IN THE SUPREME COURT OF FLORIDA

POLK COUNTY,

Petitioner

vs.

DONNA M. SOFKA,

Respondent
_____/

Case No. 88,407

2nd DCA Case No. 95-01886

FLORIDA ASSOCIATION OF COUNTY ATTORNEYS'

AMICUS CURIAE BRIEF

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STATEMENT OF THE CASE AND FACTS

This brief is filed by The Florida Association of County Attorneys as Amicus Curiae in support of Petitioner, Polk County. The Florida Association of County Attorneys adopts the Statement of the Case and Facts presented in Polk County's initial brief.

SUMMARY OF ARGUMENT

Under Section 768.28, Florida Statutes, (1995), the Legislature has provided a limited waiver of sovereign immunity. This Court has held that governmental decisions made at the planning-level are immune from liability while those made at the operational-level are not. While planning-level decisions are considered immune, this Court has recognized two "exceptions" where a governmental entity may be held liable:

1) for an engineering design defect not inherent in the overall plan for a project it has directed be built, or

2) for an inherent defect "which creates a known dangerous condition."

While the first exception is not at issue in this case, the Second District Court of Appeal, in a split decision, found the second exception applied to this case. Although the case law construing this exception is not crystal clear, it defies logic to extend the exception to cover the circumstances in this case. The "creation of a known dangerous condition" exception is, and should be, limited to those situations where the governmental entity creates a known dangerous condition that is so "inconspicuous" and not "readily apparent" to foreseeable victims that it constitutes a "trap."

The circumstances in this case, involving an extremely short private dead-end road that intersects with a county maintained road

and is across the intersection from a recently dedicated county road, do not rise to the level of a "trap." Polk County should be immune from suit under the circumstances presented here.

Extending liability to governmental entities for the failure to warn in this case emasculates the doctrine of sovereign immunity set out in Neilson. Moreover, it places counties in the position of being insurers of every intersection in their boundaries even those created by private access roads. If this Court approves the decision of the Second District Court in this case, every county in this State will have to spend tax dollars inspecting and controlling every intersection in its jurisdiction, no matter how rural the intersection, and regardless of whether or not it involves a private road or driveway that intersects a county road. This is a violation of the separation of powers doctrine in that it permits judges and juries to determine spending priorities for governmental entities.

ARGUMENT

THE COUNTY DID NOT CREATE A KNOWN DANGEROUS CONDITION JUSTIFYING WAIVER OF SOVEREIGN IMMUNITY BY ACCEPTING DEDICATION OF A SUBDIVISION ROAD WHICH CREATED A FOUR-WAY INTERSECTION WITH ANOTHER COUNTY MAINTAINED ROAD AND THE PRIVATE ROAD ON WHICH SOFKA WAS TRAVELING PRIOR TO THE ACCIDENT.

Under the doctrine of sovereign immunity, state and federal governments are deemed immune from tort liability unless that government has waived immunity. Justifications for the doctrine of sovereign immunity include the separation of powers doctrine, the need for discretion in governmental decision making and the need to protect the public treasury from the fiscal impact of tort awards. Gerald Wetherington and Donald Pollock, Tort Suits Against Governmental Entities in Florida 44 U. Fla. L. Rev. 1, 5-6, (1992).

Section 768.28(5), Florida Statutes (1995), provides a limited waiver of immunity for torts against the State and its subdivisions. In interpreting this Statute, this Court has held that while that Statute 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 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.

Commercial Carrier Corporation v. Indian River County, 371 So.2d 1010, 1022 (Fla. 1979).

In Department of Transportation v. Neilson, 419 So.2d 1071, 1073 (Fla. 1982) this Court held:

> the failure to install traffic control devices and the failure to upgrade an existing road or intersection as well as the decision to build a road or roads with a particular alignment, are judamental, planning level functions and absolute immunity attaches. (emphasis added)

The Neilson Court recognized that the decision to build or change a road, and all the determinations inherent in such a decision, are of the judgmental, planning-level type. Id. at 1077. To hold otherwise would substitute the wisdom of the judicial branch for that of the governmental entity whose job it is to determine, fund and supervise necessary road construction and improvements and would violate the separation of powers doctrine. Id.

The Court did acknowledge, however, that a governmental entity *may* be liable for 1) an engineering design defect not inherent in the overall plan for a project it has directed be built or 2) for an inherent defect "which creates a known dangerous condition. Id. at 1077. The Court reasoned that the failure to warn of a known dangerous condition was "a negligent omission at the operational level of government" and "may serve as the basis for an action against the governmental entity." Id. at 1078.

City of St. Petersburg v. Collum, 419 So.2d 1082 (Fla. 1982) was issued the same day as Neilson. That case involved a mother and daughter who were sucked into a drainage system and drowned.

