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IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

RAYMOND ORTEGA, et al.,

Appellants,

Case No. 3D23-0740

v.

BURGEER KING CORPORATION,
Et al.,

Appellee.
______________________________/

Notice to Invoke Discretionary Jurisdiction of the Florida Supreme Court

In accordance with rule 9.120 of the Florida Rules of Appellate Procedure, Appellants, Raymond Ortega and Antonio Llerena (Collectivley "Appellants"), by and through undersigned counsel, and respectfully invokes the discretionary jurisdiction of the Florida Supreme Court to review the opinion filed on June 19, 2024 (the "Opinion"), which was rendered on August 15, 2024, upon issuance of the Court's Order denying Appellants motion for rehearing and motion for rehearing *en banc*. The nature of the order is a final order affirming the entry of final summary judgment against the Appellants, and in favor of Burger King Corporation ("BK").

The Opinion states that in part:

> **“Applying a de novo standard of review to both claims, *see Volusia Cnty. v. Aberdeen at Ormond Beach*, L.P., 760 So. 2d 126, 130 (Fla. 2000) (noting that an order granting summary judgment is reviewed de novo); *LoanFlight Lending, LLC v. Wood*, 49 Fla. L. Weekly D623 at *1 (Fla. 3d DCA Mar. 20, 2024) (“The standard of review for a trial court's order granting or denying a motion to amend to state a claim for punitive damages [is] de novo.”) (quotation omitted), we affirm, as appellants have failed to establish any error committed by the trial court. *See, e.g., Webb v. Priest,* 413 So. 2d 43, 47 n.2 (Fla. 3d DCA 1982) (observing: “The general rule in Florida is that an owner or employer will not be held liable for acts of an independent contractor.”); id. at 47 n.2 (“[A]n employer is not held absolutely liable under the concept of non-delegable duty.”); *Smyth ex rel. Est. of Smyth v. Infrastructure Corp. of Am.,* 113 So. 3d 904, 910-11 (Fla. 2d DCA 2013) (“The general rule that a landowner or other employer of an independent contractor is not liable for the negligent acts of the independent contractor is subject to numerous exceptions.”); *U.S. Sec. Servs. Corp. v. Ramada Inn, Inc.,* 665 So. 2d 268, 271 (Fla. 3d DCA 1995) (“It is important to understand, however, that a landowner in these circumstances is not vicariously responsible for all torts committed by the independent contractor [who the landowner has hired to carry out the landowner's non-delegable duty to provide reasonably safe premises for its business invitees]; the landowner is only liable for the independent contractor's breach of the landowner's non-delegable duty to provide reasonably safe premises for its invitees. Accordingly, we have held that a landowner is not legally responsible for the negligent discharge of a firearm by a guard of the independent contractor who injures or kills a business invitee of the landowner. This is so**

> **because such a shooting in no way constitutes a breach of the landowner's non-delegable duty to provide reasonably safe premises to its business invitees, including reasonable protection against third-party criminal attacks; it is solely a breach of the independent contractor's tort duty to conduct itself in a reasonably safe manner so as not to injure third parties." (citing *Williams v. Wometco Enters.*, 287 So. 2d 353 (Fla. 3d DCA 1973) (finding theater that had hired security corporation could not be held vicariously liable for negligent discharge of firearm by employee of independent contractor where there was no showing that theater exercised either supervision and control over security guard or had knowledge of his dangerous propensities); *Brien v. 18925 Collins Ave. Corp.*, 233 So. 2d 847, 849 (Fla. 3d DCA 1970) ("We conclude that an owner of real property is not vicariously liable for harm allegedly caused by the negligent discharge of a firearm by an employee of the independent contractor security corporation the owner hires to protect his property"); see also *Tercier v. Univ. of Miami, Inc.*, 383 So. 3d 847, 851 (Fla. 3d DCA 2023) (noting that in the context of a cause of action for negligent hiring, retention or supervision "'[i]t is necessary that the underlying wrong—the actions of the employee or servant—be a tort' and that the employee's actions 'be performed outside the scope of employment.'" (quoting *Acts Ret.-Life Comtys. Inc. v. Est. of Zimmer*, 206 So. 3d 112, 115 (Fla. 4th DCA 2016))."**

However, the Opinion incorrectly based its ruling after conducting a vicarious liability analysis just as the trial court did. Indeed, vicarious liability is not a factor that should be considered when the issue before the court is a breach of a nondelegable duty.

