Legal Update

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LIABILITY UNDER THE DANGEROUS INSTRUMENTALITY DOCTRINE DOES NOT MULTIPLY WITH A SHARED VEHICLE

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The Florida Supreme Court recently reviewed the issue of whether liability under the dangerous instrumentality doctrine extends to both the vehicle owner and the bailee of a vehicle in the same case, such that both parties could be liable. The Court held it does not.

In *Emerson v. Lambert*, -- So.3d --, 2023 WL 7815643 (Fla. 2023), a 21-year-old was driving the family car when he was involved in a vehicle accident. The car was owned and titled to his father. The car was mainly driven by his mother but her name was not on the title. The plaintiff sued the son and both parents for negligence; alleging the son's negligence in operating the vehicle,

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LAW ENFORCEMENT-PUBLIC RECORDS-MARSY'S LAW

On November 30, 2023, the Florida Supreme Court issued an opinion as to whether Marsy's Law, which precludes the disclosure of information or records which could be used to locate or harass a victim of crime, extends to the disclosure of the victim's identity. See *City of Tallahassee v. Florida Police Benevolent Association, Inc.,* 2023 WL 8264181 (Fla. 2023). The Court concluded that a victim's name does not qualify as information or records that could be used to locate or harass the victim or the victim's family and that Marsy's Law did not preclude the City from releasing the names of two police officers, who were claiming the status of victims under Marsy's Law.

In 2018, Florida voters approved a constitutional amendment (known colloquially as "Marsy's Law") which was designed to protect the rights of victims of crime. The provision states, in pertinent part, that "every victim is entitled to [various] rights, beginning at the time of his or her victimization," Art. I, § 16(b), Fla. Const., including "[t]he right to prevent the disclosure of

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vicarious liability against the father as the title holder, and vicarious liability against the mother as a bailee who allowed her son to use the vehicle. The mother argued at trial that she could not be liable under the dangerous instrumentality doctrine because it did not support holding family members vicariously liable as bailees. The motion was denied on the basis that a family member with an identifiable property interest in an automobile could be liable even if another family member legally owned the vehicle. The jury found the son 75% percent at fault and the plaintiff 25% at fault. The damages awarded totaled over $27 million. Under section 324.021(9)(b)3, Florida Statutes, the judgment against the father was reduced to $600,000, the statutory maximum against a vehicle owner vicariously liable under the dangerous instrumentality doctrine. Judgment was entered against the son and the mother together for over 18 million. An appeal followed.

The Florida Supreme Court reviewed the history of the doctrine, explaining that liability under the dangerous instrumentality doctrine arises from a concern that a car's true owner should not escape responsibility for injuries that result from its use. Liability "will generally flow from legal title and while persons with other property interests may be vicariously liable, the number of people liable under the doctrine is not multiplied every time a vehicle is shared." The doctrine looks to the one who originates the danger by entrusting the automobile to another; that person is in the best position to ensure that there will be adequate resources to pay the damages caused by its negligent operation.

In *Emerson*, the father originated the danger by giving his son permission to use the car and therefore was in the best position to face the plaintiff's claim for damages. A gratuitous bailment, like the mother giving her son permission to use the car, does not come with the same rights and responsibilities of title ownership because a bailee's control over the vehicle relies on possession alone. In other words, that the mother gave her son permission to use the car is immaterial to liability when the father/titleholder gave both mother and son the permission to use the car. Consequently, the father can be liable, but not also the mother. To hold both the mother and father responsible would create an arbitrary and impractical rule under which liability would be determined not by evaluating the vehicle's ownership and control—the doctrine's traditional focus—but on examining family relationships to identify bailments. Thus, liability generally lies with the titled vehicle owner or the person granting use of the vehicle, but not both together.

By: Jennifer C. Barron

information or records that could be used to locate or harass the victim or the victim's family, or which could disclose confidential or privileged information of the victim," Art. I, § 16(b)(5), Fla. Const. And a "victim," according to Marsy's Law, "is a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act or against whom the crime or delinquent act is committed." Art. I, § 16(e), Fla. Const.

The law has primarily garnered attention in those circumstances where law enforcement officers, involved in a use of force incident, have relied upon the law as a basis for precluding the release of their identity to the public. The standard rationale is that the officer was the victim of a crime (i.e., battery LEO) committed by the suspect, which in turn necessitated his/her use of force. In that situation, the officer's position is that the release of his/her identity can be used, along with other information, to do what the Constitution forbids namely, to locate or harass the officer or his/her family. That is the scenario in which this case arose.

