2014
CASE LAW SUMMARY

Negligence

Absence of Evidence that Proposal for Settlement Made in Bad Faith

State Farm Insurance Company v. Reyes, 137 So. 3d 1123 (Fla. 3d DCA 2014)

State Farm filed a nominal Proposal for Settlement and then received a final summary judgment in its favor. The trial court entered an Order denying the motion for attorney's fees without any specific basis for the denial. A transcript of the hearing on the motion indicated that the Plaintiffs argued that the Proposals for Settlement were nominal and in bad faith and that State Farm had made similar nominal offers on "late filed" Hurricane Wilma claims in 68 other cases.

An 18 minute hearing on the motion consisted of argument of counsel and there was no opportunity to assess the particular facts of the other 68 cases. On the face of this record, the Third District found that there was no bad faith in State Farm's proposal and no determination of bad faith by the trial court. Therefore, they reversed with directions to enter an award granting State Farm its reasonable attorney's fees and costs.

Actions Within Scope of Employment

Trabulsy v. Publix Supermarket, Inc., 138 So. 3d 553 (Fla. 5th DCA 2014)

While Trabulsy was shopping in Publix, he momentarily left his grocery cart unattended. Blanton, a store employee, noticed the unattended cart and assumed it had been abandoned. He retrieved the cart and began to re-shelve the items. When Trabulsy discovered that his cart had been moved, he confronted Blanton and the two got into an altercation that culminated with Blanton shoving Trabulsy, thereby causing him to fall to the floor. The two gave conflicting accounts of the dispute; both claiming that the other was the aggressor.

The trial court granted Summary Judgment; however, the Fifth District reversed. In doing so, they noted that "conduct is within the scope of employment, if it occurs substantially within authorized time and space limits, and is activated at least in part by a purpose to serve the master. The purpose of the employee's act,

rather than the method of performance thereof, is said to be the important consideration."

Adding that the record could support the conclusion that Blanton did not act in self-defense, but instead overreacted to Trabulsy's complaint, the Fifth District pointed out that a jury, if it accepted this version of the facts, could still conclude that Blanton's loss of control was motivated by his purpose to serve Publix. "In other words, although his method might have been inappropriate, his purpose was, nevertheless, to serve his employer."

Discovery of IME Doctor's Litigation History

Orthopedic Care Center v. Parks, 155 So. 3d 377 (Fla. 3d DCA 2014)

In this motor vehicle accident case, the Defendant retained Rolando Garcia, M.D., a physician with Orthopedic Care Center, to perform an IME. During his deposition, Dr. Garcia provided a list of the depositions and trials he had participated in in the prior three years. Dr. Garcia estimated that approximately 70% of the cases were for the defense and 30% were for the Plaintiffs. When asked to review the list to see if there were any patients that he could identify from the list, he was unable to do so.

The Plaintiff then issued a subpoena to Orthopedic Care Center asking them to identify which of the persons or cases on the list provided by Dr. Garcia were actual patients. The Center objected and moved for protective order. The trial court denied the objection and the Center then filed a Petition for Certiorari which was also denied.

The Third District found that there was no abuse of discretion in ordering the representative of the Center to make this determination. Further, there was no merit to the claim that the trial court's order violated the statutory protection against disclosure of patient information because the Order did not require any reports regarding the patient's medical condition be produced. Moreover, it was the doctor who provided the list of the names of the cases originally.

Discrepancies Between Testimony and Surveillance are Best Resolved by Jury

Guillen v. Vang, 138 So. 3d 1144 (Fla. 5th DCA 2014)

The trial court dismissed the Plaintiff's personal injury claim following a motor vehicle accident for fraud on the Court. Surveillance showed the Plaintiff performing activities that he allegedly claimed in his deposition that he could not perform. The Fifth District reversed finding that this did not constitute clear and convincing evidence sufficient to support dismissal with prejudice for fraud on the Court adding that the discrepancies between the testimony and the surveillance are best resolved by a jury.

Duty to Prevent Misconduct of Third Persons

Knight v. Merhige, 133 So. 3d 1140 (Fla. 4th DCA 2014)

Court declined to extend duty to parents for murders committed by adult son with psychiatric problems and violent history. The parents supported their son financially and otherwise. His parents secretly told him to go to a family Thanksgiving at a relative's house despite the hosting family expressly telling them not to bring him. Many family members feared the son and his mother even told an unidentified witness that she hoped he would not kill everyone at Thanksgiving. He was not denied entry into the home. Midway through an uneventful meal, he walked outside and returned with a gun. He killed his aunt, two sisters (one pregnant), a six-year old girl and wounded others.