Holding the City was not immune from suit, the Court explained:

> We find that a governmental entity may not create a known hazard or trap and then claim immunity from suit for injuries resulting from that hazard on the grounds that it arose from a judgmental, planning-level decision. When such a condition is knowingly created by a governmental entity, then **it** reasonably follows that the governmental entity has the responsibility to protect the public from that condition, and the failure to so protect cannot logically be labelled a judgmental, planning-level decision . . . [I]t is only logical and reasonable to treat the failure to warn or correct a known danger created by government as negligence at the operational level.

Id. at 1086.

Thus, when a governmental entity creates a known dangerous condition, which is not readily apparent to persons who could be injured by the condition, a duty at the operational-level arises to warn the public of, or protect the public from, the known danger.

In Bailey Drainage District v. Stark, 526 So.2d 678 (Fla. 1988), Stephen Stark was killed when his vehicle was struck by another as he passed through an intersection that had **no** traffic control devices. The personal representative for Stark's estate sued Broward County and the Bailey Drainage District, alleging "that the decedent's view of the intersection was impeded by plant growth on both sides of the road which created a danger not apparent to decedent . . . and both (governmental entities) failed to provide proper **signs** or traffic control devices to warn of the danger." Id. at 679-680. This Court affirmed the Fourth District

Court of Appeal decision reversing the trial court's entry of summary judgment in favor of the governmental entities. This Court stated:

> We note that the failure to regulate traffic at an intersection by posting signs or other means does not in and of itself give rise to an actionable breach of duty. Neilson. Likewise, the existence of an obstructed view of traffic at an intersection does not in and of itself give rise to liability. We hold, however, . . . sovereign immunity does not bar an action against a governmental entity for rendering an intersection dangerous by reason of obstructions to visibility if the danger is hidden or presents a trap and the governmental entity has knowledge of the danger but fails to warn motorists. Where a governmental entity knowingly maintains an intersection right-of-way which dangerously obstructs the vision of motorists using the street in a manner not readily apparent to motorists, it is under a duty to warn of the danger or make safe the dangerous condition. (emphasis added).

Id. at 681.

In Department of Transportation v. Konney, 587 So.2d 1292 (Fla. 1991), this Court, citing Neilson, reversed the Fourth DCA and remanded for entry of judgment in favor of the governmental entities involved. In Konney, the plaintiff had been allowed to present evidence to the jury that a **particulartraffic control device should have been installed at an intersection." Id. at 1293. This Court stated:

> 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 Konney case was presented to the Court on the basis of a failure of the duty to warn of a known dangerous condition, however, the Court found it was really a failure to upgrade an intersection case. Id. at 1296. Concurring specially, Justice Kogan acknowledged that it is difficult to recognize in many instances where sovereign immunity for failure to install traffic control devices ends and the duty to warn of a dangerous condition begins. See id. at 1299. He explained:

> The analysis set forth in Neilson and elaborated in Collom admittedly is not crystal clear. The Court, for example, interchangeably used the terms "trap," "hazard," "known dangerous condition," and "dangerous condition." In common usage, these terms clearly connote a varying level of severity. In particular, "trap" imports a far more serious peril than does "dangerous condition," especially in light of the fact (noted by the majority) that every intersection can be considered dangerous.
>
> However, while this loose usage of the English language may seem confusing, I believe the Court's true meaning is evident both from

> the overall thrust of the analysis . . . and the facts upon which Collum was based. The Collum opinion, for example, concluded that liability could exist notwithstanding sovereign immunity where a local government constructs water drainage systems in such a way that unsuspecting persons are sucked into them, to their deaths. Collum, 419 So.2d at 1084-87. Such a situation obviously constitutes a very serious peril.
>
> I believe these factors indicate the Neilson and Collom Court was talking about a known hazard so serious and so inconspicuous to a foreseeable plaintiff that it virtually constitutes a trap. In such circumstances, a duty arises either to warn foreseeable plaintiffs or to take actions to diminish the peril. Neilson; Collom.
>
> The crucial question, then, is whether the present case falls within the second exception announced in Neilson, since the decision to install traffic control devices otherwise is immune. I agree that Neilson compels the result reached by the majority, although this is a result I am not entirely happy with.
>
> Nevertheless, I must emphasize that this does not necessarily mean that a roadway hazard never can fall within the second Neilson exception. If the facts of the present case were more serious and the danger more inconspicuous, I would conclude that liability could exist under the second Neilson exception. (emphasis added)

~~See also~~ Cygler v. Presjack, 667 So.2d 458, 461 (Fla. 4th DCA 1996) (for liability to attach there must be "a known hazard so serious and so inconspicuous to a foreseeable plaintiff that it virtually constitutes a trap); and Department Of Transportation v. Stevens, 630 So.2d 1160, 1162 (Fla. 2d DCA 1993) review denied, 640 So.2d 1108 (Fla. 1994) (there has been an absence of clarity in the opinions concerning what circumstances constitute a dangerous

condition or trap for purposes of imposing liability upon governmental entities).

