersections in an orderly manner or blinking and flashing lights clearly indicating to the motorist approaching said intersection that same was a hazardous and dangerous intersection and governing the flow of traffic accordingly and such necessary traffic control devices so as to alert the motorist using said intersecting streets of the nature of the dangerous and defective roadway and intersection. **Neilson at 1073-74, Footnote 2.**

As stated by this court,

> As we read it, the **Neilson's** complaint alleges failure to . . . warn of hazardous conditions through the installation of traffic control devices. **Id.** at 1078.

Therefore, assuming arguendo, that the flashing beacon is a traffic control device which is/can be used as a warning device the instant case is indistinguishable from **Neilson.**

Although the **Perez** decision concern the "known dangerous condition" exception to governmental immunity, **Perez** did not involve traffic control devices more directly addressed in **Neilson**. Nothing in **Perez** conflicts with this court's recognition in **Neilson** that upgrading a roadway with more sophisticated methods of traffic control devices than those actually used cannot give rise to liability. **Neilson** at 1076, citing **Romine v. Metropolitan Dade County, 401 So.2d 882 (Fla. 3rd DCA 1981)** review denied, **412 So.2d 469 (Fla. 1982).**

Equally important, the basis used by the trial judge to distinguish this case from **Neilson** (beacon as a warning device versus traffic control device) crumbled by the end of the testimony of KONNEYS' engineering expert, Mr. Arnold Ramos. Initially, Mr. Ramos testified that a "hazard identification beacon"

(Manual of Uniform Traffic Control Devices §4(E)(1) (1978)) as opposed to the "intersection control beacon" (§4(E)(3)) should have been placed by the PETITIONERS at the intersection.[2] (R. 942-3). On cross examination, however, Mr. Ramos openly recognized that he had made a mistake and that the hazard identification beacon could not, in fact, be used at the intersection in question[3] (R. 1001-2; 1129-30). Thus, KONNEY'S preliminary argument that a flashing beacon was part of the "highest level of warning available" suddenly became unavailable.

The only remaining device available to KONNEY became the "intersection control beacon." Said device is not a warning device at all but which is, by definition, a traffic control signal[4] (R. 997-1008; Pl.s Ex. 18, §4(E)(3)). Thus, although KONNEY has consistently argued that she pled the "known dangerous condition" exception under **Perez** evidence of the flashing beacon had nothing to do with PETITIONERS duty to warn.

In actuality this case treads directly upon the numerous decisions including **Neilson** which recognize that traffic control as opposed to warning of a known dangerous condition is strictly within the police power of the governmental entity. **Neilson at 1077; Romine v. Metropolitan Dade County, 401 So.2d 882 (Fla. 3rd DCA 1981); Palm Beach County Board of County Commissioners v. Salas, 511 So.2d 544 (Fla. 1987); Ralph v. City of Daytona Beach, 412 So.2d 875, 878 (Fla. 5th DCA 1982).**

(B) Installation of a Flashing Beacon Involves a Major Capital Expenditure

Although this court has clearly recognized a concomitant duty to warn of a known dangerous condition, **City of St. Petersburg v. Collum, 419 So.2d 1082**

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[2] The "hazard" beacon has a circular yellow traffic signal head which flashes for both roads.

[3] The M.U.T.C.D. forbids its use at an intersection where, inter alia, a stop sign is present - §4(E)(1)(5).

[4] KONNEY introduced numerous blowups depicting such beacons (Pl.s Exhibit #30 A-6)

(Fla. 1982) no case, except the instant, has obligated the government to construct a capital improvement such as an electric traffic control beacon.

In **Trianon Park Condominium v. City of Hialeah,** 468 So.2d 912, 917 (Fla. 1985) this court set forth certain "basic principles" regarding governmental tort liability. As this court made clear in **Trianon**:

> There is no liability for the failure of a governmental entity to build, expand or modernize capital improvement such as buildings and roads. **Id. at 912.**

A flashing control device suggested by KONNEY requires the running of electrical wires, erection of concrete poles and a cost (Circa 1983) of up to $12,000.00 (R. 970).

In **Neilson**, the precise issue considered by this Court was whether the decisions concerning the installation of traffic control devices may constitute omissions or negligent acts which subject the government to liability. **Id. at 1077.** In answering the question in the negative this court specifically recognized the arguments made by the petitioning governmental entities that a contrary holding would in essence obligate the governments to build "cadillac" roadways and that no matter how the government decides to build a road the actions would be subject to second guessing and review by a judge and jury. **Id** at 1074. The COUNTY respectfully urges this court to recognize the inherent validity of these arguments.

KONNEY'S reliance on this court's decision in **Palm Beach County Board of Commissioners v. Salas**, 511 So.2d 444 (Fla. 1987) (Answer Brief to 4th DCA pgs. 8-9) is misplaced. **Salas** did not involve the issue of upgrading traffic control devices or the initiation of capital improvements, et al. In **Salas**, the COUNTY relied on minimum standards in a maintenance manual and asserted that the manual is the only proper standard of care. **Id. at 545.** **Salas** does not stand for the proposition as KONNEY suggests that once the plaintiff makes an allegation of a known dangerous condition the governmental entity must undertake major capital expenditures.

(C) Installation of a Flashing Beacon Involves a Decision at the Planning Level versus Operational Level of Government

As recognized by this Court in **Nielson** decisions regarding the installation of traffic control devices involves not only a capital expenditure but a discretionary decision which are judgmental, planning level functions. **Id. at 1077**.

This court recently revisited the so-called "discretionary function" in **Kaisner v. Kolb, 543 So.2d 732 (Fla. 1989)**.

It is respectfully submitted that KONNEYS' assertion (jurisdictional Brief pg. 2) that **Kaisner** stands for the proposition that there is no meaningful distinction between "planning/discretionary" functions of government and that there must be a common law or statutory duty of care for governmental immunity is in a word, false.