The Fourth District upheld dismissal of the family member's complaint against the parents. To hold a defendant liable for the criminal acts of a third party requires:

- Either a special relationship between the plaintiff and defendant; or
- The defendant's control over: the premises where the injury occurred; the instrumentality causing the injury; or the person causing the injury.

The Court further reasoned - even if the question of duty was one of foreseeability alone, public policy warranted dismissal where the defendant's conduct involved the inclusion of an adult family member into the extended family circle.

The parents had no special relationship with the plaintiffs to protect them from the son's conduct. Family members generally owe no heightened obligation to protect other adult family members from each other. Plaintiffs did not allege that

the parents controlled the gun or premises. A "special relationship" exists when one takes charge of a third person whom he knows or should know to be likely to cause harm to others if not controlled. The "take charge" requirement is limited to the context of professional custodians with special competence to control the behavior of those in their charge. The parents did not have sufficient control over their son's actions to place him in the functional equivalent of their legal custody – financial support and inviting him to the dinner was not enough.

Although the Court seemed to suggest that duty could arise through foreseeability analysis, it declined to create the duty for public policy reasons. The Court reasoned that family members with psychological or behavioral problems are a common occurrence and families should be encouraged to include them in the family circle.

Dorsey v. Reider, 139 So. 3d 860 (Fla. 2014)

Dorsey got into a verbal dispute at a bar with Reider and Noordhoek. As Dorsey left, he was confronted in the parking lot. Reider blocked his passage and Noordhoek struck Dorsey with a tomahawk. The Third District reversed and remanded for entry of judgment for Reider, holding that Reider owed no relevant duty to Dorsey when he was attacked by Noordhoek.

Reider owed a duty as his conduct in blocking Dorsey's ability to escape from an escalating situation created a foreseeable zone of risk posing a general threat of harm to others. Further, while a party does not generally have a duty to prevent the misconduct of third persons, the courts have carved out exceptions where the party has actual or constructive control of: 1) the instrumentality; 2) the premises where the tort was committed; or 3) the tortfeasor.

The Florida Supreme Court found that Reider had constructive control of the instrumentality – it was in his unlocked truck and Reider had the key to lock the car remotely. He also had actual control of the area because he continued to block Dorsey's escape when the tomahawk was used. The Florida Supreme Court also considered that Reider saw Noordhoek with the tomahawk. Dorsey did too and asked Reider "what is this?" This occurred 10-15 seconds before the attack, yet Reider did not stop Noordhoek or let Dorsey escape.

Exceeding Scope of Invitation Changes Status on Premises

Denniser v. Columbia Hospital Corp. of South Broward, 39 FLWD 990 (Fla. 4th DCA 2014) **Opinion has not been released for publication and still subject to revision or withdrawal. Most recent reporter's oldest case is June 2014, so not sure this will be published**

The Plaintiff's mother was a patient in the hospital. During one visit, the Plaintiff went in to a kitchen through a closed, unlocked door, to get some tea. Inside the kitchen area, she allegedly slipped and fell on the wet floor causing injury. She sued the hospital claiming that she was an invitee.

In a Motion for Summary Judgment, the hospital's risk manager testified by way of Affidavit that the subject kitchen area was for use only by the employees and staff of the hospital and was "not to be used by patients and/or visitors of the hospital." A sign posted on the wall next to the entry door read "Pantry" and "Staff Only." There was no evidence that the Plaintiff was ever given permission to enter the kitchen.

The hospital moved for Summary Judgment arguing that the Plaintiff lost her status as an invitee and became an uninvited licensee or trespasser by going into an area of the hospital that was beyond the scope of her invitation. As such, the hospital argued that it was required to warn the Plaintiff of concealed dangers only if her trespass was discovered. The hospital denied that any employee was aware of the Plaintiff's presence in the kitchen before she fell.

The trial court granted Summary Judgment and the Fourth District affirmed the finding that the Plaintiff was an uninvited licensee or trespasser because there was no evidence to the contrary. Summary Judgment was, however, reversed because there was no sworn evidence in the record to support the motion. Specifically, pages of the deposition relied upon in the Summary Judgment were not attached to the motion nor included within the record on appeal.

