IN THE SUPREME COURT OF FLORIDA

POLK COUNTY,

Petitioner,

vs.

CASE NO. 88,407

DONNA M. SOFKA,

Respondent.

AMICUS CURIAE BRIEF
OF **PALM** BEACH COUNTY

IN SUPPORT OF PETITIONER POLK COUNTY,
ON APPEAL FROM
THE SECOND DISTRICT COURT OF **APPEAL**

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STATEMENT OF THE CASE AND FACTS

Palm Beach County **appears** here pursuant to Rule 9.370 **Fla.** Rule R.Civ.P. **as Amicus** Curiae on behalf of Petitioner, Polk County. Palm Beach County relies on and **agrees** with the Statement of the **Case** and Facts **set** forth in Petitioner's Initial Brief on the **merits.**

SUMMARY OF ARGUMENT

The Second District Court of Appeal erred when it affirmed the Stipulated Final Judgment entered by the Circuit Court of Polk County. The Second District's findings conflict with this Court's previous decisions holding that before a governmental entity can be held liable for the failure to warn of a dangerous condition, it must have created the condition for or have knowledge thereof.

There is no evidence that Polk County created the dangerous condition on the East Lamp Post Lane, nor evidence that Polk County knew or should have known of its existence. Furthermore, the decision of whether to install certain traffic control devices on roadways or at intersections are planning level discretionary decisions from which governmental entities are immune from liability.

This Rule is particularly important in the case at bar where the Respondent traveling on private road approximately 3/10 mile long and not maintained by Polk County.

Finally, it could not be said that the intersection constituted a trap because the Respondent was familiar with the intersection and she had a duty to stop and yield to oncoming vehicles.

ARGUMENT

I. THE SECOND DISTRICT COURT OF APPEAL ERRED IN AFFIRMING THE STIPULATED FINAL JUDGMENT ENTERED BY THE CIRCUIT COURT OF POLK COUNTY.

A. POLK COUNTY OWED NO DUTY TO THE RESPONDENT BECAUSE THE DECISION WHETHER TO INSTALL TRAFFIC CONTROL DEVICES IS A JUDGMENTAL PLANNING LEVEL DECISION.

Let us be reminded that it wasn't so long ago that Florida like other jurisdictions operated under the doctrine that the "king could do no wrong". If a citizen was injured by a governmental entity, it often had no recourse but to become a ward of the State.

Fortunately, Florida became enlightened and waived its sovereign immunity by enacting Florida Statute 768.28(1) which provides: [I]n accordance with S.13 Art.X State Constitution, the State, for itself and for its agencies or subdivisions hereby waives sovereign immunity for liability only to the extent specified in this act. Section (5) provides: The State and its agencies shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances.

With the enactment of this Statute, the question became how it would be interpreted by the Courts of this State. The first question the Courts faced was whether Florida Statute 768.28 was a complete waiver of sovereign immunity or did it exempt certain governmental planning level decisions from suit.

In Commercial Carrier vs. Indian River County, 371 So.2d 1010, (Fla. 1979), the Supreme Court of Florida was asked to determine the scope of the waiver of sovereign

immunity. In that case, **a** wrongful death action which arose out of a collision at an intersection where it was alleged previously existing stop sign along with pavement markings were missing and the Defendant, County was sued, for among other things, failure to maintain the stop sign. Trial Court dismissed the Complaint and the Third District Court of Appeal affirmed. 371 So.2d 1013

The Florida Supreme Court held that the State and its political subdivisions had only waived sovereign immunity and accepted liability for certain operational acts and that as to planning level decisions, they remain immune from suit. Id. I at 1022 After a review of decisions, from other jurisdictions, See Evangelical United Brethren Church vs. State, 67 Washington 2d 246, 407 Pacific 2d **440,** (1965) and Florida Statute 768.28, the Court stated that:

> **So** we, too, hold that although Section 768.28 evinces the intent of our Legislature to waive sovereign immunity on a broad basis, nevertheless, certain "discretionary" governmental functions remain immune from tort liability. This **is so** because certain functions of coordinate branches of government may not **be** subjected to scrutiny by Judge or Jury **as** to the wisdom of their performance. Id. at 1022.

