No. 2D21-3639

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

ROBERT SEMAAN,

Appellant,

v.

JAMES RYAN KAVANAGH,

Appellee.

On Appeal from the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, L.T. No. 21-CA-4493, Hon. Paul L. Huey

ANSWER BRIEF OF JAMES RYAN KAVANAGH

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STATEMENT OF THE CASE AND FACTS

Nature of the case

While driving a car on a used car sales lot without parental supervision, but with his dad's authorization and approval, a 13-year-old boy crashed and injured a car salesman, Appellee James Ryan Kavanagh. App. 3 (describing accident), 36 (conceding child was 13 years old). Kavanagh sued Appellant Robert Semaan, not in his capacity as an employer or owner of the dealership, but rather in his capacity as the child's father. App. 4.

Seeking to avoid liability, Semaan moved for judgment on the pleadings, claiming he was entitled to workers' compensation immunity. *See* App. 66; Fla. R. App. P. 9.130(a)(3)(C)(v). The trial court denied that motion, ruling there was "no way" Semaan's dealership could have employed his 13-year-old son to drive a car: "I just can't see how that would apply. I don't know how we could hire a 13-year-old to drive a car. I just don't see how it's possible that the workers' comp[ensation] law would apply to that, so I'm going to deny that motion." App. 44–45.

The issue here is whether the trial court correctly denied that motion when the pleadings demonstrated numerous disputes of fact regarding Semaan's purported entitlement to workers' compensation immunity as a supervisor or fellow employee.

Course of the proceedings

Kavanagh sued Semaan for negligent breach of parental duties. App. 3–5. Semaan denied the allegations and asserted as an affirmative defense workers' compensation immunity. App. 12. Kavanagh replied to that affirmative defense. App. 14–18.

After pleadings closed, Semaan asserted he was entitled to judgment on the pleadings based on his purported workers' compensation immunity. App. 21–23. Kavanagh opposed. App. 25–29. After a hearing (App. 31–64), the trial court denied the motion. App. 68. Semaan appealed. App. 66.

Disposition in the lower tribunal

In the amended complaint, Kavanagh explained the circumstances of the crash. App. 1–8. Semaan was the owner and manager of Discovery Auto Center LLC, a used car dealership in Tampa. App. 2. Discovery, in turn, employed Kavanagh as a salesman. App. 3.

While acting in the course and scope of his employment, Kavanagh was on the vehicle sales lot recording video footage of a car's interior through an open door. App. 3. "At that time and place, Mr. Semaan's minor child, who was too young to legally operate a motor vehicle in Florida, was driving a motor vehicle on the sales lot without parental supervision but with Mr. Semaan's authorization and approval." App. 3.

The child crashed the car into the open driver side door of the vehicle Kavanagh was filming, pinning him between the car's chassis and door. App. 3. Importantly, the complaint didn't allege that the child was one of Discovery's employees. *See* App. 3. Nor did the complaint address whether the child's driving had any business, educational, or recreational purpose. *See* App. 3.

Kavanagh was injured and immediately sought medical treatment. App. 3. Thereafter, he submitted a workers' compensation claim. App. 3. In response, Discovery constructively terminated Kavanagh. App. 3. The complaint did not address whether Kavanagh pursued that claim to conclusion. *See* App. 3.

Based on those circumstances, Kavanagh sued Semaan for a single count of negligent breach of parental duties.[1] App. 3–5. Specifically, Kavanagh specified that he "does not bring this action against Mr. Semaan as an employer." App. 4. Instead, he "brings this action against Mr. Semaan in his role as the parent and/or legal guardian of the minor child whose conduct injured Plaintiff." App. 4.

[1] In counts two and three, Kavanagh also asserted Discovery unlawfully retaliated against him for pursuing workers' compensation benefits and sought underinsured motorist benefits from Progressive American Insurance Company. App. 5–7. But those counts aren't pertinent to this appeal.

Exploring Semaan's role as the child's parent or guardian, the complaint alleged he was liable because

> he (a) entrusted the minor child with a dangerous instrumentality, *i.e.*, the motor vehicle he was operating at the time of the crash, (b) knew, consented to, directed, or sanctioned the minor child's conduct, and (c) failed to exercise parental control over his minor child even though he knew or in the exercise of due care should have known that injury to Plaintiff and others was a probable consequence of the minor child's conduct.

