ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,407

POLK COUNTY

Petitioner,

-vs.-

DONNA M. SOFKA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

AMICUS CURIAE BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

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SUITE 450 GABLES ONE TOWER, 1320 SOUTH DIXIE HIGHWAY, MIAMI, FLORIDA 33146 • TELEPHONE (305) 666-5053

TABLE OF AUTHORITIES

CASES PAGE

OTHER AUTHORITIES **PAGE**

ROY D. WASSON, ATTORNEY AT LAW
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STATEMENT OF THE CASE AND OF THE FACTS

This is a proceeding for discretionary review of a certified question of great public importance from the Second District Court of Appeal. The gist of the question is whether a governmental entity's failure in the first instance to install traffic control warning devices at an intersection--as opposed to its failure to install such warnings after being put on notice of a particular danger at the corner--is an operational-level decision as to which sovereign immunity is inapplicable, or is a planning-level decision protected by sovereign immunity.

The Plaintiff/Respondent, Donna M. Sofka, was rendered a quadriplegic in a two-car crash which occurred at an unmarked intersection. Tr-400-04. The roadway which ran from north to south through the intersection (on which the other car was traveling) was a county road. Tr-2169. The roadway which crossed the intersection from east to west is a short, privately-maintained street to the east of the intersection. Tr-457. About six months before the accident, the county approved the construction of a new street on the west side of the intersection as a dedicated public roadway. Tr-2170.

When the collision occurred, Ms. Sofka was driving west from the private street and either crossing onto the new public street which continued westbound, or was turning onto the southbound county road. See Tr-403-04. Ms. Sofka apparently did not slow down or stop at the intersection and her car was broadsided by the

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other vehicle. See Tr-403-04, 428.

The Academy otherwise accepts the version of the Statement of the Case and of the Facts set forth by the Respondent, the party whose position the Academy supports in this Amicus Brief.

SUMMARY OF THE ARGUMENT

Resolution of the question of whether sovereign immunity applies to this case requires a determination of whether the County's action in approving the plans for the intersection, and in failing to use reasonable care in providing stop signs or other appropriate traffic control devices, constituted a planning-level, discretionary decision. In the context of roadway design and marking cases, this Court has previously held that initial design decisions, such as the location and alignment of roads, and the placing of traffic control devices, are discretionary decisions protected by sovereign immunity. This Court also has held that where governmental entities create known dangerous conditions, a duty to warn arises which is not protected by sovereign immunity.

The parties in the present case accept the foregoing statements of Florida law on the point and disagree on whether the evidence in this case establishes a known dangerous condition as to which a duty to warn arose. The Academy of Florida Trial Lawyers, however, disagrees that existing statements of Florida law on the subject are adequate and proposes instead that those holdings be revisited and overruled.

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In adopting the current definition of planning-level, discretionary acts as the test which provides the government with sovereign immunity, this Court has looked favorably upon the decisions of other states. Those states have expressly held that highway design decisions are not discretionary acts under that analysis. In Alaska, Hawaii, Iowa, and Indiana, the courts have wisely held that negligent decisions to design dangerous roadways are operational-level decisions not subject to sovereign immunity.

This Court's prior decisions holding that roadway design decisions are discretionary acts also are inconsistent with the four-part test enunciated by the Washington Supreme Court which this Court has adopted as its own. Therefore, because jurisdictions to which this Court looked in formulating current sovereign immunity doctrine do not support the existing state of Florida law that roadway design decisions are protected by sovereign immunity, this Court should revisit that issue and recede from its prior holdings that design decisions are planning-level, discretionary acts.

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ARGUMENT

I.

THE DANGEROUS DESIGN OF ROADWAYS WHICH COULD BE REMEDIED BY PLACEMENT OF SIGNS OR OTHER TRAFFIC CONTROL DEVICES IS NOT A PLANNING LEVEL FUNCTION SUBJECT TO SOVEREIGN IMMUNITY. BUT IS OPERATIONAL

Introduction:

The lead case on the question of when state agencies are protected by sovereign immunity--and when they are liable in tort--where collisions are caused by dangerous conditions on roadways is Department of Transportation v. Neilson, 419 So. 2d 1071 (Fla. 1982). In that decision, this Court held that "decisions concerning the installation of traffic control devices, the initial plan and alignment of roads, or the improvement or upgrading of roads or intersections . . . are basic capital improvements and are judgmental, planning-level functions" for which governmental agencies are immune. Id. at 1077.

