2016
CASE LAW SUMMARY

Negligence

Alcohol

De La Torre v. Flanigan's Enterprises, Inc., 187 So. 3d 330 (Fla. 4th DCA 2016)

A driver went to Flannigan's and, while there, became intoxicated. During the evening, Flannigan's employees stopped serving alcohol to the driver and allegedly served her water in an effort to "sober her up." The driver later left the restaurant in her vehicle, and, at some point later that evening, crossed into oncoming traffic and struck a vehicle containing the Plaintiffs who were injured in the accident. The restaurant had an internal policy designed to prevent drunken patrons from driving away from the premises. The Amended Complaint alleged that this policy called for the restaurant employees and/or law enforcement officers to insure that intoxicated patrons did not drive by taking car keys away from the patrons and insuring that they left in a taxi or with a sober driver. The Plaintiffs filed suit against the restaurant alleging that it undertook a voluntary duty to prevent the driver from driving while intoxicated, but was negligent in performing this duty. The restaurant moved to dismiss arguing that the suit was barred by Florida Statute §768.125. The trial court agreed and dismissed the action.

Florida Statute §768.125 provides that "a person who sells or furnishes alcoholic beverages to a person of lawful drinking age shall not thereby become liable for injury or damage caused by or resulting from the intoxication of such person, except that a person who willfully and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age or who knowingly serves a person habitually addicted to the use of any or all alcoholic beverages may become liable for injury or damage caused by or resulting from the intoxication of such minor or person." The parties agreed that neither of the exceptions in the statute were applicable. In fact, Plaintiffs argued that the statute was not relevant at all because they contend that liability was based upon the "undertaker doctrine."

The Fourth District ruled that the restaurant's actions were insufficient for the undertaker's doctrine to apply. Its action in "cutting off" the driver and giving her water did not increase the risk of harm stemming from the driver's intoxication nor did it undertake to perform a duty owed by the driver of the third parties. The

court also found that it was unreasonable to assume that the driver would not have driven but for the restaurant's actions.

Okeechobee Aerie 4137 v. Wilde, 199 So. 333 (Fla. 4th DCA 2016)

A known alcoholic left a bar while heavily intoxicated and ended up seriously injuring a man on a motorcycle. The Plaintiffs brought suit pursuant to Florida Statute 768.125. The Defendant never contested that the driver was a habitual drunkard pursuant to the statute. Pursuant to Florida Statute 561.701-06, the Responsible Vendor Act, the Plaintiffs suggested that there were two causes of action that they could present to the jury: the first under Florida Statute 561.701 and the second under Florida Statute 768.125.

The Fourth District ruled; however, that Florida Statute 768.125 does not "create" a cause of action; rather, it is a protective statute meant to eliminate a cause of action where one might otherwise exist, except in certain circumstances. Importantly, a determination that a drinking establishment knowingly served a habitual alcoholic is not a *per se* determination that the duty and breach elements of a negligence action have been met. The Fourth District advised that proactive attempts by a drinking establishment to protect the public from a habitual drunkard whom it has knowingly served, may be sufficient to show that there has been no breach of the legal duty. Thus, to be clear, the cause of action in the case was still negligence. Plaintiff simply alleged that the negligence in the case was not limited by Florida Statute 768.125.

The Plaintiffs also asserted that there was another cause of action available under the Responsible Vendor Act. That law; however, is a voluntary statute that imposes no duties on any vendor. Instead, the Act serves to protect a vendor from certain administrative penalties resulting from serving an underage person or from selling or allowing the sale of illegal drugs on its premises. Thus, while a violation of a statute may be "evidence of a breach of a standard of care," the rule does not apply to the Responsible Vendor Act because the Act cannot be violated *per se*. In other words, a vendor may choose to comply with the Act or not, and then it suffers the consequences because of its decision.

The Plaintiffs' argued that the Responsible Vendor Act was not used to show a breach of the standard of care, but rather was used to show that the Defendant was aware of the existence of the law. Even though the trial Judge instructed the jury, statements made by the Plaintiffs in opening and closing, as well as the Judge's instructions to the jury before closing, diminished the apparent

effectiveness of the limiting instruction given by the trial Judge. The admission of evidence related to the Responsible Vendor Act also lead the trial Judge to allow in evidence of a prior lawsuit against the bar for an accident caused by someone who had allegedly been drinking there.

