IN THE SUPREME COURT OF FLORIDA

NADINE JOHNSON, Individually and as Personal Representative of the Estate of Scott E. Johnson, deceased,

Petitioner,

v.

COLLIER COUNTY,

Respondent.

CASE NO. 66,656

PETITIONER'S REPLY BRIEF
ON THE MERITS
On Certified Conflict From The
Second District Court of Appeal

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POINT ON APPEAL

WHETHER THE SECOND DISTRICT COURT OF APPEAL ERRED IN THIS WRONGFUL DEATH (ELECTROCUTION) CASE BY CERTIFYING CONFLICT WITH EVERY OTHER DISTRICT COURT IN FLORIDA AND AFFIRMING A FINAL SUMMARY JUDGMENT FOR COLLIER COUNTY ON GROUNDS THAT THE JOB OF A COUNTY BUILDING INSPECTOR WHO INSPECTS A CONSTRUCTION SITE FOR ANY ELECTRICAL CODE VIOLATIONS IS A DISCRETIONARY ACTIVITY FOR WHICH THE COUNTY IS IMMUNE FROM LIABILITY?

ARGUMENT

A. (Planning Level - Operational Level Dichotomy)

The recent Trianon Park case[1] from this Court obviously does have to be considered now in this case. However, we do not believe it has "effectively decided this case," as the County argues in its brief. The County also states (at p. 2 of its brief) that we now find the "keystone" of our argument (the Third DCA's opinion in Trianon Park) quashed. The fact, however, is that even before this Court's opinion in Trianon Park, we had argued (Initial Brief, p. 9) that the special facts of this case make it even stronger than Trianon Park because of the one on one relationship involved here.

The specific question addressed by this Court in Trianon Park is:

> "Whether a governmental entity may be liable in tort to individual property owners for the negligent actions of its building inspectors. . .?" [e.s.]

The Trianon Park case involved municipal liability to the ultimate condominium unit owners for property damage they suffered. But here, the plaintiff's deceased was not just a future unit owner, and this case does not just involve property damage.

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1. Trianon Park Condo Assoc., Inc. v City of Hialeah, 10 F.L.W. 210 (Fla. April 4, 1985).

This Court in its reasoning in Trianon Park, cited section 288 of the Restatement of Torts which provides that legislative enactments for the protection of the interests of the community as a whole rather than for the protection of any individual or class, create no duty or liability. However, the provision of the building code involved here is not just for the protection of the general public. There is testimony in this case that the reason why the National Electrical Code requires a GFI in a temporary construction pole is in order to protect the construction workers, in particular, from this type of accident resulting from a short circuit or similar danger in a power tool, worn extension cord, etc. (R. 268, 112).

When inspecting a temporary service pole being used by construction workers during construction a special duty is owed to the construction workers, separate and apart from the duty owed to the general public. There is practically a privity relationship involved here between the deceased and the electrical inspector, unlike the situation in Trianon Park. The element of reliance by construction workers on the County's inspection and approval of the temporary electrical hook-up and the special duty owed sets this case apart from Trianon Park.

If the County did not perform the electrical inspection of the temporary service pole then it is likely the subcontractors would have made sure for themselves that the temporary service pole had a properly wired GFI before they

would plug into the system. But it was customary to rely on the County inspector. One of the other subcontractors on the job when the deceased was electrocuted testified:

> Q: And then did you assume there was a ground fault interrupter in this particular box without looking at it?
>
> A: Well, I assumed it was in there because the code says it has to be there and the inspector apparently went there." (R.268).

This case involves a municipal inspector who is supposed to inspect and certify a temporary service pole before it is electrified for use by construction workers, and a construction worker who is now dead because he was trained to rely on the inspector's certification to mean that the temporary service pole can be safely used since it complies with code requirements.

There is an analogous private duty and liability here when dealing within the construction trade. If the general contractor, for example, had hired a private inspector or independent electrician to inspect the temporary service pole and certify it is safe for all the various subcontractors on the job to plug into; would it not be actionable if the private inspector was negligent? (Even under section 440.10, Fla. Stat., there is no immunity hindering one subcontractor's civil lawsuit against another subcontractor on the job.) If an architect is negligent in his supervision of construction which results in a worker's death, would there not be analogous private liability under the common law?

From the perspective of the construction workers on the

job, the County inspector is not just enforcing an ordinance; but also providing a professional service which, if not performed by the County, would surely be performed in the private sector. From their perspective the County's act falls into category IV discussed in Trianon Park (providing professional, educational and general services).

Justice McDonald, specially concurring in Trianon Park, wrote that if the government's activity directly causes an injury, liability may attach and in such circumstances he would have no hesitency in saying so. We believe a jury could so find in this case.

This Court's holding in Trianon Park is that the government has no responsibility to protect personal property interests or ensure the quality of buildingsthat individuals purchase. We believe the issue involved here is related, but not identical, and the factual differences involved here raise additional public policy considerations not involved in Trianon Park.

Accordingly, we do not believe the recent Trianon Park decision is so obviously dispositive of this case, as the County asserts it is.

B. (Effect of County's Purchase of Liability Coverage)

We admit this issue was not specifically argued in the trial court or in the Second DCA; nor could it have been as a practical matter since the Avellone case[2] we now rely on

2. Avellone v Bd. of County Commissioners of Citrus County, 10 F.L.W. 478 (Fla. 5th DCA, Feb. 21, 1985).

was just decided after the Second DCA's opinion in this case, and it interprets the statute in a way it had never before been interpreted. Until Avellone, Section 286.28(2), Fla. Stat. was used to overcome the $100,000/$200,000 damage ceiling when an insured governmental agency was negligent in an operational level activity; however, no case had ever before interpreted the statute to waive governmental immunity for planning level functions as well as operational level functions, to the extent of insurance coverage. In actuality, before Avellone, such an interpretation of the statute had not occurred to us. We are not, in the words of the County in its motion to strike our argument, "converting this court of limited jurisdiction to a testing ground for every desperate argument previously thought to be unworthy of judicial consideration." We wish we could have prognosticated the Avellone interpretation before it was rendered, but we were not so prescient.

