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No. 2D21-485

IN THE SECOND DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

ANTONIO RUIZ and MARIA HERNANDEZ,

Appellants,

v.

WENDY'S TRUCKING, LLC, a Florida Corporation, WENDY MARIE CABRERA, an individual, REINIER ALONSO LEYVA, an individual, ROBERTO GARCIA, an individual, J&J HAULING, INC., a Florida Corporation, and JESUS GARCIA, an individual,

Appellees.

On Appeal from the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, L.T. No. 16-CA-2511, Hon. Emily A. Peacock

INITIAL BRIEF OF ANTONIO RUIZ AND MARIA HERNANDEZ

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STATEMENT OF THE CASE AND FACTS

Nature of the case

While Antonio Ruiz was repairing a dump truck in Roberto and Jesus Garcia's parking lot for commercial trucks, it broke loose and crushed his legs, torso, and skull. *See* R. 98, 355. He sustained life-altering injuries. R. 81–82, 100. Along with his wife, Maria Hernandez, he sued the Garcia brothers and other defendants (Wendy's Trucking, LLC, Wendy Marie Cabrera, Reinier Alonso Leyva, and J&J Hauling, Inc.) for various torts. R. 28–39. At summary judgment, the circuit court ruled Roberto and Jesus owed Antonio and Maria no legal duty whatsoever. R. 526–27. Two issues are presented:

1. Did Roberto and Jesus owe Antonio and Maria[1] any duty when they: (1) created a dangerous situation that presented a foreseeable zone of risk at their commercial parking lot by ignoring truckers who were having their trucks repaired there, failing to properly prohibit repairs, and failing to put any safety procedures in place; and (2) invited Antonio onto the property?

2. Did other genuine disputes of material fact regarding breach, including but not limited to an expert affidavit regarding industry standards for commercial truck lots, preclude summary judgment?

[1] For clarity, this brief refers to the parties by their first names.

Course of the proceedings

Antonio sued Roberto and Jesus (the owners of the lot) for negligence (Counts V and VI), and Maria sued them for loss of consortium (Count VIII).[2] R. 34-38. Roberto and Jesus answered. R. 42–55.

After discovery, Roberto and Jesus moved for summary judgment. R. 56–63. Antonio and Maria opposed. R. 106–27. As part of their response, Antonio and Maria attached the affidavit of an expert, who opined that the industry standard for commercial trucking lots is to have adequate supervision and safety procedures in place. R. 128–29, 190–205.

The circuit court convened a hearing, which was transcribed. R. 536–90. During the hearing, and at the request of Roberto and Jesus, the circuit court refused to consider the expert's affidavit. R. 566. At the conclusion of the hearing, the circuit court granted summary judgment to Roberto and Jesus. R. 570. That oral ruling was reduced to a written final order. R. 526–27. This appeal followed. R. 595–96.

[2] Aside from their negligence and loss-of-consortium claims against Roberto and Jesus, Antonio and Maria also brought negligence claims against the driver of the dump truck (Reinier Alonso Leyva), a negligence and dangerous instrumentality claim against the owner of the dump truck (Wendy Cabrera), a vicarious liability claim against the company that employed the driver (Wendy's Trucking, LLC) and a negligence claim against the lessees of the parking spot where the accident took place (J&J Hauling, Inc.). Those claims, however, are not at issue in this appeal.

Disposition in the lower tribunal

A. The commercial parking lot

About 20 years ago, Roberto purchased a five-acre property at West Linebaugh Avenue in Tampa. R. 135, 139-140. He was 70% owner, and his brother, Jesus, was 30% owner. R. 144. The property was composed of crushed concrete and was used as a parking lot for large commercial trucks. R. 143, 137. That lot is where Antonio's accident occurred. R. 29–30, 80.

Roberto had an oral agreement with Eglisbel Tito Ginarte to pay him commissions for renting parking spots to commercial truck owners on the front side of the property. R. 164-184, 229-230. Roberto and Jesus rented the back portion of the lot to Tito for him to park about 30 independent dump trucks for a flat rate of about $1,000 per month. R. 214-15, 227. Roberto signed the majority of the parking lease agreements with the truck owners as landlord but had no written lease agreement with Wendy Cabrera, whose truck was parked at the lot when the accident occurred.[3] R. 181–84, 340.

Roberto made his living by setting tile and marble. R. 135. He visited his lot only once every month or two, often late at night on his way home from his main job when he had the time, to make sure that the people who

[3] The lease agreements forbade oil changes or engine work, but allowed emergency "car work" for tire change or battery changes. *See* R. 287–312. No action was ever taken to enforce these rules. *See* R. 287–312.

were parking there were actually paying customers. R. 141, 154. He said Tito was the one running the place. R. 142, 165. “He had to run that business, he had to keep everything clean. It wasn’t my responsibility. It was his responsibility to keep everything in order.” R. 154.

According to Tito, his job was only to find truckers who wanted to park in the lot and to collect monthly rents. R. 218-19. He had another job elsewhere, so he would just stop by the parking lot on Saturdays and sometimes after work during the week. R. 222. In any given week, he would be on the property only for one or two hours each time he would go, typically three or four times per week. R. 247, 278.

Roberto and Jesus never made Tito agree he was supposed to enforce any rules. R. 230-31. Roberto and Jesus never gave Tito a checklist of things truckers weren’t supposed to do on the property. R. 232. Roberto and Jesus knew Tito had never been in charge of supervising a lot where big trucks were parking and had no qualifications to run a big truck parking lot. R. 238.

According to Roberto, Tito was supposed to put up signs prohibiting mechanic work on site, but he wasn’t sure whether he ever did that or not. R. 145-146. Tito said the only signs Roberto asked him to put up were signs for parking, but then he later suggested that there were signs saying that mechanical work wasn’t allowed. R. 231, 251.

Roberto testified that the lot was strictly to be used as a parking lot and not for mechanical work. R. 147. “If there’s anything wrong with the truck then you should have the truck towed away to a mechanic shop.” R. 148. “If you’re going to have your car worked on you need to put it somewhere you know where it’s meant to have mechanic work.” R. 148. “When you go, you know, take your car to the mall, and you park in the mall, do you do mechanic work there? Of course not, you would take it to the proper place where you have the mechanic for your car work done, not on the piece of property that is not set up for mechanic duties.” R. 149.

Yet Tito testified there was no one at the property to enforce the rule against mechanical work being performed. R. 244. There was no one stationed at the front gate of the commercial parking lot. R. 254. There was no one in January 2016 supervising the property other than a homeless man who had lived on the property for approximately one year whom Tito had instructed to go around with a flashlight at night to look for thieves. R. 224–25, 227. The gate remained open. R. 142. There was nobody in charge of keeping out people who did not belong there. R. 254. Tito said there were no safety rules on the property. R. 250.

Tito testified he witnessed people doing mechanical work at the property. R. 264. At one point, Tito asked Roberto to hire someone to supervise

the property because he couldn't do it himself and was concerned people were doing the forbidden mechanical work. R. 277. Roberto refused because he didn't want to have to pay another person. R. 279.

Roberto testified he wasn't aware until January 2016 that people were working on their trucks on his property. R. 151. But he also testified that when he would drive by the property, he would see tires and oil filters thrown on the property. R. 153. He agreed he had the right to stop anyone he saw working on trucks. R. 165.

