IN THE SUPREME COURT OF FLORIDA

DOCKET NO. 85,990
(DCA No. 93-3025)

LUCILLE NASH,

Petitioner,

vs.

WELLS FARGO GUARD SERVICES INC., OF FLORIDA,

Respondent.

PETITIONER'S JURISDICTIONAL BRIEF

On Review from the District Court of Appeal,
First District, State of Florida

COKER, MYERS, SCHICKEL,
COOPER & SORENSON, P.A.

HOWARD C. COKER, ESQUIRE
Florida Bar No. 141540

CORINNE L. HELLER, ESQUIRE
Florida Bar No. 907911
136 East Bay Street
Jacksonville, FL 32202
(904) 356-6071

Attorneys for Petitioners

TABLE OF CONTENTS

Table of Citations i

Statement of the Case and Facts 1

Summary of the Argument 2

Jurisdictional Statement 3

Argument 3

THE DECISION OF THE FIRST DISTRICT COURT OF APPEALS CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL AND THE FLORIDA RULES OF CIVIL PROCEDURE SINCE IT GRANTED A NEW TRIAL TO DEFENDANT/APPELLANT BASED UPON AN UNPLED, UNRAISED AND UNPROVEN AFFIRMATIVE DEFENSE.

Argument 8

THE FIRST DISTRICT OPINION IS IN CONFLICT WITH OTHER DISTRICT COURT OPINIONS TO THE EXTENT THAT IT REQUIRES A NEW TRIAL ON ALL ISSUES WHEN THE BASIS FOR REQUIRING A NEW TRIAL WAS BASED SOLELY ON THE JURY'S FAILURE TO APPORTION DAMAGES, NOT UPON THE AMOUNT AND KIND OF DAMAGES THEMSELVES.

Conclusion 10

Certificate of Service 10

Appendix A.1

TABLE OF CITATIONS

CASES	PAGE
American Aerial Lift v. Perez, 629 So. 2d 169 (Fla. 3d DCA 1993)	5,8
Bradford Builders, Inc. v. Dept. of Water & Sewers, 142 So. 2d 137 (Fla. 3d DCA 1962)	4
Chesterton v. Fisher, 20 Fla. L. Weekly D1192 (Fla. 3d DCA May 17, 1995)	7
E.H.P. Corp. v. Cousin, 20 Fla. L. Weekly D995 (Fla. 2d DCA April 21, 1995)	6
Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993)	2,3,7,8,9
Kersey v. City of Riviera Beach, 337 So. 2d 995 (Fla. 4th DCA 1976)	5
Larrabee v. Capeletti Bros., 158 So. 2d 540 (Fla. 3d DCA 1963)	9
Meyers v. Garmire, 324 So. 2d 134 (Fla. 3 rd DCA 1975)	5
Newville v. Dept. of Family Services, 883 P.2d 793 (Mont. 1994)	8
Owens-Illinois, Inc. v. Baione, 642 So. 2d 3, 4 (Fla. 2d DCA 1994)	7
Peninsular Life Ins. Co. v. Hanratty, 281 So. 2d 609 (Fla. 3d DCA 1973)	5
Purvis v. Inter-County Telephone & Telegraph Co., 173 So. 2d 679 (Fla. 1965)	9
Schindler Corp. v. Ross, 625 So. 2d 94, 96 (Fla. 3d DCA 1993)	9
Schindler Elevator Corp. v. Viera, 644 So. 2d 563, 564 (Fla. 3d DCA 1994)	9
Seminole Gulf Railway v. Fassnacht, 635 So. 2d 142 (Fla 2d DCA 1994)	5
Sonnenblick-Goldman v. Feldman, 266 So. 2d 48 (Fla. 3d DCA 1972)	4

State v. Pepper,
155 So. 2d 383 (Fla 1st DCA 1963) 4

Wale v. Barnes,
278 So. 2d 601, 604 (Fla. 1973) 3

W.R. Grace & Co. v. Dougherty
636 So. 2d 746 (Fla. 2d DCA 1994) 7

CONSTITUTIONAL PROVISIONS AND STATUTES

Art. V §3(b)(3), Fla. Const. (1980) 3

Fla. Stat. §768.81 5

COURT RULES

Fla. R. App. P. 9.030(a)(2)(A)(iv) 3

Fla. R. Civ. P. 1.140(h) 3

STATEMENT OF THE CASE AND FACTS

Petitioner was the Plaintiff in a personal injury action resulting from a pistol-whipping attack at the Professional Office Building at Methodist Hospital (hereinafter "Methodist"). Respondent was the Defendant guard service which had contractually agreed with Methodist to provide security services at the office complex. Plaintiff alleged that Defendant's negligence was proximately related to the injuries sustained by Plaintiff. (App. 1) Defendant answered Plaintiff's Complaint and made several affirmative defenses, but did not allege the negligence of any third party, including Methodist, in its answer. (App. 2) Nor did Defendant assert that Methodist was negligent in answers to interrogatories. (App. 3)

