2009
CASE LAW SUMMARY

Negligence

Admission Against Interest

Petit-Dos v. School Board of Broward County, 2 So.3d 1022 (Fla. 4th DCA 2009)

The Fourth District held that the trial court erred in failing to admit statements from the school bus driver who admitted in deposition testimony feeling some responsibility for the accident. The Fourth District found that these were admissions against interest against her employer under F.S. §90.803(18)(d) and should have been admitted, however, the failure to admit the statements were harmless because the jury did assign liability to her employer. For further details about this case, please see the discussion under the **Fabre** subheading under Procedural and Legal Issues.

Agency/Apparent Agency

Madison v. Hollywood Subs, Inc., 997 So.2d 1270 (Fla. 4th DCA 2009)

The decedent was shot and killed in the drive-thru lane of a restaurant owned by a franchisee. The trial court dismissed the complaint against the franchisor and the Fourth District affirmed. The court noted that the franchise agreement only established that the franchisor had control to ensure uniformity in the standardization of products and services offered by the restaurant, but that the day-to-day operations were within the sole control of the franchisee. Because the franchise agreement did not establish security measures to be undertaken or other operational aspects of the restaurant, it did not support a claim of agency against the franchisor.

Bifurcation

Stanley v. Delta Connection Academy, 12 So.3d 781 (Fla. 5th DCA 2009)

The trial court ordered bifurcation of liability and damages and ordered that the damage portion of the claim be tried first. The Fifth District granted certiorari and found that irreparable injury would be caused which could not be remedied on appeal.

Dangerous Instrumentality

Rippy v. Shepard, 15 So.3d 921 (Fla. 1st DCA 2009)

Rippy appealed a final order granting Shepard's Motion to Dismiss. The case stemmed from an accident involving a farm tractor, and a claim by the Plaintiff that same was a dangerous instrumentality. The court recognized that although a farm tractor met the statutory definition of a motor vehicle, the definitions of motor vehicle are not controlling in determining whether a device is a dangerous instrumentality.

The court noted that farm tractors are exempt from most motor vehicle regulations including registration, payment of license taxes and display of license plate. The court added that farm tractors, like road graders, are neither used as a mode of transportation, nor routinely operated in public places so as to pose a significant danger to the public. As such, they concluded that a farm tractor is not a dangerous instrumentality.

Duty of Care/Forseeability

Aircraft Logistics v. H.E. Sutton Forwarding Company, 1 So.3d 309 (Fla. 3d DCA 2009)

Aircraft owner kept an airplane based at a local airport. Sutton owned a portable cattle loading ramp also kept at the airport. In consideration for the monies spent by Sutton for fuel and maintenance, the airport housed the ramp for Sutton. Further, it was undisputed that the ramp was in the airport's exclusive care, custody and control and was used by the airport to load and unload horses from airplanes.

On the day of the incident, a sudden thunderstorm erupted causing micro-bursts of wind over the airport. There were no storm warnings in effect. The gusts lifted the ramp onto Aircraft's plane causing a total loss. The trial court granted summary judgment and the Third District affirmed finding that Sutton was not in a position to control the risk because the ramp was in the custody of the airport. Further, the Third District found that there was no basis for imposing a duty to secure property in the absence of some anticipated need for doing so.

Equitable Subrogation

State Farm v. Johnson, 18 So.3d 1099 (Fla. 2d DCA 2009)

Defendant and State Farm's insured were involved in a motor vehicle accident in June, 2000. In January, 2003, State Farm paid its insured over $40,000 in UM benefits. In October, 2005, State Farm sued the defendant tortfeasor seeking reimbursement for the monies it had paid to its insured. The defendant tortfeasor moved for summary judgment arguing that State Farm's claim was for contractual subrogation as opposed to equitable subrogation and therefore its claim was barred by the statute of limitations. The trial court granted the motion.

The Second District reversed finding that this was a cause of action for equitable subrogation because State Farm made a payment to protect its own interest; State Farm did not act as a volunteer; State Farm was not primarily liable for the debt; State Farm paid off the entire debt; and subrogation would not work any injustice to the rights of a third party. As such, because State Farm filed its claim within four years of paying the claim, the trial court's summary judgment was reversed.

