Negligence

Apparent agency

UATP Management, LLC v. Barnes, 320 So. 3d 851 (Fla. 2d DCA 2021)

An adult friend of the minor child's mother took the child to an indoor trampoline park for a birthday party. In order for him to be admitted, she signed a customer release and assumption of risk and waiver of liability and indemnification agreement which included all the required words for waiver, arbitration, indemnification, etc. Unfortunately the child was seriously injured while attending the party. When the boy's mother sued the facility, it moved to compel arbitration based upon the documents signed by her friend. The Defendant argued that the woman had acted within her authority as the mother's apparent agent when she signed the document. The trial court denied the motion to compel arbitration finding that the friend could only execute a limited release on behalf of the child pursuant to Florida Statute §744.301(3). The Defendant argued that the trial court should have granted its motion to compel and that the court's role was strictly limited to deciding the threshold issue of whether a valid agreement to arbitrate existed. The trial court found that no valid written agreement existed between the friend and the Defendant because the friend lacked the legal authority to execute the release on behalf of the child or his parents. The trial court found that no agreement existed, therefore, it did not need to reach the issue of enforceability because enforceability pre-supposes that an agreement does exist. The court acknowledged Florida's public policy favoring the arbitration of disputes, as well as the law stating that courts should resolve doubts concerning the scope of such agreements in favor of arbitration; however, importantly, no such presumption exists when the parties dispute whether they agreed to arbitrate. In this case, the boy's mother did not sign the document. The boy himself lacked the capacity to do so because he was under 18. As a result, the arbitration agreement could not bind the mother or her son unless the Defendant demonstrated that the friend had authority to sign on behalf of the boy pursuant to Florida Statute §744.301(3). The mother's friend did not have the apparent agency to sign the document where the mother, who was the purported principal did not represent anything to the Defendant to induce its supposed reliance on the friend's authority. Although the friend, by signing the agreement warranted and represented that she had the mother's actual or implied authority to execute the agreement, an agent cannot establish her own agency. Rather, apparent agency is conferred based upon the principal's actions or statements.

Dog bite

Parsons v. Culp, 328 So. 3d 341 (Fla. 2d DCA 2021)

The Defendants' dog ran towards the Plaintiffs' dog and caused the leash from the Plaintiffs' dog to wrap around the Plaintiff's ankles. As a result, she fell and suffered multiple fractures. The Plaintiff sued the Defendants based upon Florida Statute §767.01 which renders owners of dogs liable for damage done by their dogs or person. The jury awarded the Plaintiff $1,000,000. The Defendants sought to avoid liability for the dog's actions by blaming the Plaintiff herself, as well as the manufacturer/seller of their dog's collar which had broken. As for the comparative fault of the Plaintiff, the court noted that Florida Statute §767.01 is a strict liability statute but still requires an affirmative or aggressive act by the dog. The court also discussed Florida Statute §767.04 which requires an actual dog bite (which did not take place here). The Second District noted that these two statutory provisions had become intermingled in the common law, and it further noted that comparative negligence was added to §767.04 and ultimately concluded that it was required to read a comparative default defense into Florida Statute §767.01. The Second District then noted that if the legislature wanted to include negligence of a third party as a statutory defense to a dog related injury claim, it could do so. As a result, the Second District concluded that comparative fault applied based on §767.04 even though the case did not involve an actual dog bite but found that *Fabre* did not, thereby precluding the defendants from introducing the alleged fault of the non-party manufacturer/retailer.

Lastly, the Second District once again ruled that the trial court should not admit evidence of the full amount of past medical bills when Medicare has paid these bills. Instead, it ruled that the trial court should only introduce the reduced amount.

Duty

Glickman v. Kindred Hospitals East, LLC, 314 So. 3d 630 (Fla. 3d DCA 2021)

A visitor to Kindred Hospitals shot the Plaintiff several times and then shot and killed himself. Plaintiffs sued, amongst others, the security company on duty in the hospital. The contract between the security company and the hospital states that "the security services hereunder are only being provided to Client and its employees, and no other person or entity is, nor is intended to be, a third-party beneficiary under this contract. The Security Company is assuming no duty to protect any other persons or entities or their property, nor is it being compensated hereunder to do

so…”. Based upon the plain wording of the contract, the trial court granted summary judgment which the Third District affirmed.

