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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. We have highlighted specific cases that may be of interest to you.

In *Searcy v. Zawackis*, the Fourth District Court of Appeal held that in a case stemming from a motor vehicle accident, summary judgment in favor of a defendant was improper where, even though it was undisputed that the plaintiff violated the traffic laws, there was still a question of material fact regarding whether the defendant used reasonable care, thereby showing no negligence on behalf of the defendant.

In *Clair v. Perry*, the Fourth District Court of Appeal held that a treating physician is not generally subject to the pretrial notification requirements contained in Florida Rule of Civil Procedure 1.280(b)(4).

In *Fabregas v. North Miami Bakeries, Inc.*, the Third District Court of Appeal held that summary judgment was improper where a business owner failed to warn an independent contractor of the existence of a dangerous condition on the premises it had actual or constructive knowledge of or was in a better position to appreciate than the injured independent contractor.

In *Universal v. Pupillo*, the Fifth District Court of Appeal held that disclosure and the production of documents protected by work product privilege could not be compelled absent a showing that the person seeking such documents is unable to obtain the substantial equivalent materials without hardship.

In *Whipple v. D & D Tree Farms*, the Third District Court of Appeal held that the "undertaker's doctrine" created a duty to use reasonable care and therefore without proof that a defendant used reasonable care in maintaining a fence it undertook to build summary judgment was improper.

I. *Kenneth Searcy, as personal representative of the Estate of Sue Ellen Kelly v. Lynn Zawackis and FedEx Express*, 55 So. 3d 660 (Fla. 4th DCA 2011).

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FACTS AND PROCEDURAL HISTORY

While driving her vehicle, Sue Ellen Kelly collided with a FedEx vehicle operated by Lynn Zawackis at an intersection several days after Hurricane Wilma struck Palm Beach County, Florida. Due to the hurricane, the traffic lights at the intersection were not functioning. The accident resulted in Ms. Kelly's death. Her estate brought a negligence action against Ms. Zawackis and FedEx for vicarious liability. The defendants alleged that the decedent was herself negligent in failing to abide by the applicable traffic laws, which require motorists to treat an intersection as a four-way stop.[1]

Depositions were taken of Ms. Zawackis and two witnesses to the accident. Ms. Zawackis testified that when she reached the intersection, there were no other vehicles stopped there. She looked right and left, proceeded into the intersection and was hit by a vehicle she had not seen prior to entering the intersection. One witness to the accident testified that he saw the decedent speeding and entering the intersection where the accident took place without stopping at the intersection. A second witness testified that Ms. Zawackis looked left then right, but looked down for two-three seconds prior to entering the intersection and that she did not look left again before entering the intersection.

An accident reconstructionist for the decedent testified that the FedEx driver was a contributing cause to the accident because she did not make certain that the traffic was clear prior to proceeding into the intersection.

The defendants moved for summary judgment arguing that the evidence demonstrated that the accident occurred at a four-way stop where the FedEx driver had the right of way and the decedent failed to stop at the intersection. The trial court granted the defendants motion for summary judgment and the plaintiff appealed.

APPELLATE COURT DECISION

It is well settled law in Florida that in order to obtain summary judgment, the party moving for same must show conclusively the absence of any issue of material fact, and that the court must draw every possible inference in favor of the non-moving party.[2]

While the relevant Florida Statutes require that the first vehicle to stop at an intersection shall be the first to proceed, they also require that the driver yield the right-of-way to any vehicle

[1] The Florida Statutes require that where an intersection's traffic lights are inoperable, drivers are to treat an upcoming intersection as though it is a 4-way stop intersection, and thus the first vehicle to reach the intersection should be the first vehicle to proceed.[1] Florida law also recognizes a driver's entitlement to assume that others will obey the traffic laws and stop at a stop sign.
[2] *Moore v. Morris*, 475 So. 2d 666 (Fla. 1985).

