OIA 10-5-90

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION,

Petitioner,

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

LORETTA KONNEY, etc., et al.

Respondents.
_____/

PALM BEACH COUNTY,

Petitioner,

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

LORETTA KONNEY, etc., et al.

Respondents.
_____/

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

PETITIONER, PALM BEACH COUNTY'S REPLY BRIEF

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PRELIMINARY STATEMENT

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

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

I

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

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

KONNEY has consistently maintained that this case is a direct descendant of the decision rendered in **City of St. Petersburg v. Collom**, 419 So.2d 1082 (Fla. 1982).

In **Collom**, however, this Court specifically stopped short of requiring expensive and "fail safe" improvements for fear of entangling itself with the inherent functions of the executive and legislative branches of government. **Id. at 1085-1086.** **Collom** did not involve the decision and implementation of a traffic signal device. In this regard, **Collom** did not eviscerate the legal evolutionary distinction between conventional methods of warning and traffic signal devices whose primary function is to control traffic. **Department of Transportation v. Webb, 409 So.2d 1061 (Fla. 1st DCA 1981) and Department of Transportation v. Vega, 414 So.2d 559 (Fla. 3rd DCA 1982).**

In **Department of Transportation v. Neilson, 419 So.2d 1071 (Fla. 1982)**, this Court specifically recognized that the **Neilson's** Complaint attempted to state a cause of action based upon, inter alia, the warning of a hazardous condition **through the installation of traffic control devices. Neilson at 1078 (emphasis added).**

KONNEY'S response to the fact that the flashing beacon chosen by their expert in this case was characterized and listed as a traffic control device and not a warning device is completely off the mark (KONNEY'S Brief Page 21). It is the "hazard identification beacon" Manual of Uniform Traffic Control Devices, (§ 4(E-1) 1978) which by specific definition is utilized; "at intersections where a warning is required." Although originally suggested by KONNEY'S expert as the proper method to warn at the intersection it was then retracted as an improper device under the circumstances. (R-1001-1002; 1129-1130).

The COUNTY in the case at bar is not attempting to escape responsibility as KONNEY suggests by "hiding behind the manual." It is, however, the COUNTY'S position that the manual which was colloquially referred to by KONNEY at trial as the "bible of Traffic Engineering" lists the flashing beacon suggested as one for reinforcement of the traffic control. If we accept this premise as true, then this case purely and simply involves an attempt to "warn" via the use of a traffic control device. This is the precise argument raised and rejected in **Neilson**. **Id. at 1078.** In this case it may have walked and talked like a duck, but only because KONNEY dressed it up to do so.

The inherent danger with this precedent is that it entangles the Court not with the issue of whether there was a sufficient warning of a known dangerous condition, but with the decision (contradicted by the Traffic Engineering bible) as to what is a warning. This case, a flashing beacon, tomorrow, full traffic

signalization or artificial street lighting since surely these have the secondary albeit not primary function of warning.

Additionally, KONNEY attacks the Petitioner's arguments as making a distinction without difference (KONNEY'S Brief, Page 21) and yet she suggests that since a traffic engineer and not the Board of County Commissioners makes decisions regarding the installation of flashing beacons that it is an operational not planning level function. In **Neilson,** this court dispelled a similar argument:

> with regard to the installation and placement of traffic control devices, we find the argument that such placement is exclusively the decision of traffic engineers and, as such, an operational-level function, to be without merit. Many municipalities and counties make these decisions, including even the installation of single traffic lights, within the ambit of their legislative function. **Id. at 1077.**

Additionally, as analyzed in **Kaisner v. Kolb, 543 So.2d 732 (Fla. 1989)**, the distinction does not concern itself with the individual who makes such a decision but whether it is one which would entangle the court with fundamental questions of policy and planning. While it is true as recognized in **Kaisner** that all planning level decisions involved in operational act and vice-versa, it can also be argued that any regulatory device has a function of warning. In fact, all of the regulatory devices at and around the intersection in question were attacked by KONNEY at

trial as failing to sufficiently warn (R. 915-950).[1]

KONNEY has no direct response to Petitioner's arguments concerning the costs and expertise required in the determination of the placement of an electronic traffic control device. The testimony at trial, in fact, illustrated that such a decision is made through the Traffic Engineering Department of Palm Beach County and not the Traffic Operations Section (R. 1213; 1238-1240). The former makes the initial planning and engineering decision, while the latter performs the installation and maintenance functions.