Jackson v. The Florida Highway Patrol, 46 FLWD 2543 (Fla. 1st DCA 11/24/21)

The Florida Highway Patrol (FHP) had responded to reports of reduced visibility on I-75 due to a nearby fire. The troopers placed fog and smoke signs on the road and closed the highway. The closure began after midnight and went into the early morning hours of the next day. After approximately three hours, the troopers determined the highway was safe to reopen. Thirty minutes after doing so, a trooper observed solid smoke and fog while driving the highway and heard accidents occurring behind him. They once again shut down I-75. One of the accidents which occurred caused the death of the Plaintiff's decedent. The Plaintiff brought suit against FHP and the trial court granted summary judgment in favor of FHP. The First District affirmed finding that the FHP owed no independent common law duty to protect the decedent on a public interstate during a low visibility incident.

<u>Duty to warn</u>

Pratus v. Marzucco's Construction & Coatings, Inc., 310 So. 3d 146 (Fla. 2d DCA 2021)

Marzucco was the general contractor overseeing a parking garage construction project. Pratus was an employee of an electrical sub-contractor on the project. Pratus was injured when he stepped into an uncovered drain on the construction site. The drain was outside of the door that opened onto an exterior landing on the second floor of the garage. The interior lighting in the garage was 20-30% of the normal level; however, it was bright outside on the day of the accident.

As Pratus opened the door to access the landing and the stairs leading to the third floor, sunlight and dust generated by Marzucco's concrete grinding work on the landing blinded him and he stepped into a drain. There were about 100 drains on the site and whether Marzucco covered a particular drain depended on the phase of construction. Pratus had observed the subject drain covered and uncovered at various times during his work at the site. His work on the project was sporadic and he had been off of the site for about a week before the date of the accident. When he was last on the site, the door had been closed and marked with caution tape, but

on the day of the accident, the tape had been removed. Pratus would not have opened the door if the caution tape remained and he used the door because it was the most direct path for him to complete his work on the third floor.

Pratus sued Marzucco for negligence, arguing that it breached its duty to maintain the premises in a reasonably safe condition by leaving the drain uncovered and failing to warn of the danger of the uncovered drain. Marzucco moved for summary judgment arguing that it had no duty to warn of the uncovered drain because the danger was open and obvious. The trial court concluded that Marzucco was entitled to judgment as a matter of law. The Second District reversed concluding that it was error to enter a summary judgment for the Defendant on the basis that the Defendant had no duty to warn Plaintiff of an open and obvious danger. Further, even if the danger was open and obvious, Marzucco still had a duty to maintain the premises in a reasonably safe condition and it failed to establish that it should not have anticipated the potential harm to Plaintiff as a result of the uncovered drain notwithstanding his knowledge of the danger.

Employee driving to/from work

Peterson v. Cisco Systems, Inc., 320 So. 3d 972 (Fla. 2d DCA 2021)

Ibrahim was employed by Cisco as an engineer. Normally, Ibrahim worked at Cisco's offices in Virginia. Cisco sent Ibrahim to work temporarily at a customer's business in Tampa. For the duration of his stay in Tampa, Cisco paid for Ibrahim's rental car and hotel room. While driving the rental car from the hotel to the client's work site, Ibrahim struck Peterson's car. Peterson then sued Cisco Systems under a theory of respondeant superior. The trial court granted Summary Judgment in favor of Cisco and the Second District affirmed finding that Ibrahim was not acting within the course and scope of his employment at the time of the accident and that an employee driving to and from work is not within the scope of employment so as to impose liability on his employer.