In **Kaisner** this court specifically found that:

> A court must find no liability as a matter of law if either (A) no duty of care existed, or (B) the doctrine of governmental immunity bars the claim. **Id. at 734.**

Although this court found that the terms "discretionary" and "operational" are subject to broad definition, this court recognized the importance of this immunity and its roots in the doctrine of separation of powers. **Kaisner at 736** citing **Trianon, 468 So.2d at 918 (Fla. 1985); Commercial Carrier v. Indian River County, et al., 371 So.2d at 1022 (Fla. 1979).**

Using the test outlined in the **Evangelical United Brethren Church v. State, 67 Wash.2d 246, 255, 407 P.2d 440, 445 (1965)** (adopted in **Commercial Carrier, 371 So.2d at 1019**) this Court found that on its facts (officers failing to use proper procedure during traffic stop) did not entangle this Court with the decision making of the execution or legislative branch or in fundamental questions of public policy or planning. **Kaisner, supra at 737-8.**

As stated previously, this Court, however, has already recognized in **Neilson** the danger of such entanglement in decisions regarding traffic control devices. As opposed to reviewing police procedures once an individual is in

custody, reviewing the proper method of traffic control (including traffic control device implementation) clearly engages the courts in the decision-making of the executive and legislative branches.

In **Commercial Carrier** this court used the "Evangelical test" to determine whether maintenance of existing traffic control devices was operational in nature or a discretionary act. **Id. at 1018-19.** Although the Court found that the maintenance of a device already erected was an operational level activity it specifically withheld application of the test to decisions concerning the installation of said devices in the first instance, such as the case at bar. **Id. at 1022.**

The various district courts have until this case consistently found that the initial decision to install traffic signal devices is inherently a planning level determination. See **Ingham v. State, DOT, 399 So.2d 1028 (Fla. 1st DCA 1981)** (failing to provide adequate signalization-immune discretionary function) **A.L. Lewis Elementary School v. Metropolitan Dade County, 376 So.2d 32 (Fla. 3rd DCA 1979)** (traffic signal installation is a discretionary policy matter) **Ferri v. City of Gainesville, 362 So.2d 345 (Fla. 1st DCA 1978)** (no right to have a particular device installed at a particular time).

Both established precedent and an application of the "evangelical test" to this cause clearly indicate an act which is purely discretionary and governmental.

II.

ADDITIONAL ISSUES PRESENTED FOR REVIEW UNDER THIS COURT'S PLENARY POWER

A.

THE TRIAL JUDGE ERRED BY ALLOWING REFERENCE TO CERTAIN PRIOR AND SUBSEQUENT ACCIDENTS TO PROVE NOTICE AND THE EXISTENCE OF A DANGEROUS CONDITION

KONNEYS' engineering expert, Mr. Arnold Ramos, reviewed over objection, eighteen prior and subsequent accidents which occurred at the intersection in question. (R 892-972). KONNEY contended that the prior accidents were being utilized to prove both notice and the existence of a dangerous condition (R-406), while the subsequent accidents were being used solely to demonstrate the existence of a dangerous condition (R-393).

The COUNTY, raised two primary objections to the use of these "other accidents" which are restated here:

(1) Hearsay of Accident Reports.
(2) Not Substantially Similar (Material Change in Condition)

(1) HEARSAY OF ACCIDENT REPORTS

None of the witnesses or individuals who were involved in any prior or subsequent accident were produced at trial.[5] Instead, in order to prove both notice and the existence of a dangerous condition KONNEYS' expert relied solely on the information contained within the hard copies of police accident reports (R 892-972).

The County objected on the grounds that the information contained within these reports was hearsay (R-893,894,954, 963). The court overruled the objections.

In total Konneys' expert reviewed eight prior and ten subsequent accidents. The reports themselves were utilized in order to determine, inter

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[5] In the present cause Konney listed all of the participants and police officers involved in the prior and subsequent accidents in their pretrial witness list. (R. 2751-2777a).

alia, speed of vehicles (R-959), direction of travel (R-958), angle of impact (R - 958) and conclusions by police officers as to the cause of the accident (i.e., running a stop sign) (R - 954, 960, 961). All of the above information was disclosed to the jury. Additionally, information contained within the accident reports was used by KONNEY via the testimony of her expert to keep a running tabulation on the number of injuries and fatalities (R-954, 958, 961-964, 970).

Since the subsequent accidents were being utilized solely to establish the existence of a dangerous condition they were being offered to prove the truth of the matter asserted (i.e., cars were running stop signs -- fatalities were occurring). More importantly, all of the accident reports, both prior and subsequent were being offered to prove their substantial similarity (relevance) to the accident at issue and use of the reports in this context was clearly hearsay.

In **Cahill v. Dorn**, 519 So.2d 56, (Fla. 4th DCA 1988), the Fourth District Court examined the admissibility of non-party driver's statements which formed the basis of a police officer's report. In addition to finding that the statements are barred under 316.066(4) Florida Statutes (1985) the Court held that such statements are inadmissible hearsay. **Id.** at 56.

It is respectfully submitted that the testimony of KONNEYS' expert at the trial of this cause was even more violative of the hearsay rule than in **Cahill**. In **Cahill**, the officer who prepared the report was at least produced at trial. **Id.** at 56. In the instant case, the judge permitted hearsay on hearsay since KONNEYS' expert relied upon information from a police officer who, in turn, relied on the statements and observations of witnesses. Neither the COUNTY nor SOF DOT was given the opportunity (the primary rationale underlying the hearsay rule) to cross examine the suppliers of the information.

Accident reports prepared by police officers which are based upon witness statements have consistently been viewed as hearsay, **Town of Belleair v. Taylor**, 425 So.2d 669 (Fla. 2nd DCA 1983). See also **State v. Inman**, 347 So.2d 791 (Fla. 3rd DCA 1977) (Police Accident Report Hearsay when based upon witness statements); **Duffel v. South Walton Emergency Services, Inc.,** 501 So.2d 1352,

(Fla. 1st DCA 1987) (Statements made to officer inadmissible hearsay - not within any exception). Also **United States v. Hicks**, 420 F.2d 814 (5th Cir. 1970); **Yates v. Bair Transport, Inc.**, 249 F.Supp. 681 (S.D.N.Y 1965); Annotation, 69 A.L.R. 2d 1148.

Whether or not KONNEY established that these other accidents were substantially similar to the accident in question (a point addressed shortly) did not sanction the use of hearsay information.