The Neilson decision is not crystal-clear when it comes to the question of liability for placement of traffic control devices. On the one hand, the Court seems to hold that the initial decisions pertaining to signage always are subject to sovereign immunity, where it states: "Such decisions as the location and alignment of roads, the width and number of lanes, and the placing of traffic control devices are not actionable because the defects are inherent in the overall project itself." See id. at 1078 (emphasis added).

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In the next statement on the subject however, the Court indicates that the rule is not without exception: "If, however, the governmental entity knows when it creates a curve that vehicles cannot safely negotiate the curve at speeds of more than twenty-five miles per hour, such entity must take steps to warn the public of the danger." Id. (emphasis added).

In cases such as this one, a question often arises about what kind of knowledge gives rise to the duty to warn under the second part of Neilson. Is it actual knowledge of a prior accident at the same location? Or may it be knowledge imputed from other circumstances, such as a review of the plans and layout of the roadway itself which should put the reasonable person on notice of the risk of harm to the motoring public? Does a County get one or more "free" accidents before the duty to warn arises? Of course the governmental Defendants (and their amici) in such cases say yes. The claimants in such cases take the opposite position: that where the jury could find knowledge of the danger from a review of the plans and expert testimony, then sovereign immunity does not protect the failure to install traffic control devices, even absent a history of other accidents.

As usual, in the present case, Polk County takes the position that it did not know of any extraordinary risk from the present intersection which rendered it a "trap for the unwary" any more than the risk posed by another unmarked intersection. See Initial Brief at 34. The County points to the lack of prior accidents as dispositive of its sovereign immunity claim. Id. at 35. Polk

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County cites this Court's later holding in Department of Transportation v. Konney, 587 **So. 2d 1292 (Fla. 1991)** which quashed **a** decision for the claimant, holding that the lack of prior accidents at the intersection in question "establishes that this intersection was not a known dangerous condition when it was created.'! Id. at 1296.

The Respondent argued before the Second District (and is expected to argue again before this Court) that--notwithstanding the lack of prior accidents at the intersection--there was enough evidence of a known dangerous condition to overcome the sovereign immunity defense. Such evidence includes the County's review of the plans, inspection of the intersection, and practices at other similar intersections. Thus, the parties on both sides of this issue accept the Neilson and Konney standard, requiring a showing of a known hazard. They merely disagree on whether the facts of this case meet that standard.

The Academy submits that the approach taken by both the County and the Plaintiff are insufficient to correctly answer the certified question in this case. Even if the Respondent's position in this case is the correct reading of Neilson, it would seem that the showing needed to overcome sovereign immunity where a roadway is designed without proper traffic control devices would be greater than the showing that the governmental entity should have known of the unreasonable risk of harm when the road was built. If actual, subjective "knowledge" of the risk is required to overcome immunity--rather than a reason to know of the risk, as is

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ordinarily the standard in negligence cases--then the jury could find that the agency is immune, even though it was negligent in the design of an unsafe intersection.

The Academy herein offers a different approach to this issue from that employed by the parties: to revisit the basic premise of Neilson that roadway design decisions are discretionary, planning-level activities protected by sovereign immunity. The Academy submits that the requirement of actual knowledge of a dangerous intersection--whether obtained by prior accidents or by other proof--is unnecessary under the correct analysis of the issue.

Roadway Design Decisions are Operational and Not Discretionary:

This Court should follow the states which have held that the negligent design of a dangerous roadway is not a discretionary, planning-level function subject to sovereign immunity. While the decision whether to build or accept dedication of certain roadways is an immune discretionary-level function, the better-reasoned decisions hold that the negligent design of a roadway which creates a hazard is an operational decision which subjects the appropriate governing body to liability.

This Court should recede from its holding in Department of Transportation v. Neilson, supra, that "[s]uch decisions as the . . . placing of traffic control devices are not actionable because the defects are inherent in the overall project itself." Neilson and its progeny failed to recognize that several jurisdictions--

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including two which provided Florida with part of the legal foundation upon which our discretionary/operational distinction is based--have determined roadway design decisions to be operational functions not subject to sovereign immunity. We took our existing sovereign immunity doctrine from the examples of states where the acts and omissions of Polk County would not be immune, so this Court should overrule its prior decisions which hold that highway design is a discretionary, planning function.

