IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,074

GLORIA JEAN AVALLONE,

Petitioner,

vs.

BOARD OF COUNTY COMMISSIONERS
OF CITRUS COUNTY, et al,

Respondents.

PETITIONER'S BRIEF IN SUPPORT OF JURISDICTION

(CONFLICT CERTIORARI)

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and
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TOPICAL INDEX

LIST OF CITATIONS AND AUTHORITIES

I.

INTRODUCTION

The petitioner, Gloria Jean Avallone, was the plaintiff in the trial court and was the appellant/cross-appellee in the District Court of Appeal, Fifth District. The respondents were the defendants/appellees/cross-appellants. In this brief of petitioner on jurisdiction the parties will be referred to as the plaintiff and the defendants and, alternatively, by name. The symbol "A" will refer to the petitioner's rule-required appendix which accompanies this brief. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

JURISDICTIONAL STATEMENT

The instant cause is in direct, express and irreconcilable conflict with the following decisions:

A. IDE v. CITY OF SAINT CLOUD, 8 So. 2d 924 (Fla. 1942); PICKETT v. CITY OF JACKSONVILLE, 20 So. 2d 484 (Fla. 1945) and CRUZ v. METROPOLITAN DADE COUNTY, 350 So. 2d 533 (Fla. App. 3rd 1977): which cases hold that where an entity--public or private--operates a park/swimming facility, there is an absolute duty to exercise due care for the safety of those invited on the premises. The Fifth District opined herein that irrespective of a decision to provide and/or operate a park/swimming facility, immunity still attaches for those decisions regarding how to (safely) operate it;

B. INGRAHAM v. DADE COUNTY SCHOOL BOARD, 450 So. 2d 847 (Fla. 1984) and DEPARTMENT OF TRANSPORTATION v. NEILSON, 419 So. 2d 1071 (Fla. 1982): which cases recognize that absolute immunity attaches only to "policy making, planning or judgmental governmental functions." The Fifth District's reliance on these two opinions misapplies precedent; and

C. CITY OF DAYTONA BEACH v. PALMER, 10 F.L.W. 189, Florida Supreme Court Case No. 64,773, opinion filed April 4, 1985, and TRIANON PARK CONDOMINIUM ASSOCIATION, INC. v. CITY OF HIALEAH, 10 F.L.W. 210, Florida Supreme Court Case No. 63,115, opinion filed April 4, 1985: which cases recognize that where there existed a common law tort prior to waiver of immunity, such tort is actionable under § 768.28, Florida Statutes (1983). The Fifth District has now held that negligent operation of a swimming facility--long recognized as actionable--is a "proprietary" activity, hence, immunity for same cannot be waived under § 768.28, Florida Statutes, or § 286.28, Florida Statutes.

III.

STATEMENT OF THE CASE AND FACTS

Those facts relevant to a determination of the issue of jurisdiction may be learned from the opinion herein sought to be reviewed:

* * *

"We withdraw the opinion originally issued in this case and substitute the following in its place.

"Plaintiff's appeal is from an adverse summary judgment in this personal injury suit. We conclude that the trial court reached the correct result, so we affirm.

"Plaintiff was injured when she was pushed from a dock at a public park and swimming area owned and operated by Citrus County. The principal basis of her claim against the county was the failure of the county to provide supervisory personnel at the park despite its knowledge that children frequenting the park would roughhouse and play on the dock and push visitors to the dock into the water. The trial court found that:

> "'1. That the Board's decision whether or not to provide lifeguards or other supervisory personnel for the Blue Bird Springs facility was a discretionary, planning-level decision for which, under the doctrine of sovereign immunity, it is immune from tort liability.
>
> "'2. That the Board's purchase of insurance pursuant to Fla. Stat. § 286.28 constituted a waiver of sovereign immunity to the extent of the Board's liability insurance policy limits.'

