

TABLE OF CONTENTS

	PAGE
TABLE OF CITATIONS.....	ii
STATEMENT OF CASE AND FACTS.....	1
SUMMARY ARGUMENT.....	4
ARGUMENT:	
POINT I - THE DISTRICT COURT OF APPEALS DECISION THAT OPERATIONAL FAILURES ARE NOT PROTECTED UNDER SOVEREIGN IMMUNITY, DOES NOT CONFLICT WITH EXISTING PRECEDENT, AND THERE IS NO BASIS TO EXERCISE DISCRETIONARY JURISDICTION UNDER RULE 9.030 (2) (A) (iv) OF APPELLATE PROCEDURE.....	5
CONCLUSION.....	7

<u>TABLE OF CITATIONS</u>	<u>Page</u>
<u>City of St. Petersburg v. Collom</u> , 419 So. 2d 1082 (Fla. 1982)	6
<u>Department of Transp. V. Konney</u> , 587 So.2d 1292 (Fla. 1991)	6
<u>Department of Transp. v. Neilson</u> , 419 S0.2d 1071 (Fla. 1982)	6
<u>Fisel v. Wynns</u> , 667 So.2d 761 (Fla. 1996)	6
<u>Polk County v. Sofka</u> , 803 So. 2d 751 (2001)	6
<u>Scott v. Florida Department of Transportation</u> , 752 So.2d 30 (Fla. 4 th DCA 2000)	6

STATEMENT OF CASE AND FACTS

Respondents', Kristen Mann and Krystle Chalich, sued Petitioner, The State of Florida Department of Transportation (hereinafter DOT), for serious personal injuries that each sustained arising out of a motor vehicle accident that took place on December 6, 2002 at the intersections of SR-26 and SR-222, in the City of Gainesville, Florida (R- Volume I, p. 1 to 36¹). The accident occurred when the vehicle that they were passengers in, attempted to make a left turn from SR 222 to the eastbound lane of SR 26; their vehicle was broad sided by another vehicle traveling in the westbound lane of SR 26, a high-speed road with a 60 mph speed limit (R- Volume I, p. 3 to 4).

Respondents' contend that Petitioner negligently created and maintained an intersection with an irregular geometric configuration, which created a dangerous condition. At its intersecting points, the eastbound lane of SR 222 splits from the westbound lane of SR 222, and curves to the right, coming to a T-intersection with the

¹ Cites are to the Record before the District Court of Appeal, First District, State of Florida.

westbound lane of SR 26; at this point, there exists a sharp bend in SR-26 the road². At a point approximately 309' east of the subject intersection, there exists a split in the westbound land of SR-26, in which traffic can proceed straight ahead and directly onto the westbound lane of SR - 222, or can bear to the left along the curve in SR-26, toward the subject intersection. It is this geometric irregularity, with its corresponding 60 mph speed limit and limited site distance, which makes it dangerous for drivers to make left hand turns from SR 222 to SR 26 (R - Volume I, p. 4-5). Respondents also contend this irregular intersection created a dangerous trap-like condition, known to Petitioner but not readily apparent to the left-turning driver, for the observation of westbound traffic along SR 26 directly onto SR 222, creates an illusion of safety precipitating a left-turning driver to enter the intersection when it was not safe to do so (R- Volume I, p. 5-9). This is an operational failure at the accident site, not subject to the defense of sovereign immunity.

Under a claim of sovereign immunity, Petitioner moved

² The bend in SR -26 curves to the right for eastbound traffic and to the left for westbound traffic.

for summary judgment to dismiss the Verified Complaint by Motion, with Memorandum of Law in support thereof dated October 8, 2005 (R- Volume II, p. 137-273). In opposition to the Summary Judgment Motion, Respondents submitted the sworn testimony of witnesses via affidavit and deposition, that evidenced questions of fact exist as to the dangerous conditions arising out of this irregular intersection, which was known to Petitioner, but not readily apparent to the left-turning driver, and was a cause of the accident; as such, the claim constituted an exception to the sovereign immunity defense (R- Volume III, p. 282-458).

Following oral argument below (see Volume VI, pp. 1-45), the Hon. Robert Roundtree, granted summary judgment, based upon his determination that the dangerous condition, if any, was open, obvious, and readily apparent, and not a trap; that Respondent failed to prove Petitioner had knowledge of the alleged defect; and that the design of the intersection was a planning level function protected by sovereign immunity (R- Volume V, p. 838-839).

By Decision dated January 25, 2007, the District Court of Appeals, First District, reversed the trial court decision, for the record evidenced a factual dispute, which may not be resolved by summary judgment. In so finding,

the District Court of Appeals recognized that the underlying claim was that a hazardous condition arose out of an irregular intersection on a high speed road way, which created a hidden danger with an illusion of safety, i.e. a danger that was not readily apparent. The District Court of Appeals determined that existence of the hidden danger and illusion of safety claim was borne out by the record, which included depositions and affidavits to evidence the factual dispute. While the Petitioner disputed such claim and argued that the dangers were readily apparent, the District Court of Appeals below simply held that this factual disputed is not to be determined by summary judgment, for it is manifest that issue finding, not determination, is the governing standard of review. The District Court of Appeals did not announce any new rule of law.

