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IN THE DISTRICT COURT OF APPEAL
SIXTH DISTRICT OF FLORIDA

CASE NO.: 6D23-3091
L.T. CASE NO. 2018-CA-002917-O

WALGREEN COMPANY,

Appellant,

v.

DYNASERV FLORIDA LLC, and
MONICA PAPPALARDO,

Appellees.
_________________________________/

REPLY BRIEF OF APPELLANT, WALGREEN COMPANY

On Appeal from Final Orders of the Ninth Judicial Circuit,
in and for Orange County, Florida

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<u>**ARGUMENT**</u>

I. RESPONSE TO DYNASERV'S JURISDICTIONAL STATEMENT

Defendant/Appellee Dynaserv Florida LLC ("Dynaserv") argues the "Order Granting Defendant/Cross-Defendant, Dynaserv Florida, LLC's Motion for Final Summary Judgment on Plaintiff's Amended Complaint" entered on February 28, 2022 (R. 1019), was "an appealable final judgment"; the Notice of Appeal filed by Co-Defendant/Appellant, Walgreen Company ("Walgreen") on June 29, 2023, was untimely; and, therefore, this Court lacks subject matter jurisdiction to review the summary judgment order in favor Dynaserv on the negligence claim of Plaintiff/Appellee Monica Pappalardo. (A.B. 1-4). Dynaserv is mistaken.

Generally, a final order ends all judicial labor in the case. *E.g.*, *S. L. T. Warehouse Co. v. Webb*, 304 So. 2d 97, 99 (Fla. 1974); *accord Almacenes El Globo De Quito, S.A. v. Dalbeta L.C.*, 181 So. 3d 559, 561 (Fla. 3d DCA 2015) ("For the purposes of appellate review, an order . . . is 'final' if it ends all judicial labor in the case.") (citing *Miami-Dade Water & Sewer Auth. v. Metro. Dade County*, 469 So. 2d 813 (Fla. 3d DCA 1985)). The summary judgment order in favor of Dynaserv on Plaintiff's claim against it did not end judicial labor in

the case. Plaintiff's claim against Walgreen and Walgreen's crossclaims against Dynaserv remained pending. Hence, regardless of language of finality, that summary judgment order would have been immediately appealable only if it qualified as a "partial final judgment" under Florida Rule of Appellate Procedure 9.110(k). It did not.

A partial final judgment is appealable under rule 9.110(k) only if it "disposes of" "an entire case as to any party" or "a separate and distinct cause of action that is not interdependent with other pleaded claims." *See Harrison v. J.P.A. Enters., L.L.C.*, 51 So. 3d 1217, 1218-19 (Fla. 1st DCA 2011) (discussing rule 9.110(k) and stating that, "[i]f an order does not finally end the judicial labor in a case, '[p]iecemeal appeals will not be permitted where claims are interrelated and involve the same transaction and the same parties remain in the suit'") (quoting *Webb*, 304 So. 2d at 99); Philip J. Padovano, *Florida Appellate Practice* § 23:5, at 535 (2024 ed.) ("Generally, if the part of the case that has been decided involves the same parties, the same transaction, and the same underlying factual background as the remaining parts, it will not be treated as final."). That was precisely the situation here.

The summary judgment order did not dispose of the entire case as to Dynaserv, as Walgreen's crossclaims against it remained pending. Moreover, Walgreen's crossclaims were clearly "interdependent" or "interrelated" with Plaintiff's claims against Dynaserv. *See Triggiano Hernandez v. Jackson Mem'l Hosp. Pub. Health Trust*, 305 So. 3d 569, 570 (Fla. 3d DCA 2020) ("Claims are interrelated if they 'arise out of the same incident.'") (quoting *Biasetti v. Palm Beach Blood Bank, Inc.*, 654 So. 2d 237, 238 (Fla. 4th DCA 1995)); *Florida Appellate Practice* § 23:5, at 534 ("case law subsequent to the adoption of Rule 9.110(k) makes it clear that 'most partial judgments are interrelated with remaining portions of the case and thus are not final and not immediately appealable'") (footnote omitted).

Because the summary judgment order did not "dispose[] of [the] entire case" as to Dynaserv and Plaintiff's claim against Dynaserv was "interdependent" or "interrelated" with Walgreen's crossclaims against Dynaserv that remained pending, the summary judgment order was not immediately appealable. *E.g.*, *Harrison*, 51 So. 3d at 1218-19 (dismissing appeal because the "Partial Final Judgment" did not dispose of the entire case as to any party and the claims that

remained pending were interrelated to the one decided); *Miami-Dade Water & Sewer Auth.*, 469 So. 2d at 814-15 (same). Hence, the summary judgment order was not immediately appealable.