Wendy never talked to Tito about whether or not mechanical work was permitted on the property. R. 336. Although Tito testified he told every person parking a truck at the lot, including Wendy, that they weren't allowed to perform mechanical repairs on the property (R. 263), Wendy testified nobody told her she couldn't have mechanical work done on the property. R. 340.

B. The accident

On January 23, 2016, Antonio sustained severe, life-altering injuries at the property. R. 29-30, 80. On that date, Wendy called him to repair a transmission valve on her truck. R. 97. Antonio had repaired her truck at the same property the week before the accident as well. R. 96. Antonio saw other people repairing trucks while he was at the property. R. 98.

On the date of the accident, Antonio spoke with a representative of the lot whom he believed to be the supervisor (presumably the homeless man) when he arrived at the property. R. 97. Antonio told him he was there to repair Wendy's truck. R. 97. The man told Antonio that Wendy was on her way, so he should wait for her; he also offered Antonio a cup of coffee. R. 97. After waiting for a little while, Antonio decided to leave, but the man said, "[d]on't leave, because Wendy is right about to arrive." R. 97. No one at the property told Antonio he couldn't work on Wendy's truck. R. 99. Antonio didn't see any signs on the property advising that no vehicle repairs should be done on the property. R. 99.

When Wendy arrived, Antonio got under the truck to repair it. R. 98. It was raining at the time. R. 98. Alonso, the driver of Wendy's truck, didn't recall Tito ever talking with him about whether mechanical work was permitted at the yard. R. 434, 441. He didn't see any signs on the property prohibiting mechanical work. R. 441. While Antonio worked on it, Wendy was sitting in the driver's side of the cab of the truck because it was cold. R. 330. She said that when Antonio was finished with the truck, Alonso started the ignition. R. 330. Antonio felt the truck start and said, "from there that was it." R. 98. He lost consciousness after he was run over. R. 98. Wendy described

what she saw next, “the neck was destroyed and that side of the head was out, was gone. My God.” R. 355.

As a result of the accident, Antonio suffered, among other things, fractures of the ankle, fibula, tibia, ribs and vertebra, lacerations of the scalp, head, kidney and abdominal wall, sepsis and septic shock, gastrointestinal hemorrhage, acute kidney failure, respiratory failure, loss of vision to both eyes and amputation of his left leg. R. 81–82. Since the accident, Antonio is able to see only shapes or outlines. R. 100.

After the truck ran over Antonio, it also struck Charles Dudley’s truck. R. 378–80, 414. Charles had been renting parking spots for his trucks for about a year. R. 376. Throughout that year, he had mechanics come to the yard to work on his trucks and saw other truck owners do the same. R. 376. According to Charles, there were no signs on the lot prohibiting mechanical work until after the accident. R. 401.

“Everybody had mechanics. I mean whoever was parked there was people coming and going. I knew other guys that had mechanics coming and going.” R. 394. When asked if he was ever told that he couldn’t have a mechanic out there, he testified, “[t]hey did and then they didn’t. It was like one day okay and one day no, one day you know yes.” R. 393. When asked if he had ever seen another mechanic go underneath a tractor trailer “such as the

gentleman did on this particular day to do heavy duty mechanic work," Charles responded, "I saw it all the time over there." R. 400. Charles stopped parking at the lot shortly after the accident because he didn't like the commotion that went on there. R. 392-93.

After the accident, according to Tito, a big sign was placed at the entrance of the lot saying that mechanics were not allowed to perform work. R. 231, 251–52. At some point after the accident, Roberto ended his business relationship with Tito because he "got sloppy with the way he was doing stuff." R. 152. People were doing stuff on the property that they weren't supposed to. R. 153.

C. The lawsuit

The third amended complaint alleged that Roberto and Jesus had a nondelegable duty to maintain their premises in a reasonably safe condition and prevent unreasonable and dangerous activities from taking place on the premises. R. 34–36. It further alleged they breached that duty in nine different ways when they:

1. allowed or failed to prevent mechanic repairs and maintenance to be done on the property;

2. failed to hire someone to supervise the property and prevent mechanical repairs and maintenance on the property;

3. failed to hire someone qualified to supervise the property and prevent mechanical repairs and maintenance on the property;

4. failed to train someone to supervise the property and prevent mechanical repairs and maintenance on the property;

5. failed to supervise his agent(s) or employee(s) whose employment duty it was to prevent mechanical repairs and maintenance on the property;

6. failed to maintain or make available necessary safety equipment for trucks that were on the property;

7. failed to provide adequate warnings that mechanic repairs and maintenance were not permitted on the property;

8. failed to maintain an orderly flow of traffic for vehicles on the property by among other things, not having appropriate signs or markings to regulate traffic through the property, the parking spaces, and storage areas; and

9. had or allowed a convicted child molester to supervise the property without conducting a background check, providing training, or supervising his work in an unrestricted area generally open and available to access by the public.

R. 34–36.

D. The summary judgment papers

In moving for summary judgment (R. 56–63), Roberto and Jesus argued there was no evidence of any negligence on their part and no evidence that a condition of the property caused the accident (R. 57). They argued Antonio was a licensee while on the property and, thus, they owed him only the duty not to harm willfully or wantonly and did not breach that duty. R. 60.

Antonio and Maria responded that Roberto and Jesus had created a foreseeable zone of risk at their commercial parking lot by permitting

mechanical repairs to happen without proper safety measures in place. R. 113. They also argued Roberto and Jesus owed them the duty of reasonable care under ordinary negligence because the injury did not involve a defective condition of the premises but, rather, their own affirmative negligence. Finally, they argued that even if the case were evaluated under premises liability law, Antonio was an invitee (not a mere licensee) who was owed the highest duty of care. R. 106–27.

In support, Antonio and Maria filed the expert affidavit of Jay Zembower. R. 190. Mr. Zembower, who had over 40 years' experience in the automotive and trucking industry,[4] generally opined:

> Some of the measures the commercial vehicle parking lot must take is to: (A) ensure that no service and repair work is being performed on the commercial vehicles, (B) prevent unauthorized persons from entering the property, (C) supervise the activity on the property, (D) develop and implement safety policies and procedures; [and] (E) enforce the safety policies and procedures.

R. 193.

[4] Among additional qualifications, Mr. Zembower's experience included: serving as an expert witness in federal and state courts regarding procedures and policies for automotive service and storage and care of RVs, trucks, and other vehicles; 40 years' experience in the repairing of automobiles, trucks and recreational vehicles; 40 years' experience in the operation of automotive, truck, recreational vehicle, and tire facilities; Lemon Law arbitrator with over 2,000 case reviews; and land use commissioner and chairman of the planning and zoning board for Seminole County, Florida. R. 191.

In particular, Mr. Zembower opined that "[t]he industry standard for a commercial vehicle parking lot is to hire and have employees to oversee the operations." R. 193. He opined that an individual needed to be present on the commercial parking lot to enforce the rule that no mechanical work was to be performed. R. 193. In that regard, Roberto's "presence once every month or every few months was *inadequate supervision* for the property and *not consistent with industry standards* for supervision of a commercial vehicle parking/storage lot." R. 194 (emphases added).

