IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF TRANSPORTATION,

Petitioner,

v.

LORETTA KONNEY, ETC., ET AL.,

Respondents.

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

PALM BEACH COUNTY,

Petitioner,

v.

LORETTA KONNEY, ETC., ET AL.,

Respondents.

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

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

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

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TABLE OF CITATIONS

CASES:

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STATEMENT OF THE CASE

This cause is presented for review of a decision of the District Court of Appeal, Fourth District, which expressly and directly conflicts with the decisions of this Court in the cases of *Department of Transp. v. Neilson*, 419 So.2d 1071 (Fla. 1982) and *Ingham v. State, Dept. of Transp.*, 419 So.2d 1081 (Fla. 1982). Jurisdiction is predicated upon Art. V, § 3(b)(3), *Fla. Const.* and *Fla. R. App. P.* 9.030(a)(2)(A)(IV). The Petitioners were Defendants in the Trial Court and Appellants in the District Court of Appeal. The Respondent was Plaintiff in the Trial Court and Appellee in the District Court of Appeal.

The Plaintiff was LORETTA KONNEY, Personal Representative of the Estate of Douglas M. Konney (KONNEY); the Defendants were the STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION (DOT) and PALM BEACH COUNTY (COUNTY)[1]. Through this action, KONNEY sought damages for the alleged wrongful death of her decedent-husband. Suit was filed in the Circuit Court, Fifteenth Judicial Circuit (Palm Beach County) on July 26, 1983, and was brought to trial before a jury on December 7, 1987 upon the allegations set forth in the Second Amended Complaint (R: 2559).

On December 18, 1987, the jury returned its verdict in favor of KONNEY and against each of the Defendants. It found the COUNTY responsible for 60% of the liability, the DOT responsible for 40% of the liability, and assessed total damages at $260,000: $150,000 allocated to the Estate, $35,000 allocated to LORETTA KONNEY, as survivor, and $75,000 allocated to Ricky Konney, as survivor (R: 3241).

The COUNTY served timely post-trial motions for a new trial and to set aside the verdict and enter judgment in accordance with motions for directed verdict (R: 3244-8); the DOT served timely motions for new trial and for judgment in accordance with motion for directed verdict (R: 3249-3251).

The Trial Court entered orders denying the post-trial motions of both the COUNTY and the DOT on February 18, 1988 (R: 3266-9). On February 23, 1988, the Trial Court

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1 A third defendant, DOUGLAS FUNK, settled with the Plaintiff prior to trial, and was dismissed from the action.

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entered a Cost Judgment in favor of KONNEY and against the Defendants in the amount of $11,206.01, and a Final Judgment against the COUNTY in the amount of $149,100, and against the DOT in the amount of $99,400 (R: 3270-3).

On March 18, 1988, the DOT filed a timely Notice of Appeal to the District Court of Appeal, Fourth District (R: 3276); on March 25, 1988, the COUNTY filed its joinder in the appeal (R: 3277).

The District Court affirmed the judgments below in an Opinion filed July 19, 1989. The DOT timely filed a petition for rehearing and a motion for certification of a matter of great public importance on August 3, 1989; the COUNTY timely filed a motion for rehearing or clarification on the same date.

The District Court of Appeal granted the motion of the DOT for rehearing and issued an Opinion on Rehearing on November 15, 1989. This decision again affirmed the judgments below. As with that Court's original opinion of July 19, 1989, the opinion on rehearing was concurred in by two judges; one judge concurred as to the decision only. The District Court denied the motion for certification by an order entered November 21, 1989.

The DOT timely filed its Notice to Invoke Discretionary Jurisdiction on December 11, 1989 (Case No. 75,180), and the COUNTY timely filed its Notice on December 20, 1989 (Case No. 75,241). On January 24, 1990, this Court granted the motion of the COUNTY to consolidate the two proceedings for all appellate purposes, and, on June 20, 1990, it accepted jurisdiction of these causes and granted review.

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STATEMENT OF THE FACTS

This suit arose 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 were under County jurisdiction (R: 1784-5). State Road 710 ran generally from the Northwest to the Southeast; County Road 809 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. 1).[2] In order to facilitate turning, and to reduce the hazard of right hand turns on a skew angle, the intersection had two additional legs as illustrated in the Appendix diagram attached hereto (R: 985-6; App. 1). Traffic on SR 710 had the right of way through the intersection. Westbound traffic upon C 809 was governed by a stop sign at the main intersection; 488 feet in advance of this 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: 937-8; 1403). The speed limit on C 809 was 55 m.p.h. (R: 1401). Southbound traffic upon SR 710 encountered the following three regulatory and warning signs as it approached the intersection (distances are given from the mid-point of the main intersection; also given is the location of the north leg of the intersection or sideroad and the main intersection):

1. 1740 feet -- sideroad sign
2. 1560 feet -- 45 m.p.h. sign (reducing speed from 55 m.p.h.)
   650 feet -- (sideroad -- north leg)
3. 530 feet -- crossroad sign
   0 feet -- (main intersection)

(R: 926-7; 1623; Def.'s Ex. 3)

There were no traffic signals at the intersection on the date of this accident.

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[2] 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.

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On Friday, January 23, 1983, George Funk and a friend, Mark Sylvester, drove down from Stuart to Gulfstream Race Track in Hallandale in Funk's Thunderbird (R: 588-9). While there, according to Sylvester, Funk consumed two beers and, perhaps, a hot dog over the course of 2-3 hours (R: 592-3; 610). They left the track at 5:30-6:00 p.m. and, after having some difficulty in locating I-95, they proceeded North on the Interstate to Boynton Beach, where they exited I-95 and continued North on U.S. Highway One 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 on U.S. Highway One to Northlake Boulevard (County Road 809) (R: 594, 596). There, although they had plans for the evening in Stuart, and were returning to Funk's home which was East of U.S. Highway One, they determined to take a roundabout course to reach their destination and turned West onto Northlake Boulevard, intending to reach SR 710, upon which they would travel Northwest to SR 711 and from there to C 76 before heading back East to their destination (R: 596, 605-8). Both Funk and Sylvester were somewhat familiar with the C 809 - SR 710 intersection (R: 597, 613).