The Plaintiffs asserted that the accident was introduced for the purpose of showing that the Defendants were on notice of the Act. However, because notice was not relevant to the issue in the case, the Court ruled the trial court erroneously admitted the evidence. Even if it were relevant, it was more prejudicial than probative. The Court then addressed several specific statements made during the closing argument by Plaintiffs' counsel. Plaintiffs' counsel had argued that there was no one other than the jury to act and that the Alcohol Beverage and Tobacco Bureau would not act. The Fourth District found that this argument was not designed to increase damages, but rather was a proper argument asking the jury to impose liability against the Defendants. The statement in closing argument that this case "will long be remembered or it will soon be forgotten" was found to be an improper conscience of the community argument because it was combined with an "it will just keep happening" statement.

Finally, the trial court ruled that the trial Judge properly excluded the drunk driver from the verdict form in this case against the bar. Florida Statute 768.81 does not require the apportionment of responsibility between a Defendant whose liability is derivative and the directly liable negligent tortfeasor. In this type of case, there is negligence only when there is a subsequent wrongful act by the person intoxicated and thus the Defendant's liability was derivative. As such, the Fourth District reversed for a new trial.

Defendant's policies do not establish standard of care

Dominguez v. Publix Supermarkets, Inc., 187 So. 3d 892 (Fla. 3d DCA 2016)

The Plaintiff sued Publix following a slip and fall. Surveillance video from the store reflected that the Plaintiff slipped and fell on a patch of laundry detergent that came from the top of a bottle that had just fallen from a store shelf. A video recording of the aisle showed that, in the eight minutes preceding the incident, several customers traveled through the aisle, including one who stopped in front of where the bottle was located, reached up to a shelf, and then walked out of the aisle.

At the time the bottle fell, an assistant grocery manager was examining shelves at the opposite end of the aisle. Upon hearing the crash, he ran to the spot of the spill. The video showed the manager straddling the spill and bending over to wipe the bottle nine seconds after the bottle fell. Four seconds later, the Plaintiff turned into the aisle and slipped on the detergent. The manager's back was to the Plaintiff as she turned into the aisle. As evidenced by the video camera, the entire incident from the time the manager heard the bottle fall to the time the Plaintiff slipped consumed 13 seconds.

As the Third District pointed out, the issue is not whether Publix failed to warn the Plaintiff of the substance on the store floor because it was an open and obvious condition. Rather, the issue is whether the store owner used ordinary care to maintain its premises in a reasonably safe condition. In transitory foreign substance cases, courts look to the length of time the condition existed before the accident occurred. Based upon the facts of this case, the court held that the trial court erred in denying the Defendant's Motion for Judgment in accordance with the Motion for Directed Verdict.

Lastly, the Third District commented that the fact that Publix's internal operating procedures called for the manager to immediately block off the aisle where the detergent issued did not change the result in the case. The evidence relating to Publix's procedures about blocking the aisle was admissible and relevant to the jury's consideration of the manager's conduct after the spill, however, internal safety policies do not themselves establish the standard of care owed to the Plaintiff. As such, they held that if the store manager did, under the circumstances and within the five seconds "he was allotted by fate, demonstrated reasonable and ordinary care, the fact that he did not abide by Publix's internal operating procedure blocking off the aisle did not create a heightened duty of care in favor of the Plaintiff.

Dog bite

Arellano v. Broward K-9 Services, Inc., 41 FLWD 2659 (Fla. 3d DCA 11/30/16)

Broward K-9 supplied guard dogs to a commercial business. One morning, their employee came to the business to feed and tend to the dogs and discovered that the dogs had escaped their fenced yard. Apparently, the business had been burglarized the night before and the chain-link fence cut thereby allowing the dogs to escape into the neighborhood near the Plaintiff's home. Believing that the dogs belonged to one of her neighbors, the Plaintiff fed and sheltered the dogs for about

5 days taking steps to find the dog's owner. Eventually, one of the guard dogs attacked Arellano's dogs and she intervened whereupon the guard dog bit her.

The Plaintiff brought a statutory damages claim for strict liability against the owner of the guard dogs. The trial court entered Final Summary Judgment for the owner after finding as a matter of law that the Plaintiff's actions in feeding and sheltering the dogs while she attempted to identify their owners constituted an intervening, superseding proximate cause of the Plaintiff's injuries. The Third District reversed pointing out that, under the statute, the dog owner was strictly liable for injuries caused by the dog bite and the owner's liability was reduced only by a percentage of the injured party's comparative negligence. Whether and to what extent the Plaintiff was comparatively negligent here was a question of fact for the jury.

