IN THE SUPREME COURT OF FLORIDA

POLK COUNTY,

Petitioner,

v. CASE NO. 88,407

DONNA M. SOFKA,

Respondents.
_____/

BRIEF OF AMICUS CURIAE, DEPARTMENT OF INSURANCE DIVISION OF RISK MANAGEMENT

ROBERT A. BUTTERWORTH
Attorney General

LOUIS F. HUBENER
Assistant Attorney General
Florida Bar No. 140084

Office of the Attorney General
The Capitol, PL-01
Tallahassee, FL 32399-1050
(904) 488-9935

Counsel for Amicus Curiae
Department of Insurance,
Division of Risk Management

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INTEREST OF AMICUS CURIAE

The Division of Risk Management submits this brief in the interest of all state and local government entities having authority to approve access to public roads or plans for the creation or dedication of private roads that will have access to public roads.

At first blush, this case would seem to involve the tension between two well-established lines of cases. One line holds that a governmental entity responsible for road design and traffic planning has no **duty** to install traffic signals or warning signs at road intersections, this being a planning level function. The other line holds that the government has a duty to warn of a known dangerous condition that it creates in the course of designing or maintaining public roads. But the dangerous condition must be both *known* to the government and created **by** the government, and it must be both so serious and inconspicuous that it amounts to a trap.

Although this case involves no such hazard and therefore no tension between the two lines of authority, the decision below would strongly suggest that in order to avoid liability government **should** provide adequate signals or warnings at all intersections for which it has any arguable responsibility, including private/public road intersections. Alternatively, in the case of

private roads, the government could maintain saf'e lines of vision along the private road as it approaches an intersection. The financial impacts attendant to such responsibilities would be tremendous and would affect every local government--county or municipality--in the state, as well as state government. Heretofore, no case has held that a governmental entity in this state has a duty to ensure the safety of travel on a private road.

A further difficulty with the decision below is that it fails to clearly state how the County created a dangerous condition when it did nothing more than approve a plat of a subdivision that included *West* Lamp Post Lane. The decision plainly identifies the lack of a warning sign on *East* Lamp Post Lane, a private road, as the cause of the accident, however. If all private/public road intersections are dangerous, which they arguably are, do all now require warning signs and maintenance at public expense? The same question might also be asked about all public/public road intersections.

These concerns are not merely fanciful. The Florida Department of Transportation regulates access to state roads pursuant to section 335.181 et seq., Florida Statutes, and Chapters 14-96 and 14-97, Fla.Adm.Code. Private roads or drives or driveways must receive necessary access approvals. For purposes

of this case, such access permitting is scarcely distinguishable from the process by which local governments approve either subdivision plats (as here) or other building plans or permits allowing the intersection of a private road with a public road. Pursuant to section 316.006(2)(b) and (3)(b), Florida Statutes, however, cities and counties can only negotiate with the private landowners for the exercise of traffic control over private roads. This statute imposes no duty on cities or counties with respect to private roads apart from such an agreement nor does it allow them to insist on control.

If the danger in this case was the lack of a warning sign on East Lamp Post Lane, a private road, then government, contrary to all precedent, is now liable not only for its planning level decisions but also for failing to ensure the safety of private roads over which it has no necessary authority.

SUMMARY OF ARGUMENT

The action of Polk County in approving a subdivision plat that included West Lamp Post Lane did not create a hazardous intersection--that is one with a hidden trap--or increase any hazard that existed on East Lamp Post Lane--a private road for which the County had no responsibility. The County did not create the private road or agree to maintain its safety.

Under the circumstances the case law is clear. Polk County had no duty to warn persons driving on East Lamp Post Lane of the presence of Old Polk County Road. To hold otherwise will mean that every state and local governmental entity that approves access of private roads to public roads--whether by permits or, as here, approval of subdivision plats--will assume liability for the safety of the private roads and will have a duty to place and maintain warning signs on the private roads.

ARGUMENT

POLK COUNTY HAD NO DUTY TO MAKE A PRIVATE ROAD SAFE FOR MOTORISTS *AND* THEREFORE IS NOT LIABLE AS A MATTER OF LAW FOR NOT PLACING A WARNING SIGN ON EAST LAMP POST LANE.

