# THE WEEK IN TORTS

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**CASES FROM THE WEEK OF MAY 16, 2014**

**ALTHOUGH THE PLAINTIFF WAS AWARE OF A FUEL SPILL, AND IT WAS AN OPEN AND OBVIOUS CONDITION, A DEFENDANT STILL HAS A DUTY TO MAINTAIN ITS PREMISES IN A REASONABLY SAFE CONDITION WHEN IT HAS ANTICIPATED POTENTIAL HARM AS A RESULT OF THE SPILL**

*Tallent v. Pilot Travel Centers*, 39 Fla. L. Weekly D953 (Fla. 2nd DCA May 7, 2014):

The court began by addressing the dichotomy between the duty to warn and the duty to maintain the premises in a reasonably safe condition. The plaintiff fell on a fuel spill at a gas station. Plaintiff sued the station arguing its negligent maintenance is what caused him to fall. In its answer, the station asserted the spill was open and obvious and that the station's employees complied with its fuel-spill cleanup procedures. The trial court granted summary judgment.

Because the plaintiff was a business invitee, the defendant owed him two duties: (1) the duty to use reasonable care in maintaining the premises in a reasonably safe condition; and (2) the duty to warn of dangers of which the owner has or should have knowledge and which are unknown to the invitee and cannot be discovered through the exercise of reasonable care.

In this case, the plaintiff was a veteran truck driver and immediately noticed the spill when he arrived at the station. He conceded that he saw the trash can blocking the aisles as he pulled up. The court ruled it was clear from the record that the station owed no duty to warn, because plaintiff had knowledge of the existence of the spill.

However, simply because he was aware of the spill, and it was open and obvious, does not end the inquiry. There were still issues of fact regarding whether the station maintained its premises in a reasonably safe condition.

The station relied on the testimony of its head maintenance person to prove that it followed company cleanup procedures that day. However, the maintenance person testified he had no personal recollection and could only provide testimony as to his usual and customary procedure for cleaning fuel spills. The size and extent of the spill was also in dispute, but there was testimony from a station employee that the spill was more than 20 gallons and that it spread at least 40 feet from its origin.

Because there were questions of fact, the court reversed the summary judgment.

**FEE ARRANGEMENTS ARE PROTECTED BY ATTORNEY/CLIENT PRIVILEGE**

*Tumelaire v. Naples Estates*, 39 Fla. L. Weekly D935 (Fla. 2nd DCA May 7, 2014):

A woman sued her HOA, raising various allegations against the board of directors and requesting an accounting. The HOA refused to produce the documents, and asserted that she was an agent for the mobile home park owner with whom the HOA had been in litigation for 15 years.

The HOA moved to compel the plaintiff to disclose information about her fee arrangements with her attorney and her accountant, as well as an unredacted copy of an email sent from her attorney to the park owner's attorney.

The court found the information on the fee arrangement was protected by the attorney client privilege. It also noted that billing records contained confidential communications also.

Notably, the court explained that the attorney/client privilege--unlike the work product doctrine--**is not concerned with the litigation needs of the opposing party**. Therefore, undue hardship is not an exception, nor is disclosure permitted because the opposing party claims that the privileged information is necessary to prove their case.

However, the unredacted email that the plaintiff's attorney sent to the park owner's attorney waived any work product privilege the plaintiff may have claimed on that.

As to the information regarding the plaintiff's accountant, because the plaintiff had named the accountant as an expert in her case, and this was discovery seeking the extent of the party's relationship with a particular expert, the balance shifted in favor of allowing the pretrial discovery.

**ERROR TO AWARD FEES FOR ATTORNEY TIME WHICH PREDATED THE PROPOSAL FOR SETTLEMENT'S *SERVICE* DATE**

*Mills-Telecorp. v. Kattour*, 39 Fla. L. Weekly D959 (Fla. 3rd DCA May 7, 2014).

