SUPREME COURT OF FLORIDA

POLK COUNTY,

Petitioner,

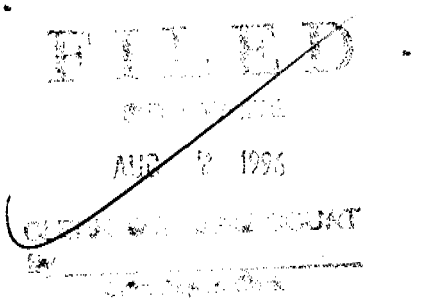
v.

DONNA M. SOFKA,

Respondent.
_____/

CASE NO. 88,407

District Court of Appeal,
2nd District - No. 95-01886



PETITIONERS INITIAL BRIEF ON THE MERITS

Wofford H. Stidham
Florida Bar No. 0710687
Hank B. Campbell
Florida Bar No. 434515
Post Office Box 1578
Bartow, FL 33831
(941) 533-0866
Attomeys for Appellant/petitioner

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STATEMENT OF THE CASE AND FACTS

(A) Nature of the Case, Course of Proceedings and Disposition Below.

Petitioner/defendant Polk County, Florida, pursuant to Rule 9.030(a)(2)(A) and 9.120, Florida Rules of Appellate Procedure, seeks review of a decision of the Florida Second District Court of Appeal entered in its Case No. 95-10866 on April 19, 1996 (Appendix pp. 1-13), rehearing denied on June 14, 1996 (Appendix p. 14). The decision affirmed a Stipulated Final Judgment entered by the Circuit Court of Polk County (R 5401-5406; Appendix pp. 15-20).

The case went to trial on Donna Sofka's Fourth Amended Complaint. Insofar as it relates to Polk County the complaint asserts that Sofka suffered serious injuries in an intersection collision with another automobile as a result of the County's actions or failure to act. The specific allegations were that Polk County was liable for "(f)ailing to maintain its streets in a reasonably safe condition by not installing a traffic signal or stop sign at the intersection of Lamp Post Lane and Old Polk City Road," resulting in an "inherently dangerous condition existing at said intersection." (R 2168-2181; Appendix pp.21-35).

The jury returned a verdict for Ms. Sofka, fixing her damages at $6,500,000. The verdict found the County 77% negligent and Ms. Sofka 23% negligent (T 1437-1438).[1] Following the verdict the County filed a Motion for Judgment in accordance with Motion for Directed Verdict or in the alternative Motion for New Trial (R 5112-5132). The motion presented several grounds for a new trial. A new trial was granted following this Court's decision in Fabre v. Marin, 623 So.2d 1182 (Fla. 1993) (R 5174). Another Order denied the Motion for Directed Verdict, stating

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[1] The Index to the Record on Appeal uses separate numbers for the transcripts of the trial. Accordingly transcript references will use the letter "T" and other record references the letter "R".

that since a new trial was being ordered the remaining motions were moot (R 5175). Thereafter the parties entered into a Settlement Agreement (R 5402-5406), a key part of which contemplated the Stipulated Final Judgment (R 5401) that was appealed to the Second District Court of Appeal. The Settlement Agreement provided for a payment of $40,000 at the time of the agreement; a Stipulated Final Judgment for a net $1,000,000.00; and an additional $40,000 if Polk County did not prevail on appeal. It further provided that the record on the day of the judgment would be the record-on-appeal in any ensuing appeal. The agreement acknowledged Polk County's right to appeal the Stipulated Final Judgment on two issues, viz. (i) whether the trial court had erred in refusing to dismiss the case, or grant summary judgment, or direct a verdict for Polk County because Sofka's claim was barred by sovereign immunity; and (ii) whether the trial court erred when it failed to direct a verdict for Polk County on the grounds that the evidence was not sufficient to show that any alleged fault of Polk County was the proximate cause of the accident (R 5402-5406; Appendix pp. 17-18).

It should be noted that the case was not before the court of Appeal, nor is it here, clothed with the presumed correctness of a jury verdict because Polk County was granted a new trial.

The split decision of the Second DCA panel certifies one of two questions to this court. Judge Blue, writing for the majority, certified the following question as one of great public importance:

> Although a governmental agency's decision whether to install a traffic control device is normally a planning-level decision, protected by sovereign immunity, may that immunity be lost if governmental action creates a dangerous condition resulting in a duty to warn and the failure to install any warning results in a breach of duty.

Judge Parker, in dissent, agreed that a question should be certified but maintained that the

question should be:

> If a county has legal notice of an intersection between two paved secondary roads and either fails to make any planning-level decision regarding appropriate traffic control or decides not to place any traffic control devices at the intersection, can the subsequent absence of a stop or yield sign at that intersection constitute either an operational-level error or the creation of a known dangerous condition?

Both questions ignore the fact that the street upon which Sofka was travelling is a private road, Judge Fulmer, in a concurring opinion, sided with Judge Blue *except* as to the question to be certified. She stated that she would certify the question suggested by Judge Parker.

Polk County respectfully suggests that the question certified by the majority of the panel, i.e. the one articulated by the dissenting judge, and approved by the concurring judge, should provide the basis for jurisdiction in this court pursuant to Rule 9.030(a)(2)(A)(v), Florida Rules of Appellate Procedure. Polk County further suggests that Judge Parker's and Judge Fulmer's question is the one that should be considered because Judge Blue's question assumes the central issues in the controversy, viz. (i) that governmental action *created* a dangerous condition resulting in a duty to warn; (ii) that the dangerous condition was *so* egregious that it virtually constituted a trap to persons to whom it was not readily apparent; and (iii) that Polk County had a duty to warn travelers on a private road that they were approaching an intersection with a public road.

Moreover, Polk County, in light of the uncertainty as to what question has been certified, submits that discretionary jurisdiction is vested in this court by Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure, because the majority decision in the court below conflicts with the decisions of this court in Department of Transp. v. Neilson, 419 So.2d 1071, 1079 (Fla. 1982) and Department of Transp. v. Konney, 587 So.2d 1292, 1294 (Fla. 1991).

(B) The facts –

The determinative facts are that on December 28, 1988, at around 10:00 p.m., Donna Sofka was seriously injured in a two car accident that occurred at the point where Lamp Post Lane intersects with Old Polk City Road[2], a county road, just north of Lakeland, Florida (T 2169).

That part of Lamp Post Lane on the east side of Old Polk City Road, i.e. the part upon which Sofka was travelling, *dead-ends about three-tenths of a mile easterly of its point of entry* onto Old Polk City Road (T 416, 418, 428, 614, 658-59). It provides the only access to and from several homes which line the lane (T 837). It is privately owned and maintained. In fact in 1979, some nine years *before* Sofka's accident, a "Notice of Privately Maintained Access" was placed on the public records acknowledging that maintenance of the access route, i.e. Lamp Post Lane, would be the responsibility of the occupants (Plaintiffs Ex. 10). Until a little more than six months before Sofka's accident, Lamp Post Lane was an unpaved drive, entering Old Polk City Road through a three-way "T" intersection, Old Polk City Road being the top of the "T" (T 457).

There were no warning signs or other warnings, such as rumble strips, on Lamp Post Lane nor was there a stop sign or any other traffic control device at its point of intersection with Old Polk City Road. The record does not reveal any reported accidents, other than Sofka's, at the point of intersection over the lane's entire history.

Some six months before Sofka's accident (T 461, 463, Ex. 1), a private subdivision

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[2]Erroneously referred to in the dissenting opinion as "SR 33".

developer Vincent Strawbridge constructed a street that intersected Old Polk City Road on its west side at a point roughly opposite Lamp Post Lane (T 457). The County issued the necessary permits for the street, which has been and is referred to in these proceedings as "West Lamp Post Lane", accepted the subdivision plat, and eventually accepted the street as a dedicated public roadway (T 2170). Thus the three-way "T intersection" between a county road and a private road became a four-way intersection with the private road, "East Lamp Post Lane", approaching from the east and public roads approaching from the other three directions (T 460; 692-3, Ex. 2 A-D). No stop signs or other traffic control devices or warnings were installed at the intersection after West Lamp Post Lane was connected to Old Polk City Road (T 692-93).

Sofka's friend Dana Skerritt Hagerman lived in one of the houses on East Lamp Post Lane (T 686). Sofka had visited Dana at that location in November, something less than two months prior to the accident (T 687). On the day of the accident Sofka again went to Dana's house between 6:00 and 7:00 p.m. to pick her up. They were going out to celebrate Sofka's birthday (T 689). Concerning daylight conditions, Sofka testified that it was "still light" when she arrived (R 1051). They returned that evening sometime around 9:30 or 10:00 o'clock turning onto Lamp Post Lane from Old Polk City Road (T 690). Thus Sofka had driven onto Old Polk City Road at least two times before the accident, and one of those times being earlier that same day. She had stopped at Old Polk City Road both times. One time she waited for oncoming traffic to pass (T 707,709-10) and had entered Lamp Post Lane from Old Polk City Road at least two times on the day of the accident, one of them only a minute or two before the accident (T 690-91).

Sofka and Dana had stayed out a little later than they had intended (T 711). Dana

insinuated that she was in a hurry (T 711). She was supposed to meet her boyfriend (T 710-11).

After dropping her friend off at her home, Sofka headed back toward Old Polk City Road. She was headed to her apartment to call her boyfriend (T 1053) which would have required her to turn left or south on Old Polk City Road. Without pausing she crossed the northbound lane of Old Polk City Road into the path of a vehicle traveling in the southbound lane (T 403-404, 428). Neither vehicle took any evasive action (T 404-05, 428).

There were no third party eye witnesses. Sofka testified that she could only recall backing out of her friend's driveway and putting her car in drive (T 1052). The evidence does not reveal whether she was trying to turn left on Old Polk City Road. She could remember nothing else that occurred prior to the time she awoke in the hospital (T 1053, 1072-1074).

There was testimony that in addition to approving the subdivision plat, issuing permits and accepting the dedication of West Lamp Post Lane, county officials had inspected the new roadway at various time during construction (T 8, 57-60, 461-62). Dr. William Fogarty testified that the construction of West Lamp Post Lane created a four-way intersection that represented a dangerous condition. He stated that a motorist proceeding west on East Lamp Post Lane could begin to see West Lamp Post Lane when about 70-80 feet from Old Polk City Road. Sofka's counsel used that testimony to argue that an "illusion" that the road continued into the distance was created and, essentially, that the illusion created the dangerous condition (R 5475-78).

However, Dr. Fogarty, while attempting to present a reason by Ms. Sofka could not see the headlights of the approaching vehicle that struck her, declared that she could not see the headlights of the vehicle until she was about "80 feet from impact and she's half-way past her point of critical encounter: (R 5628). He thereby established as a fact that the last chance that

she had to avoid the impact was about 160 feet from the highway. Then, while developing his opinion that the new four-way intersection represented a dangerous condition?he explained that one proceeding west on East Lamp Post Lane could begin to see West Lamp Post Lane ahead about 70 - 80 feet from Old Polk City Road (R 5594). He thereby established that motorists driving at Sofka's speed in a westerly direction could not see West Lamp Post Lane until they are about 80 feet past the point of no return, i.e., the last point where they could stop.

SUMMARY OF ARGUMENT

I

POLK COUNTY IS PROTECTED BY SOVEREIGN IMMUNITY.

A. The Decision Below -

The majority of the panel in the Second District Court of Appeal acknowledged that Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979), Department of Transp. v. Neilson, 419 So.2d 1071 (Fla. 1982), and Department of Transp. v. Konney, 587 So.2d 1292, 1294 (Fla. 1991) are depositive of this case. However, in affirming the Stipulated Final Judgment the majority ignored the fact that East Lamp Post Lane was a dead-end street only three tenths of a mile long; assumed that Sofka was "crossing over" Old Polk City Road when she was hit; assumed that the alleged "dangerous condition" represented a "trap for the unwary"; assumed the County *created* the trap; and erroneously attempted to distinguish the dispositive cases on the rationale that Neilson and Konney involved *inadequate* traffic control devices while the case sub iudice involves the complete absence of *any* warnings.

B. Basic Review of Decisional Law on Waiver of Sovereign Immunity.

Sovereign immunity is waived only to the extent specified in Section 768.28, Florida Statutes (1995). The statute provides that the state is liable for tort claims only to the same extent as private individuals under like circumstances, Florida Statutes §768.28(1)(5) (1995). This Court held in Commercial Carrier Corn v. Indian River County, 371 So.2d 1010 (Fla.

