Third District Court of Appeal

State of Florida, July Term, A.D. 2012

Opinion filed September 18, 2013.
Not final until disposition of timely filed motion for rehearing.

No. 3D11-2587
Lower Tribunal No. 09-3068

Marie E. Menendez,
Appellant,

vs.

West Gables Rehabilitation Hospital, LLC,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Jennifer D. Bailey, Judge.

Silverstein, Silverstein & Silverstein, P.A., and Gregg A. Silverstein and Darryn L. Silverstein; The Powell Law Firm, P.A., and Brett C. Powell, P. Brandon Perkins, and Kristen Perkins, for appellant.

Quintairos, Prieto, Wood & Boyer, P.A., and Jeanette Bellon, and Robert J. Cousins (Ft. Lauderdale), for appellee.

Before LAGOA and LOGUE, JJ., and SCHWARTZ, Senior Judge.

LOGUE, J.

Marie E. Menendez sued West Gables Rehabilitation Hospital, LLC after she was injured while another person received gait training at the Hospital. After the depositions of the witnesses were taken, the Hospital moved for summary judgment. The trial court granted the motion. Menendez appealed. Because Menendez's theories of liability depend upon the application of the "rescue doctrine," and the rescue doctrine was not pled or argued to the trial court below, we affirm.

AMENDED COMPLAINT AND PROCEDURAL BACKGROUND

In her amended complaint, Menendez alleged that she was an invitee at the Hospital when employees of the Hospital "were in the process of gait training patients in the hallway. As one of the patients was being gait trained, said patient began to fall and in the process of the fall, caused Plaintiff, Marie E. Menendez, to fall and sustain injury." In Count I, Menendez alleged that the Hospital violated its duties "to warn of a dangerous condition of which it knew or should have known because it existed for a sufficient length of time before the accident" and "to keep the subject premises in a reasonably safe condition for its invitees" because it "failed to keep the hallway safe for invitees who may be in the area when the gait training is being performed by inexperienced therapists." Menendez added that

"said dangerous and negligent conditions were not apparent to Plaintiff, Marie E. Menendez."

In Count II, Menendez alleged that the Hospital violated its "duty to perform the gait training in its hallways in a reasonably safe manner." She further alleged that "[d]ue to the inexperience, negligent and unsafe gait training by the employee, servant, agent and/or apparent agent of Defendant, the patient began to fall and in the process of falling caused injury to Plaintiff, Marie E. Menendez." Nowhere does the amended complaint plead the elements of the rescue doctrine or refer to a rescue.

After depositions were taken, the Hospital filed its motion for final summary judgment which the trial court granted. This appeal followed.

FACTS REFLECTED IN THE DEPOSITIONS

The depositions filed in support of the motion for summary judgment, even when viewed in a light most favorable to Menendez, tell a story at odds with the allegations in the amended complaint. According to the uncontradicted deposition testimony, the patient who fell while undergoing gaiting training was Menendez's mother. In 2007, Menendez's mother suffered a stroke. As a result, among other things, she lost the ability to walk. She was initially treated at another facility, where she first received gait training—physical therapy to help her regain the ability to walk. Later, she began to receive outpatient gait training at the Hospital.

The gait training for Menendez's mother at the Hospital was conducted in the Hospital's physical therapy center, not in a hallway. On the day of the accident, the mother first practiced walking using the parallel bars. She next began practicing walking with a hemi-walker in the therapy room. A hemi-walker has four legs and provides a very stable brace at hip-level. It is designed to be used on the side of the body, like a cane. The training involved the mother moving the hemi-walker forward on her left side and then stepping beside it.

The undisputed evidence indicates that the risk of falling is always present during gait training. For this reason, the patient is fitted with a gait belt, which is held by the therapist. The gait belt allows the therapist to either prevent or control a fall, depending on the circumstances. At the time of the accident giving rise to this lawsuit, the therapist was on the mother's left side, holding the gait belt with both hands.

Menendez made a point of being present at her mother's gait training sessions at both hospitals. Although already permanently disabled herself due to a neck injury resulting from an unrelated accident at work, Menendez voluntarily assisted in the therapy. On the day of the accident, she was stationed behind her mother and the physical therapist, guiding a wheelchair immediately behind her mother, in case her mother wanted to sit down. Menendez testified that she was fully aware of the risk that her mother could fall during gait training.