which has entered the intersection from another highway "*or which is approaching so closely on said highway as to constitute an immediate hazard during the time when the drive is moving across or within the intersection* (emphasis supplied)."[3] The court found that although Ms. Zawackis' was the first vehicle to stop at the intersection, therefore the first vehicle entitled to enter the intersection, that Ms. Zawackis was still required to exercise reasonable care when doing so. As the court explained, quoting from a decision from the Second District Court of Appeals:

> A motorist about to enter an intersection with the traffic signal in his favor has the right of way. He also has a right to assume others will obey the law and exercise due care to avoid an accident. *However, even though he has a favorable light he must exercise reasonable care to determine that there is no impending traffic which would impede safe passage through the intersection. He has not exercised reasonable care once he knows or should have known that another motorist is going to run a red light and he has a clear opportunity to avoid the collision.* Therefore, the issue in this case is whether or not there is any evidence, directly or inferentially, to suggest that the [plaintiff] did not exercise reasonable care in entering the intersection.[4]

The court concluded that the defendant did not show conclusively that the driver was without negligence because one witness to the accident testified that Ms. Zawackis was looking down for two to three seconds prior to entering the intersection. Additionally, the plaintiff's accident reconstructionist testified that if Ms. Zawackis had looked to her left two to three seconds prior to entering the intersection, she would have seen that the plaintiff was about to run the stop sign. Based on that evidence, there was a question of material fact as to whether Ms. Zawackis exercised reasonable care in entering the intersection. Therefore, summary judgment was improper.

II. ***Maria L. Clair v. Lindi E. Perry*, 2011 Fla. App. LEXIS 1923 (Fla. 4th DCA 2011).**

FACTS AND PROCEDURAL HISTORY

Lindi Perry brought suit against Maria Clair alleging she was injured in a motor vehicle accident caused by Ms. Clair. Ms. Clair admitted to negligence, and trial proceeded on the issue of damages. At trial, Ms. Perry wanted to introduce testimony from her treating physician regarding whether she had sustained a permanent injury as a result of the accident. Ms. Clair objected on the basis that such testimony constituted an expert opinion, and therefore Ms. Perry was required to notify Ms. Clair of that opinion prior to trial pursuant to Florida Rule of Civil

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[3] *See* Fla. Stat § 316.123(2)(a); *see also Gordon's Tractor Serv., Inc. v. Bilello*, 336 So. 2d 1208 (Fla. 2d 1976).
[4] *MacNeill*, 253 So. 2d at 264.

Procedure 1.280(b)(4). The trial court agreed with Ms. Perry and excluded her treating physician's testimony.

The jury determined that Ms. Perry had suffered no permanent injury. Ms. Perry then moved for a new trial, arguing that her treating physician was not an expert witness subject to Rule 1.280(b)(4), and his testimony should have been entered as evidence. The trial court granted Ms. Perry a new trial, and Ms. Clair appealed.

APPELLATE COURT DECISION

Rule 1.280(b)(4), which governs discovery of expert witnesses, provides that a party is entitled to the facts known and opinions held by experts retained by the other party to testify at trial.[5] This rule, however, applies only to facts and opinions acquired or developed in anticipation of litigation or for trial.[6] The court found that a treating doctor, while unquestionably an expert, does not acquire his expert knowledge for the purpose of litigation, but rather simply in the course of attempting to make his patient well.[7] Therefore, a treating physician is not classified as an expert for the purposes of Rule 1.280(b)(4), but rather as an ordinary witness.[8]

The court determined that Ms. Perry's treating physician's opinions were not acquired or developed in anticipation of litigation or for trial, and therefore he should have been permitted to testify. Since her physician was a "critical witness," Ms. Perry would have been substantially prejudiced if a new trial were not granted.

