2013
CASE LAW SUMMARY

Negligence

Can Withhold Video of Fall Until After Plaintiff's Deposition

McClure v. Publix Supermarkets, 124 So. 3d 998 (Fla. 4th DCA 2013)

Plaintiff was allegedly injured in a slip and fall at the Publix. Subsequent to filing suit, she filed a Request for Production requesting the store security video. When Publix failed to respond to this request, she filed a motion to compel. Publix responded that it would produce the requested video following its deposition of the Plaintiff. The trial court denied the Plaintiff's motion to compel production of the video and allowed Publix to delay production of the video until after it completed the deposition of the Plaintiff. Plaintiff filed a Petition for Certiorari. In a 2-1 decision, the Fourth District denied the Petition for Certiorari noting that the Plaintiff had not shown that, if she answered the questions at a deposition prior to production of the video, any harm would occur or whether the video would conflict with her statements at the deposition.

Delayed Discovery Doctrine

Cisko v. Diocese of Steubenville, 123 So. 3d 83 (Fla. 3d DCA 2013)

In May, 2009, the Plaintiff sued the Diocese for negligence related to physical and sexual abuse they allegedly suffered between 1966 and 1967 by two priests under the Diocese's supervision. The Complaint alleged that the events produced traumatic amnesia that blocked her memory of the abuse until May, 2005. The Diocese moved for Summary Judgment claiming the four year statute of limitations barred the action and the Plaintiff argued that the action was permissible under the delayed discovery doctrine as set forth in *Herndon v. Graham,* 767 So. 2d 1179 (Fla. 2000). The trial court concluded that *Herndon* did not apply to the negligence action and entered summary judgment reasoning that *Herndon* was limited to intentional tort actions against the perpetrator for childhood sexual abuse. The Third District agreed and affirmed.

Discovery of Falls at Other Supermarket Locations is Not Discoverable

Publix Supermarkets v. Santos, 118 So. 3d 317 (Fla. 3d DCA 2013)

The Plaintiff filed suit against Publix for negligence alleging that she was an invitee at a specific Publix store located in Miami when she slipped and fell as a result of "old wet spinach or some other transitory substance" at or near a kiosk located in the store. The kiosk was part of the Publix Aprons Program where Publix provides recipes and in-store cooking demonstrations to customers for the in-store sampling. Santos sought the discovery of all slip and falls at the specific store where she fell within the three years prior to her accident.

Publix served a response which showed that no prior incidents occurred at that store. The Plaintiff then requested that Publix produce all incident reports relative to any occurrence at kiosks located in Publix stores within the State of Florida. Publix objected and moved for a protective order contending that the burden of proof standard set forth in Florida Statute 768.0755 did not require it to produce the information. The trial court then directed Publix to supplement its response to an earlier interrogatory and provide information regarding prior incidents at all Publix stores in Florida within the past three years.

The Third District granted certiorari, finding that the trial order granted the Plaintiff "carte blanche" discovery to irrelevant information. In so doing, the Third District noted a change in the wording of the statute when the legislature repealed §768.0710 and enacted Florida Statute 768.0755. Specifically, the legislature focused on a particular "business establishment" where the slip and fall occurred and now an injured person must prove that the particular "business establishment" where the injury occurred had actual or constructive knowledge of the dangerous condition and, therefore, discovery should be restricted to information regarding that particular establishment.

Duty to Provide Reasonably Safe Work Place

Simpson v. Tarmac America, LLC, 124 So. 3d 1039 (Fla. 3d DCA 2013)

The duty to provide a reasonably safe working place for employees of an independent contractor does not relate to known hazards which are part of or incidental to the very work the contractor was hired to perform.