On May 19, 2020, a man rushed at a Tallahassee police officer with a hunting knife. The officer defended himself by fatally shooting the assailant. Eight days later, on May 27, a different Tallahassee police officer responded to a crime in progress. The perpetrator, who had just stabbed a man to death, aimed a gun at the officer. The officer defended himself by shooting the man, killing him. A grand jury investigated each shooting and determined in each case that the shooting was lawful and a justifiable use of force. Reporters sought disclosure of the officers' names from the City. The officers, however, asserted that they qualified for Marsy's Law protections because they were victims of the assaults from which they had defended themselves. The officers argued that, as Marsy's Law victims, they were entitled to prevent the release of their personal identifying information, including their names. The City disagreed and intended to release their names to the media and so the FPBA sued the City to preclude the release of their identities.

The Florida Supreme Court ultimately concluded that a victim's name does not qualify as "information or records that could be used to locate or harass the victim or the victim's family." Art. I, § 16(b)(5), Fla. Const. The Court found that there was no textual basis in Marsy's Law for the idea that victims' names are categorically immune from disclosure. The Court reasoned that identifying a person was altogether different than locating or harassing that person, because a person's name, standing alone, is not the kind of information or record that can be used to locate or harass since it communicates nothing about where the individual can be found and bothered. Accordingly, the Court held that Marsy's Law did not preclude the City from releasing the names of the two police officers whose conduct is at issue in this case.

However, the Court was careful to clarify that its decision was limited to the determination that Marsy's Law does not guarantee to crime victims a generalized right of anonymity. The decision specifically notes that there are separate statutory exemptions contained in Florida's Public Records Law, already in existence, which do protect the identity of a victim of a crime. In pertinent part, the court noted as follows:

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FOURTH DISTRICT COURT OF APPEAL DENIES STANDING TO RESTAURANT TO CHALLENGE SETTLEMENT AGREEMENT BETWEEN A CITY AND THE STATE OF FLORIDA

A restaurant in Miami recently unsuccessfully appealed a lower court order dismissing the restaurant's amended complaint against the City of Miami on the basis of standing. *Manny Seafood Corp. v. City of Miami*, No. 3D23-0357, 2023 WL 8101728, at *1 (Fla. 4th DCA, Nov. 22, 2023). Manny Seafood sought a declaration from the lower court that the City of Miami's intended use of a parcel of waterfront property as a public park was prohibited by the terms of a July 22, 2010 Settlement Agreement between the City of Miami and the Florida Department of Community Affairs. Manny Seafood Corporation appealed a final order of the lower court dismissing, with prejudice, its amended complaint for lack of standing.

Manny Seafood argued the Settlement Agreement required the property to be used as working waterfront, and the City's planned use of the property as a public park would violate the agreement. In its amended complaint, Manny Seafood sought declaratory and injunctive relief. After conducting a hearing on the City's motion to dismiss, the lower court concluded Manny Seafood lacked standing to enforce the Settlement Agreement's terms. Of primary importance, the Fourth District affirmed that while Manny Seafood owns property near the subject City property, it was nevertheless a stranger to the Settlement Agreement. In fact, as the Fourth District noted, the agreement specifically stated it is not intended to benefit any person or entity who is not a party to the agreement. As the Fourth District affirmed, "unless a non-party is an intended third-party beneficiary to a contract, the non-party lacks standing to enforce the agreement." The Fourth District was also unpersuaded by Manny Seafood's reliance on the "aggrieved and adversely affected party" definition in section 163.3215, Fla. Stat. Under section 163.3215, an "aggrieved and adversely affected party" may appeal and challenge the consistency of a development order with an adopted comprehensive plan. Regardless of its status as a non-party to the Settlement Agreement, Manny Seafood argued it was an "adversely affected party" by virtue of the City's alleged violation of the agreement. In rejecting this argument, the Fourth District focused on the requirement of the involvement of a "development order"—defined as "any order granting, denying or granting with conditions an application for a development permit"—in order for section 163.3215 to be implicated. And, Manny Seafood's complaint did not suggest, much less allege, the City's proposed use of the subject property as a public park constituted a "development order" so as to implicate section 163.3215.

In affirming the lower court's dismissal of Manny Seafood's claims based on standing, the Fourth District affirmed the lower court's actions in terms of taking seriously its "gatekeeping" function, bearing in mind "[a] party must have standing to file suit at its inception and may not remedy this defect by subsequently obtaining standing." *Venture Holdings & Acquisitions Grp., LLC v. A.I.M. Funding Grp., LLC*, 75 So. 3d 773, 776 (Fla. 4th DCA 2011) (citation omitted).

