SUPREME COURT OF FLORIDA

POLK COUNTY,

Petitioner,

v.

DONNA M. SOF'KA,

Respondent.

CASE NO. 88,407

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

REPLY BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

Several items in Sofka's statement of the facts need clarification or expansion, First, she states that "Subsequent to the dedication of West Lamp Post Lane, Lamp Post Lane became a through street forming a four-way intersection with Old Polk City Road." (Answer Brief p. 2). The characterization of the lane as a "through street" is misleading. East of Old Polk City Road Lamp Post Lane was a privately-owned residential street *that* dead-ends one third of a mile from the public road (R-416, 418. 428. 614. 658-59, Plaintiff Ex. 10). West of Old Polk City Road Lamp Post Lane had been dedicated to public use at the time of the accident. Just west of Old Polk City Road it splits into two short residential streets that end in culde-sacs. Thus West Lamp Post Lane too "dead-ends" a few hundred feet from Old Polk City Road (Pl. Ex. 1). At trial the court sustained Polk County's objection to Sofka's counsel referring to Lamp Post Lane as a "through street" (Charlotte Barr, T. 74-75). The county's lawyer objected because that description might imply that East Lamp Post Lane was a through street in the generally accepted sense and that it was a county mad. The objection was sustained (Charlotte Barr, T. 75). Sofka's counsel then said "I'll call it something else." (Charlotte Barr, T. 75, Line 16). Now, ignoring both the judicial rebuke and the promise Sofka reverts to the misleading characterization.

Another point of clarification is *that* the plat *that* was "approved by the County" in conjunction with the issuance of the building permit to developer Strawbridge was a plat of "Lexington Green" subdivision. It shows *only the west side* of Old Polk City Road. In other words, it does not show that East Lamp Post Lane enters Old Polk City Road on the side opposite the former. Thus, it does not show the so-called "four-way intersection" about which Sofka contends Polk County failed to warn. (Charlotte Barr, T. 77; Pl. Ex. *5).*

Sofka's statement of facts says that after having accepted the dedication of West Lamp

Post Lane, and invoicing the developer for traffic control devices, "no *signs* were installed prior to Donna Sofka's accident despite the fact that the developer had paid for the signs to be installed" (Answer Brief p. 2, 2nd par.). This is extremely misleading because it infers that the developer was invoiced for a traffic control device on East Lamp Post Lane that would have warned Sofka. The inference appears to be intentional because one of the references cited in support of the statement is Exhibit 6. (Exhibit 6 Appendix 1 to Answer Brief, p. 2). That photograph depicts the Northeast corner of East Lamp Post Lane where the lane accesses Old Polk City Road, i.e. the corner where a stop sign warning motorists on East Lamp Post Lane, such as Sofka, would be located. The view does not show the corner where a stop *sign* warning east-bound motorists leaving Lexington Green on West Lamp Polk Lane would be located. In other words, it does not show the corner where a *sign* for which the developer paid would be located. The evidence shows that the developer paid for signs for ***Lexington Green*** subdivision only. The developer testified *that* he was billed for "three street markers, three control signs" (R 1316). Exhibit 5 shows two streets in Lexington Green *viz.* Lamp Post Lane and Concord Lane, and three corners, including Old Polk City Road, where street markers would be placed. Hence the need for the three markers and three control devices, all in Lexington Green. Succinctly, insofar as Sofka suggests or implies that the County accepted payment for a stop sign on East Lamp Post Lane that would have warned her she is wrong.

It also should be noted that at no time prior to the accident was there a county-installed or maintained stop sign at Lamp Post Lane and Old Polk City Road (Charlotte Barr, T. 71, lines 5-9). Thus the County could not be held responsible for *failing* to maintain *existing traffic* control *devices*. Further, Polk County does not have a policy governing the installation of stop

signs on private roads. (Charlotte Barr, T. 97, lines 4-11).

