OA 10/5/90

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

REPLY BRIEF OF PETITIONER, STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION, ON MERITS

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TABLE OF CITATIONS

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STATEMENT OF FACTS

The Plaintiff suggests that testimony to the effect that the subject intersection was inherently dangerous, a trap, and highly unique in its geometry was given by witnesses for all parties. The record discloses considerably less than what the Plaintiff suggests.

In respect to the characterization of this intersection as "inherently dangerous" and a "trap",[1] it is significant to note that virtually every traffic engineer who testified characterized *all* intersections as highly dangerous or inherently dangerous. Thus Ramos (Plaintiff's expert) described all intersections as dangerous (R: 912); Walker (County Engineer) noted that all intersections are inherently dangerous because they are the points where traffic streams cross (R: 1217); Sheehan (County operations superintendent) described all intersections as hazardous and dangerous (R: 1372); Schmidt (SOFDOT former Safety Engineer) testified that all intersections, as potential locations for traffic conflict, might be termed hazardous or inherently dangerous (R: 685). It is from this perspective that the characterizations of the subject intersection must be understood.

While both Ramos and the County and SOFDOT employees noted that there was an

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[1] The term "trap" as used by this Court in City of St. Petersburg v. Collom, 419 So.2d 1082, 1086 (Fla. 1982) must be understood as a term of legal art. Both Collom and the companion Matthews cases involved children who fell into open culverts or drainage ditches and were drowned. In each case there was a hidden quality to the ditch or culvert which made it much more dangerous than it would appear to be on the surface. In the briefs before this Court, the issue of attractive nuisance was raised -- Answer Brief of Matthews p. 12-14 -- and it is clearly within this context that use of the term "trap" was intended and understood. A survey of cases considering whether specific conditions are "traps" or not reveals the parameters of the concept. Jackson v. Whitmire Construction Company, 202 So.2d 861 (Fla. 2d DCA 1967) (a pile of rocks and debris not a trap); Hayes v. Criterion Corp., 337 So.2d 1026 (Fla. 2d DCA 1976) (drainage ditch with worn sides not a trap); Kinya v. Lifter, Inc., 489 So.2d 92 (Fla. 3d DCA 1986) (artificial lake with ordinary slope not a trap); Saga Bay Property Owners Ass'n v. Askew, 513 So.2d 691 (Fla. 3d DCA 1987) (artificial lake with weeds and debris, murky water and a drop-off not a trap); Seitz v. Surfside, Inc., 517 So.2d 49 (Fla. 3d DCA 1987) (shallow water at end of pier not a trap); Johnson v. Williams, 192 So.2d 339 (Fla. 1st DCA 1966) (cable strung across ground not a trap); Sarignac v. Dept. of Transp., 406 So.2d 1143 (Fla. 2d DCA 1981) (canal known to be used for diving that was reduced in water depth without notice was a trap); Tucker Brothers, Inc. v. Menard, 90 So.2d 908 (Fla. 1956) (a slow burning fire of embers covered with a large bed of ashes was a trap). In these cases, only where a condition appears innocuous to the normal (usually minor child) observer but, in fact, contains a hidden and serious danger is it held to be a "trap". Whatever the justification for applying a term which has grown up with the concept of attractive nuisance (with the implications of hazardous situations for young children, not necessarily for adults) to roadways, it is clear that the intersection involved in this case was, as a matter of law, not a trap. There was nothing about the intersection which gave an innocuous appearance while carrying -- lurking beneath a placid exterior -- a hidden danger. What constituted a danger at this intersection was, first of all, what constitutes a danger at all intersections -- converging traffic. The danger that this intersection posed to a somewhat greater extent than that of a typical 90° intersection was certainly not hidden: it was the angle of the roadways and , more particularly, it was in the acute angles where a driver on C 809 was required to turn his head to look for traffic before crossing SR 710. There was nothing hidden about the fact that the intersection existed -- it was marked with a number of reflective signs and pavement markings. No one testified that a driver on C 809 (or SR 710) had any more difficulty in recognizing that he was approaching an intersection here than he would in approaching any other intersection. The difficulty was in viewing the acute angles after one stopped (R: 1825-1826). Here, Funk drove obliviously through the intersection without stopping. Most importantly, even Ramos conceded that the visibility or sight distance was enhanced at the angle at which the Funk and Konney cars approached. (See diagram in Appendix to SOFDOT's Initial Brief).