1979) that sovereign immunity is waived if *existing* highways and traffic control devices *are* not properly *maintained.* Some three years later the Court ruled that decisions relating to the installation of appropriate traffic control methods and devices are discretionary decisions which implement the governmental entity's police power and as such are judgmental, planning level functions provided. The holding was made subject to the caveat that sovereign immunity can be waived if a governmental entity *creates* a known dangerous condition and fails to warn unsuspecting persons of the danger. Department of Transp. v. Neilson, 419 So.2d 1071 (Fla. 1982).

As explained in City of St. Petersburg v Collom, and City of St. Petersburg v. Mathews, 419 So.2d 1082 (Fla. 1982), and Department of Transp. v. Konney, 587 So.2d 1292, 1294 (Fla. 1991), when a governmental entity *creates* a *known* dangerous condition *which is not readily apparent* to persons who could be injured by the condition, an operational level duty to warn arises.

A complaint, if it is to state a cause of action on a Neilson and Collom "failure to warn" theory, must allege specifically the existence of an operational level "duty to warn"; must plead the existence of a known "trap for the unwary"; and must contain specific factual allegations as to why the condition constitutes a known trap. Harrison v. Escambia County School Bd., 434 So.2d 316, 320-21 (Fla.1983).

There is no governmental tort liability unless there is an underlying common law or statutory duty. Section 768.28, Florida Statutes (1995) did not establish any new duty of care. Governmental commissions, boards, etc. by the issuance of permits are acting pursuant to basic governmental functions and there has never been a common law duty establishing a duty of care

with regard to how these various governmental bodies carry out these functions. Trianon Park Condominium Ass'n, v. City of Hialeah, 468 So.2d 912 (Fla. 1985).

C. Sovereign immunity was not waived by Polk County. Decisions relating to whether traffic control devices are necessary in the first instance are discretionary planning level decisions.

Sofka's complaint alleges that Polk County was negligent by *failing* to maintain its streets in a reasonably safe condition *by* not installing a traffic signal or stop sign at the intersection in question; and that this failure created an "unreasonably dangerous condition."

It is clear that the alleged ***"fuilure to*** maintain," which could allow recovery under Commercial Carrier, is in truth a claim that the County is liable for failing to *install* traffic control devices in *the first instance* after West Lamp Post Lane was added to the intersection. Recovery for such a failure is proscribed by Neilson.

The complaint does not state a cause of action. Harrison v. Escambia County School Board, supra.

D. Neither the allegations nor the facts support a claim pursuant to the Neilson "failure to warn of a known dangerous condition" caveat.

Several specific requirements must be met to state a cause of action under a "failure to warn theory". For the reasons that follow both the Complaint and the proof are deficient in this regard.

(1) There was no duty of care with respect to the County's alleged negligent conduct.—

There is no governmental tort liability in the absence of an underlying statutory or

common law duty. Trianon Park Condominium Ass'n. v. City of Hialeah, supra. Polk County owed no duty to travelers on East Lamp Post Lane under any scenario because it was a private road or street and Polk County has no right to control traffic on it.

(2) Old Polk City Road does not represent a dangerous condition so serious that it virtually constitutes a trap.

East Lamp Post Lane is a three-tenths of a mile long residential street that dead-ends on its eastern end. It is traveled only by persons who enter it through its intersection with Old Polk City Road, to-wit: residents and their visitors. Over its entire history of there were no reported accidents prior to Sofka's. Thus, the four-way intersection in question does not represent a hazard or trap of the egregious nature contemplated by Neilson, Collum, or Konney.

(3) Polk County did not *create* the alleged dangerous condition.

Polk County's sovereign immunity was not waived because Polk County did not ***create*** the condition alleged to be hazardous. Neilson, Collom. The condition must be created by the governmental entity itself. Collom, Harrison.

A hazard is ***created*** by a governmental entity only when it designs, constructs or produces the condition, not when it ***permits*** or ***allows the*** dangerous condition to be created.

(4) There is no evidence that Polk County *knew* that a hazard so serious that it constituted a trap had been created.

For a governmental entity to waive its sovereign immunity under Neilson's "failure to warn" caveat it must, in addition to ***creating*** the dangerous condition, ***know*** that the condition is

dangerous and *intentionally* fail to warn those who might be harmed of the risk. Collom, Harrison. There are no allegations, nor is there any evidence, that Polk County *knew* that a dangerous condition *so* egregious that it constituted a "trap for the unwary" had been created.

***(5)* Any danger presented by Old Polk City Road was readily apparent.--**

The alleged known dangerous condition must not be ***readily apparent*** to persons who might be injured by it if sovereign immunity is to be waived. Collom, Harrison, Konney, Payne v. Broward County, 461 So.2d 63 (Fla. 1984). The existence of the alleged danger posed by Old Polk City Road to motorists traveling west on East Lamp Post Lane is readily apparent to any such motorist because they had to enter Lamp Post Lane through its intersection with Old Polk City Road and the short length of the lane leaves no room for confusion.

II

THE EVIDENCE DOES NOT SUPPORT A FINDING OR CONCLUSION THAT ANY ACTION OR INACTION ON POLK COUNTY'S PART WAS A PROXIMATE CAUSE OF THE ACCIDENT.

As a matter of law, Sofka was required to plead and prove that Polk County's negligence was the proximate cause of her injuries and damages. Sofka failed to meet that burden in that she knew Old Polk City Road was there and there was no evidentiary explanation as to how or if Polk County's alleged negligence in failing to install a traffic control device on the private road caused the accident. Greene v. Flewelling, *366* So.2d 777 (Fla. 2d DCA 1979).

ARGUMENT

I

POLK COUNTY IS PROTECTED BY SOVEREIGN IMMUNITY

As a matter of law Polk County is protected from Sofka's claim by sovereign immunity. Therefore, the Court of Appeal erred when it affirmed the Stipulated Final Judgment.

A. The Decision Below.

The majority in the court below began its analysis of the law by acknowledging that Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979), Department of Transp. v. Neilson, 419 So.2d 1071 (Fla.1982), and Department of Transp. v. Konney, 587 So.2d 1292, 1294 (Fla. 1991) are depositive of this case and that both Neilson and Konney have a "factual similarity to this case". However, it found a "critical distinction" to be that Neilson and Konney involved claims of *inadequate* traffic control devices whereas this case alleges the complete absence of a warning. The majority then held "[we] conclude that the failure to erect any warnings at the subject intersection constituted a failure to warn of the dangerous condition, an operational level decision for which sovereign immunity is inapplicable."

In reaching its decision, the majority did not mention the fact that East Lamp Post Lane, which it acknowledged was a private road, was in fact a residential street only three-tenths of a mile long. This omission left the impression that it was a through road over which unsuspecting motorists might be traveling. Moreover, the majority's conclusion assumes that the "dangerous condition" was so serious that it represented a "trap for the unwary", and it assumes the trap was

created by the state. The opinion also states that Sofka's vehicle was hit while "crossing over" Old Polk City Road. There is no evidence that she was going on across the highway when she was hit. The evidence shows that she was going back to her apartment which would have required her to make a left turn. Lastly, the opinion states that in Konney the court found that there were *adequate* signs at the intersection. That simply is not true. These omissions, assumptions, and the last-mentioned error are pointed out here because they undoubtedly helped shape the decision and lend credence to the distinction the majority was trying to make.

Succinctly, the decision of the Second District Court of Appeal is bottomed squarely on erroneous or unsupported premises and a perceived distinction between *inadequate* traffic control devices on the one hand and no traffic control device at *all* on the other. Polk County contends that the cases endorsed by the majority do not justify the distinction it attempts to make and that the distinction conflicts with Neilson.

B. Basic Review of decisional law on waiver of Sovereign Immunity.

The problem with which we are wrestling began with the enactment in 1973 of Florida's "waiver of sovereign immunity law", now codified in Section 768.28, Florida Statutes (1995). Lost in much of the judicial analysis of the statute has been the fundamental fact that the statute expressly states that sovereign immunity for tort liability is waived only to the extent *specified* therein. And, the statute specifies that sovereign immunity is waived only when a loss of property, personal injury, or death is caused by the negligent or wrongful act or omission of any employee of the governmental entity, acting in the scope of his employment:

"under circumstances in which the state or such agency, if a *private person* would

be liable to the claimant in accordance with the general laws of [the] state." (emphasis added).

Section 768.28(1), Florida Statutes (1995).

This unambiguous limitation is reiterated in the section that caps damage at $100,000 for each claimant:

The state ... shall be liable for tort claims in the same manner and to the same extent *as* private *individuals* under like circumstances." (emphasis added).

Section 768.28(5), Florida Statutes (1995).

What could be called this Court's "seminal *case*" construing the statute, Commercial Carrier Corp. v. Indian River County, supra, involved a motor vehicle accident that occurred at an unmarked intersection where there previously had been a stop sign and pavement markings. The complaint alleged a negligent failure of Indian River County to maintain the stop sign at the intersection and the negligent failure of the state Department of Transportation to replace the painted word "STOP" on the pavement in advance of the entrance to the intersection. The central issue was whether the sovereign immunity of the two governmental entities had been waived by the enactment of 5768.28, Florida Statutes (1995). A divided Florida Supreme Court, the majority speaking through Justice Sundberg, distinguishing between "planning level" activities and "operational level" activities, held that "... the proper maintenance of the traffic sign at an intersection and the proper maintenance of the printed letters "STOP" on the pavement of a highway..." constituted operational level activity that was not protected by sovereign immunity. However, in reaching its conclusion, the majority made this distinction:

We do not deal in these cases with the issue of whether *or not,* or what type of, traffic control devices should have been installed at the particular intersections. Accordingly, we express no opinion with respect to whether liability could be

imposed on the governmental bodies involved *for failure in the first instance to place traffic control devices at the intersection.* (emphasis added)

371 So.2d at 1022.

Two justices dissented, rejecting the majority's necessarily underlying premise that the failure to timely fix a traffic light or to put a stop sign in place were not "circumstances" for which a "private person would be liable". The dissent also pointed out that the use of public funds for highway maintenance, and the use of appropriation formulas for such funds involve discretionary decisions.

It should be noted at this early stage that by statutory definition a "warning" is a traffic control device. Section 316.003(23), Florida Statutes (1995).

A subsequent case, the oft-cited Department of Transp. v. Neilson, supra, also involved an intersection collision. Plaintiffs alleged that the defendant governmental entities were negligent (i) in the initial design and construction of the intersection; (ii) in failing to install adequate traffic control devices and signals; (iii) in designing, constructing, and maintaining confusing traffic control devices at the intersection; and (iv) in failing to warn motorists through the placement of additional traffic control devices that the intersection was hazardous. The trial court dismissed the governmental entities from the suit on the ground that they were protected by sovereign immunity because the alleged failures involved planning level functions. The Second DCA reversed. In reversing the district court, the majority of this Court, now speaking through Justice Overton stated:

> In effect, the District Court held that once the decision is made to have roads intersect, *it is for the jury to determine* whether the road could have been designed better or *whether traffic control devices are necessary.* We disagree, and quash the District Court's holding under the circumstances of this case. (emphasis

added)

419 So.2d at 1074.

Thus, the **Court** expressly and with clarity, posited that whether traffic control devices are necessary at **all** at **a** new intersection, i.e., "in **the first** instance", is not a jury question.

The **Court** went on to state the issue **and** answer to be:

> **...** whether *decisions concerning* the ***installation of traffic control devices,*** the initial plan **and** alignment of roads, or the improvement or upgrading of **roads or** intersections **may** constitute omissions or negligent acts which subject governmental entities to liability. We answer the question in the negative, holding such activities are basic capital improvements and **are** judgmental, planning level functions. (emphasis added)
>
> **419** So.2d at **1077.**

It **then** noted:

> With **regard** to the installation **and** placement of traffic control devices, **we** find **the** argument that such placement is exclusively the decision of traffic engineers, and, **as** such, **an** operational-level function to be without merit **....** Traffic control **is strictly** within **the** police **power** of **the** governmental entity. Questioning **this** function necessarily raises the issue of the government's **proper use** of its police power.
>
> **419** So.2d at **1077.**

The **Court** then held:

> In our view, decisions relating **to the** *installation* **of** ***appropriate traffic control methods and devices or*** **the** establishment of speed limits are discretionary **decisions which** implement **the** entity's police **power and** are **judgmental,** planning-level functions. **(emphasis** added)
>
> **419 So.2d** at **1077.**

The ***sum*** of **these** pronouncements is that the **Court** answered the question expressly left open by Commercial Carrier and left no doubt but that decisions **as** to whether ***traffic control devices are necessary*** **in** the **first** *instance* are planning level decisions insulated **from** liability by sovereign

immunity. However, the Court issued two caveats whereby sovereign immunity may be waived and a governmental entity may become liable: (i) for an engineering design defect not inherent in the overall plan for a project it has directed be built or (ii) for an inherent defect which creates a known *dangerous* condition. The Court explained that 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 any defects are inherent in the overall project itself. Then, in illustrating a situation where a failure to warn of a known danger is a negligent omission at the operational level of government that is not protected by sovereign immunity the Court, after pointing out that designing a sharp curve in a road was protected planning level activity, gave the following example:

> 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.
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> 419 So.2d at 1078.

