

School Zone and Flashing Yellow Traffic Signals

Initial Information:

A speeding car struck Diannet Leyva while she was crossing the street in a 15 MPH effective school zone.

Investigation Result:

The school zone was not in effect at the time Diannet was struck and killed. On January 3, 2005, the school zone was in effect from 8:00 AM to 9:00 AM. According to witnesses, the estimated time that the car struck Diannet Leyva was approximately 7:50 AM. The first 911 call was at 7:54 AM. According to DOT records, the school zone flashing yellow lights activated at precisely 8:00.10, or 10 seconds after 8:00 AM.

School Zone Signage

Initial Information:

School Zone warning signage was posted.

Investigation Result:

On January 3, 2006, no overhead mounted school zone signage was in place in the east bound lanes. Signage facing eastbound traffic was subsequently placed on the flashing yellow light post immediately before the crosswalk traffic light. This signage indicates a newly-changed school zone start time of 7:15 AM. Further, on January 11, 2006 a school zone sign facing the east bound traffic was placed on the sidewalk immediately before the crosswalk traffic signal, with this sign also indicating a newly-changed school zone start time of 7:15 AM.

Police advise that the eastbound school zone signage was knocked down by Hurricanes Katrina, Rita or Wilma and had not been replaced. The only signage in the eastbound lanes approaching the crosswalk traffic light was the school zone painted on the road surface, and a sign depicting the "pedestrian crossing" symbol at the crosswalk traffic light.

Vehicle Speed

Initial Information:

The car that struck Diannet Leyva was speeding.

Investigation Result:

The speed limit on W. Flagler Street when the School Zone speed limit is not in effect is 40 MPH according to posted signage on W. Flagler. While estimates of the vehicle's speed vary between 30 and 40, with one witness estimating as much as 50 MPH, it remains clear that the 15 MPH School Zone speed limit was not in effect. Police calculations of the speed based on limited information place the speed at 30.77 MPH.



The Traffic Signal Light Was Red

Initial Information:

The traffic signal light was red at the time Palmenia Alfonso drove through the crosswalk.

Investigation Result:

All witnesses testified consistently that this was true. The Traffic signal light was red at the time Palmenia Alfonso drove through the crosswalk.

Crossing Guards

Initial Information:

Two uniformed crossing guards were in the street, with both attired in fully uniforms including fluorescent yellow vests and gloves, blowing whistles and waving their arms to get the attention of driver Palmenia Alfonso.

Investigation Result:

There is conflicting testimony as to whether the school crossing guards were indeed wearing their complete City of Miami Crossing Guard uniforms. A number of witnesses state that one or both of the crossing guards were in fact not wearing their yellow vest and gloves. One witness describes seeing them without those items at the time of the accident, and then noticing that an hour later they were both wearing them as they police investigated the accident scene.

There is also conflicting testimony as to whether the school crossing guards actually entered the intersection, and a number of witnesses testified that the school crossing guard positioned on the south side of W. Flagler Street in the eastbound lanes remained at all times on the sidewalk, where that guard stood to press the button that signals the traffic light to change. Diannet Leyva was struck in the east bound lanes.

A number of witnesses testified that the guard positioned on the north side of W. Flagler Street in the westbound lanes may have entered the intersection on his assigned side of the street, but his attention may have been directed toward either the children crossing, or the vehicle traffic driving westbound. There is conflicting testimony as to the north side school crossing guard's position and actions at the time Diannet Leyva was struck.

Cellular Phone

Initial Information:

Driver Palmenia Alfonso may have been using a cell phone at the time her car struck Diannet Leyva.

Investigation Result:

One witness testified that while they did not actually see the driver of the car holding a cell phone, they were able to see inside her car as it passed through the crosswalk, and the driver was holding an object in her left hand, and she appeared to be engaged in animated discussion. Cell phone records indicated that the driver used her phone for calls occurring at 7:44:35 AM, 7:46:15 AM, 7:52:33 AM and 7:53:20 AM.



Yellow Safety Zone

Initial Information:

Driver Palmenia Alfonso may have crossed into the yellow safety zone that serves as the painted “median” strip between the east bound and westbound lanes at the crosswalk.

Investigation Result:

There is conflicting testimony as to whether Palmenia Alfonso crossed into the yellow safety zone as she passed through the crosswalk at the traffic light. While two witnesses describe that she was indeed crossed into the yellow safety zone, they fail to agree on significant related material facts. In addition all of the other witnesses to the collision said that Alfonso was in the left lane of travel, not the safety lane. The physical evidence is inconsistent with her being in the safety lane, as well.

CONCLUSION

The totality of the evidence reveals the following to be the most accurate version of events that can be gleaned from the various witnesses:

On January, 3, 2006, Palmenia Alfonso was driving eastbound on Flagler Street. The Flagler Elementary School is located at 52nd Court on Flagler Street. Flagler Street is controlled by a 40 MPH speed limit at 52nd Court, except when the school zone speed limit of 15 MPH is in force. The school zone speed limit became effective at 8:00 A.M. on the date of the collision despite the fact that there was school activity beginning at 7:30 A.M. (This conflict has been remedied since the collision.)