In her argument Sofka asserts that "witnesses testified that they knew of other incidents in which drivers had driven into the intersection without realizing they were doing so" (Answer Brief, p. 21, 1st par,) At a later point the argument makes reference to "others who had driven into the intersection without realizing they were doing so" (Answer Brief, p. 30). In neither instance is there a record reference for the statement nor is there a reference to these purported facts in Sofka's Statement of Facts. Donna Skerritt Hagerman, the friend who Sofka dropped off at her home on East Lamp Post Lane just minutes before her accident, testified that she was with *Gary* Tew when he "drove through" the "intersection" (R *695).* On cross examination *she* conceded that *Gary* was drunk at the time and that she didn't know of anyone else who had had trouble "negotiating that intersection" (R 700, lines 8-22). Another witness, Deborah Prescott, a friend who had visited Ms. Hagerman, testified that she inadvertently had driven out onto Old Polk City Road from East Lamp Post Lane on two occasions, once when Hagerman was with her (R 748-751). It should be noted that both incidents involving Prescott occurred before West Lamp Post Lane was constructed (R 752), i.e. before the "four way intersection" that allegedly resulted in a "dangerous condition" was constructed.

ARGUMENT

Ms. Sofka's Answer Brief addresses the question of whether sovereign immunity protects Polk County from her claim in topic I B and topic II (Answer Brief, pp. 18-29, 36-39), This reply is made primarily to point out that Ms. Sofka's argument vis-a-vis sovereign immunity completely ignores, or only obliquely responds to, four significant questions raised by Point I of

Polk County's Initial Brief. They are:

1. Whether a governmental entity *has a duty* to warn motorists traveling on a private road that they are approaching a well-traveled public road that represents an allegedly "dangerous condition". (See, Initial Brief, pp. 27-30).

2. Whether a governmental entity, by issuing a permit that allows the construction by a private developer of a street that represents an allegedly dangerous condition, *creates* the dangerous condition within the meaning of Department of Transp. v. Neilson, 419 So.2d 1071 (Fla. 1982) and its progeny. (See Initial Brief, pp. 32-34).

3. Whether the alleged dangerous condition at the place where East Lamp Post Lane and West Lamp Post Lane both access Old Polk City Road was so egregious that it represented a hazard or trap to the unwary; and, if *so*, whether Polk County knew that the dangerous condition *was so* egregious *that it constituted a hazard or trap,* and nevertheless intentionally declined *to* warn motorists of the hazard or trap. (*See* Initial Brief, pp. 30-32, 34-36).

4. Whether the alleged "known dangerous condition" was readily apparent to persons who could be injured by the condition, i.e., persons driving westward toward Old Polk City Road on East Lamp Post Lane. (See Initial Brief, pp. 36-38).

Sofka's Answer Brief completely ignores questions 3 and 4. Concerning question 1 Sofka simply argues that the fact that East Lamp Post Lane was a private road is irrelevant (Answer Brief, p. 22). The argument slithers around the "creation" issue presented by question 2 by assuming, as did the District Court of Appeal, that Polk County *created* the alleged hazard by issuing the building permit(s), and having had employees visit the job-site during construction. Succinctly, the argument treats the case as a simple negligence case, arguing that the evidence

of negligence is sufficient to allow a jury to decide the case. (See Answer Brief, p. 21, 1st par.). The net result is that the argument does not even remotely address issues that are critical to whether sovereign immunity was waived.

Polk County concludes that questions 3 and 4, above, were adequately addressed in its Initial Brief (Initial Brief, pp. 30-32, 34-36, 36-38) and that the fact that they are not mentioned in Sofka's brief makes the point that Sofka has not, because she cannot, truly addressed the sovereign immunity question in light of the decisional law. However, Polk County will briefly expand on questions 1 and 2 and follow with a couple of miscellaneous points.

1. Sovereign Immunity was not waived because there was no duty of care with respect to the County's alleged negligent conduct.

There must be an underlying common law or statutory duty of care with respect to the alleged negligent conduct for there to be governmental tort liability. In the absence of an underlying duty of care, there can be no waiver of sovereign immunity. Section 768.28, Fla. Stat. (1995), Florida's "waiver of sovereign immunity statute", did not establish any new duty of care for governmental entities. Trianon Park Condominium Assn., Inc. v. City of Hialeah, 468 So.2d 912,917 (Fla. 1985).