The inherent unreliability of information contained solely within the four corners of police reports was clearly illustrated at trial. Mr. Ramos hypothesized that a subsequent accident occurring on February 20, 1986 and which resulted in five fatalities had no drinking involved (R - 964) and was therefore substantially similar to KONNEYS' accident.[6]

A review of the entire homicide report, however, revealed that the driver who drove over rumble strips (subsequent measures placed on roadway), and ran the stop sign was intoxicated with a .19 alcohol level. Since this fact itself was hearsay, KONNEY'S expert could only be cross-examined on his failure to review the report (R-1105).

More importantly, this one example illustrates how prejudicial it was to the COUNTY'S case for the trial judge to allow KONNEY'S expert to parrot the unreliable information within these reports.

On appeal before the Fourth District Court KONNEY took no issue with the fact that the 18 accident reports reviewed were hearsay. Instead, on appeal KONNEY asserted for the first time that Florida Statute §90.704 sanctioned the use of information in these reports to support her expert's opinion that the roadway was dangerous and that the Petitioners were on notice of it. (See KONNEYS' Answer Brief pg. 23 to the Fourth District Court, Case No. 88-0727).

As recognized by Florida Courts, Florida Statute §90.704 is frequently utilized at trial to permit doctors to base their medical opinions upon tests and laboratory reports which are not admitted into evidence. **Bender**

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[6] The fact that five (5) fatalities had occurred was disclosed to the jury along with the false conclusion regarding alcohol consumption.

v. State, 472 So.2d 1370 (Fla. 3rd DCA 1985). These opinions, however, are normally supported by additional facts which are in evidence or by an examination of a patient whom the jury has also observed. Riggins v. Mariner Boat Works, Inc., citing Robinson v. Hunter, 506 So.2d 1106 (Fla. 4DCA 1987 rev. denied, 518 So.2d 1277 (Fla. 1987); Bender, supra. There is, in fact, a long line of cases which prohibit the use of expert testimony if used merely to serve as a conduit to place otherwise inadmissible evidence before the jury. Riggins, 545 So.2d 432 (Fla. 4th DCA 1989); Smithson v. V.M.S. Realty, Inc., 536 So.2d 260 (Fla. 3rd DCA 1989); 3-M Corp. - McGhan Medical Reports Div. V. Brown, 475 So.2d 994 (Fla. 1st DCA 1984); See also Ehrhardt, Florida Evidence, §704.1 (2nd Ed. 1984).

In Riggins, supra, defendant's expert (chemical toxicologist) was permitted at trial to opine the deceased's blood alcohol level, relying exclusively (as in the instant case) upon a report which was otherwise inadmissible hearsay. As in the case at bar, the defendants in Riggins failed to call those who actually prepared the report.

The Second District Court reversed a verdict in favor of the defendants and held that the expert's testimony was merely used as a conduit to get the inadmissible report before the jury. Id. at 432. Additionally, the court found that such a tactic unfairly prejudices the opposing party and misleads the jury by,

> emphasizing otherwise inadmissible evidence and placing an aura of truth upon a document which is legally unreliable. Id. at 432.

Equally important, facts or data are presentable under Florida Statute §90.704 if they are of a type reasonably relied upon by experts in the field to support the opinions expressed. Florida Statute §90.704; Bunyak v. Clyde J. Yancey and Sons Dairy, Inc., 438 So.2d 891, (Fla. 2nd DCA 1983). (emphasis added).

In the case at bar, there was absolutely no predicate testimony which established that the reports were either relied upon by experts in Mr. Ramos' field (Engineering) or that they were being used to support his opinions.

In fact, at trial KONNEY'S expert specifically testified that

accident reports were not relevant to support any of his opinions including the fact that the intersection in question was dangerous. All of Mr. Ramos' opinions were given before he and KONNEY'S counsel reviewed hard copies of police reports. (R - 938). Mr. Ramos testified that his opinions were:

> based on no great hindsight other than looking whats happened throughout the state and history of this type of intersection given the rural conditions and high speeds... (R - 939).

The COUNTY respectfully refers this Court to the record (R-949) wherein KONNEY specifically questioned her expert as to whether any reliance was placed on accident reports to support his opinions:

> Q: Did you have to have any accident data before making the engineering conclusion that those devices should have been in place at this intersection?
>
> A: My conclusion is the fact that given the geometrics of this intersection, given the fact that its a rural setting with high speeds and its an area where accident will begin to happen given sufficient growths in time of traffic, and you have a location in which you can anticipate accidents.
>
> Q: In your opinion did you need accident data --
>
> A: Based on just that, if someone were to bring me that data and say we're constructing this intersection and it looks like this, I can tell them at that point that they, without the accident data since the road is not yet built, its a candidate for an area to have trouble unless certain devices were to go in. (R.950, emphasis added).

And on a second attempt by KONNEY'S counsel:

> Q: In your opinion would it have been necessary to have any accident data in hand to have installed the flashing beacon and the rumble strips.
>
> A: No sir...

Despite the black and white record on appeal KONNEY now argues that reference to police accident reports was permitted since it was information

relied upon to support her experts' opinions. This is plainly incorrect.

In actuality KONNEY made no attempt to produce any participants, witnesses or police officers from any prior or subsequent accident. All of the information including speed of vehicles, causation, etc., came from the hard copies of police accident reports. This amounted to the mere parroting of nontestifying witnesses, a tactic to which Florida Statute §90.704 was not intended and specifically denounced. **Sikes v. Seaboard Coast Line R. Co.,** 429 So.2d 1216 (Fla. 1st DCA 1983) 11 Moore and Bendix, Moore's Federal Practice §703.10(3) (2nd Ed. 1982). The review of these numerous accidents without the legal right to cross-examination of witnesses was extremely prejudicial to the COUNTY.

(2) NOT SUBSTANTIALLY SIMILAR (MATERIAL CHANGE IN CONDITION)

Admittedly, the decision to allow evidence of prior or subsequent accidents is a discretionary decision which rests primarily with the trial judge. **Lasar Manufacturing Company, Inc., v. Bachanov,** 436 So.2d 236 (Fla. 3rd DCA 1983). This decision, however, is not unqualified, for prior or subsequent accidents are relevant and material only if proven to be substantially similar. **I.B.L. v. Florida Power and Light Company**, 400 So.2d 1288 (Fla. 3rd DCA 1981); See also **Seaboard Coast Line Railroad Co. v. Friddle**, 290 So.2d 85 (Fla. 4th DCA 1974).

