O/A 3-4-86

32

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 ON THE MERITS

HORTON, PERSE & GINSBERG
and
NANCE, CACCIATORE & SISSERSON
Attorneys for Petitioner
410 Concord Building
66 West Flagler Street
Miami, Florida 33130
(305) 358-0427

TABLE OF CONTENTS

INDEX OF CITATIONS AND AUTHORITIES

CASES (continued)

OTHER 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, BOARD OF COUNTY COMMISSIONERS OF CITRUS COUNTY and its liability insurance carrier, AETNA LIFE & CASUALTY COMPANY, a foreign corporation, were the defendants/appellees/cross-appellants. In this brief of petitioner on the merits the parties will be referred to as the plaintiff and the defendant(s) and, where necessary for clarification, by name. The symbols "R" and "A" will refer to the record on appeal and the appendix which accompanied petitioner's brief on jurisdiction, respectively. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

STATEMENT OF THE CASE AND FACTS

Plaintiff appealed an adverse summary final judgment (R. 512, 513, 514). The defendant cross-appealed (R. 516). The facts of this case, viewed in a light most favorable to the plaintiff, reflect the following.

A.

THE SWIMMING HOLE AND ITS BACKGROUND

There exists in Citrus County a 3-acre park known as Bluebird Springs (R. 146). The park is owned and operated by the County (R. 144-149). The park has both picnic and

swimming facilities with a spring-fed lake and a dock provided for public use (R. 148-149).

The park is distinguished by the fact that no provision was made for any people to operate the park during its hours of operation (R. 151, 152). In fact, according to the past and present commissioners of Citrus County, no consideration was ever given by them to having lifeguards or some type of supervision provided to the swimming area (R.358).

The record before this Court further reflects that there was no policing of the defendant's parks at any time relevant herein (R. 333, 334, 360).

The record before this Court further reflects that the defendant, at all times relevant herein, well knew that roughhousing, pushing, shoving and horseplay on dock areas in an unsupervised beach area constituted a safety hazard (R. 233, 241). An ordinance was passed to prohibit such conduct (R. 327, 328, 359). Although the ordinance was passed, nothing was done to enforce it. Stated another way, the record before this Court affirmatively demonstrates that although the defendant owned and operated premises open to the public, it did nothing to stay advised of dangerous condition on the premises, it did nothing to police the premises to eliminate dangerous conditions, it did nothing to make itself aware of dangerous conditions on the premises and it took no steps to protect the general public from any dangerous conditions (R. 90, 91, 151, 152, 161, 162, 333,

358, 359, 360).

With no one policing the park, enforcing the county ordinance, reporting dangerous activity, etc., it is not surprising that the record further reflects that for several years prior to the incident involved herein, roughhousing on the dock occurred on a daily basis. In fact, the record before this Court reflects:

A. While people were not supposed to play or participate in games, sports or activity which endangered the life, limb or property of other people (R. 298, 299); and

B. Even though the County had the responsibility to see that its parks were operated in a safe manner (R. 340, 343, 344); and

C. Even though the County recognized that roughhousing, pushing and shoving on dock areas constituted a safety hazard (R. 233, 241); and

D. Although County Ordinance 77-18 was in effect at all times relevant and the County knew pushing people off docks "could be a dangerous activity" (R. 359-362), and that supervision is a very important factor in controlling roughhousing (R. 364);

nothing was done by the defendant to stop, control, diminish, eliminate or curtail the practice of playing "king of the dock"--an activity wherein people would constantly get up on

the dock and push people off the dock until someone came and pushed the "king" off of the dock, the activity continuing without interruption--said activity existing for some 2-3 years prior to the incident herein sued upon (R. 386, 387, 433, 434). In fact, "little kids" and "big kids" were aware "king of the dock" was occurring on a regular basis (R. 386, 387, 450) as no lifeguards were present, no county personnel were ever present, no signs were present directing "no roughhousing", nothing, in fact, to control, alert, warn or protect! (R. 386-388, 433450).

B.

