ATKINSON &
BROWNELL P.A.
ATTORNEYS AT LAW

One Biscayne Tower, Suite 3750, 2 South Biscayne Blvd. Miami, Fl 33131

December 15, 2012

CASE LAW UPDATE

Dear Ladies and Gentlemen:

This month we would like to share with you some recent opinions from the Florida District Courts of Appeal that may be of interest to you.

In *Gyongyosi v. Miller*, the Fourth District Court of Appeal affirmed an order excluding expert testimony regarding whether construction work constituted "demolition" under NFPA 241 because the interpretation of a statute is a question of law. Further that the removal of roof tiles is not an "ultra-hazardous activity" as a matter of law even where the damages caused are hazardous when the damages were not foreseeable.

In *Pratt v. Weiss*, the Fourth District Court of Appeal held that a defendant was entitled to recover its attorneys' fees and costs pursuant to Fla. Stat. § 768.79 and Fla. R. Civ. P. 1.442 where a proposal for settlement jointly served on two defendants, but which were actually treated as one entity by the plaintiff throughout the litigation and where the parties later entered into a stipulation that only one of those two entities was a proper party.

In *Wright v. American International Ins. Co.*, the Fifth District Court of Appeal affirmed an award of attorneys' fees and costs pursuant to Fla. Stat. § 768.79 and Fla. R. Civ. P. 1.442 where the claimant failed to timely file the appeal the Court's jurisdiction was limited to a determination of a final judgment awarding attorney's fees and not a review of the trial proceeding.

In *Doran v. Florida S.E., Inc. d/b/a Red Lobster,* the First District Court of Appeal held that an order granting summary judgment in favor of the defendant was improper in a slip and fall case where although the defendant did not deny the slip and fall occurred, the claimant testified that she believed she slipped and fell on a liquid even though she did not see any liquid. Such testimony raised a genuine issue of material fact precluding summary judgment.

I. *Gyongyosi v. Miller*, 80 So. 3d 1070 (Fla. 4th DCA 2012).

FACTS AND PROCEDURAL HISTORY

This case arose out of a liquid propane gas explosion that occurred at the vacation home of Alan and Jill Miller ("Miller"). The explosion destroyed Miller's residence and damaged several neighboring properties, including those owned by Joseph and Eva Gyongyosi ("Gyongyosi") and Arthur L. Carter ("Carter"). Gyongyosi and Carter filed a complaint against

multiple defendants, including Miller, for damages sustained to their homes as a result of the explosion.

The evidence established that before the explosion, Miller hired a contractor to replace the floor tiles on the sun deck over the garage. Located below the concrete roof sun deck was a concealed gas line. This gas line was partially suspended from the garage ceiling by hangers, which were attached to the underside of the sun deck. Portions of the gas line were visible from the corners of the interior of the garage. There was no indication that any part of the gas line was located on top of the deck where the contractor was working. Miller testified to having no knowledge of the location or existence of the propane tank and no knowledge of the existence or location of the piping. When their contractor finished removing floor tiles on the sun deck, an explosion occurred damaging the Miller, Gyongyosi and Carter's properties.

Gyongyosi and Carter presented two experts whose testimony supported the following explanation as to the cause of the explosion: two of the five hangers suspending the gas pipe from the garage ceiling had detached from the ceiling, causing the gas pipe to sag. The sagging of the gas pipe caused additional tension on the piping system, which initiating a fracture at an elbow joint of the system. That fracture allowed gas to leak, and that leaking gas was likely ignited by a water heater pilot light, causing the explosion. The cause of the hangers detaching was likely from vibrations created by Miller's contractor's work above the garage.

In addition, Gyongyosi and Carter presented the testimony of a third expert relating to certain safeguards promulgated by the National Fire Protection Association ("NFPA") and incorporated by the town's building codes; in particular, NFPA 241, titled "Standard for Safeguarding Construction, Alteration, and Demolition Operations." NFPA 241 does not define demolition, and Gyongyosi and Carter sought to elicit testimony from their expert that Miller's contractor's work constituted demolition, subjecting it to the requirements of NFPA 241. The trial court required Gyongyosi and Carter's expert to proffer this testimony outside the presence of the jury. During that proffer, their expert, focusing on the fact that chipping tile with a hammer presented a potential hazard to the substrate roof deck, opined that the work performed on the sun deck constituted demolition. After considering his testimony, the trial court ruled that as a matter of law the work performed by Miller's contractor was not "demolition" because that term should be defined by the "scope of the work to be performed, not the manner in which it is performed."

