OA 3.4.96

017

FILED
SID J. WHITE
FEB 9 1996
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

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 REPLY BRIEF ON THE MERITS

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

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

HOWARD C. COKER, ESQUIRE
Fla. Bar No. 141540

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

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

RULES AND STATUTES:

ARGUMENT

I. THE FACTUAL BACKGROUND DISCUSSED BY APPELLEE IS IRRELEVANT TO THE ISSUES UNDER REVIEW AND IS FACTUALLY INCOMPLETE.

In the Answer Brief, Appellee attempts to give an exhaustive factual background regarding all of the underlying facts which occurred at trial. Appellant will not respond to this recitation of facts nor its obvious omission of many other facts since this extensive factual background is only relevant to the liability of Wells Fargo which is not at issue in the present matter. Such a factual background formed the basis of Wells Fargo's brief to the First District wherein it argued that it "owed no duties to Nash". Such argument was summarily and properly rejected by the First District in the Order under review, and Wells Fargo did not seek further review of that decision. As such, there can be no argument that the jury's finding of liability on the part of Wells Fargo was error.

The only issues for determination in this appeal, and the only relevant facts, surround whether Methodist should have been included on the verdict form at trial and, if so, whether a new trial should be awarded for apportionment of liability between Wells Fargo and Methodist. Any implication of other issues, by factual recitation or legal argument, is outside the scope of this appeal.

II.A. REPLY TO ARGUMENT I.A.; THE APPELLEE CONCEDED UNDER ARGUMENT II OF ITS ANSWER BRIEF THAT CONFLICT JURISDICTION EXISTED

In Appellee's Answer Brief at page 45, Appellee states "Wells Fargo concedes that the opinion below is impliedly contrary to the decisions of other courts's (sic) regarding the scope of

a new trial pursuant to Fabre." That concession, alone, evidences a sufficient jurisdictional basis for review.

In addition to that obvious and conceded conflict, the various other bases for jurisdiction were fully outlined in the Appellant's prior briefs and include:

1) The opinion's clear defeat of the long-standing requirements of pleading of affirmative defenses;

2) The opinion's clear defeat of the long-standing requirements of defendant's burden of proving affirmative defenses at trial;

3) The opinion's misapplication of a Florida Supreme Court ruling which arrives at a result never intended by such opinion and which has negative constitutional implications.

All of these reasons, together or singularly, form an adequate basis for this Honorable Court to assert jurisdiction.

II.B REPLY TO SECOND ARGUMENT IN I.A.; THERE WAS NO WAIVER, LEGALLY OR FACTUALLY, TO WELLS FARGO'S ATTEMPT TO ASSERT A NEW DEFENSE AFTER THE CLOSE OF THE EVIDENCE

Appellee takes a novel stance to argue that Nash, by acknowledging that Wells Fargo was attempting to protect its record, somehow waived any objection to an affirmative defense being asserted after the close of the evidence. The assertion of waiver by Wells Fargo is essentially ironic. Waiver is;

> The intentional or voluntary relinquishment of a known right...or when one dispenses with the performance of something he is entitled to exact or when one in possession of any right,...with full knowledge of the material facts, does or forbears to do something the doing of which ... is inconsistent with the right, or his intention to rely upon it. Blacks Law Dictionary, 5th Ed.

This analysis essentially surrounds the age old argument, which came first, the chicken or the egg? Once Wells Fargo failed to raise the affirmative defense in its answer, failed to raise it at pre-trial, completed the entire trial and, no less than seven times during the trial, affirmatively asserted that Methodist's actions/inactions were not on trial, is it safe to assume that the defense has been waived and cannot be reborn after the close of evidence? Is there any ability to "waive" an attempt to assert an affirmative defense that is not even an existing right on Defendant's part at the time of assertion? Is there even a clear, knowing waiver by the equivocal statement that "I understand he's trying to protect the record" ...or "he is just attempting to protect his record?" (T. 615-618). Does a Plaintiff waive all of its objections to an assertion when the court does not allow argument by the Plaintiff on the issue. ("If the court is going to seriously entertain this, I'll be glad to go get all the cases.") (T. 615-618). Florida law, common sense and a reasonable application of the definition of waiver, would hold that there is no resurrection of a long since abandoned affirmative defense by an equivocal statement recognizing a belated "attempt" to assert the defense. See, Florida Med. Malpractice Joint Underwriting Assn. v. Indemnity Ins. Co. of N. Amer., 652 So. 2d 1148 (Fla. 4th DCA 1995) (Holding that where an affirmative defense was first asserted during the sixth day of trial, it was untimely and was waived); J.A.B. Ent. v. Gibbons, 596 So. 2d 1247 (Fla. 4th DCA 1992) (Holding that where an affirmative defense does not appear in the answer and was not asserted at a hearing, the defendant waived the defense and could not "resurrect" it to attack a motion for summary judgment.); Martin v. Eastern Airlines, Inc., 630 So. 2d 1206 (Fla. 4th DCA 1994) (Holding that an affirmative defense was waived when it was not asserted in the answer and could not be asserted by an amended pleading right after the statute of limitations ran.); and Fisher v. Fisher, 613 So. 2d 1370 (Fla. 2nd DCA 1993) (Holding that is was