<u>Fraud on the Court</u>

Gautreaux v. Maya, 112 So. 3d 146 (Fla. 5th DCA 2013)

Gautreaux sued Maya for injuries from an automobile accident. The primary continuing injury was migraine headaches. Gautreaux testified at her deposition that she had never suffered from headaches before the accident. The same month, Gautreaux gave history to an examining neurologist that she did not have headaches prior to the date of the accident. The medical records showed that, 2½ years before the accident, Gautreaux complained of frequent headaches. Hospital records from a year before the accident showed that she went to the emergency room for pain and pressure in her eye and the chief complaint was headache and that she had a history of migraine headaches.

Maya served a Motion to Dismiss for Fraud on the Court. Then, at her second deposition, Gautreaux claimed the previous question about headaches at her first deposition had confused her because "headaches" is plural and that she remembered now that she once had a really bad headache. At the hearing for the Motion to Dismiss, the trial court granted dismissal with prejudice for fraud on the Court.

In reversing dismissal, the Fifth District explained that such a dismissal must be supported by clear and convincing evidence. Further, misconduct that includes inconsistency, non-disclosure, poor recollection, dissemblance and even lying is insufficient to support a dismissal for fraud, and in many cases, may be well managed in best results by bringing the issue to the jury's attention through cross examination and by traditional discovery sanctions.

The trial court's authority to dismiss a lawsuit based on fraud should be as cautiously and sparingly and only upon the most blatant showing of fraud pretense, collusion and other similar wrong doing. When seeking dismissal of a lawsuit for fraud on the court, a mere testimonial discrepancy is ordinarily not enough, to warrant dismissal, the parties conduct must show a scheme calculated to evade or stymie discovery of facts central to the case. The Fifth District determined that Gautreaux's testimony was solely a testimonial discrepancy and Maya failed to show a scheme calculated to evade or stymie discovery of facts central to the case.

Herman v. Intracoastal Cardiology Center, 125 So. 3d 894 (Fla. 4th DCA 2013)

In a 2-1 decision, the Fourth District reversed the trial court's denial dismissing a case with prejudice based upon fraud on the Court. In so doing, the majority noted that cases like this are not reviewed under an "ordinary abuse of discretion standard." Rather, "the reasonableness of the trial court's decision must be judged in light of the narrowed discretion afforded to trial Judges when imposing the extreme sanction of dismissal." In this regard, they found that the alleged falsehoods or inconsistencies relied upon by the trial court in dismissing the case were either disputed issues of credibility which were best left for the jury to decide; not actual inconsistencies; or immaterial to the central issues in the case.

Premises Liability

Ramsey v. Home Depot, 124 So. 3d 415 (Fla. 1st DCA 2013)

Ramsey, a customer of Home Depot, parked her car in a handicapped accessible parking space and tripped over the wheel stop at the front of the parking space. The complaint alleged Home Depot owed a duty to exercise reasonable care to maintain the premises in a reasonably safe condition and a duty to warn of any dangerous, hazardous and unsafe conditions which existed on the property. The trial court granted Home Depot's Summary Judgment that, as a matter of law, it had no duty to warn of the wheel stop as it was an open and obvious danger and that there were no disputed issues of material fact as to whether Home Depot maintained the premises in a reasonably safe condition.

On review, the First District found that Ramsey failed to show that Home Depot failed to warn of a concealed condition. The wheel stop placed in the center of a parking space which was clearly visible generally presents no unreasonable risk of harm. The wheel stop in this case was located at the top of the parking space, centered within the parking stripes, and was a different color and material than the asphalt.

Ramsey failed to raise a genuine issue of material fact as to whether Home Depot complied with its duty to maintain the premises in a reasonably safe condition. Home Depot made a prima facie showing of entitlement to summary judgment by submitting photo evidence which demonstrated the wheel stops were not inherently dangerous, and by offering expert testimony to establish the wheel stops were in compliance with the ADA as well as state and local building codes.

Ramsey's expert affidavit stated that Home Depot could have used 5 foot instead of 6 foot wheel stops, that the used of wheel stops and concrete bollards in the accessible spaces was redundant, safer designs were available that would completely eliminate the use of wheel stops, and that the use of wheel stops in an accessible space does not provide a flat and even walking surface for disabled patrons. The affidavit attested only to the experts own personal preferences rather than to the requirement of any law, code, regulation, or recognized industry safety standard.