The Neilson Court reaffirmed its Commercial Carrier holding that the failure to properly maintain existing traffic control devices may be the basis of a suit against a governmental entity. However, apparently trying to keep the genie from completely escaping the bottle, it added the following note of warning:

> We caution, however, that the maintenance of a particular street or intersection means maintenance of the street or intersection *as it exists.* It does not contemplate maintenance as the term may sometimes be used to indicate obsolescence and the need to upgrade a road by such things as widening or changing the means of traffic control.
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> * * *
>
> Neither the original alignment of the roadway *nor* the *failure to install traffic control devices at the* intersection *is* actionable. (emphasis added)

419 So.2d at 1078.

The Court manifestly wanted to make it clear that "maintenance" of existing traffic control devices as that term was used in the case. and in Commercial Carrier does not mean upgrading the devices to meet changing conditions. It also wanted to answer the question left open by Commercial Carrier. The failure to install traffic control devices in the first instance is not actionable.

Neilson's "failure to warn of a known dangerous condition" caveat must be read in pari materia with City of St. Petersburg v. Collom and City of St. Petersburg v. Mathews, 419 So.2d 1082 (Fla. 1982), a companion case wherein the Court elaborated on the caveat:

> We hold that 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. The failure to fulfill this operational-level duty is, therefore, a basis for an action against the governmental entity. (emphasis by the court)
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> 419 So.2d at 1083.

The facts of Collom and Mathews do not involve intersection collisions but they are relevant to the issues now under consideration because they illustrate what the Court meant by "known dangerous condition" when it used that phrase in Neilson. In Collom, plaintiff's wife and daughter were walking across private property and unknowingly stepped into an unprotected St. Petersburg storm drainage ditch located on a city drainage easement. They were sucked into an unprotected sewer pipe and drowned. There were no warnings of the danger. In Mathews a twenty month old child, while playing in a St. Petersburg park, fell into a channeled concrete-encased drainage creek and drowned. St. Petersburg had constructed vertical concrete sides along

the creek from which a child could not reasonably be expected to escape. It had sidewalks alongside it but it did not have any guard rails. As in Collom there were no warnings of danger.

The Court explained what is necessary to state a cause of action under the Neilson "failure to warn" caveat in Harrison v. Escambia County School Bd., 434 So.2d 318,320-21 (Fla. 1983) a case wherein the plaintiff alleged that his son was killed at an inappropriately located school bus stop. The Court said:

> We also hold that Harrison's amended complaint fails to allege the creation of a dangerous condition or trap which would necessitate giving notice of the danger, as needed under City of St. Petersburg v. Collom, 419 So.2d 1082 (Fla.1982) and Department of Transportation v. Neilson, 419 So.2d 1071 (Fla.1982)..
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> * * *
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> Under Collom, therefore, a plaintiff would have to allege specifically the existence of an operational level duty to warn the public of a known dangerous condition which, created by it and being not readily apparent, constitutes a trap for the unwary. Neilson also requires the pleading of a known trap or known dangerous condition. Collom and Neilson require specific allegations of fact instead of generalities. Harrison's amended complaint did not meet this burden. The complaint merely alleges "unusual traffic hazards" and is insufficient to state a cause of action under Collom or Neilson.

434 So.2d 316 at 320.

Department of Transp. v. Konney, supra, also involved an intersection collision. The district court effectively held that the failure to upgrade (by installing a flashing beacon) the intersection where a *state* road and a county road crossed justified a claim that was not protected by sovereign immunity. Both the state road and county road had "stop ahead signs" and in one case appropriate markings were painted on the road surface with reflective paint. The complaint alleged that the governmental entities were negligent in failing to install a flashing beacon at the intersection; that *the* County should have installed "rumble strips" *on* the county road on the

approach to the intersection; and that the location and type of signs on each roadway was improper. The evidence showed that prior to 1977 there had been no accidents at the intersection and that from 1978 to 1982 there had been twelve accidents. The case went to trial and the jury returned a verdict against the governmental defendants, fmding the County 60% liable and the state 40% liable. The Fourth DCA affmned, relying on Collom, holding that once a governmental entity creates a known dangerous condition which may not be readily apparent to one who could be injured by the condition, and the government has knowledge of the presence of people likely to be injured, it must take steps to avoid the danger or properly warn persons who may be injured by the danger. Citing Neilson this Court quashed the decision, holding that the failure by the governmental entity to upgrade the intersection and install additional traffic control devices to meet present needs was not actionable because sovereign immunity had not been waived for such planning level decisions.

Justice Kogan, concurring specially, opined that Neilson and Collom; when discussing allowing recovery against a governmental entity for failure to warn of a known dangerous condition, were referring to "a known hazard so serious and so inconspicuous to a foreseeable plaintiff that it virtually constitutes a trap". This Court embraced this interpretation in Harrison, referring to the "known dangerous condition" about which Collom warns, as a "trap for the unwary."

Another case, Trianon Park Condominium Ass'n. v. City of Hialeah, 468 So.2d 912 (Fla. 1985), decided before Konney, involves sovereign immunity principles that are pertinent to the case at hand. The Trianon facts are not complicated. The condominium association sued the City of Hialeah for its negligent performance in inspecting the members' condominium building

and certifying it for occupancy. The gravamen was that a proper inspection allegedly would have uncovered improper construction that did not conform to the building code. The alleged result was leaks and water damage to 49 of the 65 units. The association argued that building inspections performed by a governmental entity under an adopted building code are operational level activities for which the entity can be liable in tort. The city argued inter alia that the waiver of sovereign immunity did not create any such duty and that no duty was created by either the statute establishing the building code or the common law.

This court responded to those arguments in part as follows:

> It is apparent from the decisions of the district courts of appeal that the courts and the bar are having difficulty interpreting the purpose of section 768.28 and applying the principles set forth in Commercial Carrier. A discussion of the evolving history of sovereign immunity, particularly as applied to municipalities, and the intent and purpose of section 768.28 is set forth in Caulev v. City of Jacksonville, 403 So.2d 379 (Fla. 1981). In order to clarify the law regarding governmental tort liability, it is important to first set forth certain basic principles.
>
> First, for there to be governmental tort liability, ***there must be either an underlying common law or statutory duty of care with respect to the alleged negligent conduct.*** For certain basic judgmental or discretionary governmental functions, there has never been an applicable duty of care. Commercial Carrier. Further, legislative enactments for the benefit of the general public do not automatically create an independent duty to either individual citizens or a specific class of citizens. Restatement (Second) of Torts, § 288 comment b (1964). (emphasis added)
>
> 468 So.2d 912 at 917

With these words the Court expressed the obvious, to-wit: "duty" is a mandatory component of any waiver of sovereign immunity. It then went on to articulate the other "basic principles" to which it had alluded. The second *is* that ***the*** enactment of ***the statute waiving sovereign immunity did not establish any new duty of care*** for governmental entities. The statute's sole purpose was

to waive that immunity which had prevented recovery for breaches of existing common law duties of care. Third, there is not now nor has there ever been any common law duty for either a private person or a governmental entity to enforce the law for the benefit of an individual or a specific group of individuals, and there is no common law duty to prevent the misconduct of third persons. Fourth, under the constitutional doctrine of separation of powers the judicial branch must not interfere with the discretionary functions of the legislative or executive branches of government absent a violation of constitutional or statutory rights. Fifth, certain discretionary functions of government are inherent in the act of governing and are immune from suit. It is the nature of the conduct rather than the status of the actor that determines whether the function is a type of discretionary function which is by its nature immune from tort.

The Court then pointed out that its decision in Commercial Carrier did not discuss or consider conduct for which there would have been no underlying common law duty upon which to establish tort liability if there was no sovereign immunity and reiterated:

> In order to subject the government to tort liability *for operational phase activities,* there must first be either an underlying common law or statutory duty of care in the absence of sovereign immunity . . .
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> * * *
>
> Clearly, the legislature, *commissions,* boards, city councils, and executive officers, by their enactment of, or failure to enact, laws or regulations, or *by their issuance* of, or refusal to issue, licenses, *permits,* variances, or directives, *are acting pursuant to basic governmental functions* performed by the legislative or executive branches of government. The judicial branch has no authority to interfere with the conduct of those functions unless they violate a constitutional or statutory provision. *There has never been a common law duty establishing a duty of care with regard to how these various governmental bodies or officials should carry out these functions.* These actions are inherent in the act of governing. (emphasis added)

468 So.2d at 919.

Polk County contends that sovereign immunity insulates it from Sofka's claim for several reasons that arise out of the application of the decisional law discussed above to the facts of this case. These reasons follow.

C. Sovereign immunity was not waived by Polk County. Decisions relating to whether traffic control devices are necessary in the first instance are discretionary planning level decisions.

This case does not involve the ***maintenance*** of pre-existing traffic control devices as was the case in Commercial Carrier. The so-called "T intersection" where East Lamp Post Lane entered Old Polk City Road had existed ***without any traffic control devices*** for many years before West Lamp Post Lane entered the picture. The question raised by Sofka's complaint is nothing more than whether a traffic control device should have been installed in the first instance at the newly foamed "four-way intersection. "

The Konney Court observed:

> This case has been presented to this court on the basis of a failure of duty to warn of a known dangerous condition; however, we find that the true basis for Konney's assertion is that the State and the County were negligent for failing to upgrade this intersection.

That is precisely what has happened here. The pertinent allegations of the Fourth Amended Complaint are:

> 19. At all times material, Defendant, POLK COUNTY, was negligent including, but not limited to, the following negligent acts or omissions which were a legal cause of Plaintiffs damages:
>
> a. ***Failing to maintain*** its streets in a reasonably safe condition ***by not installing*** a traffic signal or stop sign at the intersection of Lamp Post Lane and Old Polk City Road;

> b. Failing to warn of the inherently and unreasonably dangerous condition existing at said intersection (emphasis added). (R 21682182)

Sofka's counsel explained at the hearing on the County's motion to dismiss that this meant that "failing to maintain or put in a stop sign or traffic signal is a failing to warn of inherently and dangerous condition" (R 5497-5498).

There is no question about it. Sofka's complaint, on its face and according to her counsel, is based squarely on the proposition that *the* County *failed to maintain* its streets in a reasonably safe condition *by not installing,* or as counsel phrased it, *putting in,* a traffic signal or stop sign at the intersection. That proposition runs head-on into Neilson's warning as to what it did *not* mean by "failure to maintain" existing traffic control devices:

> . ..We caution, however, that *the maintenance* of a particular street or intersection means *maintenance* of the street or intersection *as it exists.* It does not contemplate maintenance as the term may sometimes be used to indicate obsolescence *and the need to upgrade* a road *by such things as* widening or *changing the means* of *traffic* control. (emphasis added)
>
> 419 So.2d at 1078.

Again, Sofka's complaint stands on the single assertion that the County negligently failed to *maintain* its streets by not *installing* a traffic control device, i.e. by *not changing the means of traffic control* from no device at all to some type device. Accordingly, it does not state a cause of action against the County as a matter of law. Harrison v. Escambia County School Bd., supra.

Sofka's claim gains no support from Commercial Carrier, which did not deal with whether traffic control devices should be installed in the first instance, and it flies in the face of Neilson, which holds that traffic control falls strictly within the police power of the governmental entity;

that whether traffic control devices are necessary in the first instance are planning level decisions; and that the obligation to *maintain* does not mean the obligation to install or upgrade traffic control devices. Therefore, as a matter of law, Sofka's claim against Polk County is barred by sovereign inununity on the authority of Neilson, Collom, Harrison and Konney.