As Funk and Sylvester proceeded West on C 809 past Military Trail (at which point Northlake Boulevard is renamed West Lake Park Road), they were followed by Kenneth Parramore, an officer of the Game & Freshwater Fish Commission (R: 545). Although Parramore did not observe the Funk vehicle weaving, he did notice that its speed was erratic -- slowing down and speeding up on several occasions with no apparent purpose over the course of two miles before it reached the intersection with SR 710 (R: 548, 565-6). He observed Funk and Sylvester in sustained conversation up to 1/4 mile from the intersection -- after which point he did not have occasion to see whether they continued in their conversation (R: 548; 569). The Funk vehicle approached the intersection of C 809 and SR 710 traveling between 45-55 m.p.h. (R: 546). When Parramore was several hundred feet from the main intersection of the two roadways, he observed the glow of headlights from a car (which vehicle was that of the Defendant, Konney) headed South on SR 710 (R: 552-3; 569-70). At this point, Officer Parramore was several car lengths behind Funk and

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began to slow down preparatory to making a right turn (R: 570). Funk continued into the intersection, ignoring the stop ahead warning sign, the stop sign and the pavement markings 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, 648-9).

Douglas Konney was an employee at Pratt-Whitney; he had, over the preceding years, worked on both the first work shift (8:00 a.m. - 4:00 p.m.) and the second work shift (4:00 p.m. - 12:00 p.m.) (R: 1477; 1953-4). On the date of the accident, he had been working the second shift and had gotten off early at about 9:00 p.m.; he was headed home in his Camaro (R: 1479). He always drove SR 710 to and from work, and having driven it many times, was familiar with it in both night and day conditions (R: 1955-6).

As Konney approached the main intersection, he apparently observed Funk's vehicle passing, or about to pass, the stop sign since he locked his brakes, leaving 35 and 41 foot skid marks prior to the impact between the two vehicles (R: 631; Def.'s Ex. 4)[3]. Konney was killed in the collision; Funk, complaining afterward of chest pains, died in the hospital; Sylvester survived with less serious injuries.

Parramore, after observing the accident, placed a call for police and emergency assistance at a nearby house and returned to the scene within 5 minutes of the accident (R: 554-5). He observed a strong odor of alcohol in and about the Funk vehicle when he checked on the condition of Funk and Sylvester (R: 558; 584-5). There were no spilled or broken alcohol containers in the car, and Sylvester denied in testimony that they had any alcohol or alcoholic drinks in the car with them (R: 570; 595; 612; 635-6).

The investigating officer, Deputy Charles Bowers, had blood drawn from Funk at the hospital (R: 632; 650; 1537-1565; 1942-5). It indicated a blood alcohol level of .095 at the time of drawing; at the time of the accident, it would have been somewhat higher (Pintacuda's Deposition).

The DOT's computerized accident records indicated that the section of SR 710

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[3] Including the typical reaction time testified to by the Plaintiff's own expert, Konney would have begun to apply his brakes well before the skid mark began (R: 935).

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inclusive of the main intersection and two legs (a section 1/3 of a mile in length) ranked far below the statewide accident rate averages for two-lane roads (Pl.'s Ex. 33; Def.'s Ex. 2 a & b: R: 841; 856-61). From 1973-77, there were no recorded accidents on the section; in 1978-82, 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 (1978), 1.209 (1979), 3.448 (1980), 0 (1981) and 5.174 (1982) 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 C 809 was a county road, the traffic count upon that road was not included in the average daily traffic count for this section of SR 710 for purpose of computing the accident rate on SR 710. If the traffic passing through the intersection on C 809 were included with the traffic on SR 710, the total count would be greater and would result in an even lower calculated accident rate figure (R: 862-4).

The DOT identifies potentially dangerous sections of roadway (whether these sections be straight sections, curved sections or intersections) of the state road system through use of a computer generated listing termed a High Accident Section List. The List for the DOT's 7 county 4th District (which encompasses Palm Beach County) included about 200 high accident rate sections each year prior to this accident (R: 840). The 1/3 mile section of SR 710 intersecting with C 809 never experienced an accident rate sufficient to earn inclusion on this List (R: 782).

The Plaintiff contended that the DOT and COUNTY should have installed a flashing traffic control beacon at the intersection, which beacon or light would flash red for traffic on C 809 and yellow on SR 710 (R: 939). The Plaintiff also contended that the County should have installed rumble strips on C 809 at the approach to the intersection (R: 939). Finally, the Plaintiff criticized the location and type of signing on each roadway.

At the charge conference, the DOT requested and submitted a special interrogatory verdict which would require the jury to distinguish between a finding of negligence arising

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out of failure to install the flashing traffic light and a finding of negligence arising out of choice and placement of signs and rumble strip (R: 1982, 2002, 3221). The Plaintiff objected to the use of a special interrogatory verdict, and the Trial Court declined to use one (R: 2002-3). Thus, although two separate areas of liability issues were presented to the jury, the two-issue rule was properly satisfied by the proffered verdict. *Colonial Stores, Inc. v. Scarbrough*, 355 So.2d 1181 (Fla. 1978).