error to direct a verdict based upon an unpled defense that was thereby waived.). Courts have compelling reasons to find such a waiver since, as held in Brickell Station Towers, Inc. v. JDC Corp., 549 So. 2d 203 (Fla. 3rd DCA 1989);

> We hold that the trial court decided matters which were not the subject of appropriate pleadings. In granting relief which was neither requested by appropriate pleadings, nor tried by consent, the trial court entered the order in violation of BST's due process rights. Accordingly we reverse. Id. (citations omitted) (emphasis added).

In order to assent to Wells Fargo's affirmative defense and thereby waive any objections, Wells Fargo had to have a valid, protected right to assert such defense. That right had been lost during the Answer stage, during the pre-trial conference, at each and every point during the trial when Wells Fargo's counsel denied the existence of the defense and then, by resting at trial prior to asserting it. Once the defense was waived, it could not be resurrected by a singular mention by defense counsel and an alleged waiver to such mention after the close of all the evidence at trial.

Additionally, for the statements of Nash's counsel to have constituted a waiver, they must have been clear, unequivocal, and incapable of any other interpretation except to waive Nash's right to object the introduction of a new defense. Such is not the case here and no such waiver can be interpreted. In this age where courts are trying to promote professionalism and civility, the polite response of Nash's counsel which allowed Wells Fargo to "attempt" to protect his record, can hardly be viewed as anything other than a polite acknowledgement of a belated attempt to assert the waived issue. It cannot, unequivocally, be said to mean that Nash assented to entry of the new defense.

II.C REPLY TO ARGUMENT I.B.; KNOWLEDGE OF THE AFFIRMATIVE DEFENSE EXISTED SUFFICIENTLY BEFORE TRIAL OF THIS CAUSE THAT WELLS FARGO HAD A KNOWING OPPORTUNITY TO ASSERT IT, BUT CHOSE NOT TO, AND THEREBY MADE A KNOWING WAIVER OF THE DEFENSE

Wells Fargo claims that prior to the trilogy of Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993); Allied Signal Inc. v. Fox, 623 So. 2d 1180 (Fla. 1993) and W.R. Grace & Conn v. Dougherty,636 So. 2d 746 (Fla 2nd DCA 1994), Wells Fargo had insufficient knowledge that the affirmative defense existed, or that it was an affirmative defense. Such argument is totally without merit. The record shows that after the close of the evidence, Wells Fargo's attorney was sufficiently aware of the two cases Fabre v. Marin, 597 So. 2d 883 (Fla. 3rd DCA 1992) and Messmer v. Teacher's Ins. Co., 588 So. 2d 610 (Fla. 5th DCA 1991) that he then decided to raise the issue. Those two cases were decided and reported in April of 1992 and September of 1991 respectively. The trial in this action occurred on May 17, 1993. The Pre-trial in this action occurred on May 6, 1993. Wells Fargo's Answer was filed on March 23, 1992. All of these significant events occurred after one or both of the District Court decisions in Messmer and Fabre. During all of these significant events, Wells Fargo remained silent and failed to assert the defense. Since the defense was based upon Fla. Stat §768.81, it was in existence at all times relevant and was analogous to the affirmative defense of comparative negligence. The defense of comparative negligence has been an affirmative defense, requiring pleading and proof, long before this action and was known to be such by Wells Fargo. It is simply common sense that allegations of third-party fault requiring apportionment, like contributory fault requiring apportionment,

would be an affirmative defense. Therefore, Wells Fargo's assertion of ignorance of the law is without merit.