Exculpatory Clauses

Gillette v. All Pro Sports, LLC., 135 So. 3d 369 (Fla. 5th DCA 2014)

The Plaintiff sued a Go-Kart facility alleging that their employee negligently increased go-cart speed, thereby causing her to lose control of the go-kart and crash into a railing. The court granted summary judgment ruling that a waiver and

release form signed by the Plaintiff precluded her negligence action. The Fifth District reversed and noted that clauses that intend to deny an injured party the right to recover damages from another who negligently causes injury are strictly construed against the party seeking to be relieved of liability.

As such, the wording of such clauses must be so clear and understandable that an ordinary and knowledgeable person will know what he or she is contracting away. Here they found that the release was not so clear that the negligence of the sort complained of was intended to be within the scope of the release and therefore, the cause was remanded.

Diodato v. Islamorada Asset Management, Inc., 138 So. 3d 513 (Fla. 3d DCA 2014)

On August 20, 2009, the decedent and her husband signed a Release for a shallow reef dive. On the reverse side of the releases, the decedent and her husband initialed boxes stating "this Release is valid for one year from the date of this Release." They returned to the dive shop on April 14, 2010 and again, before the dive, they signed other Releases but did not initial the box providing for the one year operative period.

On the morning of April 15, 2010, which was the day the wife died, they arrived late and did not sign a Release. The dive they were supposed to go on that day was an open water wreck dive; a dive for which, according to the Plaintiff, dive industry standards dictated a particular form of Release must be used. In fact, the Defendant admitted that they used different Releases for these more advanced open water dives.

On the morning of the dive, the decedent showed apprehension about diving. The reason for her apprehension was not known, however, ocean swells were estimated between 4-5 feet. The dive instructor and the decedent's husband entered the water first. The decedent followed, but after only submerging to a depth of approximately 10 feet, she signaled to the dive instructor that she wanted to surface.

She surfaced with a dive instructor accompanying her, however, he did not help her on board the boat. She reached for and held onto the dive boat's granny line, but lost her hold and drifted away from the boat. The boat's captain sounded an alarm and after a brief search, she was found floating after having drowned.

The trial court granted Summary Judgment on the basis of the release signed in August, 2009. Having examined the release that was signed for the shallow dive, as well as the release that was intended to be obtained for the advanced open water dive, the Third District reversed noting once again that Courts' disfavor and narrowly construe pre-claim exculpatory terms and releases.

Expert Opinions Subject to Daubert Test

Perez v. Bell South Telecommunications, Inc., 138 So. 3d 492 (Fla. 3d DCA 2014)

A Bell South call center operator became pregnant. Her treating physician classified the pregnancy as "high risk" and recommended a week of bed rest. A few months later, the patient reported being under a lot of stress at work and her obstetrician gave her a note stating that she could only work a maximum of 40 hours per week due to her high risk pregnancy and she should be allowed frequent bathroom breaks. Within two weeks, she was fired for non-performance and two days later, she suffered a placental abruption and delivered her child 20 weeks early.

In his deposition, the obstetrician testified that it was his opinion that work place stress, exacerbated by Bell South's alleged refusal to accommodate her medical condition, was the causal agent of the abruption and the early delivery of her son with his attendant medical consequences including multiple surgeries and developmental deficits. This testimony was the only testimony linking the premature birth to Bell South, however, the obstetrician testified that there was no way of ever knowing for sure what caused the placental abruption. In fact, he testified that his conclusions were purely his own personal opinion and not supported by any scientific research.

Specifically, he testified that he was unaware of any studies that showed stress to be a factor in determining the likelihood of a placental abruption nor were there any studies that showed a connection between stress and abruption. He also was unaware of any medical literature that showed a correlation between stress and placental abruption. The trial court struck these opinions under the *Frye* test.

More recently, the legislature amended Florida Statute 90.702 and Florida became a "*Daubert*" jurisdiction. The statute provides that "if scientific, technical or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a factual issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify about it in the form

of an opinion or otherwise, if: (1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case."

Applying the *Daubert* test to this case, the Third District noted that the "subject of an expert's testimony must be scientific knowledge. In order to qualify as scientific knowledge, an inference or assertion must be derived by the scientific method. The touchstone of the scientific method is empirical testing - - developing hypotheses and testing them through blind experiments to see if they can be verified." The court added that "general acceptance in the scientific community alone is no longer a sufficient basis for the admissibility of expert testimony." Therefore, "subjective belief and unsupported speculation are henceforth inadmissible." Accordingly, they affirmed the striking of the expert's opinion.

