2015
CASE LAW SUMMARY

Negligence

Alcohol

Hall v. West, 157 So. 3d 329 (Fla. 2d DCA 2015)

Hall suffered serious injuries when struck by a speeding car driven by West. West and several friends had visited Sheppard's Beach Resort earlier. West drank alcoholic beverages before and after arriving at Sheppard's and he was intoxicated. Sheppard's security personnel told West to leave the premises and escorted him and his friends to their car. West got behind the wheel and drove off and some 2 hours later and 13 miles away, he struck Hall. At that time, his blood alcohol measured .188.

The Plaintiff essentially sued Sheppard's for negligently allowing West to drive away while intoxicated. The trial court dismissed the Complaint against Sheppard's and the Second District affirmed.

In doing so, they noted that "Florida law imposes no general duty on a business owner to insure the safety of an intoxicated person who is about to leave the premises and that business has no legal duty to control the conduct of a third person to prevent that person from harming others." In the context of this case, they noted that Sheppard's could not restrain West or prevent him from driving, nor could they take away his keys or impound his car.

Lastly, they noted that Florida Statutes §768.125 provides the only liability for injury or damage resulting from intoxication. Under this statute, if a person sells or furnishes alcoholic beverages to a person of lawful drinking age, they are not liable for injuries or damages caused by or resulting from the intoxication of such person unless the person who sells or furnishes the alcoholic beverages willfully and unlawfully sells or furnishes alcoholic beverages to a person habitually addicted to the use of alcoholic beverages (or if the person who is provided the alcohol is not of lawful drinking age).

Causation

Sanders v. ERP Operating Limited Partnership, 157 So. 3d 273 (Fla. 2015)

Two young women were killed in a "gated community" apartment complex. They were shot to death by unknown assailants inside their apartment and there were no signs of forced entry although things were stolen from the apartment. The evidence revealed that, in the three years prior to the murders, there had been two criminal incidents where the gate had been broken and criminals followed residents on to the premises.

Plaintiffs asserted that the Defendant failed to maintain the premises in a reasonably safe condition by failing to maintain the front gate, failing to have adequate security, failing to prevent dangerous persons from gaining access to the premises and failing to protect and warn residents of dangerous conditions and criminal acts.

Following a verdict in favor of the Plaintiffs in which the apartment owner was found to be partially responsible, the Defendant moved for a new trial and a judgment notwithstanding the verdict which the trial court denied. The Fourth District reversed and found that entering a directed verdict was appropriate. The Court concluded that without proof of how the assailants gained entry into the apartment, the Plaintiff simply could not prove causation.

The Supreme Court disagreed and found that with evidence such as the broken gate and the existence of prior opportunistic crimes, a reasonable jury could have determined that the Defendants' failure to maintain the security gate and the failure to have a courtesy officer visible probably allowed the assailants to get to the decedents' door without being detected.

In order for a court to remove a case from the trier of fact and render a directed verdict, there can be only one reasonable inference to be drawn from the evidence, however, where the jury has to draw multiple inferences from direct evidence to reach a decision regarding negligence, the jury is entitled to make the ultimate factual determination. Accordingly, the decision of the Fourth District was quashed.

Design Company Owed Duty To FDOT And Not Plaintiff

McIntosh v. Progressive Design & Engineering, Inc., 166 So. 3d 823 (Fla. 4th DCA 2015)

As the decedent was exiting a mobile home park, he collided with a truck traveling on a cross-street. The traffic signals at the intersection allowed a driver exiting the mobile home park to rely upon a traffic signal further out into the intersection meant for other traffic. This resulted in the driver overlooking the closer traffic signal which was meant to control the traffic exiting the mobile home park.

Previously, the City of Pembroke Pines had asked The Florida Department of Transportation to install traffic sign signals at the intersection. FDOT hired TEI Engineers and Planners, who in turn hired Progressive Design & Engineering to design the traffic signals for the intersection. The design company submitted the traffic signal design to FDOT which provided it to Broward County Traffic Engineering, the police department and various FDOT Departments associated with the project. The parties reviewed the plan and provided electronic comments to the design company's engineer of record. The design company's response had to be approved by FDOT and the original commenter.

