

IN THE SUPREME COURT OF FLORIDA

SUP. CT. CASE NO.: 91,767
3RD DCA CASE NOS.: 94-03011
95-00534

DADE COUNTY SCHOOL BOARD,
Petitioner/Appellant,

vs.

THREE KINGS PARADE, INC.,
RADIO STATION WQBA,
SUSQUEHANNA BROADCASTING
COMPANY, and CITY OF MIAMI,
Respondents/Appellees.

RESPONDENTS' BRIEF ON JURISDICTION

WALTON LANTAFF SCHROEDER & CARSON
By: JOHN P. JOY
KENNETH L. VALENTINI
Attorneys for Respondents
707 S.E. Third Avenue, Suite 300
P.O. Box 14309
Ft. Lauderdale, Florida 33302
(954) 463-8456

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PRELIMINARY STATEMENT

In this brief, Petitioner, DADE COUNTY SCHOOL BOARD, shall be referred to as "DCSB" or "Petitioner". Respondents, THREE KINGS PARADE, INC., RADIO STATION WQBA, SUSQUEHANNA BROADCASTING COMPANY, and CITY OF MIAMI, shall be referred to as "THREE KINGS" or "Respondents". The decision under review is attached as A.1 - 13.

STATEMENT OF THE CASE AND FACTS

THREE KINGS takes issue with several statements made by DCSB in its brief. Further, additional facts are necessary. Accordingly, the following statement is offered.

At the 19th Annual Three Kings Day Parade, five spectators were burned when a Miami High School student kicked a can of flaming liquid into the crowd. The liquid in the can had caught fire in the course of igniting flaming batons used by majorettes in the Miami Senior High School marching band. (A. 2).

DCSB was the party responsible for the actions of the Miami High students, teachers, band directors, etc. who were involved in the unfortunate incident. Further, as part of its involvement in the parade, DCSB had signed a "Participation Agreement" wherein it agreed to indemnify THREE KINGS PARADE, INC., and CITY OF MIAMI for any claim resulting from DCSB's participation and actions during the Three Kings Day Parade. This agreement was executed in conjunction with DCSB's sponsorship of the parade which included an advertising banner which accompanied the Miami Senior High School marching band in the parade. (A. 2, 5).

THREE KINGS PARADE, INC. was a promoter of the parade. It submitted an application to the CITY OF MIAMI to obtain a permit for the parade. In the application THREE KINGS PARADE, INC., agreed that it would be "financially, administratively, and programmatically responsible for all aspects of the event". Additionally, THREE KINGS PARADE, INC. entered into an agreement with the CITY OF MIAMI pertaining to the conduct of the parade. In this agreement, THREE KINGS PARADE, INC., undertook to secure the services of the city departments of police, fire, rescue and inspection to "insure the safety and welfare of the participants and the attending crowds". (TR. 322, 348 - 49 & exhibits).

Two personal injury lawsuits were filed against DCSB and THREE KINGS, among others. In response to the spectator suits, THREE KINGS denied that it was negligent; affirmatively asserted that the negligence of DCSB was the sole cause of the injuries; and, asserted crossclaims against DCSB for indemnity and contribution. (A. 2).

THREE KINGS was able to settle any and all claims which had been asserted against it in the two lawsuits by the injured spectators. Additionally, the claims of two other spectators had been settled pre-suit. However, the settlements were not global and THREE KINGS continued to pursue its claims against DCSB for reimbursement of the settlement monies. (A. 2).

With regard to THREE KINGS' crossclaim for indemnity, the trial court ruled that under the indemnity agreement, THREE KINGS was entitled to be reimbursed for damages paid by THREE KINGS

which were due to DCSB's fault. The court ordered a jury trial for this purpose. (A. 2).¹

On July 27, 1994 the jury returned a verdict finding that DCSB was 100% responsible for the incident in suit and completely absolved THREE KINGS from any negligence. The jury also found that there was no "special relationship" between RADIO STATION WQBA and CITY OF MIAMI (as parade sponsors) and DCSB whereby the parade sponsors were technically, derivatively or vicariously responsible for any negligence of DCSB. (A. 2).

Based on the jury's verdict, DCSB (on August 2, 1994) filed a Motion for Entry of Final Judgment. (R. 5983). Thereafter, on October 17, 1994, THREE KINGS filed its Motion for Entry of Final Judgment. (R. 6062-6070). In its motion THREE KINGS alleged that the jury's verdict (finding DCSB 100% responsible for the accident) reflected that the parade sponsors were entitled to full indemnity and/or equitable subrogation for the settlement monies paid. With regard to equitable subrogation, THREE KINGS asserted that the jury's verdict demonstrated that it had, in effect, discharged an obligation and paid a loss which "ought to be borne by DADE COUNTY SCHOOL BOARD". Based on the fact that DCSB had stipulated that the amounts paid by THREE KINGS were reasonable, THREE KINGS sought a judgment ordering reimbursement of all settlement monies paid. (R. 6063).