THE INJURY AND THE LAWSUIT

On June 29, 1980 the plaintiff was lawfully using the facilities provided at the subject park. Sometime during the midday the plaintiff either: (1) walked out to the dock to call to her friends and was, at that time, physically hoisted onto the shoulders of an individual by the name of "Jeff" (R. 101, 102) or (2) was physically hoisted onto the shoulders of "Jeff", who then carried the plaintiff out to the dock (R. 391, 392)--when someone pushed Jeff from behind. As a result of the pushing and shoving the plaintiff was caused to fall, strike the dock and suffer severe personal injury (R. 109, 110, 118, 119, 120).

The plaintiff sued the defendant (R. 1-5) and alleged, in essence and pertinent part:

* * *

"5. That on or about June 29, 1980, the plaintiff, GLORIA JEAN AVALLONE, was upon the premises known as Bluebird Springs, a facility operated by the BOARD OF COUNTY COMMISSIONERS OF CITRUS COUNTY, which was open to the public, as a guest making use of the facilities, and as such the plaintiff, GLORIA JEAN AVALLONE, was a business invitee upon the premises of the defendant, BOARD OF COUNTY COMMISSIONERS OF CITRUS COUNTY.

"6. That the plaintiff, GLORIA JEAN AVALLONE, on or about June 29, 1980, while a business invitee upon the premises of the defendant, BOARD OF COUNTY COMMISSIONERS OF CITRUS COUNTY, was caused to fall while on the dock located on such premises. Plaintiff was caused to fall when a group of small children who had been playing and roughhousing on the dock for an extended period of time pushed the individual who was carrying the plaintiff onto the dock, causing her to fall and strike her head on the dock. The plaintiff's ultimate fall and striking of her head on the dock was a direct and proximate result of the negligence and carelessness of the defendant, BOARD OF COUNTY COMMISSIONERS OF CITRUS COUNTY, acting by and through its agents, servant and employees in failing to provide lifeguards or other supervisory personnel to control the actions of children and other patrons of the facilities on the dock when the defendant knew, or by the exercise of reasonable care should have known, that unsupervised children on a dock facility would roughhouse and play and push and shove each other and others while lawfully upon the said premises, thereby exposing all the persons on the dock in general, and the plaintiff, GLORIA JEAN AVALLONE, in particular, to great personal injury and harm." (R. 2,3).

* * *

The defendant answered the plaintiff's complaint (R. 71, 72) and ultimately moved for summary final judgment (R. 220, 441, 442):

* * *

"1. The Board of County Commissioners of Citrus County's decision not to provide lifeguards or other supervisory personnel at the Blue Bird Springs facility was a discretionary decision for which there

exists no liability in tort. COMMERCIAL CARRIER CORPORATION v. INDIAN RIVER COUNTY, 371 So. 2d 1010 (Fla. 1979).

"2. Based on the pleadings, answers to Interrogatories, depositions and Memorandum of Law filed herein, there exists no issue as to any material fact and Defendants are entitled to a summary judgment as a matter of law."

* * *

The trial court agreed with the plaintiff's argument that there existed no immunity for the defendant--defendant's immunity had been waived--but granted "liability" summary final judgment to the defendant concluding (as a matter of fact?):

* * *

". . .that the actions of Jeff Grubb, in carrying the plaintiff onto the dock at the Blue Bird Springs facility, constituted a separate, efficient, independent, unforeseeable, intervening cause of the plaintiff's injuries and damages and, as such, the acts or omissions of the Board did not constitute the proximate cause of the plaintiff's injuries and damages. . ." (R. 512, 513).

* * *

C.

APPEAL TO THE DISTRICT COURT

Plaintiff's appeal to the District Court of Appeal, Fifth District, was joined by the defendant's cross-appeal. On February 21, 1985, the District Court reversed the summary final judgment, finding the existence of genuine issues of material fact as pertains to both liability and proximate cause (A. 13, 14). As to the defendant's cross-appeal, the District Court affirmed trial court ruling that "immunity had been waived."

The defendant filed a Motion for Clarification and Rehearing (A. 18-23). The District Court granted the motion, vacated its opinion dated February 21, 1985 and entered an entirely new opinion:

1. Not reaching the question of the correctness vel non of the "liability--proximate cause" issues; instead,

2. Reversing that portion of the summary final judgment cross-appealed by the defendant--See: AVALLONE v. BOARD OF COUNTY COMMISSIONERS OF CITRUS COUNTY, 467 So. 2d 826 (Fla.App. 5th 1985)--holding (as a matter of law) that the defendant's conduct was not actionable.