The trial court then found that the plaintiff's injury was caused by an independent intervening efficient cause, so that any act or omission of the Board of County Commissioners did not constitute the proximate cause of plaintiff's injuries, and for this reason entered the summary judgment in favor of defendants. In the light of our determination that the county is immune from suit, we need not address the correctness of this determination.

"The appellants do not contest the trial court's finding that the decision of the Board to provide or not provide supervisory personnel at the park was a 'discretionary, planning-level decision.' In its cross-appeal, the Board and its insurance carrier contend that absolute immunity attaches for planning-level activities of

> government, and that the immunity for such planning-level activity is not altered or affected by the fact that the Board has purchased liability insurance. We are now compelled to the conclusion that the Board is correct." (A. 25,26)
>
> * * *

As should by now be apparent to this Court, in the District Court of Appeal, Fifth District, the law now is:

A. Any government entity which chooses to operate a swimming facility can do so with absolute impunity and with no regard for the safety or well-being of invitees because the decision to not provide supervision, lifeguards, etc. (the decision regarding "reasonable care") is a proprietary one while in the rest of the state:

> "The authority to maintain a park carries with it authority to maintain a bathing beach. . . Those who maintain the latter are under a duty to exercise due care for the safety of those invited there. . ." 8 So. 2d at page 925

B. The operation of a swimming facility is a proprietary function not subject to § 768.28 or § 286.28 waiver while in the rest of the state, the operation of a swimming facility has nothing to do with proprietary functions and the failure to operate same safely imposes liability.

Conflict exists.

IV.

SUMMARY OF ARGUMENT

The plaintiff would suggest to this Court the opinion herein sought to be reviewed is in conflict with the cases

cited, supra. The District Court of Appeal, Fifth District has misapplied precedent and the opinion herein sought to be reviewed sets a dangerous precedent. The decision to operate (or not operate) a swimming facility is/was the only "judgmental decision" herein made. Once it was decided to operate a swimming facility, the defendant was lawfully bound to operate it safely. In this case the District Court of Appeal, Fifth District, determined there existed no significance to the defendant's decision to operate the swimming facility. The court found great significance to the fact that the defendant chose not to provide lifeguards or supervision for invitees on the premises. The decision not to provide lifeguards/supervision was neither a "governmental" decision nor a "judgmental/planning" decision. It was a decision made in the course of operating the swimming facility. Hence, review of the "decision" should have been controlled by negligence principles not sovereign immunity theories.

For the specific reasons to be advanced, infra, the plaintiff urges this Court to exercise its discretion and to accept this case for review.

V.

QUESTION PRESENTED

WHETHER THE DECISION HEREIN SOUGHT TO BE REVIEWED IS IN CONFLICT WITH THE OPINIONS CITED, SUPRA.

VI.

ARGUMENT

A.

APPLICABLE JURISDICTION PRINCIPLES

It is too well settled to need detailed citation of

authority that this Court has jurisdiction to review the decisions of District Courts of Appeal on direct conflict ground to resolve embarrassing conflicts between decisions and that jurisdiction may be invoked where a District Court of Appeal: (1) announces a rule of law which conflicts with a rule previously announced by another Florida appellate court; or (2) applies 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; or (3) misapplies precedent; or (4) applies and/or refuses to apply applicable law to a case under consideration. See: Article V, § 3, Florida Constitution; WALE v. BARNES, 278 So. 2d 601 (Fla. 1973); BELCHER v. BELCHER, 271 So. 2d 7 (Fla. 1972); and NEILSEN v. CITY OF SARASOTA, 177 So. 2d 731 (Fla. 1960).

B.

THE DECISION HEREIN SOUGHT TO BE REVIEWED IS IN DIRECT CONFLICT WITH THE CASES CITED, SUPRA.

The plaintiff suggests that for several distinct and obvious reasons, conflict exists.