The summary judgment order became appealable only when Walgreen's crossclaims were finally resolved, on July 26, 2023. (R. 2201). Walgreen's Notice of Appeal and Amended Notice of Appeal were therefore timely to invoke this Court's jurisdiction to review the summary judgment order in Dynaserv's favor on Plaintiff's claim against it as well as the orders granting summary judgment on Walgreen's crossclaims. Any other conclusion would be irreconcilable with Florida's longstanding public policy against piecemeal appeals. *E.g.*, *Webb*, 304 So. 2d at 99; *Triggiano Hernandez*, 305 So. 3d at 570; *Harrison*, 51 So. 3d at 1219.

II. CONFLATING THE DISCRETE ELEMENTS OF DUTY AND PROXIMATE CAUSATION, THE TRIAL COURT ERRONEOUSLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DYNASERV AND AGAINST PLAINTIFF

Dynaserv does not respond to Walgreen's contention that the trial court improperly conflated the discrete elements of duty and proximate causation. Dynaserv likewise does not respond to Walgreen's contention that, in deciding the duty issue, the trial court

should have asked only one question – was it foreseeable that, if Dynaserv failed to use reasonable care in carrying out its acknowledged contractual obligations to Walgreen (including immediately notifying Walgreen about hazards and other safety issues on the property), it was likely people coming onto the property could be injured in some way.

Instead, Dynaserv relies on "tipsy coachman" arguments. (A.B. 12-13). It argues that summary judgment was correct (regardless of the trial court's errors) because (1) Dynaserv did not "create the risk" (A.B. 15-16); (2) Dynaserv lacked "the ability to avoid the risk" (A.B. 17-18); (3) the contract between Walgreen and Dynaserv did not impose any duty on Dynaserv to protect or warn Plaintiff (A.B. 19-25); and (4) "[o]ne contracting with the owner and possessor of a premises to provide information regarding safety . . . is not liable for the owner's failure to act on the information provided where the owner does not have a reciprocal . . . obligation to act on the information provided." (A.B. 25-27).

"'[I]t is well-settled that "[t]he [t]ipsy [c]oachman doctrine does not apply to grounds not raised in a motion for summary judgment . . . ."'" *Walls v. Roadway, Inc.*, 388 So. 3d 89, 96 (Fla. 3d DCA 2023)

(quoting *Mitchell v. Higgs*, 61 So. 3d 1152, 1155 n.3 (Fla. 3d DCA 2011)). Only the first and third of Dynaserv's "tipsy coachman" arguments were raised in support of its summary judgment motion. Nevertheless, as Walgreen will demonstrate, *none* of the arguments supports an alternative basis for the summary judgment on Plaintiff's claim.

A. Dynaserv's Negligent Omissions Created a Broader Zone of Risk

Dynaserv's first argument is that summary judgment was appropriate because Plaintiff "failed to provide any evidence . . . tending to show [it] created the danger presented by the sidewalk." (A.B. 16). "The duty element of negligence focuses on whether the defendant's conduct foreseeably created a broader 'zone of risk' that poses a general threat of harm to others." *McCain v. Florida Power Corp.*, 593 So. 2d 500, 502 (Fla. 1992); *accord Chirillo v. Granicz*, 199 So. 3d 246, 249 (Fla. 2016); *Dorsey v. Reider*, 139 So. 3d 860, 863 (Fla. 2014).

As Walgreen pointed out in its response in opposition to Dynaserv's summary judgment motion (which response Plaintiff incorporated and relied on in its response (R. 838)), it was undisputed

that a contract existed between it and Dynaserv requiring Dynaserv to perform weekly a "site inspection" of “the landscaping elements and paved surfaces” of Walgreen’s property; to notify Walgreen within 24 hours of “any noticeable outside maintenance problem or hazard,” “including but not limited to” “malfunctioning exterior lights,” “broken curbs,” and “pot holes”; and “to report immediately to Store Leadership any exterior health/safety issue at the subject Walgreens property and document the report.” (R. 800, 808-13). It was also undisputed that Dynaserv did not notify Walgreen of the section of “raised, uneven” sidewalk that Plaintiff alleged (R. 142) had been responsible for her trip and fall. (R. 801, 809-10, 812-13).

On this record, it is clear Dynaserv's failure to use reasonable care in carrying out its contractual obligations *would* "create[] a broader 'zone of risk' that [would pose] a general threat of harm to others." Unlike *Aguila v. Hilton, Inc.*, 878 So. 2d 392, 396 (Fla. 1st DCA 2004), on which Dynaserv relies (A.B. 16), here the risk of harm *did* "arise from an[] act or omission" of Dynaserv. Therefore, Dynaserv's first argument fails to support the summary judgment.