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element of uniqueness to this intersection, it was by no means so dramatic or significant as is suggested by the Plaintiff. Thus Schmidt testified that, while the large majority of roadway intersections occurred at right angles, there were still a significant number of skew angle intersections throughout the country -- in the subject case, technically termed a high type channelized intersection (R: 690; 779-780); Walker testified that there were other skew angle intersections in Palm Beach County, although none might have had *precisely* the same angle (R: 1242); Smith (SOFDOT Maintenance Engineer) testified that there were a number of skew angle intersections throughout the County, particularly in the Glades area, along US 1 in North County, and along SR 710 at its intersections with various other roadways (R: 1785-1788). What the evidence established, without controversy, was that skew angle intersections (of which there is virtually an infinite number of angle values), while less common than right angle intersections, were far from unique. It also established that within the range of potential angles (1-89°on the acute angles, 91-179° on the obtuse) there was probably not another intersection in Palm Beach County with this *precise* set of angles.[2]

The Plaintiff's contention that there were limited sight distances at the subject intersection is also untrue in any respect relevant to this case. According to Ramos, the sight distance relevant to the vision of Konney and Funk exceeded the standards which required visibility of a one foot high object 700 feet down the intersecting roadway (R: 946). According to this testimony of Ramos, since Konney and Funk approached at an obtuse angle, they actually had improved visibility of each other while the acute angles might be somewhat impaired.

The Plaintiff notes that Funk's passenger, Sylvester, did not observe either the Konney vehicle or the stop sign. Significantly, Parramore (the Game Officer) observed both well before he reached the intersection (R: 552-553, 567). This speaks volumes as to the condition of Funk and Sylvester and as to the cause of the accident.

The Plaintiff suggests that SOFDOT's observation that Konney apparently locked his

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[2] No significance was ever developed in the evidence in respect to the precise angles exhibited at this intersection. The only significance attached to the angles were that they were skewed. In this respect, this intersection was far from unique.

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brakes at about the point when Funk was reaching the stop sign is speculation, unsupported in the record. In fact, the skid marks left by Konney were established without question (R: 631-632).[3] The calculations based on these skid marks and a range of standard reaction times is also in the record (R: 1709-1710). While this testimony was from a defense expert, his reaction time ranges were far more conservative than those testified to by Plaintiff's expert (R: 988). Of course, if Plaintiff's expert's reaction time values are used, the result would be that Konney would have applied his brakes well before Funk approached the stop sign (a situation even more strongly supportive of the Defendants' position). There was no evidence as to any reason that would have caused Konney to apply his brakes, other than to avoid Funk's vehicle. Calculations based on the length of the skid marks and reaction time antecedent to the skid initiation can establish the time elapse from reaction by Konney to impact. Since the speed of Funk's vehicle was established by eye-witness testimony from a Plaintiff witness, it is a simple mathematical calculation to determine where Funk's vehicle was when Konney reacted. The testimony, supra, was that Funk's vehicle was either at or approaching the stop sign when Konney reacted. There is no evidence to establish what could have been added to the situation which would have given Konney more time to react and, indeed, the Plaintiff does not suggest anything.