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[1] For a good example see (R. 934) regarding the inability of a 45 mph speed limit sign to adequately warn.

II

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

Hearsay of Reports

KONNEY responds that the purpose of reviewing the accident reports was, inter alia, to establish the inherent dangerousness of the intersection (Appellee's Answer Brief Pg. 26). There is no hearsay exception noted under the Florida Rules of Evidence for such an intended purpose. **Florida Evidence Code §90.801 (1979).** In point of fact, while an ultimate purpose was to establish an inherently dangerous situation, KONNEY'S expert on direct examination parroted all of the information contained within the reports including speed of vehicle (R. 959), even conclusions drawn by non-participants as to the cause of the accident (R. 954-970). In essence, the reports were used initially by KONNEY to meet her burden of proving relevance via substantial similarity and then to prove the elements of notice and inherent dangerousness.

Petitioners, therefore, were shunted in the opportunity to establish that many of the other accidents were not substantially similar, and thus not relevant to any of the issues presented. Additionally, whether KONNEY laid the proper predicate has no bearing on the objection based upon hearsay raised by the COUNTY at trial and on appeal. The COUNTY'S objection goes to the manner in which the evidence was presented to the jury and its prejudicial affect in that form, not to the predicate laid by

KONNEY (R.964).

Whether many of the cases cited by the COUNTY in its initial brief involve situations where the report itself is offered into evidence is both incorrect and a non sequitur. The proper inquiry is whether an expert is parroting information from nontestifying witnesses and not whether the report itself is being offered into evidence. **Kurynka v. Tamarac Hosp. Corp., 542 So.2d 412 (Fla. 4th DCA 1989); Smithson v. V.M.S. Realty, Inc., 536 So.2d 260 (Fla. 3rd DCA 1988); Riggins v. Mariner Boat Works, Inc., 545 So.2d 430 (Fla. 2nd DCA 1989).** In **Riggins, supra** the lab report at issue was previously excluded by the court. It was the experts opinion formulated upon the inadmissable report that was considered improper. **Id. at 432.** The court shed light on this issue when it recognized that normally **§90.704, Florida Statutes (1987)** is utilized when additional facts in evidence buttress the opinions given. The court cautioned that the rule should not be used to extrapolate information from an otherwise inadmissible document.

Accepting KONNEY'S argument would in essence mean that the hearsay rule has no applicability if the information comes through the form of expert testimony as long as the report itself is not admitted into evidence. This strained view of the hearsay rule and **§90.704, Florida Statues** is not only completely unsupported but expressly contradicted by the cases cited by the COUNTY.

Whether Mr. Ramos testified that he "customarily" relied on accident data has absolutely no impact on how he testified in

this case. Mr. Ramos unequivocally testified in regards to the intersection in question that the COUNTY and SOF DOT should have known of the inherent danger from the date the intersection was constructed (R.949). It was Mr. Ramos on direct examination who stated that in this case he did not utilize or need accident data (R.949). It is only on appeal that KONNEY asserts that the data was necessary to support any opinions. The record offers no support for this contention.

Finally, KONNEY suggests that **Cahill v. Dorn, 519 So.2d 56 (Fla. 4th DCA 1988)** and **Riggins v. Mariner Boat Works, Inc., 545 So.2d 430 (Fla. 2nd DCA 1989)** were decided under the accident report privilege. **Riggins** did not even involve an accident report, it involved a chemical toxicology report. Nowhere in the discussion is the accident report privilege mentioned.