In **Seaboard, supra**, Judge Mager in his dissenting opinion (adopted by this Court, 306 So.2d 97 (Fla. 1974)) recognized that testimony of other accidents is admissible in Florida "under certain qualifications." 290 So.2d 85, 89.

These qualifications are stated as follows:

> (1) where the accidents occurred at the same place and under conditions which were at least substantially similar to the accident in dispute; (2) where the similar accident evidence has some tendency to establish a dangerous or defective condition at the place in question; (3) where the offer of evidence is to prove not negligence but notice of the dangerous character of the conditions; (4) where the evidence of the similar

> accidents offered to establish the existence of a dangerous condition is not too remote in time to the accident or condition to which such other accidents are claimed to be similar.

At the trial below the COUNTY argued in Motion in Limine that accidents which occurred subsequent to KONNEYS' accident and subsequent to remedial measures were not substantially similar (R. 387-90).

Factually, KONNEY'S accident occurred on February 15, 1983. In April of 1983 the COUNTY increased the number and size of stop signs at the location (R-389), but more importantly, in December of 1983 the COUNTY installed rumble strips. (Rumble strips consists of 5-6 bumps placed directly on the pavement surface preceding the stop sign).

It was KONNEYS' position at trial that warning signs alone would not correct the dangerous condition at the intersection but that rumble strips coupled with a flashing beacon would (R-403). In spite of this contention, KONNEY argued that accidents occurring after the installation of rumble strips evinced a dangerous condition and were substantially similar to KONNEYS' accident (R-401-404).

The COUNTY asks respectfully, albeit rhetorically: How can the condition of the intersection be substantially the same after a precise warning which KONNEY suggested to the jury should have been in place, was in place?

Of the cases establishing precedent in this area, none involve the admission of accidents after material remedial measure were taken.

In **Chambers v. Loftin**, 67 So.2d 220 (Fla. 1953) this Court held that other accidents involving the same equipment (circular power saw) should have been admitted on the issue of notice to the defendant of a dangerous condition. **Id.** at 222.

In **Seaboard Air Line Ry. Co. v. Hawes**, 269 So.2d 392 (Fla. 4th DCA 1972) the court allowed evidence of another accident involving the same rail crossing signal as the Respondents, occurring one day after. **Id.** at 395. The court permitted the evidence because of the stable nature of the equipment and conditions involved. **Id. at 395.**

The landmark case of **Seaboard Coast Line Railroad v. Friddle**, 290 So.2d 85, (Fla. 4th DCA 1974) (dissenting opinion adopted by Florida Supreme Court), 306 So.2d 97 (Fla. 1974), likewise concerned a static condition not present in the case sub judice. **Friddle** involved the admission into evidence of a prior accident occurring at the same railroad crossing. 290 So.2d 85, 88. The objection raised to its admissibility concerned the fact that the prior accident occurred during the day and was west to east accident, while the **Friddle** accident occurred at night and was from east to west. **Id.** at 89, See Footnote 2. Since the other accident in **Friddle** was a prior accident and did not occur after subsequent remedial measures were introduced, **Friddle** is totally distinguishable from the case at bar.

In short, while the COUNTY is mindful of the fact that substantial similarity does not require exactness, it does require at a minimum that there is no substantial disparity between the different warning devices in place. The existence of rumble strips, which by KONNEY'S own assertion, involved a different level of warning than road signs (R - 915, 922) and part of the "highest level of warning available" (R - 481, 941) as a matter of law was a substantial change at the intersection.

Moreover, the public policy rational behind the "subsequent remedial measures" rule applies with equal force here. By allowing evidence of accidents after subsequent remedial measures had been taken the trial court placed the COUNTY in a position of (A) either revealing to the jury that subsequent remedial measures were actually taken or (B) remaining silent (as in the instant case) and creating the false impression that subsequent accidents were allowed to continue without any remedial concern.[7]

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[7] In the instant case this impression was confirmed by the jury's written recommendation that both defendants place high levels of warning at the intersection.

B.

THE TRIAL JUDGE ERRED IN PREVENTING PETITIONERS FROM PRESENTING EVIDENCE OF MR. FUNK'S BLOOD ALCOHOL LEVEL

At the trial of this cause both SOF DOT and the COUNTY sought to establish the blood alcohol level of Mr. Funk (driver of other vehicle). The trial judge sustained KONNEYS objections and excluded the entire testimony of toxicologist, Jay Pintacuda and the blood alcohol level of Mr. Funk (R-1566).

KONNEYS' objections (R-1544 through R-1551) can succinctly be restated as:

(A) Irrelevant - Mr. Funk not a party to lawsuit;

(B) Failure to establish reliability of blood drawing method;

(C) Failure to establish chain of custody;

(D) Failure to establish the qualifications of the technician who drew the blood under H.R.S. guidelines.

(A) Irrelevant - Mr. Funk Not a Party to Lawsuit

At trial, KONNEY relied on **Seaboard Coast Line Railroad v. Zufelt, 280 So.2d 723 (Fla. 1st DCA 1973)** and **Salas v. Palm Beach Board of County Commissioners, 511 So.2d 544 (Fla. 1987),** to support her position that because Mr. Funk was not a party to the lawsuit his negligence was not an issue; and therefore, his blood alcohol level should be excluded. (R 1548-1549).

It should first be noted that **Zufelt** was decided well before **Brackin v. Boles, 452 So.2d 540 (Fla. 1984)**, and as noted by the First District Court in **Zufelt**;

> As we view the record, the trial judge based his ultimate decision in rejecting the blood alcohol test upon the exclusionary provision of Florida Statute §317.171... **Id. at 724.**

In **Brackin**, this Court held that Florida Statute §316.066 (successor

statute to §317.171) does not bar the introduction of blood test results in a civil trial. **452 So.2d 540 at 542.**

In **Zufelt,** a 16 year old Plaintiff was a passenger in a car driven by her mother, which ultimately struck the defendant's train. The defendant railroad sought to introduce the blood alcohol level of the driver (plaintiff's mother) to determine, inter alia,[8] proximate causation. **Supra, at 724.** The trial judge rejected this proffer by the defendants.

