Negligence

Condominiums

Cali v. Meadowbrooks Lakes View Condominium Association, Inc., 59 So. 3d 363 (Fla. 4th DCA 2011)

This was an action for breach of duty to repair common elements. The Plaintiff filed a negligence claim against a condominium association alleging that damages were proximately caused by two severe water leaks from plumbing pipes located within the interior boundary walls of the Plaintiff's unit and a unit above his. It was alleged that duties were owed to the Plaintiff pursuant to §718.113, Florida Statutes, as well as the declaration of condominium. The condominium association denied any duty to the Plaintiff arguing that the pipes were not part of the common elements and the trial court agreed and entered summary judgment.

On appeal, it was held that a reading of the declaration of condominium and the applicable Florida Statutes as a whole created a factual dispute as to whether all of the pipes within the interior boundary or perimeter could be considered common elements. Entering summary judgment was improper because of this disputed issue of fact.

Duty

Fabregas v. North Miami Bakeries, Inc., 63 So. 3d 1 (Fla. 3d DCA 2011)

This was an action against a bakery by an independent contractor's employee who had placed boards over a deep fat fryer in order to be able to access hoods and vents which were being cleaned by the contractor. The contractor was severely burned when the boards broke and/or shifted, causing him to fall into the fryer vat. The bakery moved for summary judgment asserting that it owed no duty to the independent contractor's employee. The employee argued that, by not turning the oil off earlier, the bakery created a hidden danger. The trial court granted the bakery's Motion for Summary Judgment.

On appeal, the Court noted that there is a general rule that, one who hires an independent contractor is not liable for injuries sustained by that contractor's employees in their work. Exceptions to that rule exists however, including where an owner has actual or constructive knowledge of a latent or potential danger on the premises and has breached a duty to warn independent contractors' employees

of such a danger. Here, the bakery owner turned off the fryer, however with an inadequate lead time to permit the oil within the vat to cool to a safe temperature creating a latent, non-obvious danger. There was therefore, an issue of fact which precluded the entry of summary judgment.

Moreover, the Court noted that an injury sustained by an independent contractors' employee that occurs during in the independent contractor's specialized work does not result in liability to the owner. However, here, the Defendant, bakery was arguably in a better position than the independent contractor employee to appreciate the special hazard in the work area. The Court noted that the independent contractor's work was the hood, vents and filters, not the fryer vat or other equipment in the bakery.

Westervelt v. Thyssenkrupp Elevator Corporation, et al., 76 So. 3d 10 (Fla. 4th DCA 2011)

The Plaintiff was injured while riding in a condominium elevator that suddenly stopped while he was working as a concierge. The Defendant had been hired to maintain and repair the elevators. The building owner, Toscana, was also named as a defendant. At trial, a directed verdict was entered in favor of the Defendants and against the Plaintiff. The directed verdict was reversed on appeal.

On appeal, the Court noted that one of the elements of a negligence cause of action is a "duty, or obligation, recognized by the law, requiring the defendant to conform to a certain standard of conduct, for the protection of others against unreasonable risks." Here, the Plaintiff had submitted evidence without objection that the building had a duty to maintain its premises. Thus, Toscana's duty of care was clearly established at trial. Likewise, the evidence at trial established that Thyssenkrupp's duty of care was to maintain and repair the elevators. Whether or not there was a breach of their respective duties should have been left for the jury to decide.

IMEs

Ruiz v. Carpio, 36 FLW D1324 (Fla. 3d DCA 6/22/11)

The trial court permitted the Defendant to schedule an IME which was to be videotaped. The Third District granted certiorari and quashed the order finding that the order departed from the essential requirements of the law by requiring the Plaintiff to submit to an IME that was to be videotaped.

USAA Casualty Insurance Company v. Callery, 66 So. 3d 315 (Fla. 2d DCA 2011)

The Second District quashed an order of the trial court requiring redacted reports of 20 other patients to whom the auto insurer sent to an IME physician to show bias in favor of the auto insurer. The court found that the trial court departed from the essential requirements of law compelling production absent compliance with the notice requirements of Fla. Stat. 456.057(7)(a)(3) which regulates that a healthcare practitioner may not discuss a patient's medical records without the patient's written authorization unless or upon the issuance of a subpoena with proper notice to the patient or the patient's legal representative by the party seeking such records.