Fraud on the Court

Diaz v. Home Depot USA, Inc., 196 So. 3d 504 (Fla. 3d DCA 2016)

The Plaintiff sued Home Depot alleging that she was injured when a fire extinguisher fell from the wall above her and hit her in the neck and shoulder. She alleged she suffered permanent injuries to her neck and shoulder. During the course of pretrial discovery, including a deposition, the Defendant questioned the Plaintiff about her injuries, as well as, whether she suffered any prior neck or shoulder injuries. At each point, Diaz denied that she previously suffered any injury to her neck or back and denied that she was ever involved (either before or after the Home Depot incident) in a slip and fall accident or motor vehicle accident that required medical treatment.

After obtaining the Plaintiff's medical records, the Defendant discovered that just nine months prior to this incident, she had been involved in a motor vehicle accident, was placed in a cervical collar, and was transported by ambulance to an Emergency Department where she received treatment. On arrival at the Emergency Department, she complained of, amongst other things, pain to her neck and upper back. She described her pain level there as 10/10. Additionally, the medical records revealed that, less than seven months before the Home Depot incident and just two months after the above-described accident, she visited the Emergency Department again complaining of neck pain and back pain. The medical history reflects that the Plaintiff stated she passed out two days earlier, fell backwards and hit concrete. She complained of throbbing pain to the neck and sharp pain to the back and described her pain level as 8/10.

Additionally, the medical records revealed that eight months after the Home Depot incident, and less than two months after filing the lawsuit against Home Depot, she was involved in a single car accident which required her to go to the hospital. According to the history provided by the Plaintiff, the accident occurred two weeks earlier. Apparently, she was driving a car at 120 miles per hour when it struck a divider and spun several times. The windshield on her car broke and there was a prolonged extraction of her. She was not wearing a seatbelt, but was not ejected from the vehicle. She described her pain level as 10/10. She also told the nurse that she had had chronic neck pain since 2009. The Third District affirmed the trial court's dismissal of the Complaint for fraud on the court finding no abuse of discretion even when taking into account the heightened standard of "clear and convincing evidence" which is required to dismiss an action for fraud on the court.

Impact Rule

G4S Secure Solutions USA, Inc. v. Golzar, 41 FLWD 2514 (Fla. 3d DCA 11/9/16)

A security company was sued for emotional distress alleging that it negligently hired, retained and supervised its employee who recorded a video of the Plaintiff while she was undressed. The trial court entered a judgment in favor of the Plaintiff and the Third District reversed because the impact rule precludes recovery of purely non-economic damages for emotional distress for the tort of negligent hiring, retention/supervision absent any physical injury. Further, the employee's intentional conduct did not merge with the employer's negligent conduct and therefore the employer was not vicariously liable for the intentional torts of its employee.

In store surveillance in transitory foreign substance incident

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Negligent supervision

Acts Retirement-Life Communities, Inc. v. Zimmer, 41 FLWD 2668 (Fla. 4th DCA 11/30/16)

Acts is a facility at which Zimmer lived with his wife, and at which he lived alone after her passing. Residents live in units similar to condominiums, with their own kitchen and living areas. There are also common areas, including a community dining area and a health center. If necessary, residents can transfer to

an Assisted-Living residence at the facility. At all times material to this case, Zimmer was living independently, in his own unit.

While living at Acts, Zimmer made friends with multiple employees, in particular, a culinary manager named Maria. He gave a variety of "gifts" to these employees including at least $30,000 in cash and a $42,000 Mercedes to Maria. The nature of whether these were unsolicited tips or gratuities or whether they were the result of exploitive and manipulative actions by employees taking advantage of Zimmer.

Zimmer's son became concerned with his father's finances and after discovering more information about the "gifts" he alerted Acts. Acts conducted an appropriate and timely investigation and terminated every employee who had accepted a gift from Zimmer, including Maria, because doing so violated their internal policy against employees accepting gratuities. Even after her termination, Maria and her husband remained friends with Zimmer and Zimmer requested that Acts' employees drive him to see Maria at various locations. These employees complied because driving residents was part of their job duties. Maria also continued to see Zimmer by picking him up directly. Within half a year of the employee terminations, Zimmer died. After his death, his estate filed suit against Acts and Maria. The claims against Maria were settled and the case against Acts went to trial. Eventually, the jury found Acts liable in the amount of $50,000.

The Fourth District ruled that the trial court erred in entering judgment for the Plaintiff because there was insufficient evidence that the Acts knew or should have known that their employees were likely to commit a fraud upon the Plaintiff. Further, Acts could not properly be found liable for the actions of the employees after the employee was terminated and, further, Acts could not be found liable for negligent supervision of employees who were not terminated, but only drove Plaintiff to visit the terminated employees because those employees were not committing any tort and were acting within the scope of their employment.