The Plaintiff's contention that 1/10 of all traffic fatalities in Palm Beach County in 1986 occurred at this intersection is irrelevant and false. It is irrelevant because the subject accident occurred in 1983, three years earlier -- thus not relevant to the question of notice. In addition, Plaintiff's own expert conceded that the road was under construction in 1986 -- thus the roadway conditions were dissimilar (R: 1078). It is false because the testimony was that the County experienced 174 fatalities in 1986; Plaintiff's counsel then asked whether, if one assumes 7 fatalities at this intersection, that would be 1/10 of all *urban* fatalities (R: 1148 -- there were 74 fatalities in urban areas of the County, 100 in rural). Significantly, five of the fatalities in 1986 occurred in one accident when the

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[3] Trooper Bowers testified that the visible marks were 35 and 41 ft. He further testified that there is usually an additional length of 'shadow' skid marks left by the tires after they begin to skid but before the rubber is heated sufficiently to leave bold marks. Since measurements were taken at night, he could not detect the length of the shadow marks. Thus the lengths are conservative, and Konney may have locked his brakes even earlier.

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occupants of one vehicle were all killed (R: 964). It is also misleading to suggest that there had been four fatalities through the date of the subject accident; in fact, two of these occurred in the present accident, and the other two occurred in an accident in 1978. Contrary to the Plaintiff's assertion, there was a change made in the traffic control at the intersection following the 1978 accident: the County installed a stop ahead sign to provide additional warning and to reinforce the existing stop sign controlling traffic on C 809 (R: 1019).

The Plaintiff suggests that the testimony showed that fatal accident investigations were conducted at the local level and decisions for remedial action also occurred there (Respondent's Brief p. 4). What the cited Record portions indicate is that the SOFDOT investigation is made at the District level and the County investigation is done by the County Engineer's office. Nothing in the cited record suggests that any decision *to install* traffic signals is made at local or lower levels.

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SUMMARY OF ARGUMENT

1. Plaintiff's argument totally misconstrues this Court's holding in *Neilson* and acceptance of it would have the broad ranging effect of reversing *Neilson's* determination that certain functions such as installation of traffic signals and upgrading and rebuilding of existing structures are inherently discretionary because they implicate capital expenditure. The Plaintiff's argument would convert the sovereign immunity issue to a jury question. Contrary to Plaintiff's claims, evidence established that the traffic signals at issue, herein, had a traffic control function.

2. The Plaintiff's argument as to a causative nexus between the signage on SR 710 and the accident confuses proximate cause with cause-in-fact. It also requires the pyramiding of inference upon unestablished inference.

3. The testimony of Hall was essential to SOFDOT's case and improperly excluded.

4. No issue of whether SOFDOT owed a duty of care was presented by the evidence to the jury. Consequently a jury instruction on the subject was improper.

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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.

The Plaintiff's argument upon sovereign immunity manages the remarkable feat of distorting this Court's clear and unambiguous holding in *Department of Transportation v. Neilson*, 419 So.2d 1071 (Fla. 1982) to the point that the product of her efforts would establish a principle precisely the opposite of that which was enunciated by this Court.

In *Neilson*, this Court addressed the application of the discretionary function exception to the waiver of sovereign immunity established in *Commercial Carrier Corp. v. Indian River Cty.*, 371 So.2d 1010 (Fla. 1979) to the broad range of issues arising out of the design, construction and maintenance of the roadways. Distilled to its essence, the *Neilson* holding was this:

1. The design and construction decisions inherent in the overall planning of a roadway are inherently discretionary or planning level functions still within the sphere of immunity;

2. (a) the decisions regarding whether to install traffic control devices such as flashing and sequential signals which involve substantial capital expenditures are also inherently discretionary or planning functions, but

   (b) the decisions to provide warnings of known, dangerous conditions through the routine use of signs, markings and other methods not involving capital expenditures are operational level functions for which there has been an effective waiver of immunity;

3. (a) the decisions to maintain existing structures by upgrading or rebuilding them (which, again, involve non-routine decisions implicating capital expenditure) are, likewise, inherently discretionary or planning

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functions, but

(b) the decisions involving routine maintenance of existing structures and conditions (so long as they do not implicate significant capital expenditure for rebuilding or upgrading) are operational level functions for which immunity has been waived.