He also opined that large, commercial trucks require supervision and oversight. "In the case of commercial vehicles weighing as much as 80,000 pounds and up to 53 feet in length, it's paramount to have adequate supervision and oversight as well as ample policies and enforcement as the nature of these vehicles are noisy and have numerous blind spots by their mere design are dangerous to those that may be in close proximity to the same." R. 194.

Mr. Zembower also opined how that industry standard supervision and oversight should apply to on-site mechanical repairs:

> [W]hile a mechanic is performing mechanical repairs, there must be someone in charge to oversee the safety of everyone on the property. That person must: (1) have a tag out/lock out protocol where the key to the truck or vehicle is either in a locked box held by the supervisor or with the mechanic; (2) ensure that no one is within or enters the cabin of the vehicle being worked

> on unless they are a qualified employee actively assisting the mechanic with the repair process."

R. 194.

E. The summary judgment ruling

At the hearing, Roberto and Jesus argued the circuit court shouldn't consider the plaintiffs' expert affidavit because it was submitted only four days before the summary judgment hearing. R. 546-47. Granting that motion, the circuit court refused to consider it. R. 566.

Subsequently, the circuit court ruled that Roberto and Jesus, the landowners, owed no duty whatsoever to Antonio and Maria. R. 570. It then granted summary judgment to Roberto and Jesus. R. 526, 566. "I do not believe that there is a duty of care based on the—in the facts and circumstances of this and the people who allow a truck to be parked on the property." R. 570. The circuit court then ordered "that there is no duty of care owed to Plaintiffs, under the facts and circumstances of this case, where a truck has been allowed to have been parked on a property." R. 526.

SUMMARY OF ARGUMENT

1. The circuit court committed an elementary legal error when it ruled no duty existed at all. As owners of the commercial lot, Roberto and Jesus owed Antonio the duty of reasonable care arising from both the general tort law of negligence and the common law regarding premises liability.

2. Further, even though the circuit court never reached the issue, material issues of fact exist regarding whether or not Roberto and Jesus breached the duty of care owed to Antonio and Maria. Mr. Zembower's expert affidavit, which the circuit court refused to consider, created additional disputed issues of material fact that precluded summary judgment.

ARGUMENT

I. Did the circuit court err when it ruled Roberto and Jesus owed Antonio no legal duty whatsoever?

Duty is a threshold issue that determines whether the courthouse doors will even be open to a plaintiff. *McCain* v. *Fla. Power Corp.*, 593 So. 2d 500, 502 (Fla. 1992). And the "nonexistence of one specific type of duty" doesn't mean no duty whatsoever is owed. *Chirillo* v. *Granicz*, 199 So. 3d 246, 251 (Fla. 2016). Here, the circuit court ruled Roberto and Jesus owed no duty of any kind. That ruling was wrong for two different reasons, either of which requires reversal.

The first reason is that the circuit court erred when it failed to recognize that the injury wasn't caused by a defect in the property itself. That elementary oversight by the circuit court had significant consequences. Namely, regardless of Antonio's status on the property as an uninvited licensee or invitee, it meant that Roberto and Jesus always remained liable for their own

affirmative negligence in creating a dangerous situation or a zone of foreseeable risk. *See infra* Argument I.A–B.

The second reason is that, in the alternative, even if a property defect had caused Antonio's injury (it didn't), and even if Antonio's status on the property as an uninvited licensee or invitee made any difference (it couldn't), the circuit court still erred when it ruled no duty was owed to him because Roberto and Jesus miscategorized his status on the property. In fact, Antonio wasn't an uninvited licensee; instead, he was an invitee entitled to the highest standard of care. *See infra* Argument I.C.

Standard of review

This Court owes no deference to the circuit court's summary judgment ruling.[5] A summary judgment ruling on a pure question of law is reviewed de

[5] Because summary judgment "deprives a party of his or her right to trial," it must be exercised "with restraint." *Clay Elec. Co-op., Inc.* v. *Johnson*, 873 So. 2d 1182, 1185 (Fla. 2003). And that's especially so in negligence cases. *Moore* v. *Morris*, 475 So. 2d 666, 668 (Fla. 1985) ("Summary judgments should be cautiously granted in negligence and malpractice suits.").

Appellate review of a summary judgment ruling requires a two-pronged analysis. *Byers* v. *Radiant Group, LLC*, 966 So. 2d 506, 508 (Fla. 2d DCA 2007). First, after every possible inference is drawn in favor of the nonmovants (here, Antonio and Maria), there must be "no genuine issue of material fact." *Id.* (citing *Huntington Nat'l Bank* v. *Merrill Lynch Credit Corp.,* 779 So. 2d 396, 398 (Fla. 2d DCA 2000)). If the record "raises even the slightest doubt that an issue might exist," then summary judgment is improper. *Pratus* v. *Marzucco's Constr. & Coatings, Inc.*, 310 So. 3d 146, 149 (Fla. 2d DCA 2021) (quoting *Competelli* v. *City of Belleair Bluffs*, 113 So. 3d 92, 92–93 (Fla. 2d DCA 2013)). Second, even if there appears to be no genuine issue

novo. *Sturgill* v. *Lucas*, 292 So. 3d 462, 465–66 (Fla. 2d DCA 2020). Whether a tort duty exists is a question of law reviewed de novo. *Chirillo*, 199 So. 3d at 248.[6]

Merits

A. Regardless of Antonio's status on the property as an uninvited licensee or invitee, Roberto and Jesus always had a duty under ordinary negligence principles to avoid their own affirmative negligence in creating a dangerous situation

The elements of negligence are "duty, breach, proximate causation, and damages." *Limones* v. *School Dist. of Lee County*, 161 So. 3d 384, 389 (Fla. 2015). In turn, there are four sources of a legal duty: "(1) statutes or regulations; (2) common law interpretations of those statutes or regulations; (3) other sources in the common law; and (4) the general facts of the case." *Sturgill*, 292 So. 3d at 465–66 (citing *Limones*, 161 So. 3d at 389).

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of material fact, summary judgment is proper only if the movants (here, Roberto and Jesus) are entitled to a judgment as a matter of law. *Byers*, 966 So. 2d at 508 (citing *Volusia County* v. *Aberdeen at Ormond Beach, LP*, 760 So. 2d 126, 130 (Fla. 2000)).

[6] The accident occurred on January 23, 2016, and the summary judgment ruling was rendered on January 8, 2021. Thus, the recent adoption of the federal summary judgment standard has no impact on this appeal. *See In re Amends. to Fla. Rule of Civ. Proc. 1.510*, 309 So. 3d 192, 194 (Fla. 2020) (providing effective date of May 1, 2021).

Here, the circuit court ruled Roberto and Jesus owed no duty at all.[7] But that ruling was wrong. Regardless of Antonio's status on the property as an uninvited licensee or invitee, Florida law always imposed upon Roberto and Jesus the duty to avoid their own affirmative negligence.

In particular, because they permitted mechanical repairs to occur on the commercial parking lot without having any safety procedures in place, Roberto and Jesus were affirmatively negligent in two different ways. First, they created a dangerous situation. *See infra* Argument I.A.1–4. Second, that dangerous situation resulted in a foreseeable zone of risk. *See infra* Argument I.B.