During the review process, an FDOT employee commented that a special signal might be necessary to make sure that the drivers did not rely upon the wrong signal. Additional consulting companies were contacted and before the designs were approved, a meeting was held at the intersection to review the design. At trial, the jury found that the design defect was patent. Under the *Slavin* doctrine, the liability of the contractor is cut off after the owner has accepted the work performed, if the alleged defect is a patent defect which the owner could have discovered and remedied.

The Fourth District held that as between the parties to the intersection construction project, the FDOT was the entity to whom the design company owed its duties because the FDOT controlled the acceptance of the design company's work. Ultimately, they determined that the evidence supported the jury's finding that, while the design company was negligent, the design was accepted and discoverable by FDOT with the exercise of reasonable care and, therefore, the design company was not liable to the Plaintiff.

Equitable Subrogation

Allstate Insurance Company v. Theodotou, 171 So. 3d 163 (Fla. 5th DCA 2015)

Hintz was riding his scooter when he sustained catastrophic head injuries as a result of an accident with Emily Boozer. Boozer was driving her father's car at the time of the accident which was insured by Allstate. Following the accident, Hintz was treated by several healthcare providers where, according to his Complaint, his injuries were severely exacerbated by medical negligence. Thereafter, Stalley, as guardian of Hintz, sued the Boozers for damages resulting from that accident. Stalley successfully argued that the doctrine espoused in *Stuart v. Hertz Corp.* precluded the Boozers from presenting evidence that medical negligence was a contributing cause of his injuries. The Boozers were ultimately held liable for all damages and a judgment was entered in excess of $11,000,000. Allstate then paid Stalley its policy limits of $1,100,000 with the remainder of the judgment remaining unpaid.

After the personal injury verdict was rendered, but before final judgment was entered, Stalley filed a separate medical malpractice lawsuit against the various healthcare providers and sought recovery for the very same injuries involved in the initial lawsuit against the Boozers. He also filed a bad faith action against Allstate which remains pending. After Allstate and Boozer were granted leave to intervene in Stalley's medical malpractice lawsuit, they each filed Complaints in that case claiming that they were entitled to equitable subrogation from the medical providers. The medical providers moved to dismiss the Complaints arguing that the Appellants were barred from seeking equitable subrogation because they had not paid the entirety of Hintz's damages.

The trial court granted the Motions to Dismiss and dismissed the Complaints with prejudice. The Fifth District reversed and stated that the right to equitable subrogation arises when payment has been made or judgment has been entered, so long as the judgment represents the victim's entire damages. They also certified this question to the Florida Supreme Court: "is a party that has had judgment entered against it entitled to seek equitable subrogation from a subsequent tortfeasor when the judgment has not been fully satisfied?"

Exculpatory Clause Bars Action

Sanislo v. Give Kids the World, Inc., 157 So. 3d 256 (Fla. 2015)

The family went to a camp put on by a not-for-profit organization that provides free vacations to seriously ill children and their families at its resort village. The family signed a release as part of the application process and then another one when they arrived. The release stated that they would not hold anyone responsible for any liability "whatsoever" in connection with every activity that could possibly occur at the resort.

While there, the family participated in a horse-drawn wagon ride. The wagon was equipped with a lift to enable people in wheelchairs to participate. A mother there with her child, stepped on to the wheelchair lift for a picture when the lift collapsed, thereby causing her injury. The jury found for the Plaintiffs and, on appeal, the Defendant argued that the lower court erred in denying a pretrial Motion for Summary Judgment based upon the Affirmative Defense of release.

The Plaintiff argued that express language regarding negligence must be present to render an exculpatory clause effective to bar an action for negligence because the Supreme Court had held that indemnification agreements which are similar in nature to exculpatory clauses require specific provisions protecting the indemnitee for its own negligence in order for it to be effective. While the Fifth District has allowed this kind of exculpatory clause to bar recovery, the remaining Districts did not and thus the case came to the Supreme Court on conflict.