While **Cahill** did involve an accident report, the Court specifically found that the statements contained therein were hearsay in addition to being privileged. **Id. at 56.**

ISSUE III

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

It is simply untenable for KONNEY to rely on **Seaboard Coast Line Railroad Company v. Zufelt, 280 So.2d 723 (Fla. 1st DCA 1973)** to support their position. There is absolutely no evidence of impairment of the driver in **Zufelt**. Unlike the instant case, the trial court specifically noted that the driver reacted to the railroad's warnings as evidence by skidmarks. **Id. at 724.**

The passage of the Appellate Court quoted by KONNEY (Answer Brief Page 32) concerning "opening the minds of the jurors to ... excursions outside the pleadings," did not concern blood alcohol as it related to proximate cause, but how it [blood alcohol] related to the railroad's contributory negligence claim against the passenger for riding with a driver who had been drinking. **Id. at 725.**

In the case at bar, conversely, there was ample evidence to create a jury question as to whether or not Mr. Funk's impairment was the proximate cause of the accident. Unlike **Zufelt,** the alleged intoxicated driver in the case at bar took no evasive action (R. 551). It is undisputed that Mr. Funk failed to react to any of the warnings or regulatory signs in place including a "stop ahead" warning sign placed 488 feet preceding the stop sign which was clearly visible to drivers on C809 (West Lake Park Road) (R.551, 567, 573, 648-649).

Mr. Funk's blood alcohol level at the time the blood was drawn (10:45 p.m.) was .09 wt./vol. The proffered testimony of Mr. Pintacuda would have established that the level was higher at the time of the accident and could have been as high as a .17 wt./vol. (Pintacuda's Deposition, Page 25). This is by statute prima facie evidence of impairment under **Florida Statute §316.1934 (1983).**

KONNEY unilaterally supposes that the "probable result" is that both impaired and nonimpaired drivers would not have received a proper warning. It is respectfully submitted that it is not KONNEY'S function to argue the exclusion of otherwise relevant evidence on what may or may not be the probable result. Given the actions of Mr. Parramore, the eye witness who was sober and who recognized and reacted to the signs in place along with the actions of approximate of 5300 drivers who enter the intersections daily (R. 918) without incident, it is equally "probable" that Mr. Funk would have recognized the warnings and completely avoided the accident had he not been impaired.

The gravamen of Plaintiff's Complaint against both Petitioners was the failure to warn of known dangerous condition. (R. 2559-2581). It was the breach of this duty which KONNEY alleged resulted in Mr. Konney's death.

It was for the jury to determine whether the breach of this duty to warn was the cause in-fact of Mr. Konney's death. The COUNTY was entirely within its right to submit a different theory of causation to the jury. The COUNTY specifically pled as an affirmative defense that the accident in question was caused by

persons/conditions beyond the COUNTY'S control (R. 2587-2589). KONNEY at no time sought to strike this as an improper defense.

Florida courts have historically followed the so-called "but for" causation in-fact test. **Stahl v. Metropolitan Dade County, 438 So.2d 14 (Fla. 3rd DCA 1983).**

KONNEY, by arguing that there was evidence presented at trial on the issue of the foreseeability of intoxicated drivers using the roadway totally misconstrues the issue here on appeal.

Assuming, arguendo, the Petitioners could not be relieved of responsibility since Mr. Funk's driving was foreseeable occurrence, it was still KONNEY'S burden to establish that the alleged breach of a duty to warn was a cause-in-fact of the accident. It is to this element of negligence that the jury was entitled to consider the facts concerning Mr. Funk's intoxication, including the blood alcohol result, particularly since he took no steps to heed the warnings in place at the time of the accident.

Interestingly, on the issue of foreseeability KONNEY states that Petitioners' arguments must fail since there was no evidence adduced at trial that Mr. Funk's driving was unforeseeable to the defendants. The point is, however, that this again was an issue for the trier of fact. **Crislip v. Holland, 401 So.2d 1115, 1117 (Fla. 4th DCA 1981); Anglin v. Department of Transportation, 502 So.2d 896, 898-899.** Only if reasonable persons could not differ as to the total absence of evidence to support any inference that the intervening cause was foreseeable may the court determine the issue as a matter of law. **Overby v. Wille, 411 So.2d 1331,**

1332 (Fla. 4th DCA 1982); Anglin, 502 So.2d 896.