SUMMARY ARGUMENT

The Court District Court of Appeal, First District, held that the record evidenced a factual dispute as to Respondents' claim that the motor vehicle collision was due to the existence of a "hidden danger with an illusion of safety" at the accident site, and, in accord with well

established precedent, held that the corresponding failure to correct or warn constituted an operational level function, not protected by sovereign immunity. It is manifest that the Court below did not announce a new rule of law that a governmental entity will lose the protection of sovereign immunity when a hazardous condition is "readily apparent". To the contrary, the Court below simply recognized the existence of a factual dispute, for it is manifest that an illusion of safety is not readily apparent. In context of the Summary Judgment motion at issue, the Court below properly engaged in issue finding, not issue determination.

In view of the fact that the court below did not establish precedent which conflicts with decisions of other district courts or this Court, Petitioner's motion for permission to appeal should be denied.

ARGUMENT

POINT I - THE DISTRICT COURT OF APPEALS
DECISION THAT OPERATIONAL FAILURES
ARE NOT PROTECTED UNDER SOVEREIGN
IMMUNITY, DOES NOT CONFLICT WITH EXISTING
PRECEDENT, AND THERE IS NO BASIS TO
EXERCISE DISCRETIONARY JURISDICTION
UNDER RULE 9.030 (2) (A) (iv)
OF APPELLATE PROCEDURE

The District Court of Appeal properly determined that

operational failures are not protected by sovereign immunity, citing existing precedent, to wit: Department of Transp. v. Neilson, 419 So.2d 1071 (Fla. 1982; City of St. Petersburg v. Collom, 419 So. 2d 1082 (Fla. 1982); and Polk County v. Sofka, 803 So.2d 751 (2001), review denied 821 So. 2d 300 (Fla. 2002). The Court below did not announce any new rule of law in conflict with the cited precedent.

Under the stated law, the Court simply held that Respondents had alleged, and presented proof in evidentiary form, that a factual dispute existed as to whether the Petitioner's operational failure was a proximate cause of the subject motor vehicle accident. Accordingly, resolution of that dispute cannot be by summary judgment (see Rules of Civil Procedure, Rule 1.510 (c)); see also, Fisel v. Wynns, 667 So.2d 761 (Fla. 1996), at 764); Scott v. Florida, 752 So. 2d 30, at 31); see, as distinguished, Department of Transp. v. Konney, 587 So. 2d 1292 (Fla. 1991), for unlike the claimant in Konney, Respondents, herein, have not premised their claims on a mere failure to upgrade an intersection, but rather, have specifically alleged, and presented proof in evidentiary form (R Volume III, p. 317-337) that DOT created and maintained a

geometrically irregular intersection of SR 222 and SR 26, which constituted a dangerous condition for drivers seeking to make a left hand turn from SR 222 to SR 26), which contributed to the accident). As such, Respondents have properly pled and established an evidentiary basis for a cognizable cause of action, which is not protected by the claim of sovereign immunity. The District Court of Appeals simply recognized that a factual dispute existed, necessitating a determination by the trier of fact.

CONCLUSION

The District Court of Appeals properly determined that the record evidenced a factual dispute with respect to Respondent's claim that the geometric irregularity of this high-speed intersection constituted a hidden danger with an illusion of safety, which was a contributing cause of the accident. In context, whether the danger was readily apparent to the unsuspecting driver presents a question of fact. The District Court of Appeals did not announce any new rule of law, and its decision comports with existing precedent. Accordingly, Petitioner's request for permission to appeal to this court should be denied.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that two (2) true and correct copies of the above and foregoing was sent via UPS Express Mail this 14th day of June, 2007, to Petitioner's attorneys, SILVER, LEVY, FELDMAN & BASS, P.A., 2701 North Rocky Point Drive, Island Center, Suite 1000, Tampa, Florida 33607.

Lynch, Farrell & Hetman, PLLC
Attorneys for Respondents
111 State Street
Albany, New York 12207
Tele: (518) 463-1252
Peter A. Lynch

By: _____
Peter A. Lynch, Esq.
Florida Bar No.: 0362751

CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this Brief is set forth in Courier New 12-point font, and complies with the font requirements of Rule 9.210 (a) (2).

Lynch, Farrell & Hetman, PLLC
Attorneys for Respondents
111 State Street
Albany, New York 12207
Tele: (518) 463-1252
Peter A. Lynch

By: _____
Peter A. Lynch, Esq.
Florida Bar No.: 0362751