Speaking to the conflation that some courts and practitioners engage in when discussing the two [vicarious liability and nondelegable duty], the Second District Court of Appeals of Florida, in *Armiger v. ASSOCIATED OUTDOOR CLUBS, INC.,* 48 So.3d 864 (Fla. 2ndDCA 2010), citing to the analysis in *Atlantic Coast Development Corp. v. Napoleon Steel Contractors*, 385 So.2d 676, 379 (3rd DCA,1980), succinctly stated that:

> **We recognize that liability for the breach of a nondelegable duty is often discussed and classified as a form of vicarious liability**. *See, e.g., M.S. v. Nova Se. Univ. Inc.,* 881 So. 2d 614, 620 (Fla. 4th DCA 2004) ("Where there is a non-delegable duty, the employer hiring an independent contractor to perform services encompassed within that duty is vicariously liable when those services are performed negligently."); *McCall v. Ala. Bruno's, Inc.*, 647 So. 2d 175, 178 (Fla. 1st DCA 1994) ("The Restatement states that the rules imposing vicarious liability on employers for the acts of independent contractors arise `in situations where, for reasons of policy, the employer is not permitted to shift the responsibility for the proper conduct of the work to the contractor' . . . ."). As noted in *McCall*, the Restatement itself treats liability for the breach of a nondelegable duty as a subset of vicarious liability, id., and respected treatises on tort law discuss nondelegable duties within a chapter on vicarious liability. *See 2 Dan B. Dobbs, The Law of Torts* § 337, at 920 (2001); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 71, at 511-12 (5th ed.1984). **Nevertheless, the occasional imprecision in analysis and joint classification for the purpose of convenience in discussion does not alter the fundamental differences between direct liability**

for the breach of a nondelegable duty and vicarious liability for the tortious acts of another.

[Emphasis added].

Additionally, the independence of a contractor is a question for the jury. Although irrelevant to the analysis of BK's liability, the alleged independence of Legacy is a question of fact for a jury to determine when a defendant is seeking a contribution determination; as BK has done here. See *Metsker v. Carefree/Scott Fetzer* Co., 90 So.3d 973 (Fla. App. 2012) and *Armiger*, at 875. "A jury may infer the existence of an agency even when both the principal and the agent deny it." *Metsker citing Singer v. Star*, 510 So.2d 637, 640 (Fla. 4th DCA 1987)."

Similarly, the ultimate question of negligence should be determined by a jury, especially because BK's duty is non-delegable, and there is sufficient evidence in the record, including the Legacy Judgment, to justify the conclusion that Legacy breached its duty, and the breach proximately contributed to the injury suffered by the Appellants. *See McCain v. Fla. Power Corp.,* 593 So.2d 500, 502 (Fla. 1992). BK delegated the responsibility of keeping the premises safe from unruly patrons and the task of physically removing patrons to

Legacy. However, because the duty was nondelegable, BK remains liable when as here, Legacy is determined to have been negligent in removing patrons as evidenced by the jury verdict.

There is no dispute that BK invites the public onto the premises of the Whopper Bar for the transaction of business, and therefore assumes a non-delegable duty to have those premises in a reasonably safe condition. *See Modlin, at* 600. Accordingly, BK owed the Appellants a duty to keep the premises in a reasonably safe condition. And that duty includes to prevent harm to invitees from dangers that BK knew of or might have foreseen given the circumstances. Here, BK was aware that the Legacy Director had recommended that the Whopper Bar have two guards on duty because of the location, the intoxicated patrons, and aggressive BK staff. The BK Security Director made no efforts to verify the reasonableness of the Legacy Director's request for two guards with data from the police department situated directly across the street from the Whopper Bar.

Furthermore, Guard Guzman testified that he witnessed numerous occasions where BK staff instigated confrontations with patrons and escalated such confrontations. The evidence in the record demonstrated that in fact there were already 100 police

involved incidents at the Whopper Bar in just the 10 months preceding the subject incident. Moreover, Manager Pazmino testified that given the location of the Whopper Bar, situated between a gay and straight club, coupled with the fact that the Whopper Bar is the only BK location that serves beer, and is open late into the night and early morning, presented unique circumstances and challenges. However, Manager Pazmino also testified that BK does not provide its Whopper Bar staff with any specialized training or screening. Such screening and training would allow BK to identify suitably tempered employees that wouldn't instigate fights with patrons or provide resources and training to help them identify problems that arise with customers who are intoxicated and find solutions that deescalate situations rather than escalating them, like Guard Guzman testified he witnessed often at the Whopper Bar. Accordingly, the Final Judgment was entered in error and Appellants respectfully submit that it must be vacated.