D. **Neither the allegations nor the facts support a claim pursuant to the Neilson "failure to warn of a known dangerous condition" caveat.**

There are several reasons why this case does not fall within the "failure to warn of a known dangerous condition" caveat issued in Neilson. sovereign immunity was not waived by Section 768.28 because Polk County did not have any duty to warn motorists on East Lamp Post Lane, a private road, about the presence of Old Polk City Road, or to install traffic control devices where Lamp Post Lane entered Old Polk City Road. This is without regard to whether the decision or non-decision occurred at an operational level. Second, accepting the facts in the light most favorable to Ms. Sofka, there is no basis upon which reasonable persons could find that the intersection of Lamp Post Lane and Old Polk City Road represents a danger to *travelers* on *East Lamp Post Lane* of the severity contemplated by the cases discussed above, i.e. it does not represent a "trap or hazard" to such travelers. And, the complaint does not allege a "trap or hazard with sufficient specificity. Third, Sofka has no cause of action based on a "failure to warn" because the County did not *create the* condition alleged to be hazardous, i.e. the allegedly dangerous "four-way intersection." Fourth, the complaint does not allege, nor is there any evidence, that Polk County knew that a condition serious enough to constitute a "trap" had been created. Fifth, the "failure to warn" exception to Neilson does not apply because the facts of the

case show that the danger presented by Old Polk City Road to westbound motorists on East Lamp Post Lane necessarily was readily apparent to all such motorists, including Sofka. Each of the reasons, some of which concededly overlap, mandates a conclusion that sovereign immunity was not waived under a Neilson "failure to warn" theory. Each reason will be further developed below.

(1) There was no duty of care with respect to the County's alleged negligent conduct.

The enactment in 1973 of the law now codified in Section 768.28, Florida Statutes (1995), which provides for a limited waiver of sovereign immunity, did not establish a new duty of care for governmental entities. For there to be governmental tort liability there must be an underlying common law or statutory duty of care with respect to the alleged negligent conduct. Trianon Park Condominium Ass'n. v. City of Hialeah, supra.

There was no duty of care with respect to the alleged negligent conduct of Polk County. That is because Sofka, as she approached the accident site, was driving westward on East Lamp Post Lane toward Old Polk City Road. East Lamp Post Lane is a private street. All places where rumble strips could have been installed, or "stop ahead" signs erected or painted on the road surface, were on private property. The County had no duty to control or warn traffic on the private road because, as a matter of law, it can exercise traffic control jurisdiction over a private road lawfully only if it enters into a *written agreement* with the party or parties owning or controlling the road giving the County traffic control jurisdiction over the road. Such a written agreement must be approved by the governing body of the County and the sheriff, It may

contain provisions for the reimbursement of actual costs of traffic control and enforcement and for liability insurance and indemnification by the private party or parties. Section 316.006(3)(b), Florida Statutes (1995). There are no allegations, nor is there any evidence, that East Lamp Post Lane, which as repeatedly stated herein only goes three-tenths of a mile to a dead-end, exists for the benefit of anyone other than the homeowners and their visitors, nor are there any allegations or evidence that Polk County had entered into a written agreement for traffic control with the persons who own or control Lamp Post Lane. On the contrary, a notice of privately maintained access disclaiming any responsibility on the County for maintaining access was recorded nearly nine years before the accident (Plaintiffs Ex. 10).

Duty is an essential element of any negligence action. If there is no duty there can be no negligence. McCain v. Florida Power Corp., 593 So.2d 500,502 (Fla. 1992). It only makes sense that a *duty* to control traffic could arise only when there is a *right* to control traffic. In other words, any duty must be the correlative of a right. See e.g. Rupp v. Bryant, 417 So.2d 658 (Fla. 1982). Inasmuch as the County had no right to go onto Lamp Post Lane and post signs warning motorists that they are approaching Old Polk City Road it could not have a duty to do so. Furthermore, a governmental entity has no duty to warn of a known dangerous condition which it did not create. Hill v. City of Lakeland, 466 So.2d 1231, 1232 (Fla. 2d DCA 1985); Hyde v. Florida Dept. of Transp., 452 So.2d 1109 (Fla. 2d DCA 1984). And, in the absence of a duty there can be no waiver of sovereign immunity. Trianon Park Condominium Ass h. v. City of Hialeah, supra.

In the Court of Appeal, Sofka argued that "it is irrelevant that East Lamp Post Lane was a private road" citing Bailey Drainage Dist. v. Stark, 526 So.2d 678 (Fla. 1988). Stark deals only

with the obligation to ***maintain public roads*** in a reasonably safe condition, It says that when bushes and weeds creating a danger to travelers on a public road are located on private property where removal is not an option, the entity ***has*** a duty to warn travelers ***on the public road*** of the danger. It does not even remotely say that an entity has to warn travelers on a private road of the danger presented by its point of access to a public road.

The only thing that Polk County conceivably could have done to warn west-bound motorists on East Lamp Post Lane that they were approaching Old Polk City Road would have been to place a traffic control device, perhaps a stop sign, at the edge of the right-of-way of Old Polk City Road, or put a blinker light over the intersection. One might argue, as Sofka may do, that the County was obligated to do just that if it was precluded from placing approach warnings on East Lamp Post Lane. Such a suggestion, if accepted by the courts, would lay the foundation for governmental liability each time a driver enters a public road from a private road and an accident results. There are tens of thousands, if not hundreds of thousands, of private roads and driveways that exit onto the public roadways of this state. Some lead to only one dwelling house. Some go to clusters of homes. Some go to private housing developments. Some go to mobile home parks. Some go to recreational vehicle parks. Some go to truck stops. Some go to churches and schools. Many lead to convenience stores or shopping malls. The list can go on and on. If a court accepts the proposition that governmental entities have a legal duty to warn motorists on private roads of the danger posed by the private road's point of entry onto a public road, it will expose such governmental entities to liability under Section 768.28 under the "failure to warn" theory. The litigation floodgates will be open.

Surely Section 768.28 was not intended to impose a duty on governmental entities to warn

travelers on private roads of hazards, even the hazard presented by the private roads point of entry to a public road. The public simply should not be exposed to liability for the failure of its representative to post such warnings. Of course, points of access to public roads can represent dangerous conditions but this court has at least obliquely acknowledged that every intersection is inherently dangerous. Konney, 587 at 1295.

The question of whether a governmental entity must warn users of private roads that they are approaching a public road is a question of duty. Whether a duty exists is a question of law for the courts, not the jury, McCain, Neilson.

Polk County also suggests that deciding whether to undertake to post warnings at all points where private roads and driveways access public roads would involve a major planning level decisions by the governmental entities.

(2) Old Polk City Road does not represent a hazard so serious that it virtually constitutes a trap.

Even if it is conceded, *arguendo* only, that the danger level at the point where East Lamp Post Lane entered Old Polk City Road was increased when West Lamp Post Lane entered the picture, there are not sufficient allegations in the complaint that the increased danger level was *so egregious that it constituted a hazard or trap,* nor *is* there any evidence to support a finding to that effect.

At best Sofka contends only that the addition of West Lamp Post Lane created a four-way intersection that constituted a known, dangerous condition about which Polk County should have warned. Several things challenge this contention. First, East Lamp Post Lane is only three-tenths of a mile long. It has been in existence for many years. Its only access was through the "T

intersection" with Old Polk City Road. No reported accidents occurred at the point of access. West Lamp Post Lane also is a dead-end street. Thus anyone who enters Old Polk City Road from West Lamp Post Lane has to know that the intersection is there. The net result is that anyone who entered Old Polk City Road from either East Lamp Post Lane or West Lamp Post Lane necessarily would have been coming out of a short dead-end street and would have to know of the presence of Old Polk City Road. There was no other way for them to enter either of the streets. Further, during the approximately six month period that West Lamp Post Lane had been in existence, there had not been any accidents at the intersection. The fact that the record does not reveal that there had ever been an accident at the point of access prior to Sofka's alone "establishes that this intersection was not a known dangerous condition when it was created." Konney at 587 So.2d 1296.

At the hearing on the County's motion to dismiss the complaint Sofka's counsel argued that West Lamp Post Lane created an "illusion" and that the "illusion" created the dangerous condition. Before the jury he argued "Dr. Fogarty said, when you see this rise in the road you assume there's a road on the other side. So what you're going to see is you're going to see a continuation through here... (R 1357). The illusion theory was the cornerstone of Sofka's argument that the four-way intersection represented a "trap to the unwary." The problem is that Fogarty's testimony does not even come close to laying the foundation for the theory. Fogarty established the point of critical encounter, i.e., the "point of no return" for westbound traffic on East Lamp Post Lane at 150 to 160 feet (R 5628). He also testified that one can begin to see West Lamp Post Lane when they are about 70 or 80 feet from the crest of Old Polk City Road

(R 5594). Thus he established conclusively that one traveling west on East Lamp Post Lane cannot see West Lamp Post Lane until they are 70 or 80 feet from Old Polk City Road and that when one is 70 or 80 feet from Old Polk City Road he or she is half way past her point of critical encounter or "point of no return." That being true, there simply is no way that West Lamp Post Lane could lure a motorist, even an unsuspecting one, into a trap if one cannot see that trap until he or she is half- way past the point where he or she could avoid a collision.

Perhaps the best expression of Sofka's claim that a hazard or trap existed is found in her counsel's jury argument. He argued that Sofka's "catastrophic accident four months after this configuration comes into play... in and of itself shows that this is a dangerous intersection (R 1353) and, "I would submit to you that the evidence is clear that a four-way uncontrolled obstructed rise-in-the-hill intersection with no control signs is a dangerous condition (R 1358).

There is nothing else. When stripped of the illusion theory and fully exposed, Sofka's claim is nothing more than a claim that Polk County was negligent because it failed to install a stop sign when a four-way intersection was created, i.e. "in the first instance." There simply was no hazard or trap in this case within the meaning of Neilson, Collum, Konney, and other cases.

(3) Polk County did not create the alleged dangerous condition.–

The majority opinion of the Second DCA blandly states, without analysis, that Polk County ***created*** the alleged dangerous condition about which it allegedly failed to warn. In fact the certified question posed by the author of the majority opinion suggests its own answer by assuming as a fact that the county ***created*** the allegedly dangerous condition. The opinion simply ignores the obvious and legitimate question of whether by issuing permits for the private

subdivision, and accepting the dedication of West Lamp Post Lane, Polk County itself ***created,*** within the meaning of Neilson, Konney, and Collom, the "dangerous condition" that allegedly strips it of sovereign immunity.

The decisions of this Court firmly establish that "create" is a critical operative word in the Neilson "failure to warn" caveat and that ***the*** hazard must ***be created*** by the governmental entity itself, In Collom this Court, after rejecting the broad language used by the Second District Court of Appeal, opined:

> 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 a responsibility to protect the public from that condition, and the failure to so protect cannot logically be labeled a judgmental, planning-level decision. We find it unreasonable to presume that a governmental entity, as a matter of policy in making the judgmental, planning-level decision, would ***knowingly create a trap or a dangerous condition*** and ***intentionally*** fail to warn or protect the users of that improvement from the risk. In our opinion, it 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. (emphasis added)
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> 419 So.2d 1082 at 1086.

In Harrison v Escambia County School Bd., supra the Court explained:

> Under Collom . . . a plaintiff would have to allege specifically the existence of an operational level duty to warn the public of a known dangerous condition which, ***created by it*** and being not readily apparent, constitutes a trap for the unwary, (emphasis added)

These words leave little room for doubt. There can be no governmental liability under a "failure to warn of a known hazard" theory unless the governmental entity itself, or one acting on its behalf, designs, constructs, or produces the condition that constitutes the trap. The word

"create" must be taken literally, and must not be used interchangeably with "permit" or "allow". Certainly, the failure to warn of the trap cannot *create* the trap. Until *the* trap has been *created* thereisnoreasonforawaming.

Polk County did not design, construct, produce, or otherwise ***create the*** "four way intersection" that is alleged to be a hidden trap. At best, from Sofka's standpoint, it allowed or permitted the construction of the alleged trap. In Trianon this Court noted:

> "[County] commissioners...by their issuance of...permits...are acting pursuant to basic governmental functions performed by the legislative or executive branches of goverument. The judicial branch has no authority to interfere... There has never been a common law duty establishing a duty of care with regard to how these various governmental bodies or officials should carry out those functions, These actions are inherent in the act of governing.
>
> 468 So.2d 912 at 919.

(4) There is no evidence that Polk County knew that a hazard so serious that it constituted a trap had been created.

Collom and Harrison specify that ***in addition*** to creating the allegedly dangerous condition itself, the governmental entity must know that it has created a dangerous condition so serious that it ***is*** a "trap for ***the*** unwary" and must ***intentionally*** fail to warn or protect the users of that improvement. See specifically Collom, at 419 So.2d 1086. Certainly a governmental agency could not ***intentionally*** fail to warn users about a condition so dangerous as to constitute a hazard or trap without first ***knowing*** that the condition is so dangerous that it constitutes a trap for the unwary.

