12-4

IN THE SUPREME COURT OF FLORIDA

CITY OF JACKSONVILLE,

Petitioner,

vs. CASE NO: 87-02100

LINDA DURRANCE and
DARRYL DURRANCE,

Respondent.

ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondents, Linda Durrance and Darryl Durrance, join in the Statement of the Case and Facts of Petitioner, City of Jacksonville, in its Initial Brief on the Merits. However, Respondents would respectfully point out that the findings of the trial Court and intermediate Appellate Court below are not based solely on the issue of the existence of a legal duty on the part of the City of Jacksonville. Rather, the proper issue is the proper application of all aspects of the law as set forth in Trianon Park Condominium Associations, Inc. vs. City of Hialeah, 468 So.2d 912 (Fla. 1985), to the facts in the instant case.

Those facts are as set forth in the First District's opinion, at page 2 of that opinion (see Petitioner's Appendix 1) and consist of a simple slip and fall in the public areas of the Duval County Courthouse when Petitioner slipped and fell in a puddle of water in the corridor.

JURISDICTIONAL STATEMENT

Respondents join in the Jurisdictional Statement of Petitioner and concede that there is an express and direct conflict between the District Court opinion in the instant case and the decision of the Third District Court of Appeal in Zieja vs. Metropolitan Dade County, 508 So.2d 354 (Fla. 3rd DCA 1987), cause dismissed, 518 So.2d 1279 (Fla. 1987)

SUMMARY OF ARGUMENT

The application of the broad dicta in Zieja, supra, to the facts of the instant case have resulted in error in the trial court level which has now been property corrected by the First District Court of Appeal. The clear mandate of Trianon, supra, mandates than an analysis of this cause of action would fall under Category III of that case pertaining to property controlled functions for which a municipality is not immune from suite.

While the facts in Zieja, which involved injuries sustained at the hands of a knife-wielding attacker, may properly may have been decided by the Third District under the law as expressed in Trianon, supra, the over-broad dicta in that case has lead to an erroneous result in the instant case. Contrary to the dictate of Trianon, supra, the Third District in Zieja indicated that the fitus of an injury is the proper method for analyzing a sovereign immunity, rather than an analysis of the nature of the act or omission complained of.

There was a clear legal duty on the part of the City of Jacksonville to the Plaintiff in the instant case to maintain its public properties in a reasonably safe condition or to warn of unsafe conditions of which the City knew or should have known. Either the fact in Zieja should be strongly distinguished from the fact in the instant case or Zieja, because of the broad language contained therein, should be reversed.

ARGUMENT

ISSUE

WHETHER THE OPERATION AND MAINTENANCE OF A COURTHOUSE IS AN INHERENTLY GOVERNMENTAL ACTIVITY INVOLVING ENFORCEMENT OF THE LAWS AND PROTECTION OF THE PUBLIC SAFETY AND THUS IMMUNE FROM TORT LIABILITY

The present case arises from a slip and fall in a puddle of water in the Duval County Courthouse. There is no issue as to the fact that Plaintiff was an invitee on public premises in the Courthouse at the time of the injury. Plaintiff's case in the trial court below was predicated on the common law duty of care owed by the owner and operator of premises to keep those premises in a reasonably safe condition as to invitees on the premises.

The specific act or omission constituting negligence complained of by Plaintiff is the failure of the City to maintain its premises in a reasonably safe condition by allowing water to accumulate on the floor in the public portions of the Courthouse and allegations that the City either knew of the existence of the water on the floor or should have known of its existence because of the length of time the water had remained standing on the floor. The common law principles involved here which impose duty on the owner or possessor of premises to maintain the premises in a reasonably safe condition will not be further belabored by this reviewer. Suffice it to say that this common law duty has been recognized virtually since the adoption of the common law by the

State of Florida. There can be no serious dispute as to the existence of such a common law duty.

With respect to the development of the law of sovereign immunity, its modern embodiment begins with the case of Commercial Carrier Corp. vs. Indian River County, 371 So.2d 1010 (Fla. 1979). Therein, this Court based the analysis of sovereign immunity on the distinction between discretionary level activities of a government entity and planning level activities of a government entity with respect to the governmental activities complained of. Id. at page 1022. On that basis, the Commercial Carrier decision held that the maintenance of a road or its traffic devices was a non-immune activity for which the government could be held liable even though the planning, design or construction of such a roadway and traffic devices would be planning level activities for which the government would be immune from suit.