To understand the importance and precedential value of the decisions from other jurisdictions, it is useful to analyze the lead case adopting Florida's current sovereign immunity doctrine: Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979). In that decision, this Court first addressed the question of whether the enactment of § 768.28, Fla. Stat. (1975), waiving sovereign immunity, rendered state agencies liable for all acts of otherwise actionable negligence, or whether there remained an implied exception for discretionary acts of government. This Court looked closely to the law of other states for guidance on whether to recognize an implied discretionary act limitation on the waiver of sovereign immunity, and held that such a limitation existed in Florida too. 371 So. 2d at 1020

Once that implied limitation was recognized, this Court in Commercial Carrier continued to look to other states' decisions for help in distinguishing between the types of governmental actions subjecting governmental entities to tort liability, and those which remain protected by the discretionary act remnant of the sovereign

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immunity doctrine. The Court adopted the approach used in Johnson v. State, 447 P.2d 352 (Cal. 1968), of distinguishing planning-level functions from those governmental actions taken at the operational level. 371 So. 2d at 2d at 1022.

Rejecting an approach of specifically defining all governmental acts which would qualify as discretionary, planning-level functions--and adopting instead a case-by-case-approach for identifying immune governmental action--this Court looked to a Washington state court case for guidance. This Court observed: "The state of Washington has also implied a discretionary function exception in its waiver of immunity statute in the absence of an expressed exception." Id. at 1018 (citing Evangelical United Brethren Church v. State, 407 P.2d 440 (Wash. 1965)).

Evangelical United Brethren provides a four-part preliminary test to determine what acts of government should be designated as discretionary, planning-level functions so as to shield them from liability. See 407 P.2d at 445. That test is as follows:

> (1) Does the challenged act, omission or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission or decision essential to the realization or accomplishment of that policy, program or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision? If these preliminary questions can be clearly and unequivocally answered in the affirmative, then the challenged act, omission, or decision can, with a reasonable degree of assurance, be classified as a

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> discretionary governmental process and nontortious, regardless of its unwisdom. If, however, one or more of the questions call for or suggest a negative answer, then further inquiry may well become necessary, depending upon the facts and circumstances involved.

407 P.2d at 445.

After the "planning-level" versus "operational" distinction was adopted by this Court in Commercial Carrier, the Court expressly accepted the Washington State approach for identifying which category given cases fall into on an case-by-case basis. "In pursuance of this case-by-case method of proceeding, we commend utilization of the preliminary test iterated in Evangelical United Brethren Church v. State, supra, as a **useful** tool for analysis." 371 So. 2d at 1022(emphasis added). This Court also noted that "Alaska and Hawaii have adopted a similar construction of discretionary function immunity under their respective waiver statutes." 371 So. 2d at 1021-1022.

The importance of the approach taken by those other states accepted by this Court is that courts in Alaska, Hawaii, and other states have (before and since Commercial Carrier) determined that highway design decisions are not subject to sovereign immunity as discretionary acts.

In one such case, the Supreme Court of Alaska addressed the question of whether design decisions in roadway construction are discretionary functions subject to sovereign immunity. See Johnson v. State, 636 P.2d 47 (Alas. 1981). The Johnson case involved facts similar to the case at bar, because it also involved the State's acceptance and approval of a roadway originally designed

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and constructed by a private entity.

In Johnson, the accident occurred when a bicyclist riding on a roadway attempted to cross railroad tracks. "[T]he state did not initially design the road and crossing." 636 P.2d at 64. The road was originally constructed by a railroad over its land and then later leased to a city which reconstructed the crossing. "The reconstruction was completed pursuant to specifications approved by the state." Id. at 65 (emphasis in original).

