THE WEEK IN TORTS

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

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CASES FROM THE WEEK OF MAY 8, 2015

PROPOSAL FOR SETTLEMENT MOST WOULD BELIEVE IS AMBIGUOUS, COURT FINDS IS *NOT*.

Miley v. Nash, 40 Fla. Law Weekly D991 (Fla. 2nd DCA April 29, 2015):

Plaintiff and her husband sued the driver and his owner father, for the injuries she suffered in an automobile accident, and for her husband's loss of consortium. The defendant driver served a proposal which the plaintiffs failed to exceed at trial.

The proposal required the plaintiff dismiss both the driver and the owner from the lawsuit in exchange for a payment from the driver only. The proposal stated it was an attempt to resolve "all claims and causes of action giving rise to the lawsuit" brought by the injured plaintiff. **The proposal did not mention the consortium claim or the consortium plaintiff**.

The trial court had denied defendants' motion seeking attorney's fees, finding the proposal was deficient for failing to specifically identify the claim or claims it was attempting to resolve, failing to specifically address the pending loss of consortium, failing to state with particularity the relevant conditions, and failing to specifically state the amount in terms of the proposal attributable to each party.

The Second District reversed. It found that the proposal "clearly announced" it was targeted to address **any and all claims** resulting from the accident brought by the plaintiff

victim and against the defendant driver. Thus, the court concluded, the language of the proposal was clearly only meant to resolve the bodily injury claims brought by the injured victim, and **not** the loss of consortium brought by her husband.

The court said while it may have been more specific to refer directly to the language used in the complaint to identify the claims that were being resolved, the language used by the driver in the proposal "did not contain a level ambiguity that would render [plaintiff] unable to make an informed decision without needing clarification." Unlike cases where the proposal was ambiguous, because it failed to clarify which of the outstanding claims would be extinguished by a proposed release, in this case, the plaintiff had no other pending claims at the time of the proposal.

The court also said the proposal **did not need to address the loss of consortium because it properly identified that it was attempting to resolve the claims of the injured plaintiff** (and not every claim related to the suit brought by either plaintiff). As the consortium claim was the husband's separate and distinct claim--even though derivative--it was not affected by the proposal for settlement.

The court concluded that the consortium plaintiff was still free to pursue his loss of consortium claim, even if the plaintiff had accepted her proposal because acceptance would have only dismissed the injured plaintiff's claims, and the proposal required no action or input from the consortium plaintiff because it was his own.

Finally, the relevant conditions to proposal sufficiently described the exact amount that the driver would pay, and the exact claims the proposal would resolve, along with the exact action that the plaintiff would take (dismissal) and that each party would pay his own attorney's fees and dismiss the owner from the lawsuit. The wording of those conditions did not create any ambiguity as to what the effect of accepting the proposal would be, and the court again admonished litigants not to nit-pick the validity of a proposal for settlement based on allegations of ambiguity, unless it could "reasonably effect the offeree' s decision on whether to accept the proposal."

Because there was only one offeror, the defendant driver, and one offeree, the injured plaintiff, the proposal required no action or input from either the owner defendant or the consortium plaintiff. This was not an impermissible joint proposal, and the court reversed, remanding for an entry of fees against the plaintiff.

ABUSE OF DISCRETION TO GRANT DEFENDANT A NEW TRIAL BASED ON THE CUMULATIVE EFFECT OF UNFAIR SURPRISE WHERE THE DEFENDANT DECLINED A CONTINUANCE OR FAILED TO REQUEST ONE AFTER EACH INCIDENT.

London v. Dubrovin, 40 Fla. Law Weekly D998 (Fla. 3rd DCA April 29, 2015):

The trial court entered an order, granting a new trial based on cumulative unfair surprise, finding that the party had filed its jury instructions the night before the charge conference, corrected the name of a prior amended complaint and removed several charges under the auspices of carrying a scrivener's error shortly before trial, took a videotaped deposition of a witness the day before trial and in violation of a pretrial order, and did not serve his exhibit list until six days before the start of trial.

However, the aggrieved party did not raise a claim of prejudice or surprise based on the untimely disclosures nor did he request a continuance to conduct additional research.

The court reversed the grant of a new trial. It held that the appropriate cure for a violation that results in surprise during the trial is a continuance, and a failure to request one precludes a later claim of prejudice.