**VOLUNTEER WHOSE RESPONSIBILITY WAS TO ENCOURAGE BOY SCOUTS TO ADVANCE BY COMPLETING REQUIREMENTS FOR THEIR BADGE LEVEL WAS ACTING WITHIN THE SCOPE OF HIS DUTIES AT THE TIME OF THE COLLISION, BECAUSE HE HAD BEEN ASSISTING AN EAGLE SCOUT IN COMPLETING A PROJECT, AND HAD DRIVEN HOME FOR THE SOLE PURPOSE OF RETRIEVING A CAMERA TO COMPLETE IT—POLICY COVERED DRIVER**

*Hubner v. Old Republic Insurance*, 39 Fla. L. Weekly D962 (Fla. 5th DCA May 9, 2014):

At the time of the collision, the driver was the director of advancement and leadership training for the Boy Scouts of America. His responsibility was to encourage scouts to advance by completing the requirements for whatever badge level they were working toward. He was assisting a scout in completing an Eagle Scout project which was to clean up a cemetery that had become overgrown by trees and debris. The cleanup took several weeks and throughout the project they visited the cemetery approximately eight times.

On the final day of the project, the driver was the last person to leave, and as he was leaving realized he did not recall seeing the scout take pictures of the completed project. He then drove home to get his camera. On the way home after taking the photographs, his car struck the plaintiff.

The insurance policy issued to the Boy Scouts covered registered volunteers while participating in their official scouting activity. The insurer argued that the driver was outside the scope of his duties when he returned to the cemetery to take the pictures. However, the court disagreed, and held that the purpose was to participate in scouting activity. The court concluded that when a vehicle is used by a registered volunteer while participating in an official scouting activity acting within the scope of his duties, it is in the "actual use of the scouting unit" as that phrase was intended in the policy.

**TRIAL COURT DID NOT DEPART FROM ESSENTIAL REQUIREMENTS OF LAW BY ALLOWING PLAINTIFF TO BE DEPOSED BY VIDEO CONFERENCE FROM A FOREIGN STATE – AT THIS JUNCTURE, COURT COULD NOT CONCLUDE THAT THE ORDER WOULD CAUSE DEFENDANT MATERIAL HARM**

*Florida Highway Patrol v. Bejarano*, 39 Fla. L. Weekly D974 (Fla. 1st DCA May 12, 2014):

The plaintiff sued after being hit by an FHP vehicle while walking along the road in Okaloosa County. At the time, he was an active duty U.S. Marine stationed nearby. After filing suit, the plaintiff was transferred to a base in California 2,000 miles away.

FHP sought to depose the plaintiff and set an in-person deposition in Fort Walton Beach, Florida. Plaintiff responded with a motion for protective order asking to appear via video conference that he would arrange and pay for, to limit work-related hardships and the expense of traveling back. FHP opposed the motion and filed a motion to compel.

The trial court allowed the video conference based on the plaintiff's active duty in the Marines, his involuntary transfer to California and his willingness to pay the costs of the video conference. The court reserved jurisdiction to determine whether the deposition's reporting and video were of sufficient quality to ensure it could be used.

Based on these findings, the court concluded there was no departure from the essential requirements of law and denied FHP's petition.

**WHETHER NEGLIGENCE IS ORDINARY OR GROSS IS A QUESTION TO BE RESOLVED BY THE JURY**

*Department of Agriculture v. Board of Trustees*, 39 Fla. L. Weekly D977 (Fla. 1st DCA May 12, 2014).

**AN AFFIRMATIVE DEFENSE SUCH AS RES JUDICATA CANNOT BE CONSIDERED ON A MOTION TO DISMISS, UNLESS THE FACE OF THE COMPLAINT AND ATTACHMENTS DEMONSTRATE THE DEFENDANT'S UNQUESTIONABLE MERIT**

*May v. Salter*, 39 Fla. L. Weekly D983 (Fla. 1st DCA May 12, 2014):

A court's gaze is limited to the four corners of the complaint when ruling on a motion to dismiss (which includes the attachments incorporated therein). All well pleaded allegations are taken as true.

However, when the face of a complaint and the attachments demonstrate a defense's unquestionable merit, an affirmative defense like res judicata may be properly considered on a motion to dismiss (even though it typically is not).