2008
CASE LAW SUMMARY

Negligence

Alcohol

Hetherly v. Sawgrass Tavern, 975 So.2d 1266 (Fla. 4th DCA 2008).

Twin under aged brothers and a co-worker went to a tavern and had some drinks. Later outside the tavern, one of the twins got into a brief fight with a co-worker. The twins then went to the co-worker's residence where they opened the front door and let themselves in. They accosted the co-worker in his bedroom and they began fighting. One of the twins struck the co-worker with a beer bottle and the co-worker defended himself with a knife. The twins were charged with burglary and aggravated battery and they both pled guilty.

In turn, they sued the tavern for damages alleging liability under the Dram Shop Act. In response, the tavern pled the forcible felony defense and the trial court agreed that the plaintiff's claim was barred by the statute. The Fourth District affirmed and held that, under the Dram Shop Act, the tavern may be held liable if the tavern willfully served alcohol to minors, thereby finding that the Dram Shop is not a strict liability statute. By contrast, the forcible felony statute was mandatory and any action for damages is barred if the injury was "sustained by participant during the commission or attempted commission of forcible felony."

Apparent Agency

Pilar v. DHL Global Customer Solutions, 993 So.2d 142 (Fla. 1st DCA 2008).

Plaintiff was struck by a vehicle painted with a DHL logo, driven by a driver in a DHL uniform and the vehicle was carrying packages for DHL customers. DHL did not, however, own the van or employ the driver. Rather, they had an independent contractor agreement with another company. The trial court entered summary judgment on behalf of DHL and the First District reversed the summary judgment in part but affirmed the summary judgment on the issue of apparent agency because the Plaintiff in

no way relied upon the representations of apparent agency inasmuch as this was a motor vehicle accident.

Causation

Horn v. Tandem Healthcare of Florida, 993 So.2d 1166 (Fla. 2d DCA 2008).

Plaintiff had a slip and fall and suffered a torn meniscus. She subsequently had a total knee replacement. The trial court granted summary judgment for the defendant finding that the cause of the need for the knee replacement surgery was pre-existing degenerative arthritis. The plaintiff's medical experts testified that degenerative osteoarthritis would have required knee replacement surgery at some point in her life, but the meniscus tear aggravated the condition and accelerated the need for replacement. As such, the Second District reversed finding that there were factual issues as to whether the plaintiff's slip and fall contributed substantially to the need for knee replacement surgery.

Hulbert v. Vogt, 972 So.2d 1041 (Fla. 1st DCA 2008).

The First District reversed the trial court for granting summary judgment finding that actions of the defendant were not the proximate cause of the plaintiff's damages. Unlike the finding of a legal duty, the question of foreseeability as it relates to proximate causation generally must be left to the fact finder to resolve. The judge is only free to take this matter from the fact finder when the facts are unequivocal and where the evidence supports no more than a single reasonable inference.

Consortium

Bashaway v. Cheney Bros., Inc., 987 So.2d 93 (Fla. 1st DCA 2008).

Because Florida does not recognize marriages between same sex partners, the same sex partner who maintains a long-term committed relationship with the plaintiff cannot make a claim for loss of consortium.

Contribution

Soncoast Community Church v. Travis Boating Center, 981 So,.2d 654 (Fla. 4th DCA 2008).

The trial court entered summary judgment finding that the Plaintiff could not seek contribution as a result of a personal injury settlement because the defendant was not included in the general release as part of the settlement. The general release given not only named specific individuals and entities, but also included a release of "any and all other persons, firms, corporations, or legal entities of any type whatsoever." As part of the Release, the parties also noted that the settling party had filed a third party complaint for contribution and that the plaintiff agreed to fully cooperate with them in the contribution action (which was against the named defendant below). The Fourth District reversed the summary judgment and found that the broad general release language required further inquiry as to the party's intent adding that the very fact that both parties interpreted the general release to mean radically different things indicated that it was not appropriate for summary judgment.

Exculpatory Agreements

Appelgate v. Cable Water Ski, 974 So.2d 1112 (Fla. 5th DCA 2008).

A 5 year old plaintiff was injured when she fell while she was being pulled on a wakeboard at a camp. She was then struck by a wakeboard. The child's parents filed an action on her behalf arguing that the camp failed to maintain its premises in a reasonably safe manner. The child's mother had signed an exculpatory contract prior to the activity and, based upon this, the child court granted a summary judgment. The Fifth District reversed and held that where are a contract contains an exculpatory clause signed by a parent on behalf of her child in favor of a commercial enterprise, the contract is not enforceable to defeat the child's action to recover for personal injuries. The Court pointed out that a consenting adult could sign such a pre-injury exculpatory clause because they have the ability to exercise personal caution and mitigate the impact of future economic cause by purchasing disability and health insurance policies. Children, however, tend to throw caution to the wind during risky activities, resulting in a decreased chance to avoid the injury and, more importantly, have no ability to indemnify themselves for future economic losses.

Kirton v. Fields, 997 So.2d 349 (Fla. 2008).