1. There's no dispute that Roberto and Jesus owned and controlled the lot

Under Florida law, a landowner is "most commonly liable for injuries that occur on the property." *Johnson* v. *Howard Mark Prods., Inc.*, 608 So. 2d 937, 938 (Fla. 2d DCA 1992) (citing *Pope* v. *Carl Hankins, Inc.*, 411 So. 2d 898, 899 (Fla. 2d DCA 1982)). At times, however, property owners can even be held liable for injuries that occur off the property. *Id.* In any event, "the issue of whether a party has a duty of care does not depend on ownership or title to the premises. Instead, the appropriate inquiry is whether the party

[7] In contrast, Roberto and Jesus argued they never breached the standard of care owed to a licensee, not that they owed no duty at all.

has the *ability* to exercise control over the premises." *Metsker* v. *Care-free/Scott Fetzer Co*., 90 So. 3d 973, 977 (Fla. 2d DCA 2012) (emphasis added) (reversing summary judgment where "multiple facts in the record" established the defendant retained control of the property).

Here, the parties agree Antonio was injured on Roberto's and Jesus's property. R. 29–30, 80. The parties also agree Roberto and Jesus owned the commercial lot and had the ability to exercise control over it. *See* R. 135, 139-140, 144. For instance, Roberto exercised that control when he hired Tito to run the property. R. 154. Roberto specifically admitted he had the right to stop anyone he saw working on trucks (although he didn't testify he ever did) when he would drive by to check on the property. *See* R. 165, 153. Further, Roberto and Jesus never even argued below that they had no ability to exercise control over the property, and the circuit court never ruled they lacked that ability either.[8]

[8] And Jesus's behind-the-scenes ownership doesn't absolve him from liability. The fact that there may be "joint responsibility or control over premises does not relieve a party from responsibility." *Id.* (citing *Craig* v. *Gate Mar. Props., Inc.,* 631 So. 2d 375, 378 (Fla. 1st DCA 1994)). Rather, a duty and liability for breach may "rest upon more than one party." *Id.*

2. Under ordinary negligence principles, landowners always have a duty to avoid their own affirmative negligence in creating a dangerous situation

In two cases, the Florida Supreme Court made clear that landowners are always responsible under ordinary negligence principles for their own affirmative negligence when they create a dangerous situation on their property. *See Maldonado* v. *Jack M. Berry Grove Corp.*, 351 So. 2d 967, 968 (Fla. 1977); *Hix* v. *Billen*, 284 So. 2d 209, 210 (Fla. 1973).

Just because an accident occurred on landowners' premises doesn't automatically mean—as the circuit court may have believed—that the first inquiry is whether the injured person was a trespasser, uninvited licensee, or invitee. Instead, where the presence of a person "is known to the landowner and the injury is caused by the *active conduct or affirmative negligence of the landowner*, as distinguished from the condition of the premises, *ordinary negligence* is the measure of care as in other negligent situations." *Hix*, 284 So. 2d at 210 (emphases added).[9]

[9] *Hix*'s holding isn't unique. For instance, the Fourth District has held, in ordinary negligence cases, that a "defendant owes the plaintiff a duty of reasonable care, regardless of the relationship between the defendant and plaintiff." *Nicholson* v. *Stonybrook Apartments, LLC*, 154 So. 3d 490, 492 (Fla. 4th DCA 2015) (citing *Fla. E. Coast Ry. Co.* v. *Se. Bank*, N.A., 585 So. 2d 314, 316 (Fla. 4th DCA 1991)). Similarly, the First District has held that when liability is based on the negligence of the landowner to the person injured on his property "unrelated to any defective condition of the premises, the status of the person injured is irrelevant and the standard of ordinary

In turn, *Hix*'s holding that "ordinary negligence" governs certain tort claims against landowners gives rise to the question how to define a landowner's active conduct or affirmative negligence. And that question is answered by *Maldonado*, 351 So. 2d at 968 (citing *Hix*, 284 So. 2d at 210).

In *Maldonado*, two fruit pickers brought their three-year-old child into the citrus grove where they worked. *Id.* at 967. While the parents filled tubs with fruit, they placed the child in an empty tub. *Id.* After tubs were filled with fruit, a mechanical hydraulic lifting device (known as a "goat") would lift those tubs and empty them into a truck. *Id.* at 967–68. Tragically, the child climbed out of his empty tub, and the goat driver inadvertently reversed over him, severing his spinal cord. *Id.* at 968.

Discovery established that the landowner "was aware of the fact that its employees brought their minor children upon the premises," but "had taken no precautions to protect the safety of the children." *Id.* Although the landowner "attempted to discourage pickers from bringing their children into the groves," there was "evidence from which a jury might determine that such efforts were insufficient and unreasonable in light of the dangerous situation created by the presence of small children in the work areas." *Id.*

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negligence set forth in *Hix* governs the landowner's liability." *Seaboard Sys. R.R. Inc.* v. *Mells*, 528 So. 2d 934, 937 (Fla. 1st DCA 1988).

On appeal to the district court, this Court affirmed summary judgment to the landowner and its insurer on the basis that the child was merely an uninvited licensee. *Id.* In particular, this Court explained, "a landowner owes a licensee a duty to refrain from wanton negligence or willful misconduct which might cause injury, to refrain from intentionally exposing the licensee to danger, and to warn of any dangerous latent defect or condition known to the landowner, but not open to ordinary observation to the licensee." *Id.* Applying that standard, and given the child's status as a mere uninvited licensee, this Court held there was no evidence the landowner breached any of those lessened duties.

The Florida Supreme Court, however, rejected this Court's explanation and reversed. From the outset, the Florida Supreme Court pointed out that this Court had misconceived the theory of the case as "negligence based upon a negligent condition of the premises, and the duty of the landowner in that regard." *Id.* at 968. In fact, the Florida Supreme Court held, the case actually involved "personal negligence on the part of the landowner." *Id.*

That distinction—between landowners' defective premises and landowners' personally negligent conduct—had significant consequences. As the Florida Supreme Court explained, it's "[o]nly when liability is predicated upon an alleged defective or dangerous condition of the premises" that an "injured

person's status [becomes] relevant." *Id.* Thus, unlike questions about "the liability of a landowner for injuries arising out of a defect in the premises," which depend on the plaintiff's status on the property, "the standard of ordinary negligence set forth in *Hix* governs the liability of a landowner to a person injured on his property unrelated to any defective condition of the premises." *Id.*

Applying that distinction between injuries that are caused *by* defective premises and other injuries that merely happen to occur *on* premises, the Florida Supreme Court explained, "the grove itself was not dangerous." *Id.* Instead, it was only the operation of the goat "among children present in the grove" that "created a dangerous situation." *Id.* Thus, the landowner's personal failure "to take sufficient precautions to alleviate the dangerous situation" was its active conduct or affirmative negligence. *Id.* Accordingly, the case was remanded for a jury trial at which ordinary negligence principles would apply. *Id.* at 968–69.

3. Roberto and Jesus owed a duty because their affirmative negligence created a dangerous situation

Here, *Maldonado* (and *Hix*) are squarely on point. As landowners, Roberto and Jesus created a dangerous situation when they permitted mechanical repairs to occur on the commercial parking lot without having any safety procedures in place. And, like in *Maldonado*, there was evidence from which

a reasonable jury could conclude any minimal efforts Roberto and Jesus took to discourage mechanical repairs were unreasonable and insufficient.

