IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,180

4TH DCA CASE NO. 88-0727

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

Petitioners,

v.

LORETTA KONNEY, Personal Representative of the Estate of DOUGLAS M. KONNEY, deceased, R. EDWARD CAMPBELL, Administrator Ad Litem for the Estate of DOUGLAS M. KONNEY, deceased, DOUGLAS D. FUNK, Personal Representative of the Estate of GEORGE ROBERT FUNK, deceased,

Respondents.

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

BRIEF OF PETITIONER, STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION, ON JURISDICTION WITH APPENDIX

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TABLE OF CITATIONS

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STATEMENT OF THE CASE AND OF THE FACTS

This proceeding is brought to review a decision of the District Court of Appeal of Florida, Fourth District, which affirmed a judgement for the Plaintiff/Respondent entered pursuant to a jury verdict in the Circuit Court for Palm Beach County. The decision of the District Court was originally entered on July 19, 1989 (App. 1); following timely motions for rehearing and for certification filed on August 3, 1989 (App. 4-9), the District Court granted a rehearing and entered a modified opinion on November 15, 1989 (App. 10); the decision was ultimately rendered by that Court's entry of an Order, dated November 21, 1989, denying the motions for certification (App. 13).[1]

The Plaintiff/Respondent is LORETTA KONNEY (KONNEY), Personal Representative of the Estate of Douglas M. Konney; the Defendants/Petitioners are THE STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION (DOT) and PALM BEACH COUNTY (COUNTY).

KONNEY brought suit against the DOT and COUNTY, alleging that the decedent had been killed in a two vehicle automobile accident at the intersection of State Road 710 and County Road 809.[2]

KONNEY contended that the intersection constituted a dangerous condition due to the angle of intersection of the roads, and that the DOT and COUNTY were negligent in the choice and location of several existing warning signs and in the failure to install a flashing light type of traffic control device as a further warning of the dangerous condition (App. 11). The Defendants objected to KONNEY's efforts to introduce evidence that the installation of the flashing traffic control device was needed to provide warning of the alleged dangerous condition, and further objected to the inclusion into the trial of

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[1] Fla. R. App. P. 9.020 (g).

[2] The estate of the driver of the adverse vehicle, George Robert Funk, had also been joined as a party defendant, but had settled with the Plaintiff.

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of whether the absence of such a device constituted negligence (App. 2).[3] These objections were over-ruled by the Trial Judge, who allowed the jury to determine whether the DOT and the COUNTY were negligent in failing to install a flashing traffic control device at the intersection as a warning that the intersection was dangerous (App. 12).

After the jury returned a verdict for the Plaintiff and the Trial Court entered judgement thereon, the DOT and the COUNTY appealed the cause to the District Court of Appeals, Fourth District.

The District Court affirmed the Trial Court's judgement despite the arguments raised by the Defendants that the rulings by the Trial Court did not comport with the holding by this Court in the case of *Department of Transp. v. Neilson*, 419 So.2d 1071 (Fla. 1982).[4]

SUMMARY OF ARGUMENT

The decision of the District Court of Appeal below clearly and directly conflicts with the decisions of this Supreme Court and of other District Courts of Appeal in holding that the planning level function is not implicated by an allegation and proof that a governmental agency failed to warn of a dangerous or hazardous roadway condition by the installation of a traffic control device such as a flashing traffic light. This decision directly conflicts with the holding in *Department of Transp. v. Neilson*, 419 So.2d 1071 (Fla. 1982) which addressed this specific point regarding the duty to warn of a dangerous condition by the installation of a flashing light or other traffic control device. It also conflicts with the line of cases subsequent to *Neilson* which differentiate between the operational level duty to warn of a dangerous condition by the use of signs, markings and similar warnings and the planning level function of utilizing traffic control devices.

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[3] The Defendants requested a special verdict separating the claim based on location and choice of signs from the claim based on failure to install a flashing traffic control device. The request was denied. Hence the two issue rule is inapplicable.

[4] The Defendants raised several additional issues for appellate review by the District Court.

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ARGUMENT

In the case of *Department of Transp. v. Neilson*, 419 So.2d 1071 (Fla. 1982) this Court addressed the question of whether decisions concerning the installation of traffic control devices, the initial plan and alignment of roads, or the improvement or upgrading of roads or intersections may constitute omissions or negligent acts which subject governmental entities to liability. Its answer was that such activities constituted basic capital improvements, the decisions regarding which were held to be the judgmental, planning-level functions for which the Court had previously determined -- in *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla. 1979) -- that the statutory waiver of sovereign immunity did not extend. *Neilson* at 1077. See also *Ingham v. State, Dept. of Transp.*, 419 So.2d 1081 (Fla. 1982).