The Supreme Court found that the language of the agreement clearly conveyed that the Defendant would be released from any liability, including its own negligence, due to every possible activity. Notwithstanding the absence of the terms negligence or negligent acts, the Court held that the exculpatory clause did not render the agreement per se in effect to bar a negligence action. Exculpatory clauses are, therefore, only unambiguous and unenforceable where the language unambiguously demonstrates a clear and understandable intention to be released from liability so an ordinary and knowledgeable person would know what he or she is contracting away. The Supreme Court held that an exculpatory clause is not ambiguous and ineffective simply because it does not contain express language releasing a Defendant from liability for his or her own negligence or negligent acts;

noting that such an approach could render similar provisions meaningless and fail to effectuate the intent of the parties.

Failure to Warn Not Proximate Cause

Trek Bicycle Corp. v. Miguelez, 159 So. 3d 977 (Fla. 3d DCA 2015)

The Plaintiff suffered injuries when an object got caught in the front wheel of his bicycle, causing the wheel to suddenly stop when the object hit the front carbon fiber forks of the bicycle. It is alleged that the bike manufacturer was negligent for failing to place a warning on the bicycle alerting Plaintiff to the potential of the carbon fiber to crack and possibly fail when damaged.

The Third District reversed the verdict in favor of the Plaintiff and held that the failure to warn was not the proximate cause of the Plaintiff's injuries. Rather, the proximate cause of the injury was road debris getting caught in the front spokes thereby causing the wheel to suddenly stop. The Third District concluded that the trial court erred in denying the Defendant's Motion for Directed Verdict on the claim of failure to warn.

High Heeled Shoes Not Negligent

Bongiorno v. Americorp, Inc., 159 So. 3d 1027 (Fla. 5th DCA 2015)

Following a bench trial in which the trial court found that the Plaintiff was comparatively negligent for wearing high-heel shoes, the Fifth District reversed noting that the Defendant failed to sustain its burden of proving that Bongiorno created a foreseeable zone of risk by wearing high-heeled shoes to work.

IME's

Grabel v. Sterrett, 163 So. 3d 704 (Fla. 4th DCA 2015)

Plaintiff filed an uninsured motorist claim and, thereafter, sought to depose the doctor who performed the Compulsory Medical Examination for the insurance company. The subpoena requested the doctor to bring various items to his deposition. The doctor objected to certain items and State Farm also moved for protective order asserting the same objections. The Court overruled the objections

to three specific requests which included: (1) copies of all billing invoices submitted by the doctor to defense counsel, defense counsel's firm and the Defendant's insurer (State Farm) for a total of 6 years; (2) a document and/or statement that includes the total amount of money paid by or on behalf of the Defendants and/or their attorneys and/or the defense law firm including any predecessor and/or successor law firm and any of the attorneys presently or formerly employed at the law firm and the Defendants' insurer to the doctor for expert work over the 6 years; and, (3) all documents evidencing the amount or percentage of work performed by the doctor on behalf of any Defendant and/or defense law firm and/or insurance carrier for 6 years including time records, invoices, 1099's and other income reporting documents.

The trial court overruled the objections but limited the request to 3 years. The trial court did not address the doctor and the insurer's objection that the discovery exceeded that allowed by Florida Rule of Civil Procedure 1.280(b)(5)(A)(iii) and did not find "unusual or compelling circumstances" but merely compelled the discovery. The Fourth District granted certiorari finding that the trial court departed from the essential requirements of the law by allowing discovery of financial information that exceeded the scope of discovery permitted under the Florida Rule of Civil Procedure without finding unusual or compelling circumstances.

Grabel v. Roura, 174 So. 3d 606 (Fla. 4th DCA 2015)

The trial court found that there were inconsistencies between Interrogatory answers provided by defense counsel and deposition responses provided by Dr. Grabel, the defense expert witness concerning the percentage of income the doctor derived from working as an expert witness and the number of times he had testified for Plaintiffs and Defendants in personal injury litigation. The Fourth District granted certiorari and found that the disputed discovery exceeded the provisions of Florida Rule of Civil Procedure 1.280 which limits discovery to an approximation of the expert's involvement as an expert witness.

The court noted that the trial court allowed the Plaintiff to issue subpoenas to 20 non-party insurance carriers not shown to have any involvement in the litigation. The subpoenas required production of financial records including tax records showing the total amount of fees paid to the doctor for expert litigation services since 2009. The court pointed out that the rule expressly provides that

"the expert shall not be required to disclose his or her earnings as an expert witness."