The record in the case at bar clearly demonstrates substantial compliance with statutory - H.R.S. guidelines. More importantly, there is no dispute that the purpose of the statute - to ensure reliable scientific evidence. . . and to protect the health of the person tested was fulfilled. **State v. Bender, 382 So.2d 697 (Fla. 1980); Johnson v. Florida Farm Bureau Casualty Insurance Co., et al., 13 F.L.W. 245 (4th DCA 1988) 542 So.2d 367, rev. dism. 549 So.2d 1013, rev. dism. 551 So.2d 461.**

In regards to Ms. Edelberry's (testing nurse) qualifications, plaintiff fails to point out that Detective Waites, the police officer who accompanied Mr. Funk to the emergency room, testified that Ms. Edelberry was the assistant lab supervisor at the hospital (R. 1539). This was based upon the personal knowledge of the officer and plaintiff's hearsay objection was specifically overruled by the court (R.1539). Therefore, PALM BEACH COUNTY respectfully restates that sufficient predicate was laid to establish Ms. Edelberry's qualifications which under statute requires only that she be a "registered nurse, licensed practical nurse, or duly licensed clinical laboratory technician." **Florida Statute §316.1933, 1985.**

The proffered testimony of Gloria Carpenter served only to corroborate Officer Waites earlier testimony, and therefore, the authentication of the records produced was immaterial to the ultimate issue of Ms. Edelberry's qualifications.

IV

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

KONNEY contends that Petitioners waived their right to complain about the judge's comments and that the prospective venire was "rehabilitated" during voir dire and by the judge's later remarks. In point of fact, as stated in the COUNTY'S Initial Brief the judge's subsequent comments actually reinforced the prejudicial effect of the earlier comment. Additionally, the final verdict does not support a claim of rehabilitation. Florida courts have intuitively recognized that a rehabilitative or curative effort taken after a prejudicial comment by a trial judge is not only ineffective in most cases but actually reemphasizes and compounds the problem. **Whitenight v. International Patrol and Detective Agency, Inc., 483 So.2d 473 (Fla. 3rd DCA 1986).**

Ironically, it was Plaintiff's counsel who at trial attempted to dissuade the trial judge from giving a curative comment on this issue;

> Mr. Martins: My concern is obviously commenting via of some curative comment might then unduly in the case of the jury [sic] the court's feeling in favor of the COUNTY.
>
> I certainly don't want an edge and I'm not suggesting that, but I'm not sure what the court can say. (R. 71)

Questioning the jury during the COUNTY'S voir dire would equally have compounded the problem. This questioning would have

occurred after the judge had already decided to not strike the panel (R.139) and would have served only to place in center stage a sensitive issue raised sua sponte by the trial judge which had absolutely nothing to do with the allegations made against the COUNTY in the case at bar.

To suggest that the COUNTY waived its objection by deferring a few minutes to have the panel stricken is a mis-characterization of what transpired. The judge upon initial approach to the bench was uncertain as to exactly what was said and asked to wait until the next available break so that the court reporter could locate the comments (R. 71). After reviewing the records just moments later, the COUNTY and SOF DOT unequivocally moved to strike the panel (R. 139). This request was denied by the court.

Finally, KONNEY suggests that the COUNTY naturally believes that the verdict is unfair and not based upon the facts as it saw them. (KONNEY'S Brief Page 40). While this may be true, the point is that the objections raised to the judge's comments were made two weeks prior to the jury's verdict. The judge herself recognized that she should not have made the comments (R. 70). In **Cruz v. Warren, 157 So.2d 553 (Fla. 1st DCA 1963),** there was no tape recording of jury deliberations, that court, however, still found that the adverse verdict was an essential factor to be considered.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by U.S. Mail this 21st day of August, 1990 to RICHARD L. MARTENS, ESQ., Boose, Casey, et al., 515 North Flagler Drive, Northbridge Tower, 19th Floor, West Palm Beach, FL 33401; MICHAEL DAVIS, ESQ., 1655 Palm Beach Lakes Blvd, West Palm Beach, FL; and EDWARD CAMPBELL, ESQ., 1100 Prosperity Farms Road, Suite 203, Palm Beach Gardens, FL 33410.

By _____
Christopher D. Mauriello