Medical bills

Osceola County Board of County Commissioners v. Sand Lake Surgery Center, LLC, 320 So. 3d 950 (Fla. 5th DCA 2021)

The Plaintiffs claim they were injured when an elevator in the County's parking garage malfunctioned. Both were treated pursuant to letters of protection at Sand Lake. Rather than wait for the outcome of the Plaintiff's cases, Sand Lake sold

the Plaintiffs' accounts receivables to American Medical Funding (AMF) which is a factoring company. The county used non-party production subpoenas to request Sand Lake to provide documents related to the Plaintiffs including their medical records, billing records, payments of their bills and records related to any sale of Plaintiffs' outstanding accounts to third parties.

Neither of the Plaintiffs objected to the subpoenas and Sand Lake responded to the subpoena by advising it had sold the Plaintiffs outstanding accounts to AMF and suggested that they obtain those records from AMF. The county then followed up by scheduling the deposition duces tecum of the Surgical Center's designated corporate representative and again requested similar documents. Neither Plaintiff objected and the Surgery Center provided medical treatment and billing records but stated that it was unable to provide documents related to payments or records reflecting the sale or transfer of any bills owed by the Plaintiffs because such information was subject to trade secret and confidentiality provisions and that a violation of this would subject Sand Lake to significant damages.

Eventually, a hearing was held and the trial court sustained the Surgical Center's objections. The Fifth District reversed and held that when a healthcare facility treats a personal injury Plaintiff, the Defendant being sued is entitled to discover the amount of the original medical bills and any discounts agreed upon when the healthcare facility sells the unpaid accounts to a factoring company because that information is relevant when the Plaintiff seeks to recover medical expenses as part of the lawsuit against the Defendant. The court also pointed out that the non-party respondents failed to carry their burden with establishing that the information sought was trade secret.

<u>Open and obvious condition</u>

Dudowicz v. The Pearl on 63 Main, Ltd., 326 So. 3d 715 (Fla. 1st DCA 2021)

The Plaintiff, who was a guest at the Defendant's hotel, tripped and fell in her hotel room as the result of a 3/8" change in elevation between the tiled entry way and the carpet floor in the hotel room. The Plaintiff alleged that the Defendant breached its duty to warn and its duty to maintain the premises in a reasonably safe condition. The hotel moved for Summary Judgment alleging that the difference in floor levels was open and obvious and did not constitute a dangerous or hazardous condition sufficient to create a duty to warn or to take necessary corrective action. The Plaintiff opposed the Summary Judgment arguing that the change in the floor level was not open and obvious because it was subtle. It further argued that the

change was a violation of the applicable building codes and prima facie evidence of negligence.

The First District explained that there is no duty to warn of an open and obvious condition and that the difference in floor levels did not automatically constitute a failure to used due care for safety; however, the circumstances could transform the change into a dangerous situation. The circumstances could include uncommon design, or mode of construction, which create a hidden danger which a prudent invitee would not anticipate. Although the Plaintiff claims she did not notice a change in floor levels, there was no dispute that she initially crossed the transition area and did not trip until she walked back from the carpeted area into the tiled entry, which was a vantage point which clearly showed the change in floor levels. While the court concluded there was no duty to warn, this did not discharge the hotel's duty to maintain its premises in a reasonably safe condition. The building code violations supported the Plaintiff's claim that the changes in the elevation were required to be beveled and the hotel's transition area was not beveled. As such, the court reversed the entry of summary judgment on the negligent maintenance claim.

Conrad v. Boat House of Cape Coral, LLC, 46 FLWD 2675 (Fla. 2d DCA 12/17/21)

The Plaintiff was injured when he stepped on a missing section of a cement seawall at the Defendant's business. The trial court entered Summary Judgment as to liability in favor of the Defendants based upon a determination that the divot in the seawall was open and obvious. Although the records supported the finding that the divot was open and obvious, the Second District reversed finding that it was a fact question for the jury to determine whether the divot was an obviously dangerous condition. Further, even if the divot was an open and obvious danger, a landowner or possessor could still be liable for failing to exercise reasonable care to prevent foreseeable injury to invitees.

<u>Premises liability</u>

Tallahassee Medical Center v. Kemp, 324 So. 3d 14 (Fla. 1st DCA 2021)

On a stormy day, the Plaintiff went to the hospital to visit a patient. At the time she was wearing rubber flip-flops. After riding the elevator to the fourth floor, she exited and began walking towards the patient's room. As she went past the nurses' station, she suddenly slipped and fell in front of a utility-room door and fractured her kneecap. She sued the hospital claiming that its negligence caused her injury because the floor was wet.

