IN THE SUPREME COURT OF FLORIDA

POLK COUNTY,

Petitioner,

vs. CASE NO. 88,407

DONNA M. SOFKA,

Respondent,

_____/

AMICUS CURIAE BRIEF OF PINELLAS 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

Preliminarily, Pinellas County notes it was not a party to the proceedings below but appears pursuant to Rule 9.370, Fla. R. Civ. P. as amicus curiae on behalf of Petitioner Polk County. Pinellas 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's opinion greatly expands potential governmental liability beyond that permitted by current case law and statute. A literal reading of the opinion means governmental entities with roadway responsibilities could be held liable on a 'failure to warn" theory for dangers and hazards encountered by travelers on private property as they approach a public roadway. If there is such a duty, that duty is towards users of public roads not those on private property. The opinion as written imposes virtual limitless liability on units of government for situations over which they have no control or authority.

Decisions as to whether or not to install particular traffic signs or other devices on roadways and at intersections are fundamentally discretionary governmental activities. Accordingly those decisions are immune and not subject to suit.

In order to state a claim for a trap condition which may impose a duty to warn, the governmental entity involved must have created the condition and know of its danger. In this case Polk County did not create the alleged danger. Nor did Polk County have knowledge of a dangerous condition at the intersection.

The intersection in question did not constitute a trap as a

matter of law. Any dangers presented there were no different from those existing at countless locations all over the State of Florida and routinely encountered by motorists.

ARGUMENT

Pinellas County appears here in support of Petitioner Polk County. Pinellas County completely agrees with Polk County's thorough and comprehensive discussion of sovereign immunity law and why it should be immune as to Respondent's allegations herein. Pinellas County writes here only to amplify on a few points.

I. THE SECOND DISTRICT COURT OF APPEAL'S OPINION AS WRITTEN GREATLY EXPANDS THE POTENTIAL LIABILITY OF ALL GOVERNMENTAL ENTITIES HAVING ROADWAY RESPONSIBILITIES BEYOND CURRENT LAW, BOTH DECISIONAL AND STATUTORY.

The facts are undisputed that on the day in question Respondent was driving west on a short private road. She failed to stop **or** slow at its intersection with a county road. **A** vehicle southbound on the county road struck Respondent's vehicle seriously injuring her.

The case was tried before a jury on the basis that the intersection was dangerous and a stop sign, or other warning devices, should have been installed. The majority Second District Court of Appeal opinion held that the lack of any type of warnings at the intersection could constitute an operational failure to warn of a dangerous condition. Presumably, however, those **traffic** signs would have to be erected on private property. Otherwise they could not have been of any use to Respondent.

Without being too alarmist, this holding greatly expands the liability exposure of all governmental entities having roadway responsibilities. The opinion as written means that governmental entities may have to warn motorists and other travelers on private property of potential dangers as they approach a public road. Examples of such private areas of travel are innumerable. They include roads, driveways, sidewalks, parking lots, and other means of ingress and egress. Examples of potential hazards at points where such private property meets public property are also innumerable. They include bushes, trees, fences, hills, dips, structures, and other factors which might obscure vision. Conditions such as ruts and potholes might also **be** considered hazardous. Under the Second District Court of Appeal's reasoning a homeowner proceeding down a private driveway and whose vision is obscured **by** that person's own mailbox while entering a public street, might have a cause of action against a governmental entity for failure to warn.

Such an expansion **of** governmental liability is unprecedented. It is also contrary to case law and statute.

The Second District Court of Appeal previously rejected this type of argument in Hyde v. Florida Department of Transportation, **452** So.2d **1109** (Fla. 2d **DCA 1984).** There a child drowned after a

rear-ended vehicle became submerged in a retention pond. The retention pond was on private property next to a state road. The developer's site plan, which did not call for guardrails or other protective devices around the water, was approved by county and municipal authorities. Id. at 1110. On appeal the court held the alleged failure to install a guardrail on an existing road was a classic example of a planning level policy decision. Furthermore, there was no duty to warn of the condition on private property. Id. at 1111. In Wells v. Stephenson, 561 So.2d 1215 (Fla. 2d DCA 1990), the court held a sheriff had no duty to report a downed stop sign which was under the state's custody and control. This was so even if reasonable law enforcement action might have prevented the accident, The court emphasized that as there was no duty there was no tort. Id. at 1218.

Similarly, the Fifth District Court of Appeal rejected an alleged duty to warn in McFadden v. County of Orange, 499 So.2d 920 (Fla. 5th DCA 1986). A child was struck and killed by an automobile while trying to cross an intersection. It was alleged pedestrian cross buttons and other conditions at the intersection were confusing which created a known danger. Orange County maintained the existing intersection signals by agreement with the Florida Department of Transportation. But the court held Orange

County had no duty to warn as only the Florida Department of Transportation had the authority by statute to erect and significantly change the traffic signal devices. Id. at 924.