App. 4. As a result, the complaint alleged, Kavanagh suffered permanent and continuing injuries. App. 4–5.

Semaan answered and asserted affirmative defenses. App. 9–13. In particular, Semaan denied he was the child's father or guardian (App. 9 (¶ 2) (admitting Florida residence, but denying all other allegations), denied Kavanagh had sought workers' compensation benefits (App. 10 (¶¶ 12, 14) (denying whether Kavanagh sought workers' compensation benefits due to lack of knowledge), and denied his child was too young to legally drive a car (App. 10 (¶ 19) (denying allegation child was too young to drive due to lack of knowledge).

Despite previously denying Kavanagh had sought workers' compensation benefits (App. 10 (¶¶ 12, 14), Semaan asserted workers' compensation immunity as an affirmative defense (App. 12). In its entirety, that affirmative defense read as follows: "Plaintiff's claims are barred by Florida Statute

Section 440.11 because they are subject to the exclusive jurisdictions [*sic*] of the workers' compensation claims court and Plaintiff has already *initiated* an action in that forum." App. 12 (emphasis added). It alleged no other facts in support. For instance, it:

- didn't address whether Kavanagh pursued any workers' compensation benefits to conclusion;
- didn't address whether Discovery employed the child;
- didn't address, even if Discovery employed the child, whether Kavanagh, Semaan, and the child were assigned primarily to unrelated works;
- didn't address whether the child's driving had a business, educational, or recreational purpose;
- didn't address whether Kavanagh was aware a 13-year-old was driving cars on the sales lot;
- didn't address whether Semaan was acting in the course and scope of his duties or in a managerial or policymaking capacity when he allowed his unlicensed minor child to drive cars on the sales lot;
- didn't address whether the conduct Semaan authorized his child to perform without supervision or licensure constituted a first degree misdemeanor; and
- didn't address whether Semaan was immune from liability for duties he breached in his capacity as the child's parent.

App. 12; *see also* App. 14–18.

In his reply, Kavanagh pointed out the defense was procedurally deficient because, *inter alia*, it was a mere legal conclusion bereft of factual

support. App. 14–15. Beyond those procedural infirmities, the reply also reached the merits and alleged facts regarding numerous statutory exceptions to purported workers' compensation immunity. App. 15–18.

First, the reply alleged Semaan wasn't immune under § 440.11(1)(b)(2), *Fla. Stat.*, because he and Discovery (1) "engaged in conduct that they knew, based on explicit warnings specifically identifying a known danger, was virtually certain to result in injury or death" while Kavanagh was unaware of the risk because the danger wasn't apparent, and (2) deliberately concealed or misrepresented the danger so as to prevent Kavanagh from exercising informed judgment about whether to perform the work. App. 15–16.

Second, the reply alleged Semaan wasn't immune under § 440.11(1)(b), *Fla. Stat.*, because he and his child acted with "willful and wanton disregard or gross negligence." App. 16.

Third, the reply alleged Semaan wasn't immune under § 440.11(1)(b), *Fla. Stat.*, because even if his child was an employee of Discovery, Kavanagh and the child were assigned primarily to unrelated works. App. 16.

Fourth, the reply alleged Semaan wasn't immune under § 440.11(1)(b), *Fla. Stat.*, because he wasn't acting in the course and scope

of his duties or in a managerial or policymaking capacity when he allowed his unlicensed minor child to drive a car on the sales lot. App. 16.

Fifth, the reply alleged that even if Semaan was acting in the course and scope of his duties or in a managerial or policy making capacity when he allowed his unlicensed minor child to drive a car on the sales lot, he still wasn't immune under § 440.11(1)(b), *Fla. Stat.*, because the "conduct which caused the alleged injury" was a qualifying misdemeanor. *See* App. 16.

Sixth, the reply alleged that even if Semaan was entitled to workers' compensation immunity insofar as he satisfied the statutory requirements, he still wouldn't be immune for the breach of his distinct parental duties. App. 16–18 (citing *Snow* v. *Nelson*, 450 So. 2d 269, 271 (Fla. 3d DCA 1984), *approved*, 475 So. 2d 225 (Fla. 1985), and *Perkins* v. *Scott*, 554 So. 2d 1220, 1221 (Fla. 2d DCA 1990)).

