THE WEEK IN TORTS

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

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ERROR TO EXCLUDE PLAINTIFF'S INVOLVEMENT IN A SUBSEQUENT ACCIDENT WITH A GOLF CART AND THE PHYSICAL ALTERCATION THE PLAINTIFF HAD WITH THE POLICE AT THE SCENE OF THAT ACCIDENT--NEW HARMLESS ERROR STANDARD COMPELS NEW TRIAL.

Maniglia v. Carpenter, 40 Fla. Law Weekly D2485 (Fla. 3rd DCA November 4, 2015):

Plaintiff and defendant collided while defendant was changing lanes on I-95 at night. Plaintiff claimed he was side-swiped severely. Defendant claimed it was only a bump. The chiropractor who examined the plaintiff for his right-sided neck and back pain later testified that the x-rays taken that day showed no signs of acute injury, instead revealing a disc narrowing (normal wear and tear). He placed no work restrictions on the plaintiff.

A month later, the plaintiff was involved in an unrelated accident and a physical altercation while playing in a golf tournament. The plaintiff had driven the golf cart onto a public road, ran a red light and collided with a car causing him to fall from the cart onto the street. The plaintiff got into a physical altercation with the police at the scene, which included kicking, fighting and wrestling on the ground. There was evidence that he was intoxicated, had no permission to use the golf cart, yelled profanity at the police, and kicked both feet against the rear passenger window of the police car after he was arrested for battery on a law enforcement officer.

Additional evidence proffered by the defendant showed that the plaintiff had failed to disclose the golf cart incident and altercation to the chiropractor when he returned to him less than two weeks later, and that the MRI was taken after the golf cart incident.

The plaintiff moved in limine to exclude all of the evidence of the golf cart incident, arguing that its prejudicial effect substantially outweighed its probative value. The plaintiff argued that highly prejudicial facts such as intoxication, profanity and a struggle with law enforcement personnel were too interwoven with any facts relating to the golf cart collision, and that plaintiff's fall from the cart to the pavement could not be disclosed in a "sanitized" manner. The trial judge granted the motion.

At trial, the judge had allowed the jury to hear that the plaintiff played in the golf tournament less than a month after the accident and that he had played bumper cars with the golf cart at the first tee. The jury did not hear the complete details of the incident, nor did it hear that plaintiff failed to tell his chiropractor.

The court found that the golf cart incident included facts that addressed both the plaintiff's credibility, as well as proof of causation. It found that the possibility of unfair prejudice did not substantially outweigh the probative value of the evidence and had the motion been denied and the proffered evidence introduced the plaintiff's failure to mention the incident to his chiropractor may have affected the jury's evaluation of the plaintiff's credibility.

As the beneficiary of this "erroneous exclusion" of admissible evidence, the plaintiff was required to prove that the error complained of **did not contribute to the verdict** (*i.e.*, that there was no reasonable possibility that the error complained of contributed to the verdict). Because the plaintiff could not satisfy that requirement, the court reversed the final judgment for the plaintiff, and ordered a new trial.

TRIAL COURT PROPERLY DENIED STATE FARM'S DISCOVERY REQUESTS MADE TO DELRAY MEDICAL CENTER UNDER §627.736(6)(b).

State Farm v. Delray Medical Center, 40 Fla. Law Weekly D2467 (Fla. 4th DCA November 4, 2015):

Pursuant to §627.736(6)(b), State Farm sought discovery about the reasonableness of charges made by Delray Medical Center, including discovery regarding the amount others paid to Delray Medical for the same services and treatment. State Farm asserted that was charging much more than what was allowed under Medicare billing rates.

In looking at the plain language of the statute, §627.736(6) addresses "**discovery** of facts about **an injured person**; disputes."

State Farm asked the Fourth District to interpret the statute more broadly to allow for the discovery of documents that would help it determine whether the billing was reasonable in considering charges allowable under Medicare. State Farm also wanted to compare what Delray Medical had negotiated with private insurance companies to determine reasonableness. The Fourth District concluded that these requests were beyond the plain language of the statute, specifically §627.736(6)(b).

