IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

CASE NO. 4D23-1844
LT CASE NO.50-2021-CA-006220

HANI ENTERPRISES, INC.
Appellant/Cross-Appellee,
v.
DARRELL PHILLIPS and A1A GROCERY INC.,
Appellees/Cross-Appellant.

A1A GROCERY INC.,
Appellant,
v.
DARRELL PHILLIPS and HANI ENTERPRISES, INC.
Appellees.

On Appeal from the Fifteenth Judicial Circuit in and for Palm Beach County, Florida

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APPELLEE/CROSS-APPELLANT'S CROSS-REPLY BRIEF

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I. The Landlord had a nondelegable duty to maintain the premises in a reasonably safe condition.

The Landlord declines to squarely address the question presented on cross-appeal: whether a property owner or landlord that leases the property to a tenant, but does not surrender possession or control, maintains its nondelegable duties owed under the common law to invitees on the property. Here, because the jury concluded the Landlord did not surrender possession or control, the answer to this question must be yes.

Under Florida law, an entity that owns or controls a premises has a nondelegable duty to maintain that premises in a reasonably safe condition for its invitees. *See Vogel v. Cornerstone Doctors Condo. Ass'n, Inc.*, 299 So. 3d 1170, 1174 (Fla. 2d DCA 2020); *U.S. Sec. Services Corp. v. Ramada Inn, Inc.*, 665 So. 2d 268, 270 (Fla. 3d DCA 1995). This means that, while such an entity may delegate the *performance* of its nondelegable duty to another party, it may not delegate the ultimate *legal responsibility* for the proper performance of that duty to another party. *Ramada*, 665 So. 2d at 270-71. The

entity with the nondelegable duty is "always responsible" for its proper performance. *Id.* at 270.

In this case, the Landlord owned the subject premises and, despite leasing it to the Tenant, did not fully surrender possession, custody, and control to the Tenant. R.1165. Indeed, the Landlord retained control of the very area where Plaintiff was injured—the backyard. Because of that retention of control, the Landlord also retained its nondelegable duty of care towards the Plaintiff—and, thus, its legal responsibility to Plaintiff for the full amount of his damages arising from his injury on the premises. This is the essence of the nondelegable duty doctrine, and it governs the facts and circumstances of this case, given the particular Landlord-Tenant relationship those parties contractually agreed to, and given the jury's finding that the Landlord did not surrender possession and control.[1]

[1] In many leases, landlords turn over all possession and control to the tenant. And many landlords do not continue to actually exercise control, like the Landlord did here. In those situations, the Landlord will not have a nondelegable duty to maintain. Thus, if the jury had concluded the Landlord turned over all possession and control to the Tenant, the nondelegable duty doctrine would be inapplicable.

II. The Plaintiff has not asked to hold the Landlord and Tenant jointly and severally liable, as the nondelegable duty doctrine is independent of the doctrine of joint and several liability.

In arguing that the trial court was correct to reject the Plaintiff's nondelegable duty argument and to instead apportion liability in the Final Judgment between the Landlord and the Tenant, the Landlord offers a lengthy discussion of how joint and several liability amongst joint tortfeasors has been replaced by the comparative negligence doctrine. But that whole discussion is irrelevant to the facts of this case because the Landlord and the Tenant here have never been considered joint tortfeasors subject to the comparative negligence doctrine. To the contrary, the nondelegable duty doctrine is independent of the doctrine of joint and several liability or comparative fault between joint tortfeasors.

Joint tortfeasors in a comparative negligence context each owe "separate and distinct" duties to a plaintiff. *Walters v. Beach Club Villas Condo., Inc.*, 301 So. 3d 343, 349 (Fla. 3d DCA 2020). Unlike parties in a nondelegable duty context, one joint tortfeasor is not performing a duty on the other tortfeasor's behalf. Thus, following the advent of comparative negligence, joint tortfeasors are no longer

jointly and severally liable, but are now generally "responsible for their own percentage of fault." *Id.* at 348.

The Plaintiff here has never argued the Landlord and Tenant are joint tortfeasors; the Plaintiff's position from start to finish has been that the Landlord owed a nondelegable duty to reasonably maintain the premises (and retained that duty over the leased premises by maintaining possession and control), and thus, the Landlord is liable to the extent the Tenant negligently failed to reasonably maintain the premises. *See, e.g.*, R.28 (complaint); R.608, 1063 (pretrial briefing); R.1015 (directed verdict argument); R.1192 (post-verdict motion for judgment). This is not joint and several liability, and the doctrine of comparative fault is inapplicable to, and incompatible with, the nondelegable duty doctrine.