In affirming the judgment in favor of the Plaintiff against the State in Johnson, the Alaska Supreme Court expressly rejected the argument that roadway design decisions made by, or approved by the state, constituted discretionary acts for which sovereign immunity applied. The Court held:

> The State urges us to hold that state highway design determinations are insulated from liability because they are basic policy decisions occurring at the planning level. It argues that this initial design immunity should extend until the state has notice, actual or constructive, that due to "changed physical conditions" the original design has produced a dangerous condition . . . .
>
> * * *
>
> Thus the State inherited a paved road, with an existing crossing, but subsequently approved its reconstruction utilizing the original design. This is the design decision for which the state urges immunity. . . .
>
> The decision of whether to have built the road or crossing was a planning decision involving a basic policy decision entrusted to a coordinate branch of government. . . . However, once the state made the decision to construct the road and crossinu, the discretionary function immunity did not protect it from possible negligence liability in the operational carrying out of the basic policy-planning decision to build.

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* * *

> The failure to provide a sign warning bicyclists that the . . . crossing presented a particular hazard to them is the gravamen of Johnson's claim. The state acknowledged responsibility for both signing and maintaining Phillips Field Road, but it argues that the decision not to provide a sign warning of a particularized hazard falls within the initial design phase of decision-making and is immune "unless there is not reasonable basis for such a decision."
>
> We conclude, however, that the decision to sign is operational and hence not immune.

Id. at 65-66 (emphasis added).

This Court should likewise hold that the County's approval of the design of the private street and its decision to not provide warning signs was not a discretionary level function subject to sovereign immunity.

In Commercial Carrier, this Court also noted that Hawaii was a state with a similar approach to determining what activities are planning-level, discretionary acts to the one adopted in Florida. The Supreme Court of Hawaii had--prior to --also addressed the question whether negligent design of a roadway is protected by sovereign immunity as a discretionary or planning-level function.

In Breed v. Shaner, 562 P.2d 436 (Haw. 1977), the Court answered the following question: "Is the state of Hawaii exempted from liability as a matter of law for the design of the highway here in question under the discretionary function exception to the state tort liability act, HRS §662-15(1)?" Id. at 441. The Court noted as follows:

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> The State argued that under the planning-operational distinction . . . which equated discretionary functions to planning level conduct and non-discretionary functions to operational level conduct, any act or omission involving the design of a highway would always fall on the planning side of the dichotomy and thus be exempt from liability as discretionary. The trial court adopted this argument in granting the State partial summary judgment . . . .

Id. at 441.

The Court cited its earlier decision in Rogers v. State, 459 P.2d 378 (Haw. 1969), which applied the planning-level/operational-level distinction in holding the State's negligence in placing road signs and striping was not exempt from liability as discretionary functions. Rejecting the argument that highway design decisions always are sufficiently discretionary to be subject to sovereign immunity, the Court in Breed reversed the judgment in favor of the State. The Court noted: "In reviewing the correctness of the circuit court's order we begin with the State's general duty to keep its highways in reasonably safe condition . . . . This includes the duty to design the highway to be safe for travel by people exercising ordinary care." 562 P.2d at 441 (emphasis added).

The same result was reached by the Supreme Court of Iowa in Lewis v. State, 256 N.W.2d 181 (Iowa 1977). Iowa had a statute which preserved sovereign immunity "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state." Section 25 A.14(1) Iowa Code Annotated.

The State in the Lewis case argued that its decision to design

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and construct Interstate 29 without a median barrier and without certain warning signs present was a discretionary, planning-level decision which rendered it immune from liability. Rejecting that argument, the Supreme Court of Iowa noted that "plaintiffs' claims do not focus on the decision to build Interstate 29, a discretionary function, but on the alleged negligence of the State in implementing that decision. Consequently, section 25 A.14(1) is not preclusive of plaintiff's right to relief." Id. at 195(emphasis in original).

The Court in Lewis relied upon its earlier decision in Stanley v. State, 197 N.W.2d 599 (Iowa 1972), which held that the State was not protected by sovereign immunity in failing to adequately warn motorists of highway hazards created by ongoing repair work on the highway. The Lewis Court held: "Every act involves discretion. However, the decision not to give proper warning is no more a "discretionary function" as defined in section 25A.14(1) then is the determination to drive a state-owned vehicle in excess of the speed limit." Id. at 603-604.

Iowa has since legislatively immunized governmental decisions regarding placement of traffic control devices. See Iowa Code § 668.10(1). Most worthy of note, however, is that a later case from Iowa, decided after that statute was enacted, again held that the State's negligent design of a highway was not protected as a discretionary function under sovereign immunity. See Sullivan v. Wickwire, 476 N.W.2d 69 (Iowa 1981).

