

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 12th day of December, 2008.

Nancy C. Zapata, Administratrix
and Personal Representative of the
Estate of Robert Dozier, Deceased, Appellant,

against Record No. 072477
Circuit Court No. CL05-596

Community Alternatives, Inc., et al., Appellees.

Upon an appeal from a
judgment rendered by the Circuit
Court of the City of Norfolk.

Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that there is error in the judgment of the circuit court.

Nancy Z. Zapata ("Zapata") filed suit against Community Alternatives, Inc. ("Community Alternatives") and Camp Virginia Jaycee, Inc. ("Camp Jaycee") seeking damages for alleged negligence in caring for Zapata's decedent, Robert Dozier. Both defendants filed special pleas of charitable immunity, and Community Alternatives filed a demurrer to Zapata's count seeking punitive damages. The trial court held a hearing at which Zapata maintained that her complaint alleged claims based on simple negligence, gross negligence, and willful and wanton negligence. Twenty months after the hearing, the trial court entered a final order granting the pleas, based on its finding that the defendants were both entitled to charitable immunity; consequently, the simple negligence claims could not be sustained. However, the trial court dismissed the

entire motion for judgment including any other claims asserted. Zapata's attorney endorsed the order, "SEEN AND OBJECTED TO: For the reasons stated on the record on 11/11/05".

At the hearing on November 11, 2005, Zapata made it abundantly clear that she was alleging not merely simple negligence but also gross negligence and willful and wanton negligence. Counsel for Zapata explicitly stated that Zapata "alleged willful and wanton negligence as to all three defendants," and that "[c]haritable immunity does not bar that claim." In response to an assertion by counsel for Camp Jaycee that charitable immunity would support dismissing the case, Zapata's counsel reiterated that

[j]ust because you may decide that I cannot pursue a claim of simple negligence against this entity does not deprive me of all of my other entitlements under the rules, including pretrial discovery and all of that. . . . [Y]ou need all of those facts to decide whether I've got a claim for gross negligence.

Zapata also made it clear that additional pleadings by the defendants would be necessary to test the sufficiency of her heightened negligence claims. Counsel for Zapata made the following statement to the trial court:

I think if you say, okay, Camp Virginia Jaycee, you get charitable immunity. Then that's your ruling, and I am barred from proceeding against them for ordinary negligence. It does not result in a dismissal of the suit for prejudice. That may come later on motion for summary judgment or some other device whereby we can get a pre-pretrial ruling on the sufficiency of the evidence, but it's not ripe for purposes of a demurrer hearing, or a hearing on plea of charitable immunity.

On appeal, Zapata argues that the trial court erred in dismissing her entire action, because she adequately stated a cause

of action for gross negligence and willful and wanton negligence, and these causes of action necessarily survived the defendants' special plea which was and could only be directed to the claim of simple negligence. In response, Camp Jaycee argues that Zapata's appeal must be dismissed for failure to comply with Rule 5:25 because the November 11, 2005 hearing dealt with Zapata's original Motion for Judgment rather than her Amended Motion for Judgment referenced in her Assignment of Error.

However, when Zapata objected to the entry of the final order, it was obviously after the filing of the Amended Motion for Judgment. Zapata's reference to the hearing on November 11, 2005 simply incorporated the same substantive objections to the dismissal. Accordingly, Zapata made a contemporaneous objection to the dismissal for the same reasons that had been previously presented to the court.

Additionally, both Camp Jaycee and Community Alternatives contend that Zapata's pleadings were inadequate. While we disagree with Camp Jaycee's Rule 5:25 argument because the record reflects that Zapata preserved her objection, we need not reach the issue whether Zapata's pleadings were adequate because the trial court exceeded its authority in dismissing the entire matter.

No pleading before the trial court tested the sufficiency of any gross negligence or willful and wanton negligence claims Zapata was attempting to prosecute. A demurrer to the count regarding punitive damages had been sustained shortly after the November 11, 2005 hearing, and only a special plea in bar was pending before the trial court at the time of the order dismissing the case. The trial court erred in dismissing claims of gross negligence and willful and wanton negligence when there was no demurrer pending as to Zapata's heightened negligence claims. Accordingly, the

judgment of the circuit court is reversed, and the case is remanded for proceedings consistent with this order.

This order shall be certified to the said circuit court.

JUSTICE KINSER dissents.

A Copy,

Teste:

*original order signed by the
Clerk of the Supreme Court of
Virginia at the direction of the
Court*