

## Statement of Case and Facts

The City of Schickelville operates a wastewater treatment facility known as Samuels Point. Beginning in 1990, Samuels Point used methanol to remove nitrogen from the wastewater and allow for its safe discharge into the St. Johns River.

Methanol was stored in a 100,000 gallon tank at Samuels Point. The methanol tank was painted red and displayed the word "Flammable," approximately one-third of the way up, on the east side of the tank. The top of the tank contained a venting system which allowed methanol fumes and vapors to exit the tank.

The methanol tank was covered by a metal roof, which sustained extensive damage from multiple hurricanes in 2004. Ultimately, the roof required removal and repair because of this damage. In early January of 2006, Alan Gordon and Kahlil Day went to the City's supply yard to borrow a city-owned crane to remove the roof of the tank. Mr. Gordon and Mr. Day were under the impression that the tank did hold some fuel, but they were advised by their Supervisor, Mr. Marsh Mallow, that all fuel had been removed from the tank after the hurricanes. Mr. Mallow was under a deadline to complete all projects and he knew that the tank was inspected a month prior and that it was  $\frac{1}{4}$  full of methanol. Despite this knowledge, Mr. Mallow instructs Mr. Day and Mr. Gordon to remove and repair the damaged roof of the tank with a blow torch which is when the accident, a horrible explosion, occurs on January 21, 2006. Both Mr. Day and Mr. Gordon are seriously injured in the explosion.

There is conflicting testimony from another employee, Mary Nelson Morgan, the Director of Public Works regarding Mr. Mallow's knowledge of the contents of the tank. She testified in deposition that Mr. Mallow told her the tank was  $\frac{1}{4}$  full several weeks prior to the incident during an impromptu "safety meeting" at the water cooler. Mr. Mallow denies this

contention in deposition and maintains that he believed the tank was empty when he instructed Mr. Day and Mr. Gordon to repair the roof of the tank.

Samuels Point received Material Safety Data Sheets (MSDS) for methanol with each delivery of methanol. The material safety data sheets advise the user to keep methanol away from any ignition source, including heat, sparks and fire. The 2005 MSDS also contains the statement "Never use welding or cutting torch on or near drum (even empty) because product (even just residue) can ignite explosively."

The City of Schickelville, which is self-insured, has a third party servicing agent (TPA), Gibbs, Grouper & Associates (GGA), that administers its workers' compensation claims. The employer is governed by a Managed Care Arrangement. The City and GGA accept both workers' compensation claims as compensable and commence payment of medical and indemnity benefits to Mr. Day and Mr. Gordon and the provision of attendant care services. Mr. Gordon and Mr. Day are represented by counsel, but their attorneys never file any petitions for benefits.

#### Workers' Compensation Benefits

Mr. Gordon's wife is a registered nurse and she works in a burn unit at Shands Hospital Jacksonville. Mr. Gordon and his wife send a letter to the adjuster at GGA and specifically request that Mrs. Gordon be permitted to provide skilled nursing services to Mr. Gordon, rather than having a stranger come to their house to provide these services. After reviewing Mrs. Gordon's resume and her credentials, GGA agrees to pay Mrs. Gordon at the skilled nursing rate for attendant care services of 12 hours per day. During the course of Mr. Gordon's treatment, his wounds become infected and his treating physician makes a referral to an infectious diseases specialist. Mr. Gordon requests the list of specialists from GGA and

selects Dr. Ramen Noodle as the infectious disease specialist with whom he wishes to treat. After receiving his letters to this effect, GGA arranges treatment with Dr. Noodle.

Despite the provision of workers' compensation benefits, Mr. Gordon, along with his wife Mrs. Gordon, as a consortium Plaintiff, and Mr. Day brought suit against the City for liability pursuant to the "intentional tort" and "unrelated works"<sup>1</sup> exceptions to Fla. Stat. In an attempt to avoid the exclusivity of § 440.11(1), Fla. Stat., Plaintiffs alleged that the City committed an intentional tort by (1) directing Gordon and Day to perform the inherently dangerous and life threatening act of removing the metal roof over the methanol tank by use of an acetylene torch to cut and remove the roof; (2) intentionally failing to have a designated work assignment with safety contingencies before the work began; (3) using inexperienced and untrained City workers to perform the job; and (4) that the City deliberately concealed and/or misrepresented the dangers of performing the work to prevent Gordon and Day from exercising informed judgment about whether to perform the work.