The courts of Indiana also have held that the dangerous design

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of highways is not subject to sovereign immunity as a discretionary act, or under the "public duty versus private duty" analysis urged by the Petitioner herein. In Indiana State Highway Comm'n v. Clark, 371 N.E. 2d 1323 (Ind. App. 1978), the Court expressly rejected the "public duty" and "discretionary acts" arguments being asserted by the State, holding as follows:

> As is evident from the quote in its brief, supra, the State has misconstrued the respective meanings of private duty, public duty, and discretionary act. In Elliot v. State (1976), Ind. App., 342 N.E. 2d 674 this court held that the State has a general duty to exercise reasonable care in designing, constructing, and maintaining its highways for the safety of public users. Therefore, as a result of the holdings in Campbell, supra, Briggs, supra, and Elliot, supra, sovereign immunity is not available to the State as a defense . . . .

Id. at 1327.

This Court should follow the decisions from the foregoing states which all hold that roadway design decisions do not constitute planning-level, discretionary acts which are subject to sovereign immunity. Those decisions are perfectly consistent with the four-part test enunciated by the Washington Supreme Court in the Evangelical United Brethren case and adopted by this Court in Commercial Carrier.

Only the fourth, least important factor of that four part test "can be clearly and unequivocally answered in the affirmative" within the meaning of Evangelical United Brethren: the question whether the governmental entity involved possesses the requisite authority to do the challenged act or omission. That question "has

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limited value" because "the answer will almost invariably be yes" unless the government agents were not acting within the scope of their authority. In that case, the individuals would be personally liable and the state would not be liable at all under § 768.28. Dept. of Health & Rehab. Serv. v. Yamuni, 529 So. 2d 258, 260 n.1 (Fla. 1988). The first three prongs of that test are not unequivocally answerable in the affirmative when the decision under review concerns the design and construction of roadways; particularly the signing of dangerous intersections.

First, there is no "basic governmental policy, program, or objective" involved in the decision not to place a stop sign at a given intersection. The basic governmental policy, program, or objective may well be whether to create a roadway or intersection in the first place, but the placement of traffic control devices once that decision is made does not clearly rise to a matter of basic governmental policy.

Second, Polk County has not demonstrated how the presence or absence of a stop sign in the current case is a "decision essential to the realization or accomplishment of that policy, program or objective" of accepting dedication of the intersection where the Plaintiff's collision occurred. Under the current state of the record, assuming that the acceptance of the intersection was a basic policy, program or objective, the existence or non-existence of safe traffic control devices has not been shown to impair the realization or accomplishment of that governmental objective. Therefore, the second prong of the Evangelical United Brethren test

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has not been answered affirmatively.

Third, although the decision of whether and how to mark an intersection with traffic control devices does involve some level of expertise in the area of traffic management, the third prong of the applicable test is to enquire whether "the act, omission, or decision require[s] the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved." (emphasis added). Expertise in the area is not enough; there must be a showing that some basic governmental policy was evaluated in the decision-making process. None has been shown to be present in this case, nor could there be, because the method of marking a roadway intersection simply does not constitute a "basic policy evaluation" such as would give rise to sovereign immunity.

Highway design decision--especially those connected with the placement and nature of traffic control devices--are not planning-level, discretionary decisions which would entitle a governmental entity to sovereign immunity under the test adopted by this Court in Commercial Carrier and under the decisions of several states, including states to which this Court looked in developing its current sovereign immunity doctrine. The decision to put in a stop sign has no impact on the public policy of the states of Florida. It is not a "matter of government." See Trianon Park Condominium Assn. v. City of Hialeah, 468 So. 2d 912 at 919 (Fla. 1995). Therefore, this Court should recede from its holdings in Neilson, supra, and its progeny and respond to the certified question accordingly.

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CONCLUSION

WHEREFORE, the determination that roadway design decisions are planning-level, discretionary acts protected by sovereign immunity being inconsistent with the four-part test for identifying discretionary acts adopted by this Court in Commercial Carrier, and the courts of several states, including some which this Court followed in establishing its current sovereign immunity doctrine, having expressly rejected the proposition that roadway design decisions are protected by immunity, this Court should recede from its holdings in Neilson and its progeny that sovereign immunity protects such decisions and the certified question should be answered consistent therewith.

Respectfully submitted,

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