III. ***Cesar and Ana Marie Fabregas v. North Miami Bakeries, Inc.*, 63 So. 3d 1 (Fla. 3d DCA 2011).**

FACTS AND PROCEDURAL HISTORY

Mr. Cesar Fabregas went with the owners of Armando Filter Cleaning Services to clean Sunset Bakery's exhaust vents. The vents were located over a cooking stove. In order to access the hood and vents, the men placed boards over a deep fry vat. The area they needed to clean could not be accessed by a ladder. During the cleaning, a board broke or shifted and Mr. Fabregas fell into the fryer vat, suffering severe burns.

The plaintiffs brought suit against the owner of the bakery alleging that the restaurant owner was responsible for turning off the oil from the deep fryer vat with sufficient time for it to

[5] Fla. R. Civ. P. 1.280(b)(4).
[6] *Id.*
[7] *Frantz v. Golebiewski*, 407 So. 2d 283, 285 (Fla. 3d DCA 1981).
[8] *Id.*; *accord Avis Rent-A-Car Sys., Inc. v. Smith*, 548 So. 2d 1193, 1194 (Fla. 4th DCA 1989).

cool down prior to the hood and vents being cleaned. Mr. Fabregas brought suit as a business invitee, arguing that the bakery owed him a duty to maintain the premises in a reasonably safe condition and to warn of dangerous conditions that are known or should be known to the bakery. The bakery moved for summary judgment, asserting that it owed no duty to Fabregas because he was an independent contractor. The trial court granted the bakery's motion for summary judgment, denied Mr. Fabregas' motion for rehearing, and this appeal followed.

APPELLATE COURT DECISION

The bakery argued that summary judgment was proper for two reasons. First, there is a general rule that one who hires an independent contractor is not liable for injuries sustained by that contractor's employees in the course of their work.[9] Second, where an injury is sustained by an independent contractor performing specialized work, a business or property owner will not be liable where that owner was in no better position than the injured independent contractor employee to assess the level of danger the job posted.[10]

The Court did not disagree, but found that there were exceptions to that general rule regarding lack of liability for independent contractors, including when an owner "has actual or constructive knowledge of latent or potential dangers on the premises." In such a case, the party has breached his duty to warn of such danger.[11] In this case, the owners turning off the fryer approximately one hour before work began on the vents, which resulted in inadequate time for the oil to cool, created a latent, non-obvious danger. The Court held that the bakery owner was arguably in a better position to appreciate the hazard in the work area than Mr. Fabregas because the focus of the independent contractor's work was the hood, vents and filters- not the stove and fryer vat.

Thus, the facts surrounding the accident were in dispute, and there was sufficient evidence to allow a jury to resolve the issue of whether the placement of boards to perform the cleaning operation was reasonable under the circumstances; whether the failure to turn the fryer off earlier was reasonable under the circumstances; and whether the owner did adequately alert the men to the existence of a dangerous condition, a fryer vat with dangerously hot oil. The court concluded neither of the legal principles relied upon by the bakery warranted summary judgment, and therefore the appellate court reversed the trial court's granting of same.

IV. *Universal City Development Partners, Ltd. V. Michael Pupillo, etc., et al.*, 54 So. 3d 612 (Fla. 5th DCA 2011).

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[9] *Armenteros v. Baptist Hosp. of Miami*, 714 So. 2d 518, 520-21 (Fla. 3d DCA 1998).

[10] *Morales v. Weil*, 44 So. 3d 173 (Fla. 4th DCA 2010).

[11] *Johnson v. Boca Raton Cmty. Hosp., Inc.*, 985 So. 2d 593, 596 (Fla. 4th DCA 2008).

FACTS AND PROCEDURAL HISTORY

This decision arises out of a suit for battery filed by Michael Pupillo against Universal City Development Partners, Ltd. ("Universal") and Creed McClelland. In that suit, Mr. Pupillo alleged that while watching a parade at Universal Studios, Mr. McClelland, an Orlando police officer who was working a private security detail at Universal Studios, pushed him, chocked him and forced him to the ground. During discovery, the plaintiff requested that Universal produce incident/accident reports, both prepared before and after the subject incident claim.