The court distinguished the Florida Supreme Court opinion in *Amente v. Newman*, 653 So.2d 1030 (Fla. 1995) where the Florida Supreme Court found in a medical malpractice case a defendant physician's records for all similar patients for a two year period were discoverable without notice to the patients if the records were redacted to protect the patient's identity.

Independent Contractor

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creating a latent, non-obvious danger. There was therefore, an issue of fact which precluded the entry of summary judgment.

Moreover, the Court noted that an injury sustained by an independent contractors' employee that occurs during in the independent contractor's specialized work does not result in liability to the owner. However, here, the Defendant, bakery was arguably in a better position than the independent contractor employee to appreciate the special hazard in the work area. The Court noted that the independent contractor's work was the hood, vents and filters, not the fryer vat or other equipment in the bakery.

Premises Liability

Slaats v. Sandy Lane Residential, LLC, 59 So. 3d 320 (Fla. 3D DCA 2011)

The Plaintiff sued the Defendants for injuries sustained as the result of a fall while exiting a hotel pool area. The Plaintiffs claim the fall was caused by a step-down which created a dangerous condition. The Defendants moved for summary judgment arguing that the step-down was an open and obvious condition. In opposition, the Plaintiffs filed the affidavit of an expert stating that the step-down presented a unique, special hazard. Summary judgment was granted by the trial court and the Plaintiff appealed.

On appeal, the appellate court ruled that genuine issues of material fact precluded summary judgment. The Plaintiff had testified that she was unable to see the step-down because it was uniform in color and the afternoon sun was shining in her eyes. Moreover, the Plaintiff's architectural expert affidavit stated that the step-down presented a unique, special hazard because it was hidden and unexpected. These factual disputes were sufficient to preclude the entry of summary judgment.

Sovereign Immunity

Public Health Trust v. Rolle, 36 FLW D2139 (Fla. 3d DCA 9/28/11)

The trial court denied Public Health Trust's Motion for Summary Judgment on its defense of sovereign immunity and its Motion for Judgment on the Pleadings asserting that it was immune from liability under the Good Samaritan Act. In this medical malpractice action, the Plaintiff sued various healthcare providers including the Public Health Trust (a sovereign) and the Broward Hospital District

(also a sovereign). Broward Hospital District paid its sovereign limits and then the Public Health Trust argued that it was immune from suit because the Hospital District had paid up to the maximum amount of the statutory cap. The Third District affirmed the denial of the summary judgment noting that, at this point in the proceedings, it was not certain that Public Health Trust's alleged negligence arose out of the same incident or occurrence. Moreover, the jury could enter a verdict against the Trust in excess of the statutory limits thus allowing for a potential claims bill to be filed.

The Trust also asserted that it was immune from suit under the Good Samaritan Act (Florida Statute 768.13). The Third District noted that this was a defense to liability; however, this did not provide sovereign immunity from suit. Thus, certiorari was denied.

Brown v. The City of Vero Beach, 64 So. 3d 172 (Fla. 4th DCA 2011)

The trial court properly dismissed with prejudice a Complaint filed against a city and county board of commissioners by the parents of child who was caught in an ocean rip current off a public park and who alleged that the city and county board breached its duty to warn the public of a dangerous condition in the ocean. F.S. 380.0276(6) exempts local government entities for injury where loss of life is caused by the changing surf and other naturally occurring conditions along coastal areas and creates a limitation of liability for local government due to the death and injuries resulting from rip currents. The statute was unambiguous and provided that government entities may not be held liable for death or injuries due to changes in surf or other naturally occurring condition along the coast, whether or not warning signs are displayed. Here, the allegations of the Complaint fell squarely within the statute's provision for governmental immunity and thus dismissal of the Complaint with prejudice was appropriate.