The Plaintiff would have this Court recede from the thoughtfully fashioned analysis of *Neilson* and hold that, so long as a party contends that the installation of a traffic control signal device is needed as a warning at a particular location, this should suffice to retract the immunity which would otherwise apply to the discretionary or planning decision of the governmental unit involved. The sweep of such a principle is broad indeed -- much broader than the specific facts of this case and broader yet than the general principle which recognizes immunity in the installation of all traffic control signals. This principle espoused by the Plaintiff would, *mutatis mutandis* apply with equal rigor to the third leg of decision-making for which *Neilson* recognizes the involvement of planning level or discretionary decisions -- the upgrading and rebuilding of existing structures -- as it would to the second. If the Plaintiff's argument is accepted, and the characterization of the decisions involving installation of traffic control signal devices can be transposed from discretionary to operational by the simple expedient of the pleading or presentation of evidence by a party to the effect that such devices are warnings of dangerous conditions, then the logical imperative of such an argument would extend it to cases involving the rebuilding or upgrading of existing roadways and structures so long as a party alleges (or produces an expert who will testify) that such rebuilding or upgrading is necessary to meet the maintenance needs of the structure.[4] That the Plaintiff's argument carries such broad implications is clear from the Plaintiff's analogy of the warning function to the maintenance function in his Brief (p. 19), which correctly intimates where the next step in the process of undoing *Neilson* lies.

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[4] It is clear in the scheme of Neilson that just as the decisions involving use of routine signs are an exception to the rule that decisions to install traffic control devices (a category covering much more than signs and markings) are discretionary, so are the decisions to maintain existing structures by routine methods an exception to the rule that decisions to maintain by upgrading or rebuilding are also discretionary.

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The argument advanced by the Plaintiff carries serious implications in another respect as well. Lurking in this argument is the proposition that the *Neilson* rule -- that decisions regarding the installation of traffic control signals are inherently discretionary -- can be converted into a jury issue as to whether immunity has been waived. Note carefully his argument: he has alleged and produced an 'expert' willing to testify that the installation of a flashing traffic signal is necessary for an adequate warning at this intersection; if the jury agrees with him, and decides that such a device is a necessary warning, then there has not only been a finding of breach of duty in a tort sense, but also a determination -- by the jury -- that immunity has been waived. This occurs under the Plaintiff's theory so long as the question of waiver hinges solely upon the claimed need of the device as a warning. If the jury finds that it is not needed as a warning, then, under this theory, there is not only no breach of tort duty, but also no waiver of immunity.

To adopt such an approach is to put into the hands of a jury the question of a court's subject matter jurisdiction.[5] No authority for such an unprecedented theory is given. Under this unique concept of procedural theory, a court would have no way of determining whether it, in fact, can proceed in a cause until a verdict has been given and the case is at an end.

Neither the question of whether the State has waived its sovereign immunity; nor any other issue of subject matter jurisdiction should be anything other than an issue of law. See e.g. *Dept. of Business Regulation v. Provende, Inc.*, 399 So.2d 1038 (Fla. 3d DCA 1981); *Sun Insurance Company v. Boyd*, 105 So.2d 574 (Fla. 1958). The approach adopted by *Neilson*, on the other hand, provides an easily administered test of the nature of the function which is not only determinable by the Court at an early stage in the litigation, but also ascertainable by the governmental agencies in planning their functions and the potential for consequent tort liability.

Several specific points presented in the course of the Plaintiff's argument bear a

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[5] Sovereign immunity bars a court's subject matter jurisdiction. Circuit Court, etc. v. Dept. of Nat. Resources, 339 So.2d 113 (Fla. 1976); Schmauss v. Snoll, 245 So.2d 112 (Fla. 3d DCA 1971); Kirk v. Kennedy, 231 So.2d 246 (Fla. 2d DCA 1970).

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response.