The *Walters* case exemplifies how nondelegable liability and joint-tortfeasor liability are different concepts, because *Walters* simultaneously involved *both* joint tortfeasors *and* parties in a nondelegable duty relationship. In *Walters*, there were three tortfeasors: (1) a condo association, which had a nondelegable duty to maintain its communal dock, *id.* at 348, (2) a contractor hired by

the condo association to repair the dock, *id.* at 345, and (3) the owners of one of the condo units, who were hosting a party when one of their guests was injured on the negligently repaired dock, of which the hosts failed to warn them. *Id.*

The condo association and its contractor were in a **nondelegable duty relationship**, because the contractor was performing the nondelegable duty of repairing the dock on the association's behalf. The association was therefore liable for its contractor's negligence—but the contractor was not liable for the association's negligence. *Id.* at 349. The association and contractor were not joint tortfeasors, and the doctrine of comparative fault was inapplicable to them. The condo association was liable to the plaintiff for its own fault and the fault attributed to its contractor. But the plaintiff's recovery against the contractor would be limited to the fault attributed to the contractor.

The condo association and the unit owners, on the other hand, were **joint tortfeasors**. The unit owners were not performing any duties on the association's behalf; their duties to their guest were "separate and distinct" from the association's duty to maintain the

dock. *Id.* The theory against the unit owners was that they failed to warn the guest of the unsafe condition of the dock and indeed accessed the dock by removing an orange mesh fence separating the docket from the other common areas. *Id.* at 346. Thus, liability had to be apportioned between the association and the unit owners by their respective percentages of fault under comparative negligence. *Id.* at 348-49. The plaintiff's recovery against the condo association would not include the fault attributed to the unit owners, since there was no nondelegable duty relationship between the condo association and the unit owners.

Applying *Walters* to our case, the Landlord here is analogous to the condo association, and the Tenant is analogous to the contractor. The Landlord, like the *Walters* condo association, had the nondelegable duty to maintain its premises in a reasonably safe condition, and the Tenant, like the *Walters* contractor, was performing that nondelegable duty on the Landlord's behalf. Thus, the Landlord is liable for any negligence that the Tenant committed in performing the Landlord's nondelegable duty. On the other hand, the Tenant is liable to the *Plaintiff* only for its own negligence.

The Plaintiff has never sought to hold the Landlord and the Tenant ***both*** liable for the full amount of the judgment, distinguishing this case from traditional "joint and several" liability.[2] Rather, Plaintiff has only ever sought to hold the ***Landlord*** liable for any negligence attributed to the Landlord, and the ***Tenant's*** share of the negligence under the nondelegable duty doctrine. Similarly, the Landlord never argued comparative negligence at trial, opting instead for the theory that it retained no control over the premises at all. The jury appropriately rejected that theory, and so the Landlord remains liable for the full amount of the Plaintiff's damages, including any amount attributed to the Tenant's negligence, under the nondelegable duty doctrine.

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[2] At times, courts do refer the liability arising from the nondelegable duty doctrine as "joint and several." *See, e.g.,* *Walters*, 301 So. 3d at 348 (explaining that, "[w]hen an owner owes a non-delegable duty of care to a plaintiff who obtains a verdict assigning negligence to the owner and a party contracted by the owner, the owner [becomes] jointly and severally liable for the negligence attributed to the contracted party.") (quoting *Pembroke Lakes*, 137 So. 3d at 430). But when reviewed carefully, it is clear that courts are only referring to the fact that a property owner or landlord owing a nondelegable duty is liable for the negligence of its contractor or tenant performing that duty. These courts are not suggesting that the two entities in this nondelegable relationship are jointly and severally liable, or are joint tortfeasors.