At the pre-trial conference, the trial court issued a Pre-Trial Order which listed the issues to be tried. This Order did not list negligence of third parties as an issue in the case. (App. 4)

The case proceeded to trial on the issues listed in the Pre-Trial Order. No further Motions were made to amend the issues or pleadings in the case. During the trial, the Defendant objected to any reference to Methodist Hospital and affirmatively represented to the trial court that "they (Methodist) are not on trial here." Defendant's one witness did not present any affirmative testimony regarding any alleged negligence of Methodist.

Jury instructions were submitted by both parties to the Court. Defendant did not submit any jury instruction regarding negligence of any third parties. (App. 5)

After the close of all of the evidence and the denial of

Motions for Directed Verdict, the Defendant first attempted to assert the affirmative defense of negligence of third party Methodist. The request to include Methodist on the verdict form was denied and a jury returned a verdict for the Plaintiff. Although the trial court's reasons for denying Methodist's inclusion on the verdict form were incorrect, Plaintiff has argued that the decision not to allow Methodist's inclusion was correct on other grounds.

The Defendant appealed the verdict and the trial court's denial of a Motion for New Trial. Defendant's arguments on appeal were two-fold; (a) that it owed no duty to the Plaintiff and (b) that Methodist should have been on the verdict form.

The First District Court of Appeals found no merit to Defendant's claim of no duty.[1] However, the First District reversed and ordered a new trial to include Methodist Hospital on the verdict form, based upon this Court's decision in Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993). (App. 6) Motions for rehearing and certification were filed but were denied on June 2, 1995. Thereafter Petitioner's Notice to Invoke the Discretionary Jurisdiction of this Court was timely filed on June 29, 1995.

SUMMARY OF THE ARGUMENT

The decision of the First District Court of Appeals granted a new trial to Defendant/Appellant based upon an unpled, unraised and unproven affirmative defense that alleged the negligence of third parties. To that extent, it cannot be reconciled with eleven

[1] This part of the decision of the First District Court is not at issue in this Petition and has not been further challenged by Defendant.

decisions from the First, Second, Third and Fourth District Courts of Appeal, as further discussed herein, as well as Fla. R. Civ. P. 1.140(h). In addition, it constitutes a misapplication of this Court's ruling in Fabre, 623 So. 2d. 1182.

The basis for requiring a new trial, and the only assignment of error which was raised by the Defendant, was based upon the trial court preventing the jury from apportioning damages between the Defendant and a non-party, not upon the amount and kind of damages themselves. Therefore, to the extent that the First District's opinion requires a new trial of all issues, it cannot be reconciled with three opinions from the Third District Court as well as a decision from this Court, further discussed herein.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a District Court of Appeal that expressly and directly conflicts with the decision of the Supreme Court or any District Court of Appeal on the same point of law. Art. V §3(b)(3), Fla. Const. (1980); Fla.R.App.P. 9.030(a)(2)(A)(iv). Additionally, the Florida Supreme Court has jurisdiction to review a District Court of Appeal decision which misapplies a decision of this Court. Wale v. Barnes, 278 So. 2d 601, 604 (Fla. 1973)

ARGUMENT

THE DECISION OF THE FIRST DISTRICT COURT OF APPEALS CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL AND THE FLORIDA RULES OF CIVIL PROCEDURE SINCE IT GRANTED A NEW TRIAL TO DEFENDANT/APPELLANT BASED UPON AN UNPLED, UNRAISED AND UNPROVEN AFFIRMATIVE DEFENSE.

In the instant case, the record reveals that Defendant failed to raise the affirmative defense of negligence of third parties until after all parties rested. Fla. R. Civ. P. 1.140(h), holds:

> A party waives all defenses and objections that the party does not present either by motion...or, if the party has made no motion, in a responsive pleading... (emphasis added),

The First District Court has previously acknowledged these procedural guidelines in State v. Pepper, 155 So. 2d 383 (Fla 1st DCA 1963). In that case, the appellant asserted that it was error to prevent introduction of evidence which was outside the issues of the pre-trial order. The First District disagreed.

> The foregoing points on appeal call for consideration of issues outside the pleadings and foreign to the issues which the parties agreed should form the basis of the trial as reflected by the pre-trial conference order.
>
> Having agreed at the pre-trial conference that the only issue to be tried was whether appellant passed the examination taken by him ....appellant precluded himself from injecting into the trial any separate or different issues other than those agreed upon at the pretrial conference. The trial court was therefore correct in refusing to consider at the trial any new issues....