Here the Supreme Court looked at the facts of the instant case and concluded that the maintenance of a traffic sign did not fall under the category of planned governmental activity and **was** clearly operational and concluded that the County could be liable for failure to maintain a traffic sign at the operational level. 371 So.2d at 1022

In reversing the Third District Court of Appeal and remanding the case back to the trial court, it expressly stated that it was not dealing with the issue of whether

governmental entities could be held liable for failure to install a traffic control device in the first instance at the intersection.

> We do not deal in these cases with the issue of whether or not, or what type of, traffic control devices should be installed at the particular intersection. **Id.** at 1022

Thus was borne the distinction between judgmental planning level decisions and operational activities.

The Court having determined that the waiver of sovereign immunity was not absolute, it was left to decide what activities constituted judgmental planning level decisions.

Department of Transportation vs. Neilson, 419 So.2d 1071 (Florida 1982) proved to be such the vehicle. In that case, the Plaintiff, Patricia Neilson, was traveling through the intersection of West Interbay Boulevard and South Westshore Boulevard in the City of Tampa, when she collided with a third party oil company truck. **As** a result of the accident, Plaintiff sued the Department of Transportation, Hillsborough County and the City of Tampa, alleging that the governmental entities had (I) negligently designed and constructed the intersection, (2) failed to install adequate traffic control devices and (3) failed to warn motorists with additional traffic signs of the hazardous intersection. 419 So.2d 1073, **1074.** The trial court dismissed the action against the governmental entities, finding that the conduct alleged was a judgmental planning level function. The Second District Court of Appeal reversed, holding that decisions made by the various agencies were operational in that once they undertook these activities they had a duty to do **so** in **a** responsible manner in accordance with acceptable standards. Id. at 1074 The Supreme

Court reversed holding that decisions "relating to the installation of appropriate traffic control methods and devices or establishment of speed limits are discretionary decisions which implement the entities' police power and are judgmental planning level functions. Id. at 1077. The Court went further and noted:

> **We also** hold that the decision to build or change a road, and all the determinations in such a decision, are the judgmental planning level type. To hold otherwise, **as** expressed by the dissent, would supplant the wisdom of the judicial branch for that of the governmental entities whose job it is to determine, fund, and supervise necessary road construction and improvements, thereby violating the separation of the powers doctrine. Id. at 1077

In Neilson, the Supreme Court went one step further and noted that a duty may arise out **of a** planning level decision when a governmental entity creates **a** known dangerous condition. **41***9* So.2d at 1077, 1978. **As** an example, "the fact that **a** road ***is*** built with a sharp curve is not in itself a design defect which creates governmental liability. **If** however, the governmental entity knows when it creates a curve that vehicles cannot **safely negotiate** at speeds of more than 25 miles per hour, such entity must take steps to warn the public of the danger. Id. at 1078. See City of St. Petersburg vs. Collum: City of St. Petersburg vs. Matthews, 419 So.2d 1082 (Florida 1982).

In concurring with its ruling in Commercial Carrier, the Court in Neilson reaffirmed that the failure to maintain traffic devices may subject a governmental entity to suit. However, it stated that the maintenance of a street or intersection is to be strictly interpreted to mean **as** it exists and not upgrading a road or changing the means of traffic control. 419 So.2d. at 1078. Finally, the Court in Neilson held that governmental entities

did not have **a** duty at an operational level to bring **roads** up to current standards. Significantly, it noted that:

> "we further reject the contention that the failure to comply with standards and criteria for design construction and maintenance of public roads and highways established pursuant to sections 335.075 and 316.131 (renumbered 316.0745), Florida Statutes (1975), subjects governmental entities to suit. These statutorily directed standards were established by the legislature to set forth standards for governmental entities to follow when building new **roads** or changing and upgrading present roads or intersections. The legislature had **no** intent to mandate that all governmental entities immediately upgrade and improve all existing roads to comply with these standards". Id. at 1078.

There have been numerous decisions concerning the placement of traffic control devices and construction of public roadways. ***See*** Ferla vs. Metropolitan Dade County, **374** So.2d ***64*** (Florida 3rd DCA 1979) where the Court held that setting of speed limits and construction of a narrow roadway are a judgmental planning level decisions which could not be the subject of a tort suit.

