IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1356
DISTRICT COURT CASE NO. 4D05-01712 (04)

TAM INVESTMENT COMPANY, a Florida corporation d/b/a FALLS OF MARGATE,

Petitioner/Defendant/Appellee

vs.

GILLIAN FIELDHOUSE,

Respondent/Plaintiff/Appellant.
_____/

ON APPEAL FROM THE CIRCUIT COURT IN AND FOR BROWARD COUNTY, FLORIDA AND FROM OPINION BY THE FOURTH DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Respondent/Plaintiff/Appellant generally agrees with the "Statement of the Case and Facts" set forth in Petitioner/Defendant/Appellee's Jurisdictional Brief , and accordingly, will not add or alter the facts set forth therein.

SUMMARY OF ARGUMENT

Jurisdiction in this Court is being sought pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv) which mandates that an opinion from the District Court of Appeal must "expressly and directly conflict with the decision of another District Court of

Appeal or the Supreme Court on the same question of law."

A simple review of the two decisions set forth in Petitioner's Brief on Jurisdiction, to-wit: McCain v. Florida Power Corporation, 593 So.2d 500 (Fla. 1992) and Ashcroft v. Calder Race Course, Inc., 492 So.2d 1309 (Fla. 1986) clearly and unequivocally mandate that no such conflict exists.

At no time does the instant decision in Fieldhouse v. TAM Investment Company, ------So.2d-----, 2007 WL 1756121 (Fla. App. 4 Dist.), 32 Fla. L. Weekly D1537, opinion rendered June 20, 2007, expressly or directly set forth an incorrect standard relative to the concept of duty. The instant decision merely holds that, as far as a business invitee (tenant of an apartment complex) is concerned, the Landowner owes such tenant a duty to use reasonable care in maintaining its premises and that hidden (leaf covered exposed roots) "natural conditions" may pose a danger to an invitee/tenant constituting a question of fact

for a jury to determine whether the tenant was utilizing the property in a "reasonably foreseeable manner".

In reversing the Summary Final Judgment entered by the trial judge, to-wit: "that a natural condition can never be the subject of a duty owed by a landlord to a tenant/invitee", the Fourth District merely held that the result of this particular case, as determined by the trier of fact, will determine whether or not the use of the property (a lakefront common area) by the tenant was foreseeable by the landlord resulting in the landlord's duty to use reasonable care for the safety of the tenant/invitee.

This is, and has been, black-letter law in the State of Florida, and neither Ashcroft, supra or McCain, supra hold to the contrary. Most certainly, the instant decision of the Fourth District Court of Appeal in no way "expressly and directly" conflicts with either decision set forth in the Petitioner's Brief on Jurisdiction.

ARGUMENT

The opinion rendered by the Fourth District Court of Appeal does not "expressly and directly" conflict with any decision of this Court, or any District Court of Appeal. Petitioner/Defendant/Appellee attempts to create conflict where none exists.

A reading of the District Court's opinion in the instant case does not expressly or directly elicit any new standard of analyzing the concept of "duty". Further, and more importantly, the District Court's opinion does not impliedly or indirectly conflict with any existing court standard in evaluating whether a duty exists under the facts of this case.

A reading of the decision merely indicates that the Fourth District held that on a summary judgment proceeding in a negligence case, issues of fact remained for determination as to whether it was foreseeable that an invitee/tenant walking along a common area of an apartment complex could be injured by a natural condition on the land (an exposed tree root which was covered by leaves) and to what extent the doctrine of comparative negligence could be applied if the tenant had prior knowledge of those exposed tree roots. The opinions cited by the Fourth District support the holding that a summary judgment was improper.

The trial judge, as set forth in the opinion, opined in a blanket manner that no duty can ever exist between a landowner and tenant with respect to a natural condition on the land. Fieldhouse v. TAM Investment Company, supra.

The opinion pointed out, however, that the roots were not "open and obvious" as erroneously found by the trial court, but were rather covered by leaves (as per the pleadings and depositions) and that the Respondent/Plaintiff/Appellant

as a tenant of the property, and an invitee was owed a duty of reasonable care for premises safety. The opinion further pointed out that it was up to a jury to determine whether Respondent/Plaintiff/Appellant's use of the common area was foreseeable to the landlord, thus rendering summary judgment inappropriate.

The Fourth District opined that the trial judge erred with respect to his determination, as a matter of law, that no duty existed with respect to common area liability by holding that a landowner has a duty to utilize reasonable care in maintaining his or her property as pertains to even natural conditions, if circumstances (i.e. hidden or disguised) warrant. In addition, after finding that a duty of reasonable care is owed, the Fourth District further opined that it was a jury question as to whether it would be foreseeable that a tenant would be utilizing the property under the circumstances in the manner which Respondent/Plaintiff/Appellant utilized the property at the time of the incident.

