IN THE SUPREME COURT OF FLORIDA

THE CITY OF JACKSONVILLE
Petitioner

v.

JOANN MILLS and PHILLIP MILLS
her husband
Respondents

CASE NO.: 70,060
DCA CASE NO.: 87-1614

INITIAL BRIEF OF RESPONDENTS ON REVIEW FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

J. Schuyler Fagan, Esquire
L. Jack Gibney, Esquire
1035 LaSalle Street
Jacksonville, Florida 32207

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Respondents do not disagree with Petitioner's version of the Petitioner's Statement of the Case and Facts but would add for clarification purposes that the Respondent tripped over an expansion joint which did not have a cover over it.

ISSUE PRESENTED

The issue is whether or not a governmental entity owes a duty of care to its citizens in the day to day operation of governmental facilities.

SUMMARY OF ARGUMENT

The distinction to be drawn in this case which was recognized by the First District Court of Appeal is between the decision whether or not to act-a protected activity-and the steps that must be taken once such a decision has been implemented.

While Respondents do not disagree with the general proposition that certain governmental actions are immune, it is well established that once a governmental entity decides to act, the entity or authority must then do so with reasonable care.

If Petitioners argument is taken to its logical extreme, the govenmental entity will be responsible for no acts of negligence. This is contrary to the statute and case law which abolish governmental tort immunity in certain cases (Emphasis Supplied). Under Petitioners theory, the government agency would not be responsible for, among other activities, the maintenance of traffic lights, the maintenance of side walks and streets, or the maintenance of any government facility.

The First District court was correct in recognizing and drawing the distiction and reversing the trial court in this case.

ARGUMENT

The First D.C.A correctly drew the distinction between cases cited by the Petitioner and cases such as City of Jacksonville v. R.E. Hampton, 108 So2d 768 (Fla. 1st DCA 1959) and Hodges v. City of Winter Park, 433 So2d 1257 (Fla. 1st DCA 1983).

Hampton and Hodges deal respectively with the liability of the City of Jacksonville for failure to maintain the steps of City Hall and the liability of the City of Winter Park with respect to personal injuries received when an automobile struck a man-hole on an undedicated road.

While Hampton indicates that a pedestrian must prove that the City had knowledge of a particular danger which is a prerequiste in any negligence action, it clearly demonstates that a City or State is responsible for maintainence of facilities operated by that entity. Similarly, the Respondents in this case must prove that the city had knowledge of this particular danger.

The question in this case is whether or not the lack of protective cover over an expansion joint in the courthouse poses a hazard to the public. In both Hampton and the present case, the issue is not whether or not the government owes a duty of care but whether or not a particular situtation poses a danger to the public. Implicitly, if a particular hazard can be demonstrated and if notice can be proven, the governmental entity is held responsible for any damages caused by the danger.

In Hodges, the Fifth D.C.A. indicated that factual issues with respect to notice precluded summary judgment. The specific issue in the case was whether or not a particular man-hole posed a hazard to the public.

In this case, if the Respondents prove knowledge or notice of this particular hazard-lack of an expansion joint-the Petitioners would be held accountable for any damages to Respondents.

Under Petitioners theory, even if the City or governmental entity knows of a dangerous condition, they can take no action with impunity since the entity will be protected to an absolute extreme. This will be against the laudable policy to encourage all citizens whether governmental or private to take steps in order to insure the safety of all citizens.

To illustrate the distinction between the particular issue involved here and the case relied upon by the trial court and one of the cases relied upon by Petitioner, Zieja v. Metropolitan Dade County, 508 So2d 354 (Fla. 3rd DCA 1986), a careful reading of the decision indicates that the issue was whether or not to employ security personnel in a courthouse facility; this is a policy or judgment level decision, not an operational decision. The Third D.C.A. in that decision said that the operation of a courthouse which is an activity not normally engaged in by private persons is an inherently governmental activity and therefore is immune from tort liability.

The decision of Zieja arguably protects all governmental activities. As indicated in the opinion, it suggests that any activity which is not normally engaged in by private persons should be immune from tort liability. If this decision is expanded as the Third D.C.A. has apparently written it, there will be no liability for maintenance of traffic lights, city or state facilities, sidewalks, streets, roads, or bridges. The test would become whether or not a private person engages in a particular activity that the government is engaging in at the time.

The dissent in Zieja at 358 properly framed the issue as follows:

> May a county be held liable for injuries arising out of the allegedly negligent failure to provide security from the acts of its prisioners?

The dissent has correctly recognized this issue as a failure to act on a policy or decision making level in providing security and not on what steps or actions should be taken once security personnel have been provided.

If this court adopts the rationale of the Third District Court of Appeal, such a result would necessarily repeal Florida Section 768.28 which provides for government liability in certain restricted cases.

The other case cited by Petitioner, Trianon Park Condominium Association, Inc. v. City of Hialeah, 468 So2d 912 (Fla. 1985) deals with liability for failure of a governmental entity to enforce a particular building code provision. This deals with the initial policy decision and a judgment on the part of a governmental entity whether to enforce a statute or regulation. Importantly, Trianon does not deal with what steps must be taken of a governmental body once a decision is made to enforce the code provision.

CONCULSION

In Hampton and Hodges as well as cases construing Florida Statute 768.28 it is clear that once the government decides to act, is must act as a reasonably prudent person. The government's failure to act as a reasonably prudent person subjects the government to liability as an ordinary person.

The First District Court was correct in reversing the summary judgment previously entered for Petitioners and Respondents respectfully urge that this court affirm the decision of the First District Court of Appeal.

J. SCHUYLER FAGAN, ESQUIRE
L. JACK GIBNEY, ESQUIRE
ATTORNEYS FOR APPELLANTS
1035 LASALLE STREET
JACKSONVILE, FLORIDA 32207
(904) 398-2000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to David Carter, Esquire, 705 City Hall, Jacksonville, Florida 32202, by Mail, this 1st day of November, 1988.

J. SCHUYLER FAGAN, ESQUIRE
L. JACK GIBNEY, ESQUIRE
ATTORNEYS FOR APPELLANTS
1035 LASALLE STREET
JACKSONVILE, FLORIDA 32207
(904) 398-2000

396-6516