First, the decisions rendered in INGRAHAM, NIELSON, and most recently in PALMER, supra, and TRIANON PARK, supra, leave little room for interpretation and, hence, have clearly been misapplied to the facts and circumstances of this case. The cases relied upon recognize that only "planning" or "judgmental governmental functions" retain absolute immunity! As noted by this Court in TRIANON PARK, supra:

> "In summary, we first emphasize that § 768.28, Florida Statutes (1975), which waived sovereign immunity, created no new causes of

> action, but merely eliminated the immunity which prevented recovery for existing common law torts committed by the government. . ."

The decision to operate (or not operate) a swimming facility was (arguably) the only "judgmental decision" made in this case. Once the defendant chose to operate said facility, it was lawfully bound to operate it safely. This is the thrust of IDE, supra, PICKETT, supra, and CRUZ, supra. 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 (under either § 768.28 or § 286.28) is (both wrong and) in conflict with the decisions herein cited.

Indeed, even the Fifth District's statement:

> "The appellants do not contest the trial court's finding that the decision of the Board to provide or not to provide supervisory personnel at the park was a 'discretionary, planning-level decision'."

missed not only the thrust of the plaintiff's argument, but the significance of the holdings of the cases cited in support of the argument. At the time the trial court ruled on the defendant's motion for summary judgment, it "found" waiver of sovereign immunity pursuant to § 286.28, Florida Statutes (A. 10). The fact that there was "no challenge" to the trial court's "finding" that the Board's decision not to supply supervision was "judgmental" is (and was) of no import. At all times relevant, the plaintiff's "challenge" was (and is) addressed not to discretionary, planning decisions and not to governmental or operational decisions, but to negligence!

Under IDE, supra, and PICKETT, supra, operation of a swimming facility must be done safely, and this is so whether it be operated by a private or public entity. Hence, the decision not to provide lifeguards or other supervisory personnel was a negligence/reasonable care decision and not one having its foundations in sovereign immunity tort law. The fact of the matter remains: once a decision was made to operate the swimming facility, immunity was waived under either § 768.28 or § 286.28, Florida Statutes. District Court of Appeal, Fifth District, resolution of the case by application of "immunity concepts" creates conflict with PALMER, supra, and TRIANON, supra. Negligence in the operation of a swimming facility is now, and has always been, a common law tort. One does not mix legal maxims attendant with either "planning level decisions" or "operational level decisions" with those controlling negligence concepts. At least, one should not. Indeed, once the waiver of immunity occurs, inquiry should turn to the concepts found within tort principles. The District Court of Appeal, Fifth District, placed the proverbial cart before the horse. Ignoring how the swimming facility came into existence, the District Court concluded the decision not to provide supervision was an immunity problem. In truth and in fact, it was a negligence/no-negligence situation. At that point in time, immunity had already been dissipated.

The plaintiff suggests to this Court, with all due respect to both the Fifth District Court of Appeal and the defendant, Citrus County, neither one can be allowed to have

it "both ways." If § 286.28, Florida Statutes, is to be construed as being "part of" § 768.28 (as the District Court of Appeal, Fifth District, held), then immunity was waived pursuant to § 768.28 and under IDE, supra, PICKETT, supra, and CRUZ, supra, the injury sustained by the plaintiff was actionable and sovereign immunity was not a concern.

If, however, § 286.28, Florida Statutes, is not to be construed as being "part of" § 768.28, then this case is again controlled by IDE, supra, PICKETT, supra, and CRUZ, supra--immunity was waived as soon as insurance was purchased to cover the activities of running a swimming facility. Hence, this case should not have been decided by District Court of Appeal, Fifth District's reliance upon guardrail cases, bridge cases, car cases and building inspector cases. In this swimming facility case the District Court misapplied precedent and the conflict is apparent!

VI.

CONCLUSION

It is respectfully submitted that for the reasons set forth herein, the decision sought to be reviewed is in express and direct conflict with the decisions cited. This Court should enter its order accepting jurisdiction of this cause and enter an order setting this cause for consideration on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Brief of Petitioner on Jurisdiction was mailed to the following counsel of record this 31st day of May, 1985.

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