Additionally, where individual claims of error fail, a related cumulative error claim must also fail. In this case, the aggrieved parties did not avail themselves of the appropriate remedy for these violations during the trial, thus precluding them from claiming prejudice.

ORDER COMPELLING LITIGANT'S IN-HOUSE ATTORNEY--WHO WAS NOT THE ATTORNEY OF RECORD BUT DIRECTLY INVOLVED IN LITIGATION--TO BE DEPOSED, WAS QUASHED FOR FAILING THE REQUIREMENTS FOR TAKING THE DEPOSITION OF OPPOSING COUNSEL.

Eller-I.T.O. Stevedoring Co. v. Pandolfo, 40 Fla. Law Weekly D999 (Fla. 3rd DCA April 29, 2015):

Depositions of in-house attorneys should be limited to where the party seeking to take a deposition has shown (1) no other means to obtain information; (2) that the information sought is relevant and not privileged; and (3) the information is crucial to the preparation of the case.

Because the plaintiff failed to come close to meeting this requisite showing, the court quashed the order ordering the deposition.

TRIAL COURT ERRED IN DENYING "LOSS OF USE" DAMAGES FOR PERIOD DURING WHICH PLAINTIFF COULD NOT MOVE INTO HOME WHILE AIR-CONDITIONING SYSTEM WAS BEING REPLACED--TESTIMONY OF EXPERT REGARDING RENTAL VALUE OF HOME DURING REPAIR PERIOD NOT TOO SPECULATIVE IN SUPPORT OF LOSS OF USE DAMAGES.

Gonzalez v. Barrenechea, 40 Fla. Law Weekly D1000 (Fla. 3rd DCA April 29, 2015).

TRIAL COURT DEPARTED FROM ESSENTIAL REQUIREMENTS OF LAW BY ALLOWING DISCOVERY OF FINANCIAL INFORMATION THAT EXCEEDED THE SCOPE OF DISCOVERY PERMITTED BY THE RULE, WITHOUT FINDING UNUSUAL OR COMPELLING CIRCUMSTANCES.

Grabel v. Sterrett, 40 Fla. Law Weekly D1014 (Fla. 4th DCA April 29, 2015):

State Farm retained Dr. Grabel to conduct a compulsory medical examination. The plaintiffs in this UM claim, had served a notice of videotaped deposition requesting the doctor to bring items described in 33 paragraphs. The doctor (and State Farm) objected.

The items at issue were **copies** of all billing invoices submitted by the doctor to the defendants and their attorneys and the insurer for a five-year period; any **document** or statement including the total amount of money paid on behalf of the defendants to Dr. Grabel for work he performed as an expert on behalf of the defendants or their attorneys naming the firm for a five-year period; all **documents** evidencing the percentage of work performed by Dr. Grabel on behalf of any defendant and/or defense law firm, or insurance

carrier for a five-year period which included time records, invoices, 1099s or other income reporting documents.

The doctor objected based on the undue burdensomeness of the requests, and because they were not reasonably limited in time and beyond the permissible expert witness discovery rule found in Rule 1.280(b)(5)(A)(iii) in *Elkins*.

The court agreed. Citing to the Rule (1.280), the court reminded us that the Rule's purpose is to protect experts from the annoyance, embarrassment, oppression, undue burden or expense with the discovery of financial information. This doctor had already testified that 99% of his litigation is on behalf of the defense and he testified on 57 occasions since 2006.

Harkening back to *Elkins*, the court stated that production of the expert's business records, files and 1099s may be ordered only upon the most unusual or compelling circumstances. Experts shall not be required to disclose their earnings as experts, or income derived from other sources and subpoenas may not be used to secure discovery of financial business records concerning a litigation expert, unless there are unusual or compelling circumstances.

TRIAL COURT ERRED IN GRANTING SUBSTITUTED DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON GROUND THAT STATUTE OF LIMITATIONS HAD RUN WHERE A MISTAKE IN NAMING PROPER DEFENDANT WAS MERELY A MISNOMER--ALL THE PARTIES KNEW WHICH ENTITY THE PLAINTIFF INTENDED TO SUE, AND THERE WAS SUBSTANTIAL IDENTITY OF INTEREST BETWEEN THE ORIGINAL DEFENDANT AND THE SUBSTITUTED DEFENDANT.