In **Zufelt**, on the issue of proximate cause the court found that there was absolutely no evidence to support a defense of impairment or erratic driving by plaintiff's mother. The only testimony concerning alcohol consumption established that the driver was drinking her first beer of the day when the accident occurred. **Id. at 724.** Indeed, it was specifically noted that the driver reacted to the railroad's warnings as evidenced by skid marks measuring 130 feet from the impact. **Id. at 724.**

Thus, in addition to being a case decided before **Florida Statute §316.066**, in **Zufelt** the driver's blood alcohol level was excluded because of insufficient and indeed conflicting evidence regarding causation.

In the case at bar, however, it was a basic jury determination as to whether KONNEYS accident was caused in fact by the COUNTY'S breach of a legal duty or by the careless actions of Mr. Funk.

Unlike **Zufelt**, in the case at bar there was supporting evidence to establish that Mr. Funk's intoxication and pure inattention was a legal cause of MR. KONNEY'S death. Mr. Funk's passenger, Mark Sylvester, testified undisputably that Mr. Funk consumed alcohol that afternoon at Gulfstream Racetrack, (R-592) and he [Mr. Funk] stopped at a bar just before the accident for the proverbial "one cocktail." (R-594). Moreover, the uncontroverted evidence at trial established that despite passing an erect and fully visible "stop ahead" warning sign and then a stop sign, Mr. Funk entered the intersection and struck KONNEY'S

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[8] Pg. 724 of the case cited indicates that the Defendant sought admission of blood alcohol results for 3 separate reasons.

vehicle without touching his brakes, slowing down or taking any evasive action. (R-552). Additionally, an eyewitness to the accident testified that a strong odor of alcohol emanated from Mr. Funk's vehicle immediately after the accident although no containers were found. (R-558, 584, 585).

It is respectfully submitted that facts which go to the issue of causation are relevant in all negligence cases and are for the jury's determination regardless of whether or not the alleged tortfeasor is a party to the lawsuit. In order to establish negligence KONNEY had to prove not only the existence of a duty to protect them, a breach of that duty, but also an injury sustained as a proximate cause of that breach. See **Blackton Building Supply Co. v. Garesche, 383 So.2d 250 (Fla. 5th DCA 1980); Welsh v. Metropolitan Dade County, 366 So.2d 518 (Fla. 3rd DCA 1979); Lake Park Mall, Inc. v. Carson, 327 So.2d 121 (Fla. 2nd DCA 1976) (emphasis added).**

In a related type argument KONNEY on appeal stated that Mr. Funk's blood alcohol level was irrelevant since neither the COUNTY nor SOF DOT in this cause sought to file crossclaims against Mr. Funk (KONNEYS Answer brief to Fourth District pg. 27-28). In fact, under Florida law no such cause of action was available since KONNEY settled her claim with Mr. Funk's estate and executed a release prior to trial. **Florida Statute §768.31(5) (1985).**

The fact that Mr. Funk was not a party to the lawsuit also has no effect on the COUNTY'S right to have the jury determine whether his actions were a superseding - intervening cause. Like legal causation this is a determination for the jury. **Department of Transportation v. Anglin,** 502 So.2d 896 (Fla. 1987).

Whether or not, as contended at trial (R-561) this is an affirmative defense which must be pled is immaterial to the COUNTY, who specifically alleged as an affirmative defense that Mr. Funk's conduct was a superseding cause beyond the control of this Petitioner (R-2479-2480).

On this issue at trial KONNEY argued that **Salas v. Palm Beach County Board of County Commissioners,** 511 So.2d 544 (Fla. 1987) was controlling and dispositive. For reasons stated shortly the COUNTY strenuously disagrees. It is extremely important; however, to first review the facts of **Salas:**

> On September 12, 1979, a Palm Beach County land survey crew was dispatched to the intersection of Australian Avenue and Belvedere Road to work on a road alignment project. During the course of its work, the survey crew found it necessary to occupy the left turn lane of eastbound Belvedere Road. The crew blocked off the turn lane with orange traffic cones, thereby making the vehicle activated left-turn signal a perpetual red light. The crew did not, however, erect any signs prohibiting left turns from the remaining lanes. Belvedere Road has two other eastbound lanes in addition to the turn land and the evidence is unclear as to whether the orange cones also blocked off the center lane. While the road was underway, Marie Blount [not a party to the lawsuit] was traveling east on Belvedere Road with the intention of making a left-turn onto Australian Avenue. Seeing the turn lane blocked off, she moved to the extreme right lane and made a left-turn from there. When she did so, she failed to note a car traveling west on Belvedere, driven by Alma Salas. The two vehicles collided and Mrs. Salas was injured in the collision. **Id.** at 545.

At trial in **Salas,** the COUNTY received a directed verdict contending, inter alia, that Blount's negligence was the sole proximate cause of the accident. **Id. at 545.** The Fourth District Court reversed, **484 So.2d 1302 (Fla. 4th DCA 1986)**, and this court affirmed and held that a directed verdict was improper, **511 So.2d 544 (Fla. 1987).**

Neither the Fourth District Court nor this Court held that the introduction of evidence on the issue of foreseeability was improper. In fact, this Court held that Mrs. Blount's violation of a traffic ordinance is evidence of her negligence and that the COUNTY was entitled to a jury instruction on the issue. **Id.** at 547. What was considered improper in **Salas** was the granting of a directed verdict on the issue of foreseeability absent a demonstration of the criterion outlined in **Anglin** (i.e., unusual, bizarre, extraordinary behavior). **Id.** at 547.

Salas, therefore, has no applicability to a situation such as the case at bar where the evidence is being introduced purely for jury determination. Since the evidence was extremely relevant to determine legal causation, the trial judge abused her discretion by excluding it.

It is also respectfully pointed out that in **Salas** the actions of a third person (Mrs. Blount), who was not a party to the lawsuit was considered well within the issues created by the pleadings. This Court by allowing evidence

and jury instructions based upon her conduct, seemingly disagrees with KONNEYS' premise that the actions of a tortfeasor can only be considered in a negligence trial if the tortfeasor is made a party to the lawsuit.

(B) Failure to Establish Reliability of the Blood Drawing Method

At trial KONNEY objected to the reliability of Mr. Funk's alcohol level since the petitioners could not establish through direct evidence whether an alcohol v. non-alcohol wipe (betadine solution) was used. (R-1546).