Evidence of Prior Settlement

Saleeby v. Rocky Elson Construction, 3 So.3d 1078 (Fla. 2009)

The plaintiff was injured when roof trusses on a construction site collapsed and rendered him paraplegic. He collected worker's compensation and then sued the construction company that installed the trusses, as well as the company who manufactured them. Plaintiff settled with the manufacturer and then moved in limine to exclude evidence of the manufacturer's prior status as defendant. The trial court entered an Agreed Order on this. The remaining defendant raised the worker's compensation immunity. Plaintiff sought to show that the collapse resulted from the construction company's failure to follow safety requirements and industry standards in installing trusses.

The defendant sought to impeach the witness who testified that the trusses collapsed as a result of the installation and not from a manufacturing defect. The trial court allowed the defendant to impeach this witness with evidence that the manufacturer had previously been a defendant in the case and then settled. The trial court believed that the evidence went to the witness' bias because it was based on opinions he formulated when the manufacturer was a defendant.

The Fourth District previously ruled that the trial court did not abuse its discretion admitting the evidence because the witness first rendered the opinion when he was a defendant with a pecuniary interest in the case. The Supreme Court reversed and found that the plain language of F.S. §768.041(3) and §90.408 expressly prohibited the admission at trial of any evidence of settlement.

IME's

Miller v. Harris, 2 So.3d 1070 (Fla. 2d DCA 2009)

Following an IME, the plaintiff issued a subpoena duces tecum directly to the examining physicians and requested, amongst other things, that the physician provide documents to establish an approximate portion of the doctor's involvement as an expert witness, including percentage of earned income during the last 3 calendar years, copies of all office calendars and schedules which identified all IMEs performed by the doctor performed for insurance companies and/or defense attorneys over the last 3 calendar years, and copies of all reports of these IMEs. The trial court ordered the production of these documents pursuant to the subpoena.

On appeal, the plaintiff conceded that the IME reports of other patients were not properly discoverable. Further, because the defendant agreed that they were obligated to provide answers to interrogatories regarding the expert's involvement in IMEs, the Second District granted certiorari noting that "an expert may be required to produce financial and business records only under the most unusual or compelling circumstances, and may not be compelled to compile or produce non-existent documents."

Buck v. Chin, 19 So.3d 1132 (Fla. 3d DCA 2009)

The trial court overruled the Defendant's objections and ordered that Stephen Wender, M.D. produce all 1099's or equivalent documents for the year 2007 and ordered him to show IME related income for that year. The Third District granted certiorari finding that Rule 1.280 did not support the production of such evidence to show expert bias and can only be used to obtain documents under the most unusual or compelling circumstances such as when there has been a falsification or misrepresentation. The mere inconsistency between Dr. Wender's deposition testimony and interrogatory answers cited within the case did not serve as compelling circumstances needed to overcome this burden.

Wicky v. Oxonian, 24 So.3d 571 (Fla. 2d DCA 2009)

A woman passed out while driving and her car collided with another vehicle killing the other driver. During the police investigation of the accident, she gave consent to obtain a sample of her blood in order to be analyzed for alcohol content and the presence of controlled chemicals or substances. The analysis failed to reveal any alcohol or controlled substances and the State did not prosecute. The Plaintiff filed a discovery request seeking permission to test the surviving portion of the tortfeasor's blood in order to check for the presence of a prescription cough medicine. The trial court granted the request and a petition for certiorari was filed. The Second District granted certiorari finding that allowing the blood to be tested would cause irreparable harm to the tortfeasor. It also found that, under Rule 1.360 of the Florida Rules of Civil Procedure, Plaintiff did not show that the subject of the examination was "in controversy" nor did he show good cause for the testing.

Joint Enterprise

Erickson v. Irving, 16 So. 3d 868 (Fla. 3d DCA 2009)

On February 2, 2000, three friends, Irving, Long and the decedent Sidoni, attended a scotch tasting event in Miami Beach. While Irving drove the three men to the event, he decided to leave the event with someone else. As a result, Irving gave the car keys to Long, who agreed to return the car to Irving's home in Coconut Grove. Long asked Sidoni if he would like to drive, but Sidoni refused. Long and Sidoni subsequently left the event with Long driving. Although Long originally intended to drop Sidoni off at Sidoni's home before returning the car to Irvin, Sidoni suggested that the two stop at a bar in Coral Gables. After stopping at the bar for 45 minutes, Long and Sidoni left with Long again driving. On the way home, the car collided with a dump truck, resulting in the death of Sidoni.