Expert's Unsupported Opinion Does Not Place Medical Condition at Issue

Gray v. Richbell, 144 So. 3d 573 (Fla. 4th DCA 2014)

In this motor vehicle accident case, Plaintiffs' expert theorized that the Defendant's age and physical condition contributed to causing the accident despite never having reviewed any of the Defendant's medical records. The Plaintiffs then sought and obtained the Defendant's medical records and deposed his treating physicians over his objection and Request for Protective Order.

Because of that discovery, the Plaintiff then requested a neurological examination of the Defendant. The Defendant objected and argued that his medical condition had not been placed into controversy and that the Plaintiff had failed to show good cause for the examination.

Just prior to trial and with no action having been taken on the Defendant's objection to the IME, the Plaintiffs' expert opined that the Defendant was suffering from dementia at the time of the accident even though none of the Defendant's treating physicians had ever diagnosed him with this condition. Less than a week before trial, the trial court overruled the Defendant's objection and ordered him to undergo the examination. A Petition for Certiorari was filed and the Fourth District granted same noting that it was his conduct (i.e. whether he was negligent in failing to avoid a car that veered into his lane of traffic) that was at issue and not his mental or physical health.

Facebook Discovery

Root v. Balfour Beatty Const. LLC, 132 So. 3d 867 (Fla. 2d DCA 2014)

Root's son was struck by a car outside a construction site. Root sued the construction contractor and raised a claim of loss of parental consortium. The Second District quashed an order granting "carte blanche" access to Plaintiff Root's Facebook page and specifically quashed:

i. Any counseling or psychological care obtained by Root before or after the accident;

2. Any and all postings, statuses, photos, "likes" or videos related to Root's

i. relationships with [injured son] and other children, both prior to, and following, the accident;

ii. Relationships with other family members, boyfriends, husbands, and/or significant others, both prior to, and following the accident;

iii. Mental health, stress complaints, alcohol use or other substance use, both prior to and after, the accident;

v. Facebook account postings relating to any lawsuit filed after the accident by Root or others.

In quashing the order, the court reasoned that the categories above did not relate to Root's loss of parental consortium. Nor had the defendants shown that the requested discovery was relevant and discoverable. The court pointed to a comment by defense counsel that "these are all things that we would like to look under the hood, so to speak, and figure out whether that's even a theory worth exploring."

Fifth Amendment Privilege

Doolittle v. Shumer, 152 So. 3d 779 (Fla. 5th DCA 2014)

The Plaintiff sued the Defendants, the owners of a dog that attacked him and his dog. A third Defendant, the dog walker, was also sued. Six weeks after one of the owners filed their Answer and Affirmative Defenses, she was criminally charged for actions arising from the same incident that gave rise to the civil action. She then filed a Motion to Abate the civil action until such time that she could testify without compromising her Fifth Amendment rights of self-incrimination.

The trial court abated the entire action until further order of the Court. The Plaintiffs then filed a Petition for Certiorari and the Fifth District granted same as it applied to the abatement as to the other Defendants. As to the Defendant claiming the Fifth Amendment right, the petition was denied without prejudice for the Plaintiffs to seek further relief if the trial court either indefinitely stayed the case against her or did not otherwise consider a less intrusive means to safeguard her Fifth Amendment privilege.

Four Minutes Not Sufficient to Place Store on Constructive Notice of Transitory Substance

Walker v. Winn-Dixie Stores, Inc., 39 FLWD 1750 (Fla. 1st DCA 2014) **Has not been released for publication in permanent law reports**

Due to waiver on the issue of whether Florida Statute §768.0755 applies retroactively, the First District applied the statute to this case and affirmed a Summary Judgment in favor of Winn-Dixie. Plaintiff brought a slip and fall action alleging that the store had constructive knowledge of the dangerous condition. Through testimony, it was established that, at most, any water that had been on the floor may had been there for one to four minutes.

The Court held that the brief time period was "insufficient to satisfy the statute's requirement that the alleged dangerous condition must exist 'for such a length of time that, in the exercise of ordinary care, the business establishment should have known of the condition' before constructive knowledge of the condition can be imputed."