The expert's unsupported opinion did not establish that Home Depot failed to maintain the accessible parking space in a reasonably safe manner or that the parking space design was defective. The expert's generalized and conclusory opinions did not create factual issues necessary to avoid summary judgment.

Skala v. Lyons Heritage Corp., 127 So. 3d 814 (Fla. 2d DCA 2013)

Error to grant summary judgment on basis that danger of walking through garage with debris was obvious to a tile setter on a job site. As a business invitee, Lyons owed him a duty to maintain the premises in reasonably safe condition. An exception to the general principle that there is no liability for harm caused by known or obvious dangers, is if the facts show the owner should have anticipated the harm despite its known or obvious nature. The case facts were such that there was a genuine issue of material fact as to whether Lyons should have anticipated that Skala would choose to enter through the garage because the advantage of completing his job outweighed the risks of navigating the garage it that condition.

Property Owner Unable to Claim Indemnity Against Tenant

Tsafatinos v. Family Dollar Stores of FL., Inc., 116 So. 3d 576 (Fla. 2d DCA 2013)

Sugas, an employee of Family Dollar, was injured in the store's bathroom. Family Dollar provided Sugas worker's compensation benefits. Sugas then filed a complaint against Tsafatinos, the property owner, alleging the property was negligently maintained. Tsafatinos filed a third-party complaint against Family Dollar for common-law indemnity and other claims. The trial court dismissed the indemnity claim with prejudice.

On appeal, the Second District upheld dismissal of the common-law indemnity claim. Such a claim requires a party to allege: 1) he is without fault, 2)

another party is at fault, and 3) a special relationship exists between the two that makes the party seeking indemnity vicariously, constructively, derivatively, or technically liable for the other party.

Tsafatinos, as the property owner, could not establish prong three as premises liability is predicated in the failure of the possessor of the property to use due care. As a matter of law, Tsafatinos could not be liable, vicariously or otherwise, for Family Dollar's negligence.

Sovereign Immunity

City of Miami v. Guzman, 111 So. 3d 187 (Fla. 3d DCA 2013)

Parents sued the City of Miami on behalf of their child and in their individual capacity and received a jury award of almost $500,000. Pursuant to the sovereign immunity statute (Florida Statute 768.28(5)), the maximum amount of damages that the City of Miami is required to pay per claim to any one person is $100,000. Following this verdict, the trial court entered an Order compelling two $100,000.00 payments to each of the parents in their individual and representative capacities. Although the Plaintiffs included both the representative and individual claims in the Complaint, their claim made in their individual capacity was not argued at trial nor was it noted anywhere on the verdict form. As such, Third District reversed the trial court's order to reflect a singular award in favor of the parents in their representative capacity.

Rodriguez v. Miami-Dade County, 117 So. 3d 400 (Fla. 2013)

Denial of a motion for summary judgment on the basis that a government entity is entitled to sovereign immunity is not reviewable by certiorari. Certiorari review is only available upon a showing of: 1) a departure from the essential requirements of the law, 2) resulting in material injury for the remainder of the case 3) that cannot be corrected on post-judgment appeal. The cost and expense of defending a lawsuit is not irreparable harm in the context of certiorari review.

Aitcheson v. Fla. Dept. of Highway Safety and Motor Vehicles (FDHSMV) 117 So. 3d 854 (Fla. 4th DCA 2013)

The Fourth District reversed an order granting FDHSMV's Motion to Dismiss on the basis the Plaintiff failed to satisfy the conditions precedent for the

waiver of sovereign immunity as set forth in 768.28, Florida Statutes. The Plaintiff's complaint sought damages against FDHSMV for a slip and fall at a DMV location. Plaintiff sent notice letters to the particular DMV office, the Department of Transportation and the Department of Financial Services, by certified mail. The letters stated that the Plaintiff suffered injuries in an automobile accident and incorrectly listed the Plaintiff's date of birth. The letters contained the Plaintiff's name, the date of the accident and the location of the accident.