In trying to escape this nondelegable liability, the Landlord points to the fact that Question 5 of the verdict form asked the jury to apportion fault between the Landlord and the Tenant, and the jury found the Landlord 25% at fault and the Tenant 75% at fault. R.1165-66. The Landlord argues that the apportionment of fault means that the Landlord and the Tenant were joint tortfeasors under comparative negligence principles, and it is not liable for the Tenant's negligence. The Landlord's argument is meritless. The Landlord is now trying to reframe the verdict form to support a comparative negligence judgment, but the Landlord got the jury instruction and verdict form it requested at trial. T.1119-20. The reason for Question 1 on the verdict form—"Did [the Landlord] surrender possession, custody, and control of the premises?" R.1165—was to determine, preliminarily, whether the Landlord had a nondelegable duty. If this case involved comparative negligence and not a nondelegable duty, Question 1 would not have been included. The jury found in Question 1 that the Landlord did ***not***, in fact, surrender possession, custody, and control of the premises to the Tenant. R.1165. Thus, the Landlord retained its nondelegable duty.

Then, Question 5 of the verdict form asked the jury to apportion fault between the Landlord and the Tenant (and the Plaintiff). R.1166. The fact that the jury apportioned fault between them does not mean that the Landlord and the Tenant are joint tortfeasors. This Court explained as much in *Pembroke Lakes Mall Ltd. v. McGruder*, 137 So. 3d 418 (Fla. 4th DCA 2014), where it held that it was proper to have the jury apportion fault between the premises owner and its contractor, because the premises owner was liable to the plaintiff for the negligence of its contractor under the nondelegable duty doctrine, but the contractor was not necessarily liable to the plaintiff for the negligence of the premises owner. *Id.* at 431.[3] Here, because the Landlord is liable to the Plaintiff for the entire amount of his damages

[3] The Landlord correctly states that Florida's comparative fault statute and the elimination of joint and several liability were not addresses in *Pembrokes Lakes* or in *Armiger v. Associated Outdoor Clubs, Inc.*, 48 So. 3d 864 (Fla. 2d DCA 2010). Hani Cross-Answer Brief at 40 n.8. It appears that the Landlord is suggesting this Court and the Second District missed the mark in omitting this discussion. But the reason why there was no discussion is because when a property owner or landlord owes a nondelegable duty, Florida's comparative fault statute and the doctrine of joint and several liability are inapplicable. The nondelegable duty doctrine is independent of these doctrines. For similar reasons, there would be no reason for the Third District to have discussed joint and several liability in *Ramada*. *See* Cross-Answer Brief at 40 n.9.

under the nondelegable duty doctrine, the Tenant is only liable to the Plaintiff for the fault allocated to the Tenant. The jury's apportionment of fault between the Landlord and Tenant (and with an option to apportion fault to the Plaintiff) was **required** to ensure that the Tenant was liable only for any fault allocated to it by the jury.

There is another reason why apportionment of fault is useful and necessary in a nondelegable duty case: indemnity and contribution. Here, the apportionment of fault between the Landlord and the Tenant is relevant to any claim of indemnification or contribution that the Landlord might have against the Tenant. *See Armiger*, 48 So. 3d at 875 n.8 (explaining that, while "the potential responsibility of an independent contractor is not relevant to the analysis of the business owner's liability" to the *plaintiff*, "such considerations might be relevant in an action for indemnification by the business owner against the independent contractor"). Indeed, the lease in this case contains a provision for the Tenant to indemnify the Landlord for any negligence of the Tenant. R.1564. The Landlord thus has a remedy against the Tenant, which alleviates any perceived

unfairness in holding it liable for the Tenant's negligence that the Landlord now claims comparative negligence was designed to prevent.

Thus, asking the jury to apportion fault on the verdict form here was perfectly appropriate, and required. It does not mean that Plaintiff was seeking joint and several liability between the Landlord and the Tenant as joint tortfeasors. The Plaintiff is ***only*** seeking to hold the Landlord liable for the Tenant's negligence under the nondelegable duty doctrine (with the Tenant also remaining liable to the Plaintiff only for its own negligence, but not the negligence of the Landlord).

III. It was not necessary for the Landlord to have hired the Tenant for the nondelegable duty doctrine to apply; agency is not required.

Finally, the Landlord argues that it is not liable for the Tenant's negligence under the nondelegable duty doctrine because the Tenant is not an independent contractor that it ***hired*** to maintain its premises. But a principal/contractor agency relationship is not required for the Landlord to be liable for the Tenant's negligence in

maintaining the premises. As this Court explained in *Pembroke Lakes*,

> [t]o establish a breach of a non-delegable duty, **the plaintiff need not prove an agency relationship** because such a relationship is not relevant to the question of whether the owner is directly liable to the plaintiff. **Regardless of whether the owner contracts with a party** to clean and maintain the business premises, the owner is still directly liable to an injured invitee if reasonable efforts are not made to maintain the premises in a safe condition.