By: Dale A. Scott

THE POTENTIAL LIABILITIES FROM TREES

If a tree, located on a government's right of way, easement, or property, falls on a Plaintiff or damages their property, is there liability? The answer, as with nearly every legal inquiry, is that it depends. The Florida Supreme Court provided guidance on this issue in *City of Jacksonville v. Foster*, 41 So.2d 548 (Fla. 1949).

In *Foster* Plaintiff filed suit against Jacksonville after a tree growing along Eighth Street blew over. It was noted that a strong but not inordinate wind, caused the tree to fall and demolish Plaintiff's vehicle and injure his wife. The City contended that the subject tree appeared healthy and; therefore, any defect was not readily apparent. The Plaintiff countered, claiming that signs of decay were readily apparent due to the presence of a white fungal growth present on the subject tree at the earth line.

The Court reviewed the record and found sufficient evidence was presented to the jury to support the conclusion that the white fungus indicated decay of the root structure. Further, testimony that was presented indicated decay at the bottom of the tree's trunk which was perceptible before the fall. A reasonable inspection would have revealed these defects. Additionally, the very nature of these conditions indicate they existed for a sufficient length of time to place the City on notice.

Before reaching its conclusion, the Court noted "[w]hile a city is not an insurer of the motorist or the pedestrian who travels its streets and sidewalks, *City of St. Petersburg v. Roach*, 148 Fla. 316, 4 So.2d 367, it is responsible, of course, for damages resulting from defects which have been in existence so long that they could have been discovered by the exercise of reasonable care, and repaired." Therefore, there was sufficient evidence to suggest that by the exercise of reasonable care the defect could have been discovered, the danger removed, and the Plaintiff's damages prevented.

From this authority, it is possible for a property owner to be found liable to a Plaintiff for damage caused by trees on said property. However, the question lies on whether a tree presents readily observable signs of rot or defect. Regular inspections and routine maintenance are suggested to discover and prevent injuries and damage resulting from falling trees. However, it is not always realistically possible for such preventative actions to be taken. Once in suit, such a claim for damages should be reviewed and opined on by an expert arborist. This way, the parties can understand how and why an apparently healthy tree came to fall. Additionally, researching the weather conditions on the date of any alleged loss ought to be conducted. Since severe weather may, ultimately, be the cause.

By: David A. Belford

FIRM SUCCESS

Circuit Court Dismisses Comprehensive Plan Consistency Challenge to City-Issued Development Order

Dale A. Scott recently obtained, for the City of Deltona, a dismissal with prejudice of a complaint which challenged a development order under section 163.3215, Fla. Stat., as allegedly being inconsistent with the City's comprehensive plan. The case was *Henry Hardy v. City of Deltona*, and was pending before the Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, under case number 2021-107-51-CIDL. The case had an unusual twist in that it was initially brought by a property owner who lived next to the 110-acre development property. After she filed suit she sold her property, but attempted to "assign" her rights in the lawsuit to a property owner who lives on the other side of the development property. We moved to dismiss the amended complaint filed by the assignee, who had been substituted into the case in place of the original plaintiff, on the grounds that any standing the original plaintiff had in the case disappeared when she sold the property, the assignment was illusory because of this, and the substitute plaintiff's amended complaint would not "relate back" to the original plaintiff's initial filing of her complaint. As to the "relate back" issue, section 163.3215 has a tight, 30-day statute of limitations, in that any action challenging a development order under the statute must be filed within 30 days of the order's issuance. This was a key consideration as the substitute plaintiff would be time-barred from bringing a separate lawsuit under section 163.3215, disconnected from the original plaintiff's claim. The circuit court ultimately agreed with our arguments, and dismissed the substitute plaintiff's amended complaint. Under section 163.3215, as the City is the prevailing party, it is entitled to recover its reasonable attorney fees and costs, and we are pursuing a claim for fees and costs on the City's behalf. The substitute plaintiff is now pursuing an appeal of the circuit court's ruling before the Fifth District Court of Appeal. We look forward to defending the City's position in the appeal.