Applying a *de novo* standard of review to both claims, see *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000) (noting that an order granting summary judgment is reviewed de novo); *LoanFlight Lending, LLC v. Wood*, 49 Fla. L. Weekly

D623 at *1 (Fla. 3d DCA Mar. 20, 2024) ("The standard of review for a trial court's order granting or denying a motion to amend to state a claim for punitive damages [is] de novo.") (quotation omitted), we affirm, as appellants have failed to establish any error committed by the trial court. See, e.g., *Webb v. Priest,* 413 So. 2d 43, 47 n.2 (Fla. 3d DCA 1982) (observing: "The general rule in Florida is that an owner or employer will not be held liable for acts of an independent contractor."); *id.* at 47 n.2 ("[A]n employer is not held absolutely liable under the concept of non-delegable duty."); *Smyth ex rel. Est. of Smyth v. Infrastructure Corp. of Am.,* 113 So. 3d 904, 910-11 (Fla. 2d DCA 2013) ("The general rule that a landowner or other employer of an independent contractor is not liable for the negligent acts of the independent contractor is subject to numerous exceptions."); U.*S. Sec. Servs. Corp. v. Ramada Inn, Inc.,* 665 So. 2d 268, 271 (Fla. 3d DCA 1995) ("It is important to understand, however, that a landowner in these circumstances is not vicariously responsible for all torts committed by the independent contractor [who the landowner has hired to carry out the landowner's non-delegable duty to provide reasonably safe premises for its business invitees]; the landowner is only liable for the independent contractor's breach of the landowner's

non-delegable duty to provide reasonably safe premises for its invitees. Accordingly, we have held that a landowner is not legally responsible for the negligent discharge of a firearm by a guard of the independent contractor who injures or kills a business invitee of the landowner.

This is so because such a shooting in no way constitutes a breach of the landowner's non-delegable duty to provide reasonably safe premises to its business invitees, including reasonable protection against third-party criminal attacks; it is solely a breach of the independent contractor's tort duty to conduct itself in a reasonably safe manner so as not to injure third parties." (citing *Williams v. Wometco Enters., 287 So. 2d 353* (Fla. 3d DCA 1973) (finding theater that had hired security corporation could not be held vicariously liable for negligent discharge of firearm by employee of independent contractor where there was no showing that theater exercised either supervision and control over security guard or had knowledge of his dangerous propensities); *Brien v. 18925 Collins Ave. Corp.*, 233 So. 2d 847, 849 (Fla. 3d DCA 1970) ("We conclude that an owner of real property is not vicariously liable for harm allegedly caused by the negligent discharge of a firearm by an employee of the

independent contractor security corporation the owner hires to protect his property”); *see also Tercier v. Univ. of Miami, Inc.*, 383 So. 3d 847, 851 (Fla. 3d DCA 2023) (noting that in the context of a cause of action for negligent hiring, retention or supervision "'[i]t is necessary that the underlying wrong—the actions of the employee or servant—be a tort' and that the employee's actions 'be performed outside the scope of employment.'" (quoting *Acts Ret.-Life Comtys. Inc. v. Est. of Zimmer*, 206 So. 3d 112, 115 (Fla. 4th DCA 2016))to object based on the insufficiency of the evidence will not bar raising that issue on appeal.”); see e.g. *Correa v. US Bank Nat'l Ass'n*, 118 So.3d 952, 954-55 (Fla. 2nd DCA 2013) (holding that defendant's failure to object to sufficiency of the evidence in the trial did not bar raising the issue on appeal); *Delia v. GMAC Mortg. Corp.*, 161 So.3d 554, 555 n.1 (Fla. 5th DCA 2014) (applying 1.530(e) to hold that defendant's failure to object at nonjury trial to plaintiff's standing did not preclude the appeal because it was an issue of sufficiency of the evidence); *Lacombe v. Deutsche Bank Nat'l Tr. Co.*, 149 So.3d 152, 153 (Fla. 1st DCA 2014) (same). Unlike the cases of *Wometco* and *Brein*, cited above, the record evidence in this matter established that removing patrons was within the job description of the contractor's duties as

set forth by the landowner and therefore the reasonable conduct of such duty remains the landowner's responsibility.

The decision is within the Florida Supreme Court's discretionary jurisdiction under rule 9.030(a)(2)(A)(iv) because the Court's decision expressly and directly conflicts with the Second District Court of Appeals of Florida, in *Armiger v. ASSOCIATED OUTDOOR CLUBS, INC.*, 48 So.3d 864 (Fla. 2nd DCA 2010). Copies of the Court's opinion and order are attached to this notice as Exhibits "A" and Exhibit "B".

Dated: September 13, 2024,
Miami, FL

Respectfully submitted,

By: */s/ Jason Bravo*
Jason Bravo, Esq.