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SUMMARY OF ARGUMENT

ARGUMENT I: CONFLICT ISSUE

A. The decision of the District Court of Appeal below stands in clear conflict with *Neilson* and *Ingham* and their progeny from this Court and from the other District Courts of Appeal. In *Neilson*, this Court addressed the precise issue underlying the appeal in this case. There it was held that a plaintiff's allegations failed to implicate the operational level of governmental functioning upon which a claim could be predicated under the waiver of immunity. The plaintiff had alleged a hazardous intersection, known to the agencies with responsibility therefor and the failure to warn of the dangerous condition by the use of a flashing or sequential traffic light. In the present case, the Plaintiff was allowed to introduce evidence of the failure to use a flashing traffic light as a warning of an allegedly hazardous intersection. Since this was held in *Neilson* not to involve an operational level function, it was error to allow the admission of evidence.

B. The holding in *Neilson* and *Ingham* should be reaffirmed in full force since it accords with logic and wisdom, since the principle of *stare decisis* applies with particular rigor in maintaining consistency in a Court's interpretation of legislation and since the Legislature has created a study commission charged with a comprehensive review of the entire area of governmental claims; any changes in existing law or modification of statutory interpretation should be left in their hands.

ARGUMENT II: ADDITIONAL ISSUES

A. The Trial Judge erred in not granting the DOT a directed verdict upon the Plaintiff's claim predicating liability upon alleged signing deficiencies. There was no evidence of a causal nexus between any alleged signing deficiency and the accident. The Plaintiff's expert admitted that any connection was merely speculative. This does not meet the standard of proof of causation.

B. The Trial Court erred in allowing testimony from an investigating patrol trooper as to his opinion regarding installation of signing, signals and other traffic control devices when he was, admittedly, not an engineer and had no familiarity with the appropriate standards for their use. The Trial Judge further erred in limiting effective cross-examination upon this issue. By contrast, the Trial Judge would not allow opinion testimony regarding the location and choice of signing by the DOT's expert who, while not a registered engineer, nonetheless had the education and experience to render an opinion upon the questions proffered. Finally, the Trial Judge erred in allowing the Plaintiff's engineer to testify outside the realm of his expertise -- into the area of human perception.

C. The Trial Judge erred in instructing the jury under F.S.J.I. 3.1(a)

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when there was never an issue as to whether the Defendants owed a duty of care to the decedent.

D. The Trial Judge erred in admitting evidence of prior accidents at the intersection which were not similar to the one in litigation; she also erred in admitting evidence of subsequent accidents which lacked relevancy.

E. The Trial Judge erred in denying the Defendants' evidence of the blood alcohol test results on the other driver, George Funk.

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ARGUMENT

I.

THE DECISION OF THE DISTRICT COURT BELOW SHOULD BE QUASHED SINCE ITS HOLDING IS IN CONFLICT WITH THE DECISIONS OF THIS COURT IN NEILSON AND INGHAM, WHICH DECISIONS SHOULD BE REAFFIRMED.

A.

THE DECISION OF THE DISTRICT COURT BELOW IS CONTRARY TO AND IN CONFLICT WITH THE HOLDING OF THIS COURT IN NEILSON AND INGHAM.

In the case of *Department of Transp. v. Neilson*, 419 So.2d 1071 (Fla. 1982), this Court held that decisions concerning the installation of traffic control devices, the initial plan for and alignment of roads, and the improvement or upgrading of roads or intersections constitute the type of discretionary or planning level functions of a judgmental nature that the doctrine recognized in *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla. 1979), found not to be encompassed by the statutory waiver of sovereign immunity. In *Neilson*, this Court found that such activities involved basic capital improvements. *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 shows that it is dispositive in determining the question presented for conflict review. 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

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set forth in the plaintiff's complaint failed to state any claim involving the "operational level" of decision making -- and, indeed, only alleged claims arising out of the judgmental, planning area of governmental functions -- a careful review of those allegations (which are set forth in footnote 2 of the *Neilson* 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.

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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, were held *not* to implicate the "operational level" functions of governmental entities:

> 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 operational 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

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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 through such standard means as 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.[4]

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 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 noted that the decision whether to utilize a left turn signal was a planning level function. In *Bailey Drainage Dist. v. Stark*, 526 So.2d 678 (Fla. 1988), this Court again reaffirmed the *Neilson* holding, noting that a decision whether to install a traffic control light is a planning level function; this

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[4] 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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Court further noted that only where an allegation is made that there was a dangerous condition with *no* warning provided could there be 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 a planning level function. 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 a planning level activity.

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 was unexceptional. The District Court, however, then proceeded 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 control 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.
>
> *State, Dept. of Transp. v. Konney*, 551 So.2d 613 (Fla. 4th DCA 1989); Appendix at p. 5.

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. 2.

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

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dangerous condition, the rule recognized in *Neilson* and in all subsequent cases would be 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). Indeed, as the quoted footnote from the *Neilson* complaint reveals, the plaintiff in that case alleged precisely what the District Court below has held to constitute a permissible claim. In *Neilson*, the plaintiff did, in fact, allege that the governmental agencies were negligent in failing to provide warning of a hazardous condition through the use of traffic lights -- including flashing lights. This Court found such allegations did not implicate a recognized operational level function.

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.[5] The result is clear. Every plaintiff wishing to include a governmental entity 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

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[5] 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 Transportation, State of Florida, 14 FLW 2200 (4th DCA, 9/20/89).

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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.

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B.

THE DOCTRINE SET FORTH IN THIS COURT'S NEILSON AND INGHAM DECISIONS, AND FOLLOWED BY A LINE OF DECISIONS FROM THIS COURT AND THE DISTRICT COURTS OF APPEAL UNBROKEN UNTIL THE PRESENT DECISION BELOW, SHOULD BE REAFFIRMED.