It can be assumed that Polk County officials knew that the opening of West Lamp Post Lane by the developer resulted in what Sofka calls a "four way intersection". It can be assumed

that they probably were aware that at least in some circumstances, four-way intersections are more dangerous than "T" intersections. It also can be assumed that they knew that all intersections are inherently dangerous to one degree or another. What *cannot be assumed* is that County officials knew that the addition of West Lamp Post Lane to the intersection created a dangerous condition so *serious that it constitutes a "hazard or trap"* to unsuspecting motorists accessing Old Polk City Road from East Lamp Post Lane; and that notwithstanding that knowledge they *intentionally* failed to install a traffic control device. The facts point to the contrary. Over the years of its existence, both before and after West Lamp Post Lane came into existence, there were no reported accidents at the point of access. This fact alone shows "establish[es] that the intersection was not a known dangerous condition when it was created." Konney at 587 So.2d 1296.

The Second DCA majority opinion states that "...Sofka presented evidence that Polk County created a known dangerous condition (the four-way inters&ion) and failed to provide any warning." To that statement it appended the following footnote: "We acknowledge that the question of whether the condition was known to be dangerous was close. However, the jury clearly resolved this issue in the Plaintiffs favor." This statement and footnote point to two shortcomings in the decision. First, the pertinent question is whether the County knew of a dangerous condition so serious that it constituted a hazard or trap, not merely whether it knew a dangerous condition had been created. Second, the majority's conclusion that the alleged condition was known to be dangerous serenely relies on the wisdom of the jury and the presumed correctness of its verdict. This deficiency is significant because the case did not come before that court clothed with the sanctity of a jury verdict. The verdict had been set aside. The case was

before the court on a stipulated set of facts, viz. those reflected in the record, nothing more.

(5) Any dangerous **condition presented by Old Polk City Road was readily apparent.**

Assuming, again ***arguendo*** only, that the addition of West Lamp Post Lane to the intersection between East Lamp Post Lane and Old Polk City Road somehow created a dangerous condition so egregious that it could be called a "trap"; and that Polk County ***created the*** trap and knew it had done so, sovereign immunity nevertheless was not waived because whatever danger was presented by Old Polk City Road ***was readily apparent to any and all travelers*** on East Lamp Post Lane.

Again, Collom, elaborating on the Court's contemporaneous holding in Neilson, articulated the "failure to warn" exception as follows:

> . ..We hold that 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... (last emphasis added).
>
> 419 So.2d at 1083

The Collom language was adopted in Konney. There Justice Kogan in concurring elaborated:

> 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. (emphasis added).
>
> 587 So.2d at 1299

In Harrison the Court, addressing the pleading requirements for a Collom "failure to warn" claim, noted that a complaint must contain specific allegations of a known dangerous condition

created by it and ***being not readily apparent.***

In Pavne v. Broward County, 461 So.2d 63, 65 (Fla. 1984) this Court applied the "readily apparent" component of the Neilson "failure to warn" exception to sovereign immunity in a fact situation involving a fatal pedestrian street crossing accident, saying:

> There is no question that the county created and was on notice of the conditions at the intersection and the surrounding area. The only question, then, is whether the conditions created ***a known*** danger ***not readily apparent to potential victims*** or constituted a hidden trap for pedestrians. We conclude that they did not. (emphasis added)

On at least two occasions the Second DCA has reversed trial courts in traffic accident cases wherein it had been found that sovereign immunity had not been waived because the danger was readily apparent. Department of Transa v. Stevens, 630 So.2d 1160, 1161-62 (Fla. 2d DCA 1993; Department of Transp. v. Caffiero, 522 So.2d 57, 58 (Fla. 2d DCA 1988).

There simply is no way the danger presented by East Lamp Post Lane's intersection with Old Polk City Road was not "readily apparent" to anyone driving west on East Lamp Post Lane ***because the only way into East Lump Post Lane is by way of the same point of access,*** and the lane is so short that there is little or no room for confusion. At whatever point on the street a motorist was at any given moment, he or she would have to know that Old Polk City Road was in close proximity because Lamp Post Lane dead-ends three-tenths of a mile from Old Polk City Road. ***The*** point ***is that*** no ***one*** enters Lamp Post Lane from some other ***point*** and ***unexpectedly*** comes upon its intersection with Old Polk City Road as Sofka's argument insinuates, and as the majority opinion below easily could lead one to believe.

Sofka herself had entered East Lamp Post Lane from Old Polk City Road three times, twice the day of the accident, and had exited by the same route on two prior occasions, one of

those the day of the accident. On both prior occasions she had stopped at Old Polk City Road and looked for oncoming traffic. It simply strains credulity beyond the breaking point to conclude that the danger presented by the presence of Old Polk City Road was not readily apparent to her and any other motorist using the street.

In sum, Polk County is protected by sovereign immunity in accord with the principles set forth in Commercial Carrier, Neilson and Konnev.

II

THE EVIDENCE DOES NOT SUPPORT A FINDING THAT ANY ACTION OR INACTION ON POLK COUNTY'S PART WAS A PROXIMATE CAUSE OF THE ACCIDENT.

As a matter of law, Sofka was required to plead and prove that Polk County's alleged negligence was the proximate cause of her injuries and damages. Greene v. Flewelling, 366 So.2d 777 (Fla. 2d DCA 1979); McWhorter v. Curby, 113 So.2d 566 (Fla. 2d DCA 1959). Sofka failed to meet that burden in that there was no evidentiary explanation as to how or if Polk County's alleged negligence in failing to install a traffic control device on the private road caused the accident.

Sofka did not offer any facts or evidence explaining how or if the lack of a traffic control device caused her to fail to yield the right-of-way as she approached the subject intersection. Without some such evidence or testimony, there is an absolute lack of proof as a matter of law to support a finding that Polk County% alleged negligence actually caused Sofka to proceed into the subject intersection and into the path of the oncoming vehicle. Thus, there

was no reasonable basis for the necessary conclusion that the absence of a traffic control device was a substantial factor in bringing about the accident.

In order to prove proximate cause, Sofka was required to show "that it can reasonably be said that, but for the negligence, the loss, injury or damage would not have occurred," Greene at 780. Florida courts, in accord with most other jurisdictions, have historically followed the "but for" causation-in-fact test in determining the issue of proximate cause. Stahl v. Metropolitan Dade County, 438 So.2d 14 (Fla. 3d DCA 1983).

In Greene, supra, this court reasoned that since the plaintiff offered no explanation as to how his injuries were related to the auto accident he was involved in due to the alleged negligent driving of the defendant, the plaintiff failed to carry its burden of demon&rating proximate cause. Id. at 780. As stated by this court, "a possibility of causation is not sufficient to allow a claimant to recover." Id. at 78 1.

This court went on in Greene to hold that a plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the defendant's conduct was a substantial factor in bringing about the result.

> We find that this evidence at best raises a mere possibility of legal causation, and nothing more. It has long been held that a possibility of causation is not sufficient to allow a claimant to recover, As said by Dean Prosser: "On the issue of the fact of causation, as on other issues essential to his cause of action for negligence, the plaintiff, in general, has the burden of proof. He must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. A mere possibility of such causation is not enough, and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

Id. at 781. See also Gant v. Lucy Ha's Bamboo Garden. Inc., 460 So.2d 499 (Fla. 1st DCA

1984); Bryant v, Jax Liquors, Inc., 352 So.2d 542 (Fla. 1st DCA 1977); Wirt v, Fountainbleau Hotel Corp., 306 So.2d 547 (Fla. 3d DCA 1974).

In similar fashion, the Third District Court of Appeal, in Derrer v. Georgia Electric Co., 537 So.2d 593 (Fla. 3d DCA 1988), held that even where evidence of causation was adduced, a trial court should, in circumstances such as the case at bar and based solely on fairness and policy considerations, direct a verdict in favor of a defendant. In Derrer, the plaintiffs alleged that the defendant's negligence in causing a traffic light to be inoperable caused the accident which resulted in the plaintiffs' injuries. The District Court reasoned that:

> Surely, inoperable intersectional traffic lights do not, in the range of ordinary human experience, cause automobile drivers to miss seeing the entire intersection where the light is located; such a bizarre occurrence is, in our view, beyond the scope of any fair assessment of the danger created by the inoperable traffic light.

Id. at 594.

In the instant case and in light of the absolute lack of any testimony as to the circumstances surrounding Sofka's actions, it is impossible to determine whether the failure to have a traffic control device at the subject intersection caused the subject accident.

The allegedly necessary traffic control device was but one of several factors which were concluded by Sofka's expert as being contributions to the dangerous nature of the subject intersection. In addition to the lack of a traffic control device, Dr. Fogarty noted that the intersection had become more dangerous due to its changing from a "T" intersection to a four-way intersection prior to the accident. And, the landowners in question had allowed substantial foliage to grow within the easement (and outside of Polk County's right-of-way), thus blocking Sofka's ability to see to the north. Furthermore, he opined that the incline up "East"

Lamp Post Lane approaching Old Polk City Road may have contributed to the accident as did the excessive speed of the other vehicle involved. Most importantly, Sofka knew about the intersection. She had entered Lamp Post Lane through the intersection at least three times. Two times on the day of the accident. One time only minutes before the accident. She had left the lane via the intersection at least twice, once earlier in the day. Her friends' house was only two tenths of a mile from the intersection. On these facts, it would be impossible for reasonable men, unswayed by sympathy, to conclude that the absence of a warning sign was a cause of the accident.

CONCLUSION

Sovereign immunity protects Polk County from Sofka's claim. Therefore, the decision of the Second District Court of Appeal should be quashed with instructions to remand the case for dismissal.

Respectfully submitted,

Wofford H. Sidham
Florida Bar No. Of8309
Hank B. Campbell
Florida Bar No. 434515
Post Office Box 1578
Bartow, Florida 33831
(941) 533-0866
Attorneys for Appellant\Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by hand delivery this 12th day of August, 1996, at the office of JOHN W. FROST, II, ESQUIRE, 395 South Central Avenue, Bartow, Florida 33830.

LANE, TROHN, CLARKE, BERTRAND,
VREELAND & JACOBSEN, P.A.

Wofford H. Stidham
Florida Bar No. 078309
Hank B. Campbell
Florida Bar No. 434515
Post Office Box 1578
Bartow, Florida 33831
(941) 533-0866
Attorneys for Appellant\Petitioner

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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

POLK COUNTY,

Appellant,

v.

DONNA M. SOFKA,

Appellee.

CASE NO. 95-01886

Opinion filed April 19, 1996.

Appeal from the Circuit Court for Polk County; Oliver L. Green, Jr., Judge.

Hank B. Campbell of Lane, Trohn, Clarke, Bertrand, Vreeland & Jacobsen, P.A., Lakeland, for Appellant.

John W. Frost, II, Neal L. O'Toole, and Mark A. Sessums of Frost, O'Toole & Saunders, P.A., Bartow, for Appellee.

BLUE, Judge.

Polk County appeals the final judgment entered in Donna Sofka's favor following a jury verdict. The County contends that

it is entitled to sovereign immunity for the negligence that allegedly caused Sofka's extensive and serious injuries. We conclude that the County's liability resulted from an operational-level decision, the creation of a dangerous condition for which the County failed to warn, which is not entitled to sovereign immunity. Accordingly, we affirm but *certify* a question of great public importance.

Sofka suffered substantial injuries resulting from a two-car collision at an unmarked intersection in Polk County. The four-way intersection was created when a subdivision road was built directly opposite a private road. sofka entered the intersection from the private road without first stopping or slowing down. while crossing the intersection, Sofka's car was struck by a car traveling on the intersecting road. Sofka concedes that the car on the intersecting road had the right-of-way.

Sofka sought damages against Polk County on the theory that the County created a dangerous intersection when it accepted the subdivision road but failed to warn of the dangerous condition. Sofka supported her theory with evidence that the opening of the new road, combined with area vegetation and the topography, made the primary road difficult to see. Sofka contended that the County's failure to install a Stop sign, a Yield sign, or any other warning on the road on which she was traveling was the proximate cause of the accident.

Polk County contends that whether traffic control devices should be installed is a judgmental or planning-level decision that is immune from liability. Commercial Carrier Corp. v. Indian River Co., 371 So. 2d 1010 (Fla. 1979) (governmental agencies have sovereign immunity for planning-level decisions). In particular, Polk County relies on Department of Transportation v. Neilson, 419 SO. 2d 1071 (Fla. 1982), and Department of Transportation v. Ronney, 587 so. 2d 1292 (Fla. 1991). We agree that these cases are dispositive but disagree with the County's application of these cases to the facts before us.

Neilson is the leading case on governmental liability and sovereign immunity for alleged negligence arising from intersection collisions. Neilson appears to stand for two rules that in our factual situation are difficult to distinguish. "[T]he 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 judgmental, planning-level functions to which absolute immunity attaches." Neilson, 419 so. 2d at 1073. A governmental entity may be liable, however, for an inherent defect that creates a known dangerous condition if it fails to warn of the known danger. This is a negligent omission at the operational level. 419 so. 2d at 1078.