II.D REPLY TO ARGUMENT I. C. THERE CAN BE NO TRIAL OF AN ISSUE BY CONSENT WHERE ONE PARTY SPECIFICALLY AND REPEATEDLY DENIES THAT AN ISSUE EXISTS SUCH AS WELLS FARGO DID AT TRIAL

In section I.C. of the Answer Brief, Appellee must concede that (a) the defense at issue was an affirmative defense that required pleading and (b) the defense was waived through a failure to so plead. Therefore, Wells Fargo is left with only one alternative. Wells Fargo argues that somehow Nash "opened the door" by seeking to introduce certain pieces of evidence at trial. Wells Fargo asserts that the affirmative defense was actually "tried by consent" after it was previously waived. This is the first time that the issue of trial by consent has ever been raised before any court in this matter, and this issue did not form the basis of the trial court or First District opinion under review. Thus this argument, like the affirmative defense upon which it is based, was waived. Nevertheless, Appellant will address the impossibility of such an argument.

The rule regarding trial by consent is based upon Fla. R. Civ. Pro. 1.190(b) which states;

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, but failure to so amend shall not affect the result of the trial of these issues. If the evidence is objected to at trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended to conform with the evidence and shall do so freely when the merits of the cause are more effectually presented thereby and the objecting party fails to satisfy the court that the admission of

> such evidence will prejudice the objecting party in maintaining an action or defense upon the merits.

The Rule is normally triggered when the party seeking to enter a new issue presents evidence which would be outside the issues of the pleadings as they exist at that time. Then the other party either consents to try the issue, or objects whereby the court must make a determination of whether the issue should be allowed and the pleadings amended. See, Holy Temple Church of God v. Maxwell, 578 So. 2d 877 (Fla. 1st DCA 1991). For there to be implied consent, the evidence for the new issue must be solely relevant to that issue such that the party against whom the amendment is sought would know that a new issue was being inserted into the litigation. Dean Co. v. U.S. Home Corp., 485 So. 2d 438 (Fla. 2nd DCA 1986). It has previously been held that a mere mention of a new issue after conclusion of all testimony is insufficient to have trial by implied consent. Tomasello, Inc. v. Los Santos, 394 So. 2d 1069 (Fla. 4th DCA 1981).

The Rule regarding trial by consent does not condone trial by ambush or the late assertion of a new issue when the opposing party is prejudiced. In fact, the case cited by Wells Fargo in support of their claim that the affirmative defense was tried by consent contains the following passage;

> The deficiency of [plaintiff's] complaint in failing to allege its performance was not urged by motion to dismiss...[defendant's] responsive pleading contained no hint that [defendant] would assert that [plaintiff] materially and previously breached the contract. The trial judge aptly stated;
> 'The purpose of pleadings is to make issues. The purpose of issues is for people to know what they've got to meet and get ready to meet it.' Thus though a material omission from [plaintiff's] complaint contributed to the pleading debacle...the trial court correctly held that craftsmanship in pleading is yet an essential part

> of litigation and that evidence of [plaintiff's] asserted breach should be excluded. Massey-Ferguson, Inc. v. Santa Rosa Tractor Co., 366 So. 2d 90, 93 (Fla. 1st DCA 1979)

The Massey-Ferguson case allowed amendment to the issues regarding a singular letter which was first introduced by plaintiff's counsel and which was unobjected to by any party. Therefore, full examination of the letter and its relationship to the issues was explored by plaintiff and defense counsel. Additionally, the letter was not relevant to any other issue within the pleadings. It was on that basis, and that basis only, that the court found trial by consent, but only for that limited issue. As for the other defense that defendant sought to include by implied consent, the court refused to allow the amendment.

The word consent is defined as;

> A concurrence of wills... Agreement; the act or result of coming into harmony or accord. Blacks Law Dictionary, 5th Ed.

The definition of consent implies that both parties agree to the assertion. Therefore, if both parties expressly consented to the trial of an issue, neither party would have any grounds to object once evidence of that issue was presented. Additionally, both parties would be aware of the presentation and argument of a new issue and would have openly agreed to that. Obviously, there is no expressed consent in this case since Nash never expressly agreed to include a defense of third-party liability in the case.

Therefore, Wells Fargo is left to argue implied consent. The case of Dean Co. v. U.S. Home Corp., 485 So. 2d 438 (Fla. 2nd DCA 1986), is particularly relevant to this analysis. In that case, the plaintiff brought an action against defendant grounded in indemnity. The pleadings reflected that indemnity was the only issue to be tried. Plaintiff's counsel at trial acknowledged

that indemnity was the only action pled and that the outcome of the trial was an "all or nothing" decision. Plaintiff had never sought any amendment to the pleadings to allege a contribution or apportionment of fault claim.