Decedent's father (the custodial parent) took his son to ride all terrain vehicles. In order to gain access to the facility, the father, as his natural guardian, signed a release and waiver of liability, assumption of risk and indemnity agreement. While attempting a jump, his son lost control of the ATV and died. The decedent's mother was unaware that the father was permitting their son to engage in this activity. The Supreme Court held that a pre-injury release executed by a parent on behalf of a minor child is unenforceable against the minor or the minor's estate in a tort action arising from injuries resulting from participation in a commercial activity.

Fabre

Boza v. Carter, 993 So.2d 561 (Fla. 1st DCA 2008).

For purposes of determining whether an individual is an intentional tortfeasor, "an intentional tort is one in which the actor exhibits a deliberate intent to injure or engages in conduct which is substantially certain to result in injury or death."

Forcible Felony Defense

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finding that the Dram Shop is not a strict liability statute. By contrast, the forcible felony statute was mandatory and any action for damages is barred if the injury was "sustained by participant during the commission or attempted commission of forcible felony."

Hazardous Materials

United States of America v. Stevens, 994 So.2 1062 (Fla. 2008).

The Supreme Court held that a laboratory that manufactures and handles ultra-hazardous materials owes a duty of reasonable care to the members of the general public to avoid an unauthorized interception and dissemination of the materials. In doing so, they applied the foreseeable zone of risk test which they noted was an appropriate test under Florida law to determine if a duty existed for purposes of establishing negligence.

IME

GEICO v. Berner, 971 So.2d 929 (Fla. 3d DCA 2007).

Plaintiff sued tortfeasor and his uninsured motorist carrier. The insurance company had obtained an IME prior to suit being filed under the PIP coverage provided by their policy. After the uninsured motorist claim was filed, GEICO served a request for examination with another orthopedic specialist. The plaintiff objected to GEICO's request, stating that there was an absence of good cause because GEICO had already obtained an examination. The tortfeasor then served a Request for Medical Examination and this was objected to arguing that he and GEICO shared a common interest in the damage phase of the litigation. The trial court agreed and ordered that the orthopedic surgeon that performed the PIP examination serves as the orthopedic expert. The Third District found that the trial court departed from the essential requirements of the law and held that the carrier and the tortfeasor were entitled to an examination with another physician.

Graham v. Dacheikh, 991 So.2d 932 (Fla. 2d DCA 2008).

Plaintiff underwent an IME and subsequently requested that the physician who performed the IME produce all of his IME reports prepared between 2004 and 2006. The trial court authorized the doctor to remove the names and identifying information from the reports, however, the reports were to be produced in their entirety without an *in camera* inspection by the trial court and without any provision for confidentiality. The purpose of these medical reports was to give the plaintiff a basis to impeach the examining physician and not to discover evidence relevant to prove the plaintiff's case. The Second District granted certiorari finding that the trial court's order caused irreparable injury to the privacy rights of non-parties who had not been given notice and no opportunity to be heard.

Goeddel v. Davis, 993 So. 2d 99 (Fla. 5th DCA 2008).

Trial court ordered a non-resident plaintiff to appear for a second deposition in Florida due to plaintiff's failure to be forthcoming in his initial deposition. The defendants also requested an IME to take place during this trip. The plaintiff objected arguing that a non-resident plaintiff cannot be compelled to submit to a medical examination in Florida. The Fifth District held that the plaintiff was properly ordered to appear in Florida for a second deposition and it was not an abuse of discretion for the trial court to require him to appear for an IME during the same trip, particularly where the defendant was ordered to contribute to the cost of the trip.

Impact Rule

Futch v. Wal-Mart Stores, 988 So.2d 687 (Fla. 1st DCA 2008).

The plaintiff was abducted from a Wal-Mart parking lot and she sought damages for negligence and infliction of emotional distress caused by the store's failure to provide reasonable security. Plaintiff also sought damages for loss of consortium. Defendant moved for summary judgment asserting that plaintiffs were barred from recovery based upon the impact rule. Plaintiff testified that when she finished work at 8:00 p.m. she requested an escort to her vehicle but was denied same. While walking to her pickup truck, she was abducted at gunpoint by assailants in the parking lot. The first assailant forced her into the truck, climbed in over her and ordered her to drive to the front of another store where an accomplice got in on the passenger side. They abducted her for 4 hours and eventually released her.

During her deposition, she stated that she could not remember whether she had been "physically touched" by the assailants. She also admitted that she was not physically injured. The Defendant moved for summary judgment and the Plaintiff filed an affidavit in opposition to the motion for summary judgment in which she pointed out that it was physically impossible for the assailants to climb over her without touching her and it was also physically impossible for three people to ride in the front seat of a pickup truck without touching one another. The First District reversed the summary judgment finding that there were genuine issues of material fact which precluded summary judgment.

Negligent Hiring

Stander v. Dispoz-O-Products, Inc., 973 So.2d 603 (Fla. 4th DCA 2008).