With respect to the instant case, it should not take deep analysis to arrive at the conclusion, under Commercial Carrier, supra, that the City's failure to adequately maintain its hallways in a reasonably safe condition is not a discretionary or planning level activity but is rather an operational level activity for which immunity will not attach.

Perhaps more helpful in its detail to the instant case is this Court's exhaustive analysis of the proper application of sovereign principles set forth in Trianon Park, supra. Therein,

the Court noted a number of principles to be examined and followed in making the rather difficult sovereign immunity determination. As its first principle, this Court noted in Trianon, that in order for there to be any governmental tort liability, there must be a recognizable common law or statutory duty of care which was allegedly breached. In that regard, the Court made the observation that the waiver of sovereign immunity by statute did not itself either create or destroy any common law causes of action. Trianon, supra at page 917. The duty allegedly breached in the instant case is simply the duty, long recognized in the common law, which requires the owner or possessor of premises to maintain those premises in a reasonably safe condition as to invitees on the premises. Petitioner's assertion that no common law duty is involved in the instant case is unsupported by legal citation and is, at best, confusing. Respondent here seeks only the enforcement of this common law as against the City as would apply to the same extent against a private individual landowner under similar circumstances.

The Trianon analysis continues and the Court therein sets forth four categories of activity for the purpose of further explaining and illustrating the proper analysis of the application of the sovereign statute. These four categories are clearly set forth in that decision and have been adequately briefed by Petitioner in its Initial Brief and will not be here repeated. The confusion arises with the language, and perhaps

even the holding of the Third District opinion in Zieja, supra. Therein, the Third District purported to apply the Trianon analysis to the facts of that case. That case involved injury to a Court clerk suffered at the hands of knife-wielding attacker. It is unclear from the opinion whether that cause of action was based on allegations that the City had a duty to provide reasonably safe security within its public premises or whether it was based on the City's failure to provide adequate guards for its prisoners within the Courthouse. In the former case, the holding of the Third District may have been error. In the latter case, there may have been proper basis for the application of sovereign immunity. In any event, the Zieja opinion did not confine its language or holdings to the specific facts of the case but, rather, went far beyond those facts. In essence, the Third District stated that any tort chargeable to a municipality which occurs within the confines of a Courthouse is immune from suit. This conclusion is reached on the basis that the "operation of a Courthouse" is a Category II function under the analysis of Trianon, supra, for which the government will always be immune.

This conclusion flies directly in the face of this Court's statements with respect to Category III in Trianon, supra.

Category II is entitled "Enforcements of Law and Protection of the Public Safety" and is defined by this Court in Trianon as: "how a governmental entity, through its officials and employees,

exercises its discretionary power to enforce compliance with the laws duly enacted by a government body...". Trianon, supra at page 919. Application of that analysis to the janitorial function of sweeping or mopping corridors in a Courthouse is clearly error. Such janitorial functions clearly do not implicate the "discretionary power to enforce compliance with the laws". The obvious application of Trianon to the instant case falls in Category III, "Capital Improvement and Property Control Functions". In this regard, this Court specifically stated:

> "On the other hand, once a governmental entity builds or takes control of property or an improvement, it has the same common law duty as a private person to property maintain and operate the property". (Citations omitted]

Trianon, supra at page 920, 921.

The statement quoted above, in all its simplicity, is the single controlling principle in the instant case. It would appear that the Court in Zieja was confused in its analysis by analyzing the cite of the tort rather than analyzing the act or omission on the part of the municipality complained of. Obviously, the site was of both cases is a Courthouse. However, the proper analysis revolves around the particular activity of a municipality for which immunity is sought. If the act is a discretionary, planning level act then it is immune. On the other hand, if the act is an operational one, such as mopping and maintaining floors in public buildings, then it is not immune. The application of those principles to the simple fact in the

instant case are clear and compelling. If there could be any doubt about their application, that doubt must be completely dispelled by even a cursory reading of Trianon Park, supra. As the Court observed in that case,

> "On the other hand, there may be substantial governmental liability under categories III and IV. This result follows because there is a common law duty of care regarding how property is maintained and operated and how professional and general services are performed. It is in these latter two categories that the Evangelical Brethren test is most appropriately utilized to determine what conduct constitutes a discretionary planning or judgmental function and what conduct is operational for which the governmental entity may be liable."