They knew truck owners were having their trucks repaired on the lot. Although Roberto claimed he was unaware that trucks were being repaired on his lot, he admitted he saw tires and oil filters when he'd drive by. R. 151, 153. In fact, Tito asked Roberto to hire a supervisor because he was worried about truckers having mechanical repairs done on the lot. R. 277–79. Roberto refused to because he didn't want to spend the money. R. 279. *See Bolton* v. *Smythe*, 432 So. 2d 129, 130 (Fla. 5th DCA 1983) (complaint adequately stated a cause of action for simple negligence where the property owner's sprinkler system sprayed water on a windshield, obstructed a driver's vision, and caused the driver to lose control of her vehicle because landowner had knowledge of the situation).

Charles said the property owners waffled on whether or not repairs were permitted: "They did and then they didn't. It was like one day okay and one day no, one day you know yes." R. 393. While Tito claimed to have told every person parking a truck at the lot that they were not allowed to perform mechanical repairs on the property, including Wendy (R. 263), she said nobody told her mechanical work on the property was forbidden. R. 340. In fact, she had her truck worked on before the date of the accident. R. 96.

Although Roberto said Tito was supposed to put up signs not to do any mechanic work on site, he couldn't say that he ever actually did that. R. 145–46. Antonio and Alonso did not see any signs on the property advising that no vehicle repairs should be done. R. 99, 441. On the date of the accident, Antonio told a "supervisor" he was there to repair Wendy's truck and was offered a cup of coffee and told to wait for her. R. 97. Nobody at the property told Antonio that he wasn't permitted to work on the truck that day. R. 99.

There was a gate that remained open at all times. R. 142. There was nobody at the lot's entrance to review who was coming and going. R. 254. The only person there on a regular basis was a homeless man on the property who was there at the request of Tito and was apparently holding himself out to be the supervisor. R. 224–27. The lot was poorly run, to say the least.

Roberto and Jesus failed to properly prohibit mechanical repairs and, thus, should've put safety measures in place to ensure that they were performed safely. Unfortunately, no safety measures were in place. Tito confirmed that no safety measures were in place. R. 250. There was no procedure to hold keys while trucks were being worked on. There was no procedure in place to ensure that no one was in the cab of a truck that was being worked on.

4. Because Antonio was injured as a result of the dangerous situation created by Roberto's and Jesus's affirmative negligence, any analysis of his status on the property was irrelevant

Because Antonio's injury was the result of the dangerous situation created by Roberto and Jesus, an analysis of his status on the property was irrelevant under *Hix* and *Maldonado*.

Following *Hix* and *Maldonado*, sister districts have consistently held that the status of a person injured in a landowner's premises is irrelevant so long as the injury was unrelated to a condition of the land. For instance, in *Walt Disney World Co.* v. *Beattie*, the Fifth District held the status of a boy struck by a Disney boat while swimming in a lake as an invitee or licensee was irrelevant because liability wasn't predicated on an alleged defect or dangerous condition of the premises itself. 428 So. 2d 693, 694-95 (Fla. 5th DCA 1983). In *Fla. E. Coast Ry. Co.* v. *Gonsiorowski*, the Fourth District held a plaintiff's status on the property was irrelevant with regards to his second injury (*i.e.*, being run over by a train after losing consciousness) because the injury wasn't caused "by the condition of the premises." 418 So. 2d 382, 384 (Fla. 4th DCA 1982). And in *Seaboard Sys. R.R., Inc. v. Mells*, the First District applied ordinary negligence standards when it ruled defendants couldn't raise a plaintiff's status on the property because the plaintiff, who had been drinking, was run over by a train, which rendered the injury a result of the

property owner's negligence rather than a defect in the property. 528 So. 2d 934, 937 (Fla. 1st DCA 1988).

Similarly, Antonio's status on the property isn't relevant because he was injured as a result of Roberto's and Jesus's affirmative negligence in allowing heavy commercial trucks to be repaired on their property without safety measures in place rather than a defect on the property. Thus, ordinary negligence principles apply.

B. Because they created a dangerous situation, Roberto and Jesus's affirmative negligence created a foreseeable zone of risk

Because Roberto and Jesus created a dangerous situation, their personal negligence must be measured by whether the "defendant's conduct foreseeably created a broader 'zone of risk' that poses a general threat of harm to others."[10] *McCain*, 593 So. 2d at 502. A legal duty arises "whenever a human endeavor creates a generalized and foreseeable risk of harming others." *Id.* at 503 (Fla. 1992); *see also Chirillo,* 199 So. 3d at 249 (*McCain* is the place to start when analyzing duty under Florida negligence law). "[E]ach defendant who creates a risk is required to exercise prudent foresight

[10] "As to *duty*, the proper inquiry for the reviewing appellate court is whether the defendant's conduct created a foreseeable zone of risk, *not* whether the defendant could foresee the specific injury that actually occurred." *McCain*, 593 So. 2d at 504 (emphases in original).

whenever others may be injured as a result." *Dorsey* v. *Reider*, 139 So. 3d 860, 863 (Fla. 2014) (citing *McCain*, 593 So. 2d at 503).

The scope of such a duty, in turn, depends on the risks involved. When a defendant's conduct creates a foreseeable zone of risk, the law generally will impose a duty on that defendant to either lessen the risk or "see that sufficient precautions are taken to protect others from the harm that the risk poses." *Sturgill*, 292 So. 3d at 465–66 (citing *McCain*, 593 So. 2d at 503). As the risk increases, so does the duty, because the risk defines the duty. *Id.* (citing *McCain,* 593 So. 2d at 503).

Here, Roberto and Jesus created a foreseeably risky situation where trucks were being repaired on their commercial parking lot property (because they failed to properly prohibit mechanical repairs from occurring), but they never lessened that foreseeable risk by putting in place any safety procedures or supervision. That is, they created a zone of risk that posed a general threat to others, namely to those individuals who were repairing the trucks, such as Antonio.

In *Dorsey*, the Florida Supreme Court held a lower court erred in ruling there was no duty even though the defendant's conduct of blocking the plaintiff from escaping an area between his truck and an adjacent car created a foreseeable zone of risk around his unlocked truck. 139 So. 3d at 862, 866.

There, a third party opened the truck, retrieved a tomahawk and struck the plaintiff. *Id.* at 862. The Court found that the "minimum legal threshold to establish duty was met" by the defendant's action of blocking the plaintiff. *Id.* at 866. The defendant had control over the area, or premises, where the injury took place (the area around the truck). *Id*.

Here, Roberto and Jesus had control over the lot they owned where the injury occurred. They created a zone of risk when they failed to properly prohibit mechanical repairs from taking place. They knew that trucks were being repaired on their property but failed to properly prevent that situation. Charles said the property owners waffled on whether or not repairs were permitted. He testified that, "[t]hey did and then they didn't. It was like one day okay and one day no, one day you know yes." R. 393. He said he saw people go underneath tractor trailers to work on them all the time. R. 400.