Code Enforcement Fines Upheld on Appeal

Jennifer Barron represented a local municipality in an appeal of code enforcement fines. The code enforcement case was brought against a homeowner and the landscaping company hired by the homeowner for the removal of multiple trees from a lot adjacent to the homeowner's property. The homeowner did not obtain a permit for the removal of the trees, as required under the code of ordinances. The magistrate found two violations pursuant to section 162.09, Florida Statutes, which allowed for increased fines because the damage caused by the violations was irreparable and irreversible in nature. The homeowner removed decades-old trees from land he did not own, the trees could not be replaced as to their characteristics for at least 50 years, and the use of the heavy equipment disturbed a natural area down to dirt. A fine of $10,000 was imposed against the homeowner. On appeal, the homeowner asserted a slew of arguments, all of which the appellate court found unpersuasive. The appellate court upheld the magistrate's order of fines in favor of the city.

FIRM SUCCESS

Summary Judgment in School Board Lawsuit

Jennifer Barron and Cindy Townsend recently obtained summary judgment in a lawsuit arising from injuries sustained during a high school baseball practice. The plaintiff was a member of the baseball team and filed suit against a school board alleging negligence against the high school for, among other things, failing to properly supervise the plaintiff during a baseball drill in which he was hit by a baseball. It was undisputed that the student athlete and his parents electronically signed an FHSAA Consent and Release from Liability Certificate, prior to the season starting. The school board moved for summary judgment, arguing that the FHSAA release was enforceable to bar the plaintiff's claims. The Court agreed. In granting the motion, the Court held that the terms of the release were clear and unambiguous and a person of ordinary intelligence would understand that by signing it, the plaintiff and his parents released the school from damages arising from all claims of injury resulting from athletic participation. This included liability for negligence claims. The firm has successfully argued the enforceability of FHSAA releases in numerous cases and is delighted to provide our clients with this favorable outcome.

Settlement Reached in Federal False Claims Act Action

Dale A. Scott recently represented two relators in a qui tam, whistleblower lawsuit in federal court, brought under the federal and Florida False Claims Acts, against central Florida cardiac and veinous care service providers, which resulted in a $2,000,000 settlement. The relators' complaint alleged the "[d]efendants fraudulently and systematically . . . submitted [claims] to [government health care programs, namely Medicare and Medicaid], which [were] false or fraudulent and/or contain[ed] false and fraudulent misrepresentations regarding the types and extent of services rendered, and the medical necessity of services, and include[d] bills for services never rendered." The United States, acting through the Department of Justice, and the State of Florida, acting through the Attorney General's office, subsequently intervened in the case. The service provider defendants ultimately agreed to a (non-confidential) settlement. They agreed to pay $2,000,000 to resolve the claims, agreed to certain non-monetary terms, and agreed to pay relators' attorney's fees and costs. Following the settlement, United States Attorney for the Middle District of Florida Roger B. Handberg commented "[f]raud schemes represent a tangible threat to our public health programs" and this "settlement demonstrates our continuing commitment to the integrity of these programs, and to holding providers accountable for the truth of what they represent in their claims." The Department of Justice's press release concerning the case and the settlement is available at https://www.justice.gov/usao-mdfl/pr/florida-cardiology-pa-and-10-physicians-agree-pay-2-million-settle-false-claims-act. Florida Attorney General Ashley Moody, after the settlement, similarly commented: "The defendants in this case attempted to rip off taxpayers—even going as far as billing Medicaid and Medicare for services they claimed were provided to patients in Florida while these doctors were actually out of the country. As a result of their brazen scheme and the great work of whistleblowers, my Medicaid Fraud Control Unit and our federal partners, these defendants will now pay for ripping off taxpayers."

> "According to section 119.071(2)(j) 1., Florida Statutes, "[a]ny document that reveals the *identity* ... of the victim of a crime and identifies that person as the victim of a crime, which document is received by any agency that regularly receives information from or concerning the victims of crime, is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution."
>
> Today's decision neither weakens these various exemptions of certain information from public disclosure, nor prevents the Legislature—in performing the constitutional function reserved to it and not to us—from expanding them. Our decision instead is limited to the determination that Marsy's Law does not guarantee to crime victims a generalized right of anonymity."

Therefore, the *City of Tallahassee* decision should not be read to hold that the identity of a victim of a crime is now automatically subject to disclosure. It simply holds that Marsy's Law does not provide that protection. However, there may be other statutory exemptions upon which a victim of crime, including a law enforcement officer, may rely to protect his/her identity, i.e., section 119.071 (4)(d)2. a., Florida Statutes, which exempts from public records requirements "[t]he home addresses, telephone numbers, dates of birth, and photographs of active or former sworn law enforcement personnel ...". Notably, the Court declined to address the questions of whether police officers acting in an official capacity can be considered Marsy's Law "victims" or whether Marsy's Law requires the commencement of a criminal proceeding to take effect.

By: Michael J. Roper

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