Legal Update

ROPER TOWNSEND SUTPHEN

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BARNES V. FELIX: "REASONABLENESS" FOR OFFICERS WINS AT THE SUPREME COURT

It's easy to look at the legal world at times these days and think everyone has just lost their mind. Division is expected, of course, in an adversarial system governed by laws passed and often fought over by two very different political parties. That is why many in the legal community might express surprise over the recent *unanimous* decision of the United States Supreme Court in *Barnes v. Felix*, 605 U.S. ___ (2025), particularly since the case dealt with the often politically charged topic of law enforcement use of force and the application of the Fourth Amendment. Nevertheless, the Barnes' holding reinforces long-standing precedent directing courts not to review a law enforcement officer's decision with the "20/20 vision of hindsight," and the four-justice concurrence uses Timothy McVeigh and Ted Bundy to drive the point home.

The narrow legal issue addressed in *Barnes* was, "whether, in resolving Fourth Amendment excessive-force claims, courts may apply the moment-of-threat rule . . . ." The case arrived before the Supreme Court when the estate of Ashtian Barnes sued Roberto Felix, Jr., a Texas law enforcement officer, after Felix shot and killed Barnes in a traffic stop. Barnes' mother filed under 42 U.S.C. § 1983, alleging Felix violated his Fourth Amendment rights. The trial court granted summary judgment for Felix and the Fifth Circuit Court of Appeals affirmed. Significantly, both courts seemed to do so reluctantly and by concluding the "moment-of-threat" rule precedent in that circuit only allowed them to look at a two-second window of Felix's encounter with Barnes—the two

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WHEN MORE THAN FINGER POINTING IS REQUIRED

Under Florida law, it is well known that if a defendant wants a non-party to share in the apportionment of fault, that defendant has to raise a "*Fabre* defense." Meaning, the defendant must plead an affirmative defense asserting that a non-party is also liable for the allegedly negligent act. However, as this case illustrates, finger-pointing alone is not enough. There must be evidence.

In *Ammirabile, et al v. Admiral's Port Condominium Association, Inc., et al,* the plaintiffs filed suit alleging the defendants failed to maintain the premises where a pipe in the air

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seconds where Felix was deemed "at risk of serious harm." Justice Elena Kagan's opinion for the unanimous Court clearly and emphatically rejected that approach, stating, "[w]e hold they may not because that rule constricts the proper inquiry into the 'totality of the circumstances.'"

The Court began its opinion reinforcing that the, "inquiry into the reasonableness of police force requires analyzing the 'totality of the circumstances'," citing *Graham v. Connor* for this proposition as well as that the review is from, "the perspective of a reasonable officer on the scene." Justice Kagan then pointed out the fact-specific nature of the inquiry, noting "the Fourth Amendment requires, as we once put it, that a court 'slosh its way through' a 'fact-bound morass.'" The Court then pointed out several important facts a court reviewing a use of force decision may consider, including the severity of the crime, the actions the officer took during the stop, and the stopped person's conduct. The unanimous Court then directly rejected the "moment of threat" rule, stating the "totality of the circumstances inquiry into a use of force has no time limit." Justice Kagan's opinion then went further, stating that, "[t]he history of the interaction, as well as other past circumstances known to the officer, thus may inform the reasonableness of the use of force."

Those familiar with the "reasonableness" and "totality" analysis in use of force cases may read the *Barnes*' opinion and say, "so what?" This is just the Court saying, "when we said consider everything, we meant it." It's possible, however, that this view is too narrow for a couple of reasons. First, the unanimous opinion specifically directs district courts to review facts that will often support an officer's use of force and referenced above. Second, and more importantly, is the concurrence written by Justice Kavanaugh and joined by Justices Thomas, Alito, and Barrett. This opinion was clearly written to make a point, with Justice Kavanaugh stating he wrote separately, "to add a few points about the dangers of traffic stops for police officers . . . ." The concurrence goes on to discuss the perils of traffic stops for police officers, emphasizing that, "the point here is that when a driver abruptly pulls away during a traffic stop, an officer has no particularly good or safe options." Justice Kavanaugh's concurrence goes so far as to invoke the facts that Oklahoma City bomber Timothy McVeigh and notorious serial killer Ted Bundy were both captured during traffic stops. The four justices then sign onto Kavanaugh's directive that, "judges should keep in mind that it is one thing to dissect and scrutinize an officer's actions with the 20/20 vision of hindsight in the peace of a judge's chambers . . . [and] [i]t is quite another to make split-second judgments on the ground in circumstances that are tense, uncertain, and rapidly evolving."