No Duty to Make Landscaping Areas Safe for Walking

Wolf v. Sam's East, Inc., 132 So. 3d 305 (Fla. 4th DCA 2014)

Landowner does not have a duty to make its landscaping areas safe for walking when it already provided concrete walkways for invitees to cross the landscaping areas. Relying on *Dampier v. Morgan Tire & Auto, LLC*, the Fourth District explained that tree roots in a landscaping area were so obvious and not inherently dangerous as to constitute a non-dangerous condition as a matter of law.

The court was not persuaded by the assertion that the roots were not easily visible – "we conclude that anyone who walks into a landscaping area containing trees, grass, and mulch is held to know that the landscaping area presents 'a hazard

to walking,' particularly when concrete traverses have been specifically constructed to prevent this type of accident."

Psychological IME Must Define Boundaries of Exam on Notice

Maddox v. Bullard, 141 So. 3d 1264 (Fla. 5th DCA 2014)

Plaintiff filed a claim for damages which included a claim for mental anguish after having been bitten by the Defendant's dog. The trial court granted the Request for a Compulsory Psychological Examination, however, the order specified only the time, place and the name of the psychologist who would perform the examination. Plaintiff's counsel had asked the trial court to define the boundaries of the psychologist's examination, however, the trial court declined to do so. Specifically, it did not specify the manner, conditions, or the scope of the examination.

As a result, the Fifth District noted that this gave the psychologist "carte blanche" to perform any type and all manner of psychological inquiry, testing, and analysis of the Plaintiff for up to four continuous hours. Accordingly, the court granted the petition and noted that while the trial court could order the examination, it needed to specify the items requested by Plaintiff's counsel.

Scope of Expert Discovery

Brana v. Roura, 144 So. 3d 699 (Fla. 4th DCA 2014)

The Defendants issued subpoenas to a hospital where Dr. Grabel performed spinal surgeries and sought "each and every document…to include all records, pertaining to [Dr. Grabel]." The trial court allowed these subpoenas to be issued over objection and the Fourth District granted certiorari and quashed the subpoena noting that the subpoenas would require the production of confidential medical records of Dr. Grabel's patients adding that the respondents failed to show compliance with Florida Statute §456.057(7)(a) which requires notice to patients whose medical records are sought before issuance of a subpoena for the records.

The Fourth District also granted certiorari and quashed the subpoenas issued to insurance carriers which required disclosure of financial information concerning payments made by those carriers to Dr. Grabel for services provided as a litigation expert. In doing so, they noted that "a subpoena may not be used to secure

discovery of financial or business records concerning a litigation expert unless 'unusual or compelling circumstances' have been shown."

Brown v. Mittleman, 152 So. 3d 602 (Fla. 4th DCA 2014)

In this motor vehicle accident case, the Plaintiff's attorney referred her client to Dr. Brown who treated the Plaintiff under a letter of protection. Another law firm joined as Plaintiff's co-counsel and the Defendant subsequently subpoenaed the person with the most knowledge at Dr. Brown's office to produce documents regarding patients previously represented by both law firms, letter of protection cases and referrals from the Plaintiff's attorneys. The trial court overruled the objections and Dr. Brown filed a Petition for Writ of Certiorari arguing that Florida Rule of Civil Procedure 1.280(b)(5) prohibits the discovery and that the relationship with the second law firm is not discoverable because there is no evidence that the firm directly referred the Plaintiff to Dr. Brown.

The Fourth District denied the petition noting that the discovery was limited to a reasonable timeframe and was not overly intrusive and that the trial court had broad discretion to order production of documents regarding patients previously represented by the law firms, letters of protection cases and referrals from Plaintiff's attorneys in order to uncover an ongoing relationship between the doctor and the Plaintiff's lawyers which might, in turn, reveal bias.

Scope of IME Physician's Testimony

Boyles v. A & G Concrete Pools, Inc., 149 So. 3d 39 (Fla. 4th DCA 2014)

The Plaintiff was allegedly injured as a result of this 2008 motor vehicle accident. Notably, the Plaintiff had been involved in an accident in 2001 and claimed that he suffered from four herniated discs as a result of that earlier accident. When the patient's pain did not improve from the 2008 accident, he was referred to Dr. Katzman. Notably, the Plaintiff never told Dr. Katzman that he had any prior injuries to his neck.