Undaunted, Semaan moved for judgment on the pleadings, asserting entitlement to workers' compensation immunity. App. 21–23. Citing § 440.11(1)(b), *Fla. Stat.*, he asserted he was entitled to the same workers' compensation immunity as Discovery. App. 22. He did not, however, mention any of the statutory exceptions Kavanagh's reply had identified with respect to employers, fellow employees, or supervisors. App. 22. Indeed, Semaan didn't even acknowledge the existence of Kavanagh's reply.

Kavanagh opposed. App. 25–29. He pointed out Semaan was attempting to inject new facts outside the four corners of the pleadings, such as the existence (never mind the conclusion) of a workers' compensation action between Kavanagh and Discovery, Discovery's securement of workers' compensation insurance, and Kavanagh's election of a workers' compensation remedy. App. 27. Similarly, he pointed out how Semaan ignored numerous factual allegations in Kavanagh's reply. App. 28–29.

At the hearing, Kavanagh succinctly explained why the motion should be denied:

> The reply raises at least five scenarios where the defendant would not be protected and immune under the workers' compensation statute, and it's laid out, Your Honor, in plaintiff's response in opposition. That's tab one of your binder and it starts on page four and goes through to page five. So just looking at the workers' comp immunity statute based on the allegations in the complaint in the reply, Mr. Semaan would not be immune based on the virtual certainty of statute. Also, based on a willful wanton disregard or gross negligence portion of the statute. He would not be immune under the unrelated works portion of this statute. He would not be immune under 440.11(1)(b) because he was not acting in the course and scope of his duties or any managerial or policy-maker capacity at the time of plaintiff's injury and his conduct was a misdemeanor.
>
> In addition, there is case law that shows when you have an employer but they are not being sued as the employer, they are being sued under a different set of circumstances, there is no immunity there, and that's the cases cited in footnote two to our reply, Your Honor.

App. 35–36. Later, Kavanagh reiterated he was suing Semaan for negligent breach of parental duties, not in his capacity as Discovery's owner or manager. App. 40. He also pointed out that Semaan wasn't Kavanagh's statutory employer; rather, Discovery was the statutory employer. App. 41.

For the first time at the hearing, Semaan admitted his son was only 13 years old and asserted his son was an "employee" of Discovery.[2] App. 38. Semaan also reiterated his assertion of other facts outside the four corners of the pleadings, such as Kavanagh's election of a workers' compensation remedy. App. 38.

Ultimately, the trial court denied the motion:

> THE COURT: …. We have a car being driven by a 13-year-old, he wouldn't have a right—there's no way they could have employed him to do that. I'm going to deny the motion for judgment on the pleadings. I just can't see how that could apply. I don't know how we could hire a 13-year-old to drive a car. I just don't see how it's possible that the workers' comp[ensation] law would apply to that, so I'm going to deny that motion.

App. 44–45. A written order followed. App. 68. Semaan appealed. App. 66.

[2] In that regard, the trial court later reminded Semaan that if he was asserting his child was "actually an employee of Discovery," he'd have to produce "whatever you've got for him on his employment file and what he gets paid and W-2s and W-9s, whatever else, anything else you have about him." App. 46.

SUMMARY OF ARGUMENT

At this preliminary stage of the litigation, the trial court correctly ruled Semaan wasn't entitled to workers' compensation immunity. For starters, it astutely observed there was "no way" Discovery could have "employed" a 13-year-old child to drive cars. App. 44–45. And even if Semaan had wanted to take that dubious factual position, the reply expressly and repeatedly disputed it. App. 14–18. Aside from that problem, the reply had alleged other factual disputes regarding numerous statutory exceptions to workers' compensation immunity as an employer, fellow employee, or supervisor.

And even if Semaan had somehow demonstrated, at this preliminary stage, that there were no factual disputes regarding his purported entitlement to workers' compensation immunity, it still wouldn't protect him insofar as he breached his parental duty to supervise his child. Courts have repeatedly held workers' compensation immunity doesn't protect defendants who are sued in other capacities. *See Perkins* v. *Scott*, 554 So. 2d 1220, 1221 (Fla. 2d DCA 1990) (owner wasn't immune from liability in premises liability action because his duties as plaintiff's employer and duties as landlord were "separate and distinct"); *Williams* v. *Reed*, 698 So. 2d 357, 358 (Fla. 4th DCA 1997) (under *Perkins*, workers' compensation immunity doesn't apply if a coworker is sued in his capacity as vehicle owner, not as employer).