137 So. 3d at 431 (emphasis added).

To argue for the necessity of an agency relationship, the Landlord relies on this Court's recent decision in *Publix Super Markets, Inc. v. Safonte*, Nos. 4D2023-0216, 4D2023-0815, 2024 WL 3057561 (Fla. 4th DCA June 20, 2024), in which this Court held that Publix could not be held liable for the negligence of a customer who caused a slip and fall, because the customer was not "hired or retained" by Publix to maintain its premises. *Id.* at *3-4. But this Court did not hold that the nondelegable duty doctrine ***only*** applies when there is a hiring or retention agency relationship. What this Court actually held was that Publix could not be held liable for the customer's negligence because the customer was "never hired or

retained to assume Publix's duty to maintain any of its premises, ***nor was he ever instructed or directed*** by Publix to maintain any of its premises during his visit to Publix." *Id.* at *4 (emphasis added). The customer was simply doing his own personal shopping and "had no responsibility to maintain Publix's premises." *Id.*

Thus, consistent with *Pembroke Lakes*, *Safonte* shows that it is not the existence of an agency relationship that is dispositive to liability under the nondelegable duty doctrine ("nondelegable liability" for short). Rather, it is the "non-delegable nature of a business owner's duty of care to maintain its premises in a reasonably safe condition for invitees" that makes an owner liable for the negligence of anyone it entrusts to perform that duty. *Topvalco Inc. v. Wolff*, 358 So. 3d 747, 748 (Fla. 4th DCA 2023).

Here, unlike the Publix customer in *Safonte*, the Tenant in our case was "instructed and directed" by the Landlord to maintain the premises via the lease. Of course, as found by the jury, the Landlord also took it upon itself to continue maintaining the backyard of the premises without fully turning over possession or control to the Tenant. Nevertheless, the Tenant still had a responsibility to

maintain the premises. Thus, the Tenant here is unlike the customer in *Safonte*, who was nothing more than a mere invitee on Publix's premises at the time of the negligent conduct and had no responsibility to maintain it at all. Here, because the Landlord instructed and directed the Tenant to perform its nondelegable duty of maintaining its premises, the Landlord is liable for the Tenant's negligence in the performance of that duty.

To be clear, it is not the mere existence of a landlord-tenant relationship that imposes a nondelegable duty upon the Landlord; it is the fact that, as the jury found, the Landlord did not surrender possession and control to the Tenant. Landlords that ***do*** turn over possession and control to tenants no longer owe nondelegable duties to maintain the premises in a reasonably safe condition, having turned over all such duties to their tenants.

The Landlord suggests, without explicitly arguing, that the nondelegable duty doctrine is inapplicable in landlord/tenant cases and only arises in agency cases where a business operator hires an independent contractor to perform maintenance functions on its premises. *See* Hani Cross-Answer Brief at 41-42. While it is true

that, as a practical matter, many of the nondelegable duty cases arise in the context of business owners and contractors, cases like *Pembroke Lakes* and *Safonte* make clear that an agency relationship is not required, and the nondelegable duty doctrine has arisen in the landlord/tenant context as well. *See, e.g.*, *Suarez v. Gonzalez*, 820 So. 2d 342, 344 n.2 (Fla. 4th DCA 2002) (noting, albeit in the context of an injury to the tenant, that "the landlord-tenant relationship imposes a nondelegable duty of care upon a landlord who undertakes to make repairs or improvements for the benefit of a tenant").

The Landlord further argues that *Johnson v. Garrett*, No. 6D23-1205, 2024 WL 1460183 (Fla. 6th DCA Apr. 4, 2024), supports its suggestion that the nondelegable duty doctrine does not apply in landlord/tenant cases, because *Garrett* was a landlord/tenant case which found the nondelegable duty doctrine inapplicable. *Id.* at *4. But it was not the mere existence of a landlord/tenant relationship in *Garrett* that caused the court to reject the nondelegable duty doctrine. Rather, it was the fact that the landlord ***exercised no control*** over the premises. *Id.* at *3-4. The *Garrett* court specifically explained that, "[i]n cases involving a leased property, 'the extent of

responsibility for injuries occurring on the leased premises during the term of the lease depends upon the extent the owner of the property maintains control over the premises.'" *Id.* at *3 (quoting *Brown v. Suncharm Ranch, Inc.*, 748 So. 2d 1077, 1078 (Fla. 5th DCA 1999)). Thus, "[w]here a property owner surrenders complete possession and control of the premises to a tenant, the owner is not liable for injuries to third parties occurring on the premises." *Id.*