The following example from Neilson is particularly pertinent to the facts of this case:

> Illustrations of inherent defects include . . . the construction of a curved road where a straight road would be more appropriate. Such decisions as the location and alignment of roads . . . and the placing of traffic control devices are not actionable because the defects are inherent in the overall project itself. The fact that a road is built with a sharp curve is not in itself a design defect which created governmental liability. 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.

419 So. 2d at 1078. The fact situation presented here falls within the second situation. Sofka presented evidence that Polk County created a known dangerous condition (the four-way intersection) and failed to provide any warning.[1] under Neilson, this is a negligent omission at the operational level and, therefore, not immune.

Neilson contains a significant factual detail, which is also present in Konney. In Neilson, the plaintiff alleged a failure to provide sufficient warning based on the failure to upgrade or to install adequate traffic control devices. In Konney, the plaintiff alleged that the Department was negligent because it failed to install a flashing beacon, it failed to install rumble strips, and the location and type of signs present were improper. In reversing a jury verdict against the

---

[1] We acknowledge that the question of whether the condition was known to be dangerous was close. However, the jury clearly resolved this issue in the plaintiff's favor.

Department for a death resulting from a collision at this rural intersection, the Florida Supreme court stated:

> The issue in the instant case is whether the installation of a flashing beacon at the intersection . . . was a planning-level decision required to upgrade the intersection because of increased traffic or a necessary device due to a known dangerous condition at the time this intersection was created, i.e., an operational-level decision. In the first instance, sovereign immunity would prohibit recovery under the principles of Neilson and its progeny, while in the second instance recovery would be allowed under Collom.[2]

587 So. 2d at 1294-95 (footnote added). The court found that there were adequate signs at the intersection.

In the case before us, the complaint alleged and the evidence proved a complete failure to warn. The importance of this factual distinction is confirmed by Department of Transportation v. Webb, 438 So. 2d 780 (Fla. 1983). -There, the Florida Supreme Court approved a First District decision that affirmed a jury verdict against the Department for its failure to install warning signs at a railroad crossing. The supreme court affirmed the portion of the district court's opinion stating that the failure to place warning signs at the crossing, which was known to be dangerous, was an operational-level function.

---

[2] City of St. Petersburg v. Collom, 419 So. 2d 1082 (Fla. 1982) (governmental entity may not create a known hazard or trap and then claim immunity from suit for injuries resulting from that hazard on the ground that it arose from a judgmental, planning-level decision).

Both Neilson and Konney have a factual similarity to this case because each involved an allegedly dangerous intersection. However, it is a critical distinction that Neilson and Konney involve claims of inadequate traffic control devices, whereas the case before us alleges the complete absence of warning. The language in both cases supporting Polk County's position does not require a reversal. We conclude that the failure to erect any warnings at the subject intersection constituted a failure to warn of a dangerous condition, an operational-level decision for which sovereign immunity is inapplicable.

Just as the dangerous curve example in Neilson required a warning, the jury here was entitled to find from the evidence that Polk County had a duty to warn of the dangerous intersection and failed to do so. AS in Neilson, there is no liability for the design of a dangerous curve or intersection, but the failure to warn of the dangerous trap may result, as it did here, in the loss of the sovereign immunity which attached to the planning or design. We see no distinction between a dangerous curve and the creation of a dangerous intersection; each carries with it the duty to warn.

Because there is language in Neilson that could suggest a governmental decision on whether to install a traffic control device is always a planning-level decision, we certify the following to the Florida Supreme Court as a question of

great public importance:

> ALTHOUGH A GOVERNMENTAL AGENCY'S DECISION WHETHER TO INSTALL A TRAFFIC CONTROL DEVICE IS NORMALLY A PLANNING-LEVEL DECISION, PROTECTED BY SOVEREIGN IMMUNITY, MAY THAT IMMUNITY BE LOST IF GOVERNMENTAL ACTION CREATES A DANGEROUS CONDITION RESULTING IN A DUTY TO WARN AND THE FAILURE TO INSTALL ANY WARNING RESULTS IN A BREACH OF DUTY?

As to Polk County's remaining issue, the record contains sufficient evidence to support the jury's determination that the conduct by Polk County was the proximate cause of the accident.

Affirmed; question certified.

FULMER, J., Concurs specially,*
PARKER, Acting Chief Judge, Dissents with opinion.

FULMER, Judge, Concurring.

I agree with Judge Blue's attempt to discern the meaning and proper application of the various rules pertaining to sovereign immunity. Therefore, I concur with the majority opinion. I also agree that the issues raised by this case should be addressed as a question of great public importance. However, I would certify the question as posed by Judge Parker. The law of sovereign immunity seems to have become a morass Of rules that, upon case by case application, has developed internal inconsistency instead of clarity.

PARKER, Acting Chief Judge, Dissenting.

I respectfully dissent. while I agree that a question should bc certified to the supreme court, I would certify the following question:

> IF A COUNTY HAS LEGAL NOTICE OF AN INTERSECTION BETWEEN TWO PAVED SECONDARY ROADS AND EITHER FAILS TO MAKE ANY PLANNING-LEVEL DECISION REGARDING APPROPRIATE TRAFFIC CONTROL OR DECIDES NOT TO PLACE ANY TRAFFIC CONTROL DEVICES AT THE INTERSECTION, CAN THE SUBSEQUENT ABSENCE OF A STOP OR YIELD SIGN AT THAT INTERSECTION CONSTITUTE EITHER AN OPERATIONAL-LEVEL ERROR OR THE CREATION OF A KNOWN DANGEROUS CONDITION?

Having read and reread all of the supreme court decisions discussing the planning-level versus operational-level decisions, I conclude that Justice Sundberg's comment in his dissent in Department of Transportation v. Neilson, 419 So. 2d 1071, 1079 (Fla. 1982) (Sundberg, J., dissenting), that "[t]he enigma is now shrouded in mystery" still applies. Regardless of the many attempts by the courts of this state to clarify the law dealing with the waiver of sovereign immunity, it remains a confusing area of the law which is difficult to apply to the various factual situations presented in litigation against a governmental entity.

Lamp Post Lane, running east and west, is a dead-end, privately-maintained, two-lane road approximately one-half mile long and is located on the east side of Old Polk City Road (SR 33). It was paved in 1987. Until 1988 it connected in a "T"

intersection with SR 33, a county-maintained, paved two-lane road running north and south. There were no traffic control devices installed at that intersection.

In 1988 a new subdivision was platted and constructed on the west side of SR 33, at which time West Lamp Post Lane was constructed. West Lamp Post Lane is slightly offset from Lamp Post Lane.. Exhibits offered at trial reflect that the westbound lane of Lamp Post Lane-lines up with the eastbound lane of West Lamp Post Lane. There is a rise in Lamp Post Lane as one approaches SR 33. Polk County was aware of the newly platted subdivision and the dedication of West Lamp Post Lane as a county road. Even after West Lamp Post Lane was constructed, no traffic control devices were installed at the intersection. I have found no evidence in the record indicating that the county was aware of prior accidents at that intersection.

Donna Sofka turned off onto Lamp Post Lane and stopped to visit a residence five houses from the intersection. She had been on this road twice, once at dusk and once at 10:00 p.m., both on the day of the accident. Departing after dark, she drove west on Lamp Post Lane and entered the intersection without slowing. A vehicle traveling southbound on SR 33 struck her vehicle.

At the time of the accident, a tree and bushes were located on the northwest corner of the intersection. Sofka's expert testified that this contributed to an inability for

westbound drivers to see approaching southbound traffic on SR 33. Sofka's complaint alleged that the county created an inherently and unreasonably dangerous condition by failing to install a traffic signal or stop sign at this intersection.

The decisions concerning the installation of appropriate traffic control devices or methods generally are planning-level functions for which the government is immune. Neilson, 419 So. 2d at 1073. In Department of Transportation v. Konney, 587 So. 2d 1292, 1294 (Fla. 1991), the supreme court stated:

> [W]e have consistently held that decisions concerning the initial plan, road alignment, traffic control device installation, or the improvement of roads and intersections are not matters which would subject a governmental entity to liability, because these activities are basic capital improvements and are judgmental, planning-level functions.
>
> In Neilson, we held that "decisions relating to the installation of appropriate traffic control methods and devices or the establishment of speed limits are discretionary decisions which implement the entity's police power and are judgmental, planning-level functions.

The supreme court also 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. . . 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.

Konney, 587 So. 2d at 1295.

The Neilson court recognized that there are two exceptions when a government may not be immune from liability for such decisions. The first exception is when the government's decision is implemented in a way that it creates or maintains an unintended defect. Neilson, 419 so. 2d 1077-78. This first exception is not relevant here.

The second exception is when the government creates a known dangerous condition and fails to warn. Neilson, 419 So. 2d at 1078. In Department of Transportation v. Stevens, 630 So. 2d 1160, 1162-63 (Fla. 2d DCA 1993), review denied, 640 So. 2d 1108 (Fla. 1994), this court stated:

> 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 government entities. This has been due in part to the Neilson and [City of St. Petersburg v.] Collom [419 so. 2d 1082 (Fla. 1982)] decisions using interchangeably such terms as "trap," "hazard," "known hazardous condition," and "dangerous condition."
>
> In an effort to see through the semantic haze of case law on this point; Justice Kogan derived what he believed to be the court's true meaning in his specially concurring opinion in Department of Transoortation v. Konney, 587 So. 2d 1292, 1298-1300 (Fla. 1993). After reviewing what is described as the "loose usage of the English language" employed by the court in the two cases, he states only situations rising to the level of "a very serious peril" can support governmental liability under this theory. 587 So. 2d at 1299. Justice Kogan concluded that Neilson and Collom were talking about "a known hazard so serious and so inconspicuous to a foreseeable plaintiff that it virtually constitutes a trap." Id. at 1299.
>
> . . . .
>
> A certain level of hazard is intrinsic and unavoidable in roadway construction and in the management of traffic flow. As observed in Konney, courts may accept the proposition that every intersection may be inherently dangerous without concluding that the judicial branch has the authority to

> expose the state to tort liability in every situation where an existing structure or obsolete design presents a potential hazard. 587 SO. 2d at 1295.

I conclude, as a matter of law, as this court did in Stevens, that the dangerous condition here was not so inconspicuous and so serious as to fit within the second exception. Accordingly, I would hold that Polk County should be immune from liability.

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

JUNE 14, 1996

POLK COUNTY, Appellant(s), v. DONNA M. SOFKA, Appellee(s).	)	Case No. 95-01886

BY ORDER OF THE COURT:

Counsel for appellant having filed a motion for rehearing and motion for rehearing en banc in this case, upon consideration, it is

ORDERED that the motion is hereby denied.

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER.

WILLIAM A. HADDAD, CLERK

c: Hank B. Campbell, Esq.
John W. Frost, II, Esq.

/PM

DISTRICT COURT OF APPEAL * SECOND DISTRICT * SAT CITO SI RECTE * STATE OF FLORIDA

RECEIVED

JUN 19 1996

IN THE CIRCUIT COURT IN AND FOR POLK COUNTY

DONNA M. SOFKA,

Plaintiff,

-vs-

CASE NO. GC-G-go-0012

POLE COUNTY,

Defendant.

STIPULATED FINAL JUDGMENT

This cause came before the Court on Plaintiff, DONNA M. SOFKA's ("SOFKA"), and Defendant, POLE COUNTY's, (collectively referred to as "the parties") Settlement Agreement, Part II of which calls for the entry of this Stipulated Final Judgment.

The Court, after having reviewed the Settlement Agreement and being otherwise more fully advised, it is

ORDERED AND ADJUDGED that Plaintiff, SOFKA, recover from Defendant, POLK COUNTY, the sum of One Million and 00/100 Dollars ($1,000,000.00), inclusive of all costs, fees, pre-judgment interest and post-judgment interest.

This Stipulated Final Judgment shall not be recorded or docketed or executed against POLE COUNTY unless such is required in order to pursue a claims bill as set forth in Part IV(A) of the Settlement Agreement, a copy of which is attached hereto and all Of its terms are incorporated herein.

DONE AND ORDERED this 2 day of May, 1995.

/s/ Oliver L. Green, Jr.