In the presence of the jury, Gyongyosi and Carter's third expert was offered as an expert witness in the areas of standard of care of contractors performing alteration and demolition work, but was not allowed to testify concerning whether Miller's contractor's work constituted demolition.

At the close of the Plaintiffs' case, the Millers made multiple motions for directed verdict with respect to the vicarious liability and negligence counts. The trial court granted the Miller's motions and in an order concluded, as a matter of law, that the work performed by Miller's contractor was not "demolition" under NFPA 241 and not an "ultra-hazardous activity." The trial court also concluded the chain of events leading to Gyongyosi and Carter's damages was not foreseeable and Miller, as homeowner, had no duty to know the location or operation of latent

piping systems in the house. Finally, the trial court held that no reasonable jury could find that the evidence presented in Gyongyosi and Carter's case established any liability on the Miller's behalf. Gyongyosi and Carter appealed.

APPELLATE COURT DECISION

The first question addressed by the Court was whether the trial court erred in determining that the work performed by Miller's contractor was not demolition as a matter of law. Expert testimony may be presented in the form of an opinion "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue."[1] The admission of expert testimony has been allowed to explain the character of an object in order to determine if it complies with a statute, ordinance, or code.[2]

Gyongyosi and Carter cited a case in which an expert was permitted to testify regarding whether a spur line constitutes a "service line."[3] In that case, the Florida Supreme Court held that the issue of "whether the spur line leading from the main pipeline . . . was a service line . . . within the contemplation of the . . . regulations" was a factual question that an expert could properly testify about, and was "not readily answerable by the trial judge referring to the cold language of the regulations."[4] The Florida Supreme Court concluded that at the very least, the conflicting expert testimony as to the applicability of the regulations created a question of fact for the jury.[5] A similar case involving expert testimony regarding whether a freight elevator fell within a specific exception contained in an ordinance, resulted in the same holding, which permitted the expert testimony.[6]

This case, however, was readily distinguishable from those cases because the expert did not testify about the character of an object or disputed facts. Instead, he offered his opinion that NFPA 241 applied to the work under contract in this case based on his *own* definition of demolition. The testimony was not necessary to determine whether removal of floor tile constituted demolition in order to apply NFPA 241 where demolition was not given a specific meaning in the regulation.

Instead, the question of what is meant by demolition in NFPA 241 is a question of law to be determined by the trial court.[7] Contrary to Gyongyosi and Carter's position, the word demolition does not create any ambiguity requiring expert testimony to assist the trier of fact in applying the pertinent regulation because it is neither a technical term nor did the regulation provide a specific definition that was contrary to its ordinary meaning. Therefore, the trial court did not err in prohibiting an expert from defining the term demolition in NFPA 241 for the jury.[8]

---

[1] § 90.702, Fla. Stat.
[2] *See Noa v. United Gas Pipeline Co.*, 305 So. 2d 182 (Fla. 1974); *see also Chimeno v. Fontainebleau Hotel Corp.*, 251 So. 2d 351 (Fla. 3d DCA 1971).
[3] *Noa*, 305 So. 2d 182
[4] *Id.* at 185.
[5] *Id.* at 186.
[6] *Chimeno*, 251 So. 2d 351
[7] *See Osborne v. Dumoulin*, 55 So. 3d 577, 581 (Fla. 2011); *Edward J. Seibert, A.I.A., Architect & Planner, P.A. v. Bayport Beach & Tennis Club Ass'n*, 573 So. 2d 889, 891-92 (Fla. 2d DCA 1990); *Devin v. City of Hollywood*, 351 So. 2d 1022, 1026 (Fla. 4th DCA 1976).
[8] *See Lee County v. Barnett Banks, Inc.*, 711 So. 2d 34, ___ (Fla. 2d DCA 1997).