The decisions of this Court in *Neilson* and *Ingham* have given rise to a well-developed body of case law in the intervening eight years. The contours of the rule applying the judgmental, planning level and operational level dichotomy to roadway design, construction and maintenance has been carefully and logically developed from the premises set forth in those cases. The rule recognizes that there is minimal interference with the executive/administrative branch's sphere of decision-making produced by a court's review of the propriety of an agency's failure to provide warnings to the public of highway hazards through the use of warning signs and other similar tools used to communicate information to the public. Signs are ubiquitous, and of such minimal expense that their use is generally determined at a relatively low level of an agency's functioning. It also recognizes that when such review is pushed beyond a consideration of the use of ordinary warning signs to the more complex and expensive devices such as lights, signals and beacons, it implicates a substantially more complex network of decision making -- one in which the discretionary level of decision is inherently intertwined. That this is so is amply demonstrated by the fact that installations of a light of the type recommended by Mr. Ramos could cost up to $12,000 (R: 970). The decision of whether to install such devices is made at the highest district level of the DOT and all traffic lights (both flashing and sequential) located at the intersections between state and county roadways are the subject of a signed compact between the DOT and the COUNTY -- executed by the highest authorities for each (see Plaintiff's Ex. 17, introduced into evidence and subsequently withdrawn). This document discloses the fact that decision making regarding the installation of such devices is at a clearly discretionary level of governmental functions.

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As this Court recognized in *Commercial Carrier*, to permit the intrusion into the area of basic governmental policy and decision making by the civil tort system would seriously hamper the fundamental processes of governing. In a democracy, this decision making process is placed into the hands of those chosen by the people or those to whom such functions are delegated by the chosen representatives. That a randomly selected jury of six individuals might be allowed to pass upon the propriety of such basic decisions -- and, through the effect of a judgment rendered upon their verdict, actually determine the course of such decisions in the future -- contains profoundly undemocratic implications. This is well illustrated by -- but not restricted to -- those decisions involving the budgeting and expenditure of public funds. Ultimately, the availability of funds to meet the varying governmental needs is a matter of the fundamentally political decisions regarding taxation in which the will of the people is always expressed. Inherent in the budget making process (and this would apply to private as well as public budgeting) is the accepted fact that needs will always exceed resources; hence, no individual need is ever likely to receive the full funding that might be ideal or even desireable. The process of allocating limited funds among unlimited needs is a basic governmental function. It requires that those in whose hands the function is placed balance a wide array of needs against one another. Any matter involving substantial expenditure of funds necessarily involves this balancing function. Decisions regarding such expenditure of funds cannot be adequately reviewed as a matter of functional practicality by a civil jury which cannot see or understand the much broader budgeting concerns which involve all needs, and not merely the needs of the particular expenditure item under consideration as part of a tort claim. Thus, even if it were not constitutionally inadviseable to allow such review, it would be imperative from a functional standpoint to deny it. The alternative would be a wide-ranging trial which would, of necessity, include innumerable subsidiary issues, all of which would be directed at second-guessing the most basic policy decisions made by those to whom society has delegated the power to make such decisions.

Even were the ruling in *Neilson* not so well founded in constitutional principles

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recognizing the separation of powers within the governmental system, its full force should still be reaffirmed upon the principle of *stare decisis*. *Neilson*, like *Commercial Carrier*, was a decision which interpreted the wording and implications of §768.28, *Florida Statutes*. As the United States Supreme Court has long recognized, *stare decisis* is a principle to be applied with exceptional force and rigor when statutory interpretation is involved. *Illinois Brick Co. v. Illinois*, 97 S.Ct. 2061 (1977); *Edmonds v. Compagnie Generale Transatlantique*, 99 S.Ct. 2753 (1979). This is so because it is to be assumed that if the Legislature disapproves of a judicial interpretation, it has the power of correction in its own hands. See *Thomas v. Washington Gas Light Co.*, 100 S.Ct. 2647 (1980).

The Legislature has not, since the first announcement of *Commercial Carrier* in 1978, or since the decision in *Neilson*, acted to alter the interpretation of the statute in respect to the discretionary or planning level function exclusion. It has, instead, accepted that interpretation and its acceptance merits strong consideration.

While the Legislature has not acted to amend the statute in respect to the discretionary or planning level exclusion, or to the judicial interpretation in *Neilson* and other decisions of the scope and breadth of that exclusion, it has established a Tort Claims Study Commission whose charge is a complete review of the entire governmental claims process. CS/HB 1451. During the pendency of such a review, it is respectfully submitted that the courts should maintain the existing case law interpretation of §768.28, *Florida Statutes*, in their full force and leave any modification or amendment to the Legislature acting upon the Commission's report.

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ARGUMENT

II.

ADDITIONAL ISSUES

In addition to the issue presented to this Court for conflict review, the DEPARTMENT OF TRANSPORTATION and PALM BEACH COUNTY raised six other issues on appeal to the District Court. The District Court denied, but did not address, the arguments raised on these additional issues.

In the case of *Bould v. Touchette*, 349 So.2d 1181 (Fla. 1977), this Court stated:

> If conflict appears and this Court acquires jurisdiction, we then proceed to consider the entire cause on the merits. As stated in this Court in *Tyus v. Apalachicola Northern Railroad Company*, 130 So.2d 580 (Fla. 1961):
>
> > "Since we have concluded that, on the face of the subject opinion of the District Court, it appears there can be no doubt about the question of direct conflict with many of our prior decisions, as well as the decision of the District Court of Appeal, ... it becomes our duty and responsibility to consider the case on its merits and decide the points passed upon by the District Court which were raised by appropriate assignments of error as completely as though such case had come originally to this court on appeal."

Accord, *Bankers Multiple Line Ins. Co. v. Farish*, 464 So.2d 530 (Fla. 1985) and *Freund v. State*, 520 So.2d 556 (Fla. 1988). See also *White Construction Company, Inc. v. Dupont*, 455 So.2d 1026 (Fla. 1984).