A similar argument was recently made in **Johnson v. Florida Farm Bureau, et al., 542 So.2d 367 (Fla. 4th DCA 1988)**. In **Johnson**, the Fourth District Court affirmed the admission into evidence of the defendant's blood alcohol level even though the Plaintiff could not establish directly whether the physician who drew the blood (Dr. Garcia) used an alcohol v. non-alcohol wipe. The only evidence to support this fact was the physicians' and hospitals' routine practice.[9]

In the case at bar the technician who drew the blood was H.R.S. certified. (R-1798). More importantly, toxicologist, Jay Pintacuda, established that the vial he received in this case came from a standard (non-alcohol wipe) collection kit for the collection of blood for alcohol determinations. (Proffered Deposition page 13-14).

The record in this case clearly demonstrates substantial compliance with statutory - H.R.S. guidelines. See Florida Statutes §322.261 (1985). Furthermore, there is no dispute that the purpose of the statute -- to ensure reliable scientific evidence. . . and to protect the health of the person tested was fulfilled. **State v. Bender, 382 So.2d 697 (Fla. 1980)**; **Johnson, supra**, at 370.

(C) Failure to Establish Chain of Custody

In the case at bar Deputy Michael Waites testified that he accompanied

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[9] According to appellant Johnson's reply brief, page 37, the chief of the hospital laboratory instructed everyone who drew blood for alcohol testing to use a non-alcohol antiseptic.

MR. FUNK to the hospital (R-1537), requested blood to be drawn (R-1538), remained in the room during the entire procedure (R-1540) and then turned the blood over to Deputy Charles Bowers (R-1539). KONNEY objected because petitioners failed to establish that the vial with MR. FUNK'S blood had any markings. (R-1547).

Thereafter, petitioners proffered the testimony of Deputy Bowers who stated that the vial of blood given to him by Deputy Waites was dated, labeled and turned over to the crime laboratory (R-1945).

Jay Pintacuda, chief chemist at the crime lab confirmed via proffered deposition testimony that the blood received was properly labeled with MR. FUNK'S name and dated (R-1541). KONNEY acknowledged at trial that Mr. Pintacuda received the blood in a gray stoppered vial and that it was labeled "George Funk, 1-22-83" (R-1546). KONNEY, however argues a problem with the chain of custody since Mr. Pintacuda does not testify as to any initials or signatures or that he [Mr. Pintacuda] has any idea of who put the markings on (R-1548).

This is precisely the argument which was rejected by the court in **Johnson**. There, the court affirmed the admission of blood alcohol where the containing vial bore the name of the driver and the date of drawing of the blood, even though the vial did not reflect the name of the physician who drew the blood, which was required by administrative guidelines. **Supra at 370.**

As in **Johnson**, in this case the person who drew the blood could not testify directly as to how exactly it was drawn or even whether or not they specifically remembered drawing it. It is respectfully submitted that such proof is impossible where, as in the case at bar the individual who drew the blood unfortunately dies prior to trial. What was important in this case, as in **Johnson**, 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. There is nothing in this case which indicates unreliability.

Additionally, like **Johnson**, there was no evidence of who exactly labeled the vials. What is important is that the vials in both cases were labeled with the name of the tested individual and dated. (R-1546). A ruling

by the trial judge upholding the KONNEY'S objections as to a lack of chain of custody was completely erroneous after Petitioners had proffered the testimony of Deputy Bowers and Mr. Pintacuda.

(D) FAILURE TO ESTABLISH THE QUALIFICATIONS OF THE TECHNICIAN WHO DREW THE BLOOD UNDER H.R.S GUIDELINES

Mrs. Ann Edelberry, the hospital technician who drew the blood of MR. FUNK, died prior to trial and was therefore unavailable to testify (R-1795). The Petitioners, however, proffered the testimony of hospital's personnel director, Gloria Carpenter, who established that Mrs. Edelberry was an assistant lab supervisor at the hospital (R-1799). Moreover, records produced by Mrs. Carpenter established that Mrs. Edelberry was fully licensed under H.R.S. as a medical technician (R-1799). This offer was received by the Court (R-1803).

It is respectfully submitted that KONNEY'S objection to Mrs. Edelberry's qualifications was groundless. Mrs. Edelberry's qualifications fell squarely within Florida Statute 316.1933(2)(A) which provides in part that a "duly licensed clinical laboratory technologist or clinical laboratory technician, . . . may withdraw blood for the purpose of determining the alcoholic content thereof. . ."

KONNEYS' reliance at trial on **Beasley v. Mitel of Delaware, 449 So.2d 365 (Fla. 1st DCA 1984)** was misplaced (R-1546). In **Beasley**, blood was drawn by a funeral director. The trial court admitted the blood test results and the First District Court of Appeals reversed, finding that a funeral director is not a statutorily-enumerated practitioner under F.S. 316. 1933(2)(A). **Id. at 366.**

There is no question that Beasley is not controlling since in the case at bar Mrs. Edelberry, a licensed technician, was statutorily authorized to draw blood.

More importantly, KONNEYS' position was expressly rejected in **Kuyaua v. State, 405 So.2d 251 (Fla. 3rd DCA 1981).** In **Kuyaua**, the court held that an H.R.S. permit is required only of the individual who performs the chemical analysis of the blood, not the person who drew it. **Id. at 251.**

Additionally, in **State v. Strong, 504 So.2d 758 (Fla. 1987)**, this court held that the statutory safeguards requiring a medical technician to possess a valid H.R.S. permit is for the protection of drivers required to take blood tests under the implied consent law. **Id. at 759.**

As this court stated:

> We find the legislature did not intend this statutory safeguard of the implied consent law to apply to all blood tests offered as evidence.

In the case at bar since the blood results were being offered in a civil case and not for the furtherance of criminal prosecution it is submitted that the strict requirements of 316.1933(2)(A) do not apply. (See also **State v. Quartararo, 522 So.2d 42 (Fla. 2nd DCA 1988)**. Blood tests admissible in criminal case even when blood drawn by person other than described in 316.1933).

C.

THE TRIAL JUDGE ERRED BY MAKING CERTAIN COMMENTS TO THE PROSPECTIVE JURY PANEL

The essence of a fair trial requires the "cold neutrality of an impartial judge," **State v. Steele, 348 So.2d 398, 401 (Fla. 3rd DCA 1977).** The manner in which a trial judge governs the proceedings is reflected in his/her remarks or comments. **Hunter v. State, 314 So.2d 174 (Fla. 4th DCA 1975).**

It is respectfully submitted that certain comments made by Honorable Mary Lupo at the inception of the proceedings below reflected judicial bias toward the COUNTY. More importantly, since the comments were made directly to the venire and concerned a lack of due care by the COUNTY, said comments directly affected the COUNTY's right to a fair trial.