In its Initial Brief, Polk County argued that it had no duty to warn west-bound motorists on East Lamp Post Lane that they wexe approaching Old Polk City Road because East Lamp Post Lane is a private street that dead-ends three-tenths of a mile east of Old Polk City Road; that there is no common law or statutory duty to exercise traffic control on private roads; and that a County can lawfully exercise traffic control over a private road only if it enters into a written agreement with the private owner(s) by which it assumes traffic control jurisdiction. Section

316.006(3)(b), Florida Statutes (1995). The County further argued that no such written agreement *exists* vis-a-vis East Lamp Post Lane and that, on the contrary, a notice (Pl. Ex. 10) that East Lamp Post Lane was privately maintained, was recorded nearly nine years before the accident. The notice advised that the County disclaimed any responsibility for the lane's maintenance (Initial Brief, pp. 27-30).

Sofka's argument ignores the central legal question involved in Polk County's position in this regard, *viz.* *As a* matter *of law* does a governmental entity have a duty to warn travelers on a private road that they are approaching a well-traveled public road that presents a danger? Instead of addressing this question, Sofka argues that the County had "expressly undertaken this responsibility (to warn westbound travelers on East Lamp Post Lane that they were approaching a well-traveled public road) because in the past it had placed traffic control devices on other private roads (Answer Brief, p. 37). It is impossible to logically conclude, based on the fact that the County had placed traffic *signs* on some private roads in the past, perhaps pursuant to agreements made in accord with Section 316.006(3)(b), that it assumed an obligation to place *signs* on all private roads, including East Lamp Post Lane. The premise simply does not justify the conclusion.

Sofka, simply argues "it is irrelevant that East Lamp Post Lane was a private road." (Answer Brief, p. 22). Then she cites Bailey Drainage District v. Stark, 526 So.2d 678, 681-82 (Fla. 1988) to support her position that a governmental entity can be liable for failing to give warning *to* travelers on a private road. The reliance on Stark is misplaced. The Stark Court said that it is irrelevant whether vegetation that obstructs a motorist's view is on private property or on public property because the relevant inquiry is whether the vegetation, wherever located,

obstructs the view of motorists creating a danger which is not readily apparent. And, if the governmental entity can't go onto the private property and remove the vegetation it *can* warn motorists of the hidden danger. Manifestly, the Stark holding is that motorists on *public* roads must in some circumstances be warned of dangers resulting from obstructions to visions located on private land. Stark, however, simply does not address the question of whether motorists on private roads must be warned by the government that they are approaching a dangerous point of entry to a public road. It plainly does not support the proposition for which it is cited.

In response to the County's suggestion that affirmance of the decision of the lower appellate court may result in governmental entities being responsible for warnings at virtually every point where private driveways, roads, or streets enter public roads, Sofka argues that the decision of the court below creates no precedent about which the Court should be concerned because the Court of Appeal limited its holding "to the facts before us." (**Answer Brief,** p. 36). The problem with that contention is that it begs the question. The "facts before us", i.e., before the lower court, are precisely those inherent in the question posed by the County. Ms. Sofka was driving on a private road. The "failure to warn" about which she complains is the alleged failure to warn her that she was approaching well-traveled, allegedly dangerous, Old Polk City Road. There hardly could be an accident involving a motorist entering a public road from a private road or street where the same argument could not be made, In the current vernacular, the "bottom line" is that without saying so directly, Sofka argues that in every case where a motorist is injured while accessing a public road from a private road the question of whether sovereign immunity has been waived depends on the facts (and that factual issues should be submitted to a jury).

Sofka also argues that Polk County ignores the fact that the accident occurred *on* Old Polk City Road (Answer Brief, p. 36). *Of course* it did! But the only rational interpretation that can be derived from the allegations and the proof is that it was the absence of any warning to Sofka while driving *on the* private road that constituted the alleged negligence. The fact that she had reached the public road at the moment of impact in no way addresses Polk County's argument, based on Trianon, that sovereign immunity was not waived because Polk County had no duty to warn in the first place. In fact, Sofka does not even mention Trianon or discuss its implications vis-a-vis the County's "duty" argument.