The DEPARTMENT OF TRANSPORTATION requests this Court to review the following additional issues raised in the District Court:

1. Whether the Trial Court erred in not granting a directed verdict for the DOT predicated on the lack of evidence of a causative nexus between the signing on SR 710 and the accident;
2. Whether the Trial Court erred in allowing opinion testimony by Plaintiff's witnesses respecting matters beyond the area of their expertise while excluding opinion testimony by a Defendant's expert which was clearly within the area

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of his expertise;

3. Whether the Trial Court erred in giving Florida Standard Jury Instruction 3.1(a) when there was no jury issue as to whether the Defendants owed the decedent a duty to use reasonable care for his safety;

4. Whether the Trial Court erred in admitting testimony of certain prior and all subsequent accidents at the subject intersection;

5. Whether the Trial Court erred in excluding evidence of the blood alcohol level of the driver, Funk.

An affirmative ruling as to the first of these five additional issues, together with an affirmative ruling upon the conflict issue, would result in a full disposition of the claim of the Plaintiff against the DEPARTMENT OF TRANSPORTATION. In the event that this Court should quash the decision of the District Court upon the conflict issue and remand this cause for retrial against one or both Defendants, it will then be likely that the trial rulings upon additional issues 2-5 will recur in the Trial Court. The Defendants would, therefore, respectfully request that this Court review and reverse the rulings upon these issues. Finally, the DEPARTMENT OF TRANSPORTATION would bring to this Court's attention the apparent conflict between the comment included in its decision adopting Florida Standard Jury Instruction 3.1(a) and the manner in which the lower courts have applied this instruction. See e.g. *L.K. v. Water's Edge Ass'n.*, 532 So.2d 1097 (Fla. 3rd DCA 1988). The opportunity to render a ruling on the proper scope of the use of this instruction would assist not only in the potential retrial of the present cause, but also in the trial of other suits where the confusion wrought by the lower court decisions presents an ongoing dilemma to the bar and judiciary.

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A.

THE TRIAL JUDGE ERRED IN NOT GRANTING A DIRECTED VERDICT FOR THE DOT PREDICATED ON LACK OF EVIDENCE OF A CAUSATIVE NEXUS BETWEEN THE SIGNING ON SR 710 AND THE ACCIDENT.

At the conclusion of the case -- as well as at the conclusion of Plaintiff's evidence -- the DOT moved for a directed verdict upon all claims of the Plaintiff against it predicated upon alleged signing deficiencies (R: 1527, 1961). This matter was the subject of the DOT's Motion for Judgment in Accordance with Motion for Directed Verdict (R: 3249). The claims to which these motions were addressed were all of the claims of liability against the DOT except for the claim predicated on the failure to install a flashing traffic signal; thus, if the latter claim is barred by sovereign immunity, the granting of a directed verdict upon the DOT's motions would have resolved all claims against this Defendant.

The Plaintiff contended that the DOT's signing was deficient in the following respects:

1. That there was no sign warning of reduced speed ahead placed 500 feet in advance of the sign reducing the speed limit from 55 m.p.h. to 45 m.p.h.;

2. That the speed limit sign should have been placed in advance of the sideroad sign;

3. That the sideroad sign and crossroad sign should have been combined into a single sign placed in the location of the sideroad sign;

4. That the crossroad sign, which was 528 ft. from the main intersection, should have been 750 feet from the main intersection.

Whether the Plaintiff's contentions were correct or not was the subject of conflicting evidence; defense witnesses testified that the signing was appropriate and in accordance with the Manual requirements, while the Plaintiff's witness, Arnold Ramos, argued in support of the Plaintiff's position[6]. The DOT's motion for directed verdict, however, was

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[6] For instance, as one expert explained, if the crossroad sign were placed 750 ft. from the main intersection or crossroad, it would also be in advance of the sideroad (the north leg of the intersection) which was 650 ft. from the main intersection or crossroad. (see above) Thus, placement of the crossroad sign at a full 750 ft. from the crossroad could be confusing to drivers. It was placed as far in advance of the crossroad as possible without creating confusion with the sideroad (R: 1863); the speed reduction warning sign is not mandatory and generally

not predicated on whether the testimony of one witness or another should have been accepted by the jury as correct, but upon the lack of evidence of a causal nexus between the signing and the accident.

The signing on SR 710 controlled the conduct of the decedent, Konney. It did not control or affect the conduct of Funk. The specific complaints voiced by Ramos, the Plaintiff's expert, were as follows:

1. The use and position of the crossroad and sideroad signs were potentially confusing to a driver on SR 710 since they indicated right angle intersections rather than skew intersections and should have provided earlier warning of the intersection (R: 928-931);

2. The failure to use the reduce speed ahead sign meant that a driver could not reduce his speed before reaching the north leg of the intersection without applying his brakes to slow from 55 m.p.h. to 45 m.p.h. (R: 933, 987).

It was established, however, that there was no evidence that Konney was in any way confused by use or placement of signs at the intersection, and this was conceded by Ramos (R: 974, 978-9). Indeed, the uncontroverted evidence established that he had applied his brakes to avoid a pending collision at a point in time when the Funk car was only about to pass the stop sign (see factual statement, supra). No fact witness identified anything that Konney could have done to avoid the collision because of any theoretical confusion or otherwise (R: 634). Thus, there was absolutely no showing that use or placement of the sideroad and crossroad sign in any way affected the conduct of Konney in causing or bringing about the collision.