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CERTIFICATE OF SERVICE

I certify that the forgoing document has been furnished to each respective party to this case using the names and e-mail addresses provided by the parties pursuant to Fla. R. Jud. Admin. 2.516 and separately emailed to the parties listed below on September 13, 2024.

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Exhibit “A”

᠎# Third District Court of Appeal

State of Florida

Opinion filed June 19, 2024.
Not final until disposition of timely filed motion for rehearing.

____

No. 3D23-0740
Lower Tribunal No. 19-6042

____

Raymond Ortega, et al.,
Appellants,

vs.

Burger King Corporation, et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Vivianne Del Rio, Judge.

The Bravo Law Firm, PLLC, and Jason Bravo, for appellants.

Rumberger, Kirk & Caldwell, P.A., and David B. Shelton (Orlando), Robert V. Fitzsimmons, and Suzanne A. Singer, for appellee Burger King Corporation.

Before EMAS, SCALES and GORDO, JJ.

PER CURIAM.

Raymond Ortega and Antonio Llerena, plaintiffs below, appeal the final summary judgment entered in favor of Burger King Corporation, defendant below, as well as the nonfinal order denying their motion to amend the complaint to add a claim for punitive damages.

As to the former claim, appellants contend the trial court erred in granting summary judgment in favor of Burger King because issues of material fact remain in dispute, and because Burger King breached a non-delegable duty to maintain the premises in a reasonably safe manner for business invitees.

As to the latter claim, appellants contend the trial court erred in denying their motion to amend the complaint to add a claim for punitive damages, based on the allegation that Burger King was willfully or grossly negligent by failing to conduct a reasonable inquiry into whether its employee had any racial bias and in failing to hire two security guards (instead of one) as recommended by the security company.

Applying a de novo standard of review to both claims, see Volusia Cnty. v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000) (noting that an order granting summary judgment is reviewed de novo); LoanFlight Lending, LLC v. Wood, 49 Fla. L. Weekly D623 at *1 (Fla. 3d DCA Mar. 20, 2024) ("The standard of review for a trial court's order

granting or denying a motion to amend to state a claim for punitive damages [is] de novo.") (quotation omitted), we affirm, as appellants have failed to establish any error committed by the trial court. See, e.g., Webb v. Priest, 413 So. 2d 43, 47 n.2 (Fla. 3d DCA 1982) (observing: "The general rule in Florida is that an owner or employer will not be held liable for acts of an independent contractor."); id. at 47 n.2 ("[A]n employer is not held absolutely liable under the concept of non-delegable duty."); Smyth ex rel. Est. of Smyth v. Infrastructure Corp. of Am., 113 So. 3d 904, 910-11 (Fla. 2d DCA 2013) ("The general rule that a landowner or other employer of an independent contractor is not liable for the negligent acts of the independent contractor is subject to numerous exceptions."); U.S. Sec. Servs. Corp. v. Ramada Inn, Inc., 665 So. 2d 268, 271 (Fla. 3d DCA 1995) ("It is important to understand, however, that a landowner in these circumstances is not vicariously responsible for *all* torts committed by the independent contractor [who the landowner has hired to carry out the landowner's non-delegable duty to provide reasonably safe premises for its business invitees]; the landowner is *only* liable for the independent contractor's breach of the landowner's non-delegable duty to provide reasonably safe premises for its invitees. Accordingly, we have held that a landowner is not legally responsible for the negligent discharge of a firearm by a guard of the independent contractor

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(quoting Acts Ret.-Life Comtys. Inc. v. Est. of Zimmer, 206 So. 3d 112, 115 (Fla. 4th DCA 2016))).

Affirmed.

Exhibit “B”

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

August 15, 2024

Raymond Ortega, et al.,
Appellant(s),

v.

Burger King Corporation, et al.,
Appellee(s).

3D2023-0740

Trial Court Case No. 19-6042

Appellee Burger King Corporation's Response to Appellants' Motion for Rehearing En Banc, filed on July 15, 2024, is noted.

Upon consideration, Appellants' Motion for Rehearing En Banc is treated as having included a motion for rehearing. The motion for rehearing is hereby denied.

EMAS, SCALES and GORDO, JJ., concur.

The Motion for Rehearing En Banc is, likewise, denied.

A True Copy
ATTEST

3D2023-0740 8/15/24]
Mercedes M. Prieto, Clerk
District Court of Appeal
Third District

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Robert Voss Fitzsimmons
Matthew Eric Ladd
Robert Nelson Pelier
Edward Recio
David Bryan Shelton
Suzanne Ashelle Singer
Luisa Moreno

LA