When a term is not defined, courts must look to its plain and ordinary meaning, which can be discerned from a dictionary.[9] The term demolition is defined as "the act or process of wrecking or destroying." [10]Although not defining demolition, Black's Law Dictionary defines the term "demolish" as "[t]o destroy totally or to commence the work of total destruction with the purpose of completing the same."[11] The act of removing floor tiles with a chipping hammer in a manner that does not affect the integrity of the structure—as was done in this case—cannot constitute demolition as contemplated by NFPA 241. Concluding otherwise would defy common sense. As such, the Court affirmed the trial court's entry of a directed verdict on this issue.

The Court next addressed whether the trial court erred in determining, as a matter of law, that the removal and replacement of tile was not an ultrahazardous/inherently dangerous activity. Florida courts allow for employers to be held vicariously liable for an independent contractor's negligence under the inherently dangerous activities doctrine.[12] This doctrine provides that a party who "'employs an independent contractor to do work involving a special danger to others which the employer knows . . . to be inherent in or normal to the work . . . is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.'"[13]. An activity is inherently dangerous if the "danger inheres in the performance of the work," such that "in the ordinary course of events its performance would probably, and not merely possibly, cause injury if proper precautions were not taken."[14]

The Court held that such a danger does not inhere in the removal of floor tiles from a roof deck. Tile removal is not of such a nature that in the ordinary course of events, its performance would probably, and not merely possibly, cause injury if proper precautions were not taken.[15]

Finally, Gyongyosi and Carter contended that foreseeability in the context of proximate causation is a question of fact for the jury, and therefore, the trial court erred in ruling that "[t]he chain of events leading to Plaintiffs' damage was not foreseeable as a matter of law."

The Florida Supreme Court has explained:

> [F]oreseeability relates to duty and proximate causation in different ways and to different ends. The duty element of negligence focuses on whether the defendant's conduct foreseeably created a broader "zone of risk" that poses a general threat of harm to others. The proximate causation element, on the other hand, is concerned with whether and to what extent the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred.[16]

---

[9] *Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 104 (Fla. 2011).
[10] *American Heritage Dictionary* 380 (2d Coll. ed. 1985).
[11] Black's Law Dictionary 432 (6th ed. 1995).
[12] *Am. Home Assurance Co. v. Nat'l R.R. Passenger Corp.*, 908 So. 2d 459, 468 (Fla. 2005).
[13] *Id.* (quoting Restatement (Second) of Torts § 427 (1965))
[14] *Fla. Power & Light Co. v. Price*, 170 So. 2d 293, 295 (Fla. 1964).
[15] *American Automobile Ass'n, Inc. v. Tehrani*, 508 So. 2d 365 (Fla. 1st DCA 1987); *Eastman Kodak Co. v. Martin*, 362 F.2d 684 (5th Cir. 1966); *Waite v. Am. Airlines Inc.*, 73 F. Supp. 2d 349, 357 n.8 (S.D.N.Y. 1999); *Chainani by Chainani v. Bd. of Educ. of City of N.Y.*, 87 N.Y.2d 370, 663 N.E.2d 283, 287, 639 N.Y.S.2d 971 (N.Y. 1995).
[16] *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 502 (Fla. 1992) (internal citations omitted).

The foreseeable zone of risk test to determine the existence of legal duty should focus on "the likelihood that a defendant's conduct will result in the type of injury suffered by the plaintiff."[17]"This aspect of foreseeability requires a court to evaluate 'whether the *type* of negligent act involved in a particular case has so frequently previously resulted in the *same type* of injury or harm that 'in the field of human experience' the same *type* of result may be expected again.'"[18] "The absence of a foreseeable zone of risk means that the law imposes no legal duty on a defendant, and therefore defeats a negligence claim."[19]

Under the facts of this case, if any foreseeable zone of risk was created by Miller's contractor's conduct, it did not extend to cover the type of injury suffered by Gyongyosi and Carter in this instance—i.e., a massive liquid propane gas explosion which damaged their properties. The trial court properly determined that Miller had no duty to advise an independent contractor about gas piping, of which Miller wasn't even aware. More importantly, it was unreasonable for Miller to anticipate the damage that occurred as a result of floor tile removal.[20]

Accordingly, the trial court's order of directed verdict was affirmed.