ARGUMENT

I. Did the trial court correctly deny Semaan's motion for judgment on the pleadings?

The trial court correctly denied Semaan's motion for judgment on the pleadings. The pleadings show numerous factual disputes regarding statutory exceptions to workers' compensation immunity. And even if Semaan were entitled to immunity, it wouldn't protect him from an analytically distinct claim regarding the breach of his parental duty to supervise his child.

Standard of review

The denial of a motion for judgment on the pleadings is reviewed de novo. *See Syvrud* v. *Today Real Estate, Inc.*, 858 So. 2d 1125, 1129 (Fla. 2d DCA 2003). In reviewing such rulings, "all material allegations of the opposing party's pleadings are to be taken as true, and all those of the movants, which have been denied, are taken as false." *Farag* v. *Nat'l Databank Subscriptions, Inc.*, 448 So. 2d 1098, 1100 (Fla. 2d DCA 1984) (reversing judgment on the pleadings). "The motion is to be decided wholly on the pleadings, without the aid of outside matters such as affidavits, depositions, or other showings of fact." *Id.* Thus, "it is improper for a trial court to enter judgment on the pleadings where factual questions remain." *Id.*

Under the tipsy coachman doctrine, "even if a trial court's ruling is based on erroneous reasoning, its decision will be upheld 'if there is any

basis which would support the judgment in the record.'" *Johnson* v. *Allstate Ins. Co.*, 961 So. 2d 1113, 1115 (Fla. 2d DCA 2007).

Merits

Semaan contends he's entitled to workers' compensation immunity, but his argument doesn't hew to the procedural standards required at this preliminary motion-for-judgment-on-the-pleadings stage. *See infra* Argument I.A. Instead, Semaan's brief seeks to inject new facts that the pleadings don't establish, specifically (1) the minor child "worked for Discovery" and (2) the minor child, "at the instruction of Appellant, was moving a vehicle from one parking space on the lot to another." Semaan Br. 4. Semaan's brief also disregards the facts Kavanagh expressly alleged in his reply, all of which this Court must take as true at this stage in the litigation. Indeed, those procedural oversights are fatal to his argument. In reality, there currently are numerous disputes of fact whether Semaan might be entitled to workers' compensation immunity as a supervisor and fellow employee. The resolution of factual disputes is the purpose of discovery, summary judgment practice, and trial, so the Court should affirm the denial of workers' compensation immunity and remand for further proceedings.

Alternatively, even if Semaan were entitled to workers' compensation immunity, it still wouldn't protect him. *See infra* Argument I.B. That's because

he's been sued for breach of his parental duties. He's not been sued for breach of any duties he owed as an employer, owner, or supervisor.

A. The trial court correctly ruled Semaan wasn't entitled to workers' compensation immunity

The trial court correctly ruled Semaan wasn't entitled to workers' compensation immunity because the pleadings created numerous disputes of fact regarding various exceptions to workers' compensation immunity as an employer, fellow employee, or supervisor.

1. There are numerous exceptions to workers' compensation immunity available to employers, fellow employees, and supervisors

The Legislature has explained the scope of immunity available to employers, fellow employees, and supervisors, along with the exceptions to each species of immunity.

Generally, an employer is entitled to workers' compensation immunity unless it "fails to secure payment of compensation as required by this chapter" or "commits an intentional tort." § 440.11(a)–(b), *Fla. Stat.* An employer commits an intentional tort within the meaning of the statute when an employee proves, by clear and convincing evidence, that it "deliberately intended to injure the employee" or "engaged in conduct that the employer knew, based on prior similar accidents or on explicit warnings specifically identifying a known danger, was virtually certain to result in injury or death to

the employee, and the employee was not aware of the risk because the danger was not apparent and the employer deliberately concealed or misrepresented the danger so as to prevent the employee from exercising informed judgment about whether to perform the work." *Id.* § 440.11(b)(1)–(2). That second 73-word exception packs in many concepts, which are easiest to understand in two parts, both of which pertain to the employer's knowledge and the employee's knowledge.

First, an employee would have to prove the employer knew the conduct "was virtually certain to result in injury or death to the employee." *Id.* Typically, that would be proven "based on prior similar accidents or on explicit warnings specifically identifying a known danger." *Id.* Second, an employee would have to prove he "was not aware of the risk." *Id.* Typically, that would be proven by establishing "the danger was not apparent" and "the employer deliberately concealed or misrepresented the danger so as to prevent the employee from exercising informed judgment about whether to perform the work." *Id.*

But it's not only employers who might have workers' compensation immunity. *Id.* Both fellow employees and supervisors may enjoy the "same" scope of immunity as employers—not a greater scope—under certain

circumstances. *Id.* But to establish that immunity, fellow employees or supervisors must first jump through some additional statutory hoops.