B. There Is No Evidence Dynaserv Lacked the Ability to Avoid (or Significantly Reduce) the Risk

Dynaserv argues that "Plaintiff, the one with the burden of proof at trial, failed to provide evidence showing or tending to show that Dynaserv had the right and ability to avoid the risk." (A.B. 18). This argument improperly shifts the summary judgment burden.

It was *Dynaserv's burden* to demonstrate no evidence existed from which Plaintiff could establish Dynaserv had the ability to avoid (or significantly reduce) the risk to business invitees from the raised, uneven portion of sidewalk. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). Until it did so, Plaintiff was not obliged to prove or disprove anything. *See Pial Holdings, Ltd. v. Riverfront Plaza, LLC*, 379 So. 3d 547, 551 (Fla. 6th DCA 2024) (citing *Celotex* for the proposition that a nonmoving party need not point to evidence demonstrating the existence of a genuine issue until the moving party demonstrates no evidence exists to support the nonmoving party's case).

Dynaserv failed to carry its burden; hence, Plaintiff had no obligation to prove or disprove anything. Moreover, Walgreen asserted in its response to the summary judgment motion that it

would have repaired the problem had Dynaserv properly performed its contractual duties. (R. 806). There is simply nothing in this record to establish that a rationale trier of fact could not find for Plaintiff on the question of Dynaserv's ability to avoid or significantly reduce the risk to business invitees. *See Brevard County v. Waters Mark Dev. Enters., LC*, 350 So. 3d 395, 398-99 (Fla. 5th DCA 2022). Hence, Dynaserv's second argument also fails to support the summary judgment.

C. The Walgreen/Dynaserv Contract Created a Duty Vis-à-vis Plaintiff

Dynaserv cites three cases for the proposition that, "[w]here the duty of care is contractually assumed, the scope of the duty owed is defined by the contract" (A.B. 19), a principle with which Walgreen agrees. Walgreen also agrees with the statement in one of those cases that, "[w]here a contract exists, 'a defendant's liability extends to persons foreseeably injured by his failure to use reasonable care in performance of a contractual promise.'" *Wilson-Greene v. City of Miami*, 208 So. 3d 1271, 1274 (Fla. 3d DCA 2017) (quoting *Maryland Maint. Serv., Inc. v. Palmieri*, 559 So. 2d 74, 76 (Fla. 3d DCA 1990)).

However, Dynaserv's effort to rely on those three cases to support its argument that the Walgreen/Dynaserv contract does not establish a duty toward Plaintiff is unavailing because the contractual language in each case is significantly different from that here and, therefore, all three cases are readily distinguishable.

- In *Glickman v. Kindred Hospitals East, LLC*, 314 So. 3d 630 (Fla. 3d DCA 2021), the court affirmed a summary judgment against the plaintiff/hospital visitor and in favor of the defendant security company based on lack of duty because the contract between the hospital and the security company expressly limited the scope of the latter's obligation to "protecting the hospital and its employees" (*id.* at 633-34) and also expressly stated it was "assuming no duty to protect any other persons or entities or their property, nor is it being compensated hereunder to do so." *Id.* at 632 (emphasis in original).
- In *Cascante v. 50 State Security Service, Inc.*, 300 So. 3d 283 (Fla. 3d DCA 2019), the same court affirmed a summary judgment against the plaintiff/county garage patron and in favor of the defendant security company

based on lack of duty because the contract between the county and the security company provided the county was to be solely responsible for enacting reasonable security measures for the garage. *Id.* at 288.[1]

- In *Wilson-Greene*, the same court affirmed a summary judgment against the plaintiff, who slipped and fell on a substance in the defendant city's building, and in favor of the defendant maintenance company because plaintiff's argument, "reduced to its essentials, [wa]s that [the maintenance company] owed a duty to the building patrons **constantly** to patrol and supervise the area where the accident occurred," but the language of the contract between the city and the maintenance company could not be read as creating a duty "**constantly** to patrol the building." 208 So. 3d at 1274 (emphases in original).

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[1] Dynaserv also quotes *Cascante* (A.B. 22) for the proposition that, "only 'where the contracting party has entirely displaced the other party's duty to maintain the premises safely,' will the defendant be found liable in tort." 300 So. 3d at 288 n.4. This snippet from a footnote is pure dicta, supported only by a cite to a New York case that does not so hold, and is irreconcilable with Florida law regarding comparative negligence.