II. *Pratt v. Weiss*, 92 So. 3d 851 (Fla. 4th DCA 2012).

FACTS AND PROCEDURAL HISTORY

This case arises out of a medical malpractice action filed against multiple defendants, including FMC Hospital, Ltd., a Florida Limited Partnership d/b/a Florida Medical Center, ("FMC Hospital") and FMC Medical, Inc., f/k/a FMC Center Inc., d/b/a Florida Medical Center ("FMC Medical"). The complaint alleged that those two entities "owned, operated, maintained, and controlled" Florida Medical Center, and asserted two counts against each of them for negligent hiring and/or retention and vicarious liability. The doctors against whom the claimants alleged malpractice were allegedly agents of FMC Hospital and FMC Medical. Both FMC Hospital and FMC Medical were alleged to be responsible for the negligence of a single entity, Florida Medical Center.

FMC Hospital and FMC Medical issued a joint proposal for settlement, offering to settle the claims against them for $10,000. The proposal required the plaintiff to sign "a full and complete General Release and Hold Harmless Agreement." Although the body of the proposal stated that it would resolve "pending matters between the Plaintiff and the named Defendants," the attached "Settlement Agreement, Release of All Claims Hold Harmless Agreement" required the plaintiff to release any "agents" of the two hospital defendants.

The plaintiff and the co-defendant entered into a joint stipulation that the proper party in interest was FMC Hospital. This stipulation was not in existence when the defendants made their

---

[17] *Palm Beach-Broward Medical Imaging Center, Inc. v. Continental Grain Co.*, 715 So. 2d 343 (Fla. 4th DCA 1998).
[18] *Id.* at 345 (quoting *Pinkerton-Hays Lumber Co. v. Pope*, 127 So. 2d 441, 443 (Fla. 1961)).
[19] *Biglen v. Fla. Power & Light Co.*, 910 So. 2d 405, 408 (Fla. 4th DCA 2005).
[20] *Cf. Morales v. Weil*, 44 So. 3d 173, 176 (Fla. 4th DCA 2010).

proposal. The case proceeded to trial. The jury found in favor of FMC Hospital, which then moved for attorney's fees, pursuant to the proposal.

After two hearings and consideration of written memoranda, the trial court concluded the proposal was enforceable because it had been made by a single entity, the hospital, and was unambiguous. The trial court entered final judgment in favor of FMC Hospital for $426,580 in attorney's fees and $6,000 in expert witness fees. The plaintiff appealed.

APPELLATE COURT DECISION

On appeal, the appellant argued that the proposal was unenforceable because (1) it failed to apportion the offer between two separately named defendants; (2) it was ambiguous; and (3) it required the release of future unknown claims. The defendants' responded that (1) the proposal did not have to apportion the offer because Florida Medical Center was the single hospital entity alleged to be responsible; (2) the proposal was unambiguous; and (3) the release did not require the relinquishment of future claims. The Court agreed with the appellee and affirmed the trial court's award of attorney's fees and costs.

Fla. R. Civ. P. 1.422(c)(2)(b)-(d) "requires the proposal to 'identify' the claim or claims to be resolved, 'state with particularity' any relevant conditions, 'state' the total amount of the proposal, and 'state with particularity' the non-monetary terms of the proposal."[21] Additionally, under Fla. R. Civ. P. 1.442(c)(3), a proposal may be made by or to any party or parties and by or to any combination of parties properly identified in the proposal. A joint proposal shall state the amount and terms attributable to each party."[22]

The court cited case law regarding settlement agreements holding that they are to be interpreted by the same principles governing the interpretation of contracts,[23] and that the parties' intent must be determined according to their clear and unambiguous terms.[24] Although the Florida Supreme Court has held that Fla. R. Civ. P. 1.442(c)(3) requires that "an offer from multiple plaintiffs must apportion the offer among the plaintiffs,"[25] in this case the offer was made on behalf of the single hospital entity. The release referred to the two companies that owned, controlled, or maintained the single hospital entity allegedly responsible.

FMC Hospital and FMC Medical were treated as a single entity during the litigation. They were represented by the same lawyer, filed a single answer, and were listed as FMC Hospital, Ltd., a Florida Limited Partnership d/b/a Florida Medical Center on the verdict form. Their singular nature is most evident in the parties' ultimate agreement that FMC Hospital was the only proper defendant.