OLIVER L. GREEN, JR., Circuit Judge

Copies Furnished To:

John W. Frost, II, Esquire, P.O. Box 2188, Bartow, FL 33830-2188
Hank B. Campbell, Esquire, P.O. Box 3, Lakeland, FL 33802-0003

1995

IN THE CIRCUIT COURT IN AND FOR POLK COUNTY, FLORIDA

DONNA M. SOFKA,

Plaintiff,

vs. CASE NO: GC-G-90-0012

POLK COUNTY,

Defendant.
_____/

SETTLEMENT AGREEMENT

Plaintiff, DONNA M. SOFKA ("SOFKA"), and Defendant, POLK COUNTY, collectively referred to herein as "the parties", in order to settle the above-styled lawsuit, said case resulting from an automobile accident occurring on or about December 28, 1988, at or near tie intersection of Lamp Post Lane and Old Polk City Road, Polk County, Florida ("the accident"), stipulate and agree as follows:

I. Settlement Payment

POLK COUNTY has paid to SOFKA and her attorney, John W. Frost, II, the sum of Forty Thousand and 00/100 Dollars ($40,000.00), the receipt and sufficiency of which is acknowledged. By virtue of this payment, POLK COUNTY in no way admits any liability for the accident and expressly denies same.

II. Stipulated Final Judgment

A One Million and 00/100 Dollar ($1,000,000.00) Stipulated Final Judgment shall be entered against POLK COUNTY. This shall be a net judgment, inclusive of all set-offs due to prior settlements, this settlement, apportionments of fault, or otherwise.

This One 'Million and 00/100 Dollar ($1 ,000,000.00) Stipulated Final Judgment shall be inclusive of all costs and fees. This Stipulated Final Judgment shall not be recorded or docketed or executed against POLK COUNTY unless such is required in order to pursue a claims bill as set forth in Part IV(A) of this Agreement.

III. Appeal

A. POLK COUNTY shall be entitled to exhaust all appeals from the entry of the Stipulated Final Judgment. The record on appeal shall be the record as it exists at the time of the entry of the Stipulated Final Judgment The patties stipulate and agree that the intermediate appellate court has jurisdiction to hear POLK COUNTY's appeal of the Stipulated Final Judgment, that POLK COUNTY has standing to bring said appeal and that such appeal shall be brought on only either or both of the two (2) issues listed below. The parties stipulate and agree that either of the below listed issues is dispositive of the issue of POLK COUNTY's liability for the accident, i.e., if the appellate court reverses and remands/or the entry of judgment in favor of POLK COUNTY, *then* such rendering shall terminate the case as set forth in Part IV(B) of this Agreement:

(a) The Trial Courts refusal to grant POLK COUNTY'S Motion to Dismiss, to enter summary judgment for POLK COUNTY, or to direct a verdict against SOFKA, by virtue of POLK COUNTY's sovereign immunity, which POLK COUNTY asserts immunizes it from any liability for the accident. This issue will not include any claim by POLK COUNTY which relates to improper service or the failure on the pan of SOFKA to serve the Florida Department of Insurance.

(b) The Trial Courts' refusal to direct a verdict against SOFKA, by virtue of POLK COUNTY's assertion that SOFKA failed to adduce sufficient evidence showing that any alleged fault of POLK COUNTY was the proximate cause of the accident or any of SOFKA's damages stemming therefrom.

B. If POLK COUNTY does not file a notice of appeal within 30 days after the entrance of the Stipulated Final Judgment, then the parties stipulate that POLK COUNTY has not prevailed, and the provisions of Part IV(A) of this Settlement Agreement shall apply.

C. Notwithstanding the above, if the intermediate appellate court, for any reason, determines there is no jurisdiction or standing, or if the appeal is not dispositive of the issue of POLK COUNTY's liability for the accident, then the parties agree that a material factor determinative to the parties entering the Stipulated Final Judgment will have been frustrated, that it will no longer be equitable for the Stipulated Final Judgment to have prospective application, and that the Stipulated Final Judgment shall be void. If that occurs, POLK COUNTY should be relieved of the Stipulated Final Judgment pursuant to Rule 1.540(b) (4) and/or 1.540(b) (5) of the Florida Rules of Civil Procedure (1994), and SOFKA will return the sum of Forty Thousand and 00/100 Dollars ($40,000.00) paid pursuant to Part I, after which the parties shall be entitled to again proceed to trial of this case.

It is further stipulated, that the above provisions shall be self-executing and in such a situation, the intermediate appellate court's refusal to hear POLK COUNTY's

appeal shall itself relieve POLK COUNTY from the Stipulated Final Judgment and require SOFKA to return the sum of Forty Thousand and 00/100 Dollars ($40,000.00), regardless of the time period which will have elapsed between the entry of the Stipulated Final Judgment and the intermediate appellate court's order refusing to hear the appeal.

D. Except as provided in paragraph C above, if POLK COUNTY or SOFKA is unsatisfied with the decision rendered by the intermediate appellate court, that unsatisfied party may petition the Florida Supreme Court to hear the appeal. If POLK COUNTY chooses not to appeal to the Florida Supreme Court, or if the Florida Supreme Court, for any reason, determines there is no jurisdiction or standing, then the appeal shall be deemed "exhausted" and the provisions of Part IV shall apply based on the decision rendered by the intermediate appellate court. If the Fiorida Supreme Court accepts jurisdiction and renders an opinion, then upon the rendering of such opinion, the appeal shall be deemed "exhausted" and the provisions of Part IV of this Settlement Agreement shall apply based on the decision rendered by the Florida Supreme Court.

IV. Remedies After Appeal Is Exhausted

A. If after the appellate process is exhausted, and POLK COUNTY has not prevailed on either preserved issue, then POLK COUNTY shall pay to SOFKA, and her attorney, John W. Frost, II, an additional Forty Thousand and 00/100 Dollars ($40,000.00) within 30 days of such exhaustion. Additionally, SOFKA will then be entitled to pursue a claims bill against POLK COUNN for up to One Million and 00/100 Dollars ($1,000,000.00) (i.e., the amount of the Stipulated Final Judgment) as provided in Chapter

1 1, Florida Statutes (1994). POLK COUNTY shall have the right to oppose SOFKA's pursuit of her claims bill in any way it sees fit.

B. If, after the appellate process is exhausted, POLK COUNTY prevails on either preserved issue, the case terminates. However, POLK COUNTY's prevailing and the termination of this case shall in no *way* adversely affect SOFKA's right to the sum of Forty Thousand and 00/100 Dollars ($40,000.00) representing the settlement proceeds referenced in Part I.

LANE, TROHN, CLARKE, BERTRAND,
VREELAND & JACOBSEN, P.A.
Post Office Box 3
Lakeland, Florida 338020003
813-284-2200

By: _____
HANK B. CAMPBELL, ESQUIRE
Florida Bar No. 434515

FROST, O'TOOLE & SAUNDERS, P.A.
Post Office Box 2188
Bartow, Florida 33830-2188
813-533-0314

By: _____
JOHN W. FROST, II, ESQUIRE
Florida Bar No. 0114877

POLK COUNTY

BY: _____

_____
DONNA M. SOFKA

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

DONNA M. SOFKA,

Plaintiff,

vs.

CASE NO. GC-G-90-0012
SECTION: 04

POLK COUNTY, WAYNE MCKINNEY, INA McKINNEY, MALCOLM E. WINSTEAD, ELIZABETH L WINSTEAD, MALCOLM WINSTEAD, JR., MARY WINSTEAD, BRYON E. DUNCAN, BEVERLY J. DUNCAN, THOMAS H. TAYLOR, and DONALD TOUSIGNANT,

Defendants.

FOURTH AMENDED COMPLAINT

Plaintiff, DONNA M. SOFKA, sues Defendants, POLK COUNTY, WAYNE McKINNEY, INA McKINNEY, MALCOLM E. WINSTEAD, ELIZABETH L WINSTEAD, MALCOLM WINSTEAD, JR., MARY WINSTEAD, BRYON E. DUNCAN, BEVERLY J. DUNCAN, THOMAS H. TAYLOR, and DONALD TOUSIGNANT, and alleges:

COMMON ALLEGATIONS

1. This is an action for damages in excess of $5,000.00.

2. Plaintiff, DONNA M. SOFKA ("SOFKA") is a resident of Lakeland, Polk County, Florida.

3. At all times material hereto, Defendant, POLK COUNTY ("POLK COUNTY"), was and is a political subdivision of the State of Florida.

EXHIBIT "A"

4. At all times material hereto, Defendants, WAYNE McKINNEY and INA McKINNEY ("the McKINNEYS"), were residents of Lakeland, Polk County, Florida.

5. At all times material hereto, Defendants, MALCOLM E. WINSTEAD and ELIZABETH L WINSTEAD (the "WINSTEADS"), were residents of Lakeland, Polk County, Florida.

6. At all times material hereto, Defendants, MALCOLM WINSTEAD, JR. and MARY WINSTEAD ("MALCOLM and MARY WINSTEAD"), were residents of Lakeland, Polk County, Florida.

7. At all times material hereto, Defendants, BRYON E. DUNCAN and BEVERLY J. DUNCAN (the "DUNCANS"), were residents of Lakeland, Polk County, Florida.

8. At all times material hereto, Defendant, THOMAS H. TAYLOR ('TAYLOR"), was a resident of Lakeland, Polk County, Florida.

9. At all time material hereto, Defendant, DONALD TOUSIGNANT ("TOUSIGNANT"), was a resident of Lakeland, Polk County, Florida.

10. On or about December 28, 1968, Plaintiff, SOFKA, was travelling in a westerly direction on Lamp Post Lane when her vehicle was struck by a vehicle travelling southbound on Old Polk City Road. The collision occurred at the intersection of Lamp Post Lane and Old Polk City Road in Polk County, Florida.

11. At said time and place, Plaintiff was severely injured as described more particularly hereinafter.

12. All conditions precedent to this action have been met, including but

not limited to, proper notice to POLK COUNTY of Plaintiff's claim pursuant to §768.28, Florida Statutes.

COUNT I

(Negligence of POLK COUNTY)

13. Plaintiff realleges paragraphs 1, 2, 3, and 10 through 12.

14. Defendant, POLK COUNTY, as a political subdivision of the State of Florida, is required to maintain its streets, public rights of way, easements and adjacent real property in a reasonably safe condition.

15. Prior to December 28, 1988, Lamp Post Lane ended at Old Polk City Road, thereby creating a T-intersection which required motorists traveling west on Lamp Post Lane to stop before turning left or right (the only way to proceed) on Old Polk City Road.

16. Prior to December 28, 1988, the land on the west side of Old Polk City Road, across Old Polk City Road from Lamp Post Lane, was developed, and Lamp Post Lane was continued across Old Polk City Road by construction of a road. Thus, Lamp Post Lane became a through street which crossed Old Polk City Road.

17. Approximately four to six months prior to December 28, 1988, the developer of the continuation of Lamp Post Lane dedicated the road in his subdivision to Polk County and Polk County accepted said road,

18. The continuation of Lamp Post Lane west of Old Polk City Road created a through street across Old Polk City Road; however, no steps were taken to

alert traffic proceeding west on Lamp Post Lane on the east side of Old Polk City Road that they were about to proceed across a through street. Without control or warning signs, the intersection was not apparent, and an illusion of safe passage across Old Polk City Road existed. As a result, the intersection was inherently dangerous.

19. At all times material, Defendant, POLK COUNTY, was negligent including, but not limited to, the following negligent acts or omissions which were a legal cause of Plaintiff's damages:

a. Failing to maintain its streets in a reasonably safe condition by not installing a traffic signal or stop sign at the intersection of Lamp Post Lane and Old Polk City Road;

b. Failing to warn of the inherently and unreasonably dangerous condition existing at said intersection.

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20. The dangerous conditions existing at the intersection were known to Defendant, POLK COUNTY, or had existed for a sufficient length of time so that Defendant, POLK COUNTY, should have known of them.

21. As a result of the aforesaid acts of negligence. by Defendant, POLK COUNTY, Plaintiff suffered severe bodily injury and resulting pain and suffering, total disability, disfigurement, mental anguish, loss of capacity for the enjoyment of life, expensive hospitalization, constant medical and nursing care treatment, loss of earnings, and loss of the ability to earn money. The losses are permanent or continuing and Plaintiff will suffer the losses in the future.

WHEREFORE, Plaintiff, SOFKA, demands judgment for damages against

Defendant, POLK COUNTY, and such other and further relief as the Court deems just and proper and requests trial by jury.

COUNT II

(Negligence of the McKINNEYS)

22. Plaintiff realleges paragraphs 1, 2, 4, 10 and 11.

23. When Lamp Post Lane was paved, Defendants, the McKINNEYS, were owners of portions of the property located on Lamp Post Lane, and did use Lamp Post Lane for access to their property.