The Third District Court of Appeals has also applied the above rules to the waiver of an unpled affirmative defense. In Bradford Builders, Inc. v. Dept. of Water & Sewers, 142 So. 2d 137 (Fla. 3d DCA 1962), the Third District reversed a new trial which was based upon an unpled affirmative defense stating:

> An available affirmative defense, if not asserted, is considered waived under 1.11(h), F.R.C.P., 30 F.S.A...Id. at 138.

When affirmative defenses are abandoned in the pleadings and

not raised during a scheduled pre-trial conference, they are waived and evidence which would support the unpled affirmative defense is properly excluded. Sonnenblick-Goldman v. Feldman, 266 So. 2d 48 (Fla. 3d DCA 1972). When affirmative defenses are abandoned in the pleadings, and not raised until the time of trial or thereafter, they are waived and the defendants are estopped from asserting them at trial. Peninsular Life Ins. Co. v. Hanratty, 281 So. 2d 609 (Fla. 3d DCA 1973), Kersey v. City of Riviera Beach, 337 So. 2d 995 (Fla. 4th DCA 1976). The Third District Court has gone even further in this analysis and in Meyers v. Garmire, 324 So. 2d 134 (Fla. 3d DCA 1975), the court found that it was prejudicial and reversible error to allow presentation of evidence on an affirmative defense that was not timely raised. All of the decisions above have applied basic civil procedure rules uniformly to find waiver of an affirmative defense that is not pled or raised by the defendant before trial. The decision from the First District Court in the instant case is in clear conflict since it finds error in failing to allow inclusion of an unpled affirmative defense in the context of third parties on the verdict form.

In Seminole Gulf Railway v. Fassnacht, 635 So. 2d 142 (Fla 2d DCA 1994), these procedural issues were raised by the dissent in the context of pleading and proving third-party negligence under Fla. Stat. §768.81:

> I do not believe the issue was adequately preserved by the defendant in the trial court. The record does not reflect that the defendant asked for relief under section 768.81 until after the jury returned its verdict. In my opinion, a defendant should raise section

> 768.81 as an affirmative defense, just as defendants have always raised contributory or comparative negligence. A defendant should request jury instructions on this issue similar to the standard instructions for comparative negligence. Id. at 144.

The case of American Aerial Lift v. Perez, 629 So. 2d 169 (Fla. 3d DCA 1993) had the same reasoning as the dissent in Fassnacht. In that case, the Court refused to allow defendant to include an untimely asserted third party when it stated,

> As to the possible responsibility of Plaintiff's employer, the defendant adduced no evidence on that issue and did not request that the employer be included on the jury form. We see no reason why the defendant should be given another bite at either apple. Id. at 172.

In the instant case, the First District opinion attempts to give the Defendant another bite and conflicts with Perez.

The First District opinion is in even further conflict with the opinion of the Second District Court of Appeals rendered in E.H.P. Corp. v. Cousin, 20 Fla. L. Weekly D995 (Fla. 2d DCA April 21, 1995). In that case, the trial court allowed a third party's name to be placed on the verdict form after the defendant first raised the issue on the eve before trial was to begin. In the appeal to the Second District, the propriety of the trial court's decision was addressed. The court stated,

> On the second point raised, [the third party's] name was added to the verdict form over Cousins' objection. This was allowed even though Jai-Alai failed to affirmatively plead the negligence of a third party or raise the matter at pretrial. The first notice the Cousins received of the inclusion of [the third party's] name on the verdict form was on the eve of trial. Although [the third party's]

> name should not have been placed on the verdict form, the jury never reached the issue...as the jury's determination that Jai-Alai was not negligent was dispositive of the case. Therefore, any error in including [the third party's] name on the verdict form was harmless. Id. (emphasis added)

The Second District's opinion states that it is error to include a third party on the verdict form if the defendant does not plead the issue or raise the issue at pre-trial. The First District opinion in the instant matter says that it is reversible error not to place the name of a third party on the verdict form, even if the issue is not raised until all parties have rested their cases. Clearly, the two opinions are in conflict.

As to whether evidence must be presented by the Defendant before a third-party's negligence can be considered, the First District opinion is in conflict with at least three other District Court decisions. In W.R. Grace & Co. v. Dougherty, 636 So. 2d 746 (Fla. 2d DCA 1994), the Second District Court upheld a trial court's refusal to place the names of third parties on the verdict form and stated:

> However, the evidence in this case was not sufficient to have permitted the jury to have received instructions and a verdict form pursuant to Fabre....We conclude that the only way to determine fault in a trial is from the evidence presented to the jury. Therefore, there must be evidence of fault of a non-party before a jury can determine the fault of that nonparty. Id. at 748 (emphasis in original)

The Daughtry decision has been followed as controlling in at least two other cases; Owens-Illinois, Inc. v. Baione, 642 So. 2d 3, 4 (Fla. 2d DCA 1994) and Chesterton v. Fisher, 20 Fla. L. Weekly

D1192 (Fla. 3d DCA May 17, 1995).