While the notice provisions of the statute are strictly construed and require strict compliance, the form of the notice is not specified in the statute. Rather, the notice required by the statute must be sufficiently direct and specific to reasonably put the department on notice of the existence of the claim and demand. Further, the notice must be written and must sufficiently describe or identify the occurrence so that the agency may investigate it.

Transitory Substance Statute Applies Retroactively

Kenz v. Miami Dade County, 116 So. 3d 461 (Fla. 3d DCA 2013)

Florida Statute 768.0755 (2010), which requires a claimant to prove that a business had actual or constructive knowledge of a transitory substance is procedural and applies retroactively. The statute was procedural because it did not create a new element of the cause of action for negligence; it only codified a means and method by which a plaintiff shows that the defendant business establishment has breached its duty of care. In other words, the statute simply means that in establishing the element of breach of duty, the Plaintiff has the burden of producing evidence of actual or constructive knowledge. Generally in Florida the burden of proof is a procedural issue.

Workers Compensation Defense

Villalta v. Corn International, Inc. 109 So. 3d 278 (Fla. 1st DCA 2013)

The First District reversed summary judgment in favor of Defendant, Tropic Aire of North Florida, on grounds that genuine issues of material fact existed as to whether Tropic Aire acted with gross negligence. Villalta worked as a drywall finisher on a construction project. Another subcontractor, Tropic Aire, performed the HVAC work. While on the project, Villalta fell from a scaffold through an uncovered opening in the floor created by Tropic Aire. Villalta alleged gross negligence by Tropic Aire. Section 440.10(1), Florida Statutes, provides: a subcontractor proving services on the same project as another subcontractor is given immunity from suit by an employee of the other subcontractor, as long as certain circumstances are satisfied including that the first subcontractor's own gross negligence was not the major contributing cause of the injury.

The First District noted that the line between simple and gross negligence is often uncertain and indistinct, and in such circumstances the question of whether negligence is simple or gross should be resolved by a jury. Further, the standard for gross negligence has been described as encompassing a composite of circumstances which create a clear and present danger of serious harm, where the defendant was aware or charged with knowledge of such danger and acted in conscious disregard of that danger. The record evidence, particularly that Tropic Aire had been contacted regarding the cut-outs and that Tropic Aire's project manager acknowledged the uncovered cut-outs presented a danger to workers, was sufficient to create a jury question.

Pyjec v. Valley Crest Landscape Development, Inc., 116 So. 3d 475 (Fla. 2d DCA 2013)

Pyjec worked for a fencing company as a sub-contractor on a residential development project. Valley Crest, also a sub-contractor, planted palm trees on the development. Pyjec was injured when a palm tree fell on him and brought a gross negligence law suit against Valley Crest. The trial court entered final summary judgment in favor of Valley Crest.

Pyjec had to establish that Valley Crest's conduct in planting the palm trees amounted to gross negligence to fall within an exception of the worker's compensation exclusivity provision. To establish gross negligence, there must be a showing of (1) a composite of circumstances which, together, constitute the clear

and present danger; (2) an awareness of such danger by the sub-contractor; and (3) a conscious voluntary act or omission by the sub-contractor that is likely to result in injury.

The Second District reversed summary judgment as there were still issues of material fact. The limited record evidence showed disputes as to circumstances of how the tree fell. Summary Judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law. If the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by it.

Wood v. Southern Crane, 117 So. 3d 65 (Fla. 1st DCA 2013)

The First District reversed summary judgment in favor of Southern Crane, that as a matter of law, Southern Crane was entitled to worker's compensation immunity. The mere use of a crane did not cause a tree removal project to fall within the construction industry. The Second District rejected the argument that the removal of any tree fell under the definition of "construction industry," because it constituted clearing or substantial improvement in the appearance of land as stated in section 440.02(8), Florida Statutes.