The district court of appeal has called for clarification of the principles that control this case, suggesting that they have become inconsistent or developed into a morass. Once the cause of the accident is understood, however, application of the controlling principles is clear. There can be no liability on the part of Polk County.

Apart from plaintiff Sofka's own negligence, the cause of the accident in this case was not the County's "acceptance" of the plat for the subdivision and West Lamp Post Lane. It was simply the lack of a warning sign on a private road--East Lamp Post Lane. The testimony of the plaintiff's expert, Dr. Fogarty, makes this very clear. Dr. Fogarty testified that as plaintiff Sofka, traveling west on East Lamp Post Lane at 23 miles per hour, approached the county road (Old Polk City Road) she needed 160 feet in which to react, brake, and stop before entering the intersection. (R 5569, 5574-75) He then testified that the cause of the accident was the failure to provide a warning sign on the private road as it approached the intersection. (R 5582-87) The intersection was

dangerous because it was now a four-way intersection instead of a T-shaped intersection. Such intersections are more dangerous than T-shaped intersections because of their (presumed) heavier traffic loads. (R 5583-84) Dr. Fogarty, however, testified that he did not know whether the intersection had experienced heavier traffic loads. (R 5618). There is no evidence at all that increased traffic was a factor in this accident. Indeed, the accident was simply a two-car collision that involved no traffic from West Lamp Post Lane.

Before the district court of appeal, Ms. Sofka argued that the presence of West Lamp Post Lane across Old Polk City Road gave the 'illusion" of a continuing road (and presumably uninterrupted passage) to someone driving west on East Lamp Post Lane. Dr. Fogarty did not anywhere testify to such an illusion. In fact, his testimony refuted the argument that such an illusion could have in any way contributed to the accident. Dr. Fogarty stated that a driver on East Lamp Post Lane would not even see West Lamp Post Lane until he or she was within 70 to 80 feet of the county road (Old Polk City Road). At this point the driver would be halfway past the "point of no return," *i.e.*, the distance the driver would need in order to stop if traveling at 25 miles per hour. (R 5594-95) That distance was 160 feet. (R 5575) Thus, the presence of

West Lamp Post Lane did not cause this accident and did not constitute a trap.

The theory on which this case was tried, and on which Dr. Fogarty based his testimony, was that Polk County became responsible for a hypothetically more dangerous intersection by approving a plat that included West Lamp Post Lane. Because the four-way intersection was hypothetically more dangerous, the County should have posted a stop sign on East Lamp Post Lane, a private road, that would have alerted Ms. Sofka to Old Polk City Road. (R 5582-87)

The case law plainly does not require such action. In ***Department of*** *Transportation* of ***Neilson***, 419 So.2d 1071, 1076-77 (Fla. 1982), and more recently in *Department* of *Transportation* ***v. Konney,*** *587* So.2d *1292,* 1294 (Fla. 1991), a decision reaffirming the *Neilson* ruling, this Court made it absolutely clear that the decision to install traffic control devices or warning signs is a "judgmental, planning level function" for which a governmental entity is not subject to liability. And this ruling remained true even in the face of the Court's acknowledgment that all intersections are "inherently dangerous." *Konney, 587* So.2d 1295.

This ruling admits of but one rare exception. When the governmental entity itself creates or maintains a known dangerous

condition--that is, known to the government but not apparent to those who could be injured--the government engages in an operational level function for which it can be subject to liability. *Konney,* 587 So.2d 1294 (citing *City of St. Petersburg v. Collom,* 419 So.2d 1082 (Fla. 1982)).

Concurring in *Konney,* Justice Kogan addressed the question of what would constitute a "known dangerous condition" as contemplated in *Neilson* and *Collom.* He concluded that a known hazard was one "so serious and so inconspicuous to a foreseeable plaintiff that it virtually constitutes a trap." 587 So.2d at 1299 (Kogan, J., concurring).