After creating this zone of risk, Roberto and Jesus then failed to put adequate safety measures in place. Roberto refused to hire someone to supervise the property when Tito suggested it. R. 277–79. He refused even though multiple truck owners testified that mechanical work was being performed on the property all the time. R. 98, 264, 394. Then, no safety procedures were put in place such as a tag out/lock out protocol, where the key to the truck or vehicle is either in a locked box held by the supervisor or with

the mechanic. They failed to ensure that no person was in the cab of a truck being worked on. Because they created a zone of risk by allowing the repairs to take place on their property, they were required to make sure the activity was carried out safely. They failed to and Antonio was seriously injured.

Where the risk of injury is heightened, so is the duty. *United States* v. *Stevens*, 994 So. 2d 1062, 1069 (Fla. 2008). In *Stevens*, the Florida Supreme Court answered the question, certified by the Eleventh Circuit, as to whether a laboratory owed a duty of care to members of the general public to avoid an unauthorized interception of anthrax. *Id.* at 1064, 1070. The Court found that the allegations that the government "generated, tested, and handled deadly laboratory organisms, but failed to employ adequate security procedures," were adequate to state a claim for negligence under the "facts of the case" pursuant to Florida law. *Id*. at 1069.

The Court noted that the Restatement of Torts provides guidance as to a "foreseeable zone of risk" analysis. *Id.* at 1067. Particularly, section 302 provides that "[a] negligent act or omission may be one which involves an unreasonable risk of harm to another through either (a) the continuous operation of a force started or continued by the act or omission, or (b) the foreseeable action of the other, a third person, an animal, or a force of nature." *Id.* at 1067. Where the government chose to work with an ultrahazardous

substance, it had a duty "to contemplate a countless variety of situations in which a reasonable laboratory in their position must anticipate and guard against the unauthorized interception and dissemination of the dangerous substance." *Id.* at 1070.

Here, while Defendants chose to look the other way and allow commercial truck repairs to occur on their property, they had a duty to contemplate what harm could occur as a result and then guard against that. They did not. There was a heightened risk of injury where very large commercial trucks were coming in and out of the commercial parking lot. The fact that mechanical work was taking place on the lot increased those risks. Because there was a heightened risk, they had a heightened duty. Unfortunately, there was no "tag out/lock out" protocol where the key to the truck or vehicle being repaired is put in a locked box or held by a supervisor. There was also no procedure in place to assure that no one was within the cabin of a truck being worked on. As a result, Antonio sustained injuries that changed the course of his life. Because Roberto's and Jesus's actions and inactions created this zone of risk, they owed a duty to Antonio to ensure that sufficient precautions were taken to protect him from the harm that the risk posed. The trier of fact should determine whether or not they met that duty. *See infra* Argument II.

C. Even if premises liability law were applicable, Antonio was an invitee, not an uninvited licensee, so Roberto and Jesus owed him the duty to use reasonable care in maintaining their property in a reasonably safe condition

Even if the case were viewed through a premises liability lens, the circuit court would still be wrong. That's because Antonio was an invitee. As such, Roberto and Jesus owed him a duty of reasonable care.

1. An invitee is anyone who is expressly or impliedly invited onto property by a landowner or someone who controls the property

A landowner owes three types of persons a duty of reasonable care: (1) business invitees; (2) public invitees; and (3) licensees by invitation. *City of Pensacola* v. *Stamm*, 448 So. 2d 39, 41 (Fla. 1st DCA. 1984) (citing *Post* v. *Lunney*, 261 So. 2d 146, 147–49 (Fla. 1972), and *Wood* v. *Camp*, 284 So. 2d 691, 695 (Fla. 1973)). All three are types of invitees. *Id.* at 41. The duty owed is twofold: "(1) the duty to use reasonable care in maintaining the property 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 by the invitee through the exercise of reasonable care." *Wolford* v. *Ostenbridge*, 861 So. 2d 455, 456 (Fla. 2d DCA 2003) (citing *Knight* v. *Waltman*, 774 So. 2d 731, 733 (Fla. 2d DCA 2000)).

At one time, Florida law wouldn't categorize plaintiffs as invitees unless their visit conferred some economic benefit to the landowner. But that "mutual benefit" test was replaced by an "invitation test." *Post*, 261 So. 2d at 147–49. Relatedly, the categories of invitees were expanded to include "those who are 'licensees by invitation' of the property owner, either by express or reasonably implied invitation," and the distinction between social and commercial guests was removed. *Wood*, 284 So. 2d at 695; *see also see also Breaux* v. *City of Miami Beach*, 899 So. 2d 1059, 1064 (Fla. 2005) (an invitee "is a licensee on the premises by invitation, either express or reasonably implied, of the owner or controller of the property").

2. Antonio was an invitee owed the highest duty of care

Antonio was an invitee because it's undisputed that Wendy, a lessee who had a parking space on Roberto's and Jesus's lot, invited him onto the property both expressly and impliedly. R. 97. This Court has repeatedly held that a lessee's invitation renders the recipient an invitee, not a licensee.

For instance, in *Smith* v. *Reppond*, this Court held the status of an injured plaintiff on the property (who was injured by a dog that didn't belong to the property owner) was for the jury to decide where the plaintiff had been invited onto the property by two women who were former girlfriends of a tenant. 555 So. 2d 431, 432 (Fla. 2d DCA 1990). Similarly, in *Emerine* v.

Scaglione, 751 So. 2d 73, 74 (Fla. 2d DCA. 1999), this Court reversed a summary judgment granted in favor of property owners and ruled, as a matter of law, that the invited guest of the tenant was an invitee who was owed a duty of reasonable care.

Sister districts have arrived at identical holdings. In *Charterhouse Assocs., Ltd., Inc*. v. *Valencia Reserve Homeowners Ass'n, Inc.*, the Fourth District held that a personal trainer invited to the fitness center by a lessee was an invitee, not a mere licensee. 262 So. 3d 761, 764 (Fla. 4th DCA 2018). In particular, it chastised that circuit court for focusing on the fact that the trainer was paid for his services when it should have looked at the express invitation of the lessee. *Id.* at 766. And in *Indus. Affiliates, Ltd.* v. *Testa*, the Third District held a tenant's employee was the property owner's invitee. 770 So. 2d 202, 204 (Fla. 3d DCA 2000).

Roberto's and Jesus's purported supervisor or agent (*i.e.*, the homeless man) also invited Antonio to come onto the property on the date of the accident when he told him to wait for Wendy and have a cup of coffee. R. 97; *see also Pedreira* v. *Silva*, 468 So. 2d 1073, 1074 (Fla. 3d DCA 1985) ("[o]ne's status as an invitee may be established by the express or implied acts of the owner or his family or agents"). In *Garufi* v. *Sch. Bd. of Hillsborough County*, 613 So. 2d 1341, 1342 (Fla. 2d DCA 1993), the parent

visitor was an invitee of the school where the school had knowledge of her presence.

Here, Antonio had been to the property once before to work on Wendy's truck. R. 96. Antonio had also seen other people working on other trucks on the property. R. 98. Accordingly, Antonio was also impliedly invited onto the property.