In respect to the location of the speed limit sign and the absence of a reduce speed ahead sign, Ramos' testimony was that since the 45 m.p.h. sign was about 950 feet from the *north leg* of the intersection, a driver who began to react to the sign's instruction to reduce

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not used where the reduction is only 10 m.p.h. (R: 1869) and the combination of crossroad and sideroad warning signs in a single sign is not recommended in the M.U.T.C.D. and is potentially confusing on a high speed road (R: 1865-8).

his speed to 45 m.p.h. by releasing the accelerator could not slow his car down to 45 m.p.h. from 55 m.p.h. by coasting -- without some application of brake -- before he reached that north leg (R: 935-6). It was not the north leg, however, where the accident occurred but the main intersection! Thus, whatever a driver's ability to reduce speed without braking before reaching the north leg might have been, Ramos' testimony *itself* established there was more than ample distance for a driver to slow down by the time he reached the main intersection which was over 1,500 feet from the 45 m.p.h. sign as it was placed by the DOT (R: 987-8). Thus, even taking Ramos' testimony at its strongest, one could arguably establish a possible causal link between the absence of a reduce speed ahead sign and an accident if it occurred on the *north leg* or sideroad, but not at the *main intersection* or crossroad[7]. The lack of these causal nexus between the sign choices and placement and the accident renders the Plaintiff's claim on this basis totally deficient.

In Florida, the standard rule of causation-in-fact is whether the evidence shows that it is probable -- i.e. more likely than not -- that the alleged negligence caused, in fact, the injury or incident. *Gooding v. University Hosp. Bldg., Inc.*, 445 So.2d 1015 (Fla. 1984); *Lopez v. Florida Power & Light Co.*, 501 So.2d 1339 (Fla. 3rd DCA 1987). Speculation as to a causative nexus is not permissible; the evidence must actually demonstrate that, but for the alleged negligence, the event would not have occurred. *Nielsen v. City of Sarasota*, 110 So.2d 417 (Fla. 2d DCA 1959). In *Alene's Enterprises, Inc., v. Early*, 475 So.2d 267 (Fla. 4th DCA 1985), this Court held that a directed verdict should have been entered for a defendant where there was nothing to show a causal nexus between alleged negligent instructions (to toss a piece of glass in a dumpster) and the incident (the precise instrument of the fracture of the glass) causing injury. In *Lopez*, supra, it was held that when the plaintiff's expert offered several explanations as to how the decedent had become electrocuted while picking avocados from his tree, but could not definitely determine which was more probable (one

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7 Ramos testified that a sign reducing speed from 55 m.p.h. to 45 m.p.h. should be 1,500 ft. in advance of an intersection or other conflict point for which the reduced speed limit is needed (R: 933). The sign was 1560 feet from the main crossroad where the accident occurred.

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explanation would have involved potential negligence by the defendant, but the others would not) and no other evidence pointed to one as more probable, it was proper for the Court to enter judgment in accordance with motion for directed verdict for lack of causation. See also discussion in *Moser v. Texas Trailer Corp.*, 623 F.2d 1006, 1011-1013 (5th Cir. 1980).

Here there was no evidence, direct or otherwise, that Konney was confused by the highway signing or any other factor for which the DOT was responsible. Arnold Ramos admitted that he saw no such evidence and would be speculating to testify so (R: 974, 978). As to the location of advance speed reduction warning, it was clearly established that a driver could have reduced his speed under any circumstances between the actual location of the 45 m.p.h. speed limit sign (nearly 1/3 mile from the main intersection) and the main intersection where the accident occurred.

A directed verdict should have been granted.

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B.

THE TRIAL COURT ERRED IN ALLOWING TESTIMONY BY PLAINTIFF'S WITNESSES IN RESPECT TO OPINIONS BEYOND THE AREA OF THEIR EXPERTISE AND IN EXCLUDING TESTIMONY BY A DEFENSE WITNESS WITHIN THE AREA OF HIS EXPERTISE.

(a)

Deputy Sheriff Bowers was a homicide investigator who had taken standard police academy courses and several police accident courses (R: 623-4); he was not an engineer and was admittedly unqualified to make an engineering evaluation (R: 639). Despite this, the Trial Court permitted the Plaintiff, over Defense objections, to question Bowers as to why he felt that an engineering study was needed at this particular intersection when he prepared his accident report (R: 633-4). Bowers stated that he felt that a flashing light or a sequential light should be installed and opined that there was an inadequacy of lighting and marking (R: 634). He conceded, however, that he was not familiar with the Manual on Uniform Traffic Control Devices or other accepted traffic engineering standards (R: 646).

Under these circumstances, it was clear error for the Trial Court to permit Bowers to testify as to matters of specialized knowledge when he had no established expertise for doing so. A trial court abuses its discretion and commits reversible error when it allows a lay witness to render expert, opinion evidence or when it allows a witness expert in one field to testify beyond the range of his expertise. *Prohaska v. The Bison Co., Inc.*, 365 So.2d 794 (Fla. 1st DCA 1978). See also *Carver v. Orange County*, 444 So.2d 452 (Fla. 5th DCA 1984) (error to allow engineers who are experts in one area of engineering to testify as to their opinions in other areas); *Mills v. Redwing Carriers, Inc.*, 127 So.2d 453 (Fla. 2nd DCA 1961) (new trial properly granted when state trooper had been allowed to render an opinion for which he was not qualified as an expert).

(b)

After Bowers was allowed to give his opinion as to the traffic engineering needs of the intersection, the DOT attempted to establish that he had no basis for concluding that any changes that he was allowed to propose to the jury would have had an effect in causing the accident. To this end, he was asked *if* he had been able to determine what signs and other devices in place at the time of the accident were actually seen by the drivers (R: 639). This was objected to by the Plaintiff, and the objection was sustained by the Trial Judge (R: 640-2). Upon proffer, the witness admitted that he had no factual basis to determine that the existence of a flashing signal or any other additional device would have made any difference in preventing the accident (R: 643-4). Despite this, the Trial Court maintained her ruling, and excluded the proffer testimony, which severely prejudiced the ability of the Defense to rebut the improper testimony Bowers had been allowed to give in respect to additional traffic control devices that he felt should have been at the intersection (R: 645). This was error. Since it was prejudicial to the Defendants (addressing the central issues of liability as contended by the Plaintiff), a new trial should be mandated.

