THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
12/1/04	SM	Favorable

December 1, 2004

The Honorable James E. "Jim" King, Jr.
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 30 (2005)** – Senator Gary Siplin
Relief of Donna Sofka

SPECIAL MASTER'S FINAL REPORT

THIS IS A CONTESTED EXCESS JUDGMENT CLAIM IN THE AMOUNT OF $600,000 BY DONNA SOFKA AGAINST POLK COUNTY FOR INJURIES SUSTAINED IN AN AUTOMOBILE ACCIDENT. THE FINAL JUDGMENT IS BASED UPON A SETTLEMENT AGREEMENT MADE AFTER A JURY VERDICT IN THE CLAIMANT'S FAVOR.

FINDINGS OF FACT:

The claimant, Donna Sofka, sustained severe injuries resulting in quadriplegia during an automobile accident near Lakeland, Florida on December 29, 1988.

The accident occurred at the intersection of Lamp Post Lane and Old Polk City Road. Lamp Post Lane is a quarter-mile long private road that had been in existence for at least 20 years prior to the accident. It terminated at its intersection with Old Polk City Road up until approximately 6 months before the accident. There was no stop sign or other traffic control device at the intersection, but traffic on Old Polk City Road had the right of way. Old Polk City Road was the only outlet from Lamp Post Lane.

In 1988, two significant changes were made to the road and its surroundings. In March or April, the road was paved.

Previously Lamp Post Lane was dirt and Old Polk City Road was asphalt. At about the same time, construction began on a new subdivision and a new road was cut across from Lamp Post Lane. The two roads were slightly offset, so that cars stopped on their respective sides of Old Polk City Road would be facing each other. The new road, which was also named Lamp Post Lane, became usable sometime in June or July, and was accepted as a county-maintained road by Polk County in August. For purposes of this report, the private road will be referred to as East Lamp Post Lane and the subdivision road as West Lamp Post Lane.

On the night of the accident, which was the evening before her twenty-first birthday, the claimant picked up a friend at her house on East Lamp Post Lane just after dark. The friend's house was two-tenths of a mile from the Old Polk City Road intersection. The claimant had been on East Lamp Post Lane only once before when she had gone to the same friend's house during the day in November. After spending the evening together, the claimant drove her friend home at approximately 10:00 p.m. and visited briefly in the driveway. She then drove back toward Old Polk City Road. Although her route home required her to turn left at the intersection, there is no evidence that she attempted to make the turn. She entered the intersection going approximately 23 mph without stopping or pausing. Unfortunately, a vehicle going 52-53 mph on Old Polk City Road entered the intersection at the same time. The vehicles collided without any braking or avoidance maneuvers by either driver. The collision occurred at approximately 10:15 p.m. The claimant has no recollection of any events after leaving her friend's house.

After the collision, the claimant's vehicle overturned and came to a rest upside-down on the right shoulder of Old Polk City Road. It is not clear whether the vehicle did a half roll or one and one-half rolls. The claimant was ejected from the vehicle and came to a rest in a somewhat fetal position facing the ground on the shoulder. She was immobile and unresponsive. She was transported to the hospital by ambulance, where she was found to have a fractured spine and ultimately determined to be quadriplegic. The other vehicle veered into a fence and, remarkably, none of the occupants were seriously injured.

At trial, the defense proffered testimony that the claimant had a wine cooler earlier in the evening. The judge did not permit this testimony to be heard by the jury because he deemed that its probative value would be outweighed by its prejudicial impact. Because there was no evidence of further drinking and because a blood sample taken after the accident did not reflect the presence of alcohol, I find that alcoholic consumption did not contribute to this accident.

East Lamp Post Lane inclines slightly as it approaches Old Polk City Lane. This incline, combined with the fact that roads are constructed of blacktop with similar appearance, obscured the fact that East Lamp Post Lane was approaching Old Polk City Road. Overgrown shrubbery and brush along the side of East Lamp Post Lane also made it difficult to see traffic on Old Polk City Road. In addition, construction of the new road across the intersection arguably contributed to the illusion that East Lamp Post Lane continued without interruption. These factors and the lack of a traffic control sign or device at the intersection combined to create a dangerous condition at the intersection that was not apparent to the claimant, amounting to a hidden trap.