As to the interplay between §627.736(5) and §627.736(6) (§627.736(5) only allows medical providers to charge a "reasonable amount"), the court looked to the *Shands*

Jacksonville v. State Farm case from the First District. There, State Farm had sent requests for information including the discovery of confidential contracts between the hospital and 37 health insurance entities. State Farm wanted that discovery because it purportedly contained information regarding negotiated reimbursement rates that Shands agreed to accept for services. State Farm argued the information was necessary to help determine whether the amounts billed were "reasonable."

The court in *Shands* had concluded that discovery under §627.736(6) applied only to types of information a health care provider is required to provide as delineated within that section.

The Fourth agreed with the *Shands* case, finding §627.736(5) does not apply, because it does not apply to discovery requests made under §627.736(6)(b). Although the documents State Farm sought may have been relevant and discoverable in the context of litigation over the issue of reasonableness and charges instituted pursuant to sub-section **(5)(a)**, because they were clearly not the types of documents specifically delineated by sub-section **(6)(b)**, the trial court correctly determined that the request exceeded the permissible scope of discovery allowable under that statute.

TRIAL COURT IMPROPERLY DENIED DEFENDANT'S MOTION FOR DISMISSAL FOR LACK OF JURISDICTION, WHEN THE ALLEGATIONS WERE INSUFFICIENT AND THERE WAS NO AFFIDAVIT.

McLane v. The Automotive Resource, 40 Fla. Law Weekly D2475 (Fla. 4th DCA November 4, 2015):

A Florida limited liability company sued a Kentucky resident for breach of contract. The amended complaint alleged that the defendant committed a tortious act in the state, breaching the contract by failing to perform a contract and engage in substantial and not isolated activity.

The defendant filed a motion to dismiss and a supporting affidavit, arguing he was not a party to the purchase agreement, and there was no showing that he had operated a business venture in the state or committed a tort. The plaintiff failed to file an affidavit to rebut that one.

Because the allegations in the amended complaint did not show the defendant had committed a tort in Florida or failed to perform a contractual obligation here, coupled with the fact that even if the amended complaint had sufficiently pleaded a cause of action and properly alleged jurisdiction, because the plaintiff did not provide an affidavit or any evidence to refute that affidavit, the trial court should have dismissed the case for lack of jurisdiction. It is not enough to simply reiterate the factual allegations in the complaint; that does not meet the plaintiff's burden to substantiate its jurisdictional allegations once the defendant's affidavit makes a *prima facie* showing that the long-arm statute does not apply.

COURT REVERSES TRIAL JUDGE'S *DENIAL* OF DEFENDANT'S MOTION FOR REMITTITUR OF A PUNITIVE DAMAGE AWARD IN A TOBACCO CASE.

R.J. Reynolds v. Schoeff, 40 Fla. Law Weekly D2477 (Fla. 4th DCA November 4, 2015):

In a case where the jury awarded the plaintiffs $10.5 million in compensatory damages

and found punitive damages were warranted, the jury returned a verdict assessing $30 million in punitive damages even though the plaintiff asked (implored) the jury to award no more than $25 million in closing.

Using what seemed to be a lot of "rationalizing", and comparing the compensatory amount to the punitive amount, the Fourth District ruled remittitur should have been granted. The court wrote that even if the award was **not** unconstitutionally excessive, it should have been granted because the plaintiff's attorney "begged" the jury not to award more than $25 million in punitive damages and the trial court found there was no logical or sound reason to have exceeded that amount.

SECOND LAWYER WHO HAD AN UNENVORCEABLE CONTIGENT FEE CONTRACT WITH PLAINTIFF HAD A RIGHT TO SEEK QUANTUM MERUIT FEES AND COSTS FROM THE FIRST LAWYER IN A SEPARATE ACTION ONLY.