#### Motion for Summary Judgment

After sufficient discovery, the City first moved for Summary Judgment against Gordon arguing that it was immune under F.S. 440.11 because Gordon had elected worker's compensation as his exclusive remedy by when Gordon actively solicited attendant care benefits from the TPA and a referral to an infectious disease specialist. The trial court denied summary judgment on this ground finding that, as a matter of law, Gordon had not elected worker's compensation as his exclusive remedy based upon these actions.

Thereafter, the City filed its second motion for summary judgment against both Day and Gordon arguing that 1) worker's compensation is their exclusive remedy and that they are barred from bringing their lawsuits under the worker's compensation exclusivity provision

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<sup>1</sup> The trial court ruled that the unrelated works exception was not available to Plaintiffs. That ruling is not contested here.

found at F.S. 440.11 because the actions of the City employees in question do not rise to the level of an intentional tort; and 2) if not barred by applicable worker's compensation exclusivity provisions, then the City is immune from both lawsuits under the sovereign immunity provisions of F.S. 768.28.

On the second motion, the trial court concluded that there was a genuine issue of fact in both cases as to whether or not the facts in the record support an exception to worker's compensation immunity under F.S. 440.11(b)(2), which requires that the injury or death of an employee be "virtually certain." The court also concluded, however, as a matter of law that statutory immunity afforded by F.S. 768.28 is applicable and granted the City's Motions for Summary Judgment filed against Mr. and Mrs. Gordon and Mr. Day on that basis alone.

### Appeal

Gordon and Day filed a timely appeal of the final order granting the City final judgment on grounds of sovereign immunity. The City, in turn, filed a cross-appeal of the trial court's order denying its first motion for summary judgment against Gordon on the ground that he elected worker's compensation as his exclusive remedy.



**TUESDAY, NOVEMBER 16, 2010 JOINT INN MEETING  
RIVER CITY BREWING COMPANY  
835 MUSEUM CIRCLE, JACKSONVILLE, FL 32207  
TELEPHONE (904) 398-2299**

**THE FIRST DISTRICT APPELLATE AMERICAN INN OF COURT (FDA)  
Tallahassee, Florida**

**THE E. ROBERT WILLIAMS AMERICAN INN OF COURT (ERW)  
Jacksonville, Florida**

**PROGRAM - 6:30 p.m. to 7:30 p.m.**

**DINING - 7:30 p.m. to 8:30 p.m.**

**6:30 p.m. to 6:45 p.m.**

*Call to Order - Allison Hunnicutt Hauser, President (ERW)*

*Welcome to Judges and Honored Guests by*

*The Honorable Charles J. Kahn, Jr., Judge First DCA, President (FDA)*

*Introduction of Marc Warren, Executive Director and  
Pamela Wittmann, Director of Chapter Relations, Southeast Region  
American Inns of Court, Washington, D.C.*

*Introduction of Master of Ceremonies*

*The Honorable James H. Daniel, Circuit Judge, Duval County (FDA)*

*Explanation of Program*



**6:45 p.m. to 7:15 p.m.**

*Mock Oral Argument*

*ALAN and KAREN GORDON, his wife, and KAHLIL DAY, Appellants, v.  
CITY OF SCHICKELVILLE, a municipal corporation, et. al., Appellee*

*For the Plaintiffs/Appellants – Gregory Redmon, Esquire (FDA)*

*For the Defendant/Appellees – Tara Sa'id, Esquire (ERW)*

*Panel Judges for the Fictitious Sixth District Court of Appeal*

*Ms. Charbula, Mr. Gordon, Ms. Hauser, Mr. Rosenblum, and Mr. Sellers*

*Marshall – Edward S. Mallow, Esquire (ERW)*

*Bailiff – John J. Schickel, Esquire (ERW)*

**7:15 p.m. to 7:30 p.m.**

*Presentation and Panel Discussion with Moderator,*

*The Honorable James H. Daniel*

*The Pitfalls of Appellate Argument*

*Anticipated First DCA Judges in Attendance*

*The Honorable Charles J. Kahn, Jr., Judge First DCA (FDA)*

*The Honorable William A. Van Nortwick, Jr., Judge First DCA (FDA)*

*The Honorable James R. Wolf, Judge First DCA (FDA)*

*Invocation – Michael C. Crumpler, Esquire, Vice-President (ERW)*