Photograph insufficient to prove notice

City of Miami v. Navarro, 187 So. 3d 292 554 (Fla. 3d DCA 2016)

The Plaintiff was injured after she tripped and fell over a raised brick while walking on a brick-paved sidewalk in the City of Miami. In order to maintain a *prima facie* case of negligence against the City, Navarro had to prove either that the City had actual knowledge of the sidewalk defect (of which there was no

evidence), or constructive knowledge that the sidewalk defect existed long enough that the City should have known of it. In an attempt to establish the City's negligence, the Plaintiff relied upon a color photograph of the raised brick that she argued was sufficient, by itself, to infer that the defect had existed for a significant period of time to establish the City's constructive notice of the defect. The Plaintiff did not provide any testimony as to the length of time that it would take for a brick paver to raise up in the manner she claimed the photograph demonstrated.

The trial court found that the photograph was legally sufficient and denied the City's Motion for Directed Verdict, thus allowing the issue of whether the defect had existed for a sufficient length of time to go to the jury. The Third District held that this was error citing to the Supreme Court's decision in *Hannewacker v. City of Jacksonville Beach,* 419 So. 2d 308 (Fla. 1982) which held that "if the photograph portrays a condition that has some distinguishing feature which clearly shows that the defect has existed for a long period of time, it may afford the jury a basis to infer that a significant period of time has passed. If a photograph is ambiguous on this point and what is shown makes it questionable whether a significant period has passed, the jury would necessarily be required to indulge in speculation to determine the duration of the condition. In such a case the photograph without live testimony is insufficient."

Premises Liability

Fuentes v. Sandel, Inc., 189 So. 3d 928 (Fla. 3d DCA 2016)

After a worker fell to his death through a warehouse skylight while painting the warehouse roof, his widow sued the owner of the building and the lessee. The trial court entered summary judgment and the Third District affirmed finding that the Defendants did not owe a duty to the decedent who was employed by an independent contractor hired to paint the warehouse roof. In doing so, they noted the general rule that a property owner who employs an independent contractor to perform work on his property will not be liable for injuries sustained by an employee of the independent contractor during the performance of that work. The exception to this general rule is where the property owner exercises direct control of the work was not applicable where the Defendants did not exercise control in how the work was performed. Further, the exception to the general rule where the property owner fails to warn the contractor about concealed dangers not inherent in the work was not applicable where the danger posed by the skylights was open and apparent and the contractor had been specifically warned about the danger.

Piedra v. North Bay Village, 193 So. 3d 48 (Fla. 3d DCA 2016)

Following a collision between a motorized skateboard operator and a truck who claimed he could not see the skateboard because of foliage at the intersection, the Plaintiff sued North Bay Village, its contracted landscape maintenance company and the land owner who owned the property at the corner of the intersection. Following the granting of Summary Judgment, the Third District reversed finding that it was error to enter Summary Judgment for the City which had planted foliage at the intersection on the basis that the City was immune from suit because planting is a planning level decision for which the City enjoys sovereign immunity. The Third District agreed that the designing and planting of these areas is entitled to sovereign immunity, however, the maintenance of the area is an operational level function for which the City does not enjoy sovereign immunity. It was also error to enter Summary Judgment for the contracted landscape maintenance company when there was a factual issue as to whether the company had a duty to maintain the area in question and it was also error to enter Summary Judgment for the property owner when there were factual issues as to whether the hedges were within or without property boundaries and whether the height of the hedges obstructed the vision at the intersection.

Grimes v. Family Dollar Stores of Florida, Inc., 194 So. 3d 424 (Fla. 3d DCA 2016)

The Plaintiff, intending to shop at Family Dollar, walked through the parking lot and across one of the landscaped areas located directly across from the store. While crossing the landscaped area, she tripped over a short steel re-bar which was protruding out of the ground and was not tied to or supporting any trees or shrubs. She sued the store, the landowner and the long term lessee of the property alleging a failure to maintain the premises in a reasonably safe condition, negligent failure to correct a dangerous condition of which the Defendants, with reasonable care, should have known, and a failure to warn business invitees of a dangerous condition. She alleged that the Defendants breached their duty to her by allowing the re-bar to protrude from the ground in a concealed dangerous condition, in a well-worn path through the landscaped area used by business invitees as a shortcut to the store's entrance.

The Third District held that it was error to enter a Summary Judgment for the landowner and the long term lessee of the property where the landscaped area had allegedly had been in continuous and obvious use as a pedestrian short cut for some time and there were factual issues as to whether a dangerous condition existed, whether it was open and obvious and whether constructive knowledge could be inferred that the dangerous condition existed for such a length of time that in the exercise of reasonable care the condition would have or should have been known to Defendants.