After the case was tried, the trial court decided that there was joint fault between plaintiff and defendant. Under the law of indemnity, there can be no joint fault since a party to be indemnified must be without fault. Therefore, the court would be forced to enter a judgment for defendant on the indemnity claim. However, after the trial was concluded, the trial court allowed plaintiff to amend his pleadings to assert a contribution or apportionment claim. The trial court entered an apportioned judgment accordingly. The plaintiff maintained that such judgment was proper since the issue of apportionment was tried by consent due to the presentation of both party's fault at trial.

The Second District reversed that decision and gave the following rationale;

> Dean's counsel had no reason to develop evidence ...that would have shed light on the percentage, if any, of the damages ... ; the weighing of the relative fault of the parties is foreign to an indemnity action....
>
> We recognize, of course, the desirability of allowing the liberal amendment of pleadings...; nevertheless, the trial court's exercise of discretion to permit amendment wanes as litigation progresses. Certainly this discretion is at its nadir when the trial court has...heard all of the evidence, has denied the third party plaintiff's pleaded indemnification claim, and has ruled on the damages. In fact, only if the parties had, by consent, tried this case on a theory of contribution could it be said that the trial court did not abuse its discretion, but substantial obstacles deter us from arriving at that conclusion. Id. at 439.
>
> ...[N]othing put [defendant] on notice that relative fault was indeed the issue being tried...Indeed, [defendant] could not discern at any juncture in the trial that the third party plaintiff had shifted its

> theory of recovery. Allowing an amendment after the close of the evidence served only to trap [defendant] in a judgment requiring contribution. Id. at 440. (emphasis added)

Additional cases discuss tests for determining when issues have been tried by consent. Smith v. Mogelvang, M.D., 432 So. 2d 119 (Fla. 2nd DCA 1983), holds that whether an amendment to the pleadings should be granted should focus upon whether the party opposing such amendment would be unfairly prejudiced. Under that test, there are two main considerations; (a) whether the party opposing the amendment had a fair opportunity to defend against the issue and (b) whether the opposing party could have offered additional evidence on that issue if it had been pled. "[T]he more of an indication that additional evidence could have been offered by the opposing party if the issue had been pleaded, the greater the potential unfairness to that party from the issue not being pleaded." Id. at 122.

Applying this analysis to the case under review, this Court need go no further than the continual objections by Wells Fargo's attorney of any mention of Methodist at trial, and the repeated representations that "Methodist is not on trial here" and related arguments. (T.77-87, T. 134, T. 146, T. 163, T. 198-199, T. 341-344, and T. 425). If there was truly any trial by consent, the no less than seven references and objections to any mention of Methodist would not have occurred, dozens of pieces of evidence and testimony would have been admissible to refute any allegation of Methodist's negligence, and both sides would have allowed the issue to be open for scrutiny. Finally, there is no piece of evidence that was admitted at trial that Wells Fargo can point to as being solely relevant to a determination of Methodist's relative fault such that all parties would be on notice of the introduction of a new affirmative defense.

Wells Fargo cannot have this issue both ways. Wells Fargo cannot remain silent about its

intention to rely upon an unpled affirmative defense and, at trial, prevent introduction of evidence and testimony which would likely refute any such unpled affirmative defense and, thereafter, claim that the issue was tried by consent.

II.E REPLY TO ARGUMENT I.D, E, F & G.; APPORTIONMENT AT TRIAL WAS IMPOSSIBLE SINCE WHETHER METHODIST WAS NEGLIGENT, SEPARATE AND APART FROM THE GUARD SERVICE CONTRACTUALLY CHARGED WITH THE DUTY OF PROVIDING PROTECTION, WAS NEVER PROVEN BY WELLS FARGO

Wells Fargo was the guard service that was hired to provide protection for the parking garage. As such, Wells Fargo may be held liable to Nash due to its negligence in acting upon that contractually assumed duty. See, U.S. Security Services Corp. v Ramada Inn, Inc., 20 Fla. L. Weekly D2510 (Fla. 3rd DCA Nov. 15, 1995). Wells Fargo's arguments regarding duty as argued under sections 1 F and G of the Answer Brief are improperly raised in this appeal and have been decided over and over against Wells Fargo. As the guard service that had contractually agreed to provide a protection service to a designated class, including Nash, they had a duty to execute those duties with reasonable care and the failure to do so is negligence. Such was held to be so in the denial of Defendant's two summary judgment motions by the Trial Court, the denial of the Defendant's Motion for Directed Verdict by the Trial Court and the clear, unequivocal holding of the First District in the decision under review.