Bodzin v. Leviter, 174 So. 3d 608 (Fla. 4th DCA 2015)

A non-resident Defendant, who had not sought affirmative relief, was ordered by the trial court to appear for an independent medical examination in Florida in order to determine his capacity to testify after his counsel alleged that he was incapacitated by Alzheimer's. The court noted that the Defendant had given multiple depositions in the case without having raised incapacity to testify at those depositions and that the Plaintiff had already received the Defendant's medical records and retained an expert to review the records and form an opinion as to the Defendant's capacity. As such, they granted certiorari and quashed the trial court's order.

Latent Defect

Phillips v. Republic Financial Corp., 157 So. 3d 320 (Fla. 5th DCA 2015)

Phillips was seriously injured when he fell through a painted-over skylight as he started work his company was hired to perform. The skylight that he fell through was painted the same color as the metal panels and when viewed from the roof, the skylight was indistinguishable from the metal panels. Various Defendants moved for Summary Judgment arguing that the painted over condition was a patent defect and therefore there was no duty to warn. In doing so, they relied upon photographs from within the warehouse which were shown after the injury to Phillips' co-worker and he acknowledged that the photos showed that the skylights were visible including the specific skylight that Phillips fell through. The Fifth District reversed finding that there was a factual issue as to whether the defect was a latent defect.

Legal Malpractice Action Premature When Underlying Action Was Still Pending

Armour v. Hass, 40 FLWD 807 (Fla. 4th DCA 4/8/15)

Armour and his law firm were sued for legal malpractice. They filed a Motion to Dismiss, Abate or Stay the Malpractice Action which the trial court

denied. It was undisputed that the underlying litigation upon which the malpractice action was based was still pending. Although the trial court stayed the trial and any discovery as to damages, it otherwise allowed the action to proceed, including discovery as to liability. The Fourth District granted certiorari and quashed the lower court's ruling noting that until there is a judgment against the Plaintiffs in the underlying action, a malpractice claim is hypothetical and damages are speculative. Thus, the trial court erred in allowing any discovery to go forward and the case should have been stayed or abated.

Negligent Security

Nicholson v. Stoneybrook Apartments, LLC, 154 So. 3d 490 (Fla. 4th DCA 2015)

The Plaintiff was shot in the leg by a third party while attending a party at the Defendant's apartment complex. Plaintiff alleged that the Defendant failed to maintain its premises in a safe condition and failed to provide adequate security on the property. In its Answer, the Defendant raised the defense that she was a trespasser. The Plaintiff moved to exclude any evidence regarding her status as a trespasser arguing that her status to the land was irrelevant because her lawsuit was founded in ordinary negligence and not premises liability. The trial court disagreed and ruled that the Plaintiff's status was relevant and pertinent to the duty owed to her by the Defendant. Ultimately, the jury found that she was a trespasser and that the Defendant did not commit gross negligence.

As the Fourth District pointed out, in ordinary negligence cases, the Defendant owes the Plaintiff a duty of reasonable care regardless of a relationship between the Defendant and Plaintiff, however, in premises liability cases, the Defendant's duty to the Plaintiff is dependent upon the Plaintiff's status to the land. In a premises liability case, the only duty a property owner owes to an undiscovered trespasser is to refrain from causing intentional harm and the only duty it owes to a discovered or known trespasser is to refrain from gross negligence or intentional harm and to warn of known conditions that are not readily observable by others. In this case, the Fourth District concluded that negligent security cases are governed under the standards of premises liability and not ordinary negligence. Accordingly, the verdict below was affirmed.

No Settlement Due To Added Terms

Pena v. Fox, 40 FLWD 2573 (Fla. 2d DCA 11/13/15)

Following a motor vehicle accident, Plaintiff's counsel requested policy limits from the Defendant's insurer advising that the Plaintiff would execute a release only as to the insured adding that "any attempt to provide a release which contains a hold harmless or indemnity agreement, which releases anyone other than your insured, or which releases any claim other than my client's claim, will act as a rejection of this good faith offer."