The Plaintiff (Respondent's Brief p. 12) argues that decisions for the installation of traffic signals is made in the district office of SOFDOT, rather than Tallahassee, and by the County Engineer rather than the Commission. This argument ignores the facts that SOFDOT is a decentralized agency and that, since SOFDOT does not maintain traffic signals, the installation requires execution of a intergovernmental compact with the County Commission (SOFDOT's Initial Brief p. 17). Nor does the existence of a discretionary function require decision making by the highest administrator or legislative body. See *Trianon Park Condominium v. City of Hialeah*, 468 So.2d 912 (Fla. 1985) (inspection by building official); *Everton v. Willard*, 468 So.2d 936 (Fla. 1985) (decision by police officer whether to arrest DUI driver); *Carter v. City of Stuart*, 468 So.2d 955 (Fla. 1985) (decision by dogcatcher not to impound dog).

The Plaintiff (Respondent's Brief p. 13) concedes that cases hold that the *initial* decision whether to install a traffic signal is discretionary, but argues they do not apply. Her implication, apparently, is that there was some earlier decision to install a device at the subject intersection. In fact, there never was such a decision made prior to the date of the accident which is the subject of this suit. The cases which Plaintiff attempts to so distinguish control this case.

The Plaintiff (Respondent's Brief p. 18) quotes a portion of this Court's opinion in *Neilson* and, by the clever use of periods indicating omission of a portion of the text, produces a statement which appears to hold that while decisions to install traffic control signals is discretionary, the mere *additional* allegation of the existence of a known hazard or trap for which no proper warning was given properly states a cause of action. Recourse to the opinion itself (*Department of Transp. v. Neilson* at 1078) reveals that this Court did not suggest that an allegation of the existence of a known trap with no proper warning *added to* an allegation of lack of a traffic signal creates a cause of action. The cause of action referenced in the opinion is one for lack of warning of a dangerous condition with no allusion to existence of traffic signals.

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The Plaintiff states (Respondent's Brief p. 20) that there was no testimony or other evidence that the flashing signal involved herein would be a regulatory device. This is absolutely wrong. Walker testified precisely to this point (R: 1247-1248) and the Federally prescribed Manual of Uniform Traffic Control Devices alludes to the same in Section 4B-5, page 4B-3 (R: Pl's. Ex. 18).

The Brief of the Amicus, Academy of Florida Trial Lawyers, attempts to suggest that the issue of sovereign immunity is merely a question of evidence. In fact, sovereign immunity, which implicates a court's subject matter jurisdiction, is a question of law for the court to determine. Any evidence of matters within the functional area protected by immunity is inadmissible as being irrelevant and prejudicial.

ADDITIONAL ARGUMENTS

(This brief hereinafter addresses certain of the Plaintiff's Arguments in Answer to the Defendants' Additional Arguments. They are numbered in accordance with the Plaintiff's Answer Brief)

V.

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

The Plaintiff contends that the testimony of Ramos established the necessary causative nexus between the allegedly deficient signing on SR 710 and the accident. The Plaintiff either misreads the testimony or fails to understand causation.

Ramos testified that, in his opinion, there were certain deficiencies in the signing which controlled traffic on SR 710.[6] He also testified -- as the Plaintiff notes in her brief -- that he believed that the alleged deficiencies would cause a driver on SR 710 to become confused and that proper warning signs would not lead to such confusion. This was the *sole* basis for the opinion that signing on SR 710 was a causative factor in the accident.

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[6] As noted in SOFDOT's Initial Brief, this opinion was disputed by other testimony. It is accepted, arguendo, as true for the purpose of this argument.

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The fatal deficiency in this testimony, and in the Plaintiff's argument, is that there was not one iota of evidence that Konney (the only driver affected by signing on SR 710) was in any way confused about the roadway, the intersection or the signing as he approached the collision point with Funk. On the contrary, the evidence was all to the contrary and Ramos, himself, conceded the point on cross-examination when he testified that there was no indication in the facts of the accident that Konney was confused by the use or placement of signs or that he was confused in any way prior to the collision (R: 978-979).