Wert v. Camacho, 200 So. 3d 787 (Fla. 2d DCA 2016)

This case involved a work place accident between employees of two sub-contractors working on a maintenance project at the Mosaic fertilizer plant. During the project, parts of the plant were shut down while various sub-contractors performed maintenance, repair and upgrades. Wert was a superintendent for a sub-contractor (Rubber Applications) and Camacho was employed by another sub-contractor (Mid-State Industrial Corporation). Mid-State had set up a staging area for equipment and tools near a shack rented by Rubber Applications. When Wert left a safety meeting in Rubber Application's shack, he entered his truck and backed out from the side of the shack. As he put his truck in drive, he noticed that Camacho was laying behind his truck.

Subsequently, Camacho and his wife filed an action against Wert for negligence and against Rubber Applications for vicarious liability for his negligence. Wert and Rubber Applications asserted several Affirmative Defenses including the worker's compensation immunity. In reply to that Affirmative Defense, the Camachos allege that Camacho and Wert were "assigned primarily to unrelated works within private employment" and that "any immunity asserted by the Defendants is subject to the unrelated works exception contained within Florida Statute 440.11(1)."

The Camachos filed a Motion for Summary Judgment on the issue of the worker's compensation immunity and, in response, Wert and Rubber Applications argued they were entitled to sub-contractor statutory immunity under Florida Statute 440.10(1)(e) ("horizontal immunity"). Wert and Rubber Application also moved for Summary Judgment asserting that Mosaic was the statutory employer of Rubber Applications and Mid-State and that both companies were dependent horizontal sub-contractors of Mosaic working on the same project.

The Second District ruled that the trial court had committed error in finding that Wert and Rubber Applications were not entitled to worker's compensation immunity from claims made by the Plaintiff. In doing so, they noted that the unrelated works exception did not apply where, although both sub-contractors were employees of the same contactor, they were not part of the same "contract work." Because no vertical relationship existed between the two contractors, §440.10(1)(b) did not deem them to be employed in one and the same business or establishment. Accordingly, the case was remanded for a new trial at which time the Defendants could assert horizontal immunity.

Property owner not liable to employee of independent contractor

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After a worker fell to his death through a warehouse skylight while painting the warehouse roof, his widow sued the owner of the building and the lessee. The trial court entered summary judgment and the Third District affirmed finding that the Defendants did not owe a duty to the decedent who was employed by an independent contractor hired to paint the warehouse roof. In doing so, they noted the general rule that a property owner who employs an independent contractor to perform work on his property will not be liable for injuries sustained by an employee of the independent contractor during the performance of that work. The exception to this general rule is where the property owner exercises direct control of the work was not applicable where the Defendants did not exercise control in how the work was performed. Further, the exception to the general rule where the property owner fails to warn the contractor about concealed dangers not inherent in the work was not applicable where the danger posed by the skylights was open and apparent and the contractor had been specifically warned about the danger.

Punitive damages

State Farm Mutual Automobile Insurance Company v. Brewer, 191 So. 3d 508 (Fla. 2d DCA 2016)

Following a verdict in favor of a Plaintiff in a motor vehicle accident case, the jury determined that punitive damages were appropriate and awarded the Plaintiff $284,000 despite the fact that the Defendant's uncontroverted testimony was that his net worth was $284,000. The Second District reversed finding that a punitive damage award equal to 100% of the Defendant's net worth was so excessive as to be unconstitutional.

On remand, they ruled that the trial court may remit the punitive damages award to a reasonable proportion of the Defendant's net worth or order a new trial on punitive damages if the Plaintiff's did not wish to accept a remittitur. In so doing, they pointed out that the Fourth District had previously decided that a punitive damage award representing 40% of the Defendant's net worth was excessive.

Rosen v. McCobb, 192 So. 3d 576 (Fla. 4th DCA 2016)

Following an altercation, the Plaintiff filed a personal injury action alleging claims for assault and intentional/negligent infliction of severe emotional distress. The Defendant counterclaimed for unjust enrichment and civil battery and the trial court subsequently granted a Motion for Leave to Add a Punitive Damages Claim. Part of the list of items requested from the Defendant would have caused her to disclose financial information related to her non-party husband. The Fourth District held that it was improper to order production of financial information of a non-party.