On October 21, 1985 this Court entered its "Order Accepting Jurisdiction and Setting Oral Argument." This brief follows.

The plaintiff reserves the right to argue the significance of the above facts and other relevant record facts in the argument portion of this brief.

III.

QUESTIONS PRESENTED

A.

WHETHER, ON THIS RECORD, THE TRIAL COURT ERRED IN FINDING THE NON-EXISTENCE OF GENUINE ISSUES OF MATERIAL FACT AND COMMITTED REVERSIBLE ERROR IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY FINAL JUDGMENT.

B.

WHETHER THE TRIAL COURT WAS CORRECT IN ITS CONCLUSION--DEFENDANT'S SOVEREIGN IMMUNITY WAS WAIVED--THE PLAINTIFF'S CAUSE OF ACTION WAS ACTIONABLE.

IV.

SUMMARY OF ARGUMENT

In this brief the plaintiffs will demonstrate to this Court that the trial court erred in finding the non-existence of genuine issues of material fact and committed reversible error in granting the defendant's motion for summary final judgment. Because it has long been recognized in the State of Florida that the authority to maintain a park carries with it the authority to maintain a bathing beach, and those who maintain the latter are under a duty to exercise due care for the safety of those invited there [IDE v. CITY OF ST. CLOUD, 8 So. 2d 924 (Fla. 1942)], it may successfully be argued that there has existed, at all times relevant herein, a common law duty (of reasonable care) owed by the subject defendant to this plaintiff. As such, the recent opinions rendered by this Court demonstrate the incorrectness of District Court ruling. See, for example: TRIANON PARKS CONDOMINIUM ASSOCIATION, INC. v. CITY OF HIALEAH, 468 So. 2d 912 (Fla. 1985), which case emphasized that § 768.28, Florida Statutes (1975)--which statute 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. Hence, whether one chooses to analyze the subject issues pursuant to § 768.28, Florida Statutes (1975) or § 286.28, Florida Statutes, it is abundantly clear:

A. Because there existed a common law duty, waiver of sovereign immunity rendered defendant's (alleged) negligent conduct actionable;

B. As a matter of law, waiver of sovereign immunity occurred and because there existed a common law duty owed by the defendant to the subject plaintiff, trial court ruling was correct and District Court emphasis on the reasons for the ruling was patently incorrect.

Under traditional principles of both Florida summary judgment law and negligence concepts, genuine issues of material fact abound throughout the subject record and the instant cause should be remanded to the trial court with directions to hold a jury trial on all issues.

V.

ARGUMENT

A.

PRELIMINARY MATTERS AND RELIEF REQUESTED

The plaintiff would suggest to this Court the opinion herein sought to be reviewed is erroneous and for the reasons to be advanced, infra, this Court should quash the opinion--AVALLONE v. BOARD OF COUNTY COMMISSIONERS OF CITRUS COUNTY, 467 So. 2d 826 (Fla.App.5th 1985)--rendered by the District Court. In so doing this Court should hold:

1. The result reached by the trial court was/is correct as to its ruling, to wit: The defendant's purchase of insurance removed any "immunity" that the defendant may have possessed regarding liability for injuries sustained by invitees at the subject park;

2. The removal of the defendant's immunity (through the purchase of insurance or otherwise) rendered actionable plaintiff's personal injury cause of action as the common law in the State of Florida has long recognized that the operation of a swimming facility must be done "safely"/"with reasonable care" WHETHER IT BE OPERATED BY A PRIVATE OR PUBLIC ENTITY;

3. There exist genuine issues of material fact as pertain to the issue of liability [the District Court itself concluded this prior to the vacating of its first opinion--the second opinion concluding the issue need not then be reached, AVALLONE, supra, 467 So. 2d at p. 827]. This Court should so

find and remand for jury resolution of all fact issues. See: BOULD v. TOUCHETTE, 349 So. 2d 1181 (Fla. 1977), wherein this Court recognized:

> "If conflict appears and this Court acquires jurisdiction, we then proceed to consider the entire cause on the merits." 349 So. 2d at p. 1183.

In accord: TYUS v. APALACHIACOLA NORTHERN RAILROAD COMPANY, 130 So. 2d 580 (Fla. 1961) and RUPP v. JACKSON, 238 So. 2d 86 (Fla. 1970).