Miami-Dade County v. Rodriguez, 67 So. 3d 1213 (Fla. 3d DCA 2011)

Where a trial court denies a Motion to Dismiss or denies a Motion for Summary Judgment and the sovereign argues that it is not liable because no legal duty can be demonstrated, the appellate court will not review this matter pursuant to its certiorari jurisdiction. Where; however, the denial of the Motion to Dismiss or the denial of the Motion for Summary Judgment is based on sovereign immunity, the court will continue to exercise its certiorari jurisdiction.

Public Health Trust v. Acanda, 71 So. 3d 782 (Fla. 2011)

The Supreme Court held that service of process on the Department of Financial Services pursuant to Florida Statute 768.28(7) was not a condition precedent to Plaintiff's cause of action against a public hospital and was, therefore, not an element of Plaintiff's burden of proof. Thus, the failure of the Plaintiff to serve the Department of Financial Services until after the Defendant had moved for directed verdict was not fatal to her negligence action where the Department of Financial Services was neither a party and the Defendant failed to demonstrate any prejudice. They also held that, where a Defendant seeks to plead a Plaintiff's non-compliance with Section 768.28(7), such non-compliance must be pled with specificity and must be sufficient to place the Plaintiff on notice of non-compliance with the statute. Moreover, the Defendant must then properly raise the issue of non-compliance by way of a pre-trial motion.

Subsequent Tortfeasors

Tucker v. Korpita, 36 FLW D2494 (Fla. 4th DCA 11/16/11)

Where there was testimony by the Defendant's expert that the treatment provided to the Plaintiff following a motor vehicle accident was inappropriate and could have accelerated the degenerative process in the Plaintiff, the trial court erred in failing to give a requested instruction on intervening cause.

Here, the specific testimony went beyond questioning the medical advisability of treatment advocated by the Plaintiff's expert, or questioning the wisdom of the diagnosis, prognosis or causal relationship between the purported injuries and the alleged incident. Instead, the Defendant's experts concluded that the treatment utilized by the Plaintiff's experts would make things worse or could make things worse clinically. While the former scenario may not generally require an intervening cause instruction, the latter situation, like in this case, should result in the instruction being given as requested.

The law is well settled that the initial tortfeasor may also be held liable for subsequent injuries caused by the negligence of healthcare providers. As stated by the Florida Supreme Court in *Stuart v. Hertz*, where one who has suffered personal injuries by reason of the negligence of another exercises reasonable care in securing the services of incompetent physician or surgeon, and in following his advise and instructions, and his injuries are thereafter aggravated or increased by the negligence, mistake, or lack of skill of such physician or surgeon, the law

regards the negligence of the wrongdoer in causing the original injury as the proximate cause of the damages flowing from the subsequent negligent or unskillful treatment thereof, and holds the original tortfeasor liable therefore.

Surveillance Video

State Farm vs. H Rehab, Inc., 56 So. 3d 55 (Fla. 3d DCA 2011)

The Third District granted certiorari and quashed the trial court's order which precluded State Farm from deposing the Plaintiff and the insured (subjects of video surveillance) prior to production of the video.

Undertaker's Doctrine

White v. Advanced Neuromodulation Systems, Inc., et al., 51 So. 3d 631 (Fla. 2d DCA 2011)

The Plaintiff became paralyzed after an infection developed around a surgical device which had been implanted into his back to treat chronic pain. The Complaint alleged that a nurse, acting as an agent of the surgical device implementation company, negligently rendered nursing care while reprogramming the device. The nurse was an employee of the device company who was hired to program the simulator. Knowing that the nurse had a medical background, the day after the stimulator was implanted the Plaintiff complained to the nurse about seepage from the surgical site. The nurse instructed the Plaintiff to contact a physician.

The Plaintiffs alleged that the nurse, the device company and the pain management company were all liable under the "undertaker's doctrine" which provides that, whenever one undertakes to provide a service to other, whether gratuitously or by contract, the individual who undertakes the service assume a duty to act careful and not put another at undue risk of harm. This doctrine also comes into play where a Plaintiff alleges that a Defendant voluntarily undertook an action which, although statutorily authorized, is not required.