May v. HCA Health Services, 40 Fla. Law Weekly D1035 (Fla. 2nd DCA May 1, 2015):

The plaintiff in a medical malpractice case, sued what he believed was the appropriate defendant. During the pendency of the case, the parties stipulated that the plaintiff had sued the wrong entity, and agreed to include the right one. However, once plaintiff added the right defendant, that defendant moved for summary judgment based on the statute of limitations.

The court found that there was not only a substantial identity of interest between the two defendants (the Medical Center and the Auxiliary), but that all parties knew that the plaintiffs intended to sue the Medical Center. Also, the incorrectly named party had actively participated in the litigation. In this case, the incorrectly named defendant had actually filed an answer and affirmative defenses, and both defendants had the same attorney. They even engaged in the litigation.

Agreeing that defendants generally have no obligation to advise plaintiffs about who to sue, the court did state that it adheres to the principal that "[t]he trial of a lawsuit should be a sincere effort to arrive at the truth. Is no longer a game of chess in which the technique of the maneuver captures the prize." The court found this was merely a misnomer and that the amendment related back to the timely filing.

DEFENDANT RAILROAD HAD NO DUTY TO MAKE AUTOMATED EXTERNAL DEFIBRILLATOR (AED) AVAILABLE, OR TO TRAIN ITS EMPLOYEES IN CPR IN ANTICIPATION OF A CARDIAC ARREST.

Sells v. CSX, 40 Fla. Law Weekly D1044 (Fla. 4th DCA May 4, 2015):

A man was working as a conductor for CSX and, after he exited the train, suffered a cardiac arrest. Because of the federal regulations prohibiting employees from using cell phones while operating trains, the man who found the decedent contacted CSX's dispatcher via the train's radio system. However, because of the dispatcher's inability to communicate the exact location, the EMTs' arrival was delayed by thirteen to fifteen minutes (for a total of 35 minutes) and there was nothing to do to save the conductor's life.

The man's widow sued CSX under the Federal Employers Liability Act (FELA), alleging that CSX owed a duty to provide the decedent with a reasonably safe workplace. She alleged CSX breached its duty by failing to take reasonable measures to ensure that the decedent received prompt and timely medical attention, by failing to provide reasonably safe equipment, by failing to equip its trains with automated external defibrillators (AEDs) by failing to train employees in CPR, and for the coworker's failure to timely call for emergency personnel.

At trial, the judge granted CSX's motion for directed verdict, finding that CSX had no duty to take preventative actions in anticipation of an employee suffering cardiac arrest. Under FELA, an employer has a duty to exercise reasonable care, but in this instance, the court did not find that a railroad was required to provide AEDs or to train its employees to administer CPR.

The court distinguished this from the Supreme Court's decision in *Limones*, where the Supreme Court held it was for the jury to decide whether the school breached its duty to supervise its students when it failed to administer an AED based on a special relationship between schools and their students. The court said the business proprietor-customer relationship, and school district-student relationship are markedly different, and analogized an employer-employee relationship to the business-customer (as opposed to the one between school and student). Thus, the trial court correctly directed a verdict for CSX because it had no duty to take preventative measures, which also meant no duty to provide AEDs or to train employees in the use of CPR or AEDs.

Furthermore, the trial court properly concluded that there was no evidence that CSX's delay in summoning medical assistance caused the decedent's death. Even if there were, there is no duty to provide all kinds of emergency medical care for employees that they may foreseeably require.

Because the plaintiff failed to establish that CSX had a legal duty to train its employees in the use of CPR and AEDs, or to provide its employees with AEDs, and because the plaintiff failed to establish that any alleged breach of CSX's duty to provide prompt medical attention contributed in whole or in part to the decedent's death, the court affirmed the directed verdict entered by the trial court.

Clark Fountain welcomes referrals of personal injury, products liability, medical malpractice and other cases that require extensive time and resources. We handle cases throughout the state and across the country. Since 1997, Florida Bar Board Certified Appellate Attorney, Julie H. Littky-Rubin has prepared and disseminated The Week In Torts to fellow practitioners. Ms. Littky-Rubin handles trial support and appeals for attorneys throughout the state.

Kind Regards

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