Lastly, this plaintiff would note the incorrectness of District Court belief that the "end result" could have been affected because the appellant (plaintiff below) did 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'." AVALLONE, supra, 467 So. 2d at p. 827.

As the record before this Court shows:

1. The plaintiff's (trial) memorandum of law in opposition to the defendant's motion for summary final judgment (R. 503-511) urged the trial court to find that the defendant's conduct in maintaining the subject swimming facility was, at all times pertinent, operational and not "proprietary" (R. 506, 507). The issue/argument advanced by the plaintiff was presented to the trial court. Indeed, the argument advanced constituted the main thrust of the plaintiff's contentions;

2. The trial court ruled for the plaintiff as to the issue concerning "waiver of immunity." Hence, this plaintiff was under no legal requirement to challenge "by appeal" trial

court reasoning! The trial court, as to this plaintiff, reached the right result; See, for example: HOLL v. FLORIDA BOARD OF PHARMACY, 177 So. 2d 833 (Fla. 1965), wherein this Court, in discussing the responsibilities of a prevailing party --noted:

> ". . .He is not required to file assignments that the lower court has erred when his position is that the lower court was correct and was not in error in what it did, even if in error as to its reasoning." 177 So. 2d 835.

In accord: CERNIGLIA v. C & D FARMS, INC., 203 So. 2d 1 (Fla. 1967); IN RE: ESTATE OF YOHN, 238 So. 2d 290 (Fla. 1970); FIRESTONE v. FIRESTONE, 263 So. 2d 223 (Fla. 1972), wherein this Court stated:

> ". . .A trial court's judgment, even if insufficient in its findings, should be affirmed if the record as a whole discloses any reasonable basis, reason or ground on which the judgment can be supported. In other words, the findings of the lower court are not necessarily binding and controlling on appeal, and if these findings are grounded on an erroneous theory, the judgment may yet be affirmed where appellate review discloses other theories to support it." 263 So. 2d at p. 225.

3. The District Court did, in its first opinion, affirm the trial court's result on the issue of waiver of sovereign immunity. Once again the plaintiff received the benefit of a court's ruling--irrespective of that court's reasoning;

4. Upon motion for clarification and rehearing granted, the District Court vacated its first opinion (plaintiff having no disagreement with the result--it was favorable

to the plaintiff's interests) and substituted for it an opinion which concluded that since the trial court reached the "right result", affirmance was required. The predicate for that result was the District Court's belief that a successful litigant must "seek review" of a favorable result even if the reasoning "given" is/was legally faulty. This is simply not the law in the State of Florida and, in addition, since the opinion substituted arose from the granting of a rehearing, there was little (if anything) that this plaintiff could do but what she did do, to wit: invoke this Court's jurisdiction.

At all times pertinent this plaintiff argued that the defendant's conduct--the alleged negligence--was actionable because:

1. There existed in the defendant a common law duty; and

2. Pursuant to § 286.28, Florida Statutes (formerly § 455.06, Florida Statutes), defendant's purchase of insurance waived its sovereign immunity, rendering actionable a breach of duty arising from the defendant's maintenance of a swimming facility, which negligence allegedly caused this plaintiff to suffer injuries.

Since, at all times pertinent this plaintiff urged that the defendant's activities were "operational" and that (irrespective of methodology) immunity had been waived, the opinion of the District Court of Appeal, Fifth District should be quashed, the summary final judgment appealed should be reversed

and this case should be remanded for a jury trial on all negligence issues.

B.

ON THIS RECORD, THE TRIAL COURT ERRED IN FINDING THE NON-EXISTENCE OF GENUINE ISSUES OF MATERIAL FACT AND COMMITTED REVERSIBLE ERROR IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY FINAL JUDGMENT.

The initial issue in any negligence action is whether the injury resulted from the defendant's violation of a legal duty owed to the plaintiff. NAVAJO CIRCLE, INC. v. DEVELOPMENT CONCEPTS CORPORATION, 373 So. 2d 689 (Fla.App. 2d 1979). It is also well settled that negligence may flow from an act of omission as well as commission. C.A.RUDISILL v. TAXICABS OF TAMPA, 147 So. 2d 180 (Fla.App.2d 1962).

The plaintiff, as an invitee lawfully on the defendant's premises, was owed a duty of reasonable care. See, generally: WOOD v. CAMP, 284 So. 2d 691 (Fla. 1973), and cases cited therein.