Examining the language of the Walgreen/Dynaserv contract leads to a very different conclusion. Dynaserv admitted the contract required it to perform a weekly "site inspection" of “the landscaping elements and paved surfaces” of Walgreen’s property; to notify Walgreen within 24 hours of “any noticeable outside maintenance problem or hazard,” “including but not limited to” “malfunctioning exterior lights,” “broken curbs,” and “pot holes”; and “to report immediately to Store Leadership any exterior health/safety issue at the subject Walgreens property and document the report.” (R. 800, 808-13). Dynaserv also admitted it did not notify Walgreen of the section of “raised, uneven” sidewalk that Plaintiff alleged (R. 142) had been responsible for her trip and fall. (R. 801, 809-10, 812-13). Clearly, it was reasonably foreseeable that, if Dynaserv failed to exercise reasonable care in the performance of its contractual promises, people coming onto the property could be injured in some way. This is all Florida law requires. *See Wilson-Greene*, 208 So. 3d at 1274 (quoting *Maryland Maint. Serv., Inc. v. Palmieri*, 559 So. 2d 74, 76 (Fla. 3d DCA 1990)).

Dynaserv points to the "No Third-Party Beneficiaries" provision in the contract. (A.B. 24). However, that provision merely precludes

non-parties from suing based on a breach of the contract. Unlike the provision in *Glickman* (314 So. 3d at 632), there is no language expressly disavowing any "duty" to third parties. The provision simply has no bearing on whether Plaintiff's injury was a foreseeable result of Dynaserv's failure to use reasonable care in performance of its contractual promises, thereby creating a duty.

D. This Is *Not* a Case Where Walgreen Failed to Act on Information Provided by Dynaserv

Dynaserv relies on *Cascante* for the proposition that "[o]ne contracting with the owner and possessor of a premises to provide information regarding safety on the premises is not liable for the owner's failure to act on the information provided where the owner does not have a reciprocal contractual obligation to act on the information provided." (A.B. 25). *Cascante* actually holds only that the security company defendant had no duty to the county garage patron plaintiff because the contract between the county and the security company provided the county was to be solely responsible for enacting reasonable security measures for the garage. 300 So. 3d at 288. However, even if *Cascante* did include such a holding, it would be inapposite because this is not a situation where Dynaserv

informed Walgreen about the hazardous condition but Walgreen failed to remediate it. To the contrary, Dynaserv negligently *failed* to inform Walgreen of the condition. Walgreen asserted in its response to the summary judgment motion that it would have repaired the problem had Dynaserv properly performed its contractual duties (R. 806), and there is nothing in this record to suggest otherwise.

Again, the pertinent question is whether it was reasonably foreseeable that persons like Plaintiff could be injured if Dynaserv failed to use reasonable care performing its contractual promises. *See Wilson-Greene*, 208 So. 3d at 1274 (quoting *Maryland Maint. Serv., Inc. v. Palmieri*, 559 So. 2d 74, 76 (Fla. 3d DCA 1990)). Again, the answer is clearly "yes."

III. EVEN IF THE TRIAL COURT CORRECTLY CONCLUDED DYNASERV OWED NO DUTY TO PLAINTIFF, IT WAS ERROR TO GRANT PARTIAL SUMMARY JUDGMENTS IN FAVOR OF DYNASERV AND AGAINST WALGREEN ON THE COMMON LAW AND CONTRACTUAL INDEMNITY CROSSCLAIMS BASED ON DYNASERV'S ADMITTED FAILURE TO COMPLY WITH ITS CONTRACTUAL OBLIGATIONS TO WALGREEN BECAUSE DYNASERV FAILED TO CARRY ITS BURDEN ON SUMMARY JUDGMENT

A. Dynaserv Misstates the Burden on Summary Judgment

Dynaserv improperly seeks to shift to Walgreen the burden of presenting evidence in opposition to Dynaserv's motions for partial

summary judgment on the contractual and common law indemnity crossclaims. (A.B. 28, 32). To the contrary, as the party moving for summary judgment, it was Dynaserv's burden to demonstrate no evidence existed from which Walgreen could establish one or more of the essential elements of each crossclaim. *Celotex*, 477 U.S. at 325, 106 S.Ct. at 2554. Until it did so, Walgreen was not obliged to prove or disprove anything. *See Pial Holdings*, 379 So. 3d at 551. Dynaserv made no effort to demonstrate Walgreen would be unable to prove Dynaserv breached its contractual duty to Walgreen for the contractual indemnity crossclaim or the elements of common law indemnity for that crossclaim. Hence, Walgreen had no obligation to prove or disprove anything.