Because East Lamp Post Lane was a private road, the county did not have responsibility for maintaining the roadway. Several early residents had signed and recorded a "Notice of Privately Maintained Access" in the late 1970's stating that the road was not maintained with public funds and that any maintenance would be performed solely at the expense of the occupants. On December 16, 1981, the County installed a street sign identifying the road as "Lamp Post Lane." This sign was aligned parallel to Lamp Post Lane, visible to drivers on Old Polk City Road. There is no evidence of whether the sign was requested by the owners or whether the county was reimbursed for the sign and labor.

There is evidence that the county regularly installed stop signs on private roads that intersected with county roads if warranted by the Manual for Uniform Traffic Control Devices. However, it is not clear whether installation of such signs was initiated by the county, initiated at the request of the owners of the private street, or both. In November 1988, the county began a policy of putting stop signs on private streets at the same time as placing a street sign if the private road was accepted into the new 911 emergency response

system. There appears to have been no systematic process for placing stop signs on private roads that already had street signs before being accepted into the 911 system.

There is little evidence that East Lamp Post Lane came to the attention of the county or its employees subsequent to installation of the street sign in 1981. One of the property owners contacted the county to determine engineering requirements for paving a private road in late 1987, but it is not known if he gave the specific location. In early 1988, the paving contractor obtained a county permit to pave the road. In addition, one or more county employees came to the subdivision site to inspect West Lamp Post Lane during its construction. At that time they could have easily seen East Lamp Post Lane across Old Polk City Road. Additionally, based upon review of the subdivision plat, the county required the developer to install a stop sign at the intersection with Old Polk City Road. However, this sign was not installed until January 1999. There is no evidence that consideration was given to whether signage was needed on the other side of Old Polk City Road.

There were at least three occasions when a driver unfamiliar with the area unexpectedly drove onto Old Polk City Road from East Lamp Post Lane prior to the accident. All three incidents occurred after the road was paved, and two apparently occurred before the new road was operational. The third incident can be discounted because it involved a drunk driver. None of these incidents were reported to the county.

During the five years prior to the accident, only two accidents were reported at the location. Neither involved vehicles failing to stop at the intersection.

Procedural Background of the Case

The claimant originally filed a suit for negligence in the Tenth Circuit Court in and for Polk County in 1990, finally proceeding on the Fourth Amended Complaint in 1992. The complaint generally alleged the negligence of Polk County for failing to maintain its streets in a reasonably safe condition, and for failing to warn of the inherently and unreasonably dangerous condition; the negligence of multiple adjacent landowners for failing to install a traffic signal on a private road or requesting that the county do

same, for failing to maintain the right of way by allowing foliage to obstruct the right of way, and for creating and/or negligently permitting the existence of a dangerous condition; and the negligence of the developers of the new neighborhood across from Lamp Post Lane for creating a dangerous condition and failing to install a traffic signal or stop sign. The claims of all original defendants, except for Polk County, were resolved as follows:

Original Named Defendant	**Disposition**	**Settlement Amount**
Thomas Taylor	Directed Verdict	$ 100,000
Malcolm and Mary Winstead	Directed Verdict	60,000
Malcolm Winstead, Sr. and Elizabeth Winstead	Directed Verdict	265,000
Edward Corban		100,000
Donald Barnett		100,000
Gregory and Maureen George		101,000
Dawn Raulerson		101,000
James & Karen Casey		70,000
Estate of Wren McKinney		90,500
Smith/Heitz		15,000
Byron & Beverly Duncan	Dismissed with Prejudice	35,000
Wayne & Ina McKinney		1,200

After a 10-day trial, the jury found the county 77 percent liable and claimant 23 percent liable. The jury awarded total damages (without reduction for the plaintiff's percentage of fault) to be $6,500,000. The county moved for a new trial based on the recently granted decision in Fabre v. Marin, 623 So.2d 1182 (Fla. 1993). The motion was granted. The county's motion for a directed verdict was denied.