---

[21] Fla. R. Civ. P. 1.442(c)(2)(B)-(D).
[22] Fla. R. Civ. P. 1.442(c)(3).
[23] *Dorson v. Dorson*, 393 So. 2d 632, 633 (Fla. 4th DCA 1981).
[24] *Id.*; quoting *Cueto v. John Allmand Boats, Inc.*, 334 So. 2d 30, 32 (Fla. 3d DCA 1976); *Wallshein v. Shugarman*, 50 So. 3d 89, 90 (Fla. 4th DCA 2010).
[25] *Dollar Rent a Car, Inc. v. Chang*, 902 So. 2d 869, 870 (Fla. 4th DCA 2005) (quoting *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276, 278-79 (Fla. 2003)).

As to the appellant's other arguments, the court found that neither were accurate. The release specifically stated that acceptance would not release other named defendants, and therefore it was clear that the two physicians were not encompassed in the release. Rather than create a latent ambiguity, the language provided for the release of only unnamed agents of the hospital. Also, the release that restricted future claims to "the injuries and damages alleged" by the appellant, and therefore did not include a release of future claims.

III. *Wright v. American International Ins. Co.*, 93 So. 3d 533 (Fla. 5th DCA 2012).

FACTS AND PROCEDURAL HISTORY

This case arose out of injuries allegedly arising out of an automobile accident. Following the accident, the plaintiff, Lloyd Wright filed a lawsuit for damages. The case proceeded to trial and the jury ruled in favor of the defendant. The defendant then moved for attorneys' fees and costs pursuant to Fla. Stat. § 768.79 and Fla. R. Civ. P. 1.442 based on a prior served proposal for settlement offering $45,000. The trial court granted the defendant's request, entering judgment awarding attorneys' fees.

APPELLATE COURT DECISION

The basis of Mr. Wright's appeal was that attorneys' fees and costs should not have been awarded because the jury's verdict was incorrect. Unfortunately, Mr. Wright failed to timely file his appeal. Because of the late filing, the court concluded that its jurisdiction was limited to the final judgment on attorneys' fees and costs. On that issue, the Court held that other than Mr. Wright's assertion that the jury reached the wrong result, he made no real argument demonstrating error in the award of attorneys' fees and costs, and only succeeded in incurring additional fees for his appeal.

IV. *Doran and Doran v. Florida S.E., Inc. d/b/a Red Lobster*, 84 So. 3d 1062 (Fla. 1st DCA 2011).

FACTS AND PROCEDURAL HISTORY

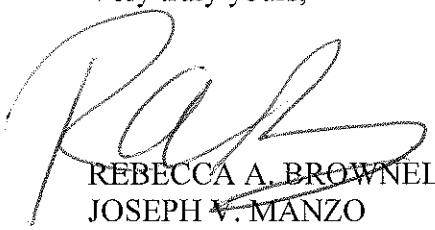
This case arose from a slip and fall in the bathroom at a Red Lobster restaurant. Red Lobster moved for summary judgment. Red Lobster did not contest the fact that claimant slipped and fell in its restaurant, but argued that the floor was not wet and therefore there was no evidence to support her allegation that she fell on a wet floor. The deposition transcript of Red Lobster's manager on duty at the time of the accident revealed that she inspected the floor and found it dry, and that the claimant initially blamed the fall on her shoes. However, the claimant testified that she did not attribute the fall to her shoes, and that she thought the floor was wet even though she did not see any water either before or after she fell. A third witness testified that when the paramedics arrived to tend to Mrs. Doran, they had to move a yellow sign which was like a "wet floor" or "be careful" sign, with that sign having been on the floor in the area where Mrs. Doran fell. Despite the conflicting testimony, the trial court granted Red Lobster's motion for summary judgment.

APPELLATE COURT DECISION

The Court reversed the trial court's order, holding that the conflicting assertions in the evidence presented created disputed issues regarding whether the floor was wet, and whether that wet floor caused the claimant to slip and fall. As a result, there was a genuine issue as to any material fact, which precluded entry of summary judgment.[26]

We hope you find the above cases helpful and insightful. Should you have any questions with respect to the foregoing, please do not hesitate to contact the undersigned at your earliest convenience.

Very truly yours,



REBECCA A. BROWNELL
JOSEPH V. MANZO

[26] *See, e.g., Laidlaw v. The Krystal Co.*, 53 So. 3d 1128 (Fla. 1st DCA 2011); *Falco v. Copeland*, 919 So. 2d 650 (Fla. 1st DCA 2006).