On the fourth step with the hemi-walker, the mother began to collapse to her right side. When the mother began to fall towards the right, the therapist had both hands on the gait belt and used it to attempt to control the fall. As her mother fell, Menendez threw herself from the safety of her location behind the wheelchair to cushion her mother's fall. Both her mother and the wheelchair fell on top of Menendez. As a result, Menendez sustained injuries to the middle of her back.

ANALYSIS

A. Summary Judgment Standard

"Summary judgment is designed to test the sufficiency of the evidence to determine if there is sufficient evidence at issue to justify a trial or formal hearing on the issues raised in the pleadings." The Florida Bar v. Greene, 926 So. 2d 1195, 1200 (Fla. 2006). It is proper only if there is no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law. Fla. R. Civ. P. 1.510(c). The granting of summary judgment presents a pure issue of law that is reviewed by the District Court of Appeal de novo. Greene, 926 So. 2d at 1200.

Courts must be particularly restrained in granting summary judgment in negligence cases. "In a negligence action, whether a defendant exercised reasonable care under a given set of facts is generally an issue for the jury to decide." L.A. Fitness Int'l, LLC v. Mayer, 980 So. 2d 550, 557 (Fla. 4th DCA 2008). Nevertheless, "[w]hile issues of negligence and … [proximate] cause are

ordinarily questions for the jury if reasonable men can arrive at different conclusions, they become questions of law if the facts point to but one possible conclusion." Dampier v. Morgan Tire & Auto, LLC, 82 So. 3d 204, 206 (Fla. 5th DCA 2012).

B. The Nature of Menendez's Claims

Menendez's complaint presents two theories of liability: premises liability and physical therapy malpractice.[1] Under either theory, based upon the facts as revealed in the depositions, duty and proximate cause cannot be established except by the application of the rescue doctrine, which was not pled or argued below.

In this regard, the uncontroverted testimony of all witnesses, including Menendez herself, was that she was stationed at a safe distance behind a wheelchair at the moment that her mother began to fall. From this position of safety, she—in her own words—"threw" herself towards her mother. It was Menendez's action in leaving her position of safety which subjected her to potential injury.

While commendable, Menendez's decision to leave the safety of her position behind the wheelchair would normally constitute an independent, intervening cause of her injury. See Goldberg v. Fla. Power & Light Co., 899 So. 2d 1105, 1116 (Fla. 2005) ("A negligent actor . . . is not liable for damages

[1] Although Count II is presented as one for "negligence," the only negligence alleged was that the physical therapy was conducted in a negligent manner.

suffered by an injured party when some separate force or action is the active and efficient intervening cause of the injury.") (internal quotation and citation omitted). Menendez's decision to leave a position of safety would constitute an intervening cause of her injury because Menendez's action "supersedes the prior wrong as the proximate cause of the injury by breaking the sequence between the prior wrong and the injury." Id. Florida courts have held that proximate cause can be determined as a matter of law, and summary judgment is appropriate, when the undisputed record reveals such an intervening cause. Ruiz v. Westbrooke Lake Homes, Inc., 559 So. 2d 1172, 1174 (Fla. 3d DCA 1990) ("The question of proximate cause is one for the court where there is an active and efficient intervening cause.") (citation omitted).

C. The Rescue Doctrine

On appeal, for the first time, Menendez argues that this problem of proximate causation can be overcome by application of the rescue doctrine. This doctrine includes three elements that must be proven by a plaintiff: (1) the defendant was negligent; (2) as a result of the defendant's negligence, the person (or property) to be rescued was in imminent peril; and (3) the rescuer acted reasonably under the circumstances. Reeves v. N. Broward Hosp. Dist., 821 So. 2d 319, 321 (Fla. 4th DCA 2002). The basic precept of this doctrine "is that the person who has created a situation of peril for another will be held in law to have

caused peril not only to the victim, but also to his rescuer, and thereby to have caused any injury suffered by the rescuer in the rescue attempt." N.H. Ins. Co. v. Oliver, 730 So. 2d 700, 702 (Fla. 4th DCA 1999).

In making this argument, Menendez directs our attention to Reeves. In Reeves, the court held that summary judgment was inappropriate because a material issue of fact existed under the rescue doctrine, where a visiting nurse injured herself in the course of catching a patient rolling off a bed, after the guardrail had not been put into the upright position. 821 So. 2d at 321-22. The plaintiff in Reeves pled the rescue doctrine in her complaint, and thus the doctrine had been presented to the trial court in an attempt to overcome summary judgment. Id. at 320-21.

