

IN THE SUPREME COURT OF THE
STATE OF FLORIDA.

Case No. 67,074

GLORIA JEAN AVALLONE,

Petitioner,

vs.

BOARD OF COUNTY COMMISSIONERS
OF CITRUS COUNTY and AETNA
LIFE & CASUALTY, a foreign
corporation jointly and
severally,

Respondents.

FILED
S. D. WHITE

JUL 3 1995

CLERK, SUPREME COURT

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RESPONDENTS' BRIEF IN OPPOSITION TO JURISDICTION

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS.....	ii
PRELIMINARY STATEMENT.....	1
STATEMENT OF THE CASE AND FACTS.....	1
SUMMARY OF ARGUMENT.....	1
QUESTION PRESENTED	
WHETHER THE DECISION HEREIN SOUGHT TO BE REVIEWED EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR OF THE SUPREME COURT ON THE SAME QUESTION OF LAW.....	2
ARGUMENT	
I. DISCRETIONARY CONFLICT JURISDICTION.....	3
II. THE INSTANT DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY PRIOR FLORIDA APPELLATE DECISION.....	4
III. THE DISTRICT COURT DID NOT MISAPPLY PRECEDENT SO AS TO CREATE CONFLICT JURISDICTION.....	6
IV. THE INSTANT DECISION ANNOUNCES NO RULE OF LAW WHICH CONFLICTS WITH A RULE PREVIOUSLY ANNOUNCED BY ANOTHER FLORIDA APPELLATE COURT.....	7
CONCLUSION.....	9
CERTIFICATE OF SERVICE.....	10

TABLE OF CITATIONS

<u>Cases</u>	<u>Page</u>
<u>Appelgate v. Barnett Bank of Tallahassee</u> , 377 So.2d 1150, 1152 (Fla. 1979).....	5
<u>City of Daytona Beach v. Palmer</u> , 10 F.L.W. 189 (Fla. April 4, 1985).....	6, 7
<u>Commercial Carrier Corporation v. Indian River County</u> , 371 So.2d 1010 (Fla. 1979).....	2, 8, 9
<u>Cruz v. Metropolitan Dade County</u> , 350 So.2d 533 (Fla. 3d D.C.A. 1977).....	2, 7, 9
<u>DOT v. Neilson</u> , 419 So.2d 1071 (Fla. 1982).....	6
<u>Ide v. City of St. Cloud</u> , 8 So.2d 924 (Fla. 1942).....	2, 7, 8 9
<u>Ingraham v. Dade County School Board</u> , 450 So.2d 847 (Fla. 1984).....	6, 7
<u>McBurnette v. Playground Equipment Corp.</u> , 137 So.2d 563 (Fla. 1962).....	3
<u>Neilsen v. City of Sarasota</u> , 117 So.2d 731 (Fla. 1960).....	3, 7, 8
<u>Pickett v. City of Jacksonville</u> , 20 So.2d 484 (Fla. 1945).....	2, 7, 8 9
<u>Trianon Park Condominium Association, Inc. v. City of Hialeah</u> , 10 F.L.W. 210 (Fla. April 4, 1985).....	6, 7
<u>Waite v. Dade County</u> , 74 So.2d 681 (Fla. 1954).....	9
<u>Winn-Dixie Stores, Inc. v. Goodman</u> , 276 So.2d 465, 466 (Fla. 1972).....	5, 6

Other

Art. V, §3(b)(3), Fla. Const.....	3
-----------------------------------	---

Fla. Stat. § 286.28..... 2, 6, 7
9

Fla. Stat. § 768.28..... 7, 8, 9

PRELIMINARY STATEMENT

Respondents Board of County Commissioners of Citrus County (Board) and Aetna Life & Casualty Company (Aetna) were Defendants in the trial court and were Appellees/Cross-Appellants in the District Court of Appeal. The Petitioner was the Plaintiff/Appellant/Cross-Appellee. The parties will be referred to as Respondents and Petitioner and, alternatively, by name. Reference to the Appendix attached to Petitioner's Brief in Support of Jurisdiction will be indicated by ("A") and the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Respondents accept the Statement of the Case and Facts recited in Petitioner's Brief on Jurisdiction to the extent Petitioner quotes from the instant opinion of the District Court of Appeal. However, Respondents take exception with Petitioner's attempts to recite what "the law now is" in the District Court of Appeal, Fifth District and to the extent Petitioner contends conflict exists.

