O/C 3-4-86

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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 REPLY BRIEF ON THE MERITS

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I.

INTRODUCTION

In this reply 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", "A" and "AR" will refer to the record on appeal, the appendix which accompanied the petitioner's brief on jurisdiction and the appendix which accompanied respondents/defendants' "Answer Brief on the Merits", respectively. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

STATEMENT OF THE CASE

The defendant, in its Statement of the Case, takes "exception to Petitioner's Statement of the Case in three respects" and reassesses many of the occurrences which transpired below in an obvious attempt to demonstrate to this Court the existence of evidence which would support the defendants' belief that it "did nothing wrong." Respectfully, it is suggested to this Court that no matter how the defendants choose to characterize the events in the lower court, one factor cannot be changed, altered or eliminated. The trial court ruled for the plaintiff on the issue of sovereign immunity--the trial court ruled the defendant was no longer possessed of immunity--and the case was terminated solely on the issue of causation! Hence, at all times relevant plaintiff "prevailed" in the lower court on the issue of "waiver of immunity."

The plaintiff would also note that at this stage of the proceedings the defendant, having previously injected into this case (by way of summary judgment motion) the issue of "causation", seeks a modicum of now credibility by eliminating from the argument portion of its brief any lengthy contentions concerning this issue. Hence, plaintiff would suggest defendant no longer chooses to "fall back" on an unsupportable position.

III.

STATEMENT OF THE FACTS

This case is before this Court "on appeal" from an adverse summary final judgment entered upon trial court granting of the defendants' motion for summary judgment. The trial court "resolved" this case on traditional tort "causation" grounds. The defendants' "Statement of the Facts" indicates "disagreement" with the facts as set out in the plaintiff's brief. The defendant can "disagree" all it wants. Indeed, the defendant can "point to" conflicting evidentiary factors until it runs out of record citation. Only one point remains: This case was not tried "on the merits." Hence, on appeal from an adverse summary final judgment the appellant (non-prevailing party) is entitled to have the record viewed in the light most favorable to her with every reasonable inference of fact and intendment of testimony being indulged in her favor and against the movant for summary judgment. The movant for summary judgment has the burden of showing conclusively the non-existence of genuine

issues of material fact. The plaintiff would adopt herein those principles of law as found at pages 5, 6, 7 and 8 of this plaintiff's "Reply Brief of Appellant/Brief of Cross-Appellee" filed in the District Court of Appeal, Fifth District, which brief this defendant has included in its appendix. (See: AR. 65-68).

At pages 4 and 5 of its brief the defendant, after re-evaluating and reassessing what it contends are "conflicts" in the testimony of the subject plaintiff, states:

> ". . .there exists no evidence in the record supporting the contention that petitioner walked out to the dock. Rather, she walked out to the beach where she was picked up by a friend and carried from the shore out on to dock, a distance of approximately thirty (30) feet. . ."

The record before this Court reflects that the defendant operated this facility without supervision and did so for several years. Hence, the defendant's attempts to draw distinctions between walking to the . . ."beach", "dock", "shore", etc., establish only that the defendant wishes to dance, weave and spin around the central issue but will never address it. In point of fact, the defendant is not, at this stage of the proceedings, entitled to any favorable intendments of testimony nor is it entitled to resolve conflicts in the evidence in a manner favorable to it. The determination of the negligence vel non of the defendant is for jury consideration and was not for trial court "conclusion." This case should be remanded for a jury trial on all negligence issues.

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

The defendant's argument is premised on four main contentions. Each of the contentions is premised upon an erroneous concept of the law. Although the defendant asserts that this plaintiff had some "obligation" to do "something" with the summary final judgment entered by the trial court, the plaintiff did all that the law required, to wit: The plaintiff appealed the summary final judgment entered. That portion of the summary final judgment which was "adverse", to wit: "causation", was effectively and affirmatively argued.

The defendant and the District Court intermingled immunity concepts and negligence principles. The defendant was under a duty of reasonable care to operate its bathing beach safely. Breach of the duty owed to the plaintiff was actionable. The purchase of insurance removed the immunity and the trial court correctly determined that the law suit could proceed. The opinion of the District Court must be quashed.

V.