First, fellow employees don't have immunity unless they're "acting in furtherance of the employer's business *and* the injured employee is entitled to receive benefits under this chapter." *Id.* (emphasis added). Second, fellow employees don't have immunity when they act "with willful and wanton disregard or unprovoked physical aggression or with gross negligence." *Id.* Third, fellow employees don't have immunity when they're "assigned primarily to unrelated works." *Id.* The Florida Supreme Court has explained that this "unrelated works" determination depends upon a fact-intensive multifactor analysis. *See Aravena* v. *Miami-Dade County*, 928 So. 2d 1163, 1174 (Fla. 2006) ("coemployees who work for different departments and at different locations, answer to different supervisors, and have primary assignments involving different duties and functions are engaged in unrelated works triggering the exception to workers' compensation immunity").

Even if an individual might otherwise have immunity as a fellow employee, if he's a supervisor, he still isn't entitled to that immunity unless he passes three additional requirements. First, the supervisor must be acting "in the course and scope of his or her duties in a managerial or policymaking capacity." *Id.* Second, "the conduct which caused the alleged injury" must

have arisen "within the course and scope of said managerial or policymaking duties." *Id.* Third, "the conduct which caused the alleged injury" must not have been "a violation of a law, whether or not a violation was charged, for which the maximum penalty which may be imposed does not exceed 60 days' imprisonment as set forth in s. 775.082." *Id.*

Here, the pleadings indicate numerous disputes of fact regarding each of the exceptions to immunity for employers (*see infra* Argument I.A.2), fellow employees (*see infra* Argument I.A.3), and supervisors (*see infra* Argument I.A.4). In light of those disputes of fact, the trial court correctly denied the motion for judgment on the pleadings.

2. The reply's allegations indicated Semaan wasn't entitled to workers' compensation immunity given the limited scope of Discovery's immunity

Numerous disputes of fact bar Semaan's purported entitlement to immunity because they implicate the intentional-tort exception to Discovery's immunity. Specifically, there are disputes of fact regarding both Discovery's conduct and Kavanagh's knowledge. App. 15–16. If the employer (Discovery) engaged in conduct it "knew, based on prior similar accidents or on explicit warnings specifically identifying a known danger, was virtually certain to result in injury or death to the employee," and if Kavanagh wasn't aware of the danger, then Discovery wouldn't be entitled to workers compensation

immunity under the exception for intentional torts. *See* § 440.11(1)(b)(2), *Fla. Stat.* And because a fellow employee or supervisor like Semaan enjoys only the "same" immunity enjoyed by an employer, not a greater amount, the trial court correctly denied the motion for judgment on the pleadings.

a. The reply alleged Discovery engaged in conduct it knew was virtually certain to result in injury or death

The reply alleged Discovery "engaged in conduct that they knew, based on explicit warnings specifically identifying a known danger, was virtually certain to result in injury or death to Plaintiff." App. 15. Thus, because the immunity enjoyed by a fellow employee (or a supervisor) is the "same" as the immunity enjoyed by an employer, there's a dispute of fact whether Discovery (and hence Semaan) would be entitled to any immunity under the intentional-tort exception.

b. The reply alleged Kavanagh wasn't even aware a 13-year-old was driving cars on the sales lot

And the pleadings indicate Kavanagh wasn't even aware the 13-year-old child was driving cars on the sales lot. To wit, the reply alleged, "Plaintiff was not aware of the risk because the danger was not apparent and [Semaan] and Discovery Auto Center deliberately concealed or misrepresented the danger so as to prevent Plaintiff from exercising informed

judgment about whether to perform the work." App. 15–16. This allegation must be taken as true at this stage.