A careful examination of the precise issues raised in the *Neilson* case is instructive in determining the question of conflict with the holding by the District Court below. In *Neilson*, the Trial Court had dismissed the action upon the pleadings as to the three governmental entities; on appeal, the Second District Court of Appeal reversed, holding that the allegations of the complaint set forth claims of negligence falling within the "operational level" of decision making. This Court, upon review, quashed the decision of the District Court, and found that the allegations of the complaint failed to allege *any* claim of negligence falling within the "operational level" of decision making. It then returned the case below with instructions to allow amended pleadings or, if the plaintiff chose not to amend, to reinstate the dismissal with prejudice. Since the holding of this Court's decision in *Neilson* was that the allegations set forth in the plaintiff's complaint failed to state any claim involving the "operational level" of decision making, a careful review of those allegations -- set forth in footnote 2 of the opinion -- is integral to a clear understanding of the holding.

In paragraphs 17 and 18 of his complaint, Neilson alleged the following:

> 17. That at all times hereinafter mentioned and at the time of the incident complained of, South West Shore, West Inter Bay, Plant Avenue and Shell Drive all merged into a common intersection in the City of Tampa, which said intersection was *dangerous and hazardous* to motorists proceeding from either

Plant Avenue, South West Shore, Inter Bay or Shell Drive because of the *angles of approach* with the aforesaid streets made when entering said known intersection so that said intersection was dangerously and defectively designed as a roadway; 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.

18. That [at] all times hereinafter mentioned and at the time of the incident complained of, the Defendants, DEPARTMENT OF TRANSPORTATION, an agency of the State of Florida, HILLSBOROUGH COUNTY, a political subdivision of the State of Florida and the CITY OF TAMPA, a municipal corporation, and each of them, individually, jointly or concurrently, designed, maintained and constructed that certain intersection where the incident complained of occurred which said intersection the traffic control devices placed thereon were so constructed, designed and maintained so as to confuse motorists using the roads at said intersection thereby exposing them to the hazard of meeting oncoming traffic and *the Defendants, each of them knew or with the exercise of reasonable care should have known of the dangerous and hazardous condition of said intersection but failed to warn motorists using said roadway of said condition* and were thereby, each of them, negligent and careless, and said negligent condition caused or contributed to cause the incident herein complained of, and with reasonable care, the aforesaid *Defendants should have provided the aforesaid traffic control devices for the reason aforesaid*, the failure of which was negligent and caused or contributed to the cause of the injuries hereinabove and hereinafter alleged.

Neilson at 1073-1074 (emphasis added)

Hence, the following actions or omissions alleged in the *Neilson* complaint, either individually or in concurrence with one another, in respect to the governmental defendants were held *not* to implicate the "operational level" function:

1. The intersection, because of the geometrical angle of approach was a "dangerous condition", "defectively designed" and "hazardous";

2. The dangerous condition thus created by the geometry of the road intersection was not adequately warned against by either a) the installation of a sequential traffic signal light, or b) a blinking and flashing light;

3. The dangerous and hazardous condition was known or, in the exercise of reasonable care, should have been known by the governmental entities.

In reviewing case law subsequent to the *Commercial Carrier* decision, this Court noted approvingly the outline of a developing distinction between the installation (or failure to install) of *signs* warning of dangerous or hazardous conditions, which was regarded as an

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operation function -- *Department of Transportation v. Webb*, 409 So.2d 1061 (Fla. 1st DCA 1981) -- and the installation (or failure to install) of traffic control *devices* such as signals or lights, which was regarded as involving a discretionary or planning level function -- *Department of Transportation v. Vega*, 414 So.2d 559 (Fla. 3d DCA 1982). *Neilson* at 1076-1077. This Court concurred in the recognition of this functional dichotomy, holding that decisions of whether to install traffic control devices, such as lights or signals, are activities connected with "basic capital improvements" and are, therefore, planning-level in nature. *Neilson* at 1077. Turning to the allegations of Neilson's complaint, this Court noted:

> As we read it, the Neilsons' complaint alleges the failure to properly "design" the intersection, "maintain" traffic control devices, and "*warn of hazardous conditions" through the installation of traffic control devices.*"
>
> *Neilson* at 1078. (emphasis added)

This Court noted that these allegations, including that of a failure to warn of known dangerous or hazardous conditions *through the installation of traffic control devices* did not implicate the "operational level" function of government in contrast to an allegation such as the existence of a known dangerous condition for which no proper warning, whatsoever, was given.

It is clear, then, that this Court's decision in *Neilson* stands for the proposition that if a dangerous or hazardous condition exists on a governmental entity's roadway, then that entity may be held liable for the failure to install warnings of the condition as by the placement of warning signs, but not for the failure to install a traffic light, signal or other such device as a warning of the dangerous condition.[5]

Until the present cause, this carefully developed distinction between the utilization of warning signs or markings on the one hand, and the utilization of considerably more expensive and elaborate capital improvements such as traffic and warning lights and signals has been universally followed by the decisions in this state.

In *Perez v. Department of Transportation*, 435 So.2d 830 (Fla. 1983), this Court clearly

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[5] As this Court's decision implies in categorizing lights, signals and other such devices as "basic capital improvements" there is a substantial distinction between such devices on the one hand and signs on the other as to expense and the decision making process of installation.