The instant case gives this Court the opportunity to clarify the "creation of a dangerous condition" exception in Neilson. In this case, it is critical to note that Sofka was driving westward on a very short (approximately three-tenths of a mile) private road (East Lamp Post Lane) before being struck in the intersection. If she were claiming negligence on the part of Polk County for failure to install a traffic control device at the intersection, the County would clearly be immune under Neilson. She alleged, however, that the County created a dangerous condition when it accepted a subdivision road across the intersection from the road on which she was traveling. She alleges that road (West Lamp Post Lane) created the impression that the private road she was on (East Lamp Post Lane) continued uninterrupted by any crossing roads (such as Old Polk City Road). She also alleged that there was some brush on the side of East Lamp Post Lane and a steep upgrade to East Lamp Post Lane which contributed to the "dangerousness" of this intersection.

While at first blush this case may appear to be remarkably similar to Stark, it is important to note a critical difference. The intersection in Stark did not involve a private road, while the intersection involved in this case consisted of two secondary roads (one recently dedicated to the county and one extremely short private dead-end road) which ran perpendicular to the primary road

(Old Polk City Road). To contend that the County created a dangerous condition by accepting the subdivision road across the street from the private road on which Sofka was traveling takes the "creation of a dangerous condition" exception much further than it has been taken in the past.

Such an interpretation would require governmental entities throughout the State to spend precious time and money inspecting and controlling every intersection in its jurisdiction, no matter how rural, and regardless of whether it involved one or more private roads. Additionally, counties would have to enter into countless agreements with private road owners pursuant to Section 316.006(3)(b), Florida Statutes (1995) so that they could put up traffic control devices and/or warning signs on private roads. This would be a tremendous burden on already strapped local governments. Such a broad interpretation of the "creation of a dangerous condition" exception would be a violation of the separation of powers doctrine which this Court recognized in Commercial Carrier. Judges and juries should not be determining where public funds are spent for the inspection, design, construction and improvement of roads. These decisions should be left to local governments which have a number of needs to balance. Exceptions to the rule of sovereign immunity for planning-level decisions must be very narrowly drawn.

As noted in Collum, certainly no governmental entity should be

able to create a dangerous condition and then claim no liability under sovereign immunity. There is a big difference, however, between building a drainage system where unsuspecting people can get sucked in and drowned and accepting a subdivision road across from a private road. Polk County should not be considered to have **"created"** a dangerous condition in this case. This intersection was not **"inconspicuous"** or a **"trap."** The private road Sofka was on was less than one-half mile long and anyone on it could only get on it from Old Polk City Road. Thus, the intersection with Old Polk City Road cannot be said to be so **"inconspicuous"** as to trap someone. The intersection was "readily apparent" to anyone traveling on East Lamp Post Lane because the only way one could get to East Lamp Post was through the intersection. Arguably, the fact that there may have been obstacles on private property affecting Sofka's view as she traveled up to the intersection and the fact that the private road had a steep upgrade should have increased Sofka's watch for the intersection she knew was there, having traveled through it three times earlier on the day of the accident.

If the Second District's opinion is affirmed, the Neilson "creation of a known dangerous condition" exception to sovereign immunity will swallow the rule of sovereign immunity for planning-level functions. If the "creation of a dangerous condition" exception of Neilson extends to the circumstances in this case, then the doctrine of sovereign immunity will be useless to governmental entities in countless situations which will result in

enormous expense and make local governments insurers for all intersections, both public and private, within their jurisdiction. The circumstances in this case simply do not rise to the level of a known trap for unsuspecting persons. Accordingly, Polk County had no duty to warn motorists on East Lamp Post Lane. Polk County should be immune from liability in this case.

CONCLUSION

Polk County did not create a known dangerous condition justifying waiver of sovereign immunity by accepting dedication of a subdivision road which created a four-way intersection with another county-maintained road and the private road on which Sofka was traveling prior to the accident. All intersections are inherently dangerous. For an intersection to be a "known dangerous condition" justifying waiver of sovereign immunity, however, it must be created by the governmental entity and be so inconspicuous to foreseeable victims that it constitutes a "trap." The private road on which Sofka was traveling was approximately three-tenths of a mile long, and the only access to it was from the intersection with Old Polk City Road. Thus, the intersection can hardly be termed "inconspicuous" or a "trap." The second District Court of Appeal's decision should be reversed with directions on remand for judgment to be entered in Polk County's favor.

Respectfully submitted,

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CERTIFICATE OF SERVXCE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Hank B. Campbell, LANE, TROHN, CLARKE, BERTRAND, VREELAND & JACOBSEN, P.A., P. O. Box 3, Lakeland, Florida 33802, and John W. Frost, FROST, O'TOOLE & SAUNDERS, P.A., P. O. Box 2188, Bartow, Florida 33831-2188, this 5th day of August, 1996.

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