THE WEEK IN TORTS

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

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Kind Regards **FLORIDA LAW WEEKLY**
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CASES FROM THE WEEK OF SEPTEMBER 18, 2015

SUPREME COURT ACCEPTS FLORIDA BAR'S CHANGES TO RULE 4-1.5 REGARDING FEES AND COSTS FOR LEGAL SERVICES.

In Re: Amendments to Rule Regulating the Florida Bar 4-1.5 – Fees and Costs for Legal Services, 40 Fla. Law Weekly S482 (Fla. September 17, 2015):

The Bar proposed an amendment to subdivision 4-1.5(e) to provide definitions for the terms "retainer," "flat fee," and "advance fee." The rule will also ultimately address fees for subrogation and lien resolution in personal injury or wrongful death cases where there is a contingency fee agreement (but the court gave the Bar more time to finish that part).

In a nutshell, a "retainer" is a sum of money paid to a lawyer to guarantee the lawyer's future availability. It is **not** payment for past legal services or for future legal services.

A "flat fee," is a sum of money paid to a lawyer for all legal services to be provided in the representation and may be deemed "non-refundable."

An "advance fee" is a sum of money paid to the lawyer against which the lawyer will bill the client as legal services are provided. The new rule says that a non-refundable retainer and non-refundable flat fee are the property of the lawyer and should not be held in trust. "Advanced fees," however, must be held in trust until earned.

The Bar filed a motion for stay for the court's consideration regarding how to handle the subrogation and lien resolution fee issues in personal injury or wrongful death cases where there are contingency fees. The court instructed the Bar to issue an alternative proposal before January 15, 2016.

DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW FOR TRIAL COURT NOT TO DISMISS COUNT AGAINST INSURER ALLEGING BREACH OF CONTRACT BASED ON ALLEGED PRESUIT AGREEMENT TO PAY POLICY LIMITS-- NONJOINDER STATUTE PROHIBITED PLAINTIFF FROM JOINING INSURER WITHOUT A JUDGMENT OR A SETTLEMENT.

Geico General Insurance Co. v. Lepine, 40 Fla. Law Weekly D2090 (Fla. 2nd DCA September 9, 2015):

Plaintiff alleged that Geico had agreed to pay its tortfeasor's policy limits as confirmed in a voicemail message. After Geico refused to pay up, plaintiff sued the tortfeasor driver, and Geico directly. Geico moved to dismiss the count against it, contending that the non-joinder statute barred it.

The Second District agreed. It noted that to allow the plaintiff to join Geico before a verdict or a settlement would invite the very situation that the non-joinder statute seeks to avoid: The jury's knowledge that insurance proceeds are available which could taint the jury's verdict.

Thus, the trial court's refusal to dismiss the count against Geico departed from the essential requirements of law, which would result in material and irreparable harm and necessitated the issuance of a writ of certiorari.

COURT GRANTS PETITION FOR WRIT TO PROTECT CME DOCTOR FROM EXTENSIVE FINANCIAL DISCOVERY.

Grabel v. Roura, 40 Fla. Law Weekly D2101 (Fla. 4th DCA September 9, 2015):

The trial court determined that deposition responses given by Jordan Grabel, the defense expert witness, were inconsistent with interrogatory answers provided by defense counsel. The inconsistencies concerned the percentage of income the doctor derived from working as an expert, and the number of times he testified for plaintiffs and defendants in personal injury litigation. The trial court concluded that such inconsistencies constituted the "most unusual or compelling circumstances" that allowed the production of the expert's financial and business records under Rule 1.280(b)(5)(A)(iii).

The Fourth District disagreed. It felt that the financial discovery exceeded the provisions of the rule which limits discovery to an approximation of the expert's involvement as an expert witness. The defendants and the doctor provided all the information required on the issue of bias, but the court nevertheless allowed plaintiff to issue subpoenas to 20 non-party insurance carriers not shown to have any involvement in the litigation. Those subpoenas required the production of financial records (including tax records) showing the total amount of fees paid to the doctor for expert litigation services since 2009.

This extensive financial discovery as to a retained expert exceeded that allowed by the rule and is unnecessary. It also did not involve "unusual or compelling" circumstances to

warrant such broad disclosure.

According to the Fourth, without a showing that the inconsistencies were the result of falsification, misrepresentation or obfuscation, there was no evidence in the "unusual or compelling" category.

TRIAL COURT DEPARTED FROM ESSENTIAL REQUIREMENTS OF LAW IN REQUIRING NON-RESIDENT DEFENDANT WHO HAD NOT SOUGHT AFFIRMATIVE RELIEF FROM FLORIDA COURTS TO APPEAR FOR AN INDEPENDENT MEDICAL EXAMINATION IN FLORIDA.

Bodzin v. Leviter, 40 Fla. Law Weekly D2101 (Fla. 4th DCA September 9, 2015):

In this case where the plaintiff sought to determine the extent to which the defendant was incapacitated by his Alzheimer's disease, the defendant himself had given multiple depositions, and had never raised incapacity to testify at those depositions. The plaintiff also received defendant's medical records and retained an expert to review them to form an opinion on his capacity. The petitioner did not object to the examination in his home state (He simply wanted it to take place where he lives).

FAILURE TO PROPERLY SERVE TRIAL JUDGE WITH A MOTION TO DISQUALIFY DID NOT RENDER THE MOTION "GRANTED" BECAUSE TRIAL COURT FAILED TO RULE IN 30 DAYS.

McCone v. Pitney Bowes, 40 Fla. Law Weekly D2120 (Fla. 5th DCA September 11, 2015):

Because the party failed to serve the trial judge in conformity with Rule 2.516 (requiring service by email), the automatic provision of Rule 2.330(j) (requiring ruling within 30 days) was not triggered. Thus, the appellate court denied the writ of prohibition.

THE TRIAL COURT MAY NOT DECREE RELIEF THAT HAS NEITHER BEEN PLEADED NOR TRIED BY CONSENT.

Troyts Auto Service v. Vitelli, 40 Fla. Law Weekly D2128 (Fla. 2nd DCA September 11, 2015):

In this case where the trial judge found the defendants liable for a claim that was neither pleaded nor tried, the court reversed. Trial courts may not decree relief that has not been pleaded in the complaint nor tried by consent by the parties.

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