REPLY ARGUMENT

In seeking to justify the District Court's (second) opinion, the defendant has put together a four-pronged argument. The defendant urges:

A. Although the trial court terminated the law suit solely upon causation principles, the plaintiff's failure (at the District Court level) to "contest" the trial court's "finding" relating to certain (alleged) discretionary actions of the defendant, created a "waiver" of the plaintiff's right to (now) complain. (See: Brief of Defendant, pages 9-17);

B. Assuming plaintiff did not waive her rights, the District Court was correct in concluding that the purchase of insurance could not constitute a "waiver" of those sovereign acts traditionally "non-actionable." (See: Brief of Defendant, pages 18-29);

C. § 286.28(2), Florida Statutes, no longer has continuing application or viability after the enactment of, and amendments to, § 768.28, Florida Statutes. (See: Pages 29-36 of the Defendant's Brief); and

D. Certiorari was improvidently granted. (See: Pages 36-44 of the Defendant's Brief).

Although the defendant does make certain "sub-arguments" in an attempt to justify the main contentions presented, the above four points comprise the defendant's position.

The plaintiff suggests to this Court the defendant's arguments are without merit and the opinion herein sought to be reviewed must be quashed with directions to the trial court to grant to the plaintiff a jury trial on all issues.

An examination of the defendant's argument in light of this Court's opinions in TRIANON PARKS CONDOMINIUM ASSOCIATION, INC. v. CITY OF HIALEAH, 468 So. 2d 912 (Fla. 1985); CAULEY v. CITY OF JACKSONVILLE, 403 So. 2d 379 (Fla. 1981); and INGRAHAM v. DADE COUNTY SCHOOL BOARD, 450 So. 2d 847 (Fla. 1984), reflect the existence of no justification for the opinion rendered and result reached by the District Court of Appeal, Fifth District.

In TRIANON, supra, this Court stated:

* * *

> "It is apparent from the decisions of the District Courts of Appeal that the courts and the bar are having difficulty interpreting the purposes of § 768.28 and applying the principles set forth in COMMERCIAL CARRIER. A discussion of the evolving history of sovereign immunity, particularly as applied to municipalities, and the intent and purposes of § 768.28, is set forth in CAULEY v. CITY OF JACKSONVILLE, 403 So. 2d 379 (Fla. 1981). . ." 468 So. 2d at p. 917.

* * *

In CAULEY, supra, this Court stated:

* * *

> "It is our decision that, in this State, sovereign immunity should apply equally to all constitutionally authorized governmental entities and not in a disparate manner. We find that § 768.28 provides a responsible method for this equal application . . ." 403 So. 2d at p. 387.

In CAULEY, supra, this Court decided that § 768.28 applies to both municipal and county governments. Hence, irrespective of what the defendant argues the rules of law as found in IDE v. CITY OF ST. CLOUD, 8 So. 2d 924 (Fla. 1942) and PICKETT v. CITY OF JACKSONVILLE, 20 So. 2d 484 (Fla. 1945) should apply to, the principles of law found therein apply not only to both the public and private sector alike but they apply to both "counties" and "municipalities" alike. Interestingly enough, the defendant cannot keep its arguments straight. At page 37 of its brief this defendant accuses this plaintiff of "confusing the doctrine of municipal sovereign immunity with the sovereign immunity applicable to the state, its agencies and subdivisions, including counties, as these doctrines existed prior to the enactment of § 768.28." Respectfully, this plaintiff is neither confused nor ill informed. There simply is no reason to draw artifical distinctions between the two. This is especially so since this Court has already held, in CAULEY, supra, that this is the case. Further, it is the defendant itself which "confuses" the issue. The defendant "confuses" immunity with negligence principles and concepts. 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 was 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. 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. Strangely enough, the defendant (still) seeks to create distinctions even though as this Court stated in TRIANON, 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. . .

* * *

> "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.

Hence, it may be stated that the trial court's result--as pertains to sovereign immunity--was/is correct:

A. The defendant's purchase of insurance "waived immunity"; and

B. Such waiver allowed plaintiff's suit to proceed.

Since the trial court reached the right result--plaintiff's cause of action was (is) viable, "The statute's sole purpose was to waive that immunity which prevented recovery for breaches of existing common law duties of care", See: TRIANON, supra, 468 So. 2d at p. 917--this plaintiff had no duty, requirement, need or necessity to "challenge" trial court "reasoning." Even though the trial court may have reached a result through improper, incorrect or inaccurate logic or legal reasoning, if that result was legally correct the District Court was duty bound to "affirm" (the cross-appeal) on the issue of "immunity" and then to reach and reverse the "causation" judgment. The plaintiff "lost" at the trial court level on "causation." Hence it was "causation" that formed the basis

for the appeal. As this Court noted in FIRESTONE v. FIRESTONE, 263 So. 2d 223 (Fla. 1972):

> ". . .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.

Irrespective of how the trial court classified "it" ["it" being the defendant's operation of a swimming facility], trial court ruling that the subject action was viable because of the purchase of insurance is/was completely consistent with Florida law on the subject matter:

> ". . .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. . ." IDE v. CITY OF ST. CLOUD, 8 So. 2d at p. 925.