When Dr. Katzman later discovered that the patient had experienced back pain from the 2001 accident, the patient maintained that the problems had resolved at least two years before the 2008 accident. When conservative treatment did not improve the patient's symptoms, Dr. Katzman performed a lumbar procedure and then a cervical procedure. Dr. Katzman related both procedures to the injury

sustained in the 2008 accident. The lumbar procedure was successful, however, the cervical procedure was not successful.

The patient then saw Dr. Dare; a neurosurgeon. During the initial evaluation with Dr. Dare, the patient did not advise him of the 2001 car accident nor did he advise him of the treatment for back pain he received over many years. Dr. Dare later received medical records from the Plaintiff's attorney revealing a prior medical history, he questioned the patient who reported that he was back to normal at the time of the 2008 accident. Dr. Dare performed additional surgery on the patient's back and his condition ultimately improved.

An IME was subsequently performed and the IME physician stated that he would not have recommended surgery because the patient did not show neurological deficits. Two years before trial and before the IME, the Plaintiff filed an extensive Motion in Limine which, amongst other things, sought to exclude testimony regarding unnecessary or unreasonable surgeries. The Fourth District admonished against the use of these kinds of motions and criticized the fact that the motion was generic and filed before most evidence was even in the record, as well as, the fact that it was argued so long before the trial.

The Judge who entered the order on the Motions in Limine did not try the case. A successor Judge looked at the Motion in Limine and it appears as though he suggested that timely objections would be necessary. When the IME physician was questioned regarding the unnecessary surgery, the Plaintiff failed to object. As such, the Fourth District found that the issue was not preserved.

Further, they noted that even if the lawyer had preserved the objection, the testimony of the IME doctor still could be admitted because the testimony did not involve an expert trying to attribute subsequent malpractice or trying to avoid subsequent malpractice, but rather, the testimony had to do with the causal link between the surgeries and the accident in question. Further, in cases where the IME testimony was ruled to be inadmissible, the claim was that the inappropriate or unnecessary surgery worsened the Plaintiff's condition. Here, however, the Plaintiff's own witnesses testified that that surgery made the condition better.

Stacking of Inferences

O'Malley v. Ranger Const. Indus. Inc., 133 So. 3d 1053 (Fla. 4th DCA 2014)

Trial court incorrectly granted summary judgment on basis of stacking of inferences. Defendant took one inference, that standing water caused the accident,

and attempted to stretch in into multiple inferences. Where there is only one inference related to causation, the summary judgment non-movant does not have to establish that the sole inference is the only reasonable inference.

The court also discussed the *Voelker* exception to the rule against stacking of inferences – when a predicate inference is the only reasonable inference that can be made from the evidence, it is no longer an inference but is deemed an established fact. Finally, the court explained that summary judgment should not be granted based on a non-movant's failure to meet its trial burden of proof on the issue of causation.

Sovereign Immunity Does Not Apply to Operational-Level Function

Bergmann v. Florida Department of Transportation, 144 So. 3d 582 (Fla. 1st DCA 2014)

The decedent was involved in a collision on a roadway over which the Department of Transportation had jurisdiction. It was alleged in the Complaint that the Department created a known hazardous condition involving a hidden danger of which is was aware and that the Department failed to correct or warn against this danger. The trial court determined that the claim was barred by sovereign immunity however, the First District reversed and found that this encompassed an operational-level function to which sovereign immunity did not apply.

Transitory Substance Statute is Not Retroactive

Pembroke Lakes Mall, Ltd., v. McGruder, 137 So. 3d 418 (Fla. 4th DCA 2014)

Florida Statute §768.0755, which requires the plaintiff to prove a business establishment had actual or constructive knowledge of a transitory substance does not apply retroactively. Conflicting with the Third District in Kenz, the Fourth District reasoned that the statute did not state it was to be applied retroactively and the plaintiff's substantive rights were affected by introducing a new knowledge element into the claim.

The case also states that the previous version of the statute imposes a non-delegable duty on the premises owner to maintain their premises in a reasonably safe condition. Then, relying on a case from 1995, the Fourth District states that when an owner owes a non-delegable duty to a plaintiff who obtains a verdict assigning negligence to the owner and a party contracted by the owner, the owner is jointly and severally liable for the negligence attributed to the contracted party.