In a suit filed by the personal representative, the Defendants raised in addition to other defenses, the defense of joint enterprise based upon the allegation that Sidoni and Long had joint control of the vehicle. The Plaintiff's motion to strike the defense was denied. Subsequently, the jury found that Long and Sidoni were involved in joint enterprise at the time of the accident. On appeal, the Third District noted that to establish the existence of a joint enterprise the defendant must prove an agreement to enter into an undertaking, a community of interest in the objects and purposes to be accomplished in the undertaking, and equal authority and control of the undertaking.

The court added that an agreement to go to a social gathering is usually not sufficient to create a community of interest, nor is the fact that the passenger gives the driver directions. Even situations such as car pools are insufficient to create joint enterprise. In essence, the relationship between a driver and a passenger must be in effect that of a partnership, principle and agent, or master and servant, or when the circumstances are such that the vehicle, though manually operated by one person, is in the actual control of the other. As such, the court reversed and remanded.

Liens

Copeland v. Buswell, 20 So.3d 867 (Fla. 2d DCA 2009)

A wrongful death action was brought. During the pendency of the lawsuit, the hospital where the decedent was treated following the accident filed a statutory lien. Thereafter, without informing the estate and without approval from the probate court, the Defendants reached a settlement with the hospital on the lien paying $300,000 on a claim of $492,224. Although troubled by the Defendants' action, the trial court eventually entered a final judgment awarding only the funeral expenses.

The Second District reversed finding that the Defendants had improperly circumvented the priority of payment of claims set forth in Florida Statute §733.707 (1). Under this statute, the costs and expenses of administration, compensation of personal representatives and their attorney's fees, funeral expenses, debts and taxes all had a priority for payment over the medical expenses incurred during the last 60 days of the decedent's life.

Paternity

Daniels v. Greenfield, 15 So.3d 908 (Fla. 4th DCA 2009)

In this wrongful death case, the child's alleged biological father was not married to the child's mother at the time of death. In fact, at the time the child was conceived and born, the mother was married to someone else. Florida Statute §382.013 provides that when a child is born to a mother who is married at the time of the child's birth, the husband is listed on the birth certificate as the father unless paternity has been determined otherwise by a court.

In this case, the mother previously filed a petition to determine paternity and child support. The decedent had answered by demanding a DNA test which was ordered but never conducted because he failed to appear. No judgment establishing paternity was ever entered.

Thereafter, the decedent committed suicide and the mother brought a wrongful death action on behalf of the son. The trial court granted summary judgment in favor of the healthcare providers finding that the child's paternity could not be determined or questioned in the context of a wrongful death case. The Fourth District reversed the entry of summary judgment finding that the trial court erred in determining the child was not a survivor of the decedent. The court remanded for further proceedings to resolve the issue either by summary judgment or in front of a jury as had occurred in the Third District's decision in *Coral Gables Hospital v. Veliz*, 847 So.2d 1027 (Fla. 3d DCA 2003). The Florida Supreme Court has now accepted jurisdiction of this case.

Premises Liability

Spatz vs. Embassy Homecare, Inc. d/b/a Embassy Retirement Home of Margate, 9 So.3d 697 (Fla. 4th DCA 2009)

Plaintiff alleged that she tripped and fell when her foot got caught on a loose and unsecured mat, partially covering the carpeted floor. The plaintiff alleged that the defendant premises owner was negligent for failing to maintain the premises in a reasonably safe condition and negligent for failing to warn her of the alleged dangerous condition.

During the plaintiff's deposition, she indicated her foot got caught on a large unsecured rug, and that she further testified that she had worked at the retirement home as a patient coordinator and had visited the facility several times a week as her mother and brother were residents.

The plaintiff's attorney missed the deadline of filing opposition evidence or law at least two business days prior to the hearing, but nonetheless, in a late filed response , the plaintiff's counsel asserted the plaintiff tripped at an area near the door's threshold where there was a loose, unsecured area in the carpet. The plaintiff also answered an interrogatory where she described the accident as occurring when her foot got caught under an unsecured piece of carpet and caused her to fall. The trial court granted the motion for summary judgment in favor of

the defendant and rejected plaintiff's request for an opportunity to amend the complaint to conform to the newly asserted version of events.