Trianon supra at page 921, citing Evangelical Brethren, 67 Wash. 2d 246, 407 P. 2d 440 (1965).

The four categories set forth in Evangelical Brethren, supra and adopted by this Court in Commercial Carrier, supra and Trianon, supra for the analysis of discretionary/operational level acts are set forth in Trianon supra at page 918. As the Court makes clear therein on affirmative answer to each of the four questions is required in order to support a finding of government immunity. Even a brief glance at those four categories reveals that three of them result in a negative answer in the instant case.

However, most important to our analysis and to the confusion created by the decision in Zieja, is the observation that the Evangelical Brethren categories do not, with one exception,

revolve around a determination of the position or activities of the government agency in general. Rather, this analysis revolves entirely around an analysis of the act or omission complained of. If the act itself, or the omission, necessarily involves a basic governmental policy, or is essential to the realization of such a policy or if it requires the exercise of basic policy evaluation and judgment, then it may be considered a discretionary act if the governmental agency involved possesses the necessary constitutional, statutory or lawful authority to carry out the act complained of. In other words, only the fourth category in Evangelical Brethren even addresses the statutory position of the governmental agency in question. The first three categories involve only an analysis of the act itself.

With that guidance in view, it is quite clear that the act complained of here is not the type of essential policy program or objective necessary to proper governance. The act complained of here is the simple act of negligence in failing to maintain the floors of a hallway.

The mere fact that the negligent failure to maintain a hallway occurred in a Courthouse is irrelevant. It is conceded that a large number of the functions of the state judiciary carried out in a Courthouse are discretionary functions to which immunity will attach. However, mopping the floors is not one of them.

Only Zieja, supra suggests otherwise in dicta. Aligned

against the language and holding of Zieja are the clear pronouncements of this Court in Commercial Carrier, supra., Trianon Park, supra., and Evangelical Brethren, supra., as specifically discussed and adopted by this Court.

At least one of the reviewing justices in Zieja recognized the potential error presented by the majority's broad dicta in that opinion. In his specially concurring opinion, Chief Judge Schwartz noted the particular distinguishing facts of Zieja involving the escape of a County prisoner. On that basis alone, Judge Schwartz concurred with the majority. However, recognizing the faulty basis of the majority's opinion as represented in the broad dicta, Judge Schwartz:

> "I believe that the court's contrary emphasis on the location of the incident incorrectly resurrects the governmental-proprietary function distinction which I had thought was laid to rest in Hargrove vs. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957), and would perhaps lead to the unsupportable result of insulating the county from liability in, say, a slip-and-fall case in which it has negligently maintained the courthouse floor."

Zieja, supra at page 357,358.

Judge Schwartz's "unsupportable result" has now come to pass in the instant case.

The error invited by the broad language in Zieja was recognized immediately by Judge Schwartz. It has now been recognized, in its application to the simple facts in the instant case, by the First District Court of Appeal. The facts of the instant case are simple. Unlike many other sovereign immunity

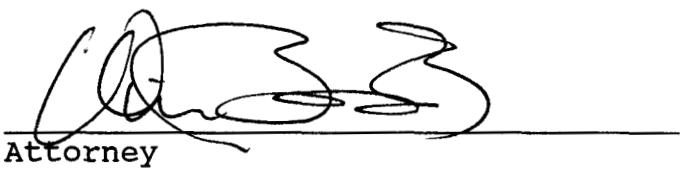
cases, the application of the law to these facts is also simple in the instant case. All of the applicable authority indicates the correctness of the First District's decision. The First District should be affirmed. Zieja, supra should be, at the very least, distinguished or perhaps reversed.

CONCLUSION

The application of Zieja to the facts in the instant case by the trial court was clear error. Rather, the proper application of Commercial Carrier, supra and Trianon Park, supra, are controlling. The opinion of the First District Court of Appeal should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy of the foregoing has been furnished to James L. Harrison, General Counsel and to David C. Carter, Assistant Counsel, 715 TownCentre, 421 West Church Street, Jacksonville, FL 32202, by mail, this 10th day of November, 1988.



Attorney