Under the facts in *Garrett*, the court found that the landlord did not maintain sufficient control over the premises to establish a duty of care towards the plaintiff. *Id.* at *5. The landlord was entirely uninvolved with the premises, and in particular, was uninvolved with security, the very lack of which allegedly caused the plaintiff's injury. *Id.* at *4. And the mere existence of certain lease terms—the right of the landlord to enter on the premises and operate the business if the tenant failed to do so, the right to inspect and make repairs, and the obligation for the tenant to comply with local ordinances—were not enough to establish that the landlord retained control. *Id.* at *4-5. Because the landlord did not retain control, he likewise retained no duty, *id.* at *5, rendering the nondelegable duty doctrine inapplicable.

Here, in contrast, the jury found that the Landlord ***did*** retain possession and control of the premises. And Plaintiff's injury occurred in the very area of the premises where the Landlord exercised that possession and control: not *inside* the store, but *outside* the store, in the backyard near the ingress/egress to the rear of the store, where it was undisputed that the Landlord took control of hiring a contractor to clean up the debris and addressing the County code violations, and where the Tenant's principal testified he believed the Landlord had responsibility. T.430-31.

The jury's finding of the Landlord's control was based on more than just some lease terms like in *Garrett*—it was based on the Landlord's ***actual conduct*** of hiring the contractors to clean up the backyard and dealing with the County to address the code violations in the backyard—the very area in which Plaintiff was injured. Notably, in rejecting the lease terms as establishing the landlord's control in *Garrett*, the court pointed out that "the existence of a right to take control of the premises under default is not the same as actually exercising that control." *Id.* at *4. Here, the Landlord did

"actually exercise" control by taking charge of cleaning up the backyard, even after entering into the lease with the Tenant.

Thus, because the jury found that the Landlord retained control of the premises—distinguishing this case from *Garrett*—the Landlord also retained its nondelegable duty towards Plaintiff (and other invitees) to maintain its premises in a reasonably safe condition. *Garrett* never held that the nondelegable duty doctrine is inapplicable in cases where a landlord retains sufficient control over its premises to retain a duty of care towards invitees.

CONCLUSION

The jury found that the Landlord retained possession and control of its premises. Thus, the Landlord retained its nondelegable duty to maintain its premises in a reasonably safe condition, and is therefore liable for the negligence of the Tenant in its performance of that duty. Accordingly, the trial court erred in refusing to hold the Landlord liable for the negligence the jury attributed to the Tenant. This Court should reverse that ruling and remand with instructions to hold the Landlord liable for the entire amount of the judgment,

while keeping in place the Tenant's liability for the portion of the judgment attributable to its allocation of fault.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of July, 2024, the foregoing was filed with the Florida Courts E-Filing Portal which furnished a copy via electronic mail to: MICHAEL J. PARK, ESQ., PARK, OSSIAN, BARNAKY & PARK, P.A., P. O. Box 5088, Clearwater, Florida 33758, diane@parklawgroup.com (Counsel for A1A GROCERY, INC.); Kenneth P. Williams, Esq., Kristina Dukanac, Esq., and Nicholas E. Richardson, Esq., SEGAL MCCAMBRIDGE SINGER & MAHONEY, 29100 Northwestern Hwy., Suite 240, Southfield, MI 48034, kwilliams@smsm.com; kdukanac@smsm.com; nrichardson@smsm.com (Counsel for A1A Grocery, Inc.); Thomas A. Valdez, Esq., Megan G. Colter, Esq., and Valerie M. Jackson, Esq., QUINTAIROS, PRIETO, WOOD & BOYER, P.A., 9300 S. Dadeland Blvd., 4th Floor, Miami, Florida 33153, tvaldez@qpwblaw.com; maggie.colter@qpwblaw.com; adneris.cruz@qpwblaw.com; tvaldez.pleadings@qpwblaw.com. Valerie.jackson@qpwblaw.com; vjackson.pleadings@qpwblaw.com (Counsel for Hani Enterprises,

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