The court based its decision on two well recognized principle of law. The first is that when faced with a motion for summary judgment, the court is limited to the issues raised by the pleadings. The second is that a party may not avoid summary judgment by taking a position contrary to the one that he or she has taken in prior sworn testimony. In accordance with these two principles, the plaintiff's version as alleged in the complaint, as well as her deposition testimony, is different than this alleged newly theory of liability based upon an unsecured carpet. Therefore, the application of the open and obvious doctrine entitled defendant to summary judgment.

Punitive Damages

Cradle to Crayons Childcare v. Ramos, 999 So.2d 1090 (Fla. 1st DCA 2009)

The defendants sought a new trial arguing that the trial court erred in allowing the plaintiffs to amend their complaint to seek punitive damages without complying with F.S. §768.72. The First District ruled that the failure of the trial court to conduct an evidentiary hearing was not fundamental error and the defendant waived their rights under the statute by failing to timely appear and having been previously defaulted.

Leavins v. Crystal, 3 So.3d 1270 (Fla. 1st DCA 2009)

The First District granted certiorari and struck the plaintiff's claim for punitive damages when the plaintiff failed to comply with F.S. §768.72 and Florida Rules of Civil Procedure 1.110 which requires a plaintiff to provide an evidentiary record or proffer which would provide a reasonable basis for recovery of damages.

Stock Development v. Ulrich, 17 So.3d 1233 (Fla. 2d DCA 2009)

At the time that the trial court granted the claim for punitive damages, it had numerous affidavits, depositions, federal trial transcript and the defendants were allowed ample opportunity to respond and present evidence in opposition, including a hearing on the motion. The Second District denied certiorari finding that the scope of reviewing a petition for writ of certiorari to review the granting of a motion to amend the complaint to add a claim for punitive damages is limited to

determining whether the Circuit Court adhere to the procedural requirements of F.S. §768.72.

Statute of Limitations

Ramirez v. McCravy, 4 So.3d 692 (Fla. 3d DCA 2009)

Plaintiff filed his suit three days after the expiration of the four year statute of limitations in a case involving a motor vehicle accident. Plaintiff argued that Florida Supreme Court administrative orders from hurricanes, which were issued after the accident, tolled the statute of limitations on his claim. The last administrative order was more than six months before the statute of limitations expired. Finding that the weather emergencies which gave rise to the administrative orders had nothing to do with the late filing of this action, the Third District upheld the dismissal of the action for failure to bring it within the statutory time limit. The Supreme Court has now accepted jurisdiction of this matter.

Summary Judgment

Howard v. Boulanger Drywall Corp., 23 So.3d 817 (Fla. 4th DCA 2009)

The Plaintiff, an employee of the window subcontractor, sued another subcontractor who installed safety railings at the construction site after the employee was injured. The employee fell from a third story balcony. The Plaintiff alleged that the Defendant was negligent for not installing and/or constructing a safety boot rail system in accordance with the specific and detailed instructions provided with the system.

The uncontested facts established that the Defendant was responsible for installing the guardrail, but was not responsible for selecting or paying for the type of material used for maintaining the guardrail system. The Defendant also submitted an affidavit from an independent safety consultant who attested to its proper construction.

The Plaintiff filed an affidavit from a Humans Factors and Industrial Safety expert who stated that the safety boot guardrail system was not properly installed based upon his reference to the manufacturer's installation instructions. Significantly, the affidavit was not based on his personal knowledge, instead, the expert simply reviewed the installation booklet, viewed photographs of the guardrails and provided his opinion. There was no proof that he ever examined the

safety rail system or had any personal knowledge regarding the system. Because the Defendant established that it did not negligently install the guardrail system, summary judgment was appropriate.

Undertaker Doctrine

Wallace v. Dean, 3 So.3d 1035 (Fla. 2009)

A daughter was calling her mother's home from outside Florida and was unable to get her mother on the telephone. The woman then contacted her mother's neighbor to check on her mother and the neighbor called 911. Two deputies responded to the call and the neighbor advised them that the woman had diabetes and thought that an ambulance was necessary because the woman was completely unresponsive. The deputies rejected the request assuring the neighbor that the woman was merely sleeping.