The law is clear. There must be an underlying duty before there can be a waiver of sovereign immunity. Trianon. And, whether a duty exists is a question of law for the courts, not the jury. McCain v. Florida Power Corp., 593 So.2d 500,502 (Fla. 1992).

Polk County respectfully suggests *that* the question of whether sovereign immunity was waived by Polk County cannot be properly decided without deciding ***whether as a matter of law a governmental entity has a duty to warn motorists about to enter a public roadway*** from a private road, street, or driveway *of* the danger ***posed by traffic on the public roadway.*** In other words, the duty question simply cannot be ignored. It must be recognized and dealt with here. The County again, as it did in its initial brief, suggests respectfully that a holding that a governmental entity has a duty to control traffic on private roads, even if that duty is limited to warning users that they are approaching a dangerous public road, would erode sovereign immunity beyond anything yet imagined by either the legislature or the courts.

2. Sovereign Immunity was not waived because a governmental entity, by issuing a permit *which allows* the construction of a road or street that results in an allegedly dangerous condition, does *not create* the dangerous condition within the meaning of Department of Transp. v. Neilson, 419 So.2d 1071 (Fla. 1982) and its progeny.

Ms. Sofka's argument that Polk County is not protected by sovereign immunity blandly asserts that "... the construction of the intersection which was inspected, approved and accepted by Polk County, created a dangerous condition for motorists entering the intersection of Lamp Post Lane and old Polk City Road" (Answer Brief p. 21). Notice that the sentence says that it was the *construction* of the intersection that created the allegedly dangerous intersection, but it does not say that the construction was done by Polk County or a party acting on its behalf. In fact, the Statement Of The Case and Facts states that construction was completed by developer Rick Strawbridge in June 1988 (Answer Brief, p. 1). After loftily declaring that the alleged dangerous condition was created by the County in this way, Sofka's argument gives a litany of "facts" that purportedly "aggravated" the "condition created by the four-way intersection" and concludes that Polk County "negligently implemented, or failed to implement, its own policies at an operational level by failing to warn of the dangerous condition which *it had created.*" **(Answer Brief, pp. 21-22).**

Stripped of the camouflage Sofka, simply asserts, as if the question is irrelevant or incontrovertible that it needs no argument, that by reviewing and approving the developers' plans, including plans for traffic control devices in the then-new Lexington Green subdivision, by inspecting the site during construction, and by accepting the dedication of the road, Polk County created the alleged dangerous condition. This is precisely how the district court erroneously handled the question.

Polk County submits first and foremost that the idea that a governmental entity *can* create a dangerous condition simply by issuing a permit and inspecting the project flies in the face of Trianon. In that *case* this *Court* squarely held that governmental entities, by issuing "licenses, permits, variances or directives," are acting "pursuantto basic governmental functions performed by the legislative or executive branches of government"in which the judicial branch has no right to interfere. Trianon at 468 So.2d 919. Polk County submits that Trianon cannot be distinguished vis-a-vis the facts'of the case sub *judice*. The Polk County officials who issued the permit(s), and inspected the job site, like those, in Trianon, were acting pursuant to basic governmental functions that are protected by sovereign immunity. Trianon at 468 So.2d 919.

Sofka's argument does not mention Trianon in this regard either. Instead of addressing the Trianon argument in relation to whether Polk County created the alleged dangerous condition, and attempting to demonstrate that the County's legal position is wrong, the argument simply sloughed over the issue.