There is no question that Antonio was invited onto the property by both Wendy and the homeless man. Thus, he was owed the duty owed to an invitee, including the duty to maintain the property in a safe condition. At the very least, the issue should've been submitted to a jury. Although it can be a question of law, the status of a person on the property of another is generally a question of fact. *See Wood*, 284 So. 2d at 696 (question for the jury in that case); *see also Lukancich*, 583 So. 2d at 1072; *Smith*, 555 So. 2d at 432 (plaintiff's status on the property was a question for the jury); *Fla. Power & Light Co.* v. *Daniell*, 591 So. 2d 284, 286 (Fla. 5th DCA 1991) (reversing summary judgment where, among other rulings, the determination of the status of the plaintiff coming onto another's property was for a jury). Accordingly, the circuit court erred in determining that no duty existed as a matter of law because it potentially misconceived Antonio's status as a licensee when he

was, in fact, an invitee (the circuit court never specifically stated why it was ruling there existed no duty).

3. Even if Antonio were a licensee, he was still owed a lessened duty of care

Even if this Court were to categorize Antonio as a licensee (which he was not), Roberto and Jesus still owed him a duty. It's just a lessened one. The circuit court's ruling that there was *no duty* owed (R. 60) ignored the reality that even uninvited licensees are owed a duty to refrain from "wanton negligence or willful misconduct that would injure the licensee, to avoid intentionally exposing the licensee to danger, and to warn of any known dangerous condition that is not open to ordinary observation." *Emerine*, 751 So. 2d at 74.

Roberto's and Jesus's reliance on *Stewart* v. *Texas Co.*, 67 So. 2d 653, 654 (Fla. 1953), at summary judgment was misplaced. R. 60. There, the Florida Supreme Court categorized the plaintiff as a licensee where she walked to a gasoline service station for the purpose of getting change for a $10 bill so that she could pay "her help." *Id.* at 654. While the case was decided before *Post*, in which the Florida Supreme Court adopted the invitation test for invitees instead of the mutual benefit test, the plaintiff was also clearly not invited in that scenario. Here, quite to the contrary, Antonio entered Roberto's and Jesus's property after having been there before, after having seen

others working on trucks, at the specific invitation of Wendy, a lessee, and at the invitation of the purported supervisor or agent of the property.

II. Although never reached by the circuit court, did genuine disputes of material fact regarding breach preclude summary judgment?

Because the circuit court erroneously decided the duty issue in favor of Roberto and Jesus, the circuit court never addressed the remaining issue of breach. *See* R. 570. Accordingly, this Court need not address that issue and should remand the case based on the circuit judge's erroneous decision regarding duty. *See, e.g., Sturgill*, 292 So. 3d at 465 (confining appellate analysis to the issue of duty where trial court did as well). But if this Court decides to review the issue of breach in the first instance, ample evidence exists upon which a jury could find Roberto and Jesus were negligent in failing to meet the duty required of them. In this regard, the circuit court abused its discretion in failing to consider the affidavit of Mr. Zembower, which raised additional disputed issues of material fact.

Standard of review

The grant of summary judgment is reviewed de novo. *See supra* Argument I (discussing standard of review). Additionally, the refusal to consider an affidavit when ruling on a summary judgment motion is reviewed for abuse of discretion. *See Fla. Fed. S&L Ass'n* v. *Martin*, 400 So. 2d 151, 153 (Fla. 2d DCA 1981) (court's rejection of affidavits filed in support of bank's cross

summary judgment motion was an abuse of discretion); *see also Deshazior* v. *Sch. Bd. of Miami-Dade County,* 217 So. 3d 151, 152 (Fla. 3d DCA 2017) (reviewing circuit court's exclusion of a late-filed affidavit in opposition to the summary judgment motion for abuse of discretion).

Merits

A. Several genuinely disputed issues of material fact regarding breach precluded summary judgment

Regardless whether viewed as affirmative negligence or premises liability, there exist genuinely disputed issues of material fact whether Roberto and Jesus breached their duty.

To fulfill their duty under the "foreseeable zone of risk" analysis, Roberto and Jesus needed to either lessen the risk to Antonio or see that "sufficient precautions" were taken to protect him from the harm that the risk posed. *See Sturgill*, 292 So. 3d at 465–66 (citing *McCain*, 593 So. 2d at 503). From the outset, Roberto and Jesus breached that duty in two obvious ways.

First, they failed to properly prohibit mechanical work from taking place on their property. *See* R. 99, 145–46, 231, 251–52, 441. Second, even if they took some effort to prohibit such repairs, they undertook virtually no effort to enforce such a prohibition. According to Tito (R. 244), there was no one there in charge of enforcing the "no mechanical work" rule. *See, e.g.*, *Poe* v. *IMC Phosphates MP, Inc.*, 885 So. 2d 397, 403 (Fla. 2d DCA 2004) (genuine

issue of material fact existed as to whether adequate signage or other indication at the property entrance indicated plaintiff was entering private property). Accordingly, simply by virtue of their failure to prohibit or enforce a purported prohibition on mechanical repairs, a reasonable jury could have found that Roberto and Jesus breached their duty to lessen the risk posed by the mechanical repairs or put sufficient precautions in place to protect from the harm of mechanical repairs.

Additionally, beyond the failure to prohibit or enforce a prohibition on mechanical repairs, there was additional evidence of breach. Roberto visited the property only once every month or two. R. 141, 154. The man he claims was in charge, Tito, would stop by the property three or four times a week for an hour or two. R. 247, 278. In January 2016, there was no one at the property to supervise it other than the homeless man that Tito allowed to be there. R. 224–25, 227. At some point, Tito asked Roberto to hire someone to supervise the property because he couldn't do it himself and he was concerned that there were people doing the mechanical work that they weren't supposed to be doing. R. 277. Roberto refused. No one was stationed at the front gate of the lot. R. 254. The gate remained open and there was nobody in charge of keeping out people who did not belong there. R. 14, 254. In

short, Roberto and Jesus chose to run a commercial parking lot and then ran it poorly.

Furthermore, there isn't much dispute in the record at all that Roberto and Jesus put in place no safety precautions. Roberto and Jesus knew or should have known that commercial trucks were being repaired on their property and, yet, they did not properly prohibit the activity or put any safety procedures in place so that the activity was safe. It is the job of a jury, not the judge, to decide whether Roberto's and Jesus's actions were sufficient or insufficient.

Even under a premises liability analysis, "[a]n owner who creates a dangerous condition already has breached the duty to use reasonable care in maintaining the property in a reasonably safe condition regardless of the owner's knowledge of the dangerousness of the condition." *Wolford* v. *Ostenbridge*, 861 So. 2d 455, 456 (Fla. 2d DCA 2003) (the duty to use reasonable care in maintaining the property in a reasonably safe condition and the duty to warn of dangers that the owner has or should have knowledge of and are unknown to the invitee are two distinct duties). Material issues of fact exist over whether or not Roberto and Jesus created a dangerous condition when they knew mechanical repairs were taking place, failed to prohibit them, a homeless man was the only constant "supervisor," the gate was left

open at all times, no safety procedures were put in place, and Antonio was injured. *See Klaue* v. *Galencare, Inc.*, 696 So. 2d 933, 935 (Fla. 2d DCA 1997) (reversing a grant of summary judgment to defendant where plaintiff was injured after files fell on her because a jury had to determine whether defendant used reasonable care in the manner in which they stacked the files that fell on plaintiff causing her to fall); *see also Stevens* v. *Jefferson*, 436 So. 2d 33, 35 (Fla. 1983) (upholding judgment for plaintiff who established bar owner "either created a dangerous condition or allowed one to exist by the manner in which he ran his establishment" when he failed to train anyone to maintain order in his bar, which previously had numerous fights and shootings).

