THE WEEK IN TORTS

A Weekly Summary Of The Latest Case Decisions Critical To Those Helping Victims of Negligence

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FLORIDA LAW WEEKLY
VOLUME 40, NUMBER 11
CASES FROM THE WEEK OF MARCH 13, 2015

BECAUSE PLAINTIFF'S PRESUIT AFFIDAVIT FAILED TO CORROBORATE PLAINTIFF'S CLAIM OF NEGLIGENCE AGAINST THE NURSING STAFF AND NURSING SUPERVISORS, TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS (ON THAT COUNT ONLY).

University of South Florida Board of Trustees v. Mann, 40 Fla. Law Weekly D563 (Fla. 2nd DCA March 4, 2015):

The court agreed that the presuit affidavit--though it could have been more detailed--appropriately corroborated plaintiff's claims except with respect to the count against the nursing staff and nursing supervisors. The court assumed--without deciding--that the plaintiff's expert physician was competent to provide an affidavit addressing errors by the hospital's nursing staff, but found that nothing in the affidavit addressed any deficiencies in the care provided by the nursing staff or supervisors.

As such, the trial court should have granted the motion to dismiss, and the failure to do so resulted in irreparable harm against Tampa General Hospital.

NO ERROR IN FINDING ATTORNEY AND CLIENT LIABLE FOR §57.105 FEES, EVEN ABSENT A FINDING OF BAD FAITH.

Pronman v. Styles, 40 Fla. Law Weekly D572 (Fla. 4th DCA March 4, 2015):

This routine contract dispute became a knock-down, drag-out fight over a challenge to venue and jurisdiction as asserted by the defendants in a motion to dismiss. The defendant vociferously represented that they had no ties to Broward County, and that their corporate entity only did business in Canada.

Plaintiff served a §57.105 fees motion, giving the defendant 21 days to withdraw its venue argument. After the time passed, the defendant refused to withdraw their motion for ten months, while also obstructing discovery requests directed at the defense they were asserting.

The trial court granted the motion for §57.105 fees. The Fourth District concluded based on the competent and substantial evidence in the record, that the trial court correctly did so, because the defendants knew or should have known that the motion to dismiss had no merit, and continually objected to discovery requests. The court also found that defendants' original attorney was jointly liable for the fee award even without making an express finding that the attorney was not acting in good faith upon the representations of his client. The Fourth District observed that under a pre-1999 version of §57.105 fees that was required, but after the statute was amended in 1999, such a finding of bad faith is not required.

NON-FINAL ORDER DENYING MOTION TO DISMISS PREMATURE BAD FAITH ACTION, NOT SUBJECT TO INTERLOCUTORY REVIEW.

United Automobile Insurance Co. v. Baylis, 40 Fla. Law Weekly D574 (Fla. 4th DCA March 4, 2015):

The insurer sought certiorari review of the circuit court's non-final order denying their motion to dismiss the plaintiff's premature bad faith action, and overruling its objections to the plaintiff's premature bad faith discovery requests.

While the Fourth District granted the petition as to the discovery objections (until an obligation to provide coverage and damages has been determined, a party is not entitled to discovery related to the claims file or the insurer's business policies or practices regarding the handling of claims), it dismissed the petition as to the denial of the motion to dismiss. The court noted that a non-final order denying a motion to dismiss a bad faith action is not subject to interlocutory review via a petition for writ of certiorari, however, the court's dismissal was without prejudice to the defendants moving to abate the bad faith action.

ERROR TO DIRECT VERDICT FOR PLAINTIFF ON THE ISSUE OF DEFENDANT'S VICARIOUS LIABILITY FOR INDEPENDENT CONTRACTOR DRIVER'S NEGLIGENCE BASED ON §316.302(1)(B), PROVIDING THAT ALL OWNERS AND DRIVERS OF COMMERCIAL VEHICLES ARE ENGAGED IN INTRASTATE COMMERCE AND SUBJECT TO FEDERAL RULES AND REGULATIONS.

Peninsula Logistics v. Erb, 40 Fla. Law Weekly D601 (Fla. 5th DCA March 6, 2015):

At the time of this crash, a driver was transporting cargo for Peninsula. The plaintiffs concede that the driver was an independent contractor. Still, they argued that Peninsula was liable for the negligence based on §316.302(1)(b), which provides that all owners or drivers of commercial motor vehicles engaged in intrastate commerce are subject to rules and regulations contained in §49 CFR. 49 CFR §390.5 actually defines employee to include independent contractors.

The trial judge accepted the plaintiff's argument regarding the vicarious liability under the federal regulations. However, because Peninsula was neither the owner nor the driver of

the vehicle operated by the driver, the terms defined in chapter 316 under the section's plain language, were not subject to federal rules or regulations.

Additionally, even if those rules and regulations applied to Peninsula due to its contractual relationship with the driver, it was not the driver's "employer" as defined by those rules and regulations because it did not own or lease a vehicle, or assign the driver to operate it. Because Peninsula itself had no legal right to operate the vehicle, it could not "assign" any such right of operation to the driver. In this case, the vehicle was owned by a different entity that had assigned the driver to operate it and therefore, the court ordered Peninsula was entitled to final judgment.

ERROR TO AWARD ATTORNEYS' FEES TO DEFENDANT ON BASIS OF OFFER OF SETTLEMENT WHERE OFFER WAS AMBIGUOUS AS TO WHETHER IT WOULD PRECLUDE PLAINTIFF'S POTENTIAL UNINSURED MOTORIST AND HEALTH INSURANCE CLAIMS.

Vogan v. Cruz, 40 Fla. Law Weekly D603 (Fla. 5th DCA March 6, 2015):

The plaintiff sued the defendant and received a final judgment that was less than the proposal for settlement amount made by the defendant.

While the defendant's offer did not require a separate release, the court found that fact not to be dispositive. Instead, in looking at the language of the offer to assess the ambiguity, the offer contained extremely broad language, which attempted to resolve all actions, causes of action, demands for damages and clearly applied to any and all claims.

The court said because the language constituted, in essence, a general release implicating claims extrinsic to the litigation, the fact that the offer did not require a separate document entitled "release" was immaterial, because the only claim involved in the underlying suit was a tort claim. Nevertheless, because the offer expressly proposed to resolve contractual and statutory claims it was ambiguous as to whether it would preclude the plaintiff's potential uninsured, motorist and health insurance claims, and thus was not enforceable.

Kind Regards

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