In regard to the scope and extent of the duty owed to the plaintiff by the defendant, the cases of IDE v. CITY OF ST. CLOUD, 8 So. 2d 924 (Fla. 1942) and PICKETT v. CITY OF JACKSONVILLE, 20 So. 2d 484 (Fla. 1945) are pertinent.

In IDE v. CITY OF ST. CLOUD, supra, it was alleged in the plaintiff's complaint that the defendant maintained a bathing beach outside the city limits and that, for some time, the City had knowingly allowed a deep hole out in the lake to remain hidden and unguarded. The plaintiff further alleged that the

City had invited the general public on the premises and, in response to the invitation, the plaintiff's husband and minor son utilized the facilities offered and were drowned by reason of the City's alleged negligence. This Court reversed the trial court's dismissal of the plaintiff's complaint. In so doing this Court noted that since the City had the power to maintain a park and perform a function for its people, it should be held to the same degree of care as a private person:

> "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 p. 925.

In PICKETT v. CITY OF JACKSONVILLE, supra, the plaintiff sued the City of Jacksonville, a municipal corporation, for the death of the plaintiff's son who drowned while swimming in a pool owned and operated by the defendant. Judgment was initially entered for the defendant and the plaintiff appealed. The plaintiff's complaint alleged that the decedent was an invitee on the premises owned and operated by the defendant and that the decedent had been lawfully using the pool. The plaintiff alleged that the defendant was negligent in its failure to provide a sufficient number of competent attendants about the pool. Basically, the plaintiff's complaint alleged that the defendant was negligent in its supervision of the premises. In addressing the allegations of negligence, and in ultimately reversing the order dismissing the plaintiff's complaint, this Court noted:

> "One who maintains a public resort is required by law to keep it in a reasonably safe condition for those who properly frequent the place. Where the public is invited to attend a resort, it is the duty of the one who so invites to exercise all proper precaution, skill and care commensurate with the circumstances to put and maintain the place, and every part of it, in a reasonably safe condition for the uses to which it may rightly be devoted. . ." 20 So. 2d at p. 485.

Although this Court discussed numerous aspects of the negligence charged, it specifically noted:

> "The question of supervision often arises in connection with the operation of swimming pools and bathing resorts. In the ordinary case, due care requires the presence of attendants or guards in number reasonably sufficient for the protection of bathers. Even though a guard be in attendance, his inattention may furnish ground of recovery.
>
> * * *
>
> "ADEQUATE SUPERVISION INCLUDES PREVENTION OF BOISTEROUS CONDUCT ON THE PART OF PATRONS." 20 So. 2d at p. 487.

Cf. CRUZ v. METROPOLITAN DADE COUNTY, 350 So. 2d 533 (Fla.App.3d 1977), wherein the District Court of Appeal, Third District, noted that a County had no duty to supervise swimming in an area which was not designated as a public swimming area! It would appear that the opinion in CRUZ, supra, supports the principles of law found in IDE, supra, and PICKETT, supra, to wit: a duty to supervise swimming exists where a County designates an area as a public swimming area.

In this case the conduct complained of--the "dangerous condition"--existed for some two, three years prior to June

29, 1980. That genuine issues of material fact exist concerning whether the condition should have been discovered and corrected by the defendant within that period of time is too obvious to need detailed citation of authority. See: SCHMIDT v. BOWL AMERICA, FLORIDA, INC., 358 So. 2d 1385 (Fla.App.4th 1978) and cases cited therein. Compare: GAIDYMOWICZ v. WINN-DIXIE STORES, INC., 371 So. 2d 212 (Fla.App.3d 1979), [involving time factor of such short duration that the defendant could not have had constructive knowledge of the condition], and KESSLER v. GUMENICK, 358 So. 2d 1167 (Fla.App.3d 1978), [wherein there was no evidence that the defendant had "constructive knowledge" of the danger prior to the incident sued upon], with the instant cause [where the record demonstrates that the dangerous condition had existed on a regular basis for some two, three years prior to the subject incident].

