

Third District Court of Appeal

State of Florida

Opinion filed September 2, 2026.
Not final until disposition of timely filed motion for rehearing.

No. 3D24-1436
Lower Tribunal No. 91-26591-CA-01

Florida Department of Environmental Protection,
Appellant,

vs.

City of Miami Beach,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Vivianne del Rio, Judge.

Alayon & Associates, P.A., and Patrick Alayon, and Harrison N. Strows, for appellant.

Ricardo J. Dopico, City Attorney, and Henry J. Hunnefeld, Deputy City Attorney, and Fredi R. Mack, First Assistant City Attorney, and Carla Pompa, Litigation Fellow, for appellee.

Before FERNANDEZ, LINDSEY and BOKOR, JJ.

FERNANDEZ, J.

Defendant, the Florida Department of Environmental Protection (“FDEP”) appeals (1) trial court’s Order Granting the City of Miami Beach’s Motion for Final Summary Judgment on FDEP’s third-party complaint; (2) the Final Judgment entered in favor of the City on the third-party complaint; and (3) the Order Denying FDEP’s Motion for Rehearing. FDEP argues the trial court prematurely entered summary judgment on indemnity before any adjudication of FDEP’s underlying liability to plaintiffs. We agree, reverse, and remand.

FACTS AND PROCEDURAL HISTORY

A. The Underlying Action and Early Disposition (1991-2000)

In 1991, plaintiffs Juan Garcia and his parents (collectively “plaintiffs”) sued multiple defendants, including the City of Miami Beach (“the City”); FDEP (through its predecessor, the Florida Department of Natural Resources (“FDNR”)), and various private entities, arising from injuries Garcia sustained while diving into South Beach waters. In November 1996, the court entered final summary judgment for FDEP.

In February 1997, pursuant to a settlement agreement and stipulated consent judgment, the City agreed to a final judgment of \$2,250,000 to resolve only plaintiffs’ direct claims against the City. The City agreed to pay plaintiffs \$200,000, the statutory sovereign-liability cap at the time. The City

also agreed to support a claims bill authorizing payment of an additional \$1,050,000.00 to plaintiffs in excess of the statutory limits.

By June 1998, the City had settled with plaintiffs, and the trial court dismissed with prejudice the plaintiffs' direct claims against the City. The dismissal applied only to the City and did not include plaintiffs' claims against FDEP.

Plaintiffs appealed FDEP's final judgment. After this Court's decision in Garcia v. State Department of Natural Resources, 707 So. 2d 1158 (Fla. 3d DCA 1998), the Florida Supreme Court reversed the summary judgment for FDEP in Florida Department of Natural Resources v. Garcia, 753 So. 2d 72 (Fla. 2000). Both courts held that FDEP may be liable to plaintiffs but could seek indemnity from the City under the management agreement between the City and FDEP. Fla. Dep't. of Nat. Res., 753 So. 2d at 77 (citing Garcia, 707 So. 2d at 1160). Plaintiffs could thus resume their action against FDEP.

B. Later Proceedings and the Third-Party Indemnity Claim (2017-2024)

After the Florida Supreme Court's decision, the case remained largely inactive for years, aside from mediation conference notices and the trial court's notices of lack of prosecution. In October 2017, plaintiffs showed good cause why the case should not be dismissed for lack of prosecution. The trial court ordered that the action against FDEP remain pending. In

October 2018, plaintiffs moved for mediation with FDEP. FDEP moved for partial summary judgment. FDEP further moved to excuse mediation so that the case could proceed with trial preparations. The trial court granted that motion.

By December 2018, the case had entered the pre-trial period. FDEP requested leave to file a third-party complaint for indemnity against the City, which the trial court allowed. FDEP filed its third-party complaint against the City in January 2020.

On January 27, 2020, the City moved to dismiss FDEP's third-party complaint, which included a count for declaratory judgment on FDEP's indemnity rights against the City if FDEP were held liable in the underlying action. FDEP also filed another motion for partial summary judgment on FDEP's immunity. It argued plaintiffs had exhausted the section 768.28(5), Florida Statutes (1989), sovereign immunity cap when the City paid plaintiffs \$200,000 and a claims bill authorized the additional \$1,050,000.00 contemplated by the settlement.

In late October 2000, the City filed an amended motion to dismiss FDEP's third party complaint. The trial court denied that motion in March 2021. The City then filed its answer and affirmative defenses in April 2021.

At that point, trial was set for the one-week period commencing December 4, 2023. In October 2023, the City moved to sever/bifurcate FDEP's third-party complaint from trial on plaintiffs' underlying negligence complaint, asserting that FDEP's indemnity claims against the City had not yet accrued. The trial court denied the motion in December 2023.

The City then moved for final summary judgment on FDEP's third-party indemnity claims, asserting sovereign immunity and equitable defenses of waiver/laches. Trial on the underlying liability claims still had not taken place. Plaintiffs moved for a continuance of trial in November 2023, after which trial was reset to the two-week period commencing April 1, 2024, and later reset again to June 3, 2024.