3. The reply's allegations indicated Semaan wasn't entitled to fellow-employee immunity

Aside from the limitations of Discovery's immunity, and even if Semaan might have been entitled to a greater scope of immunity than Discovery, numerous other disputes of fact still scuttle his efforts because they implicate exceptions to fellow-employee immunity.

a. No allegation indicated the child's driving was "in furtherance of the employer's business" because it's unclear whether it had any business, educational, or recreational purpose

The pleadings don't establish whether the child's driving had a business, educational, or recreational purpose. That's important, because if the child's driving had only an educational or recreational purpose, it couldn't possibly have been done "in furtherance of the employer's business." § 440.11(1)(b), *Fla. Stat.* And absent satisfaction of that "in furtherance" requirement, it's impossible for any employee—even a supervisor or owner—to enjoy fellow-employee or supervisorial immunities. *See Williams* v. *Reed*, 698 So. 2d 357, 358 (Fla. 4th DCA 1997) (reversing summary judgment where "deposition testimony indicated only recreational use of the swamp buggy on the weekends," which created a fact question "whether Reed's act

of having the swamp buggy at the employment site was 'in furtherance of the employer's business'"). Thus, there's a dispute of fact whether the first exception to fellow-employee immunity applies.

b. The reply alleged Semaan acted with "willful and wanton disregard" or "gross negligence"

The reply alleged "Defendant and the minor child acted with willful and wanton disregard or gross negligence." App. 16. Because this allegation must be taken as true at this point, there's a dispute of fact whether the second exception to fellow-employee immunity applies.

c. The reply alleged Kavanagh, Semaan, and the child were assigned primarily to unrelated works

Fellow employees aren't entitled to workers' compensation immunity when "they are assigned primarily to unrelated works." § 440.11(1)(b), *Fla. Stat.* Here, the reply alleged Semaan (the owner, who may have worked solely in an office) and the child (who may not have even been an employee)[3]

[3] The pleadings contain no allegations about the child's employment status because they don't describe his remuneration, if any. That's important, because the statute limits workers' compensation immunity to employers and employees, who are defined as "any person who receives *remuneration* from an employer for the performance of any work or service while engaged in any employment under any appointment or contract for hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes, but is not limited to, aliens and minors." § 440.02(15)(a), *Fla. Stat.* (emphasis added). The trial court was aware of this problem when it ordered Semaan to produce all documents related to

were "assigned primarily to unrelated works" than Kavanagh (a salesman who worked on the sales lot). *See Aravena*, 928 So. 2d at 1174 ("coemployees who work for different departments and at different locations, answer to different supervisors, and have primary assignments involving different duties and functions are engaged in unrelated works triggering the exception to workers' compensation immunity"). Because the Court must take this allegation as true, at minimum there's a factual dispute regarding whether the third exception to fellow-employee immunity applies.

4. The reply's allegations indicated Semaan wasn't entitled to supervisor immunity

Even if Discovery's immunity wasn't limited, even if Semaan were entitled to greater immunity than Discovery, and even if he might have been entitled to workers' compensation immunity as a fellow employee, he still wouldn't have been entitled to immunity as a supervisor.

In explaining the scope of workers' compensation immunity for supervisors, the Legislature explained the rules as follows:

> The same immunity provisions enjoyed by an employer shall also apply to any sole proprietor, partner, corporate officer or director, supervisor, or other person who in the course and scope of his or her duties acts in a managerial or policymaking capacity and the conduct which caused the alleged injury arose within the course and scope of said managerial or policymaking

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the child's purported employment, including his employment file, W-2s, and W-9s. *See supra* note 2.

> duties and was not a violation of a law, whether or not a violation was charged, for which the maximum penalty which may be imposed does not exceed 60 days' imprisonment as set forth in s. 775.082.

§ 440.11(1)(b)(2), *Fla. Stat.* That 98-word, multiclause sentence packs in a lot of concepts, so the best way to understand it is to take it piece by piece. In short, although the "same immunity provisions enjoyed by an employer shall also apply to any sole proprietor, partner, corporate officer or director, supervisor, or other person," there are three statutory exceptions through which that person can lose that immunity.

First, immunity is limited only to a person "who in the course and scope of his or her duties acts in a managerial or policymaking capacity." § 440.11(1)(b)(2), *Fla. Stat.* Second, even if a person has acted within that scope, immunity is further limited to situations in which "the conduct which caused the alleged injury arose within the course and scope of said managerial or policymaking duties." *Id.* Third, even in those situations, immunity is even further limited to circumstances in which "the conduct which caused the alleged injury … was not a violation of a law, whether or not a violation was charged, for which the maximum penalty which may be imposed does not exceed 60 days' imprisonment as set forth in § 775.082." *Id.* Here, Semaan hasn't surpassed the hurdles presented by any of the exceptions, never mind all three of them.