SUMMARY OF ARGUMENT

The instant decision of the Fifth District Court of Appeal does not directly conflict with the decision of any Florida appellate court on the same question of law. The district court never addressed the issue of whether the Respondent board's decision whether or not to provide lifeguards was a discretionary,

planning-level decision. Rather, the trial court properly made that determination, which ruling remained uncontested until the time of filing of Petitioner's jurisdictional brief. Petitioner's failure to contest this ruling leaves this Court without jurisdiction to determine the merits of this cause.

The instant decision neither conflicts with nor misapplies any Supreme Court precedent relating to the waiver of sovereign immunity. Rather, the district court's decision that the purchase of insurance pursuant to Section 286.28, Florida Statutes does nothing to alter the absolute immunity which attaches to "planning-level" activities of government, comports with existing precedent.

The instant decision does not conflict with any of the decisions cited by Petitioner which relate to the law of sovereign immunity as it existed prior to this Court's decision in Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979). The decisions of Pickett v. City of Jacksonville, 20 So.2d 484 (Fla. 1945); Ide v. City of St. Cloud, 8 So.2d 924 (Fla. 1942); and Cruz v. Metropolitan Dade County, 350 So.2d 533 (Fla. 3d D.C.A. 1977) involved decisions rendered prior to the Commercial Carrier decision and involved rules of law completely different from that involved in the instant case. On that basis, there is no conflict between the instant case and the decisions of Pickett, Ide or Cruz.

QUESTION PRESENTED

WHETHER THE DECISION SOUGHT TO BE REVIEWED EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF ANOTHER DISTRICT

COURT OF APPEAL OR OF THE SUPREME COURT ON THE SAME QUESTION OF LAW.

ARGUMENT

I. DISCRETIONARY CONFLICT JURISDICTION.

It is well settled that this Court has discretionary jurisdiction to review any decision of a District Court of Appeal that--

"...expressly and directly conflicts with a decision of another District Court of Appeal or of the Supreme Court on the same question of law." Art. V, §3(b)(3), Florida Constitution.

The principle situations which justify the invocation of this Court's jurisdiction to review decisions of District Courts of Appeal because of alleged conflicts are (1) the announcement of a rule of law which conflicts with a rule previously announced by the Supreme Court or another District Court of Appeal, or; (2) the application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of by a Florida appellate court. Neilsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960). The former includes those situations in which a district court misapplies precedent by expressly accepting an earlier appellate decision as controlling precedent in a situation materially at variance with the case relied upon. See McBurnette v. Playground Equipment Corp., 137 So.2d 563 (Fla. 1962).

II. THE INSTANT DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY PRIOR FLORIDA APPELLATE DECISION.

Petitioner's contention that conflict jurisdiction exists is based on the mistaken assumptions that--

- (1) "...review of the 'decision' should have been controlled by negligence principles not sovereign immunity theories." (Petitioner's Brief at p. 5).
- (2) "The Fifth District Court of Appeal's stated belief (and resultant conclusion) that any decision regarding how to operate a swimming facility was not waivable..." (Petitioner's Brief at p. 7).
- (3) "...the decision not to provide lifeguards or other supervisory personnel was a negligent/ reasonable care decision and not one having its foundations in sovereign immunity tort law." (Petitioner's brief at p. 8).

and

- (4) "... the District Court concluded the decision not to provide supervision was an immunity problem." (Petitioner's Brief at p. 8).