In February 2024, the trial court heard the City's motion for summary judgment. On March 14, 2024, the court granted the City's motion, fully disposing of FDEP's indemnity claim. The trial court found: (1) FDEP waited more than two decades to file the third-party action; and (2) sovereign immunity barred indemnification because any judgment against FDEP would be based on FDEP's own negligence, and in any event, would likely be barred by section 768.28, Florida Statutes. On March 15, 2024, the trial court entered Final Judgment for the City, incorporating the court's findings from

the order granting the City's motion for final summary judgment and closed the case as to the City.

On March 29, 2024, FDEP filed a motion for rehearing, arguing in part that FDEP had no obligation to seek indemnity before its liability to plaintiffs was established or paid. After a hearing, the trial court denied the motion for rehearing.

STANDARD OF REVIEW

We review *de novo* an order granting final summary judgment. Ibarra v. Ross Dress for Less, Inc., 350 So. 3d 465, 467 (Fla. 3d DCA 2022).

ANALYSIS

FDEP raises several issues on appeal, but one is dispositive: whether summary judgment on indemnity was premature absent an adjudication of FDEP's underlying liability to plaintiffs. We find that it was.

In Dade County School Board v. Radio Station WQBA, 731 So. 2d 638, 643-44 (Fla. 1999), the Florida Supreme Court explained that “[a]lthough a party is permitted to file a claim for indemnification prior to resolution of liability,” entry of summary judgment on indemnity before liability is resolved is premature. Florida courts generally disfavor deciding indemnity issues before the underlying liability issue has been resolved. See Jerome Nagelbush, Inc. v. Frank J. Rooney, Inc., 342 So. 2d 121, 122 (Fla. 3d DCA

1977); Mims Crane Serv., Inc. v. Insley Mfg. Corp., 226 So. 2d 836, 842 (Fla. 2d DCA 1969); Fitzpatrick v. Meredith, 248 So. 3d 1251, 1254 (Fla. 4th DCA 2018) (“While it is unusual for indemnity to be determined before liability, it seems to have happened here. When that happens, the indemnification judgment is considered premature.” (citing Radio Station WQBA, 731 So. 2d at 643-44)).

As this Court explained in Jerome Nagelbush, Inc.:

We pretermitted discussion of the arguments of the parties as to whether there were genuine triable issues of fact precluding the entry of the summary judgment because we hold that entry of judgment against the Third-Party defendant on the claim of indemnity, prior to a judgment against the general contractor in the main action, or a settlement and discharge of the action by payment by the contractor, was premature.

By virtue of the wording of Fla.R.Civ.P. 1.170(g), the filing of the crossclaim or complaint for indemnity at that stage of the proceedings was not premature, as a means of avoiding a multiplicity of actions and in order that the entire subject matter arising from the one set of facts may be disposed of in one action, but the entry of judgment against the indemnitor at that stage of the main action was premature

For the reason stated, the summary judgment is reversed, without prejudice to and subject to further proceedings on the merits of the crossclaim of Rooney against Nagelbush for indemnity, following judgment, if any rendered in favor of the plaintiff against the defendant contractor.

Id. at 122 (internal citations omitted). Before trial on the underlying liability issue, determining rights to indemnity is not possible. Am. Home Assur. Co.

v. Weaver Aggregate Transp., Inc., 990 F. Supp. 2d 1254, 1270 (M.D. Fla. 2013) (citing Diplomat Properties Ltd. Partnership v. Tecnoglass, LLC, 114 So. 3d 357, 363 n. 2 (Fla. 4th DCA 2013)).

Here, in granting summary judgment to the City, the trial court presumed the basis for FDEP's potential liability by stating, "An examination of the Underlying Complaint reveals that Plaintiffs hope to hold FDEP liable for FDEP's own negligence – not the City's. Thus, the City cannot indemnify FDEP." The trial court then applied Florida's Sovereign Immunity Statute, section 768.28, to bar indemnity on the theory that FDEP cannot be indemnified for its own negligence. The trial court relied on unverified, unsworn pleadings not properly party of the summary judgment record to speculate how liability would ultimately be determined. That was improper. Whether FDEP is liable for its own negligence is for the trier of fact at trial and cannot be assumed on summary judgment. Weaver Aggregate Transp., Inc., 990 F. Supp. 2d at 1270.

Moreover, summary judgment must be based on record evidence, not allegations. Fla. R. Civ. P. 1.510 (c)(1)(A) ("A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations,

stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials[.]”). An unverified complaint is not record evidence for summary judgment purposes. See Eco-Tradition, LLC v. Pennzoil-Quaker State Co., 137 So. 3d 495, 496 (Fla. 4th DCA 2014); Boettcher v. IMC Mortg. Co., 871 So. 2d 1047, 1049 n. 2 (Fla. 2d DCA 2004); Houk v. PennyMac Corp., 210 So. 3d 726, 732-33 (Fla. 2d DCA 2017). Because the factual predicate for applying section 768.28(19) was not established by record evidence, it cannot support summary judgment under rule 1.510.

CONCLUSION

FDEP’s underling liability to plaintiffs has not been adjudicated, thus, the trial court’s entry of final summary judgment on FDEP’s indemnity claim was premature. We therefore reverse the orders on appeal and the Final Judgment, and remand for further proceedings on FDEP’s indemnity claims to be addressed after resolution of plaintiffs’ underlying liability action, consistent with this opinion.

Reversed and remanded.