Prior to a second trial, the parties entered into a Stipulated Final Judgment wherein the county paid the claimant $40,000 and agreed to allow the plaintiff to pursue a claim bill for an additional $1,000,000 unless the county prevailed

on either of two appellate issues:

1. The trial court's refusal to grant either a summary judgment or a directed verdict by virtue of the county's sovereign immunity.

2. The trial court's refusal to direct a verdict against the plaintiff by virtue of the county's assertion that the plaintiff failed to show sufficient evidence that any alleged fault of the county was the proximate cause of the accident or the damages suffered therefrom.

Polk County appealed those two issues to the Second District Court of Appeal, which affirmed the jury verdict and concluded 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. Polk County v. Sofka, 675 So.2d 615 (Fla. 2nd Dist. 1996). The court also certified the sovereign immunity issue to the Supreme Court as an issue of great public importance.

The Supreme Court refused to answer the certified question and held that the Second District Court of Appeal never had jurisdiction to review the case because the order granting a new trial in favor of the county had never been vacated, even though both parties stipulated to the jurisdiction of the district court. Polk County v. Sofka, 702 So.2d 1243 (Fla. 1997).

Accordingly, the Supreme Court quashed the decision of the district court. On remand, the district court dismissed the case for lack of jurisdiction. The trial court then vacated the order granting a new trial and entered a new stipulated final judgment.

Both parties filed motions to enforce the settlement agreement, but the procedural quandary didn't fit squarely into the agreement's provisions. The Second District Court of Appeal held that the trial court didn't have the authority to vacate the order granting a new trial in favor of the defendant, and remanded the matter back to the trial court. Polk County v. Sofka, 730 So.2d 389 (Fla. 2d Dist. 1999).

The parties then entered into a new settlement agreement

wherein the county agreed to withdraw its motion for a new trial, pay the plaintiff $68,000, and allow the plaintiff to pursue a claim bill for $600,000 if, after exhaustion of the appellate process, the county had not prevailed on either of the preserved issues noted above. A new panel of judges on the Second District Court of Appeal heard the county's appeal and again affirmed the stipulated final judgment and held that the plaintiff presented sufficient evidence from which the jury could infer the county's creation of a known dangerous condition, and that the trial court properly submitted the issue of proximate cause to the jury. Polk County v. Sofka, 803 So.2d 751 (Fla. 2d Dist. 2001).

The Supreme Court declined to accept jurisdiction. Thus, under the terms of the Stipulated Final Judgment, Polk County did not prevail on either of the preserved issues and the claimant is pursuing a claim bill for $600,000.

Financial Impact of the Claim
The Director of Risk Management for Polk County has submitted an affidavit stating that payment of the claim would come from funds in General Fund Contingency because there is no insurance or budgeted funds to cover the claim. The affidavit further states that payment of the claim would reduce Polk County's appropriations and proportionately reduce its ability to meet obligations and provide necessary services.

CONCLUSIONS OF LAW:

In negligence cases a Special Master must determine whether a state agency or subdivision was negligent and, if so, whether and to what extent the claimant was also negligent. In making this determination, the four elements of duty, breach, causation of injury, and damages must be considered.

Polk County's Duty
The opinion of the Second District Court of Appeal affirming the judgment in this case succinctly states the law regarding the county's duty:

"As a general rule, decisions involving the installation of traffic control devices, the initial plan and alignment of roads, or the improvement or upgrading of roads or intersections are judgmental, planning-level functions to which absolute immunity attaches. See Department of Transportation v.

Neilson, 419 So.2d 1071 (Fla.1982). An exception to this rule exists, however, "when a governmental entity creates a known dangerous condition, which is not readily apparent to persons who could be injured by the condition." City of St. Petersburg v. Collom, 419 So.2d 1082, 1083 (Fla.1982). In such situations, a duty at the operational level arises to warn the public of the known danger, and courts can require a necessary warning without substantially interfering with the governing powers of the coordinate branches. Id. This exception contemplates a dangerous condition so hazardous and so inconspicuous to a foreseeable plaintiff that it virtually constitutes a trap. Department of Transportation v. Konney, 587 So.2d 1292, 1298 (Fla.1991) (Kogan, J., concurring)." Sofka, 803 So.2d at 754.