The case went to trial and the hospital moved for directed verdict. It argued that the Plaintiff had not presented sufficient evidence of a wet floor or that the hospital knew of such a substance on the floor for the case to go to the jury. The motion was denied and the jury awarded the Plaintiff over $1,000,000. The trial court denied the hospital's motion for new trial and remittitur.

The First District reversed and found that the Plaintiff did not present sufficient evidence that a foreign substance was on the floor where she fell or that the medical center knew if such a substance existed. At trial, Kemp testified that she felt like something wet was there but she did not see a wet substance on the floor before or after her fall (except a drink that she was carrying spilled when she fell). In fact, no one saw a wet substance responsible for her fall. Her then boyfriend believed that she slipped on a wet floor because of the way she fell but he also did not see a wet substance on the floor. Medical center employees working near where she fell also testified that they did not see anything wet on the floor and even though Kemp testified of having wetness on the back of her clothes after the fall, she did not know what caused the wetness.

At trial, Kemp mainly relied on video evidence from a hospital camera showing moment by moment action in the hallway where she fell. The video did not show a substance on the floor but it did reveal repeated action in the area where she fell as employees accessed a nearby utility room. The Plaintiff asserted that something delivered to the utility room by a hospital employee could have caused the wet substance to be deposited on the floor causing her to fall and that the spill could have resulted from a leaking bag that was dragged to the utility room, from a tray or from something dropped on to the floor from a housekeeping cart. The video itself however, showed no such leaks, spills, drops or other deposits of a liquid substance on to the floor.

The First District noted that Kemp was entitled to use circumstantial evidence like the video to prove her case but there were limits to the inferences that could be drawn from such evidence. It held that a directed verdict should be issued if a Plaintiff relies upon circumstantial evidence to establish a fact, fails to do so to the exclusion of all other reasonable inferences and then stacks further inferences upon it to establish causation.

Dudowicz v. The Pearl on 63 Main, Ltd., 326 So. 3d 715 (Fla. 1st DCA 2021)

The Plaintiff, who was a guest at the Defendant's hotel, tripped and fell in her hotel room as the result of a 3/8" change in elevation between the tiled entry way and the carpet floor in the hotel room. The Plaintiff alleged that the Defendant

breached its duty to warn and its duty to maintain the premises in a reasonably safe condition. The hotel moved for Summary Judgment alleging that the difference in floor levels was open and obvious and did not constitute a dangerous or hazardous condition sufficient to create a duty to warn or to take necessary corrective action. The Plaintiff opposed the Summary Judgment arguing that the change in the floor level was not open and obvious because it was subtle. It further argued that the change was a violation of the applicable building codes and prima facie evidence of negligence.

The First District explained that there is no duty to warn of an open and obvious condition and that the difference in floor levels did not automatically constitute a failure to used due care for safety; however, the circumstances could transform the change into a dangerous situation. The circumstances could include uncommon design, or mode of construction, which create a hidden danger which a prudent invitee would not anticipate. Although the Plaintiff claims she did not notice a change in floor levels, there was no dispute that she initially crossed the transition area and did not trip until she walked back from the carpeted area into the tiled entry, which was a vantage point which clearly showed the change in floor levels. While the court concluded there was no duty to warn, this did not discharge the hotel's duty to maintain its premises in a reasonably safe condition. The building code violations supported the Plaintiff's claim that the changes in the elevation were required to be beveled and the hotel's transition area was not beveled. As such, the court reversed the entry of summary judgment on the negligent maintenance claim.

City of Naples v. Chops City Grill, Inc., 331 So. 3d 291 (Fla. 2d DCA 2021)

The Plaintiff was injured when she tripped and fell on a sidewalk in an area with pavers in front of the restaurant. The patron sued the city and later added the restaurant as a Defendant. The restaurant's Summary Judgment was granted but the Second District reversed and found that the restaurant failed to meet its burden establishing the absence of negligence. More specifically, it failed to provide evidence that it did not have control over the pavers in front of the restaurant where the Plaintiff fell and thus had no duty of care concerning the area.