Only time and future opinions will tell if *Barnes* represents a shift of restatement. The opinion offers much more clarity for those advising law enforcement officers—take notes and document all interactions, particularly those involving traffic stops, well in advance of the interaction with the suspect. This includes documenting a suspect's criminal history, past interactions, and all observations that inform the officer's judgment before contact is made. This contemporaneous documentation will provide a trial court the best information for judging the officer's actions in the moment, regardless of whether future analysis looks like that of the past, or the one suggested in Justice Kavanaugh's concurring opinion.

By: Ryan Williams

conditioning system burst, causing the plaintiff to slip and fall. The defendant condo association contracted maintenance to a maintenance company, and as a result, the defendant condo association raised a *Fabre* defense naming the maintenance company. The plaintiffs subsequently added the maintenance company as a party defendant. The defendants each moved for summary judgment, asserting that the plaintiffs failed to proffer any evidence that the defendants breached a duty to the plaintiffs. In opposing summary judgment, the plaintiffs argued that the condo association had a nondelegable duty to maintain the premises and that the association raising the *Fabre* defense was sufficient to establish the maintenance company's negligence. The trial court granted summary judgment and the Third DCA ultimately affirmed.

The plaintiffs sought to avoid summary judgment, arguing that the condo association's *Fabre* defense against the maintenance company triggered liability without requiring any other kind of supporting evidence. Not so, said the court. A defendant is entitled to name a non-party and seek apportionment of fault—if the record contains sufficient evidence of that party's negligence. The mere assertion of a *Fabre* defense is not evidence and by itself, not enough. If a defendant wants a *Fabre* defendant on the verdict form, the defendant must be sure there is legally sufficient evidence in the record from which the jury can find that the *Fabre* defendant was at fault. Without any evidence, the *Fabre* defendant is not added to the verdict form. Under the same guise, a plaintiff cannot use the *Fabre* defense as evidence of liability.

This case offers an interesting illustration of the intersection between summary judgment and a *Fabre* defense. In this case, the plaintiffs added the maintenance company as a party defendant and the condo association had no obligation to produce evidence of the maintenance company's negligence at the summary judgment stage of the case. That burden fell to the plaintiffs. The plaintiffs apparently had no evidence of the maintenance company's negligence and the condo association's prior assertion of a *Fabre* defense was not evidence. Under Florida's summary judgment standard, which now aligns with the Federal standard, the defense does not have to offer evidence to prove or disprove a plaintiff's case. Thus, once the plaintiffs added the maintenance company as a party, the plaintiffs had to show the company's negligence. In this case, the summary judgment standard clearly worked in favor of the defense. However, if the plaintiff had not added the maintenance company as a party and this case went to trial, it would have been incumbent on the condo association to do more than finger point—to discover evidence of the maintenance company's fault to ensure the *Fabre* defendant could be listed on the verdict form.

By: Jennifer C. Barron

THE SLIPPERY SLOPE OF WATERBORNE LIABILITY

The infamous Florida summer is here again, school is out, the afternoon thunderstorms are in full swing, and the oppressive heat is here to stay. As with every year, people will flock to public, private, natural, and man-made bodies of water to cool off. Naturally, this influx of people will cause crowding and increase the possibility of accidents and injuries. Equally as infamous as the Florida heat is the litigious nature of these visitors. Any accidents or injuries, no matter how slight, will inevitably result in a lawsuit against the owner; therefore, this article will explore how and under what circumstances liability could fall on a property owner.