In truth and in fact, the issue of "prior knowledge" is not as significant in its relationship to the time that the defendant had to discover the existence of the dangerous condition, as it is to the pertinent issue of "foreseeability"--the basis upon which summary final judgment was granted:

> ". . .That the actions of Jeff Grubb in carrying the plaintiff onto the dock at the Bluebird Springs facility constituted a separate, efficient, independent, unforeseeable, intervening cause of the plaintiff's injuries and damages and, as such, the acts or omissions of the Board did not constitute the proximate cause of the plaintiff's injuries and damages. . . (R. 512).

The fact remains--as demonstrated in the subject record--the defendant, at all times relevant, knew that pushing people off of docks "could be a dangerous activity" (R. 361, 362) and that the County Commission recognized that rough-housing, pushing, shoving and horseplay on dock areas constituted a safety hazard, especially in an unsupervised beach area (R. 233, 242). The significance of these factors and the further facts that the defendant provided no supervision, never even considered providing supervision and had no policing of their parks at all times relevant herein, is compelling!

In STEVENS v. JEFFERSON, 436 So. 2d 33 (Fla. 1983), this Court discussed in detail the subjects of causation and/or foreseeability. In quoting with approval the Fourth District Court of Appeal's decision in CRISLIP v. HOLLAND, 401 So. 2d 1115 (Fla.App.4th 1981), this Court stated:

> "An action for negligence is predicated upon the existence of a legal duty owed by the defendant to protect the plaintiff from an unreasonable risk of harm. The extent of the defendant's duty is circumscribed by the scope of the anticipated risks to which the defendant exposes others. In order to prevail in a law suit, the plaintiff must demonstrate that he is within the zone of risks that are reasonably foreseeable by the defendant. The liability of the tort feasor does not depend upon whether his negligent acts were the direct cause of the plaintiff's injuries, as long as the injuries incurred were the reasonably forseeable consequences of the tort feasor's conduct. (Citation omitted). If the harm that occurs is within the scope of danger created by the defendant's negligent conduct, then such harm is a reasonably foreseeable consequence of the negligence. The question of foreseeability and

whether an intervening cause is foreseeable, is for the trier of fact. (Citation omitted)."

See also: STAHL v. METROPOLITAN DADE COUNTY, 438 So. 2d 14 (Fla.App.3d 1983), wherein the District Court, reviewing Florida law on the subject of causation and/or foreseeability, noted:

> "Another way of stating the question whether the intervening cause was foreseeable is to ask whether the harm that occurred was within the scope of the danger attributable to the defendant's negligent conduct. A person who creates a dangerous situation may be deemed negligent because he violates a duty of care. The dangerous condition so created may result in a particular type of harm. The question whether the harm that occurs was within the scope of the risk created by the defendant's conduct may be answered in a number of ways.
>
> ". . .Finally, there is the type of harm that has so frequently resulted from the same type of negligence that 'in the field of human experience' the same type of result may be expected again. . ."

The record before this Court demonstates that the defendant knew, at all times relevant herein, that roughhousing, etc., would constitute a danger to such an extent that "policy" dictated that an ordinance be passed to prohibit such conduct in public parks, etc. The fact remains, however, the defendant failed to do anything to protect the general public from that which the defendant knew was dangerous. The record before this Court can support a jury finding that there were no signs posted at the park prohibiting roughhousing, etc. The record before this Court can support a jury finding that the defendant took no steps to protect the general public from what this record demonstrates as being

an ongoing and dangerous condition.

The plaintiff suggests to this Court that the fact that the plaintiff may have been carried out to the edge of the dock by Jeff Grubb (as opposed to her testimony that she walked out and was then hoisted upon his shoulders) provides no support for the trial court's ruling. This is so in that there existed at the park no supervision at all, the effect of which was to allow to go unchecked the very acts of horseplay, roughhousing, pushing and shoving which the defendant knew about, or in the exercise of reasonable care should have known about, such conduct leading to the plaintiff's injury. It was the very fact that no supervision was extant that allowed the dangerous condition to continue for some two, three years. The plaintiff certainly met her burden by showing the dangerous condition existed for this two, three year period and that the defendant, by and through its agents, servants and employees did nothing to correct the situation.

Indeed, in STEVENS v. JEFFERSON, supra, this Court rejected any assertion that a defendant have knowledge of a particular assailant's propensities:

> ". . .Actual or constructive knowlege, based upon past experience, that there is a likelihood of disorderly conduct by third persons in general which may endanger the safety of his patrons, is also sufficient to establish foreseeability."

