

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
 NOV 25 1988
 CLERK, SUPREME COURT
 BY *[Signature]*
 Deputy Clerk

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

REPLY BRIEF OF PETITIONER ON THE MERITS
 DANIEL H. BRANTLEY

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POINT ON APPEAL

- I. THE SUMMARY JUDGMENT BELOW WAS IMPROPER BECAUSE
(A) EVIDENCE INDICATED A JURY QUESTION AS TO A
DANGEROUS CONDITION NOT OPEN AND OBVIOUS, AND
(B) IT WAS PREMATURE AS DISCOVERY WAS NOT
COMPLETED.

REPLY ARGUMENT

- I. THE SUMMARY JUDGMENT BELOW WAS IMPROPER BECAUSE
(A) EVIDENCE INDICATED A JURY QUESTION AS TO A DANGEROUS CONDITION NOT OPEN AND OBVIOUS, AND
(B) IT WAS PREMATURE AS DISCOVERY WAS NOT COMPLETED.
-

The Respondent conveniently ignores the fact that firemen were on the premises fighting the fire at Camp Choe from 4:00 P.M. until 8:00 or 9:00 P.M. During this five hour period officers, as well as maintenance people, of the Defendant were on the premises and did not warn the fireman of the dangerous condition which was not open and obvious, namely the 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 the fireman stepped in one and was severely injured and can no longer work as a fireman. The representative of the Girl Scout Counsel stated in her Deposition that, while the firemen had asked them to leave the immediate premises, the officers and maintenance people simply moved to the front of the property, on the other side of the fence directly across from where the firemen were located. These personnel remained throughout the entire five hour period during which the firemen were on the premises. In addition Mrs. Tejera stated in her Deposition that when the firemen first arrived, they arrived at the service center which was in the front of the property while the fire was located at the back of the 20 acre area. At this time fire fighters told the personnel to leave and that only a property person should remain. Then Mr. Ingraham, who was the site manager, remained at the site manager's house on the property the entire time.

Therefore the Appellee's statement that an emergency existed and there was no time or opportunity to warn the firemen is contrary to the very facts stated by the Defendant's representative Mrs. Tejera. There was both time and ample opportunity for the representative of the Defendant to warn the fire fighters of dangerous conditions existing on the property.

It is more important to remember of course that in this case we are dealing with a Summary Judgment and the Plaintiff has been precluded from even going forward to establish these facts because of the application of the Fireman's Rule. Under the current state of the law, a fireman is a licensee as a matter of law and therefore by pleading in the alternative that he was a business invitee, the Plaintiff in no way waived the duty owed to him by the Defendant, to warn of a dangerous condition which was not open and obvious. The fact that Brantley pled that he was a business invitee and was entitled to a higher duty of care than a licensee, does not change the fact that the Defendant owed to him at the very least the duty to warn of latent dangers. Contrary to the Appellee's assertion that the Plaintiff did not allege a breach of duty to warn, the Complaint alleges negligence on the part of the Defendant landowner. The allegations of negligence inherently include breach of duty to warn the Plaintiff licensee of unknown dangerous conditions on the landowner's property.

Moreover, Florida law clearly places this duty on the landowner, i.e. a duty to warn of latent conditions known to the owner to be dangerous, when such danger is not open to ordinary observation by the licensee and when the owner has an opportunity

to give a warning. Price v. Morgan, 436 So.2d 1116 (Fla. 5th DCA 1983). The cases cited by the Appellee, acknowledge a landowner's legal duty to warn of conditions not open to ordinary observation and had the Summary Judgment been denied, the Plaintiff could have fully established the fact that the Defendant had more than ample opportunity to convey such a warning. Furthermore as the Appellee, points out in its Brief, the trial court was clearly not going to allow any amendment to the Complaint, stating that it could not possibly see any way the Complaint could be amended to show a sufficient basis to sustain the claim (R 261). Therefore there was no waiver issue in this case.