The most that Ramos's testimony regarding the allegedly defective signing can establish is that it had the potential for confusing a driver. From this, one must speculate 1) that Konney was confused at all (a speculation with absolutely no evidentiary basis), 2) that, if he was confused, then he was confused by the signing, and 3) that his "confusion" causally contributed to the accident. This is to pyramid inference upon inference to the third degree without the first, or base inference, being established by the evidence; indeed, it was not only not established, it was contrary to the evidence which indicated that Konney was alert and not confused. See *Voelker v. Combined Ins. Co. of America*, 73 So.2d 403 (Fla. 1954).

The Plaintiff suggests, curiously, that although there was no evidence that Konney was speeding, he would have gone slower if there had been a reduced speed ahead sign. Since Plaintiff acknowledges Konney's speed was in accord with the speed limit, the Plaintiff's suggestion fails to inform how this would occur. Furthermore, the purpose of a reduce speed ahead sign is to give a driver adequate time to respond to a changed speed limit. If the accident had occurred closer to the new speed limit *and* if Konney were speeding, this might raise an issue.[7] However, as Ramos himself conceded, the speed limit was reduced more than 3/10 of a mile from the accident scene -- far more distance than is needed to reduce speed even without application of a brake (R: 989).

The Plaintiff's reliance upon *Stahl v. Metropolitan Dade County*, 438 So.2d 14 (Fla. 3d DCA 1983) is misplaced upon several grounds. First, the present matter presents an issue

[7] Although, perhaps not without a problem of an unsupported inference.

of cause-in-fact, not an issue of proximate cause. Second, this was not a case where an accident occurred due to unexplained aberrant actions of Konney, leaving as an issue for litigation the explanation of the aberrant action. Here there was no aberrant conduct on the part of Konney identified by the Plaintiff. There was nothing for inferential evidence to explain. Konney, with the right-of-way, was driving south upon SR 710 and, at some point before the accident, he began to react to apply his brakes -- and did, in fact, apply them for some distance prior to the collision. The aberrant conduct which caused the accident was that of Funk who, for reasons not certain, but clearly inferable from the evidence, violated the right-of-way and drove his car into that of Konney.

A directed verdict upon the signage issues in respect to SOFDOT should have been granted.

VI.

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.

C.

Contrary to the Plaintiff's implication, Hall's testimony was not excluded on the ground that he had not been listed as an expert witness on the pre-trial list.

The Trial Court excluded testimony by Hall in regard to why SOFDOT placed signs in certain locations, a matter well within his expertise.[8] This was particularly crucial testimony since Ramos had criticized the sign locations. Hall's testimony that the signs were located in accord with certain constraints created by the road geometry could only come from a SOFDOT employee who knew why SOFDOT had located the signs where they were located.

In addition, Hall's deposition, containing opinion testimony was utilized by the Plaintiff; the Defense effort to present live explanation of this testimony was erroneously

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[8] Although Hall was not a registered engineer, he was one by training. See SOFDOT Initial Brief.

rejected by the Trial Court.

VII.

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.

Contrary to the Plaintiff's suggestion, there was no evidence, and no issue presented to the jury, as to whether SOFDOT owed a duty of care to persons in the position of Konney. The instruction 3.1 (a) is intended for use when an issue has been raised; thus whether SOFDOT announced to the jury that it owed a duty is irrelevant. Unless it contended in evidence or argument that it did not owe a duty, there could be no issue on the point. The Plaintiff simply confuses a non-issue with an issue.

CONCLUSION

For the reasons set forth herein, and in the Initial Briefs of the Petitioner and the Amici supporting the position of the Petitioner, the STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION urges that the decision below be quashed with instructions as set forth in this Party's Initial Brief.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record listed below by U. S. Mail, this 4th day of September, 1990:

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