When the neighbor returned to check on the woman the following morning, she saw that she had not moved from her position she had been left in. The neighbor then dialed 911 a second time and an ambulance was ultimately dispatched. The woman was transported to a local hospital where she died several days later without ever regaining consciousness. The Supreme Court found that these actions were operational and not of a planning level and therefore, the action was not barred by sovereign immunity. Further, the Supreme Court held that, under the "undertaker's doctrine, one who undertakes an action must do so non-negligently applies even to a sovereign.

Workers' Compensation Immunity

Casas v. Siemens Energy, 1 So.3d 294 (Fla. 3d DCA 2009)

The Plaintiff was a machine operator using a mechanical punch press machine. He had been instructed that if a metal lid became stuck in the machine, he should remove it with a long metal rod or with a long screwdriver. While attempting to clear a stuck metal lid, the machine he worked on cycled and crushed his arm. He then sued his employer who claimed workers' compensation immunity. Plaintiff invoked the intentional tort exception to workers' compensation immunity. The trial court granted summary judgment. Originally, the Third District Court affirmed the trial court in its split decision. The case then went to the Florida Supreme Court which quashed it in light of its decision in Bakerman v. The Bombay Company, 961 So. 2d 259 (Fla. 2007).

On remand, the Third District Court of Appeal found that the lack of safety equipment, as well as the alleged lack of training regarding the operation of the machine raised questions of fact. The Third District also noted that there must be an element of concealment present under the "substantial certainty test" and that the testimony raised was sufficient to proceed.

Adams Homes of Northwest Florida v. Cranfill, 7 So.3d 611 (Fla. 5th DCA 2009)

Adams Homes was constructing a home and employed Seacoast Building Supplies to furnish and deliver roofing materials to the site. Another subcontractor was responsible for actually installing the roof. When Adams Homes needed roofing materials, it would contact Seacoast and order the product. In this case, the plaintiff delivered roofing materials. When he did so, he delivered the products to the roof in accordance with Seacoast's standard operating procedure to "stock the roof out." While doing so, the plaintiff fell through the roof of the home and was seriously injured. Adams Homes asserted that the plaintiff was a statutory employee and, as such, they were entitled to the workers' compensation defense. Trial court found and Fifth District affirmed that the employee was a "materialman" pursuant to F.S. §713.01(20). As such Adams Homes was found not to be entitled to workers' compensation immunity.

C.W. Roberts Contracting, Inc. v. Cuchens, 10 So.3d 667 (Fla. 1st DCA 2009)

The court found that the defendant in a wrongful death suit should have been granted summary judgment based upon the immunity provided under §440.10, Florida Statutes, because the undisputed facts showed that the contractor was a statutory employer of the decedent, and therefore should have been protected by the workers compensation immunity.

The workers comp statute cited above provides that a subcontractor who sublets work to a subcontractor is liable for the payment of all employees workers compensation benefits unless a subcontractor secured compensation coverage on its own. Therefore, the general contractor is a statutory employer and all these subcontractors' employees cannot be sued unless the employer has committed an intentional tort which caused the injury or death.

Under §440.11(1)(b) the employers' actions shall be deemed to constitute intentional tort and not an accident only when the employee proves by clear and convincing evidence, either that the employer "deliberately intended to injure the

employee" or that the employer "engaged in conduct that the employer knew, based on prior similar accidents or explicit warnings, specifically identifying a known danger was virtually certain 6to result in injury or death to the employee", and the employee "was not aware of the risk because the danger was not apparent" and because the employer "deliberately concealed or misrepresented the danger so as to prevent the employee from exercising informed judgment about whether to perform the work.

In this case, the plaintiff decedent worked for a subcontractor that hauled asphalt and material from an air force base to a mill pile where the accident took place. The plaintiff's surviving spouse entered into a negotiated settlement of a worker's compensation claim for the death of her husband, and it included a provision that it would represent the set6tlement of all actions that may arise from the accident.

The complaint and evidence lacked the necessary allegations that the general contractor deliberately concealed and misrepresented the danger or that the condition of the mill pile was virtually certain to cause injury or death. Furthermore, there was no evidence that the plaintiff who was hauling the materials away from the job site was unaware of the risk. Therefore, summary judgment should have been granted in favor the general contractor.