The plaintiff would respectfully urge this Court to please compare this case with the case of SARASOTA COUNTY, FLORIDA v. BUTLER, _____ So. 2d _____, 10 FLW 1819, 1820 (Fla.App.2nd, Opinion filed August 2, 1985), relied upon by the defendant at page 20 of its brief. What the court in BUTLER, supra, actually held--as compared to what the defendant argues--was:

> "It was neither the beach nor the operation of it, but the water, which caused the child's death . . ." 10 FLW at page 1820.

Further examination of that opinion demonstrates that the plaintiff therein attempted to affix liability upon the defen-

dant under a theory that the governmental entity created the dangerous condition, knew it to be dangerous and that such danger was not readily apparent to those persons who might sustain injury as a result of it. In reviewing the record, the District Court noted:

> "The hazardous nature of the waters which might exist at the South Lido Beach cannot be attributed to Sarasota County. That condition, based upon the present record, pre-existed Sarasota County's assumption of proprietary dominion over the beach. There is no claim pleaded nor was one tried upon a theory that Sarasota County by, for example, dredging or other action, generated the undercurrents, the drop-offs or the tides associated with the waters adjacent to the beach. . ."

It would clearly appear from an examination of the opinion rendered by the court in BUTLER supra, that not only does BUTLER have no factual application to the circumstances of this case, but the pleadings in BUTLER, supra, do not identify the same theories of liability as are found herein.

The plaintiff would again emphasize that in this case 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 pro-

vide 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.

As is by now apparent, since the trial court ruled favorably to the plaintiff on the issue of immunity (irrespective of whether or not the underlying basis for the ruling was either legally correct or factually sound), the plaintiff was under no obligation to "appeal" that portion of the final judgment which was "favorable" to her. The plaintiff was free (and is now still free) to urge its ultimate correctness (as to the issue of waiver of sovereign immunity) without the need for "cross" assignments, etc. Indeed, it was the District Court which was obligated to "affirm" that portion of the summary final judgment dealing with immunity for any reason found in the record and the District Court of Appeal, Fifth District, did not do so. Further, it was the District Court which (apparently) "got confused" regarding who had what burden on appeal. The defendant's brief "seizes upon" the District Court's mistake and compounds the error. However, since there has been extant, at all times relevant, a common law duty of reasonable care (which would require the presence of attendants or guards in number reasonably sufficient for the protection of bathers--See: PICKETT v. CITY OF JACKSONVILLE, supra, 20 So. 2d at p. 487) breach of that common law duty is (with the inclusion of damage

sustained) actionable. The error of the District Court of Appeal, Fifth District, is apparent.

In summary, the plaintiff would suggest to this Court:

A. The defendant's conduct in (negligently) operating a bathing beach facility falls squarely within the type of conduct for which there always has been an underlying common law duty. See: IDE,supra; PICKETT, supra; CAULEY, supra; and TRIANON, supra.

B. Since there always has been an underlying common law duty controlling the activities engaged in, waiver of immunity renders the defendant:

> "liable for tort claims in the same manner and to the same extent as a private individual under like circumstances. TRIANON, supra, at page 917.

This effectively means that for at least the subject activity, the identical existing duties for private persons apply to governmental entities.

C. Since the trial court "held" that the defendant's purchase of insurance waived the defendant's sovereign immunity the trial court had to have held, by necessity, that the plaintiff's cause of action was viable, to wit: Defendant's activities were not immune. Since the trial court judge reached the issue of causation, it is clear the court did not decide the case on any immunity grounds. Hence, it may be concluded that the trial court did rule for the plaintiff on the issue of sovereign immunity.

D. Because the record demonstrates genuine issues of material fact on the issue of causation (indeed, the defendant no longer "challenges" that fact), summary final judgment was improper.

The District Court's analysis of the subject issue was simply erroneous. The result reached, the logic utilized and the construction that the District Court placed on the cases recently decided by this Court, establish not only reversible error but "conflict" in the constitutional and traditional sense. More importantly, the District Court's opinion lends further credence to this Court's stated belief--See: TRIANON, supra, 468 So. 2d at p. 917:

> "that the courts and the Bar are having difficulty interpreting the purpose of § 768.28 and applying the principles set forth in COMMERCIAL CARRIER. . ."

The opinion of the District Court of Appeal, Fifth District, should be quashed.

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, and to remand this cause for a jury trial on all issues.

VII.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Petitioner on the Merits was served by U.S. mail this 6th day of January, 1986 on:

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