TRG Desert Inn Venture, Ltd. v. Berezovsky, 194 So. 3d 516 (Fla. 3d DCA 2016)

The trial court granted Plaintiff's Motion for Leave to Add a Claim for Punitive Damages. The Third District denied certiorari. In doing so, they stated that certiorari is the appropriate remedy to challenge a trial court's order allowing punitive damages when the essential requirements of law, as embodied in Florida Statute §768.72, have not been followed. Thus, certiorari can be granted when the record establishes that a trial court applied the incorrect law. In this case, at most, the trial court incorrectly applied the correct law and this is not reviewable by certiorari.

Sovereign immunity

G4S Secure Solutions, Inc. v. Morrow, 41 FLWD 2035 (Fla. 2d DCA 9/2/16)

The Plaintiff's decedent died after being severely beaten by a fellow prisoner while being transported to a Pinellas County Sheriff's Office facility. The personal representative of the decedent filed a wrongful death action against the driver of the transport vehicle and G4S as his employer. G4S, which was handling prisoner transport pursuant to an agreement for services with the Sheriff's Office, filed a Motion for Summary Judgment based upon limited sovereign immunity pursuant

to Florida Statute 768.28. Although the Second District found that the agreement between G4S and the Sheriff's Office contained language expressing an intent to avoid creating an agency relationship, the Court found that an agency relationship existed as a matter of law by virtue of the degree of control of the Sheriff's Office exercised over the company's operation and therefore, found that G4S was entitled to limited sovereign immunity.

In so doing, the Court noted that the Sheriff's Office exercised extensive control over the hiring and training of the G4S employees. The Sheriff participated in the interviews of potential G4S hires and had the final say over who was hired. They also had the ability to have a G4S employee fired at will. The Sheriff's Office conducted the training of the G4S employees and the employees were trained according to the Sheriff's Office procedures. In fact, G4S was required to comply with all of the Sheriff's Offices standards, policies, trainings, and directives. They were also required to create and update standard operating procedures subject to the Sheriff's approval. The Sheriff also retained control over G4S's budget, including employee salaries and pricing schedules and had the final say over wage increases and billing rates. Lastly, G4S was subject to audits by the Sheriff and they were required to obtain prior written approval of any overtime requests. G4S employees also received orders directly from the Sheriff's dispatch officer. The Sheriff supplied and maintained the transport vehicles and equipment and monitored the vehicles while they were in transit. The Sheriff also had the authority to change G4S employee schedules as necessary.

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Summary Judgment for the property owner when there were factual issues as to whether the hedges were within or without property boundaries and whether the height of the hedges obstructed the vision at the intersection.

Jordan v. Nienhuis, 203 So. 3d 974 (Fla. 5th DCA 2016)

Plaintiff sued Nienhuis as Sheriff of Hernando County. It was alleged that the Plaintiff's late husband experienced a medical emergency which made breathing difficult. The Plaintiff contacted 911 for assistance and advised the operator of her husband's difficulties. The operator told her that help was on the way and "questioned her about the decedent's condition." When the decedent's condition worsened and he lost consciousness ending up on the floor, the 911 operator directed the Plaintiff to "just leave him there" while awaiting further assistance from paramedics. Paramedics arrived at the scene and administered CPR; however, the patient eventually died.

The Complaint asserted that the 911 operator negligently mislead the decedent's wife about the seriousness of the medical emergency and induced her not to render aid to her husband thereby resulting in his death. It was also alleged that the 911 operator was negligent in giving her instructions on how to care for her husband and in reliance on the operator's instructions she did not explore alternative options for responding to the emergency.

The trial court dismissed the Complaint and the Fifth District affirmed finding that the Plaintiff failed to plead a special relationship between the 911 operator and the decedent and added that the Sheriff owed a duty of care only to the general public and not to the individual decedent. Further, liability did not exist under the undertaker's doctrine where the 911 operator did not increase the risk of harm to the decedent or otherwise control the situation.

Strict liability does not apply to improvements to real property

Simmons v. Rave Motion Pictures Pensacola, LLC, 197 So. 3d 644 (Fla. 1st DCA 2016)

The Plaintiff was injured when he sat in a chair in a movie theater which broke. He brought suit against the contractor that bought seating for the theater and installed it, and also sued the broker that sold the seating system to the contractor. The First District ruled that the seating system was not a product for purposes of product liability, but rather, was a permanent improvement to real

property. Because strict liability principles do not apply to permanent improvements to real property, the trial court properly entered summary judgment on the strict liability counts.