What should be emphasized at this juncture is that the legal issue of "causation/foreseeability" is the same regardless of

factual context. As this Court noted in STEVENS v. JEFFERSON, supra:

> ". . .The extent of the defendant's duty is circumscribed by the scope of the anticipated risks to which the defendant exposes others. In order to prevail in a law suit, the plaintiff must demonstrate that he is within the zone of risks that are reasonably foreseeable by the defendant. . ."

The plaintiff suggests to this Court the plaintiff was injured as a result of a dangerous condition which was ongoing on the defendant's premises for some two, three years prior to the subject incident and which condition the defendant either knew of or, in the exercise of reasonable care, should have known of. The issue of foreseeability was/is a question of fact under the circumstances of this case and the final judgment appealed should be reversed.

C.

THE TRIAL COURT WAS CORRECT IN ITS CONCLUSION THAT THE DEFENDANT'S SOVEREIGN IMMUNITY HAD BEEN WAIVED.

The plaintiff would suggest to this Court that the trial court's conclusion (the result reached), to wit: The defendant's sovereign immunity had been waived, was/is legally correct. Irrespective of the alleged legal incorrectness of the reasons assigned or espoused by the trial court, that portion of the summary final judgment (previously cross-) appealed should have been affirmed! The plaintiff suggests to this Court the opinion herein sought to be reviewed should be quashed.

This Court's recent opinion in TRIANON PARKS CONDOMINIUM ASSOCIATION, INC. v. CITY OF HIALEAH, 468 So. 2d 912 (Fla. 1985) emphasized 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. Because this Court felt that the courts were having difficulty interpreting the purpose of § 768.28, this Court stated the following:

* * *

> "First, for there to be governmental tort liability, there must be either an underlying common law or statutory duty of care with respect to the alleged negligent conduct. For certain basic judgmental or discretionary governmental functions, there has never been an applicable duty of care (Citation omitted). Further, legislative enactments for the benefit of the general public do not automatically create an independent duty to either idividual citizens or a specific class of citizens. (Citation omitted).
>
> "Second, it is important to recognize that the enactment of the statute waiving sovereign immunity did not establish any new duty of care for governmental entities. The statute's sole purpose was to waive that immunity which prevented recovery for breaches of existing common law duties of care. § 768.28 provides that governmental entities 'shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances.' This effectively means that the identical existing duties for private persons apply to governmental entities." 468 So. 2d at p. 917.

This Court, in IDE v. CITY OF ST. CLOUD, supra, reversed trial court dismissal of the plaintiff's complaint and in so doing noted that if the City had the power to maintain a park

and perform a function for its people, it should be held to the same degree of care as a private person. This Court held:

> "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 p. 925.

Hence, it may be stated--as a matter of law--that as pertains to this defendant's decision to operate a bathing area, a swimming facility, a park, etc.:

> ". . .the identical existing duties for private persons apply. . ."

Highly pertinent to an identification of the "existing duty" is this Court's opinion in PICKETT v. CITY OF JACKSONVILLE, supra. In that case the plaintiff's complaint alleged that the decedent was an invitee on the premises (owned and operated by the defendant) and that the decedent had been lawfully using the pool. The plaintiff alleged that the defendant was negligent in its failure to provide a sufficient number of competent attendants about the pool. Basically, the plaintiff's complaint alleged that the defendant was negligent in its supervision of the premises. This Court, in its discussion of the scope and extent of the actual duty owed, stated:

> "Adequate supervision includes prevention of boisterous conduct on the part of patrons." 20 So. 2d at p. 487.

As a matter of practical concern, it makes little difference

whether waiver of immunity obtained pursuant to § 768.28, Florida Statutes (1975) or, as contended for herein, pursuant to § 286.28, Florida Statutes (1979). As this Court noted in INGRAHAM v. DADE COUNTY, 450 So. 2d 847 (Fla. 1984):

* * *

> "§ 768.28 totally revised the area of sovereign immunity, but as a part of the overall revision of this area by the Legislature it specifically provided that the statutory provisions permitting the State to purchase insurance based upon § 455.06 would continue in effect. Specifically, § 768.28 (10) provides: 'Laws allowing the State or its agencies or subdivisions to buy insurance are still in force and effect and are not restricted in any way by the terms of this Act.' § 455.06 thus became a part of the overall scheme of the Legislature relating to the waiver of sovereign immunity." 450 So. 2d at p. 849.