***Bailey Drainage** District v. Stark,* 526 So.2d *678* (Fla. 1988), illustrates the outer limits of the "known dangerous condition" theory as applied to intersections. In *Stark,* the county's road intersected a drainage district road, this Court noting that both entities were "political subdivisions of the State of Florida." Id. at 679. Hence, both roads were public roads. The complaint, which the trial court had dismissed, alleged that on one of the roads the motorist's view of the intersection was obstructed by plant growth, and neither the county nor the district had provided a sign or signal. This Court stated the rule of the case as follows:

> 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, and in response to the certified question, 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. See *Duval County School Bd. v.* Dutko, **483** So.2d **492** (Fla. 1st DCA), *review denied,* **492 So.2d 1331** (1986). The failure to do so is a failure at the operational level.

Id. at **681** (emphasis added).

Stark does not hold, and cannot be logically or fairly read to hold, that government has a duty to make safe a private road or maintain vegetation along a private road as it approaches a public road. The danger in this case inhered in East Lamp Post Lane, a private road. Polk County did not create that road, nor was it legally responsible for maintaining that road. Heretofore, government has had no common law or statutory duty to ensure the safety of private roads. And, as this Court has said repeatedly,

the State's waiver of sovereign immunity created no new duties of care. *Kaisner* v. *Kolb,* 543 So.2d 732, 733 (Fla. 1989) (citing *Trianon* ***Park*** *Condominium Ass'n* ***v. City*** of *Hialeah,* 468 So.2d 912, 917 (Fla. 1985)).

By approving the plat, the County did not create an inconspicuous hazard mounting to a trap. The hazard existed before the County took any action on the plat, and approval of the plat did not make the County legally responsible for conditions on ***East*** Lamp Post Lane. Had West Lamp Post Lane never been constructed, or had Polk County never approved the plat, Ms. Sofka would still have had the accident.

The rule of this case as it now stands is that if state or local government in any way approves access of a private road to a public road, thereby "creating" an "intersection," it assumes responsibility--and liability--for such hazards as may exist at the intersection, including those on the private road. And this is true notwithstanding the absence of a negotiated agreement (which can be rejected by private landowners) pursuant to section 316.006(2)(b) and (3)(b), Florida Statutes. The government's choice therefore is to ***install and maintain*** warning signs on private roads, or face liability.

This cannot be--and should not be--the law. As is apparent from this case, such a judicially-imposed mandate violates separation of powers in two fundamental ways. It usurps in the first instance the legislative prerogative to impose a duty on government respecting the safety and maintenance of private roads. And second, it transforms what is fundamentally a planning level decision--the approval of a plat--into one that is operational in nature, and then subjects that decision to court review based on an expert's concern for some hypothetical difference in the level of traffic, a difference which, if it existed, was not even a factor in the plaintiff's accident. *See Neilson,* 419 So.2d **at 1075** ("there are areas inherent in the act of governing which cannot be subject to suit and scrutiny by judge or jury without violating the separation of powers doctrine").

This case does not demand clarification of the controlling principles but only their sensible application. Once plaintiff's theory of the case and Dr. Fogarty's testimony are understood, the result is crystal clear under the controlling principles. Polk County's approval of the plat did not either create or add to the danger posed by the intersection of private East Lamp Post Lane with Old Polk City Road. The danger lay in the construction and maintenance of the private road. Polk County had no duty to place

a warning sign on that road, and therefore it cannot be held liable for the plaintiff's injuries.

CONCLUSION

The decision below should be reversed and this case remanded for entry of judgment in favor of Polk County.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

LOUIS F. HUBENER
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0140084

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(904) 488-9935

Counsel for Division of Risk Management, Department of Insurance

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY that a true copy of the foregoing has been** furnished **by U.S. Mail to Hank B. Campbell,** LANE, **TROHN, CLARKE, BERTRAND,** VREELAND & **JACOBSEN, P.A., Post Office** Box **3, Lakeland,** FL **33802-0003 and** John **W. Frost, 11,** Esquire **and Neal L. O'Toole, Esquire, Post Office Box 2188,** Bartow, **Florida 33830; this** 5th day of August, **1996.**

LOUIS F. HUBENER
Assistant Attorney General

<barbara>sofka.amb