The district court never determined, concluded or stated a belief that the decision not to provide lifeguards or other supervisory personnel was a discretionary, planning- level decision immune from tort liability. The district court never even addressed that issue, but rather, accepted as correct, as it is bound to do, the trial court's uncontested finding that this decision was a "discretionary, planning-level decision." (A-25).

"Because that issue is not before us, we do not address the correctness of that ruling here, but we accept it as correct and begin our analysis from that point." (A-25 n.1). See also A-15 n.1.

"In appellate proceedings the decision of

a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error." Appelgate v. Barnett Bank of Tallahassee, 377 So.2d 1150, 1152 (Fla. 1979).

The instant decision announces no rule of law relating to the operation of a swimming facility or to the determination of whether or not to provide supervision. The instant decision then, does not and cannot conflict with any of the decisions cited by Petitioner.

Moreover, Petitioner acted at her own peril in failing to appeal or otherwise contest the trial court's ruling that she now so strenuously argues provides the basis for conflict jurisdiction. Because the issue now contested was considered only by the trial court and not raised before the district court, there is no decision by the district court with which to find conflict. Winn-Dixie Stores, Inc. v. Goodman, 276 So.2d 465, 466 (Fla. 1972)

As in the instant case, the petitioner, Winn-Dixie, raised an issue in the trial court which was not raised on appeal to the district court. That issue, the failure to join an indispensable party, was decided adversely to Winn-Dixie at the trial court level. Despite that ruling, the trial court found for Winn-Dixie, which finding was appealed by Goodman. In that appeal, Winn-Dixie failed to raise the issue of failure to join an indispensable party on cross-appeal or otherwise. When Winn-Dixie attempted to invoke conflict jurisdiction based on the issue of failure to join an indispensable party, this Court stated --

"There is no decision by the district court

of appeal as to joinder of indispensable parties with which to find conflict....This court is without jurisdiction under the Florida Constitution to consider the merits of the cause." Id. at 466.

Petitioner, in the instant case, failed to contest, both in her appeal and response to the Cross-Appeal, the trial court's finding that the decision of the Respondent Board was discretionary and not subject to tort liability. This Court is without jurisdiction to determine the merits of the instant cause.

III. THE DISTRICT COURT DID NOT MISAPPLY PRECEDENT SO AS TO CREATE CONFLICT JURISDICTION.

The instant decision does not misapply the precedents set forth in Ingraham v. Dade County School Board, 450 So.2d 847 (Fla. 1984), DOT v. Neilson, 419 So.2d 1071 (1982), City of Daytona Beach v. Palmer, 10 F.L.W. 189 (Fla. April 4, 1985) or Trianon Park Condominium Association, Inc. v. City of Hialeah, 10 F.L.W. 210 (Fla. April 4, 1985). Rather, the instant decision comports with those decisions.

Specifically, the district court stated that §286.28, Florida Statutes (1983) "remains in effect as part of the overall scheme of the Legislature relating to the waiver of sovereign immunity." (A-25, 26). Additionally, based on the trial court's uncontested ruling that the decision whether or not to provide lifeguards was a discretionary, planning-level decision, the district court properly applied "sovereign immunity theories" and concluded that "nothing in §286.28...overcomes or alters the absolute

immunity which attaches to 'planning-level' activities of government." A-26. The apparent basis for this proper conclusion is that §286.28, Florida Statutes, cannot provide for a greater waiver than §768.28, Florida Statutes, the statute which incorporates it. This conclusion neither conflicts with nor misapplies the precedent set forth in the decisions of City of Daytona Beach v. Palmer, Trianon, Neilson or Ingraham.

IV. THE INSTANT DECISION ANNOUNCES NO RULE OF LAW WHICH CONFLICTS WITH A RULE PREVIOUSLY ANNOUNCED BY ANOTHER FLORIDA APPELLATE COURT.