Throughout her introductory comments and during voir dire the judge made disparaging remarks about the condition and lack of concern over the County Courthouse including, but not limited to, the following:

> The courtroom that we're in is probably one of the most useless ones and ill-designed ones in the building. (R.12-13).
>
> This building, as you probably read in the newspaper consists of an old portion which we are in now and a wraparound.
>
> That's why you don't see any windows because they were all blocked in from the original courthouse. And the wraparound is conducted around the original portion of the building.
>
> Yes you are in the portion of the building which supposedly or may contain asbestos, but since the folks in Palm Beach County perhaps aren't worried about it, we just have to work here. (R-27) (emphasis added).
>
> After approach by counsel to the bench the trial judge stated:
>
> THE COURT: I'm going to ask the court reporter at the afternoon break or during the evening, I'm going to ask the court reporter to locate the Court's comment. My recollection is I said the people of Palm Beach County.

Shortly thereafter, per the Court's instruction, all counsel reviewed

the record and both Petitioners moved to strike the prospective jury panel. (R-139). Said motion was denied by the Court. (R-139).

While some degree of judicial participation is acceptable, the judge's dominant position is such that his/her comments especially if related to the parties or proceedings before the jury, may overshadow those of the litigants or witnesses. **Whitfield v. State, 479 So.2d 208, 212 (Fla. 4th DCA 1985); 53 Fla. Jur.2d Trials 34 (1983).**

Florida Courts have recognized that since jurors generally listen to, and view the trial judge with great reverence, special care must be taken to preserve unbias neutrality. In **Abrams v. State, 326 So.2d 211 (Fla. 4th DCA 1976)** the fourth district court reiterated the long held principle that

> . . .great care should always be observed by the judge to avoid the use of any remark in the hearing of the jury that is capable, directly or indirectly, expressly, inferentially, or by innuendo, of conveying any intimation as to what view he takes of the case. . . All matters of fact . . . should be left to the unbiased judgment of the jury.
>
> Citing **Lester v. State, 37 Fla. 382, 20 So. 232 (Fla. 1896).**

In this regard while it may be argued that the judge's comments referred to the people in as opposed to from PALM BEACH COUNTY, the venire may easily have inferred a lack of responsibility by the Petitioner, PALM BEACH COUNTY. The judge herself believed in regards to the courthouse conditions that the Petitioner, PALM BEACH COUNTY didn't care.

> MR. MAURIELLO: My recollection of the comments was the County.
>
> THE COURT: Could have been because I believe the County doesn't care either, . . . (R-72).

Additionally, it is respectfully pointed out that it is/was a matter of common knowledge that absent funding and a decision by the governmental body of PALM BEACH COUNTY, the people of PALM BEACH COUNTY were powerless to alter courthouse conditions. Moreover, the newspaper articles which the trial judge

made specific reference to (R-26) assailed the Board of County Commissioners for not correcting courthouse problems. (R-3264-3265).

Admittedly, a challenge to a judgment or decree based upon prejudicial comments requires a demonstration of an act prejudicial to a party's rights, which produced a prejudicial effect. **Crews v. Warren**, 157 So.2d 533, 561 (Fla. 1st DCA 1963).

In the case at bar, the content of the statements, the surrounding circumstances and the final verdict together indicate actual prejudice to the COUNTY.

Courts have consistently reviewed the content of prejudicial statements to assess whether or not they have produced a detrimental effect. **Abrams, 326 So.2d at 212; Crews v. Warren, 157 So.2d 553, 561 (Fla. 1st DCA 1963); Robinson v. State, 161 So.2d 578, 579 (Fla. 3rd DCA 1964).** In **Robinson** the court stated:

> Where such comment expresses or tends to express the judge's view as to the weight of the evidence, the credibility of a witness, or the guilt of the accused, it thereby destroys the impartiality of a trial to which the litigant or accused is entitled. **Supra** at 579 citing **Hamilton v. State,** 109 So.2d 422 (Fla. 3rd DCA 1959).

The instant lawsuit against the COUNTY was a tort action predicated upon a theory of negligence. Thus, the comments inferring lack of concern over the courthouse went to the very issue of reasonable care which was a basic jury determination.

It is respectfully requested that the court examine the entire record (preliminary statement and voir dire) together with the surrounding circumstances. As stated by the First District Court of Appeals:

> . . .the acts complained of must be viewed in light of the entire record and with due awareness of the fact that the [the judge] was in a particularly advantageous position to observe the nuances and implications of all the transpired. **Crews**, 157 So.2d 553, 561.

The remarks concerning the lack of concern over the condition of the courthouse were not an isolated occurrence but a theme which was recounted throughout the judge's opening remarks, (See R. 12, 13, 15, 26, 27) and continued

into the questioning (sua sponte) of the venire:

> THE COURT: And where did you build?
>
> MR. AGUSTYNOWICA: Massachusetts.
>
> THE COURT: Any particular type of construction?
>
> MR. AGUSTYNOWICA: Homes, apartments.
>
> THE COURT: You want to take notes and report all your criticisms of this room and this building? (R-50)

While at a certain time and manner comments concerning courthouse conditions are innocuous at best, the present comments were made at a time when asbestos and the condition of the courthouse were at the height of public and media attention (R-3264-3265). The newspaper coverage of this issue was specifically mentioned by the court to the venire.[10] (R-26).

More importantly, as argued to the court in the COUNTY'S Motion for New Trial (R-32), the newspaper articles directly assailed PALM BEACH COUNTY for its lack of concern.

While an adverse verdict is not conclusive evidence of the existence of a prejudicial effect, it is another essential factor to be considered. **Crews**, 157 So.2d at 561; See also **55 Fla. Jur.2d, Trial, §340 (1984)**. In addition to finding both SOF DOT and the COUNTY liable, the jury specifically found the COUNTY 60% negligent and SOF DOT 40%. 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.