In the instant case, both parties had rested their cases before Methodist's fault had been raised by the Defendant so evidence on the issue was not presented. Therefore, the First District Court opinion conflicts with all three of these opinions.

When This Court decided Fabre, it was attempting to give meaning to Florida's comparative fault statute. This Court did not intend, by that decision, to nullify the Rules of Civil Procedure regarding requirements of pleading and proof for affirmative defenses. When the opinion of the First District Court in the instant case is read along with this Court's opinion in Fabre, other opinions of courts cited by this Court in Fabre and with the Florida Rules of Civil Procedure, it becomes clear that the application of the Fabre rule to the instant facts resulted in a misapplication of the law. The instant application of Fabre may have adverse constitutional due process implications. see Newville v. Dept. of Family Services, 883 P.2d 793 (Mont. 1994). The Fabre facts clearly show that the issues of third party fault were before the parties throughout the pendency of the litigation and that evidence of third party fault was presented at trial. Therefore, the facts in Fabre are sufficiently distinguishable from the instant case such that Fabre should not control the outcome of the instant case. The instant case can be resolved by reliance on basic civil procedure rules of pleading and proof.

THE FIRST DISTRICT OPINION IS IN CONFLICT WITH OTHER DISTRICT COURT OPINIONS TO THE EXTENT THAT IT REQUIRES A NEW TRIAL ON ALL ISSUES WHEN THE BASIS FOR REQUIRING A NEW TRIAL WAS

BASED SOLELY ON THE JURY'S FAILURE TO APPORTION DAMAGES, NOT UPON THE AMOUNT AND KIND OF DAMAGES THEMSELVES.

The opinion of the First District in the instant case mandates a "new trial incorporating a proper verdict form" without restricting the trial to apportionment of fault. To that extent, it directly conflicts with opinions of the Third District Courts of Appeal. In American Aerial Lift v. Perez, 629 So. 2d 169 (Fla. 3d DCA 1993), the Third District reversed the trial court based on Fabre issues. However, the Court also stated,

> Since a new trial is required on grounds unrelated to the damages issue, the new trial shall be confined to issues of the liability of the defendant and of the other entities allegedly responsible for the condition of the defective equipment. Id. at 172 (citations omitted)

The Third District followed this opinion with two others which come to the same result; if the reason for retrial is based upon the inclusion of non-parties pursuant to Fabre, then the new trial is to be based upon liability and apportionment only. Schindler Corp. v. Ross, 625 So. 2d 94, 96 (Fla. 3d DCA 1993) ("Neither of the errors which require a new trial affected the jury's determination of the plaintiff's damages. Accordingly, we direct that issue shall not be considered at the retrial..."). Schindler Elevator Corp. v. Viera, 644 So. 2d 563, 564 (Fla. 3d DCA 1994) ("On remand, the trial court is instructed not to consider the issue of damages, and to confine the issues on retrial to a determination of the negligence...")

Therefore, the First District opinion in the instant case is

directly contrary to the line of cases from the Third District discussed above and a clear conflict exists. Additionally, this Court has previously adopted a similar holding in Purvis v. Inter-County Telephone & Telegraph Co., 173 So. 2d 679 (Fla. 1965), which adopted the rule in Larrabee v. Capeletti Bros., 158 So. 2d 540 (Fla. 3d DCA 1963), holding that where the assignments of error and issues raised by the party bringing the appeal only relate to liability, the new trial should not address issues of damages. Therefore, the First District Court decision also conflicts with these opinions.

CONCLUSION

Petitioner respectfully submits that this Court has jurisdiction to review the decision below since it expressly conflicts with several decisions of this Court, other District Courts of Appeal and the Florida Rules of Civil Procedure. Petitioner requests that this Court exercise that jurisdiction to consider the merits of petitioner's arguments.

RESPECTFULLY SUBMITTED,

CORINNE L. HELLER, ESQUIRE
Florida Bar No. 907911
136 East Bay Street
Jacksonville, FL 32202
(904) 356-6071
Attorneys for Petitioners

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to James P. Murray, Esquire, International Place, 100 Southeast Second Street, Seventeenth Floor, Miami, FL 33131-1101 by U.S. Mail this 10th day of July, 1995.

CORINNE L. HELLER, ESQUIRE