The plaintiff appealed an order dismissing with prejudice her complaint alleging that the defendant, who sent goods through an independent contractor trucking company, was responsible for an accident where the decedent was killed by the driver of the truck owned by the independent contractor. It was alleged that the defendant was liable for the negligence of the driver because the defendant failed to investigate his background, qualifications or experience and knew or should have known that the driver was unfit. The plaintiff also alleged that the defendant had a non-delegable duty to protect motorists on the highway from the dangers that the driver posed. The defendant moved to dismiss arguing that the complaint contained only conclusions and contained no facts which would make someone liable for negligently selecting an independent contractor to transport goods.

The Fourth District found that the dismissal of the complaint was appropriate where the complaint contained no facts and the conclusions set forth in the Complaint were insufficient to make a defendant liable for negligence of an independent contractor. In doing so, they distinguished another case which held that the landlord could be found responsible for the actions of an incompetent independent contractor which resulted in injury to the tenant because the landlord owed a duty to the tenant which did not exist in this case.

Negligent Inspections

Travelers Insurance Co. v. Securitylink¸ 995 So.2d 1175 (Fla. 3d DCA 2008).

The insurer, as subrogee of a warehouse owner, appealed dismissal of its complaint against the security company. The warehouse owner contracted with the security company to install and monitor an alarm at its warehouse. The alarm company employed a security company to respond to alarms at the warehouse. On one weekend, the alarm company received 4 alarm signals from the warehouse. Each time, the alarm company called the security company to dispatch a guard to inspect the premises.

On the first 3 alarms, the guard inspected the premises and reported no evidence of forced entry or suspicious activity. On the 4th alarm, the alarm company called the warehouse owner requesting that they send someone to the warehouse. Upon entering the warehouse, they discovered a ladder descending from a broken skylight and determined that merchandise was missing.

The owner's insurer paid a claim for the stolen merchandise and then filed a subrogation action to recover the monies paid. The security company contended that it only owed a duty to the alarm company with whom it contracted. The Third District found that this position was not well-taken because a non-contracting party may bring a party for breach of a contractual duty when the party is the intended beneficiary of a contract. It further held that negligent performance of inspections may give rise to a cause of action.

Premises Liability

DiMarco v. Colee Court, 976 So.2d 650 (Fla. 4th DCA 2008).

A tenant tripped and fell on a paver at the apartment complex and alleged that the condition of the paver had deteriorated and was regularly extended above the adjacent ground level. The plaintiff alleged that the landlord was negligent in allowing a dangerous condition to exist without warning the residents. The landowner moved for summary judgment asserting that it had no duty to warn of an open and obvious condition because the plaintiff had lived in the apartment complex for 2 months prior to the incident. The trial court granted the summary judgment and the

Fourth District reversed finding that even though a condition was open and obvious, this does not discharge the landowner from its duty to maintain the property in a reasonably safe condition.

Martin v. Gulfstream Metal Plating, 977 So.2d 688 (Fla. 4th DCA 2008).

Suit was filed for personal injuries caused when the plaintiff's feet became entangled in a dog leash causing her to fall. Summary judgment was entered in favor of the defendant. The plaintiff was walking her employer's dog when the dog pulled on the leash and ran around her in an effort to reach another dog owned by an employee of the defendant. The other dog was on the street unattended.

While the dogs were playing with each other in a playful manner, the plaintiff tripped over the dog leash. The plaintiff brought a claim against the defendant employer for leaving his gate opened and allowing his dog to freely roam off the property. Because the injury occurred off the premises and because there was no evidence that the dog was vicious or even acting in a vicious manner, and because the accident could have easily have occurred if the dog had been on a leash, summary judgment was affirmed.

Miami-Dade County v. Deerwood Homeowners Ass'n., 979 So.2d 1103 (Fla. 3d DCA 2008), *rev. denied,* 994 So.2d 305 (Fla. 2008).

The county filed a cross claim against the homeowners association and its maintenance company alleging that they were liable to the county caused by tree roots growing under the surface of the county's sidewalk. The county argued that the homeowners association and the maintenance company undertook maintenance of the tree and that the plaintiff and the county relied upon this. In doing so, the county argued that once an obligation is voluntarily undertaken, it must be performed with reasonable care. The Third District held that gratuitously planting a tree and maintaining it for 9 years did not take this case out of the Florida Supreme Court's decision in *Sullivan v. Silver Palm Properties,* 558 So.2d 409 (Fla. 1990) which held that private landowners are not liable for injuries caused by subterranean roots growing under public rights-of-way.

Johnson v. Boca Raton Community Hospital, 985 So.2d 593 (Fla. 4th DCA 2008), *rev. denied,* 2009 WL 36442 (Fla. 2009).

The Estate filed a claim against the premises owner for injuries suffered by the decedent as a result of his exposure to asbestos while working as a pipe insulator for an independent contractor on the premises. The trial court entered summary judgment and the Fourth District affirmed noting that one who hires an independent contractor is not liable for injuries sustained by that contractor's employees in performing the work unless the owner has been "actively participating in the construction to the extent that he directly influences the manner in which the work is performed" or "is engaged in acts either negligently creating or negligently approving the dangerous condition resulting in the injury or death to the employee." Owner liability may also attach when the owner has actual or constructive knowledge of a latent or potential danger on the premises but fails to warn the employee of such danger.