¹ A jury trial to determine whether DCSB's neglect was the "sole cause" of the spectators' injuries (as alleged by THREE KINGS) was in any event necessary.

Following a hearing on October 26, 1994 on the parties' post-trial motions, and in opposition to THREE KINGS' Motion for Judgment, DCSB on October 28, 1994 submitted a legal memorandum arguing that THREE KINGS was not entitled to a judgment under equitable subrogation. (R. 6073). In response, THREE KINGS filed papers arguing that it was entitled to a judgment under its indemnity theory and also under the doctrine of equitable subrogation. As to the latter theory, THREE KINGS asserted that equitable subrogation should be invoked to afford relief wherever justice demanded, irrespective of technical legal rules. [citing West American v. Yellow Cab, 495 So.2d 204 (Fla. 5th DCA 1986)]. (R. 6076, 6078).

On November 23, 1994, the trial court entered a Final Judgment for THREE KINGS, stating that its ruling in favor of THREE KINGS was based on the jury's finding that DCSB was 100% at fault for the accident in suit, as well as DCSB's stipulation that the amounts which THREE KINGS had paid in settlement of the claims were reasonable. (R. 6235, 6238-39).

On appeal to the Third DCA, DCSB sought reversal of the final judgment and remand for entry of judgment in its favor. Alternatively, a new trial was sought (due to the failure of the lower court to dismiss a juror for cause). In response, THREE KINGS asserted that the trial court had correctly entered judgment in its favor pursuant to the contract executed by DCSB (wherein DCSB agreed to indemnify THREE KINGS for damages sustained which were attributable to the actions of DCSB). THREE

KINGS further argued that, even assuming there was any error in the ruling pertaining to the contractual indemnity issue, said error was harmless under § 59.041 Fla. Stat. as the record as a whole (including the jury's finding that it was without fault) established that its liability to the spectators could have only been technical or derivative (common law indemnity), and that it had borne a loss which, in equity, ought to have been borne by DCSB (equitable subrogation).

In affirming the judgment under review (with the exception of the language permitting execution on the judgment against DCSB), the Third District Court of Appeal stated that it found no merit in the arguments for reversal in the main appeal. Although the Third District recognized that the award could not be supported on common law indemnity grounds because of the jury's technical finding that there was no special relationship between the parties, the court at p. 5 further opined:

However, considering the record as a whole, and particularly the jury verdict finding DCSB 100% at fault for causing the injuries to the parade spectators, we hold that the doctrine of equitable subrogation applies to provide the sponsors recompense.

SUMMARY OF THE ARGUMENT

Petitioner has not established express and direct conflict between the decision under review and this Court's decisions in Dober v. Worrell, 401 So.2d 1322 (Fla. 1981) and Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp., 537 So.2d 561 (Fla. 1988).

In Dober v. Worrell, this Court held that the failure to raise an affirmative defense before a trial court enters summary judgment precludes the raising of that defense for the first time on appeal. Id. at 1323. Clearly, the decision under review poses no conflict with Dober.

Further, there is no conflict with this Court's decision in Arky, Freed. There, this Court addressed the issue of whether appealing parties are entitled to reversal and remand with instructions to enter a judgment in their favor (as opposed to merely a new trial) when the reviewing court rules that the trial court erred in entering judgment in favor of a plaintiff who tried a different claim than the one plead prior to trial. In the decision under review, the Third District did not grant a new trial (as opposed to the judgment DCSB sought). Further, in the decision under review the proceeding to determine whether THREE KINGS was alternatively entitled to a judgment under the doctrine of equitable subrogation occurred after the jury trial which determined who was at fault for the accident in suit. In said post-trial proceedings, the parties had fair opportunities to litigate the legal applicability and/or availability of this doctrine based on the jury's finding that DCSB was 100% responsible for the accident.

ARGUMENT

I. THERE IS NO CONFLICT BETWEEN THE DECISION UNDER REVIEW AND DOBER V. WORRELL.

In Dober, the Worrells sued Dr. Dober for medical malpractice. The trial court granted summary judgment for Dr. Dober based on the statute of limitations defense. On appeal the Worrells asserted for the first time that the period of limitations should be tolled based on Dr. Dober's alleged fraudulent concealment of facts surrounding the incident. Even though the record revealed that the Worrells had knowledge of the alleged concealment when initiating the suit, the District Court determined that the cause should be remanded so that the Worrells could have an opportunity to amend their pleadings to assert the fraudulent concealment issue. 401 So.2d. at 1323.