Thus, in order to overcome the county's sovereign immunity, the Claimant must prove: (1) that there is a dangerous condition, so unapparent to persons that might be harmed that it amounts to a trap; (2) that the dangerous condition was created by the county; and (3) that the dangerous condition was known to the county.

(1) Existence of a Dangerous Condition: Based upon careful consideration of the evidence, I have found that the intersection of East Lamp Post Lane and Old Polk City Road constituted a dangerous condition that amounted to a hidden trap.

(2) Creation of the Dangerous Condition: It is difficult for me to find that the dangerous condition was created by the county. In my view, the most significant action that caused the intersection to be dangerous was the paving of East Lamp Post Lane. Prior to that time, there was a visual demarcation between the dirt surface of the private road and the asphalt surface of Old Polk City Road. Subsequently, the surfaces of the two roads were more blended in appearance. The county was not involved with paving the road other than issuing a permit to the paving company. I would not deem the issuance of a routine permit to be a sufficient basis for finding that the county created the dangerous condition.

At trial, the claimant's accident reconstruction expert focused on the construction of West Lamp Post Lane as the significant act that created the dangerous condition. Although I do not share that opinion, I do not entirely

discount its contribution to the dangerous condition because it was apparently accepted by the trial jury. The road was not physically constructed by the county, but the county's involvement was much more extensive than the mere issuing of a permit. County employees reviewed the proposed subdivision plat and required the placement of a stop sign at the intersection of West Lamp Post Lane and Old Lamp Post Lane. One or more county employees inspected the road as it was being built and upon completion prior to its acceptance by the county. Without the county's approval of the developer's plan, there would have been no 4-way intersection. While this strains the definition of the term "create," it is apparently a basis for the jury verdict and the district court's affirmance. Therefore, in deference to the jury and the courts, I conclude that the county did create the dangerous condition.

(3) Knowledge of the Dangerous Condition: The appellate court held that the jury had sufficient evidence to find that the county had knowledge of the dangerous condition. From my review of the record, evidence of this knowledge could include: a card in the county's "Private Road File" reflecting that a street sign was installed at Lamp Post Lane in 1981 and that there was no control sign installed; a homeowner's call to the county to request information about county paving standards; issuance of a permit for paving of East Lamp Post Lane; review of the subdivision plat including the new West Lamp Post Lane intersection with Old Polk City Road, and the requirement that a stop sign be placed there; the presence of county employees at the intersection while inspecting progress on West Lamp Post Lane, and the county's recently enacted policy of placing stop signs on private roads that were approved for the 911 system.

Balanced against these indications of knowledge are the fact that there were only two accidents at the intersection in the five years prior to the claimant's, with neither being related to absence of a stop sign.

In Department of Transportation v. Konney, 587 So.2d 1292 (Fla. 1991), the Florida Supreme Court observed that every intersection may be considered to be inherently dangerous, so in a general sense knowledge of the existence of an intersection amounts to knowledge of a dangerous condition.

However, the duty to act does not arise unless the dangerous condition is not readily apparent to motorists—that it is a hidden trap. I found no evidence that the county had actual knowledge that a hidden trap existed at the intersection of East Lamp Post Lane and Old Polk City Road. I also found no case law conditioning the county's duty to warn upon it having knowledge that the dangerous condition constituted a hidden trap that was not readily apparent to persons who might be injured by it. Therefore, I must agree with the appellate court's opinion that the evidence at trial created an issue of fact as to whether a known dangerous condition existed, which was resolved by the jury in favor of the claimant. I also agree with the footnote in the original opinion that the question of the county's knowledge is very close.