In sum, no new ground was broken by this opinion nor were there any conflict with the opinions cited by the Petitioner/Defendant/Appellee in urging conflict.

In McCain v. Florida Power Corporation, 593 So.2d 500 (Fla. 1992), this Court opined that there are two components to the concept of duty. The first component is a question of law which must be determined by the court while the

second component is a question of fact (i.e. foreseeability, foreseeable harm or proximate causation) for the jury's determination.

Sub judice, the Fourth District held that Respondent/Plaintiff/Appellant was owed a duty of reasonable care by virtue of her status as a tenant on the apartment complex property. Further, the Fourth District correctly opined that whether or not Respondent/Plaintiff/Appellant was utilizing the property in a foreseeable manner was for the jury to determine. The Fourth District's opinion further discussed the issue of prior knowledge of the exposed tree roots, and determined that, pursuant to established case law, the doctrine of comparative negligence might limit the landowner's liability.

There is absolutely nothing in the instant opinion of the Fourth District which directly and expressly conflicts with the McCain decision or establishes any new standard as urged by Petitioner/Defendant/Appellee.

Next, Petitioner/Defendant/Appellee urges conflict with this Court's decision in Ashcroft v. Calder Race Course, Inc., 492 So.2d 1309 (Fla. 1986). In that decision, this Court held that the landowner owes a duty to utilize reasonable care for the invitee upon the property. That duty does not disappear merely because the invitee knows or has knowledge of the existence of a dangerous condition under certain circumstances as enumerated therein. The Fourth District followed

this Court's opinion, (that the mere knowledge of a dangerous condition on the part of an invitee does not abrogate the duty owed to that invitee by the landowner). As this Court held in the Ashcroft decision, the duty to warn or not to warn "is certainly not a fixed rule, and all of the circumstances must be taken into account". Id. at 1309. An analysis of the circumstances is, of course, a jury question.

Thus, this Court opined that a duty remains when "there is reason to expect that the invitee's attention would be distracted.....or that after a lapse of time he may forget the existence of the condition, even though he has discovered it or been warned; or where the condition is one which would not reasonably be expected, and for some reason, such as an arm full of bundles, it may be anticipated that the visitor will not be looking for it". Id. at 1309.

This Court went on to say that those elicited conditions are questions of foreseeability which are left for the jury to determine but does not abrogate the duty owed by a landowner to an invitee.

Accordingly, the decision of this Court in Ashcroft in no way sets forth a standard which has been challenged by the instant opinion of the Fourth District Court of Appeal. If anything, the standard of Ashcroft is adopted by the Fourth District when it went on to discuss the issue of foreseebility of Respondent/Plaintiff/Appellant predicated upon her prior knowledge of the exposed tree roots.

The Fourth District did not challenge this Court's holdings or reach a conclusion any different than this Court reached in McCain and Ashcroft. Rather, the Fourth District merely held that each case must be determined on an individual

basis predicated upon the facts of that case and that foreseeability is a factual question

which cannot be determined at a summary judgment level.

The balance of the argument raised in Petitioner/Defendant/Appellee's Jurisdictional Brief merely reargues both the summary judgment motion as well as the oral argument before the Fourth District Court of Appeal. It in no way creates conflict in the decisions of this Court and the decision of the Fourth District Court of Appeal and any comments in this Brief would be irrelevant to the jurisdictional arguments.

CONCLUSION

Based upon a clear and plain reading of the Fourth District Court of Appeal's opinion in the instant matter, there is no express or direct conflict with the previous decisions of this Court in Ashcroft and McCain. The Fourth District merely held that a duty of reasonable care was owed by a landlord to a tenant/invitee to maintain the premises in a safe condition and that whether the Respondent/Plaintiff/Appellant was utilizing the premises in a foreseeable manner when she was injured remained a jury question for determination and, therefore, inappropriate for determination at the summary judgment level.

This Court should therefore deny certiorari and remand for further proceedings consistent herewith.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND TYPE SIZE AND FONT

I certify that this brief complies with the type-volume limitation set forth in Florida Rule of Appellate Procedure 9.210(a). This brief is typed in Times New Roman 14.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail to: James P. Waczewski, Esquire, Luks, Santaniello, Perez, Petrillo & Gold, Attorneys for Appellee, Suite E, 2022-2 Raymond Diehl Road, Tallahassee, Florida 32308 this ___ day of September, 2007.

_____

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