(c)

Although the Trial Court freely permitted the Plaintiff to elicit expert opinion testimony from Bowers in areas he acknowledged to be beyond his expertise, it refused to allow the DOT to elicit testimony from one of its witnesses in respect to an area clearly within his expertise.

Thomas Hall was an Engineer III with the DOT, and had been, for eight years, in charge of studies and operations in the traffic engineering division of the Department's 4th District (R: 1568-70). As such, he was involved in determining the use and placement of traffic control devices in the District, and in developing traffic engineering plans in accordance with the Manual of Uniform Traffic Control Devices (R: 1570-1). Although not a licensed engineer, he had completed two years of college plus additional engineering studies at Georgia Tech and Northwestern University (R: 1570, 1580). His function with the DOT included making engineering recommendations for the use of flashing beacons (R:

1580).

In her main case, the Plaintiff read lengthy portions of two pretrial depositions given by Hall in which he testified to the standards for placement of various traffic signs and traffic control devices, including flashing signals (R: 1272-1288).

In the main case of the Defendant, DOT, Hall was called to give live testimony (R: 1582). After an extensive proffer (R: 1587-1618), the Trial Court limited the allowable testimony to matters involving the internal policies of the DOT and any decisions to modify the signing which he might have made. She barred any testimony as to whether the signs in place at the time of the accident complied with the M.U.T.C.D. or the reason why a particular sign would have been located in a particular location (R: 1619).

Here it was established that the witness not only had substantial formal training in the engineering field (two years of college plus additional courses, but short of a degree) but also had worked in the *precise* field of signing and traffic device planning and installation for which his testimony was sought. The Trial Judge apparently excluded his opinion testimony because he lacked a degree or license. The Third District noted in *Salas v. State*, 246 So.2d 621 (Fla. 3rd DCA 1971), that "an expert may be qualified by his *experience*, skill or independent study of a particular field" (emphasis added). The Second District, in *Fay v. Mincey*, 454 So.2d 587, 595 (Fla. 2d DCA 1984), noted that "(i)t is well established that an expert does not need a special degree or certificate in order to be qualified as an expert witness in a specialized area..." The limitation of the DOT's own employee witness, upon which it depended for expert evidence, was manifestly error. Further compounding the Trial Court's error upon this issue, the Plaintiff had used Hall's deposition testimony which included certain questions relating to the placement of traffic signs and devices and their functions and purposes. Despite this fact, and despite having her attention called to the Plaintiff's use of Hall's deposition testimony, the Trial Judge would not permit Hall to give testimony in the same subject area which would favor the Defense or give further explanation of his testimony on deposition (R: 1576).

(d)

The Trial Court allowed the Plaintiff to elicit testimony from Arnold Ramos to the effect that a driver might be familiar with an intersection and not appreciate its danger (R: 968). The Defense objection to this testimony was overruled. It was established that Ramos was a civil engineer (R: 895, 972); his primary experience was in the construction and zoning field (R: 896-9), and he was admittedly not a human factor's engineer (R: 972). There was no showing that he was trained in psychology or in the elements of human perception. Under these facts, it was improper to admit his opinion on this issue. *Carver v. Orange County*, 444 So.2d 452 (Fla. 5th DCA 1984). See also *Harrison v. Savers Federal Sav. & Loan*, 549 So.2d 712 (Fla. 1st DCA 1989) (real estate appraiser not entitled to render an opinion on the functional design of a building); *United Technologies v. Indus. Risk Insurers*, 501 So.2d 46 (Fla. 3rd DCA 1987) (consulting engineer whose expertise is in area of combustion and explosion should not have been allowed to testify as to his opinion regarding damage to a phone computer system by acid spill); *Kelly v. Kinsey*, 362 So.2d 402 (Fla. 1st DCA 1978) (professor of economics not entitled to render an opinion on loss of income potential due to injury), and *Executive Car & Truck Leasing v. DeSerio*, 468 So.2d 1027 (Fla. 4th DCA 1985) and *GIW Southern Valve Co. v. Smith*, 471 So.2d 81 (Fla. 2nd DCA 1985) (both cases recognizing limitations on the rendering of expert opinions on organic brain damage by clinical psychologists). See particularly *Polk v. Ford Motor Co.*, 529 F.2d 259, 271 (8th Cir. 1976), cert. denied 96 S.Ct. 2229 (1976) (the basis for any expert's opinion must be sufficient to take such testimony out of the realm of speculation). That it was prejudicial is clear. Konney was intimately familiar with this intersection, having traversed it twice daily, in light and darkness, for years. The Plaintiff was attempting to deflect the effect of this fact which clearly showed the decedent had substantial opportunity to be knowledgeable about any allegedly dangerous condition caused by the geometry of the intersection.

C.

THE TRIAL COURT ERRED IN GIVING STANDARD JURY INSTRUCTION 3.1(a) WHEN THERE WAS NO ISSUE OF THE EXISTENCE OF A DUTY TO USE REASONABLE CARE.

The Plaintiff requested that the Trial Court give Florida Standard Jury Instruction 3.1(a):

> The Court has determined and instructs you as a matter of law that the circumstances at the time and place of the incident complained of were such that the State of Florida, Department of Transportation and Palm Beach County each and both had a duty to have used reasonable care for the safety of Douglas Konney.