At one time there had been signs advising eastbound motorists of the effective times for the school zone. These signs had been blown down by either Hurricanes Katrina or Wilma in 2005 and had not been replaced at the time of the collision. Ms. Alfonso claims to have driven the area for twenty (20) years and did not know about the school zone. For the purposes of our filing decision I am assuming that Ms. Alfonso knew, or should have known, that she was approaching a school zone that went into effect at 8:00 A.M.

Across from the Flagler Elementary School is a strip shopping mall that parents use in order to drop off their children. Some take them across the street, and others watch as they do so. The street crossing is governed by a crosswalk traffic light that is controlled by school crossing guards posted on the westbound and eastbound sidewalks. At somewhat regular intervals one, or both, presses a button on the light post that will cause the traffic light to cycle from green to red for eastbound and westbound traffic.

As Ms. Alfonso approached the traffic light, at about 35 MPH, it cycled from green to red with plenty of time for her to stop. As the light turned red, the crossing guard on the westbound side motioned for the parents and children on the eastbound side to cross. Although the crossing guards are supposed to step into the street and hold up their arms, all of the witnesses, except for the guards themselves, say that the guard on the eastbound side stayed on the sidewalk. Diannet Leyva began to cross the street, while her sister stayed at the curb and watched her cross. Ms. Alfonso, traveling in the left-hand eastbound lane, was talking on her cell phone as she approached the red light. The cell phone or something else distracted her sufficiently that she did not see the traffic signal and her car collided with Diannet Leyva as she crossed the street. Ms. Alfonso was able to stop her car in a distance of approximately 75 feet from the point of collision. There is no credible evidence that Ms. Alfonso intentionally ran the red light.



The case law controlling traffic death is clear; the misconduct needed to raise a traffic death from a citation for careless driving to that of vehicular homicide is conduct that is reckless, defined as “willful and wanton”. McCreary v. State, 371 So.2d 1024 (Fla. 1979), State v. May, 670 So.2d 1002 (2nd DCA Fla. 1996). The cases that assist in the definition of that phrase repeatedly state that “willful” means “intentional, knowing and purposeful”. “Wanton” means with “conscious and intentional indifference to consequences and the knowledge that damage is likely to be done to persons or property.” D.E. v State, 904 So.2d 558 (Fla. 5th DCA 2005); Del Rio v State, 854 So.2d 692 (Fla. 2nd DCA 2003); Lewek v State, 702 So.2d 527 (Fla. 4th DCA 1997); State v May, 670 So.2d 1002 (Fla. 2nd DCA 1996); W.E.B. v State, 553 So.2d 326 (Fla. 1st DCA 1989),

Ms. Alfonso was originally arrested because it was believed that she was traveling at 40 MPH in a 15 MPH school zone. Intentionally driving at 40 MPH in an active school zone is the type of conduct that could support a vehicular homicide charge. Although all witnesses report that she was speeding, that was based upon the erroneous belief that the school zone was in effect. All of their estimates, save one, put her at 40 MPH or lower. The physical evidence puts her at less than 35 MPH. Therefore we can no longer rely on speeding as the “intentional” conduct.

The running of the red light could be the “intentional” factor, but the burden would be on the State to prove that it was intentional conduct in order to make it willful:

“There are few, if any, persons who drive automobiles who have not, through momentary lapse of attention, error or judgment, failing to see what they should have seen, particularly on roads not in municipalities, been guilty of running a stop sign at an intersection without slowing down. Such, no doubt, constitutes negligence sufficient to support a damage suit based on simple negligence.” Porter v. State, 88 So.2d 924 (Fla. 1956).

The witnesses that were in a position to make a judgment are consistent that it appeared to them that Ms. Alfonso was not paying attention to the light because of her cell phone use or some other distraction. If there were proof of any intentional conduct that precipitated the collision, it would have to be the use of the cell phone.

The State legislature has, on several occasions, failed to get out of committee legislation that would make cell phone use, or electronic equipment use, an infraction. (There has been no effort that we could find to make it a criminal offense.) All of those efforts failed to get out of committee and were never passed. One of those failed efforts involved a prohibition on using a cell phone without a hands-free device in a school zone (House Bill 1367, 2002). Miami-Dade County passed an ordinance requiring the use of hands-free sets with cell phones, but the State Legislature passed F.S. 316.0075 preempting the regulation of such devices to the State. This nullified the Miami-Dade County ordinance.

Therefore, we are left in the position of making the use a cell phone “willful and wanton” when the State Legislature has refused to make it a civil infraction. Further, we would essentially be taking the position that use of a cell phone while driving, without hands-free equipment, is reckless driving, if any harm resulted from such use. Based upon the cases cited above, I do not believe that any court would agree with that position. In other words, we cannot combine a legal act with an inadvertent traffic violation and conclude that the conduct becomes “willful and wanton”.

The most serious charges that we can file are the infractions of Careless Driving and Running a Red Light.