Universal objected to that request, arguing that work product privilege protected its incident reports. At the hearing, the plaintiff admitted that the incident report related to the subject incident was privileged, but argued that he was entitled to incident reports regarding prior, substantially similar incidents. The plaintiff argued that the reports were relevant to his vicarious liability claim against Universal and contended that he was not able to obtain substantially equivalent material without undue hardship. The trial court agreed, compelling production of the incident reports, and Universal appealed.

APPELLATE COURT DECISION

Under Florida Rule of Civil Procedure 1.280(b)(3), a party may obtain discovery of an opposing party's "documents . . . prepared in anticipation of litigation . . . only upon a showing that the party seeking discovery has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means."[12] To make that showing, Pupillo argued only that information about prior incidents was within the scope of discovery, and that he was unable to obtain substantial equivalent material without due hardship.

"The rationale supporting the work product doctrine is that 'one party is not entitled to prepare his case through the investigative work product of his adversary where the same or similar information is available through ordinary investigative techniques and discovery procedures.'"[13] If the moving party fails to show that the *substantial equivalent* of the material cannot be obtained by other means, the opposing party's objection will be sustained.[14] Here, the court found that the material the plaintiff was requesting could be obtained through the use of ordinary discovery tools like depositions and interrogatories. The court stated that it was the documents in question that were privileged, not the facts about which they pertain. Since the facts contained in the requested documents were available through other means, the trial court

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[12] *See generally S. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1385 (Fla. 1994).

[13] *Deason*, 632 So. 2d at 1384; quoting *Dodson v. Persell*, 390 So. 2d 704, 708 (Fla. 1980)).

[14] *Id.* at 1385.

departed from the essential requirements of law in compelling Universal to produce its protected documents.

V. *Dwayne Whipple, as personal representative of the Estate of Jaylen Whipple v. D & D Tree Farms, Inc., etc., et al.,* 2011 Fla. App. LEXIS 10396 (Fla. 3d DCA 2011).

FACTS AND PROCEDURAL HISTORY

On August 15, 2007, Dewayne Whipple and Kimberly Whipple took their 7-year-old son Kevin to the hospital and left their 2-year-old Jaylen in the care of his aunt and great-aunt at their apartment in Royal Palm Gardens, which borders Homestead Colony Apartments. When Jaylen's aunt went to retrieve her cell phone charger out of her car, unbeknownst to her, Jaylen followed her out the front door of the apartment, crawled through a gap in the chain-link fence that separated Royal Palm Gardens and Homestead Colony and drowned in the a lake located on the property of Homestead Colony.

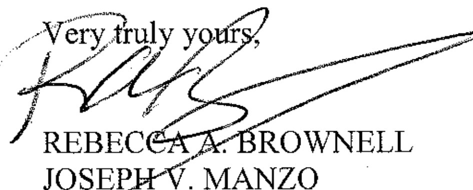
Mr. Whipple filed a wrongful death suit against a number of parties, alleging that they were negligent in failing to properly maintain a boundary line fence between the two properties in a safe and secure manner. The defendants filed a motion for summary judgment, arguing that they had no duty to properly maintain the fence so as to prevent access to the lake. The trial court granted the defendants' motion and the plaintiff appealed, arguing that the defendants are potentially liable under the undertaker's doctrine, and the appeal court reversed.

APPELLATE COURT DECISION

The court held that where the defendants undertook to build a perimeter fence around the property, they had an implied legal obligation or duty to do so with reasonable care.[15] Thus, there was a question of fact as to whether the defendants used reasonable care in maintaining the fence, and therefore summary judgment was improper.

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,



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[15] *See Banfield v. Addington*, 104 Fla. 661, 140 So. 893, 896 (Fla. 1932) ; *Union Park Memorial Chapel v. Hutt*, 670 So. 2d 64, 66-67 (Fla. 1996).