1. Contractual indemnity

Dynaserv continues to argue Walgreen is not entitled to contractual indemnity for its own negligence (A.B. 32) though Walgreen disavowed any claim to indemnity for its own negligence, both in the trial court (R. 1165) and in its Initial Brief (I.B. 12, 34).

Dynaserv argues Walgreen has no right to contractual indemnity because Dynaserv did not breach any duty owed to Plaintiff. (A.B. 34). In doing so, Dynaserv ignores Walgreen's

contention that whether Dynaserv owed a duty to Plaintiff is irrelevant to the contractual indemnity crossclaim; rather, whether Dynaserv is contractually obligated to indemnify Walgreen is a simple matter of contract construction. (I.B. 34-37).

The crossclaim alleges Dynaserv failed to comply with its contractual obligation immediately to notify Walgreen of the dangerous condition related to the raised section of sidewalk Plaintiff alleged caused her trip and fall. (R. 583). The alleged breach by Dynaserv of this duty to Walgreen is the only duty issue pertinent to the contractual indemnity claim. If Walgreen can satisfy the trier of fact that Dynaserv *did* breach its contractual duty to Walgreen and the breach was responsible in whole or in part for Plaintiff's injuries, Walgreen would be entitled under the contract to indemnity proportionate to the damage caused to Walgreen by Dynaserv's breach. Dynaserv made no effort to demonstrate Walgreen would be unable to prove any portion of the foregoing. Hence, summary judgment was improper on the contractual indemnity crossclaim.[2]

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[2] For all the reasons discussed above at pages 13 and 14, Dynaserv's argument based on *Cascante* (A.B. 35-38) is inapposite.

2. Common law indemnity

As with the contractual indemnity crossclaim, Dynaserv fails to address Walgreen's contentions regarding the common law indemnity crossclaim.

In its Initial Brief, Walgreen contended that, in addition to a contractually based obligation to indemnify, there is a common law obligation to indemnify in circumstances where one tortfeasor violates a duty owed to another. (I.B. 40-42). Therefore, as with the contractual indemnity crossclaim, whether Dynaserv owed a duty to Plaintiff is irrelevant to the common law indemnity crossclaim. As with the former, the pertinent question is whether Dynaserv violated a duty it owed to Walgreen.

To be entitled to recover on the common law indemnity crossclaim, Walgreen would need to satisfy the trier of fact that (1) it was wholly without fault; (2) Dynaserv violated a duty to Walgreen that caused Plaintiff's injuries; and (3) Walgreen was liable to Plaintiff only because it was vicariously, derivatively, or technically liable for Dynaserv's acts or omissions (i.e., Walgreen was liable solely because it owed Plaintiff a non-delegable duty). *Fla. Farm Bureau Gen. Ins. Co. v. Ins. Co. of N. Am.*, 763 So. 2d 429, 435 (Fla. 5th DCA 2000)

(citation omitted); *see also Houdaille Indus., Inc. v. Edwards*, 374 So. 2d 490, 492-93 (Fla. 1979). As Walgreen has explained above, at pages 14 and 15, as the party moving for summary judgment, the burden was on Dynaserv to demonstrate Walgreen would be unable to prove one or more of those elements at trial. Dynaserv made no effort to do so. Moreover, on this record it is certainly possible a rationale trier of fact could find that, as between it and Dynaserv, Walgreen was entirely without fault, Dynaserv violated a contractual duty to Walgreen that caused Plaintiff's injuries, and Walgreen was liable to Plaintiff solely because it owed her a non-delegable duty. Accordingly, summary judgment was also improper on the common law indemnity crossclaim.

CONCLUSION

Because the trial court erred as a matter of law in concluding Dynaserv owed no duty to Plaintiff, the judgments in favor of Dynaserv on Plaintiff's claim and on Walgreen's crossclaims for common law and contractual indemnity and equitable subrogation must all be reversed. Even if the trial court correctly concluded Dynaserv owed no duty to Plaintiff, the judgment on Walgreen's common law and contractual indemnity crossclaims must be

reversed because Dynaserv failed to carry its burden to demonstrate that Walgreen would be unable to prove one or more of the crossclaims' essential elements at trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on October 3, 2024, I electronically filed the foregoing with the Clerk of the Court using the Florida E-Filing Portal. I also certify that the foregoing is being served this day on the parties identified below via transmission of Notice of Electronic Filing generated by the Florida E-Portal:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the word count in Florida Rule of Appellate Procedure 9.210(a)(2)(B), in that it contains 3,432 words. This document also complies with the Bookman Old Style 14-point font requirement set forth in Florida Rule of Appellate Procedure 9.045(b).

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