Florida law requires an owner only to maintain the facilities in question "in a reasonably safe condition for the purposes to which they are adapted and apparently designed to be used." *Savignac v. Dept. of Transportation*, 406 So.2d 1143, 1146 (Fla. 2nd DCA 1981); *see also Ramaden v. Crowell*, 192 So.2d 525, 528 (Fla. 2d DCA 1966). A property owner cannot be held liable for conditions which exist in natural or artificial bodies of water unless constructed to constitute a trap or there is some unusual danger not generally existing in similar bodies of water. *Id*; *see also Allen v. William P. McDonald Corp.*, 42 So.2d 706 (Fla. 1949). The accumulation of debris near the edges of waterways is a common phenomenon. *Tremblay v. South Florida Water Management Dist.*, 560 So.2d 1219, 1220 (Fla. 3rd DCA 1990). The location, type, and nature of the condition in each case must be considered to determine whether its presence in a body of water constitutes a trap or is a common phenomenon generally existing in similar bodies of water. *Whitaker v. City of Belle Galde*, 638 So.2d 186, 187 (Fla. 4th DCA 1994). If the responses to those inquiries are no and yes, respectively, there can be no liability. *Id.*

In *Trembly*, the plaintiff was injured while riding in an inner tube, pulled by a motorboat, in the Snake Creek Canal. *Tremblay v. South Florida Water Management Dist.*, 560 So.2d 1219, 1219-20 (Fla. 3rd DCA 1990). The plaintiff was thrown from her inner tube when she entered shallow water and her head struck a concrete block lying two or three inches below the water. *Id* at 1220. In reaching its conclusion, the court reasoned that debris often accumulates near the edges of waterways. *Id*. It was determined that the specific debris in this case was a common phenomenon and did not constitute an unusual nature not generally existent in similar bodies of water. *Id*.

The general rule, that is "supported by the decided weight of authority," provides that owners of "bodies of water are not guilty of actionable negligence on account of drownings therein unless [the bodies of water] are constructed so as to constitute a trap ... or unless there is some unusual element of danger lurking about them not existent ... generally" in similar bodies of water. *Feliciano v. Rivertree Landings Apartments, LLC.*, 387 So.3d 422, 427 (Fla. 2nd DCA 2024); *see also Allen v. William P. McDonald Corp.*, 42 So. 2d 706, 706 (Fla. 1949). Therefore, the determination of a landowner's duty turns on whether the circumstances create some unusual element of danger "lurking about" the body of water that does not exist in similar bodies of water. *Feliciano v. Rivertree Landings Apartments, LLC.*, 387 So.3d 422, 427 (Fla. 2nd DCA 2024); *see also Allen v. William P. McDonald Corp.*, 42 So. 2d 706, 706 (Fla. 1949); *Hendershot v. Kapok Tree Inn, Inc.*, 203 So. 2d 628, 629 (Fla. 2d DCA 1967).

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Generally, the sloped edges of a body of water are insufficient to maintain a cause of action. *Kinya v. Lifter, Inc*., 489 So. 2d 92, 95 (Fla. 3d DCA 1986) (affirming final judgment in favor of landowner based upon the body-of-water rule where "the 'slope' of the bank was not so different from natural bodies of water so as to render the lake" unusually dangerous); *Navarro v. Country Vill. Homeowners' Ass'n*, 654 So. 2d 167, 168 (Fla. 3d DCA 1995) (holding that "deep water drop -off" in lake "owned, operated, and maintained" by homeowners' association did "not constitute a concealed dangerous condition" that would trigger the exception to the body-of-water rule as "sharp change in depth is characteristic of lakes" (quoting *Saga Bay*, 513 So. 2d at 693-94)); *Kaweblum ex rel. Kaweblum v. Thornhill Ests. Homeowners Ass'n*, 801 So. 2d 1015, 1018 (Fla. 4th DCA 2001) (holding that the slopes on each side of a canal did not "transform this ordinary body of water into a trap or hidden danger").