Feris v. Club Country of Fort Walton Beach, Inc., 138 So. 3d 531 (Fla. 1st DCA 2014)

The First District reversed entry of final summary judgment in favor of Club Country in a slip and fall case. Feris slipped on the dance floor on what he believed was alcohol. He testified that other patrons were drinking on the dance floor, that he did not have a drink in hand when he fell, that he felt a liquid substance that smelled of alcohol, and that he did not know how long the substance had been on the floor. Others' testified to the effect that it was normal for patrons to bring drinks on the dance floor. The trial court entered summary judgment on the basis of §768.0755, Florida Statute, which places the burden on the plaintiff to establish the defendant's actual or constructive knowledge of the dangerous condition. This statute was enacted after Feris' fall. Feris argued that §768.0710, Florida Statute, applied.

The First District found that §768.0755 did not apply retroactively, a decision in conflict with the Third District's holding in *Kenz v. Miami Dade County*, 116 So. 3d 461 (Fla. 3d DCA 2013). Regardless, Feris met his burden of proof to survive summary judgment under either statute. His testimony presented circumstantial evidence from which a jury could infer that Club Country or its agents allowed or caused a dangerous condition to exist, or that this condition existed with such regularity that Club Country knew or reasonably should have known of its existence.

Worker's Compensation Defense

VMS, Inc. v. Alfonso, 147 So. 3d 1071 (Fla. 3d DCA 2014)

VMS entered into a contract with the Florida Department of Transportation to maintain and manage portions of different roadways. Pursuant to that contract, VMS was obligated to secure worker's compensation insurance. It is undisputed that they did so. VMS then subcontracted work to ABC. The contract required ABC to secure worker's compensation insurance and they did so.

Thereafter, ABC hired Lazaro Contreras to perform some of the work that ABC had obligated itself to do. Contreras then hired day laborers including Alfonso to complete the work. While performing work covered by the VMS/ABC/Contreras contract, Alfonso was seriously burned when hot tar spilled on him. Alfonso was immediately taken to the hospital where it was reported that he had sustained the burns while working at home.

The evidence regarding VMS' knowledge of this incident was disputed, however, there was no dispute that Contreras did not have worker's compensation insurance and that ABC and VMS did not report this incident to their compensation carriers. Alfonso never asserted a claim for worker's compensation benefits, but instead filed suit against both ABC and VMS for negligence. VMS responded and claimed worker's compensation immunity. ABC settled its portion of the case with Alfonso.

Thereafter, Alfonso moved for an entry of partial summary judgment against VMS arguing that they were estopped from claiming worker's compensation immunity and from asserting comparative negligence because they failed to notify its worker's compensation carrier that Alfonso had been injured. The trial court agreed, however, the Third District reversed. In doing so, they held that VMS was not liable for injuries sustained by Alfonso where it had secured worker's compensation coverage for Plaintiff by virtue of the coverage secured by its sub-contractor. The Court also found that VMS had no obligation to notify its carrier of the Plaintiff's injury and could not be estopped from asserting the immunity.

Baker v. Airguide Manufacturing, LLC, 151 So. 3d 38 (Fla. 3d DCA 2014)

Baker began working for a company called Pacesetter; an employment agency that supplies employees to short-handed companies. Pacesetter placed Baker along with other Pacesetter employees with Airguide. While working at Airguide 2 years later, Baker suffered an injury. An Airguide supervisor helped her to wash the wound and then called Pacesetter to deal with the injury. Pacesetter sent a driver to pick her up and then brought her back to the Pacesetter facilities where she filed a report. She was subsequently taken to a doctor's office and then to a hospital. She then successfully filed a worker's compensation claim and, after receiving an unsatisfactory amount, she filed an action against Airguide. Airguide moved for Summary Judgment arguing that it was immune from liability because Baker was either a borrowed servant or was an employee of the help supply service company provided under Florida Statute §440.11(2).

The Motion for Summary Judgment relied heavily upon Baker's deposition testimony. In her testimony, she testified that she reported directly to Airguide in the mornings, was trained to use the machines by Airguide employees, was monitored and reprimanded by Airguide employees and was assigned weekly hours and tasks by Airguide management. Two days before the Summary Judgment hearing and 4 months after her deposition, she filed an Affidavit and an errata sheet that materially conflicted with the statements she made during her

deposition. The trial court entered Summary Judgment ruling that Airguide was entitled to worker's compensation immunity. The Third District also pointed out that a party may not rely on an Affidavit that contradicts or repudiates prior deposition testimony to defeat a Motion for Summary Judgment. *See Ellison v. Anderson*, 74 So. 2d 680, 681 (Fla. 1954).