Following its receipt of this, the Defendant's insurance company issued a release which specifically released the insured, his heirs, executors and assigns and subsequently shifted its reference to "releasee(s)" without defining the term. The trial court found that there was a settlement, however, the District Court reversed finding that the additional terms including "releasee(s)" without defining the term improperly added parties beyond those that the Plaintiff proposed to release and materially deviated from the limitation clearly expressed in Plaintiff's offer. As such, there was no meeting of the minds and no settlement.

Patent Defect

McIntosh v. Progressive Design & Engineering, Inc., 166 So. 3d 823 (Fla. 4th DCA 2015)

The Plaintiff's father was exiting a mobile home park when he collided with a truck traveling on a cross street. The traffic signals at the intersection allowed the driver exiting the mobile home park to rely upon a traffic signal further out into the intersection meant for other traffic, while causing the driver leaving the mobile home park to overlook the traffic signal closest to him. As a result, the Plaintiff's father was killed. His estate sued the company that designed the intersection. Following a verdict for the design company, the Plaintiff appealed arguing that the trial court erred in finding that the *Slavin* doctrine applied to the design company.

Under the *Slavin* doctrine, the liability of a contractor is cut off after the owner has accepted the work performed if the alleged defect is a patent defect which the owner could have discovered and remedied. The Fourth District found that the evidence supported the jury's finding that the design defect was patent.

Moreover, the Court found that the Florida Department of Transportation was the entity to whom the design company owed its duties because FDOT controlled the "acceptance" of the design company's work. Lastly, they concluded that the evidence supported the jury's finding that while the design company was negligent, the design was accepted and the defect was discoverable by FDOT with the exercise of reasonable care. As such, the verdict in favor of the design company was affirmed.

Premises Liability

Denson v. SM-Planters Walk Apartments, Inc., 40 FLWD 951 (Fla. 1st DCA 2015)

The trial court granted Summary Judgment in favor of the Defendant on both the failure to maintain the premises in a reasonably safe condition and a failure to warn. The First District affirmed the Summary Judgment on the claim that the Defendant breached its duty to warn because the condition was open and obvious based upon evidence presented. It reversed the Summary Judgment on the failure to maintain the premises because the evidence in the case was disputed on the issue of whether the Defendants used non-skid paint on the stairs or properly mixed a non-skid additive with the paint.

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land. In a premises liability case, the only duty a property owner owes to an undiscovered trespasser is to refrain from causing intentional harm and the only duty it owes to a discovered or known trespasser is to refrain from gross negligence or intentional harm and to warn of known conditions that are not readily observable by others. In this case, the Fourth District concluded that negligent security cases are governed under the standards of premises liability and not ordinary negligence. Accordingly, the verdict below was affirmed.

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Plaintiffs asserted that the Defendant failed to maintain the premises in a reasonably safe condition by failing to maintain the front gate, failing to have adequate security, failing to prevent dangerous persons from gaining access to the premises and failing to protect and warn residents of dangerous conditions and criminal acts.

Following a verdict in favor of the Plaintiffs in which the apartment owner was found to be partially responsible, the Defendant moved for a new trial and a judgment notwithstanding the verdict which the trial court denied. The Fourth District reversed and found that entering a directed verdict was appropriate. The Court concluded that without proof of how the assailants gained entry into the apartment, the Plaintiff simply could not prove causation.

The Supreme Court disagreed and found that with evidence such as the broken gate and the existence of prior opportunistic crimes, a reasonable jury could have determined that the Defendants' failure to maintain the security gate and the failure to have a courtesy officer visible probably allowed the assailants to get to the decedents' door without being detected.

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evidence to reach a decision regarding negligence, the jury is entitled to make the ultimate factual determination. Accordingly, the decision of the Fourth District was quashed.

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Premises Liability – College Is A Business Establishment

McCarthy v. Broward College, 164 So. 3d 78 (Fla. 4th DCA 2015)

The Plaintiff slipped and fell on an unidentified liquid in an elevator at Broward College. The college moved for Summary Judgment arguing that the Plaintiff could not prove actual or constructive knowledge of the dangerous condition as required by Florida Statute 768.0755. The trial court granted the motion finding that the college was a "business establishment" for purposes of the statute.