Speedway, LLC v. Cevallos, 46 FLWD 2643 (Fla. 4th DCA 12/15/21)

Cevallos pulled up to a gas pump at a Speedway gas station and went inside the station to pay for gas. As she was walking back to her car, another car ahead of

her exited out of the station. In a surveillance video, the exiting car left behind a puddle of liquid. Cevallos began to pump her gas and while waiting for the gas to finish, she moved toward the trash can nearby to throw something away. She took a few steps around the pump and slipped on a liquid substance of oil and gas left by the car that had vacated the premises less than two minutes earlier. Cevallos fell to the ground in pain. She testified she had not seen the puddle at any time prior to her accident. Her clothes were soaked with gasoline from her fall.

Cevallos tried the case on a theory that the buildup occurred on the concrete which was caused by inadequate maintenance by Speedway. The Fourth District held that the trial court erred in denying a motion for directed verdict on constructive knowledge where the Plaintiff failed to offer evidence of a dangerous condition or that any condition existed for a period of time sufficient to establish constructive notice of it. The Fourth District pointed out that the photos of the concrete which Plaintiff alleges had established the existence of a slippery condition caused by a buildup could have simply shown discoloration rather than buildup as a fact witness testified. They added that where photos are ambiguous as to the condition and duration of the condition revealed, they do not support an inference of constructive notice.

Conrad v. Boat House of Cape Coral, LLC, 46 FLWD 2675 (Fla. 2d DCA 12/17/21)

The Plaintiff was injured when he stepped on a missing section of a cement seawall at the Defendant's business. The trial court entered Summary Judgment as to liability in favor of the Defendants based upon a determination that the divot in the seawall was open and obvious. Although the records supported the finding that the divot was open and obvious, the Second District reversed finding that it was a fact question for the jury to determine whether the divot was an obviously dangerous condition. Further, even if the divot was an open and obvious danger, a landowner or possessor could still be liable for failing to exercise reasonable care to prevent foreseeable injury to invitees.

Vargas v. Dolphin Mall Associates, LLC, 47 FLWD 10 (Fla. 3d DCA 12/22/21)

Based upon the length of time that the alleged dangerous condition had existed before the accident occurred, in conjunction with the size, nature and apparent risks of the area in question, the Third District concluded that the trial court did not err in concluding that the evidence was insufficient to establish that the Defendant had actual or constructive knowledge of a dangerous condition which required it to take

remedial action. Therefore, pursuant to Florida Statute §768.0755(1), the entry of Summary Judgment was affirmed.

Release of liability

UATP Management, LLC v. Barnes, 320 So. 3d 851 (Fla. 2d DCA 2021)

An adult friend of the minor child's mother took the child to an indoor trampoline park for a birthday party. In order for him to be admitted, she signed a customer release and assumption of risk and waiver of liability and indemnification agreement which included all the required words for waiver, arbitration, indemnification, etc. Unfortunately the child was seriously injured while attending the party. When the boy's mother sued the facility, it moved to compel arbitration based upon the documents signed by her friend. The Defendant argued that the woman had acted within her authority as the mother's apparent agent when she signed the document. The trial court denied the motion to compel arbitration finding that the friend could only execute a limited release on behalf of the child pursuant to Florida Statute §744.301(3). The Defendant argued that the trial court should have granted its motion to compel and that the court's role was strictly limited to deciding the threshold issue of whether a valid agreement to arbitrate existed. The trial court found that no valid written agreement existed between the friend and the Defendant because the friend lacked the legal authority to execute the release on behalf of the child or his parents. The trial court found that no agreement existed, therefore, it did not need to reach the issue of enforceability because enforceability pre-supposes that an agreement does exist. The court acknowledged Florida's public policy favoring the arbitration of disputes, as well as the law stating that courts should resolve doubts concerning the scope of such agreements in favor of arbitration; however, importantly, no such presumption exists when the parties dispute whether they agreed to arbitrate. In this case, the boy's mother did not sign the document. The boy himself lacked the capacity to do so because he was under 18. As a result, the arbitration agreement could not bind the mother or her son unless the Defendant demonstrated that the friend had authority to sign on behalf of the boy pursuant to Florida Statute §744.301(3). The mother's friend did not have the apparent agency to sign the document where the mother, who was the purported principal did not represent anything to the Defendant to induce its supposed reliance on the friend's authority. Although the friend, by signing the agreement warranted and represented that she had the mother's actual or implied authority to execute the agreement, an agent cannot establish her own agency. Rather, apparent agency is conferred based upon the principal's actions or statements.