More importantly, at the hearing the trial judge recognized that the Plaintiff's status, as a licensee, was determined as a matter of law and it was irrelevant what the Plaintiff had pled (R 256). If there was any waiver in this case, it was by the Defendant, who argued as a basis for obtaining the Summary Judgment, the fact that the Plaintiff was a licensee (R 247, 248). Finally the Appellee admitted at the hearing, that if there was *any* theory by which the Plaintiff could recover, an amendment to the Complaint would have to be allowed, regardless of the Summary Judgment (R 248).

The Plaintiff clearly argued that there was a latent dangerous condition on the *property, that the* Defendant knew or should have known of and failed to warn of; specifically asking to be given the opportunity to plead these theories of recovery and to be allowed to complete discovery (R 258). Contrary to

what the Appellee asserts, there was no waiver on the part of the Plaintiff in this case, as status as invitee, licensee, trespasser, etc., is something which is established as a matter of law and not as a matter of pleadings. Furthermore the Appellee waived any such argument, when it used the Plaintiff's status as licensee as the very basis for getting the Summary Judgment below.

The bottom line in this case is that the Summary Judgment was improperly granted where there were sufficient facts to preclude its entry and where there was additional discovery on key issues left to be done, so at the very least the Summary Judgment was premature.

The disputed issues left unresolved which require reversal of this Summary Judgment concern (1) which of the Defendant's agents knew about the existence of a row of unfilled post holes; and (2) whether the Defendant's agents had an opportunity to warn the Plaintiff about the holes. There was evidence presented to the court that the Defendant's staff members had both knowledge and opportunity to warn the Plaintiff and on the reversal of this summary Judgment the Defendant will have a fair opportunity to complete discovery, and resolve these issues.

Florida law mandates reversal where a party has been deprived of a full and fair opportunity to conduct discovery and also requires reversal where there are genuine issues of fact left to be determined. This is undisputedly what happened in this case and this requires reversal.

The Plaintiff twice advised the court that he had not been able to complete discovery on the issue of which of the

Defendant's agents knew about the existence of the holes. Therefore the court did have an opportunity to provide for further discovery. This issue appears on the Record as being presented to the lower court at (R 151-239; Page 13, 16).

The Plaintiff clearly indicated on the Record that he needed additional time in order to complete discovery. However the court disregarded the Plaintiff's position and determined that no further discovery was necessary based on the court's reasoning that the case should be resolved under the Fireman's Rule. It is apparent from the Transcript at the Hearing, that the court was not inclined to allow for further discovery of this matter, when it had determined that the case could be resolved on the application of the legal doctrine under the Fireman's Rule. The Order granting Summary Judgment shows that the court decided the disputed factual issues and went on to decide the case, disregarding the disputed facts and the absence of critical evidence, based on the Fireman's Rule.

There was nothing to be gained by repeatedly advising the judge of the need for time to complete discovery after doing this twice and having the judge disregard the request. This position was clearly brought before the lower court and there is no issue as to this being waived, as the Appellee erroneously concludes. This case does not turn on waiver issues. The lower court was well advised of the underlying factual disputes, the incomplete status of discovery -- which is absolutely critical to resolving this case on the merits -- and the facts before the lower court which remove this case from an application of the Fireman's Rule.

The Plaintiff's deposition provided evidence that the Fireman's Rule was inapplicable to the present case and thereby fulfilled the Plaintiff's obligation to produce evidence raising genuine factual issues under Rule 1.510.

The Defendant conceded below that there were holes in the ground in the area where the Plaintiff fell (Appellee's Brief at page 4; R 206; 212-213). Similarly the Defendant conceded that fences were installed on the property in 1981. This information came from Ms. Tejera's Deposition; the witness produced by the Defendant as the one person with the "most knowledge" about the property. The Record clearly reflects the need to do additional discovery before this case can be resolved. Ms. Tejera's deposition revealed that numerous persons had information about the upkeep of the property, which Ms. Tejera admitted she did not have. The Defendant failed to produce those people for deposition on the Plaintiff's request to produce the person with the most information about the property. Instead the Defendant produced one witness who admitted she had no knowledge about the condition.