First, Kavanagh expressly alleged Semaan wasn't acting within the course and scope of his duties or in a managerial or policymaking capacity when he approved and authorized his 13-year-old son to drive cars. App. 16 ("Defendant is not immune because he was not acting in the course and scope of his duties … when he allowed his unlicensed minor child to operate a motor vehicle on the dealership lot").

Second, Kavanagh expressly alleged the conduct that caused the alleged injury (*i.e.*, driving underage without a license and approving a minor to drive without a license) did not arise within the course and scope of any such managerial or policymaking duties. App. 16 ("Defendant is not immune because he was not acting … in a managerial or policymaking capacity when he allowed his unlicensed minor child to operate a motor vehicle on the dealership lot").

Third, Kavanagh expressly alleged that conduct (*i.e.*, driving underage without a license and approving a minor to drive without a license) was "violation of a law that includes a maximum penalty that does not exceed 60 days' imprisonment." App. 16.

Despite the confusing nature of this third exception's triple negative phraseology ("*not* a violation of a law, whether or *not* a violation was charged, for which the maximum penalty which may be imposed does *not* exceed 60

days' imprisonment"), some authority has interpreted it as barring immunity only when the conduct at issue rose to the level of a first-degree misdemeanor. *E.g.*, *Powers* v. *ER Precision Optical Corp.*, 886 So. 2d 281, 284 n.2 (Fla. 1st DCA 2004). And in the trial court, Kavanagh identified Semaan's conduct as a second-degree misdemeanor without mentioning how the minor child's conduct could have risen to the level of a first-degree misdemeanor or third-degree felony. *See* App. 16.

Still, this Court can affirm for any reason that appears in the record, *Johnson*, 961 So. 2d at 1115, so it doesn't really matter whether that language applies only to first-degree misdemeanors or also includes second-degree misdemeanors. That's because it was both a second-degree misdemeanor for Semaan to authorize an unlicensed minor to drive a car, § 322.36, *Fla. Stat.*, and—if future discovery indicates the child drove cars without a license on the sales lot on more than one occasion[4]—it could be up to a first-degree misdemeanor or third-degree felony, § 322.34(2)(b)–(c)(3), *Fla. Stat.* ("Any person … who does not have a driver license or driving privilege but is under suspension or revocation equivalent status as defined in s. 322.01(42) … who, knowing of such … suspension or revocation

[4] At this time, the pleadings identify only one occasion on which the child drove a car on the sales lot without a license. But future discovery could indicate the child drove cars without a license on two or more occasions.

equivalent status, drives any motor vehicle upon the highways of this state … while under suspension or revocation equivalent status, commits" a "misdemeanor of the first degree… upon a second or subsequent conviction" or a "felony of the third degree … upon a third or subsequent conviction" if "the current" or "most recent prior violation" resulted from a "traffic offense causing death or serious bodily injury"); *see also id.* § 322.01(42) (defining "suspension or revocation equivalent status" as "a designation for a person," such as an underage minor, "who does not have a driver license or driving privilege but would qualify for suspension or revocation of his or her driver license or driving privilege if licensed").

Attempting to sidestep this problem regarding the commission of misdemeanors, Semaan suggests it's "debatable" whether there was any criminal violation at all because, he asserts, the minor wasn't driving on a "highway or public street.'" (Semaan Br. 9 (quoting § 322.36, *Fla. Stat.*)). But he's wrong. The Legislature defines a street or highway as "the entire width between the boundary lines of a way or place if any part of that way or place is open to public use for purposes of vehicular traffic," § 322.01(40), *Fla. Stat.*, which would include private lots open to public use.

Indeed, based on this definition, this Court and sister districts have repeatedly held § 322.36's statutory language "include[s] parking lots that are

open to public use by vehicles, even though such parking lots may be privately owned." *State* v. *Tucker*, 761 So. 2d 1248, 1249 (Fla. 2d DCA 2000) (citing *State* v. *Lopez*, 633 So. 2d 1150, 1151 (Fla. 5th DCA 1994), which held the statute "clearly appl[ies] to parking lots that are open to the public and are travelled by vehicles whether or not the lot is owned by a governmental agency"); *accord Mattingly* v. *State*, 41 So. 3d 1020, 1022 (Fla. 5th DCA 2010); *United States* v. *Gardner*, 444 Fed. App'x 361, 363 (11th Cir. 2011). And the question "[w]hether a street is considered to be open to public use is usually a question of fact." (citing *Tucker*, 761 So. 2d at 1249).