Respondeat superior

Tsuji v. Fleet, 326 So. 3d 143 (Fla. 1st DCA 2021)

Tsuji was injured in a motor vehicle accident when she was struck by a car being driven by Morton while he was within the course and scope of his employment with LBC Company. He was also driving an LBC-owned vehicle. Within four years of the accident, Tsuji sued Morton and LBC alleging that Morton was negligent and caused injury to her. Tsuji also alleged that LBC was also liable for Morton's actions. Not long after suit was filed, Tsuji learned that Morton died a few weeks after the accident. Tsuji then moved to substitute Fleet as the Personal Representative of Morton's Estate.

LBC then moved for summary judgment arguing that Tsuji's claims were barred by Florida Statute §733.702(5) and 733.710(1). These statutes require creditors to present claims against the decedent's estate within two years of the decedent's death. Tsuji opposed the motion arguing that a cause of action can be brought against the tortfeasor's estate more than two years after the tortfeasor's death when the Plaintiff seeks to recover damages only from the tortfeasor's casualty insurer. The trial court relied upon case law from the First District and entered summary judgment for LBC. The trial court found that if Tsuji could not hold Morton's estate liable, LBC could not be vicariously liable for Morton's negligence. The First District affirmed holding that "appellant's vicarious liability action against appellee is barred by the well-settled doctrine that 'when a principal's liability rest solely on the doctrine of *respondent superior* a principal cannot be held liable if the agent is exonerated.'"

Slip and fall

De Los Angeles v. Winn-Dixie Stores, Inc., 326 So. 3d 811 (Fla. 3d DCA 2021)

The Plaintiff alleged that she slipped on detergent at Winn-Dixie and during her deposition described that the liquid was clear, slippery, light blue, not dirty and that there were no footprints in it. Plaintiff had no knowledge as to how long the liquid detergent had been on the floor before she fell but testified that it had been there for 3-5 minutes because that is how long she was in the aisle alone before the incident occurred. She also testified that she had no knowledge of whether any Winn-Dixie employees were aware that there was liquid on the floor. An open bottle of detergent was found on the shelf near where she fell with a cap next to the bottle and the bottle standing upright; however, there was no leaking or dripping from the bottle. The trial court entered summary judgment in favor of Winn-Dixie and the

Third District affirmed because there were no facts evidencing the length of time the substance was on the floor which could lawfully compute constructive notice to the Defendant. The Plaintiff argued that summary judgment was premature because discovery was ongoing; however, because no Motion for Continuance or an affidavit was filed stating the need to continue the hearing to conduct additional discovery, the Third District affirmed.

Vargas v. Dolphin Mall Associates, LLC, 47 FLWD 10 (Fla. 3d DCA 12/22/21)

Based upon the length of time that the alleged dangerous condition had existed before the accident occurred, in conjunction with the size, nature and apparent risks of the area in question, the Third District concluded that the trial court did not err in concluding that the evidence was insufficient to establish that the Defendant had actual or constructive knowledge of a dangerous condition which required it to take remedial action. Therefore, pursuant to Florida Statute §768.0755(1), the entry of Summary Judgment was affirmed.

<u>Sovereign immunity</u>

Lovelace v. G4S Secure Solutions, Inc., 320 So. 3d 178 (Fla. 4th DCA 2021)

G4S contracted to provide security services at Broward County facilities. The Fourth District entered Summary Judgment which upheld that G4S was entitled to sovereign immunity where the county asserted a degree of control over the company such that it was an agent of the county.

