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 AWARD PLAINTIFF DAMAGES FOR LOST EARNING CAPACITY WHEN PLAINTIFF FAILED TO DEMONSTRATE DIMINISHED ABILITY TO EARN MONEY IN THE FUTURE, AND FAILED TO PRESENT EVIDENCE THAT WOULD ALLOW A JURY TO QUANTIFY THE AMOUNT OF AN AWARD--ALSO ERROR TO AWARD DAMAGES FOR FUTURE MEDICAL EXPENSES WHERE NO EVIDENCE THAT THEY WERE REASONABLY CERTAIN TO BE INCURRED.

Volusia County v. Joynt, 40 Fla. Law Weekly D2563 (Fla. 5th DCA November 13, 2015):

A woman was severely injured when she was run over by a Volusia County beach patrol truck while sunbathing. She sued the county, and a jury awarded her $2.6 million in damages ($2 million for past and future pain and suffering, $500,000 for diminished earning capacity and $100,000 for future medical expenses). The county challenged both the awards for diminished earning capacity and future medical expenses.

The purpose of an award for future earning capacity is to compensate a plaintiff for "loss of capacity to earn income," as opposed to actual loss of future earnings. The test is to permit the recovery of future economic damages when such damages are to be established with reasonable certainty. A plaintiff must demonstrate not only reasonable certainty of injury, but must present evidence which would allow a jury to reasonably calculate any lost earning capacity.

In this case, the plaintiff put on evidence sufficient to establish reasonable injury, but she failed to demonstrate any diminished ability to earn money in the future, and failed to present any evidence that would allow the jury to quantify the amount of an award.

Prior to the accident, the plaintiff was employed as a teacher's assistant where she was generally responsible for specialized or concentrated assistance for students in elementary and secondary schools. At the time of the accident, she was voluntarily unemployed because she and her husband decided she would stay home until their child went to kindergarten. She was earning no income at the time.

Just a year after the accident, the plaintiff resumed her employment full-time, and although she faced some physical challenges, the record reflects that those challenges did not affect her ability to do her job. One of the witnesses (her principal) even testified that the plaintiff's teaching ability helped many students.

The principal also testified that they would have to reevaluate the decision to keep the plaintiff employed if her health were to decline. The plaintiff relied on that portion of the testimony to support the loss of earning capacity award.

The court found there was no testimony presented to indicate that the plaintiff was completely disabled from further gainful employment, and there was no evidence to support the speculative award of $500,000. Therefore, the court reversed the entire award.

As for future medical expenses, while there was testimony about potential future medical needs, "careful review of the evidence" revealed that the claimed future medical expenses were either not reasonably certain to be incurred, or that there was no basis upon which the jury could have with reasonable certainty determined the amount of those expenses. The court concluded that there was no evidence from which a jury could infer with reasonable certainty these multiple speculative assertions with regard to future treatment. Thus, the award for future medical expenses was also reversed.

LITIGATION PRIVILEGE DOES NOT BAR MALICIOUS PROSECUTION ACTION WHERE ALL ELEMENTS OF MALICIOUS PROSECUTION ARE PRESENT--CONFLICT CERTIFIED

Edwards v. Epstein, 40 Fla. Law Weekly D2550 (Fla. 4th DCA November 12, 2015):

In this case, the trial court specifically found that material issues of fact remained as to the elements of the claim. Thus, based on the facts presented, and the inferences to be drawn from those facts, the trial court found all the elements of malicious prosecution were present.

The issue regarding whether the litigation privilege bars a malicious prosecution cause of action where all the elements are met is currently pending before the supreme court, but this court (as it did in *Fischer v. Debrincat*, 169 So. 3d 1204 (Fla. 4th DCA 2015)), held that the litigation privilege does not bar the claim.

IN ORIGINAL APPELLATE PROCEEDINGS, MOTIONS FOR ATTORNEYS' FEES MUST BE SERVED NOT LATER THAN THE TIME FOR THE REPLY TO THE PETITION.

Geico General Insurance Co. v. Moultrop, 40 Fla. Law Weekly D2551 (Fla. 4th DCA November 12, 2015):

In this case, the court denied the petition for certiorari without requiring a response to the petition, or a reply to the response. Because the plaintiffs/respondents first filed for fees **after** the petition had been denied, the motion was untimely.

NO MEETING OF THE MINDS TO CREATE A "SETTLEMENT"--TRIAL COURT ERRED IN DISMISSING COMPLAINT BASED ON SETTLEMENT AGREEMENT.

Pena v. Fox, 40 Fla. Law Weekly D2573 (Fla. 2nd DCA November 13, 2015):

Before filing suit, plaintiff's counsel demanded the policy limits from defendant's insurer, in exchange for release of all claims against the defendant. The settlement contemplated that the insurer, USAA, would provide a proposed release for the plaintiff to execute but it imposed certain conditions to the form, which plaintiff's attorney addressed in detail in the demand letter. USAA tendered the check with the proposed release.

When the proposed release came, plaintiff's counsel deemed the language "release its agents and employees" as an attempt to expand the release to include USAA (which plaintiff had explicitly stated could not occur). Plaintiff considered the offer rejected and proceeded to file a lawsuit. The defendant filed a motion to enforce settlement.

The court reminded us that settlements are governed by contract law, and are formed when there is a mutual assent and a meeting of the minds between the parties. The acceptance of an offer must be absolute and unconditional, identical with the terms of the offer. Acceptance must be the mirror image of the offer in all material respects or it is considered to be a counter-offer.

The USAA release became a counter-offer because it added additional terms and was different than meeting the terms of the original offer.

The court acknowledged that it shared the circuit court's view that the inclusion of the defendant's agents and employees within the release was not the product of nefarious motives, but noted that such a point was irrelevant to the issue. The words themselves were what mattered because they controlled who would or would not be released.

The court concluded that when reading the plaintiff's offer and the defendant's acceptance together, there was no meeting of the minds, and thus no settlement.

VOLUNTARY DISMISSAL OF A COUNTER-CLAIM DID NOT DIVEST COURT OF JURISDICTION TO AWARD SANCTIONS UNDER §57.105.

Heldt-Pope v. Thibault, 40 Fla. Law Weekly D2575 (Fla. 2nd DCA November 13, 2015).

Kind Regards

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