In this case **Polk** County did not have the duty **or** authority to install traffic control devices on a private road. As pointed out by Petitioner, the only statutory authority for such a responsibility is set forth in Section 316.006(3)(b), Florida Statutes which allows for traffic control on private roads by written agreement. Here there was no agreement. Nor did Polk County voluntarily assume such duties at the intersection in the past. There were never any traffic signs at the intersection in question.

II. GOVERNMENTAL DECISIONS ON WHETHER OR NOT TO INSTALL STOP SIGNS AND OTHER TRAFFIC CONTROL DEVICES AT INTERSECTIONS **ARE** DISCRETIONARY AND HENCE IMMUNE.

This Court has repeatedly held that the failure to maintain existing traffic control devices is operational and subject to suit. Governmental entities, however, cannot be held liable for the alleged failure to install those devices in the first place **or** how **a** particular project was designed and built. Commercial **Carrier** Co. v. Indian River County, **371** So.2d **1010** (Fla. 1979); Department of Transportation v. Neilson, **419** So.2d **1071** (Fla.

1982).

In a companion case to Neilsoq, Ingham v. Department of Transportation, 419 So.2d 1081 (Fla. 1982), the plaintiff alleged negligence in construction of a road curve, inadequacies in the position, shape and size of a median, and failure to provide adequate traffic signals. This Court held:

> We hold that the alleged defects in the construction of the road, the median, and the intersection, if in fact they are defects, are defects inherent in the overall plan of the road. Neither these alleged defects nor the failure to install additional traffic control devices is actionable because each is a judgmental, planning-level function to which absolute immunity attaches. Id. at 1082.

Subsequently, in Department of Transportation v. Konnev, 587 So.2d 1292 (Fla. 1991), it was alleged a flashing beacon and rumble strips should have been installed at an intersection. This Court held:

> We find that Neilson and Ingham control 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.

These principles have been applied in a number of contexts. See Payne v. Broward County, 461 So.2d 63 (Fla. 1984) (decisions to create or open road and to install traffic control light are immune absent a trap situation); Perez v. Department of Transportation, 435 So.2d 830 (Fla. 1983) (vehicle vaulted over bridge pedestrian handrail into bay, design and upgrading immune absent a known dangerous condition); Perez v. Metropolitan Dade County, 662 So.2d 421 (Fla. 3d DCA 1995) (decision to extend school speed zone discretionary); Department of Transportation v. Wallis, 659 So.2d 429 (Fla. 5th DCA 1995) (danger in crossing street where no stoplight and no sidewalk readily apparent, design immune); Freeman v. Taylor County, 643 So.2d 44 (Fla. 1st DCA 1994) (failure to install guardrail at dump site immune); Masters v. Wright, 508 So.2d 1299 (Fla. 4th DCA 1987) (design of bridge with unprotected pedestrian walkway and allowing fishing on bridge immune).

Furthermore, the above principles must be applied regardless of the nomenclature used at the trial court level. In Konney, supra, this Court recognized that the true basis for alleged negligence was the failure to upgrade not a duty to warn. 587 So.2d at 1296. See also Perez v. Department of Transportation, 435

So.2d at **831**; Tubell v. Dade County Public Schools, 419 So.2d **388** (Fla. 3d DCA 1982) ("educational malpractice" immune regardless of nomenclature used). Here it appears the issue considered by the jury was whether a stop sign or other traffic control devices should have been installed. That issue, however, should not have been considered by the jury.

The Second District Court of Appeal attempts to bolster its decision on the basis that there was a "failure to erect any warnings" as opposed to "inadequate" traffic control devices. This proposition is without authority and the opposite is more likely true. Not acting at all involves a greater amount of discretion on the part of government and should **be** afforded greater immunity. For instance, it is generally held that once a governmental entity assumes a certain duty then **it** must do so with reasonable care. See Slemp v. City of North Miami, 545 So.2d 256, 258 (Fla. 1989) (once city undertakes to build storm sewer pump system it has duty to reasonably maintain). In the instant case Polk County never assumed signage duties at the subject intersection.

Finally, it should be noted that this Court has recognized that the above discretionary immunity is essential to government, not only for the protection of taxpayers' liability, but also to the very essence of governing and the constitutional separation of

powers. See Trianon Park Condominium Association v. City of Hialeah, 468 So.2d 912 (Fla. 1985) (alleged negligence of building inspectors, no duty to enforce building code); Everton v. Willard, 468 So.2d 936 (Fla. 1985) (decision to arrest intoxicated motorist immune); Reddish v. Smith, 468 So.2d 929 (Fla. 1989) (classification of prisoner immune); City of Daytona Beach v. Palmer, 469 So.2d 121 (Fla. 1985) (how firefighters combat fire discretionary); Department of Health and Rehabilitative Services v. B.J.M., 656 So.2d 906 (Fla. 1995) (allocation and placement of juvenile services immune); Vann v. Department of Corrections, 662 So.2d 339 (Fla. 1995) (classification, supervision, and warning of prisoner's escape immune).

III. POLK COUNTY DID NOT CREATE *AN* ALLEGED DANGEROUS CONDITION AT THE INTERSECTION AND DID NOT KNOW OF THE SAME.

Respondent's sole basis for the proposition that Polk County "created" the alleged dangerous intersection was the opening of the new subdivision road across from the private road Respondent was driving on. Respondent argues that Polk County inspected, approved, and accepted the new road which created a four-way intersection, The Second District Court of Appeal appears to have accepted this proposition.