<u>Spoliation of evidence</u>

Adamson v. R.J. Reynolds Tobacco Company, 325 So. 3d 887 (Fla. 4th DCA 2021)

The decedent smoked 50 cigarettes a day and was diagnosed with a lung mass in May 1992 and died of cancer in 1993. She left behind her husband and a 10-year-old daughter. One of the disputed issues in the case was whether the decedent had primary lung cancer or secondary lung cancer. The only medical records available were 42 pages generated from the decedent's three-day hospital stay in March 1993 at a Rhode Island Hospital where she underwent surgery to treat a metastatic brain tumor. The records stated that she had presented with a lung mass in May 1992. The evidence was that lung cancer is usually diagnosed in people between ages of

65 and 75 and that a woman of the decedent's age would likely have contracted a gynecological form of cancer at that age.

It was not until July 2006 that the Florida Supreme Court decided the *Engle* case and stated that Plaintiffs could file individual claims. In an April 2008 call log, a paralegal at Morgan and Morgan representing the decedent's husband memorialized a phone call with him in which the firm was trying to "fill in the blanks on his discovery." The Plaintiff advised that he had shredded the decedent's medical records two years before because they were so old, and he did not think he would ever need them. The Defendant sought an adverse inference jury instruction which the trial court agreed to give.

The Fourth District affirmed the trial court's decision and noted that first-party spoliation occurs when a party to the action loses, misplaces, or destroys evidence. Prior to the court exercising such a leveling mechanism, the trial court must answer three threshold questions: (1) whether the evidence existed at one time; (2) whether the spoliator had a duty to preserve the evidence; and (3) whether the evidence was critical to an opposing party being able to prove a *prima facie* case for defense. Here, it was clear that the evidence existed at one time and the evidence certainly could have been relevant. The court also noted that a duty to preserve the evidence is not required for an adverse inference instruction to apply.

<u>Statute of limitations</u>

Friedel v. Edwards, 327 So. 3d 1242 (Fla. 2d DCA 2021)

The Plaintiff filed a Complaint against a driver who hit her in an accident. The Complaint was filed more than three years after the accident happened. At the time that the Complaint was filed, the Plaintiff was unaware that the Defendant driver had actually passed away three months before the Complaint was filed. Upon learning of the driver's death, the Plaintiff moved to amend her Complaint seeking to add the Personal Representative who had been appointed for the Estate. By the time the amendment was made, four years had passed from the time of the accident. The trial court refused to allow the amendment ruling that the statute of limitations had passed. The Second District reversed and found that simply because the original Complaint was mistakenly filed against the deceased driver unknowingly, it did not render the Complaint a legal nullity as the Defendant had asserted. The District Court also held that the trial court erred in refusing to allow the Plaintiff to amend her Complaint because it related back to the original filing because it merely substituted the Personal Representative for the deceased driver.

Summary judgment

City of Naples v. Chops City Grill, Inc., 331 So. 3d 291 (Fla. 2d DCA 2021)

The Plaintiff was injured when she tripped and fell on a sidewalk in an area with pavers in front of the restaurant. The patron sued the city and later added the restaurant as a Defendant. The restaurant's Summary Judgment was granted but the Second District reversed and found that the restaurant failed to meet its burden establishing the absence of negligence. More specifically, it failed to provide evidence that it did not have control over the pavers in front of the restaurant where the Plaintiff fell and thus had no duty of care concerning the area.

Wrongful death

Tsuji v. Fleet, 326 So. 3d 143 (Fla. 1st DCA 2021)

Tsuji was injured in a motor vehicle accident when she was struck by a car being driven by Morton while he was within the course and scope of his employment with LBC Company. He was also driving an LBC-owned vehicle. Within four years of the accident, Tsuji sued Morton and LBC alleging that Morton was negligent and caused injury to her. Tsuji also alleged that LBC was also liable for Morton's actions. Not long after suit was filed, Tsuji learned that Morton died a few weeks after the accident. Tsuji then moved to substitute Fleet as the Personal Representative of Morton's Estate.

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