Payne vs. Palm Beach County, 395 So.2d 1267 (Florida 4th DCA 1981), where the 4th **DCA** held that the decision whether or not to install a guardrail was a judgmental planning level decision. Palm Beach County vs. Salas, 511 So.2d 544 (Florida 1987) where it was held that the decision to utilize a left turn at an intersection was a planning level decision. Perez **vs.** Department of Transportation, 435 So.2d 830 (Florida 1983) **where** the Supreme Court held the act of designing a bridge and the failure to improve and upgrade the bridge were judgmental planning level decisions were immune from suit. A.L. Lewis Elementary School vs. Metropolitan Dade County, 376 So.2d 32 (Florida 3rd DCA 1979) held "that the fixing of particular traffic zones, installation of traffic signals and

pedestrian control devices are discretionary policy matters, planning or judgment governmental features, and as such cannot be the subject of traditional tort law liability...." 376 So.2d at 34.

In Pavne vs. Broward County, 461 So.2d 63 (Florida 1984), a case with issues similar to the instant case, Defendant Broward County was sued for opening up a road without adequate traffic control and in effect creating a dangerous condition for unassuming pedestrians. Plaintiffs' decedent had attempted to cross the road at mid block and was struck and killed by an oncoming vehicle. 461 So.2d at 64 After an adverse verdict, the County appealed and the 4th DCA reversed holding that sovereign immunity protected the County from liability following the Supreme Court's decision in Neilson, Supra, but certified the question as to whether the County had a duty to warn of a hidden danger or a trap on the roadway. The Supreme Court affirmed holding that a governmental entity is always protected from sovereign immunity for the decision to create or open a road. 461 So.2d at 65. It also concluded that the Plaintiffs' decedent did not face a trap when she crossed the road mid block and thus Broward County owed no duty to warn pedestrians of routine danger. Id. 66 The Court went further and stated:

> "As a matter of law, neither the pleadings nor the evidence establish that the danger Allison faced was any greater than that facing any pedestrian seeking to cross any street at mid block. The pleadings and evidence show that the County had not installed a traffic light, that Rock Island Road had been opened without a center line (although the line had been painted at the time of the accident), and that plans had been made to upgrade pedestrian and vehicular control, but they had not been implemented. However, regardless of the circumstances which resulted in the intersection being in the state it was the day *of* the accident, no liability may be imposed if those circumstances failed to create a known danger not readily apparent

to potential victims, or a trap, and there was no such hidden danger or trap."

In Trianon Park Condominium Association, Inc. vs. City of Hialeah, 468 So.2d 912 (Flarida 1985), the Supreme Court expanding the meaning of judgmental planning level decisions beyond the building of roads and installation of traffic control devices. In that case, the Plaintiff, Condominium Association, sued the Defendant, City, for negligent inspections of the building which failed to disclose shoddy design and construction of the building. Id. at 950. A jury returned a verdict against the City and the 3rd DCA affirmed holding that "the enforcement of a building code is a purely ministerial action which does not give rise to the status of a basic policy evaluation since the majority of the inspectors act involve simple measurement and enforcement of the building code as written rather than the exercise of discretion and expertise". Id. at 915. The Court then concluded that the "the City's inspection and certifications of buildings within its borders is an operational level activity, for which it may be subject to Court liability under Section 768.28 Florida Statutes" Id.

The Supreme Court in quashing the decision of the District Court of Appeal set forth five principles regarding governmental tort liabilities and they are as follows:

1) Before there can be governmental tort liability, there must be an underlying common law or statutory duty or care with respect to the alleged incident.

2) The enactment of Florida Statute 768.28 did not create a new duty of care but only applied existing duties owed by private individuals to governmental entities.

3) There is no common law duty for a governmental entity to enforce the law for the benefit of an individual or group of individuals.

4) Under the separation of powers doctrine, the judicial branch must not interfere with the discretionary functions of the Legislative and executive branches of the government.

5) Certain discretionary functions of government are inherent in the act of governing and are immune from suit. **468** So.2d at 917,918

After setting forth these principles, the Court held that the City in conducting building inspections, was exercising its police power for the protection of public at large and owed no duty to any individual or group of individual owners of the condominium units.