All these activities however are in and of themselves immune

for which there is no governmental liability. In Trianon Park Condominium, susra, this Court held that a city's alleged negligence in inspecting condominium construction and approving plans under a building code did not state a claim. The same type of allegations with respect to building permits failed in Hummel v. Stenstrom-Strump Construction & Development Co., 648 So.2d 1239 (Fla. 5th DCA 1995). If the above activities are themselves immune, how can they form a basis for liability by allegedly creating a dangerous condition? They cannot. They are still immune. Moreover, as indicated in its brief, Polk County did not itself design, build or construct the new road. The private road was not changed in any way. Therefore Polk County did not create an alleged dangerous condition and cannot be held liable. City of St. Petersburg v. Collom, 419 So.2d 1082 (Fla. 1982); McFadden v. County of Oranse, 499 So.2d at 923; Hill v. City of Lakeland, 466 So.2d 1231 (Fla. 2d DCA 1985).

In addition, it is extremely significant that there were no prior reported accidents at the intersection which might have given Polk County notice of a particular danger. Respondent did not and could not prove Polk County knew of the alleged danger and therefore failed to prove a claim. McFadden v. County of Orange, 499 So.2d at 923; Garza v. Hendry County, 457 So.2d 602 (Fla. 2d

DCA 1984).

IV. THE INTERSECTION WAS NOT A TRAP.

As all alleged failures by Polk County were protected by sovereign immunity, Respondent was left with the very serious burden of proving a trap condition at the subject intersection. Respondent failed to do this,

While a "trap" has not been precisely defined, Justice Kogan, in his specially concurring opinion in Konney, described it as "a known hazard so serious and *so* inconspicuous to a foreseeable plaintiff that it virtually constitutes a trap." 587 So.2d at 1299. Furthermore, Justice Kogan stated that a trap "imports a far more serious peril than does 'dangerous condition,' especially in light of the fact . . . that every intersection can be considered dangerous." Id.

Therefore the situation must present a far more serious danger than mere negligence, a defect, or simply that improvements could have been made. Rather there must be extreme and highly unusual circumstances which dictate that risk of injury is almost certain and inevitable.

In Konney this Court rejected the existence of a trap at an intersection at which there were previous fatal accidents. 587 So.2d at 1296. In Department of Transportation v. Caffiero, 522

So.2d 57 (Fla. 2d DCA 1988), review denied 531 So.2d 167 (Fla. 1988), a vehicle left the roadway and crashed into a culvert headwall. The complaint alleged failure to provide guardrails, failure to provide warning markers, lack of sufficient roadside recovery area, and failure to align the headwall after a temporary widening of the roadway. The Second District Court of Appeal held the danger was readily apparent and therefore not a trap. Id. at 59. In Desartment of Transportation v. Stevens, 630 So.2d 1160 (Fla. 2d DCA 1993), review denied 640 So.2d 1108 (Fla. 1994), a truck struck an overpass guardrail, vaulted over it, and plummeted thirty-five feet to the embankment below. Suit was brought alleging a hidden trap for unwary motorists by not correcting or warning of guardrails which permitted vaulting. Evidence was presented that eight previous accidents on the overpass involved vaulting. Nonetheless the court held that such a danger was readily apparent. This was based not just upon the "conspicuous" nature of the danger but also the 'degree" of danger involved. Id. at 1162. Furthermore, the court reemphasized that there is no duty to provide guardrails meeting more recent design standards and that a governmental entity's basic duty is to maintain existing roads in accordance with their original design. Id. at 1163. See also Payne v. Broward County, supra; Desartment of Transsortation v.

Wallis, supra; Masters v. Wright, supra.

Konney, Caffiero, and Stevens all presented situations where design improvements could have been made and in which p rhaps accidents could have been avoided. But their conditions did not rise to the level of a trap.

The instant case involves far lesser circumstances. There were no prior accidents at the intersection. How the accident itself occurred was based on speculation, and not in the nature or type of certainty required for a trap. Respondent's expert testimony was based on a "would have, could have, and should have" negligence analysis which could be utilized in any accident. Unfortunately all intersections present some degree of danger. Experts can always testify that improvements could have been made following an accident. There was no trap. Polk County should not be held liable in this case. As this Court warned in Konney, "To do otherwise would allow the judicial branch to infringe upon the legislative and executive function of deciding where tax dollars should be allocated for our roads and highways." 587 So.2d at 1296.

CONCLUSION

Pinellas County 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 U. S. Mail to JOHN W. FROST, II, ESQ., Frost, O'Toole & Saunders, P. A., P. O. Box 2188, Bartow, FL 33831-2188, and HANK B. CAMPBELL, ESQ., Lane, Trohn, Clarke, Bertrand, Vreeland & Jacobsen, P.A., P. O. Box 3, Lakeland, FL 33802-0003, this 21st day of August, 1996.

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