Since Wells Fargo had a duty to provide guard services with reasonable care, there can be no argument that it is somehow immune from suit or that Methodist has been proven separately negligent by the sole assertion of a non-delegable duty. The issue of "non-delegable duty" simply

relates to the fact that a person injured need not only look to the guard service, it may also look to the landowner. See, U.S. Security Services Corp., 20 Fla. L. Weekly D2510. Therefore, Wells Fargo's argument that apportionment was necessary since the landowner had a non-delegable duty, ignores the fact that apportionment determines relative fault between the parties. Where liability is purely vicarious with no active, separate negligence proven, there is no apportionment. Nash, therefore, could bring her action against the negligent actor (Wells Fargo), the alleged vicariously responsible party (Methodist), or both. Wells Fargo, in order to argue for apportionment, must have shown some conduct on the part of Methodist, separate and apart from the negligence of the Wells Fargo service, that caused or contributed to the injury to Nash. Since Wells Fargo effectively argued against any attempt to discuss the relationship, knowledge or actions of Methodist at trial, and failed to present any affirmative proof of Methodist's alleged independent negligence, there was insufficient evidence upon which an apportionment verdict could be submitted. Therefore, under W.R. Grace Conn. v. Daugherty, 636 So. 2d 746 (Fla. 2nd DCA 1994); rev. den. 645 So. 2d 454 (Fla. 1994) and 645 So. 2d 457 (Fla. 1994), it would have been error to submit the apportionment question to the jury, even if it had been preserved by Wells Fargo as a defense.

III. RESPONSE TO ARGUMENT II THE DECISION OF THE FIRST DISTRICT, AS CONCEDED BY WELLS FARGO, CONFLICTS WITH ALL OTHER DECISIONS AWARDING A NEW TRIAL BASED UPON THE APPORTIONMENT DEFENSE SINCE IT FAILED TO LIMIT THE SCOPE OF THE NEW TRIAL TO APPORTIONMENT ONLY.

Wells Fargo concedes that the First District decision conflicts with other decisions which

have granted a new trial based upon apportionment. These other decisions hold that where the issue is purely a failure to place another entity on the verdict form, that the new trial should be held merely to correct that error and allow the jury to make the apportionment.

After the concession that a conflict exists, Wells Fargo then argues, without reference to any legal support, that this conflict was within the First District's discretion. Clearly, where cases are in conflict between two Districts and one District's rule is the more just, judicially economical and rational, the Florida Supreme Court has the authority and duty to adopt as controlling the reasoning of the more persuasive and reasonable District. There simply is no logical basis to require a new trial on all issues where the only arguable error relates to apportionment of damages. The Third District rule as stated in American Aerial Lift v. Perez, 629 So. 2d 169 (Fla. 3rd DCA 1993) and other similar cases should be adopted and the new trial, if any, should be limited solely to apportion liability between the Defendant (Wells Fargo) and the allegedly negligent third party (Methodist).

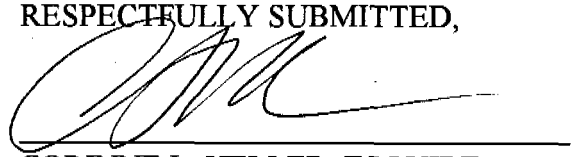
Next Wells Fargo argues, again without reference to any legal authority, that it should be given another bite at the apple to argue that neither Wells Fargo nor Methodist are liable, and that Nash is entitled to no damages. Again, that result would be unjust and would not be designed to correct the alleged wrong; that apportionment was not presented to the jury. If the issue that Wells Fargo genuinely believes is grounds for a new trial is apportionment, then any new trial should be limited merely to that determination. Nash should not be penalized by another attempt to avoid liability all together.

CONCLUSION

For the reasons stated above and in Appellant's Initial Brief, Nash urges this Honorable

Court to reverse the decision of the First District Court and reinstate the jury verdict.

RESPECTFULLY SUBMITTED,



CORINNE L. HELLER, ESQUIRE
Florida Bar No.: 907911
Coker, Myers, Schickel
& Sorenson
136 East Bay Street
Jacksonville, FL 32202
(904) 356-6071

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Steven E. Stark, Esquire, International Place - 17th Floor, 100 S.E. 2nd St., Miami, FL 33131-1101, by U.S. Mail this 8th day of February, 1996.

ATTORNEY