Moreover, without regard *to* Trianon, Neilson and its progeny leave no doubt but that for sovereign immunity to be waived, the govemental entity must itself be the actor that creates the alleged dangerous condition. This Court noted in Neilson that traffic control is strictly within the police power *of* the government and 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 accordingly are judgmental, planning level functions. Id. at 419 So.2d 1077. That is the controlling rule of law. The Neilson Court warned, however, that a governmental entity *cannot* create a *known* danger, and fail to warn the public of the danger, without incurring liability. The Neilson companion

case of City of St. Petersburg v. Collom and City of St. Petersburg v. Mathews, 419 So.2d 1082 (Fla. 1982) and the subsequent cases of Harrison v. Escambia County School Bd., 434 So.2d 318, 320-21 (Fla. 1983) and Department of Transp. v. Konney, 587 So.2d 1292,1294 (Fla. 1991) leave little doubt but that it is the position of *this* Court that a governmental entity cannot be held liable pursuant to this *caveat* unless it *creates* the alleged hazard or trap *itself.* In other words, unless the entity itself, or someone acting on its behalf, designs, constructs or produces the condition that constitutes the trap sovereign immunity cannot be waived in accord with Neilson. Harrison expresses the requirement as follows:

> 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 not being readily apparent, constitutes a trap for the unwary (emphasis supplied).
>
> Id. 434 So.2d 316 at 320.

Polk County submits that its argument vis-a-vis whether the governmental entity must itself *create* the alleged known dangerous condition raises a *bona fide* and very pertinent issue that is so central to Sofka's case that the *case* cannot be forthrightly decided without it being addressed. Simply put, *to* affirm the Court must hold either expressly or by implication that a governmental entity *can create* a dangerous condition, *so* egregious that it constitutes a trap for the unwary, by *doing nothing more than issuing a permit approving a construction project, failing to adequately inspect such a project during construction, and accepting the dedication of the project.* Such a holding would be inconsistent with the decisional law of this Court, particularly Trianon, and would open the door to governmental liability on a scale not yet thought of.

At this juncture it seems fair to observe that the Academy of Florida Trial Lawyers, in

its *amicus* brief, is more forthright than is Sofka. The Academy, obviously recognizing that Neilson *cannot* be distinguished as Sofka has tried to do, candidly asks the Court to recede from Neilson (Academy of Florida Trial Lawyers, Amicus Brief, p. 7) and adopt the more liberal standards extant in other states, particularly Alaska and Hawaii. Polk County posits that that is exactly what the Court would have to do to sustain the judgment in question --- ignore or circumvent *stare decisis* and recede from Neilson. It is interesting to note that one of the cases the Academy suggests should be followed, Lewis v. State, 256 N.W. 181 (Iowa 1977) apparently holds that sovereign immunity was waived when Iowa designed Interstate 29 without *a median barrier*. Imagine the State of Florida being liable for head-on collisions on Interstate 10 because for the most part it does not have median barriers. That is precisely where Florida is headed if the Court retreats from Neilson. In addition to questions involving traffic control. juries will be deciding, on a case-by-case basis, whether barriers should have been designed and installed, whether safety lanes should be wider, whether *curves* should be less *sharp*, grades less steep, or bridges wider. Neilson recognized this potential and struck it down.

3. Miscellaneous.

Turning now to items that do not neatly fit into any of the questions enumerated at the beginning of this Argument, Sofka states that the County, in its Initial Brief, asserted that "there is no legal distinction between a claim by a plaintiff of inadequate traffic control devices and a complete absence of warning", stating that "this is yet another manifestation of petitioner's continued failure to correctly apply the facts proven at trial to the law that this court has established with regard to the doctrine of sovereign immunity". (Answer Brief p. 15, last par.; *see* also Answer Brief p. 23, 1st par,).