B. The circuit court abused its discretion when it refused to consider a timely served expert affidavit, which created additional disputed issues of material fact regarding breach

At the summary judgment hearing, the circuit court abused its discretion when it erroneously refused to consider Mr. Zembower's expert affidavit and stated, "I'm just going to say at the outset, I'm not considering the affidavit of Zembower because that's not record evidence in the case." R. 566.

Committing an arithmetic error, Roberto and Jesus had argued Mr. Zembower's affidavit was served only "four days ago" and that Antonio and Maria were attempting to use his opinions about commercial lot standards to

"substitute for the judgment of the court" regarding the applicable legal duty. R. 564–65. Counsel for Antonio and Maria corrected the circuit court that the affidavit was timely filed on December 4th for the December 9th hearing. *See* R. 534, 566. The circuit court didn't address the issue of Mr. Zembower's affidavit again. *See* R. 566–72. Refusal to consider the affidavit was an abuse of discretion because the affidavit was timely filed and bore on the ultimate issue of negligence.

It's beyond question that Mr. Zembower's affidavit was timely served. The version of Florida Rule of Civil Procedure 1.510(c) in effect in December 2020 provided that "[t]he adverse party must identify, by notice served pursuant to Florida Rule of Judicial Administration 2.516 at least 5 days prior to the day of the hearing if service by mail is authorized, or *delivered, electronically filed, or sent by e-mail no later than 5:00 p.m. 2 business days prior to the day of the hearing*, any summary judgment evidence on which the adverse party relies." *See In re Amends. to Fla. Rule of Civ. Proc. 1.510*, 309 So. 3d 192, 196 (Fla. 2020) (emphasis added); *see also In re Amends. to Fla. Rules of Civ. Proc.*, 257 So. 3d 66, 75–76 (Fla. 2018). Antonio and Maria e-filed and e-served the affidavit at 6:57 p.m. on Friday, December 4, 2020. R. 128. Friday, December 4 was three business days before the Wednesday,

December 9 hearing. *See* R. 534. Accordingly, the electronically filed and served affidavit were more than timely under that version of Rule 1.510(c).[11]

Further, the affidavit bore on the ultimate issue of negligence. Courts have routinely held that the violation of industry standards is evidence of negligent breach of a legal duty. *Seaboard Coast Line R.R. Co.* v. *Clark*, 491 So. 2d 1196, 1198 (Fla. 4th DCA 1986) (citing *Nesbitt* v. *Cmty. Health of S. Dade, Inc.*, 467 So. 2d 711, 712–18 (Fla. 3d DCA 1985)); *Hilliard* v. *Speedway Superamerica LLC*, 766 So. 2d 1153, 1155 (Fla. 4th DCA 2000). In *Hilliard*, the court reversed summary judgment in a slip-and-fall case where the plaintiff had an expert affidavit opining that industry standards require that changes in elevation of steps must be clearly identifiable by pedestrians. *Id.* at 1154. The affidavit created a material issue of fact as to whether such an industry standard existed and whether it was breached. *Id.* at 1155; *see also Chirillo*, 199 So. 3d at 252 (expert's opinion in a medical malpractice case was relevant to the applicable standard of care). In *Ouellette* v. *Patel*, this

[11] Courts have routinely reversed summary judgment *even* where an affidavit was not submitted until a motion for rehearing of the summary judgment was filed. *See Knowles* v. *JPMorgan Chase Bank, N.A.*, 994 So. 2d 1218, 1220 (Fla. 2d DCA 2008) (reversing summary judgment of foreclosure where court hadn't considered an affidavit attached to a motion for rehearing); *see also Petrucci* v. *Brinson*, 179 So. 3d 398, 400–02 (Fla. 1st DCA 2015) (reversing grant of summary judgment where affidavit was filed along with a motion for rehearing that would have precluded summary judgment, and describing a litany of cases doing the same).

Court reversed summary judgment where the circuit court erred in refusing to consider an affidavit that would have "raised an issue of fact concerning what the prevailing professional standard of care required." 967 So. 2d 1078, 1083 (Fla. 2d DCA 2007).

Here, Mr. Zembower opined that the industry standard for a commercial vehicle parking lot was to have employees to oversee the operations. R. 193. Material issues of fact exist as to whether Roberto's once-a-month visits, Tito's estimated three-to-eight hour per week visits, and the presence of the homeless man who lived on the property were "sufficient" to satisfy this standard. Mr. Zembower also opined that ample policies and enforcement were also required due to the dangerous nature of the vehicles being parked on the lot. R. 194. In contrast, there's no evidence that any safety procedures were put in place by Roberto or Jesus.

Specifically, with respect to the mechanical repairs, Mr. Zembower stated that:

> [W]hile a mechanic is performing mechanical repairs, there must be someone in charge to oversee the safety of everyone on the property. That person must: (1) have a tag out/lock out protocol where the key to the truck or vehicle is either in a locked box held by the supervisor or with the mechanic; (2) ensure that no one is within or enters the cabin of the vehicle being worked on unless they are a qualified employee actively assisting the mechanic with the repair process."

R. 194. These precautions were not put in place by Roberto or Jesus.

Summary judgment is inappropriate when a relevant affidavit is not considered. In *Lawrence* v. *Pep Boys Manny Moe & Jack, Inc.*, 842 So. 2d 303, 305 (Fla. 5th DCA 2003), the Fifth District reversed a summary judgment where the trial court refused to consider an affidavit filed in support. *See also State of Florida Dep't of Revenue* v. *Fackler*, 843 So. 2d 994, 995 (Fla. 1st DCA 2003) (reversing summary judgment where amended affidavit should have been considered or, if it was, summary judgment was improper). In *Wolford*, 861 So. 2d at 457, the "mere fact that the expert testified that the swing was negligently installed" created a genuine issues of material fact and rendered summary judgment improper. *See also Napoli* v. *Buchbinder*, 685 So. 2d 46, 48 (Fla. 4th DCA 1996) (allegations and expert affidavit created a material question of fact as to whether alleged negligence placed appellant within the foreseeable "zone of risk").

While the expert's opinion doesn't establish *per se* negligence, his opinions about industry standards can and should be considered by the jury in deciding whether or not Roberto and Jesus breached their duty of care. Indeed, the circuit court's refusal to consider a timely affidavit violated the Florida courts' "long-standing tradition in favor of the disposition of an action on its merits." *Tucker* v. *Firestone Tire & Rubber Co.*, 552 So. 2d 1178, 1179 (Fla. 2d DCA 1989). Accordingly, the circuit court abused its discretion when

refusing to consider the affidavit and summary judgment was improper because Mr. Zembower's timely affidavit raised additional disputed issues of material fact regarding Roberto's and Jesus's negligence.

CONCLUSION

The Court should vacate the summary judgment and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with Rules 9.045 and 9.210 of the Florida Rules of Appellate Procedure. It was prepared in 14-point Arial and contains 10,868 words.

August 6, 2021

/s/ Thomas Burns
Thomas A. Burns