So, what constitutes a "trap" or concealed dangerous condition" that would impose liability? In *Gilbertson v. Lennar Homes*, 629 So.2d 1029 (Fla. 4th DCA 1993), the District Court found that defendant's failure to construct a man-made lake in accordance with permit requirements and relevant regulations constituted actionable negligence. *See Gilbertson* at 1032. The purpose of the regulation was to prevent a "steep slope" and allow anyone entering the lake an opportunity to climb out. *Id*. With this precedent considered, it is vital to ensure any construction or renovation projects comply with relevant codes and construction ordinances.

Also, a governmental entity's decision to upgrade or improve or not to upgrade or improve is a planning level function for which there can be no tort liability. *See Kaweblum ex rel Kaweblum v. Thornhill Estates Homeowners' Association*, 801 So.2d 1015, 1016-17 (Fla. 4th DCA 2001); *Trianon Park Condo. Ass'n v. City of Hialeah,* 468 So.2d 912, 920 (Fla.1985); *see also Dep't of Transp. v. Konney,* 587 So.2d 1292, 1295 (Fla.1991); *Tucker v. Gadsden County,* 670 So.2d 1053, 1054 (Fla. 1st DCA), *review denied,* 679 So.2d 773 (Fla.1996); *Barrera v. State, Dep't of Transp.,* 470 So.2d 750 (Fla. 3d DCA), *review denied,* 480 So.2d 1293 (Fla.1985). Further, a canal's "sandy embankment with its sudden drop-off" was not held to render such a body of water a hidden trap in *Scott v. Future Investments of Miami, Inc.,* 559 So.2d 726, 727 (Fla. 4th DCA 1990). *Accord Corcoran v. Village of Libertyville,* 73 Ill.2d 316, 22 Ill. Dec. 701, 383 N.E.2d 177 (1978) (finding no hidden trap where drowning occurred in a drainage ditch which allegedly had a deceptively steep slope leading into it).

However, "when a governmental entity creates a *known* dangerous condition, which is not readily apparent to persons who could be injured by the condition, a duty at the operational-level arises to warn the public of, or protect the public from, the known danger." *City of St. Petersburg v. Collom,* 419 So.2d 1082, 1083 (Fla.1982). Governments enjoy additional protections for its "planning level" decisions; which provides absolute immunity to the governmental entity's decision whether and when to upgrade or repair its waterways. *Kaweblum ex rel Kaweblum v. Thornhill Estates Homeowners' Association*, 801 So.2d 1015, 1016-17 (Fla. 4th DCA 2001). Once action has been taken, actionable negligence arises if the project creates a hidden danger. Naturally, it is best to complete the project in compliance with all relevant codes. *Gilbertson v. Lennar Homes*, 629 So.2d 1029, 1032 (Fla. 4th DCA 1993). Failing this, all efforts should be taken to remediate the dangerous condition and warn the public to avoid and mitigate litigation.

By: David A. Belford

THERE IS NO SUCH THING AS A "GOOD FAITH REFUSAL" TO PRODUCE A PUBLIC RECORD

The 2nd DCA recently considered whether the lower court erred by failing to award attorneys' fees to the Council on American-Islamic Relations, Florida, after the Pasco County Sheriff refused to produce public records requested by the Council. The circuit court concluded that although the records had been withheld, because the Pasco Sheriff had objected to the Council's requests based on clearly stated statutory exemptions, an award of attorney's fees pursuant to Florida Statutes, Section 119.12(1), was not appropriate. The Council on American-Islamic Relations, Florida, appealed the ruling.

In 2011, the Pasco County Sheriff implemented an "Intelligence-Led Policing" program. A key goal of the program was to focus law enforcement on problem people, problem places, and problem groups. The Sheriff's office analyzed information from various resources and once the groups of "problem people" were identified, those persons would be subjected to heightened law enforcement attention.