Anderson v. 50 State Security Service, 40 Fla. Law Weekly D2489 (Fla. 3rd DCA November 4, 2015):

An injured woman retained an attorney to pursue her claim. In that attorney's contract there was a provision that with the consent of the client, the attorney could associate any other attorney in the representation, as long as the attorney informed the client of the fee sharing arrangement made and a new fee contract.

The 82-year old client had retained her attorney, and then prepared a power of attorney to give her son the power to sign documents and direct her lawyer. The two then retained another attorney as co-counsel even though the two lawyers were not affiliated or in a professional relationship. After the plaintiff signed a second contingency fee agreement with the second lawyer, he was added to the service list and attended proceedings as co-counsel.

As part of the fee dispute, there was evidence that the son had sought to retain the original lawyer for his mother's claim, but was dissatisfied with the progress of the lawsuit and then retained the second lawyer. The trial court ruled that the second lawyer was responsible for obtaining a written arrangement with the original attorney before entering the case as co-counsel.

The trial court affirmed the substantial settlement offer to the plaintiff along with the disbursement of costs and the contractual 40% contingent fee to the original lawyer with no payment to the second lawyer.

As a preliminary matter, the second lawyer's contingency fee agreement did not adhere to the rules regulating the Bar and was unenforceable. Lawyers who are co-counsel have to come to an agreement for the allocation and must obtain client and court consent before fees are disbursed.

Although the case was not in the correct procedural posture for a quantum meruit claim, the court found there is authority for one for an attorney providing services but lacking a contingent fee agreement. The court affirmed the trial judge's ruling disbursing the fees to the original lawyer, but did so without prejudice to the second lawyer to pursue a quantum meruit claim in an independent action.

ERROR TO GRANT POST-TRIAL INTERVIEW OF JURORS WHO ALLEGEDLY

MISREPRESENTED LITIGATION HISTORIES DURING VOIR DIRE WHERE THEY WERE IMMATERIAL AND IRRELEVANT TO THE SERVICE IN THE CASE.

Penalver v. Masomere, 40 Fla. Law Weekly D2490 (Fla. 3rd DCA November 4, 2015):

In this medical malpractice case arising out of the negligent performance of surgery, some of the members of the venire stated that they had litigation histories, but some hid that they did. After a three-week jury trial ending in a verdict for the defendant, the plaintiff found out that one of the jurors had two landlord/tenant cases and a contract indebtedness action that were 30 years old, another one had a civil case that was over 20 years old, and a third juror had an eviction case. The trial case granted the motion to interview the jurors based on these discoveries.

The court reversed. Applying the *De La Rosa* test, the court observed that information is material **only when omission of the information prevents counsel from making an informed judgment which would have in all likelihood resulted in a preemptory challenge.**

In this case, the litigation histories of the jurors were not relevant and material to their service. The actions were remote, and the actions were different than the ones involved in this case. Accordingly, the court granted the petition and quashed the order granting the interview.

ERROR TO FIND COUNTY COURT'S RULING THAT TIMELY SUBMITTED EMERGENCY SERVICE PROVIDER'S BILL WAS NOT SUBJECT TO DEDUCTIBLE.

Metropolitan Cas. Insurance Co. v. Emergency Physicians of Central Florida, 40 Fla. Law Weekly D2497 (Fla. 5th DCA November 6, 2015):

The circuit court affirmed the county court's ruling that under the PIP statute, a provider of emergency services that timely submits its bill within the 30-day window is entitled to have its bill paid, regardless of the existence of a deductible in the insurance contract. The court affirmed a prior ruling, stating that the plain language of §627.736(4)(c), along with the deductible provision, are not in conflict and the bill should be paid in conjunction with the deduction for the deductible. One wonders why emergency services got their own section of the statute if the deductible applies universally across the board.

TO RECOVER ATTORNEY'S FEES, THE INSURED MUST RECEIVE AN AWARD OF ATTORNEY'S FEES OR SOME BENEFIT UNDER §627.428.

Explorer Insurance Co. v. Cajusma, 40 Fla. Law Weekly D2500 (Fla. 5th DCA November 6, 2015).

Kind Regards

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