Here, the Plaintiff contended that the nurse gratuitously undertook a duty to provide nursing care when she voluntarily exceeded her role as a programming technician. The Court noted that the Plaintiff's did not contend that the nurse acted negligently in observing and assessing the Plaintiff and that the nurse's actions did not place the Plaintiff in a worse condition than when he was found.

The appellate court affirmed the trial court's entry of summary judgment. Here, the nurse's actions of observing and assessing the incision site did not increase the risk of harm to the Plaintiff. Likewise, the nurse's actions did not cause other people to refrain from rendering aid. In summary, the court held that the nurse's voluntary actions did not impose an affirmative duty on her to do more than that which she had already done.

Whipple v. D and D Tree Farms, 66 So. 3d 1011 (Fla. 3d DCA 2011)

Parents took their 7-year old son to the hospital and left their 2-year old son in the care of his aunt and his great aunt at their apartment in Royal Palm Gardens. Royal Palm Gardens borders another housing community: Homestead Colony Apartments. The housing communities are separated by a chain-link fence which travels the perimeter of and are owned by and/or controlled by Royal Palm Gardens. The aunt went to retrieve her cell phone charger out of her car when, unbeknownst to her, the 2-year old followed her out the front door of the apartment. He then crawled under the hedges and through one of the gaps/holes in the chain-link fence into the neighboring apartment complex. Rescue divers later discovered he had submerged a few feet from the shoreline of the lake and he was taken to the hospital and pronounced dead due to drowning. The parents then filed a wrongful death action alleging that their son died as a result of the Defendant's negligence in failing to properly maintain a boundary line fence on their property in a safe and secure manner. The Defendants filed a Motion for Summary Judgment which the trial court granted and concluded as a matter of law that the Defendants owed no legal duty to the 2-year old to properly maintain the fences to prevent him from access to the lake. The trial court also concluded, as a matter of law, that the Defendants' alleged negligence was not a legal cause of the drowning death. The Third District reversed and noted that the facts demonstrated that the Defendants voluntarily undertook to build a perimeter fence around the subject property. As such, they noted that where a person or entity undertakes to act or to pursue a particularly course of conduct, he/it is under an implied legal obligation or duty to act with reasonable care. The Third District argued that once they undertook to build the fence, they had a duty to use reasonable care to maintain it.

Vicarious Liability

Southeast Unloading, LLC v. Lucas, 64 So. 3d 705 (Fla. 5th DCA 2011)

Southeast admitted liability for the action of its employee, a forklift operator whose negligence while backing up a forklift was alleged to be the direct and proximate cause of Lucas' injuries. Lucas sought to pursue a claim for negligent training against Southeast despite Southeast's admission of liability for the actions of its employee. Once an employer has admitted responsibility for an employee's negligence, it is generally improper to allow a Plaintiff to proceed against the employer on other theories of imputed liability.

Worker's Compensation

Pensacola Christian College v. Bruhn, 37 FLW D64 (Fla. 1st DCA 12/30/11)

This was an action against a college for an injury sustained by a student when the bicycle she was riding on the college campus, while returning to work at a bookstore after her lunch break, collided with a van owned by the college and driven by the co-defendant who was a student employee of the college.

On appeal, it was determined that the trial court erred in determining that the defendant college was not the Plaintiff's employer and that her injury was not sustained in the course and scope of her employment where the Plaintiff had entered into an hourly work contract with college; the contract provided that the student would work where needed and; the Plaintiff was assigned to work at the bookstore, an affiliate of a local college located on the college campus; and, the college had secured workers compensation coverage for both itself and its affiliate bookstore. The trial court also erred in ruling that even if the college where the Plaintiff's employer, the injury did not occur in the course and scope of her employment because she was not injured on the employer's actual premises. Because the Plaintiff was on the employer's premises, returning to work after lunch, she was within the course and scope of her employment at the time of her injury and worker's compensation was her exclusive remedy.