The Plaintiff is entitled to complete discovery before having his case finally disposed of especially where the Record so clearly shows a necessity for more information in order for there to be a full adjudication of this matter on its merits. Scherr v. Andrews, 497 So.2d 970 (Fla. 3d DCA 1986); Derosa v. Shands Teaching Hospital and Clinic, Inc., 468 So.2d 415 (Fla. 1st DCA 1985); Danna v. Bay Steel Corp., 445 So.2d 704 (Fla. 4th DCA 1984); Sewell v. Flynn, 459 So.2d 372 (Fla. 1st DCA 1984);

Moore v. Freeman, 396 So.2d 276 (Fla. 3d DCA 1981).

It is important to point out that the Appellee relied heavily on the Deposition testimony of Ms. Tejera as to what went on at the time of the fire, and which Deposition acknowledged the presence of other staff members on the grounds during the fire. As to the knowledge of those other staff members who were present on the grounds, only a reversal of this premature Summary Judgment will provide an opportunity for discovery as to their knowledge and opportunity to warn; the two factual issues left pending by this premature Summary Judgment.

The evidence revealed that there were firemen located at the fire trucks almost the entire time that other firemen were fighting the fire and that there were agents of the Defendant on the property at the time of the fire who were responsible for upkeep of the grounds. The knowledge of those agents, coupled with their presence on the grounds at the time of the fire, tends to establish that there was an ample opportunity for agents of the Defendant to warn about the condition of the grounds where the Plaintiff fell. The Plaintiff should at least be entitled to an opportunity to depose the people, namely the site manager and the property manager, to determine their knowledge and whether they had an opportunity to warn.

It is undisputed that the Defendant knew that the firemen were on the premises and therefore had a duty to warn about the hidden holes. Whitten v. Miami Dade Water & Sewer Authority, et al, 357 So.2d 430 (Fla. 3d DCA 1978); Price v. Morgan, 436 So.2d 1116 (Fla. 5th DCA 1983).

That the Plaintiff was a licensee, by virtue of being a fireman summoned by Defendant to aid in putting out the fire is undisputed. Price v. Morgan, supra. The Respondent has failed to show any grounds for why this improper Summary Judgment should be upheld. There is no argument sufficient to overcome the legal infirmities in this Summary Judgment and it must be reversed.

It is important to note that reversal of the Summary Judgment below is mandated regardless of whether or not the Fireman's Rule is upheld by this Court. Circumstances below fall within the clear exception to the Fireman's Rule, that there is liability of the defendant if the defendant is on the premises and does not warn the fireman of the dangerous condition which is not open and obvious. Once proper discovery is allowed in this case the Plaintiff will be able to go forward with his claim and established that the Defendant both the time and opportunity to warn him of the latent dangerous condition on its property.


This is simply another situation of an improper Summary Judgment; as it was entered before the Plaintiff had an opportunity to complete discovery on the most significant issue in this case and additionally because Summary Judgment was entered even though there were genuine factual issues to be decided. The Court below determined that the Fireman's Rule applied and that no amendment of the pleadings was possible to state a cause of action. Of course if this Court abrogates the Fireman's Rule there is no question that the Summary Judgment below must be reversed. However even if the Fireman's Rule is upheld, under the circumstances in this case, it is clear that

the Summary Judgment below was premature and that the Plaintiff has a cause of action against the Defendant for failure to warn of a known dangerous condition.

CONCLUSION

Regardless of this Court's decision on whether or not to retain the Fireman's Rule, the Plaintiff below is entitled to reversal of the Summary Judgment as his cause of action clearly fell within an exception to the Fireman's Rule; where the evidence showed that the condition was dangerous, not open and obvious, and that the officers and employees of the Defendant were on the premises with the firemen for hours but did not warn them of the post holes. Additionally, Summary Judgment was prematurely entered since it prevented the Plaintiff from completing discovery on the one disputed issue of fact left to be resolved. Finally Summary Judgment must be reversed since Fireman Brantley was not injured by the condition he came on the premises in regard to, so the Fireman's Rule does not apply.

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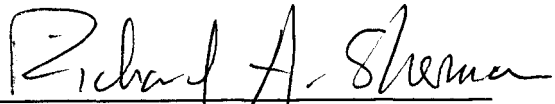
CERTIFICATE OF SERVICE

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