Summary Judgment

Perez-Rios v. The Graham Companies, 183 So. 3d 478 (Fla. 3d DCA 2016)

The Plaintiff sued for injuries in a slip and fall. At her deposition, the Plaintiff indicated that, on the morning of a clear day, she tripped on a four-inch high step leading from the pavement to a building owned by The Graham Companies. The step was plainly visible. The pavement above and below the step was constructed of red brick and the step was constructed of white stone. Photographs of the area where she fell, which she authenticated, indicated no particular defect. There was no evidence of a foreign object on the step, uneven wear and tear, inadequate lighting or wet and slippery conditions. When directly asked, the Plaintiff could not identify any defects in the step. No contradictory evidence, such as an expert's report, was submitted into the record which might have created a disputed issue of fact and, under these circumstances, Summary Judgment was properly entered in favor of the Defendant.

McNabb v. Taylor Elevator Company, 203 So. 3d 184 (Fla. 2d DCA 2016)

The Plaintiff slipped and fell near an elevator in a condominium. At some time prior to the fall, a Victaulic seal in the elevator machinery broke and leaked oil into the machinery room and out into the hallway. A technician who had serviced the leak after the fall testified that the seal was leaking at a rate of a drip every two seconds. He testified that the oil on the floor was a quarter inch deep. The elevator company submitted evidence showing that, three days prior to the fall, it had inspected the elevator machinery including the seal and its inspectors testified that it was not leaking. Based upon this, the elevator company moved for summary judgment.

In opposition to the Motion for Summary Judgment, the Plaintiff submitted the Affidavit of a mechanical engineering expert who opined that the seal had been leaking for 4.5-18 days. His opinion was based on the flow rate of the oil leaking from the seal as observed by the technician, drip test and the depth of the spill, as well as the dimensions of the machinery room. The trial court granted the Defendant's Motion for Summary Judgment finding that the Plaintiff's expert's Affidavit was not based upon actual facts. The Second District reversed and found

that the trial court's ruling was in error having improperly weighed the evidence when it discounted the expert's Affidavit.

Undertaker's doctrine

De La Torre v. Flanigan's Enterprises, Inc., 187 So. 3d 330 (Fla. 4th DCA 2016)

A driver went to Flannigan's and, while there, became intoxicated. During the evening, Flannigan's employees stopped serving alcohol to the driver and allegedly served her water in an effort to "sober her up." The driver later left the restaurant in her vehicle, and, at some point later that evening, crossed into oncoming traffic and struck a vehicle containing the Plaintiffs who were injured in the accident. The restaurant had an internal policy designed to prevent drunken patrons from driving away from the premises. The Amended Complaint alleged that this policy called for the restaurant employees and/or law enforcement officers to insure that intoxicated patrons did not drive by taking car keys away from the patrons and insuring that they left in a taxi or with a sober driver. The Plaintiffs filed suit against the restaurant alleging that it undertook a voluntary duty to prevent the driver from driving while intoxicated, but was negligent in performing this duty. The restaurant moved to dismiss arguing that the suit was barred by Florida Statute §768.125. The trial court agreed and dismissed the action.

Florida Statute §768.125 provides that "a person who sells or furnishes alcoholic beverages to a person of lawful drinking age shall not thereby become liable for injury or damage caused by or resulting from the intoxication of such person, except that a person who willfully and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age or who knowingly serves a person habitually addicted to the use of any or all alcoholic beverages may become liable for injury or damage caused by or resulting from the intoxication of such minor or person." The parties agreed that neither of the exceptions in the statute were applicable. In fact, Plaintiffs argued that the statute was not relevant at all because they contend that liability was based upon the "undertaker doctrine."

The Fourth District ruled that the restaurant's actions were insufficient for the undertaker's doctrine to apply. Its action in "cutting off" the driver and giving her water did not increase the risk of harm stemming from the driver's intoxication nor did it undertake to perform a duty owed by the driver of the third parties. The court also found that it was unreasonable to assume that the driver would not have driven but for the restaurant's actions.

Jordan v. Nienhuis, 203 So. 3d 974 (Fla. 5th DCA 2016)

Plaintiff sued Nienhuis as Sheriff of Hernando County. It was alleged that the Plaintiff's late husband experienced a medical emergency which made breathing difficult. The Plaintiff contacted 911 for assistance and advised the operator of her husband's difficulties. The operator told her that help was on the way and "questioned her about the decedent's condition." When the decedent's condition worsened and he lost consciousness ending up on the floor, the 911 operator directed the Plaintiff to "just leave him there" while awaiting further assistance from paramedics. Paramedics arrived at the scene and administered CPR; however, the patient eventually died.