* * *

In accord: BURKETT v. CALHOUN COUNTY, 441 So. 2d 1108 (Fla. App.1st 1983) and MROWCZYNSKI v. VIZENTHAL, 445 So. 2d 1099 (Fla.App.4th 1984).

It is the plaintiff's position that the defendant's 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 the facility 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 simply wrong. 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. The fact that the trial court expressed as its reason the existence of § 286.28, Florida Statutes, does not alter the fact that the trial court did, on that issue, rule for the plaintiff. 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 irrelevant. At all times pertinent the plaintiff's "challenge" was addressed not to discretionary, planning decisions and not to governmental or operational decisions, but to negligence! This is extremely pertinent because the trial court did, at all times relevant, rule for the plaintiff on the issue of "waiver of immunity." That throughout the course of the litigation the plaintiff urged more than one reason to justify trial court denial of the defendant's motion for summary judgment is patent from the face of this record. See: Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment (R. 503-511).

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 (by the defendant) not to provide lifeguards or other supervisory personnel was a negligence/reasonable care decision and not one having its foundation 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 this case by application of "immunity concepts" was erroneous. Negligence in the operation of a swimming facility is now, and has always been, a common law tort. One should not mix legal maxims attendant with "planning level decisions" and "operational level decisions" with those (maxims) controlling negligence concepts. At least, one should not. Once the waiver of immunity occurs (from whatever the source), inquiry should turn to the concepts found within tort principles, See: TRIANON PARK CONDOMINIUM ASSOCIATION, INC. v. CITY OF HIALEAH, supra:

> "First, for there to be governmental tort liability, there must be either an underlying common law or statutory duty of care with respect to the alleged negligent conduct. For certain basic judgmental or discretionary governmental functions, there has never been an applicable duty of care. . ." 468 So. 2d at p. 917.

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" of the "discretionary governmental function" type. In truth and in fact, the District Court's opinion exemplified this Court's stated belief, See: TRIANON PARK CONDOMINIUM, supra:

> ". . .It is apparent from the decisions of the District Courts of Appeal that the courts and the Bar are having difficulty interpreting the purpose of § 768.28 and applying the principles set forth in COMMERCIAL CARRIER. . ." 468 So. 2d at p. 917.

The issue before both the trial court and the District Court concerned negligence/no negligence. There was never any dispute over the fact that the defendant operated a swimming facility. Operation of the swimming facility carried with it a common law duty to operate the swimming facility safely. With the waiver of immunity--from whatever the source--there remained only traditional negligence issues remaining. 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 should 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, and PICKETT, supra--See also: 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 has, at all times relevant, been controlled by IDE, supra, and PICKETT, supra--immunity was waived as soon as insurance was purchased to cover the activities of running a swimming facility. Since the trial court did, as to the issue of "waiver of immunity", reach the right result, the summary final judgment (cross-) appealed should have been affirmed. The plaintiff would suggest to this Court that portion of the summary final judgment (cross-) appealed which found for the plaintiff on the issue of "waiver of immunity" should be affirmed by this Court and the decision of the District Court of Appeal, Fifth District, should be quashed. See: FIRESTONE v. FIRESTONE, supra, and cases cited therein.

VI.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the plaintiff respectfully urges this Honorable Court to quash the decision of the District Court of Appeal, Fifth District, to hold that the trial court was correct in determining that the defendant had "waived" its immunity (albeit for the wrong reason), to reverse that portion of the summary final judgment (initially) appealed by the plaintiff as there exist genuine issues of material fact concerning the existence, vel non, of negligence and to

remand the subject cause with directions to the trial court to hold a jury trial on all issues.

VII.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Petitioner on the Merits was served by U.S. mail this 14th day of November, 1985 on:

PATTILLO & McKEEVER, P.A.
Attorneys for Respondents
Post Office Box 1450
Ocala, Florida 32678

Respectfully submitted,

HORTON, PERSE & GINSBERG
and
NANCE, CACCIATORE & SISSERSON
Attorneys for Petitioner
410 Concord Building
66 West Flagler Street
Miami, Florida 33130
(305) 358-0427

BY: Arnold R. Ginsberg