It's reasonable to infer that the "sales lot" where the crash occurred (*see* App. 3 (¶ 10) was open to the public. At minimum, there would be a factual dispute regarding that question. *See Mattingly*, 41 So. 3d at 1022. Either way, because that private sales lot was open to the public, it can't seriously be doubted that Semaan and his minor son committed crimes when Semaan authorized the child to drive a car on it without a license.

B. Even if Semaan were entitled to workers' compensation immunity as an employer, fellow employee, or supervisor, it still wouldn't protect him from liability for the breach of his parental duties

Even if Semaan could, at this preliminary stage, somehow run the statutory gauntlets to obtain workers' compensation immunity as a fellow employee or supervisor based on the pleadings alone, it still would not matter.

That's because workers' compensation immunity would afford him no protection insofar as he breached his parental duty to supervise his child. In that regard, *Perkins* v. *Scott*, 554 So. 2d 1220, 1221 (Fla. 2d DCA 1990), *Williams* v. *Reed*, 698 So. 2d 357, 358 (Fla. 4th DCA 1997), are illustrative.

In *Perkins*, a trial court dismissed a premises liability claim on the basis of workers' compensation immunity. 554 So. 2d at 1221. This Court affirmed the dismissal of the plaintiffs' first theory, which alleged negligence as a fellow employee without addressing gross negligence or any other exception to fellow-employee immunity. *Id.* But this Court reversed the dismissal of the plaintiffs' second theory, which sued the defendant in his capacity as landlord. *Id.*

This Court explained the defendant's "limited liability" as "a fellow employee" would extend "only to their relationship as fellow employees in the course and scope of their mutual employment." *Id.* Thus, workers' compensation immunity would protect the defendant "only when he is 'acting in furtherance of the employer's business.'" *Id.* (citation omitted). Thus, if the defendant "has in fact retained duties, as the owner of the building, separate and distinct from his duties as an employee of S & S Pro Color, fellow-employee immunity provides no protection for negligent breaches of those duties." *Id.*

Relying on *Perkins*, the Fourth District reached the same result in *Williams*, 698 So. 2d at 358. There, a plaintiff was injured by a swamp buggy. *Id.* at 357. He sued the swamp buggy's owner, who also happened to be the vice president of the plaintiff's employer. *Id.* Additionally, the accident happened under circumstances in which the plaintiff was entitled to workers' compensation benefits from his employer. *Id.* The trial court granted summary judgment to the defendant on the basis of workers' compensation immunity. *Id.* On appeal, the Fourth District reversed because there was "conflicting evidence" regarding the defendant's "possible ownership interest in the swamp buggy" and the purpose for which it was used. *Id.*

First, relying on *Perkins*, the Fourth District held "the workers' compensation exclusivity principle would not shield a co-worker from liability premised on his status as owner of the swamp buggy." *Id.* at 358. Thus, to the extent the defendant was being sued in his capacity as the swamp buggy's owner, and to the extent there was a dispute of fact regarding that ownership interest, the lawsuit could proceed. *Id.*

Second, there was a dispute of fact regarding the "purpose [for which] the buggy was being used or prepared at the time of the accident." *Id.* The defendant's interrogatory response indicated it was at least sometimes used

for business purposes, but his deposition testimony indicated it was used only recreationally on the weekends. *Id.*

Here, *Perkins* and *Williams* are further support indicating the trial court correctly denied the motion for judgment on the pleadings. Like the plaintiffs in those cases, Kavanagh has sued Semaan in a different capacity; specifically, Kavanagh alleged (and, once again, those allegations must be taken as true) that Semaan breached his parental duties, which arise separate and apart from any duties he owed as Discovery's owner or as Kavanagh's supervisor or co-employee. *See Snow* v. *Nelson*, 450 So. 2d 269, 271 (Fla. 3d DCA 1984), *approved*, 475 So. 2d 225 (Fla. 1985) (discussing circumstances when a parent is negligent for the conduct of his or her minor child under Florida law).

CONCLUSION

The Court should affirm the denial of the motion for judgment on the pleadings 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 font and contains 6,228 words.

February 17, 2022

/s/ Thomas Burns
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