

IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,454

Florida Bar No: 184170

DANIEL H. BRANTLEY,)
)
) Petitioner,)
)
)
) vs.)
)
) GIRL SCOUT COUNCIL OF TROPICAL)
) FLORIDA, INC., a Florida)
) corporation,)
)
) Respondent.)
)

FILED

SID J. WHITE

MAY 31 1988

CLERK, SUPREME COURT

By _____
Deputy Clerk

ON PETITION FOR DISCRETIONARY REVIEW TO
THE THIRD DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON JURISDICTION
DANIEL H. BRANTLEY

(With Appendix)

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POINT ON APPEAL

THE DECISION BELOW CONSTITUTES PRIMA FACIE EXPRESS CONFLICT WITH Sanderson v. Freedom Savings and Loan Association, 496 So.2d 954 (Fla. 1st DCA 1986) (WHICH IS PENDING REVIEW ON THE MERITS IN THIS COURT); WHICH WAS CITED AS CONTROLLING AUTHORITY IN THE DECISION BELOW BARRING THE PLAINTIFF'S ACTION BY THE APPLICATION OF THE FIREMAN'S RULE.

STATEMENT OF THE FACTS AND THE CASE

This is another Fireman's Rule case, where Summary Judgment was granted on the basis of that Rule, as the Plaintiff is a fireman. However one clear exception to the Fireman's Rule is that there will be liability if the Defendant is on the premises and did not warn the fireman of a dangerous condition which is not open and obvious. In the present case the firemen were on the premises fighting the fire from 4:00 P.M. to 8:00 or 9:00 P.M. and officers, as well as maintenance people, employed by the Defendant were all on the premises. They did not warn Fireman Brantley of the dangerous condition which was not open and obvious to him; namely post holes for a fence which had been taken out, leaving the large holes still in the ground, with brush grown over them, such that Fireman Brantley stepped in one, was severely injured and can no longer work as a fireman.

The trial court entered a Summary Judgment for the Defendant/landowner holding that this suit was barred by the Fireman's Rule.

On appeal the Third District entered a per curiam affirmance, citing Sanderson v. Freedom Savings and Loan Association, 496 So.2d 954, 956-957 (Fla. 1st DCA 1986) (A 1). Sanderson is currently pending review on the merits in this Court, Case No. 69,687.

SUMMARY OF ARGUMENT

The District Court of Appeal's per curiam Opinion cites as controlling authority Sanderson v. Freedom Savings and Loan Association, which decision is pending review on the merits in the Supreme Court and this constitutes prima facie express conflict allowing this Court to exercise its jurisdiction. Jollie, infra. In addition this Court is currently reviewing on the merits another Third District Court of Appeal case involving the Fireman's Rule Kilpatrick v. Sklar, infra, Case Nos. 69,890 and 69,892.

It is respectfully submitted that in light of the prima facie express conflict with the Decision below and the decision in Sanderson, that this Court should exercise its discretion to review the Third District's Opinion and this case should be accepted as a companion case to both Sanderson and Kilpatrick.

ARGUMENT

THE DECISION BELOW CONSTITUTES PRIMA FACIE EXPRESS CONFLICT WITH Sanderson v. Freedom Savings and Loan Association, 496 So.2d 954 (Fla. 1st DCA 1986) (WHICH IS PENDING REVIEW ON THE MERITS IN THIS COURT); WHICH WAS CITED AS CONTROLLING AUTHORITY IN THE DECISION BELOW BARRING THE PLAINTIFF'S ACTION BY THE APPLICATION OF THE FIREMAN'S RULE.

There is prima facie express conflict with the Decision in the present case and Sanderson v. Freedom Savings and Loan Association, 496 So.2d 954 (Fla 1st DCA 1986), because the opinion of the Third District cited Sanderson as controlling authority and Sanderson is currently pending review on the merits in this Court. (Case No. 69,607) (A 1). When a District Court of Appeal cites as controlling authority a decision that is pending review by the Supreme Court on the merits, this constitutes prima facie express conflict and allows the Supreme Court to exercise its jurisdiction. Jollie v. State, 405 So.2d 418 (Fla. 1981). ~~See also~~, Mathis v. Foote Steel Corporation, 415 So.2d 893 (Fla. 1987); Harrison v. Hyster Company, 525 So.2d 1279 (Fla. 1987); R.J.B. v. State, 408 So.2d 1048 (Fla. 1982); R.L.W. v. State, 409 So.2d 1072 (Fla. 1st DCA 1982).

In Sanderson the First District Court of Appeal held that the Fireman's Rule bars recovery in personal injury and wrongful death actions, when the cause of action is based upon an injury sustained by a fireman or a policeman when acting in the line of duty, unless the complaint sufficiently alleges willful misconduct or wanton negligence on the part of the defendant, which would injure the licensee policeman or fireman. Sanderson, 956. The Plaintiff in Sanderson argued that the Fireman's Rule

only applied in situations where the fireman or policeman was injured due to a defective condition of the premise and that when a plaintiff alleged "any" active negligence, even simple negligence, on the part of the owner of the premises or its agent, the applicability of the Fireman's Rule dissipates. Sanderson, 956. The First District disagreed upholding the Fireman's Rule and it certified the case to this Court as being in conflict with Whitlock v. Elich, 409 So.2d 110 (Fla. 5th DCA 1982). Sanderson, 957.

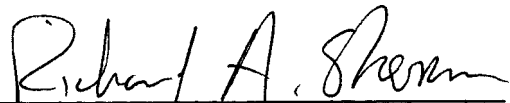
The Plaintiff Fireman Brantley, argued the same position below as that asserted in Sanderson; that his Complaint for negligence on the part of the landowner in failing to warn of a dangerous condition, which was not open and obvious, did not require the application of the Fireman's Rule. As in the Sanderson case, both the trial court and appellate court disagreed finding the cause of action barred by the Fireman's Rule. As there is prima facie conflict between Brantley and Sanderson jurisdiction exists in this Court to review Brantley on the merits along with the decision in Sanderson.

In addition still another Fireman's Rule case is currently pending review on the merits in the Supreme Court in Kilpatrick v. Sklar, 497 So.2d 1289 (Fla. 3d DCA 1986), Supreme Court Case Nos. 69,890 and 69,892. It is respectfully submitted that since all three cases present variations on the application of the Fireman's Rule, accepting jurisdiction in the Brantley case would allow this Court to make a comprehensive review of the application of the Fireman's Rule in Florida.

CONCLUSION

The Decision below constitutes prima facie express conflict with Sanderson v. Freedom Savings and Loan Association, 496 So.2d 954 (Fla. 1st DCA 1986) which is pending review on the merits in this Court, which case was cited as controlling authority in the Decision, below barring the Plaintiff's action by the application of the Fireman's Rule and this Court has jurisdiction to review the Brantley Decision.

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By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 27th day of May, 1988 to:

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