The Fourth District affirmed and held that the college is a business establishment even though it was a state owned institution of higher education because services were rendered for a fee. Further, the college was entitled to judgment as a matter of law because the Plaintiff was unable to identify the liquid in the elevator, determine how long it had been there or establish that anyone at the college had actual or constructive knowledge of its presence. Moreover, there was no evidence or argument that the condition occurred with regularity and was therefore foreseeable.

Sovereign Immunity

Plancher v. UCF Athletics Association, Inc., 175 So. 3d 724 (Fla. 2015)

A University of Central Florida football player collapsed and died during football practice. Following his death, his parents filed suit against the University and UCF Athletics Association, Inc.; the statutorily authorized direct-support organization responsible for administering UCF's athletics department. The Supreme Court held that the Athletic Association was entitled to limited sovereign immunity because the University had the right to control the Association and exercise actual control over it.

Summary Judgment

Panzera v. O'Neal, 40 FLWD 2661 (Fla. 2d DCA 12/2/15)

Following the death of their son, parents brought an action against Publix and the driver of its truck alleging that the Defendants were negligent in causing the accident which killed their son. The trial court granted summary judgment in favor of the Defendants and the Second District affirmed. They noted that the only evidence showed that the driver was traveling below the speed limit in the right lane and that he applied the brakes when he saw the decedent running into the road and that he then steered the truck to the left to avoid the pedestrian.

In response to the motion, the Plaintiffs relied solely on the deposition testimony of the decedent's parents who surmised that the driver could have avoided the accident had he taken additional evasive maneuvers and that he must not have been able to see their son before the collision occurred based upon their personal review of the scene after the accident. The Second District held that the parents were lay witnesses with no experience in accident reconstruction and, therefore, this was inadmissible testimony.

Summary Judgment Improper On Whether Plaintiff Was A Habitual Drunkard

Evans v. McCabe 415, Inc., 168 So. 3d 238 (Fla. 5th DCA 2015)

McCabe operates a business that serves alcoholic beverages to the public. Evans sued McCabe alleging that McCabe served her son alcohol on the night he died causing him to crash his car into a tree. It was alleged that McCabe served alcoholic beverages to the decedent and he knew him or should have known him to be habitually addicted to alcoholic beverages.

After substantial discovery, McCabe moved for Summary Judgment arguing that the Plaintiff could not establish that the decedent was a habitual drunkard or that McCabe had served the decedent with knowledge of the decedent's condition. In opposition to the motion, the Plaintiff filed sworn Affidavits and deposition transcripts from various witnesses attesting to the decedent's regular attendance at McCabe's and his excessive and habitual use of alcoholic beverages. The Plaintiff also filed an Affidavit from an expert witness who opined that McCabe had knowledge that the decedent was a habitual drunkard at the time it last served him alcoholic beverages.

After granting the Motion for Summary Judgment in favor of McCabe, the trial court canceled a previously scheduled hearing on the Plaintiff's Motion for Sanctions for McCabe's spoliation of evidence. The Fifth District reversed finding that there were genuine issues and material fact which existed as to whether the decedent was a habitual drunkard and whether McCabe knew of his condition when it served him alcohol shortly before the crash that ended his life. The court also found that Summary Final Judgment was prematurely entered prior to resolution of the Plaintiff's Motion for Sanctions.

Summary Judgment Reversed On Failure To Maintain

Denson v. SM-Planters Walk Apartments, Inc., 40 FLWD 951 (Fla. 1st DCA 4/22/15)

The trial court granted Summary Judgment in favor of the Defendant on both the failure to maintain the premises in a reasonably safe condition and a failure to warn. The First District affirmed the Summary Judgment on the claim

that the Defendant breached its duty to warn because the condition was open and obvious based upon evidence presented. It reversed the Summary Judgment on the failure to maintain the premises because the evidence in the case was disputed on the issue of whether the Defendants used non-skid paint on the stairs or properly mixed a non-skid additive with the paint.

Transitory Substance Statute Is Not Retroactive

Glaze v. Worley, 157 So. 3rd 552 (Fla. 1st DCA 2015)

Florida Statute 768.0755 which provides that a person who slips and falls on a transitory foreign substance in a business establishment must prove that the business establishment had actual or constructive knowledge of the dangerous condition does not apply retroactively to accidents occurring prior to July 1, 2010.