Menendez, on the other hand, never pled or otherwise invoked the rescue doctrine below as a basis for imposing liability on the Hospital. Her complaint, for example, failed to allege that she sought to rescue her falling mother, but rather, as previously discussed, presented an account in which she was unwittingly walking in a hospital hallway when she was surprised and knocked over by an unknown patient falling during gait training. Cf. Zwinge v. Hettinger, 530 So. 2d 318, 323 (Fla. 2d DCA 1988) ("We further observe that Zwinge pled the rescue doctrine in his complaint."). Menendez also failed to argue the rescue doctrine below in an attempt to overcome summary judgment.

We therefore do not address whether the application of the rescue doctrine might have allowed Menendez's claim to survive summary judgment.[2] We are foreclosed from considering the rescue doctrine because it was never presented to the trial court. Sunset Harbour Condo. Ass'n v. Robbins, 914 So. 2d 925, 928 (Fla. 2005) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.") (citation omitted); Bus. Success Grp., Inc. v. Argus Trade Realty Inv., Inc., 898 So. 2d 970, 972 (Fla. 3d DCA 2005) ("It is elementary that before a trial judge will be held in error, [she] must be presented with an opportunity to rule on the matter.").

CONCLUSION

Because Menendez failed to plead or otherwise present the rescue doctrine in the proceedings below, she cannot be heard to argue it on appeal.

Affirmed.

LAGOA, J., concurs.

[2] "[I]f it is not necessary to decide more, it is necessary not to decide more." PDK Labs., Inc. v. U.S. D.E.A., 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J. concurring) (recognizing the cardinal principle of judicial restraint).

SCHWARTZ, Senior Judge, dissenting.

I dissent because I disagree with the majority that the applicability of the rescue doctrine was not properly before the lower court or this one; and as a matter of substance, a jury could find that it applies to the facts of this case.

Menendez did not, as the majority holds, forgo reliance on the issue by failing specifically to plead or otherwise invoke it. This is because the rescue doctrine is simply a gloss on or an aspect of questions of legal causation and scope of duty which were raised, as in any negligence case, by the pleadings and arguments below. It provides that a violation of the defendant's duty to another is, in a sense, extended to include a someone else engaged in a reasonable effort to save him from a danger created by the defendant's negligence. See Reeves v. North Broward Hosp. Dist., 821 So. 2d 319, 321 (Fla. 4th DCA 2002) ("The basic precept of the 'rescue doctrine' is that the person who has created a situation of peril for another will be held in law to have caused peril not only to the victim, but also to his rescuer, and thereby to have caused any injury suffered by the rescuer in the rescue attempt.") (quoting N.H. Ins. Co. v. Oliver, 730 So. 2d 700, 702 (Fla. 4th DCA 1999)). To put it another way, it puts the rescuer in the foreseeable zone of danger created by the defendant's tortious acts. See McCain v. Florida Power Corp., 593 So. 2d 500 (Fla. 1992). Thus, the rescuer's actions become, as a matter of law, a link in the requisite causal chain between the tort and his injuries.

No matter how characterized, however, the doctrine is properly viewed as subsumed in the allegations of the complaint and answer as to negligence, duty and causation, and therefore need not be separately pled or explicitly referred to. See Beaupre v. Pierce County, 166 P.3d 712, 715 (Wash. 2007) (rejecting contention that defendant waived application of the rule barring professional rescuers from recovering under rescue doctrine by not specifically raising the claim in its answer or disclosing reliance upon it in response to discovery requests: "the professional rescue doctrine is essentially a type of implied primary assumption of risk" thus "[the defendant's] assertion of assumption of risk in its answer was sufficient to raise the professional rescue doctrine . . . ."); Fox v. Travis Realty Co., 635 N.E.2d 538, 541 (Ill. App. Ct. 1994) (specifically rejecting in part contention that plaintiff had waived reliance on rescue doctrine by way of failing to raise the matter in the trial court: "We reject the argument[] . . . . [T]he concepts engendered by the rescue doctrine may still be viable to allow a rescuer to state a cause of action . . . ."); see also Ryder Truck Rental, Inc. v. Korte, 357 So. 2d 228, 230 (Fla. 4th DCA 1978) ("Although no longer necessary to relieve a rescuer from the absolute bar of contributory negligence, the rescue doctrine is still applicable to establish that the defendant's negligence was the proximate cause of the plaintiff's injury.").