One of the specific groups of "problem people" identified by the Sheriff was "At-Risk Youth". The objective was to engage with the youth to divert them from developing into prolific offenders. To that end, the Sheriff partnered with the Pasco County School Board and the Department of Children and Families. The Sheriff assessed a youth's qualification for the at-risk designation based on a complex array of factors. In 2020, the Tampa Bay Times published two investigative articles about the Sheriff's use of Intelligence-Led Policing. The publicity of the program brought with it additional public scrutiny, causing the Council on American-Islamic Relations, Florida, to submit a public records request to the Pasco County Sheriff seeking several categories of information about the program. After several amendments, the request ultimately sought production of sixty-three discrete categories of documentation. Most of the requests were resolved without issue; however, the Sheriff objected to three categories which sought documentation used in developing the various lists of "problem people," including the list of At-Risk Youth.

The Sheriff repeatedly rejected the Council's attempts to obtain the information it was requesting, and ultimately, in September 2022, the Council filed a petition for writ of mandamus to compel the production of the records by the Sheriff. The parties actively litigated the issues on the merits until the spring of 2023, when the Sheriff announced that it had decided to discontinue the Intelligence Led Policing program and would produce the documents at issue in the mandamus petition. The Council for American-Islamic Relations, Florida, moved to recover its attorneys' fees under section 119.12(1) on the ground that the Sheriff had unlawfully withheld the subject public records for two years, causing the Council to incur substantial costs litigating the issue. The circuit court denied the motion, concluding that there was no ***unlawful*** refusal to produce responsive documents.

In pertinent part, Florida Statutes, Section 119.12(1) provides that:

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(1) If a civil action is filed against an agency to enforce the provisions of this chapter, the court ***shall assess*** and award the reasonable costs of enforcement, ***including reasonable attorney fees***, against the responsible agency ***if*** the court determines that:

(a) ***The agency unlawfully refused to permit a public record to be inspected or copied*** . . . .

Pursuant to Florida Statutes, Section 119.07(1)(a), every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records. In the event some of the information in a requested record is exempt from public disclosure, its custodian must redact the exempt information and disclose the remainder. See Florida Statutes, Section 119.07(1)(d). The burden to show that an exemption applies is on the custodian. *Barfield v. Sch. Bd. of Manatee Cnty.*, 135 So. 3d 560, 562 (Fla. 2d DCA 2014); *Rameses, Inc. v. Demings*, 29 So. 3d 418, 421 (Fla. 5th DCA 2010).

Although some of the Sheriff's concerns may have required it to redact portions of the requested documentation before disclosing the same, there was no lawful basis for the Sheriff to outright refuse to provide the information that the Council requested under the disputed categories. As such, because the Pasco County Sheriff failed to demonstrate that any statutory exemption excused its obligation to furnish the records, the withholding of the information entitled the Council on American-Islamic Relations, Florida, to recover its attorneys' fees. The Sheriff raised a plethora of objections to producing the public records; however, the Court did not delve into any of these objections in detail, because none of them permitted the Sheriff to wholesale reject the public records request.

Of utmost importance here, the statute does not require a finding that the offending agency acted unreasonably or in bad faith. *Bd. of Trs., Jacksonville Police & Fire Pension Fund v. Lee*, 189 So. 3d 120, 127 (Fla. 2016). All that is necessary is a determination that "the public agency violated a provision of the Public Records Act in failing to permit a public record to be inspected or copied." *Id.* at 128.

The takeaway is that in order to avoid an award of attorneys' fees under Florida's public records law, a custodian of public records should always produce any requested records within a reasonable time, ensuring that all statutorily exempt information is redacted from such records. It is also advised that a redaction log, which cites to the specific statutory authority for the redactions, is submitted with the records. If you have any questions related to the application of the public records law, you should contact your local government attorney or feel free to reach out to our office directly.