Petitioner's reliance on the decisions of Pickett v. City of Jacksonville, 20 So.2d 484 (Fla. 1945); Ide v. City of St. Cloud, 8 So.2d 1942; and Cruz v. Metropolitan Dade County, 350 So.2d 533 (Fla. 3d D.C.A. 1977) as providing the basis for conflict jurisdiction is completely misplaced. A careful analysis of this Court's decisions in Ide and Pickett indicates that those decisions were rendered based upon the status of the law relating to sovereign immunity or the liability of municipal corporations as it existed on the dates of those decisions. That law was--

"...to hold municipalities liable for negligence in the maintenance and operation of parks, bathing pools [and] bathing beaches when the municipality is performing a local function for its people, and the liability therefor usually is on the same basis as a private person or corporation. Pickett v. City of Jacksonville, supra, at 486.

"...[W]e think the better view is that where a city...performs a local function for its people it is held to the same degree of care as private persons." Ide v. City of

St. Cloud, supra at 925.

It became apparent to this Court in Commercial Carrier that the enactment of §768.28, Florida Statutes, constituted a total revision of the area of law relating to sovereign immunity.

"It is our task today to determine the scope of the waiver of sovereign immunity resulting from the enactment of...section 768.28, Florida Statutes (1975)." Commercial Carrier Corporation v. Indian River County, supra at 1012.

"[W]e cannot attribute to the Legislature the intent to have codified the rules of municipal sovereign immunity through enactment of section 768.28, Florida Statutes (1975)... . Id. at 1016.

Any decisions rendered in which the cause of action accrued prior to the effective date of §768.28, Florida Statutes, and which relate to the law of municipal sovereign immunity applicable to the state, its agencies and subdivisions, dealt with a rule of law completely different from the rule of law which came into effect after this Court's decision in Commercial Carrier. Where as here, the rule of law applied in the instant case differs from the rule of law applied in those decisions cited as creating conflict, there is a lack of jurisdictional conflict. Neilsen v. City of Sarasota, supra, at 734-735.

This Court's decision in Ide and Pickett, both of which preexisted Commercial Carrier, involved a completely different rule of law than that applied by the trial court and accepted as correct by the district court in the instant case. There can be no conflict, first, because the contested decision was rendered solely by the trial court and second, because the decision

involved a completely different rule of law than that applied in Ide and Pickett.

The same arguments stated above apply to the decision in Cruz, in which the Third District Court of Appeal, relying upon Waite v. Dade County, 74 So.2d 681 (Fla. 1954), determined that the county, as a political subdivision of the State of Florida, was immune from suit. Cruz v. Metropolitan Dade County, *supra*, at 534. There, the district court specifically noted that the accident with which they were concerned occurred prior to the effective date of § 768.28, Florida Statutes (1975).

It is even more apparent that the district court's decision that the purchase of insurance pursuant to § 286.28, Florida Statutes, did not constitute a waiver of sovereign immunity, is based on a rule of law completely different from that announced in Ide and Pickett. Furthermore, because the decisions in Ide and Pickett predicate liability upon the "governmental-proprietary" analysis, those decisions have no continuing vitality after the effective date of §768.28, Florida Statutes Commercial Carrier Corp. v. Indian River County, *supra*, at 1016.

CONCLUSION

Respondents submit, based on the foregoing arguments set forth herein, that the instant decision does not expressly and directly conflict with any of the decisions cited by Petitioner on the same question of law. This Court has no jurisdiction to determine the merits of the cause and the petition for discre-

tionary jurisdiction should be denied.

Respectfully submitted,

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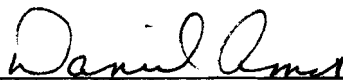
Attorneys for Respondents

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a copy of Respondents' Brief in Opposition of Jurisdiction has been served by mail, this 1st day of July, 1985, upon:

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