The Complaint asserted that the 911 operator negligently mislead the decedent's wife about the seriousness of the medical emergency and induced her not to render aid to her husband thereby resulting in his death. It was also alleged that the 911 operator was negligent in giving her instructions on how to care for her husband and in reliance on the operator's instructions she did not explore alternative options for responding to the emergency.

The trial court dismissed the Complaint and the Fifth District affirmed finding that the Plaintiff failed to plead a special relationship between the 911 operator and the decedent and added that the Sheriff owed a duty of care only to the general public and not to the individual decedent. Further, liability did not exist under the undertaker's doctrine where the 911 operator did not increase the risk of harm to the decedent or otherwise control the situation.

Worker's compensation immunity

Wert v. Camacho, 200 So. 3d (Fla. 2d DCA 2016)

This case involved a work place accident between employees of two sub-contractors working on a maintenance project at the Mosaic fertilizer plant. During the project, parts of the plant were shut down while various sub-contractors performed maintenance, repair and upgrades. Wert was a superintendent for a sub-contractor (Rubber Applications) and Camacho was employed by another sub-contractor (Mid-State Industrial Corporation). Mid-State had set up a staging area for equipment and tools near a shack rented by Rubber Applications. When Wert left a safety meeting in Rubber Application's shack, he entered his truck and backed out from the side of the shack. As he put his truck in drive, he noticed that Camacho was laying behind his truck.

Subsequently, Camacho and his wife filed an action against Wert for negligence and against Rubber Applications for vicarious liability for his negligence. Wert and Rubber Applications asserted several Affirmative Defenses including the worker's compensation immunity. In reply to that Affirmative Defense, the Camachos allege that Camacho and Wert were "assigned primarily to unrelated works within private employment" and that "any immunity asserted by the Defendants is subject to the unrelated works exception contained within Florida Statute 440.11(1)."

The Camachos filed a Motion for Summary Judgment on the issue of the worker's compensation immunity and, in response, Wert and Rubber Applications argued they were entitled to sub-contractor statutory immunity under Florida Statute 440.10(1)(e) ("horizontal immunity"). Wert and Rubber Application also moved for Summary Judgment asserting that Mosaic was the statutory employer of Rubber Applications and Mid-State and that both companies were dependent horizontal sub-contractors of Mosaic working on the same project.

The Second District ruled that the trial court had committed error in finding that Wert and Rubber Applications were not entitled to worker's compensation immunity from claims made by the Plaintiff. In doing so, they noted that the unrelated works exception did not apply where, although both sub-contractors were employees of the same contactor, they were not part of the same "contract work." Because no vertical relationship existed between the two contractors, §440.10(1)(b) did not deem them to be employed in one and the same business or establishment. Accordingly, the case was remanded for a new trial at which time the Defendants could assert horizontal immunity.

Gil v. Tenet Healthsystem North Shore, Inc., 204 So. 3d 125 (Fla. 1st DCA 2016)

The decedent worked as a carpenter for the hospital where he was exposed to hazardous materials and, allegedly, died of cancer as a result thereof. The decedent's wife attempted to get worker's compensation from the hospital; however, according to her Affidavit, employees at the hospital informed her that her "husband's illness was not a work related illness." She then filed a petition for worker's compensation benefits and the hospital denied the petition stating "entire claim denied as Claimant's employment is not the major contributing cause for his death."

Upon receiving the notice of denial, the Plaintiff voluntarily dismissed the worker's compensation petition because the denial "confused" her and "it was clear to her that this was just another denial of any worker's compensation benefits because it was not a work related illness." She then filed a wrongful death suit against the hospital in Circuit Court. The hospital moved for summary judgment and claimed that it was immune from civil suit because the exclusive remedy was worker's compensation. The Plaintiff responded that summary judgment should not be granted because there was a question of fact as to whether the hospital was estopped from claiming worker's compensation immunity.

The lower court granted summary judgment in the hospital's favor and the Fourth District reversed. In doing so, it stated that if an employer takes the position in a worker's compensation proceeding that the employee is not owed worker's compensation because "the injury did not occur during the course and scope of the employment or that there was no employment relationship," the employer may be subsequently estopped from claiming immunity on the grounds that the "worker's exclusive remedy was worker's compensation…however, if an employer merely states a defense within the worker's compensation proceeding, an employer will not be estopped from later asserting immunity." The hospital contends that it had not taken inconsistent positions but rather, asserted the "medical causation defense" under Florida Statute 440.09(1). The Fourth District stated that, if the hospital merely intended to allege the medical causation defense, it did not so clearly and that the language employed in the notice of denial could give rise to more than one interpretation. As such, summary judgment was inappropriate.