Nevertheless, it is generally recognized that when there has been a change in the law while a case is on appeal, the appellate court should apply the law in effect at the time of the appellate court's decision rather than the law in effect at the time of the trial proceedings. Hendeles v Sanford Auto Auction, Inc., 364 So.2d 467 (Fla. 1978); Zobac v Southeastern Hospital District of Palm Beach County, 382 So.2d 829 (Fla. 4th DCA 1980). The rule is the same in federal courts. See Thorpe v Housing Authority, 393 U.S.

268, 89 S.Ct. 518 (1969).

The County relies on Dober v Worrell, 401 So.2d 1322 (Fla. 1981) in arguing that we have not preserved this issue; however, Dober did not involve a situation where a new case is decided during pendency of an appeal, which breaks new ground in the jurisprudence of the State. Quite often new precedent-setting cases are applied to cases that are still "in the mill." This Court has noted that generally when a new rule is adopted and its applicability to pending cases is not specifically determined, it is applied to cases pending at the appellate level even though the question was not raised before the trial judge. See, Florida East Coast Railway Co. v Rouse, 194 So.2d 260 (Fla. 1966); Linder v Combustion Engineering, Inc., 342 So.2d 474 (Fla. 1977); Christiani v Popovich, 363 So.2d 2 (Fla. 1st DCA 1978).

It is particularly appropriate in this case to consider this new issue because the ultimate issue involved in this case is the Court's subject matter jurisdiction in this lawsuit against a governmental agency.

It is well settled that alleged trial errors which are not brought to the attention of the trial court cannot be raised on appeal unless fundamental or jurisdictional error is apparent from the face of the record. Palmer v Thomas, 284 So.2d 709 (Fla. 1st DCA 1973); Hadley v Hadley, 140 So. 2d 326 (Fla. 3d DCA 1962); Casey v Smith, 134 So.2d 846 (Fla. 2d DCA 1961); Pittman v Roberts, 122 So.2d 333 (Fla.

2d DCA 1960). Questions pertaining to the subject matter jurisdiction of the Court are an exception to the general rule and can be raised for the first time on appeal. Hadley, supra; Casey, supra; Pittman, supra. (Especially when based on new caselaw.)

Sovereign immunity is an issue involving the Court's subject matter jurisdiction. Whereas the Court at common law had no jurisdiction over the sovereign, the statute waiving sovereign immunity vests subject matter jurisdiction on Florida courts to adjudicate claims falling within the parameters of the statute. Hutchins v Mills, 363 So.2d 818 (Fla. 1st DCA 1978); Schmauss v Snoll, 245 So.2d 112 (Fla. 3d DCA 1971). See generally 28 Fla.Jur.2d, Governmental Tort Liability §51. The federal courts also take the view that the question of sovereign immunity after the Federal Tort Claims Act is a question which goes to the Court's subject matter jurisdiction. See general discussion in Stanley v Central Intelligence Agency, 639 F.2d 1146, 1156-1160 (5th Cir. 1981).

The new caselaw now relied on came out after trial and after the Second DCA opinion. The importance of insurance coverage even for planning level activities is a question which goes to the subject matter jurisdiction of the Court, and it is now apparent from the face of the record that the lower court committed jurisdictional error when it found that the County was immune. We do not believe it is improper to point out what appears to be jurisdictional

error even though it was not raised in the lower courts. Moreover, although this case is before this Court on a certified conflict, this Court can reach other issues not involved in the conflict. Bould v Touchette, 349 So.2d 1181 (Fla. 1977).

The County also argues that the statute waiving sovereign immunity to the extent of applicable liability insurance limits, Section 286.28 (2) only is directed to political subdivisions that own or lease and operate motor vehicles, watercraft, aircraft, buildings; "or perform operations in the state or elsewhere." [e.s.] Surely the County is "performing an operation" by inspecting and certifying a temporary electric service pole. The most prevalent usage of the word in the dictionary definition of "operation" is "a doing or performing esp. of action: work, deed." Webster's Third New Int. Dictionary of the English Language - unabridged. Performing an inspection is unquestionably an "operation" within the plain meaning of the word "operation." Unless a different meaning is inferred from the context, the words in a statute should be accorded their plain and most commonly understood dictionary meaning. State v Stewart, 374 So.2d 1381 (Fla. 1979); Graham v State, 362 So.2d 924 (Fla. 1978). Surely this statute was not intended to narrowly restrict political subdivisions in the type of liability insurance they are authorized to purchase to protect the citizens. It was intended to create broad power to purchase such insurance.

Accordingly, it does not matter whether the activity of the building inspector involved here is denominated as planning level or operational level, since it is apparent from the face of the record that there is applicable liability insurance coverage which the County purchased to protect people like the plaintiff, and there is an underlying duty owed in this case, as discussed under Section A, supra. This provides another reason why the trial court committed jurisdictional error by entering summary judgment for Collier County on grounds of sovereign immunity.

CONCLUSION

The Second District erred by affirming the summary judgment for Collier County on grounds of sovereign immunity. The Second DCA's opinion should be quashed and the cause remanded for further proceedings.

Respectfully submitted,

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By _____
RICHARD A. KUPFER

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true copy of the foregoing has been furnished, by mail, this 25th day of April, 1985, to: JOHN W. MACKAY, 3202 Henderson Boulevard, Suite 204, Tampa, FL 33609.

By _____
RICHARD A. KUPFER