What the County contends is that whether to install any traffic control at all at an intersection in the first instance is a planning level decision for which there is no waiver of sovereign immunity; and that *there is no distinction between (i) a claim of inadequate traffic control devices, and (ii) Sofka's claim that there was a complete absence of warning.* The County's position is bottomed on the allegations of the Complaint and the proof. Paragraph 19(b) of the Fourth Amended Complaint alleges that Polk County was negligent for "failing to warn" of the "inherently and unreasonably dangerous condition existing at said intersection." Paragraph 19(a) of the complaint alleges that defendant Polk County was negligent for "failing to maintain its streets in a reasonably safe condition" by "not *installing a traffic signal or stop sign* at the end of the intersection of Lamp Post Lane and Old Polk City Road." Sofka argues that paragraph 19(a) was simply a more specific allegation of Polk County's failure to warn and that the two allegations should be considered together as one theory of liability (Answer Brief p. 28, first par), As Sofka further points out (Answer Brief pp. *28-29)* at the hearing *on* the Motion to Dismiss the Complaint Sofka *stated,* after the court mused that he read subparagraph (a) as being a feature of subparagraph (b) and not a separate theory her counsel said, "... I think you are reading it the right way, Judge, is that (a) is saying failing to maintain or put in a stop *sign* or traffic *signal* is failing to warn *of* an inherently and dangerous condition." (R 5497-5498). Since at no time prior to Sofka's accident was there a stop sign *or* traffic signal at the point where Lamp Post Lane enters Polk City Road (charlotte Barr T 71, lines *5-9)* to be *maintained* by the County, the act *complained* of necessarily and inescapably is a failure to "put in" a stop *sign* or traffic signal *in the first instance.* A decision as to whether to install any type traffic control device, *in the first instance* is protected by sovereign immunity according to Neilson and Konney. This is true

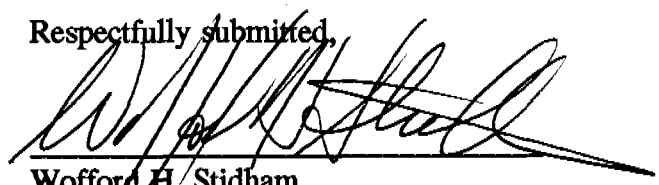
whether the "first instance" in this case was when East Lamp Post Lane was first built years ago or when West Lamp Post Lane was added. It must be remembered that Sofka contends that it was the addition of West Lamp Post Lane that resulted in the allege dangerous condition,

Turning to another facet of the case, according to prior pronouncements of this court Collom and Neilson require specific allegations of fact instead of generalities. Harrison v. Escambia County School Bd., supra at p. 321. Ms. Sofka's complaint contains absolutely no allegations of fact concerning the failure to warn of an inherently and unreasonably dangerous condition other than that the failure to install a traffic signal or stop sign at the point where East Lamp Post Lane enters Old Polk City Road. Sofka argues that the County "refuses to acknowledge" that her case was tried on a "failure to warn of a dangerous condition theory," (Answer Brief p. 23). The sum of her argument is that all a plaintiff must do is make naked allegations that the governmental entity created a known dangerous condition, present some evidence that arguably supports the allegations and let the jury decide. If this position is accepted Neilson will be as "dead as a hammer" without being expressly overruled. As was the case with Trianon, Sofka's Answer Brief does not mention Harrison, or the pleading requirements expressed therein, even though that case was heavily relied on by Polk County in the Initial Brief.

CONCLUSION

The Court should accept jurisdiction and, for the reasons set forth above, quash the decision of the Second District Court of Appeal.

Respectfully submitted,



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I HEREBY CERTIFY that a true and correct copy of *the* foregoing has been served by hand delivery this *5th* day of November, 1996, at the office of JOHN W. FROST, II, ESQUIRE, 395 South Central Avenue, Bartow, Florida 33830, and by U. S. Mail on: Louis S. Hubener, Esquire, Assistant Attorney General, The Capitol - PL01, Tallahassee, FL 32399-105, Jorge L. Fernandez, Esquire, 1660 Ringling Boulevard, Second Floor, Sarasota, FL 34236, Rosemary E. Perfit, Esquire, Post Office Box 1110, Tampa, FL 33601, Steven F. Lengauer, Esquire, Post Office Box 4973, Orlando, FL 32802-4973, Ronald K. McRae, Esquire, Post Office Box 1989, West Palm Beach, FL 33401, John E. Schaefer, Esquire, 315 Court Street, Clearwater, FL 34616, and Roy D. Wasson, Esquire, 1320 South Dixie Highway, Suite 450, Miami, FL 33146.

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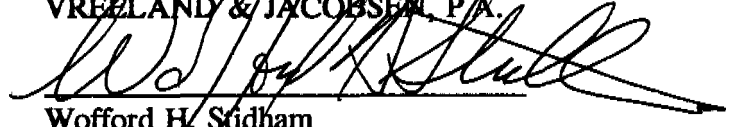

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