> We find that the enforcement of building codes and ordinances ***is*** for the purpose of protecting the health and safety of the public, not the personal or property interests of individual citizens. The discretionary power to enforce compliance with the building code flows from the police power of the state. In that regard, this power is no different from the discretionary power exercised by the police officer on the street in enforcing a criminal statute, the discretionary power exercised by a prosecutor in deciding whether to prosecute, or the discretionary power exercised by a judge in making the determination **as** to whether to incarcerate a defendant or place him on probation. Id. at 922

The Court went further stating that to hold otherwise "would represent an unconstitutional intrusion by the judiciary into the discretionary judgmental functions of both the legislative and executive branches of government. Id. at 923.

Finally, in Department of Transportation v. Konnev, 587 So.2d 1292, (Florida 1991), the Supreme Court addressed the issue of whether or not governmental entities had **a** duty

to install additional traffic control devices and make intersections safer, and if such decisions were planning level or operational. 587 So.2d at 1293.

In that case, Palm Beach County and the Department of Transportation were sued following an intersection collision at SR 710 and C-809 which resulted in the death of the Plaintiffs decedent and the operator of the other vehicle. Id. at 1293. The Plaintiff alleged that the State and County were negligent in failing to install a flashing beacon at the intersection, rumble strips, and that the location and type of signs were improper. Id. at **1294.** There was evidence that over the years there had been multiple accidents, including several fatalities. The case was tried before a Circuit Court jury which returned a verdict against the State and County and the 4th **DCA** affirmed, relying on City of St. Petersbura v. Collom, **419** So.2d 1082 and holding that the governmental entities had created a known dangerous condition which constituted a trap and they had a duty to warn traveling motorists by **use** of **a** flashing beacon. Id. at 1294.

The Supreme Court disagreed and reversed the appellate court's decision citing Department of Transportation v. Neilson, **41**9 So.2d 1071 (Florida 1982) and held that the decisions relating to the installation of traffic control devices are judgmental planning level decisions which are immune from suit.

> We find that Neilson and ... controls under the circumstances of this case. Although we accept the proposition that every intersection may **be** inherently dangerous, we reject the conclusion reached by the district court that these circumstances give the judicial branch the authority to determine the type of traffic control devices utilized at intersections. While intersections may **be** inherently dangerous, the type and extent of traffic control devices vary greatly, from rules that control the right *of* way to multilane traffic control signals. This Court and the district courts of appeal have established the principle that

> traffic control methods and the failure to upgrade intersections with traffic control devices are judgmental, planning-level decisions, which **are** not actionable. Id. at 1295

The Court reasoned that to hold otherwise "would allow the judicial branch to infringe upon the legislative and executive function of deciding where tax dollars should be allocated for roads and highways. Id. at 1296

In the case at bar, the Respondent, Donna Sofka had traveled East Lamp Post Lane on numerous occasions and thus, was quite familiar with the area. The roadway in question was a 3/10 mile long private road not built to county standards nor maintained by **Polk** County, **so** it could not be said that Polk County created a dangerous condition that was not readily apparent to the Respondent. Furthermore, there was no evidence of prior accidents at this intersection nor any testimony presented that this roadway was any different than the typical intersection where you have a short private road intersecting with a major arterial highway. Indeed, under this scenario, and the laws of the roadway, the Respondent had a duty to yield the right of way to oncoming motorists. Since there was no trap at the intersection, the Respondent had to show that the actions taken **by Polk** County were operational in nature and thus subject to liability and suit.

It is submitted here that Neilson. supra is controlling and that in deciding whether or not to install a stop sign on East Lamp Post Lane, Polk County was exercising its police **power** and carrying out a planning level discretionary decision and should be immune from suit. To hold otherwise would allow the knowledge and wisdom of **Polk** County. To be second guessed by judge and jury in violation of the separation of the powers doctrine.

CONCLUSION

Palm Beach County **as** Amicus Curiae respectfully joins Polk County in requesting this Court to overturn the decision **below.**

Respectfully submitted,

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CERTIFICATE OF **SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished by Federal Express to **NEAL** O'TOOLE, **ESQUIRE,** 395 South Central Avenue, Bartow, **Florida** 33830 **and by U.S.** Mail to HANK **B. CAMPBELL,** ESQUIRE, P.O. Box 3, Lakeland, Florida 33802-0003 this 4th day of **October,** 1996.

RONALD K. MCRAE
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cc: John **E.** Schaefer, Esquire