NOTE: OPINION RELEASED MAY 21, 2025 – DECISION SUBJECT TO APPEAL
CAIR FLORIDA, INC., Appellant, v. CHRISTOPHER NOCCO, Sheriff of Pasco County, in his official capacity, Appellee. 2nd District. Case No. 2D2024-0788.

By: Sherry G. Sutphen

THE PROPOSAL FOR SETTLEMENT, ETCHED IN STONE

The Fifth District Court of Appeal recently decided an issue regarding the enforceability of a Proposal for Settlement that contained a scrivener's error. In *Neeld v. Combs*, 403 So.3d 439 (Fla. 5th DCA 2025), Plaintiff and Defendant were involved in an automobile accident. Plaintiff's counsel filed a Proposal for Settlement in the amount of $100,000. Defense counsel timely filed a Notice of Acceptance of the $100,000 Proposal for Settlement within 30 days as required under the law.

The day after Defense counsel filed the Notice of Acceptance, Plaintiff's counsel sent an email to Defense counsel stating that Plaintiff's counsel had "assumed" that the PFS filed was for the policy limits, and instead of $100,000, the PFS should have been filed for the policy limits of $1 million. As such, Plaintiff's counsel asked Defense counsel to "withdraw" the Notice of Acceptance so that Plaintiff's counsel could serve a "corrected" PFS in the amount of $1 million. Defense counsel declined to withdraw the Notice of Acceptance and instead delivered a draft of the $100,000 settlement check to Plaintiff's counsel.

Plaintiff's counsel subsequently filed a Motion to Withdraw the "Erroneously Filed" PFS, seeking to have the Acceptance set aside. Plaintiff's counsel argued that Defendant's insurance policy provided for limits of $1 million, and thus Defense counsel should have known that the $100,000 PFS was served in error, as not only was the pre-suit offer for $275,000, but there had purportedly been verbal statements by Plaintiff's counsel made to Defense counsel about the PFS itself being for policy limits, prior to its acceptance. Moreover, Plaintiff's counsel argued that his client had never authorized a PFS for less than the $1 million policy limits.

Defense counsel responded by filing a Motion to Enforce Settlement Agreement, arguing that a valid settlement agreement was formed, and there was no legal basis to withdraw Plaintiff's PFS.

After a hearing on the competing motions, the trial court granted Plaintiff's Motion to Withdraw and denied the Defendant's Motion to Enforce.

On appeal, a panel majority of the Fifth District outlined the procedural posture of this case. After discussion of the facts, the panel noted that under the case law and statutes, because the Proposal for Settlement was conveyed in writing by Plaintiff's counsel, and was accepted in writing by Defense counsel, "that's it" for the PFS to be enforceable. The majority further noted that there was only one mechanism for withdrawing a PFS: a withdrawal filed in writing *before* the PFS was accepted. Because Plaintiff had not withdrawn his PFS *prior* to its acceptance, the Fifth District held that the $100,000 PFS was valid and enforceable, and reversed the trial court's rulings.

By: Syed M. Qadri

CONTACT A MEMBER OF THE FIRM

Jeffrey L. Ashton - jashton@roperpa.com

Jennifer C. Barron - jbarron@roperpa.com

David A. Belford - dbelford@roperpa.com

David B. Blessing - dblessing@roperpa.com

Jeffrey A. Carter - jcarter@roperpa.com

Susan G. Gainey - sgainey@roperpa.com

David R. Jadon - djadon@roperpa.com

Jamie A. McManus - jmcmanus@roperpa.com

J. Chris Prusinowski - cprusinowski@roperpa.com

Syed M. Qadri - sqadri@roperpa.com

Michael J. Roper - mroper@roperpa.com

Kiley C. Smith - ksmith@roperpa.com

Sherry G. Sutphen - ssutphen@roperpa.com

Farideh E. Tadros - ftadros@roperpa.com

Pausha Taghdiri - ptaghdiri@roperpa.com

Cindy A. Townsend - ctownsend@roperpa.com

Ramon Vazquez - rvazquez@roperpa.com

M. Ryan Williams - rwilliams@roperpa.com

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