It is respectfully submitted; however, that the evidence produced at trial does not support any disparity in the liability between the two Petitioners. At trial it was established that SOF DOT owned and controlled the primary road (Beeline Highway - SR 710) while the secondary road (West Lake Park (R-809) was under the COUNTY'S jurisdiction (R-1247). Moreover, facts which KONNEY contended should have put the petitioners on notice (configuration of

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[10] One of the newspaper articles printed during the course of the trial has been made part of the Record on Appeal (R. 3264-65).

intersection and high speeds) were available to both Petitioners (R-799) and the "flashing beacon" which KONNEY contended was the highest level of warning and necessary at the intersection could have been installed by either the COUNTY or SOF DOT. (R-823). In direct contrast to the verdict, KONNEY'S own expert, Arnold Ramos, testified that while the SOF DOT neglected indications that the intersection was dangerous and needed greater warning, the COUNTY took precautions:

> Q: This [indicating stop ahead warning sign] according to this manual does not have to be at every intersection; correct?
>
> A: That's correct.
>
> Q: You may put it where you want it?
>
> A: Palm Beach County certainly went out and did something. What happened to the D.O.T., I'm not sure.
>
> Q: Palm Beach County took action after the first fatality?
>
> A: Yes, sir, and other accidents too.
>
> Q: In addition to taking action and putting up the signs, Palm Beach County also maintained the signs; correct?
>
> A: Yes, sir. There's a very adequate record of maintenance done by Palm Beach County on both the stop sign and stop ahead sign. (R-1119-1120).

In view of this testimony by KONNEY'S expert and all the evidence at trial, the disparity in the verdict rendered was seemingly based upon facts outside the evidence. The greater finding of liability against the COUNTY is not only unsupported by the evidence adduced at trial it is contradicted. The verdict itself, therefore, is another indication of the prejudicial effect of the judge's comments.

KONNEY'S position[11] that the judge's comments were delivered in support of the judge's "overall comfort" for the jury could be hotly debated but its truth is irrelevant to the issue on appeal.

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[11] Answer Brief to Fourth District Court pgs. 39-40.

As made evident by counsel for the COUNTY'S initial approach to the bench over this issue[12] (R-69-70), it was not the intent of the judge, but the prejudicial effect of the comments upon the jury to which the COUNTY objected. Courts have long recognized that due process requires not only an impartial judge, but at the very least a jury which is left with an impression of impartiality. **State v. Steele, 348 So.2d 398 (Fla. 3rd DCA 1977).** For this reason even in cases where there is no dispute that the judge has good intentions prejudicial comments require reversal. **83. A.L.R. 2d 1118;** see also **Cronkhite v. Dickerson, 51 Mich. 177, 16 N.W. 371 (1883).** It is the "cold neutrality" of the judge which is the essence of due process. **Miami v. Williams, 40 So.2d 205 (Fla. 1949).**

What is relevant in the instant case was that the judge sua sponte raised the issue of asbestos in the courthouse (R-27), the outside media attention to the issue (R - 26-27), along with her opinions on the "ill-designed uselessness" of the courthouse (R-13) and the fact that the COUNTY didn't care (R-27). This all transpired in a negligence case where the COUNTY was a named party and during "opening remarks" before the jury heard any evidence on the matter. The judge herself recognized the error (R-70).

It is not the burden of the COUNTY to demonstrate that the jurors were presumably aware of the media attention, although after being specifically mentioned by the court they certainly were made aware of it.

The proper inquiry is whether or not the jury could reasonably infer a lack of neutrality. **Abrams v. State, 326 So.2d 211 (Fla. 4th DCA 1976).** In this regards the dominant figure of the trial judge, the fact that her remarks carry great weight with the jury and the fact that the comments served no beneficial purpose are factors to be considered. **Whitfield v. Florida 479 So.2d 208 (Fla. 4th DCA 1985); Sutton v. State, 51 So.2d 725 (Fla. 1951); State v. Locks, 94 Ariz. 134, 382 P.2d 241.**

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[12] Additionally, PALM BEACH COUNTY'S Motion for New Trial stressed the irrelevancy of the judge's intentions.

The COUNTY properly preserved this issue for appeal. At the time counsel for the COUNTY originally approached the bench there was confusion and disagreement over exactly what the court said (R-71). A waiver, by its very definition occurs only when one fails to act with full knowledge of the material facts. **Blacks' Law Dictionary - 5th Ed.** It was the judge herself who deferred ruling on the matter until the court reporter could locate the comments in the record (R-71).

Just minutes later, after reviewing the record and the comments made, both the COUNTY and SOF DOT objected and unequivocally moved to strike the panel (R-139). This motion was made at the very incipiency of what turned out to be a two week trial and immediately after examining and verifying the substance of the judge's comments. In any event, the error claimed here is surely fundamental as the impartiality of the trial judge and the trier of fact is the very essence of due process. **State v. Steele, 348 So.2d 398 (Fla. 3rd DCA 1977); Anderson v. State, 287 So.2d 322 (Fla. 1st DCA 1973); Dickenson v. Parks, 104 Fla. 577, 140 So. 459 (Fla. 1932). As stated by the court in Steele:**

> Any error based on lack of impartiality of trier of fact constitutes denial of due process, and accordingly, is per se reversible error. **Id. at 399.**

CONCLUSION

For the reasons set forth herein and in the brief of the Petitioner, SOF DOT, it is hereby submitted that the trial judge erred as claimed; that a new trial on the issue of liability as to each Petitioner, if any, be granted; and that evidence of the decision or need to install a flashing traffic signal at the intersection be excluded.

Respectfully submitted,

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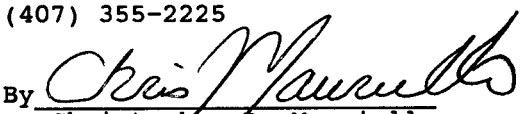
By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered this 16th day of July, 1990 to RICHARD L. MARTENS, ESQ., Boose, Casey, et al., 515 North Flagler Drive, Northbridge Tower, 19th Floor, West Palm Beach, FL 33401; MICHAEL DAVIS, ESQ., 1655 Palm Beach Lakes Blvd, West Palm Beach, FL; and by U.S. Mail to EDWARD CAMPBELL, ESQ., 1100 Prosperity Farms Road, Suite 203, Palm Beach Gardens, FL 33410.

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APPENDIX

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