24. In addition, as owners of property located on Lamp Post Lane, east of Old Polk City Road, the McKINNEYS contributed to the construction of Lamp Post Lane. As such, the McKINNEYS had a duty to maintain the subject property as well as the roadway and adjacent rights of way which entered the subject property in a reasonably safe condition for travel.

25. The McKINNEYS' duty to remedy dangerous conditions that they created on property in which they held an interest and/or on property adjacent to the property they owned, existed to the time of the subject accident. Although the McKINNEYS' ownership interest in their property had terminated on the date of the accident, a reasonable amount of time between the termination of their property interest and the date of the accident, sufficient to relieve the McKINNEYS of this duty, had not occurred.

26. At all times material, the McKINNEYS were negligent including, but

not limited to, the following negligent acts or omissions which were a legal cause of Plaintiff's damages:

a. Failing to install a traffic signal or stop sign at the intersection of Lamp Post Lane and Old Polk City Road and/or request that Polk County install a traffic light or stop sign at the aforesaid intersection; and

b. Failing to maintain the rights of way and allowing foliage to protrude onto and obstruct motorists' view of the road and public right of way.

c. Creating and/or negligently permitting the existence of the dangerous conditions set forth above.

27. The dangerous conditions existing at the intersection were known to Defendants, the McKINNEYS, or had existed for a sufficient length of time so that Defendants, the McKINNEYS, should have known of them.

28. As a result of the aforesaid negligence by Defendants, the McKINNEYS, Plaintiff suffered severe bodily injury and resulting pain and suffering, total disability, disfigurement, mental anguish, loss of capacity for the enjoyment of life, expensive hospitalization, constant medical and nursing treatment, loss of earnings, and loss of the ability to earn money. The losses are permanent or continuing and Plaintiff will suffer the losses in the future.

WHEREFORE, Plaintiff, SOFKA, demands judgment for damages against Defendants, the McKINNEYS, and such other and further relief as the Court deems just and proper and requests trial by jury.

COUNT III

(Negligence of the WINSTEADS)

29. Plaintiff realleges paragraphs 1, 2, 5, 10 and 11.

30. At the time of said accident and when Lamp Post Lane was paved, Defendants, the WINSTEADS, were owners of portions of the property located on Lamp Post Lane, and did use Lamp Post Lane for access to their property.

31. In addition, as owners of property located on Lamp Post Lane, east of Old Polk City Road, the WINSTEADS contributed to the construction of Lamp Post Lane and consented to the public use of Lamp Post Lane. As such, the WINSTEADS had **a** duty to maintain the subject property as well as the roadway and adjacent rights of way which entered the subject property in a reasonably safe condition for travel.

32. At all times material, the WINSTEADS were negligent including, but not limited to, the following negligent acts or omissions which were a legal cause of Plaintiffs damages:

a. Failing to install a traffic-signal or stop sign at the intersection of Lamp Post Lane and Old Polk City Road and/or request that Polk County install a traffic light or stop sign at the aforesaid intersection; and

b. Failing to maintain the rights of way and allowing foliage to protrude onto and obstruct motorists' view of the road and public right of way.

c. Creating and/or negligently permitting the existence of the dangerous conditions set forth above,

33. The dangerous conditions existing at the intersection were known to Defendants, the WINSTEADS, or had existed for a sufficient length of time so that Defendants, the WINSTEADS, should have known of them.

34. As a result of the aforesaid negligence by Defendants, the WINSTEADS, Plaintiff suffered severe bodily injury and resulting pain and suffering, total disability, disfigurement, mental anguish, loss of capacity for the enjoyment of life, expensive hospitalization, constant medical and nursing treatment, loss of earnings, and loss of the ability to earn money. The losses are permanent or continuing and Plaintiff will suffer the losses in the future.

WHEREFORE, Plaintiff, SOFKA, demands judgment for damages against Defendants, the WINSTEADS, and such other and further relief as the Court deems just and proper and requests trial by jury.

COUNT IV

(Negligence of MALCOLM and MARY WINSTEAD)

35. Plaintiff realleges paragraphs 1, 2, 6, 10 and 11.

36. Prior to the time of said accident, Defendants, MALCOLM and MARY WINSTEAD, contracted and agreed to maintain Lamp Post Lane.

37. At the time of said accident and when Lamp Post Lane was paved, Defendants, MALCOLM and MARY WINSTEAD, were possessors of portions of the property located on Lamp Post Lane, and did use Lamp Post Lane for access to the property they possessed.

38. In addition, as possessors of property located on Lamp Post Lane, east of Old Polk City Road, MALCOLM and MARY WINSTEAD contributed to the construction of Lamp Post Lane and consented to the public use of Lamp Post Lane, As such, MALCOLM and MARY WINSTEAD had a duty to maintain the subject property as well as the roadway and adjacent rights of way which entered the subject property in a reasonably safe condition for travel.

39. At all times material, MALCOLM and MARY WINSTEAD were negligent including, but not limited to, the following negligent acts or omissions which were a legal cause of Plaintiff's damages:

a. Failing to install a traffic signal or stop sign at the intersection of Lamp Post Lane and Old Polk City Road and/or request that Polk County install a traffic light or stop sign at the aforesaid intersection; and

b. Failing to maintain the rights of way and allowing foliage to protrude onto and obstruct motorists' view of the road and public right of way.

c. Creating and/or negligently permitting the. existence of the dangerous conditions set forth above.

40. The dangerous conditions existing at the intersection were known to Defendants, MALCOLM and MARY WINSTEAD, or had existed for a sufficient length of time so that Defendants, MALCOLM and MARY WINSTEAD, should have known of them.

41. As a result of the aforesaid negligence by Defendants, MALCOLM and MARY WINSTEAD, Plaintiff suffered severe bodily injury and resulting pain and

suffering, total disability, disfigurement, mental anguish, loss of capacity for the enjoyment of life, expensive hospitalization, constant medical and nursing treatment, loss of earnings, and loss of the ability to earn money. The losses are permanent or continuing and Plaintiff will suffer the losses in the future.

WHEREFORE, Plaintiff, SOFKA, demands judgment for damages against Defendants, MALCOLM and MARY WINSTEAD, and such other and further relief as the Court deems just and proper and requests trial by jury.

COUNT V

(Negligence of the DUNCANS)

42. Plaintiff realleges paragraphs 1, 2, 7, 10 and 11.

43. At the time of said accident and when Lamp Post Lane was paved, Defendants, the DUNCANS, were owners of portions of the property located on Lamp Post Lane, did use Lamp Post Lane for access to their property, and consented to the public use of Lamp Post Lane, As such, the DUNCANS had a duty to maintain the subject property as well as the roadway and adjacent rights of way which entered the subject property in a reasonably safe condition for travel.

44. At all times material, the DUNCANS were negligent including, but not limited to, the following negligent acts or omissions which were a legal cause of Plaintiff's damages:

a. Failing to install a traffic signal or stop sign at the intersection of Lamp Post Lane and Old Polk City Road and/or request that Polk

County install a traffic light or stop sign at the aforesaid intersection; and

b. Failing to maintain the rights of way and allowing foliage to protrude onto and obstruct motorists' view of the road and public right of way.

c. Creating and/or negligently permitting the existence of the dangerous conditions set forth above.

45. The dangerous conditions existing at the intersection were known to Defendants, the DUNCANS, or had existed for a sufficient length of time so that Defendants, the DUNCANS, should have known of them.

46. As a result of the aforesaid negligence by Defendants, the DUNCANS, Plaintiff suffered severe bodily injury and resulting pain and suffering, total disability, disfigurement, mental anguish, loss of capacity for the enjoyment of life, expensive hospitalization, constant medical and nursing treatment, loss of earnings, and loss of the ability to earn money. The losses are permanent or continuing and Plaintiff will suffer the losses in the future.

WHEREFORE, Plaintiff, SOFKA, demands judgment for damages against Defendants, the DUNCANS, and such other and further relief as the Court deems just and proper and requests trial by jury.

COUNT VI

(Negligence of TAYLOR)

47. Plaintiff realleges paragraphs 1, 2, 8, 10 and 11.

48. At the time of said accident, Defendant, TAYLOR, had actual possession of the property located on Lamp Post Lane, pursuant to a lease agreement and had contracted to purchase the property. He used Lamp Post Lane for access to the property and consented to the public use of Lamp Post Lane. As such, TAYLOR had a duty to maintain the subject property as well as the roadway and adjacent rights of way which entered the subject property in a reasonably safe condition for travel.

49. At all times material, TAYLOR was negligent including, but not limited to, the following negligent acts or omissions which were a legal cause of Plaintiff's damages:

a. Failing to install a traffic signal or stop sign at the intersection of Lamp Post Lane and Old Polk City Road and/or request that Polk County install a traffic light or stop sign at the aforesaid intersection: and

b. Failing to maintain the rights of way and allowing foliage to protrude onto and obstruct motorists' view of the road and public right of way.

c. Creating and/or negligently permitting the. existence of the dangerous conditions set forth above.

50. The dangerous conditions existing at the intersection were known to Defendant, TAYLOR, or had existed for a sufficient length of time so that Defendant, TAYLOR, should have known of them.

51. As a result of the aforesaid negligence by Defendant, TAYLOR, Plaintiff suffered severe bodily injury and resulting pain and suffering, total disability,

disfigurement, mental anguish, loss of capacity for the enjoyment of life, expensive hospitalization, constant medical and nursing treatment, loss of earnings, and loss of the ability to earn money, The losses are permanent or continuing and Plaintiff will suffer the losses in the future.

WHEREFORE, Plaintiff, SOFKA, demands judgment for damages against Defendant, TAYLOR, and such other and further relief as the Court deems just and proper and requests trial by jury.

COUNT VII

(Negligence of TOUSIGNANT)

52. Plaintiff realleges paragraphs 1, 2, 9, 10 and 11.

53. At the time of said accident, Defendant, TOUSIGNANT, had actual possession of the property located on Lamp Post Lane, pursuant to a lease agreement and had contracted to purchase the property. He used Lamp Post Lane for access to the property and consented to the public_ use of Lamp Post Lane. As such, TOUSIGNANT had a duty to maintain the subject property as well as the roadway and adjacent rights of way which entered the subject property in a reasonably safe condition **for** travel.

54. At all times material, TOUSIGNANT was negligent including, but not 'limited to, the following negligent acts or omissions which were a legal cause of Plaintiff's damages:

a. Failing to install a traffic signal or stop sign at the intersection of

Lamp Post Lane and Old Polk City Road and/or request that Polk County install a traffic light or stop sign at the aforesaid intersection; and

b. Failing to maintain the rights of way and allowing foliage to protrude onto and obstruct motorists' view of the road and public right of way.

c. Creating and/or negligently permitting the existence of the dangerous conditions set forth above.

55. The dangerous conditions existing at the intersection were known to Defendant, TOUSIGNANT, or had existed for a sufficient length of time so that Defendant, TOUSIGNANT, should have known of them.

56. As a result of the aforesaid negligence by Defendant, TOUSIGNANT, Plaintiff suffered severe bodily injury and resulting pain and suffering, total disability, disfigurement, mental anguish, loss of capacity for the enjoyment of life, expensive hospitalization, constant medical and nursing treatment, loss of earnings, and loss of the ability to earn money. The losses are permanent or continuing and Plaintiff will suffer the losses in the future.

WHEREFORE, Plaintiff, SOFKA, demands judgment for damages against Defendant, TOUSIGNANT, and such other and further relief as the Court deems just and proper and requests trial by jury

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has

been furnished by U.S. Mail to HANK B. CAMPBELL, Esquire, P.O. Box 3, Lakeland, Florida 33802; CLIFFORD J. SCHOTT, Esquire, 4315 Highland Park Boulevard, Suite D, Lakeland, FL 33813; WILLIAM S. BLAKEMAN, Esq., P.O. Box 164, Bartow, FL 33830; NEIL R. RODDENBERY, Esquire, P.O. Box 5947, Lakeland, FL 33807; WILLIAM E. LAWTON, Esquire, P.O. Box 2928, Orlando, FL 32802; JAMES A MURMAN, Esquire, P.O. Box 172118, Tampa, FL 33672-0118; MYGNON C. EVANS, Esquire, 41 Lake Morton Drive, Lakeland, FL 33801; and WAYNE and INA McKINNEY, 21802 Oak Ridge Road, Sheridan, Indiana 46069; this _____ day of April, 1992.

FROST & O'TOOLE, P.A.

By: _____

John W. Frost, II
Florida Bar No. 114877
Neal L O'Toole
Florida Bar No. 691267
395 South Central Avenue
Post Office Box 2188
Bartow, Florida 33830
(813) 533-0314

ATTORNEYS FOR PLAINTIFF