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distinguished between the installation of warning signals at a railroad crossing (planning level) and the installation of warning signs (operational level). In *Department of Transportation v. Webb*, 438 So.2d 780 (Fla. 1983), this Court determined that the placement of warning signs was not a planning level function as were the placement of traffic devices. In *Payne v. Broward County*, 461 So.2d 63 (Fla. 1984), this Court reaffirmed its holding that the decision to install a traffic light is a planning function, although an operational duty was held to exist to otherwise warn of a dangerous condition in the interim between the decision to install the device and its installation. In *Palm Beach County Bd. of Com'rs. v. Salas*, 511 So.2d 544 at 546 (Fla. 1987), this Court held that the decision to utilize a left turn signal was planning level. In *Bailey Drainage Dist. v. Stark*, 526 So.2d 678 (Fla. 1988), this Court again reaffirmed the *Neilson* holding, noting that a decision to install a traffic control light is planning level; this Court further noted that only where an allegation is made that there was a dangerous condition with *no* warning provided is there an operational level claim asserted. In *Reinhart v. Seaboard Coast Line R. Co.*, 422 So.2d 41 (Fla. 2d DCA 1982), the Second District held that the failure to install a warning sign was operational. In *Robinson v. State, Dept. of Transp.*, 465 So.2d 1301 (Fla. 1st DCA 1985), the First District held that the decision to utilize a left turn signal was planning level. Finally, in *Conover v. Board of County Commissioners of Metropolitan Dade County*, 527 So.2d 946 (Fla. 3d DCA 1988), the Third District held that the decision to erect pedestrian traffic signals was planning level.

In the present Cause, the Fourth District has held that where the evidence shows that a dangerous condition exists at an intersection, then a duty to warn of that condition may arise. To that point, the lower Court's holding is unexceptional. That Court, however, then proceeds beyond that ruling to determine that it was proper to allow the introduction of evidence, and to permit a jury to determine, that a governmental entity has a duty to utilize or emplace a flashing traffic light to provide warning of an allegedly dangerous condition:

> The trial judge properly admitted evidence showing a flashing beacon should have been installed at the intersection to warn drivers in a manner more consistent with the safety of the travelling public.

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Appendix at p.12

And, lest there by any doubt as to the reach of this holding, the District Court also held that the flashing beacon or signal was a traffic control device:

> The trial court properly admitted evidence showing the particular traffic control *device* should have been installed in a manner more consistent with the safety of the involved individuals.
>
> Appendix at p.3

The effect of this ruling is clear: by holding that a governmental agency has an operational level duty to install a traffic control device as a warning of an allegedly dangerous condition, the rule recognized in *Neilson* and in all subsequent cases is effectively neutered. While it seems to pay a nodding recognition to the *Neilson* rule that the decision whether to install traffic lights and other such devices is planning level and, hence, not actionable, it allows a claim to proceed under the identical facts if the plaintiff contends not that the agency should have installed a traffic signal or device at a dangerous intersection, but that it should have *warned* of the dangerous intersection *by installing* a traffic signal or device. Such verbal acrobatics -- creating a distinction without a difference -- clearly undercut the *Neilson* rule that a plaintiff may allege the existence of a dangerous condition and the failure to provide a warning by sign or similar usage, but that the plaintiff may not seek to make actionable the failure to use a traffic light or other such device. See also *Ingham v. State, Dept. of Transp.*, 419 So.2d 1081 (Fla. 1982) and *Ingham v. State Dept. of Transp.*, 399 So.2d 1028 (Fla. 1st DCA 1981).

Thus not only does this decision clearly and directly conflict with the precise holding in *Neilson* -- that the failure to provide warning of an allegedly dangerous and hazardous condition by the installation of a flashing light or other traffic control device is not actionable since it implicates a planning level function -- but it also subverts the very policy upon which *Neilson* was decided, and would undercut the entire effect of that decision.[6] The result is clear. Every plaintiff wishing to include a governmental entity

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[6] That this case has established a dangerous precedent is seen by the fact that its holding is already being cited in subsequent cases. see e.g. Zolkowski v. Department of Transportaton, State of Florida, 14 FLW FLW 2200 (4th DCA, 9/20/89).

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amongst the defendants in an intersectional accident need only allege that -- no matter what warnings were provided by signs, markings, etc., -- the entity should have installed a traffic light of some type (sequential or flashing). Since few intersections have such devices, it would be the rare case where an agency would not be exposed to such a claim unless it were to undertake the truly enormous expense of placing signals at every intersection.

CONCLUSION

This Petitioner therefore submits that this Court should take jurisdiction of this Cause, review the decision below, quash the holding of the District Court upon this issue and reverse as to all issues raised in the appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to FLETCHER N. BALDWIN, III, ESQUIRE, 515 North Flagler Drive, Suite 1900, West Palm Beach, Florida, 33401, CHRISTOPHER D. MAURIELLO, ESQUIRE, Post Office Box 1989, West Palm Beach, Florida, 33402, and EDWARD CAMPBELL, ESQUIRE, 4114 Northlake Boulevard, Suite 202, Palm Beach Gardens, Florida, 33410, by U. S. Mail, this 21st day of December, 1989.

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