Over the Defense objections, the Court gave this instruction (R: 2007, 2184).

This Court, in 1986, adopted a note to FSJI 3.1(a):

> This preemptive charge is not for use routinely, but only when reasonable care standard was contested before the jury, as by a 3.2 issue now to be withdrawn as a matter of law. In that event, 3.1(a) properly emphasizes reasonable care as embodied in 3.5 or 3.8 and 4.1. Otherwise it is argumentative.
>
> ...
>
> The committee has suggested that preemptive charge 3.1(a) is frequently requested by and given for plaintiffs in ordinary negligence trials even though there is no defense evidence or argument before the jury disputing the reasonable care standard and requiring judicial "preemption" of that confusing non-issue.
>
> ...
>
> That routine practice, argumentatively reinforcing the conventional issues charge on negligence, e.g., 3.5(a), is a significant departure from "the theory and technique of charging a civil juries as recommended by the Committee".
>
> *Standard Jury Instructions re: Civil Cases*, 483 So.2d 429 (Fla. 1986)

In the present cause, there was no issue presented to the jury of whether either Defendant had or did not have a duty to use reasonable care. At issue were questions of whether the Defendants *met* their duty and whether any alleged failure to meet that duty was causally related to the accident. There was no basis for the Trial Court's giving of this

jury instruction.

The comment to the standard instruction recognizes that the form of our standard instructions follows a pattern, the symmetry of which communicates a message to the jurors as well as the bare words and sentences. This symmetry is upset by the giving of a preemptive charge such as 3.1(a) to such lay jurors who cannot know why such an instruction is being given in such a strongly assertive manner when there has been no issue raised by the case presentation to which the instruction gives address. The comment recognizes that such use of this instruction inherently biases a juror's mind; hence, the strong disapproval in respect to uses such as that herein. Although the psychological effect of such an instruction upon a juror -- which arises from form and the context of its use -- may be less readily fingered and demonstrated than is the case where an instruction misstates the law, it is no less real in its effect.

Under the circumstances of this case, the giving of the instruction constituted argumentative comment which severely biased the instructions against the Defendants. Such was error and upon this error a new trial should be ordered.

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D.

THE TRIAL COURT ERRED IN ALLOWING INTRODUCTION BY THE PLAINTIFF OF EVIDENCE RELATING TO CERTAIN DISSIMILAR PRIOR ACCIDENTS AND TO ALL SUBSEQUENT ACCIDENTS.

The Petitioner, STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, would adopt the argument upon this point set forth in Argument II of the brief of the Petitioner, PALM BEACH COUNTY.

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E.

THE TRIAL COURT ERRED IN DENYING ADMISSION OF EVIDENCE OF FUNK'S BLOOD ALCOHOL TEST.

The Petitioner, STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, would adopt the argument upon this point set forth in Argument III of the brief of the Petitioner, PALM BEACH COUNTY.

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CONCLUSION

For the reasons set forth in Argument I, the decision of the District Court of Appeal, Fourth District, should be quashed. If this Court, in consideration of Argument II, should rule affirmatively upon subargument A, then this Cause should be remanded with instructions to grant the motion of the Defendant, STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION, for judgment in accordance with motion for directed verdict. If this Court should not rule affirmatively upon subargument A of Argument II, then the Cause should be remanded for retrial with instructions that the issue of the utilization of traffic lights, flashing or sequential, should not be an issue for jury determination. If this Court should rule affirmatively on any of the subarguments B - E of Argument II, then remand for retrial should also include instructions appropriately in accord with such ruling. Similarly, if the Court should not quash the decision of the District Court of Appeal upon the issues raised in Argument I, but should find grounds for reversal of the judgment in Argument II, the decision should be quashed with instructions to order a retrial in accord with such determination.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. Mail, this 16th day of July, 1990, to RICHARD L. MARTENS, ESQUIRE, 515 North Flagler Drive, Suite 1900, West Palm Beach, FL 33401, CHRISTOPHER D. MAURIELLO, ESQUIRE, Assistant County Attorney, Post Office Box 1989, West Palm Beach, FL 33402, EDWARD CAMPBELL, ESQUIRE, 4114 Northlake Boulevard, Suite 202, Palm Beach Gardens, FL 33410, STEPHANIE W. WERNER, ESQUIRE, Assistant County Attorney, Broward County, Governmental Center, Suite 423, 115 South Andrews Avenue, Fort Lauderdale, FL 33301, CHARLENE V. EDWARDS, ESQUIRE, Assistant City Attorney, City of Tampa, 315 E. Kennedy Blvd., Fifth Floor, Tampa, FL 33602, SUSAN H. CHURUTI, ESQUIRE, Pinellas County Attorney, 315 Court Street, Clearwater, FL 34616, ROBERT R. WARCHOLA, ESQUIRE, Assistant County Attorney, Hillsborough County, Post Office Box 1110, Tampa, FL 33601, V. LYNN WHITFIELD, ESQUIRE, Assistant City Attorney, City of West Palm Beach, P. O. Box 3366 West Palm Beach, FL 33402, FRANC DORN, ESQUIRE, Department of Legal Affairs, Office of the Attorney General, The Capitol - Room 1502, Tallahassee, FL 32399-1050, and THOMAS R. SANTURRI, ESQUIRE, Attorney for Escambia County, Post Office Box 13410, Pensacola, FL 32591.

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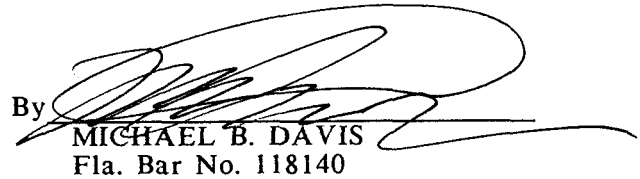
By 
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