THE WEEK IN TORTS

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SECOND DISTRICT CERTIFIES CONFLICT WITH HARMLESS ERROR STANDARD SET FORTH IN *SPECIAL V. BAUX*--COURT AFFIRMS VERDICT FOR THE PLAINTIFF EVEN THOUGH THE COURT MADE CERTAIN ERRONEOUS EVIDENTIARY RULINGS (WHICH WERE HARMLESS ERROR)

Zelaznik v. Isensee, 39 Fla. L. Weekly D1221 (Fla. 2nd DCA June 11, 2014):

The jury awarded the plaintiff over a million dollars in this automobile accident case. On appeal, the defendant challenged three evidentiary rulings: (1) limiting the testimony of her expert witness; (2) limiting the testimony of the officer who responded to the accident; and (3) publishing to the jury a 15 minute video of excerpts from plaintiff's surgery.

The IME doctor wanted to testify that the plaintiff suffered from degenerative changes, basing his opinion on his experience which indicated that some physical manifestation--swelling, bleeding or other sign of trauma--would be seen in an MRI within a short period of time. The plaintiff sought to exclude that portion of the doctor's testimony pursuant to §90.705, arguing that he did not present any medical literature to support his theory.

The Second District ruled that §90.705(2) allows a witness to testify regarding the extent of his experience, which allowed him to render the opinion. The court said that **unless the omissions in the background are glaring**, the deficiencies relate to the weight of the opinion rather than the admissibility.

While it was error to exclude that testimony, the court compared it with the Second District's articulation of the harmless error standard: *i.e.*, whether it is "reasonably probable that a result more favorable to the appellant would have been reached if the error had not been committed." The burden is on the appellant to establish harmful error, which could not be done in this case.

Similarly, prohibiting the officer from testifying was not harmful error either, because the plaintiff herself testified that she had moved around at the scene, getting in and out of her car and going back and forth to the defendant's car, which was essentially the substance of the officer's testimony.

As to the video of the surgery, plaintiff's doctor had testified that the video would help him to explain the details of her surgery to the jury, and the court had viewed the video, ruling that it was not particularly gruesome. It likened it to a surgery that one might see on TV. Because the video only consisted of 15 minutes of the surgery (which had actually taken an hour and 40 minutes), the court said there was no abuse of discretion in allowing the video.

The court did certify conflict with the Fourth District's articulation of the harmless error standard (it is more likely than not that the error did not influence the trier of fact and thereby contribute to the verdict).

ERROR TO DISMISS COMPLAINT SUA SPONTE FOR FAILURE TO EFFECT SERVICE OF PROCESS WITHIN 120 DAYS OF RENDITION OF COURT ORDER REQUIRING SUCH SERVICE WITHOUT AFFORDING PLAINTIFF NOTICE AND AN OPPORTUNITY TO BE HEARD--ERROR TO DISMISS COMPLAINT WITH PREJUDICE AS DISMISSAL WITH PREJUDICE IS NOT AN AVAILABLE OPTION UNDER RULE 1.070(j)

Carter v. Mendez, 39 Fla. L. Weekly D1229 (Fla. 4th DCA June 11, 2014).

DEFENDANT FAILED TO CONCLUSIVELY SHOW ABSENCE OF ISSUE OF MATERIAL FACT REGARDING THE ESSENTIAL ELEMENTS OF RES IPSA LOQUITUR--THE JURY COULD FIND DEFENDANT HAD SUFFICIENT EXCLUSIVITY OVER THE PICTURE WHICH FELL ON THE PLAINTIFF TO RULE OUT THE CHANCE THAT IT FELL AS A RESULT OF SOME OTHER MEANS--THE QUESTION OF WHETHER THE ACCIDENT WOULD ORDINARILY OCCUR ABSENT NEGLIGENCE WAS ALSO ONE FOR THE JURY

MacClatchey v. HCA Health Services of Florida, 39 Fla. L. Weekly D1236 (Fla. 4th DCA June 11, 2014):

A woman was visiting her husband in the hospital, and while she sat in a chair in her husband's room, a framed piece of artwork fell from the wall and struck her on the head. After the incident, an employee who came to clean up the glass showed her the broken hooks on the wall where the picture had been hanging.

The trial court granted the hospital's motion for summary judgment finding that it did not have any actual or constructive knowledge of an alleged dangerous condition, and that *res ipsa loquitur* did not apply because the plaintiff could not satisfy either of the elements of that doctrine.

The court reiterated how the burden on the moving party moving for summary judgment is to show "**conclusively** the absence of any genuine issue of material fact," and the court "must draw every possible inference in favor of the party against whom a summary judgment is sought."

The court then explained how *res ipsa* is a rule of evidence which affords an injured plaintiff a commonsense inference of negligence, provided two elements are present: (1) that the instrumentality causing his or her injury was under the exclusive control of the defendant; and (2) the accident is one that would not in the ordinary course of events have occurred without negligence on the part of the one in control.

The court concluded that there appeared to at least be a question of fact as to whether the hospital had maintained "sufficient exclusivity" of control over the framed picture, and also a question of fact as to whether wall-mounted pictures fall from the wall in the absence of negligence. Because the defendant failed to conclusively show the absence of a genuine issue of material fact regarding the two essential elements of the *res ipsa*, the Fourth District reversed summary judgment.

WHERE A PLAINTIFF SUED THREE DIFFERENT DEFENDANTS FOR INJURIES SUSTAINED IN THREE SEPARATE ACCIDENTS, AND ALLEGED THAT THE INJURIES WERE INDIVISIBLE, IT WAS STILL A DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW TO LIMIT ALL THREE DEFENDANTS TO ONE ORTHOPEDIC IME

Goicochea v. Lopez, 39 Fla. L. Weekly D1245 (Fla. 3rd DCA June 11, 2014):

Here, unlike in many cases, the same defendant was not requesting that the plaintiff submit to a second orthopedic IME. Rather, this case involved entirely **separate co-defendants** who were adverse to each other. Even though the plaintiff alleged that her injuries were indivisible, all three separate defendants had a right to an IME. Because this error could not be remedied on appeal, the court granted the petition for writ of certiorari.

Kind regards

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