Polk County's Breach of Duty

Polk County did not warn of the known dangerous condition, but asserts that it could not install a stop sign on East Lamp Post Lane without the consent of all property owners. This is based upon §316.006(3)(b), Florida Statutes, which was enacted in 1987. The county's assertion appears to be correct, but there were undoubtedly other ways that warning could have been given without exercising jurisdiction over the private road. The plaintiff's expert mentioned the painting of a reflective stripe on the road or the placement of reflectors in the county's right of way across from the intersection. Failure to give any warning constituted a breach of duty.

Causation

The appellate court cited its own decision in Clark v. Polk County, 753 So.2d 138 (Fla. 2d DCA 2000) in support of its finding that the jury had sufficient evidence to find that the absence of warning was the proximate cause of this accident and of claimant's injuries. The jury found the claimant to be partially at fault in this case. However, Clark stands for the proposition that the failure of a motorist to stop at an intersection without a stop sign is foreseeable and does not break the causative link between the county's failure to warn and the accident.

Claimant's Negligence

The jury found the claimant to be 23 percent at fault in this case. Without considering the seat belt issue, which is

discussed below, I would not have found her percentage of fault to be so high. However, the jury did have a basis from which to conclude that she should have been aware that the intersection was close in light of the fact that she had traveled only a short distance down East Lamp Post Lane.

Damages

The jury in this case heard testimony regarding the present value analysis of the claimant's life care needs, as well as the diminution of her earning capacity and loss of past earnings. Dr. Frederick Raffa, Ph.D., an economist, testified that the claimant's economic loss, based on the life care plan completed by Dr. Paul Deutsch, totaled $4,502,871 in present value dollars. The jury verdict set her monetary damages at $6,500,000 and found that she was 23 percent of the legal cause of the damages. The settlement agreement that was ultimately entered in May of 2000 provided for the claimant to recover $600,000 inclusive of all costs, fees, and pre and post judgment interest. The stipulated final judgment may not be executed without a claim bill. The accident left the claimant a quadriplegic; obviously her damages are extensive.

This case was originally tried in 1993. The law in effect at that time limited the availability of the seat belt defense to instances wherein the failure to use an available and operational seat belt either caused or contributed to the occurrence of the accident. The trial court ruled that the use of the seat belt defense was precluded by the statute, and therefore did not allow the defendants, their attorneys or witnesses to refer in any way in the presence of the jury to the alleged failure of the claimant to utilize an available and operational seat belt. However, the Florida Traffic Accident Report filed by the investigating officer reported that the claimant was not wearing her seatbelt and was ejected from her vehicle. A witness also testified that the claimant was not wearing her seatbelt the evening of the accident. The statute relied upon by the court in granting the motion in limine regarding the seat belt defense, §316.614, F.S., has since been amended to allow the failure to wear a seat belt to be considered as evidence of comparative negligence. While the jury was not able to consider the effect of the claimant's failure to wear her seat belt, the legislature in its capacity of a body of equity can consider such evidence. It is unknown how much of the claimant's injuries were caused

by the ejection from her vehicle. However, it can be safely assumed that her willingness to settle the case for $600,000 after a jury verdict of $6.5 million is due in part to her failure to wear a seatbelt and the potential reduction of damages in a subsequent trial.

In light of the claimant's catastrophic injuries, I find that the damages set by the settlement agreement in this case are reasonable and equitable.

ATTORNEYS FEES:

The claimant's attorney has submitted an affidavit certifying that attorney's fees for this claim bill are 25 percent, plus costs, which is within the 25 percent attorney's fee limitation set forth in §768.28(8), F.S. The firm intends to retain a lobbyist who will be paid a fee of 5 percent, plus costs, from the attorney's fees.

There are outstanding costs of approximately $30,500 and one known unpaid lien of $8,855.86. There are no known unpaid medical bills.

RECOMMENDATIONS:

I recommend that Senate Bill 30 (2005) be reported FAVORABLY.

Respectfully submitted,

Scott E. Clodfelter
Senate Special Master

cc: Senator Gary Siplin
Faye Blanton, Secretary of the Senate
House Claims Committee