After accepting conflict jurisdiction, this Court in Dober approved the decision of the Fourth DCA to the extent it affirmed the summary judgment entered by the trial court, but disapproved that portion which remanded the case for repleading of issues not previously raised. Id. at 1325. More specifically, this Court held that the failure to raise an affirmative defense before a trial court considering a motion for summary judgment precludes raising that issue for the first time on appeal from that judgment. Id. at 1323.

Clearly, both the facts and rule of law involved in Dober are distinctly different from those presented by the decision under review. Accordingly, no conflict with Dober is present.

II. THERE IS NO CONFLICT BETWEEN THE DECISION UNDER REVIEW AND ARKY FREED, ET AL. V. BOWMAR INSTRUMENT CORP.

There is also no conflict with Arky, Freed. There, Bowmar made several specific allegations of legal malpractice against Arky Freed and also included a general allegation that Arky Freed had failed to be "adequately prepared for trial" in the handling of a litigation matter for Bowmar. Id. at 562; see also, Arky, Freed, et al. v. Bowmar Instrument Corp., 527 So.2d 211, 212 (Fla. 3d DCA 1987). However, twelve days before trial Bowmar, in answers to expert witness interrogatories, revealed an entirely new specific charge of negligence, i.e., that Arky, Freed had negligently failed to assert or prove a particular defense which was available to Bowmar, despite Bowmar's specific instructions to do so. Arky, Freed immediately moved for a continuance, or in the alternative to exclude all evidence relating to this belated claim. The continuance was denied and a jury trial proceeded on the new claim. The jury returned a verdict in Bowmar's favor. Id. at 562.

On appeal, the Third District reversed the final judgment in favor of Bowmar and remanded for a new trial. In so doing, the Third District rejected Arky, Freed's request that on remand the trial court be instructed to direct a verdict in its favor. On this latter issue, the Third District certified conflict with other DCA opinions to the extent said decisions required a directed verdict in every case where a plaintiff pleads one cause of action and proves another at trial. Id. at 214, n. 7.

In Arky, Freed, this Court ruled that on remand Arky, Freed was entitled to a directed verdict based on the fact that Bowmar had not proved at trial the specific acts of negligence alleged in the complaint under circumstances where it was evident that Arky, Freed had been prejudiced in its ability to defend against the new, specific charge of professional negligence. Id. at 562-563.

The decision under review does not contain either the facts or the rule of law present in Arky, Freed. Rather, in the decision under review a jury trial was ordered which determined, inter alia, who was at fault for the accident in suit. Based on the jury's finding that DCSB was 100% responsible for the accident, THREE KINGS sought entry of a judgment in its favor under a theory based on indemnity and/or equitable subrogation.²

Further, the availability of the equitable subrogation doctrine was briefed by the parties post-trial and the trial court ruled that THREE KINGS was entitled to reimbursement of the settlement monies paid based on the jury's finding regarding

² Based on the fact that the settlement on behalf of THREE KINGS was clearly paid in self-protection to settle personal injury claims by the spectators (and not as a volunteer), the record before the trial court supported entry of a judgment in favor of THREE KINGS once the jury determined that DCSB was 100% responsible for the accident. See, West American Ins. Co. v. Yellow Cab Co., 495 So. 2d 204 (Fla. 5th DCA 1986) (Where record revealed that all elements of subrogation theory were tried, judgment NOV reversed and cause remanded with instructions to reinstate judgment for insurer who proved adverse party was 100% responsible for accident, notwithstanding insurer's failure to plead equitable subrogation theory).

fault. This scenario is so far removed from the facts in Arky Freed that it cannot be said that a conflict is present.

There also was no issue in the decision under review with regard to whether or not the appropriate remedy was a new trial, as opposed to a directed verdict. Rather, the Third DCA ruled that the judgment under review should be affirmed "considering the record as a whole, and particularly the jury verdict finding DCSB 100% at fault for causing the injuries to the parade spectators".

CONCLUSION

As no conflict has been demonstrated, Respondents respectfully request that this Court decline to exercise jurisdiction over this cause.

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 2nd day of December, 1997 to: PETE DEMAHY, ESQ., SMITH DEMAHY DRAKE COZAD & CABEZA, P.A., Co-Counsel for Petitioner, 141 N.E. 3rd Avenue, Miami, FL 33132 and GERALYN M. PASSARO, ESQ., Counsel for Petitioner, 600 South Andrews Avenue, Suite 405, Fort Lauderdale, FL 33301.

WALTON LANTAFF SCHROEDER & CARSON
Attorneys for Respondents
707 S.E. 3rd Avenue, P.O. Box 14309
Ft. Lauderdale, Florida 33302
Telephone (954) 463-8456
Telecopier (954) 763-6294

By: 

JOHN P. JOY
Florida Bar No.: 327018
KENNETH L. VALENTINI
Florida Bar No.: 988863