I believe that the cases holding that very similar concepts need not be specifically pled or invoked are highly persuasive to this effect. See Dunn Bus

Serv. v. McKinley, 178 So. 865, 867 (Fla. 1937) ("[T]he doctrine of 'last clear chance' is but one of many applications of the principle of 'proximate cause' to the facts of the particular case are cases as they arise . . . . Therefore the issue of fact as to whether the defendant had the last clear chance to avoid the collision and resulting injuries in this case was within the issues raised by the pleadings."); Miller v. Ungar, 5 So. 2d 598, 599 (Fla. 1941) ("It is the duty of the court to charge the jury on all questions of law growing out of the facts insofar as they correspond to the pleadings. We have heretofore held that special pleadings are unnecessary to invoke the doctrine of last clear chance."); Becker v. Blum, 194 So. 275, 275 (Fla. 1940) ("It is not necessary that the doctrine [of last clear chance] be pleaded, if the situation warrants instructions thereon."); Tropical Exterminators, Inc. v. Murray, 171 So. 2d 432, 434 (Fla. 2d DCA 1965) (finding that although defendants did not raise loss of consciousness as an affirmative defense below, it was properly raised in the answer which generally denied any negligence, and "[t]he record, especially the defendant-employee's deposition" showed that appellee's contention that the issue was not raised in any manner could not be sustained.). See generally S. Fla. Coastal Elec., Inc. v. Treasures on Bay II Condo. Ass'n, 89 So. 3d 264, 267-68 (Fla. 3d DCA 2012) (disagreeing with dissent that agency was not raised by the pleadings and finding that the defendant "invited the agency analysis through its own vague pleading of affirmative defenses" even though there was no

mention or specific reference to any type of agency theory in the pleadings); Agrofollajes, S.A. v. E.I. Du Pont De Nemours & Co., 48 So. 3d 976, 996 (Fla. 3d DCA 2010) (analyzing pleadings and determining that both the claim and defense were sufficiently evident from pleadings and record, and rejecting the theory that failure to plead a specific theory barred recovery).

The trial judge stated in the order on review:

> Uncontroverted facts (all depos) establish Ms. Menendez was behind her mother and the therapist as gait training proceeded. She was not in the zone of danger until she dove in to cushion her mother's fall. While commendable, the action does not create a duty on the part of the defendant when she places herself into the zone of danger as the risk occurs. The breach alleged is failure to control the mother in gait training. The zone of danger only encompassed those exposed to risk due to a potential breach. At all times prior to the incident, Ms. Menendez (daughter) was not in the zone of danger so no breach of duty to her.

This is an excellent description of what the rescue doctrine exists to and does prevent and why it should apply here.

Viewed, as required, in the light most favorable to the plaintiff, see Conley v. Morley Realty Corp., 575 So. 2d 253, 256 (Fla. 3d DCA 1991), the record amply demonstrates the applicability of the doctrine as a matter of law to the controlling facts. These are the two factors, and the only two, upon which the propriety of summary judgment is determined. See Fla. R. Civ. P. 1.510(c) ("The judgment sought shall be rendered forthwith if the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material

fact and that the moving party is entitled to a judgment as a matter of law.) (emphasis added); Krol v. City of Orlando, 778 So. 2d 490, 492 (Fla. 5th DCA 2001) (concluding that evidence raised a disputed issue of material fact as to whether application of exception to rule of immunity was appropriate). The failure to use some magic words cannot justify the contrary result reached below. See Reeves v. North Broward Hosp. Dist., 821 So. 2d 319 (Fla. 4th DCA 2002); Schwartz v. Hughes Supply, Inc., 537 So. 2d 190 (Fla. 2d DCA 1989); Zwinge v. Hettinger, 530 So. 2d 318 (Fla. 2d DCA 1988); Ryder Truck Rental Inc. v. Korte, 357 So. 2d 228 (Fla. 4th DCA 1978); Newsome v. St. Paul Fire and Marine Ins. Co., 350 So. 2d 825 (Fla. 2d DCA 1976).

I would reverse.