THE WEEK IN TORTS

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

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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.

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ERROR TO GRANT PLAINTIFF'S MOTION FOR ADDITUR WITHOUT AN EXPLANATION AS TO WHY IT WAS WARRANTED; ADDITIONALLY, ADDITUR INAPPROPRIATE WHERE EVIDENCE IS CONFLICTING SO THAT JURY COULD HAVE CONCLUDED THAT EXPENSES WERE UNRELATED TO AUTOMOBILE ACCIDENT.

Ferrer v. La Serna, 40 Fla. Law Weekly D2636 (Fla. 4th DCA November 25, 2015):

In this case involving a low-speed crash, the plaintiff was diagnosed as having been in acute distress with a neck injury, sprains and aggravation of a pre-existing back condition. The plaintiff's physician recommended the plaintiff not get chiropractic back adjustments, but she did anyway.

Nearly a year after the accident, plaintiff started to feel a radiating pain in her forearm and the doctor thought the inflammation in her neck caused the radiating pain in her arm, but was unable to objectively correlate the accident to the radiating pain. The defense witness said it unequivocally was not related to the accident.

Plaintiff sought approximately $12,000 for past and future medical expenses, but the jury awarded $8,000. Plaintiff moved for an additur arguing the evidence was undisputed, and so she should be awarded the amount. The trial court granted it, but did not say why.

While an additur is only reversed where there has been a clear abuse of discretion, there must be findings to support the award. Not only did the trial judge not set forth any findings to support the additur in this case, there was also conflicting evidence regarding whether the accident caused the radiating pain, or if it came from something else like her chiropractic neck adjustments.

Because the evidence was in conflict, the jury could have concluded consistent with the evidence that the expenses associated with the radiating pain were unrelated to the accident. Thus, because undisputed evidence did not support the award of an additur, the court remanded with the instruction to reinstate the jury's verdict.

SUPREME COURT ADOPTS TRIAL COURT'S "ORDER RECOMMENDING ADOPTION OF REMEDIAL MAP" WITH RESPECT TO CONGRESSIONAL REDISTRICTING.

League of Women Voters v. Detzner, 40 Fla. Law Weekly S667 (Fla. December 2, 2015):

After eight supreme court opinions concerning the legislative and congressional apportionment since the adoption of the landmark Fair Districts Amendment, the supreme court issued this opinion, stating it should bring much needed finality to litigation concerning the state's congressional redistricting, and affirmed the trial court's order "fairly" re-drawing the districts.

AFTER JURY HAD BEGUN ITS DELIBERATIONS AND LEFT FOR THE DAY, EMPLOYEE AT THE STATE ATTORNEY'S OFFICE OVERHEARD A CONVERSATION WHERE THE CASE WAS DISCUSSED; STILL, THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR MISTRIAL, BECAUSE THERE WAS NO EVIDENCE OF EXTRINSIC INFORMATION DISCUSSED OR EVIDENCE OF PREJUDICE TO THE DEFENDANT.

Key v. State, 40 Fla. Law Weekly D2628 (Fla. 4th DCA November 25, 2015):

In this criminal case where the defendant was convicted of armed sexual battery and armed kidnapping, an employee from the State Attorney's office overheard two jurors talking about the DNA that connected the defendant to the victim. There was also mention about whether the sex was consensual or not. Only one juror was doing the talking.

The defendant moved for a mistrial, based on this testimony that the jurors had a conversation after the trial court instructed them not to discuss the case outside the presence of other jurors. However, the trial court denied the motion for mistrial stating that there was nothing in the record to suggest that the exchange of ideas or deliberations outside of the jury room had taken place. The court found it did not rise to the level of prejudice and denied the mistrial.

Although it is axiomatic that jurors should not discuss a case among themselves prior to deliberations, this case involved an allegation that the case was discussed **after** they had begun.

The court also found the allegations appeared to have been insufficient to require a jury interview because there was no direct allegation that more than one juror had discussed the case. Because the employee could not say if more than one juror was talking, there could not be an agreement among jurors to disregard their oaths and ignore the law.

It is also clear there was no extrinsic information or evidence that was discussed by the jurors. Because the court found that the trial judge did not err in denying the defendant's motion for mistrial in the face of this lack of evidence and no prejudice to the defendant, the court affirmed the ruling.

ORDER AWARDING APPELLATE FEES FOR FRIVOLOUS APPEAL UPHELD.

Cosner v. Park, 40 Fla. Law Weekly D2632 (Fla. 4th DCA November 25, 2015):

Pursuant to §57.105, and the interpretive case law, a frivolous appeal is one which raises arguments a reasonable lawyer would either know are not well grounded in fact, or would know are not warranted, either by existing law or reasonable argument for the extension, modification, or reversal of existing law.

Finding that the case met the standard for frivolousness, the court upheld the award of §57.105 fees.

MOTION TO DISQUALIFY JUDGE LEGALLY SUFFICIENT TO THE EXTENT IT RELIED UPON SPECIFIC CAMPAIGN RELATED ISSUES, BUT NOT BASED ON THE UNFAVORABLE LEGAL RULINGS OR PERCEIVED SLIGHTS IN SCHEDULING ISSUES.

Rivera v. Bosque, 40 Fla. Law Weekly D2647 (Fla. 5th DCA November 24, 2015):

Plaintiff's attorneys were involved in the trial judge's ongoing re-election campaign. One had a fairly significant role, including being a member of a host committee for a reception, being listed as a supporter, making a financial contribution, and being a member of the judge's re-election committee.

The facts alleged in a motion to disqualify need only show that the party making it has a well-grounded fear that he or she will not receive a fair trial at the hands of the judge. The judicial inquiry has to focus on the reasonableness of the affiant's belief that the judge may be biased, and not on the judge's own perception of his or her ability to act fairly.

In addition to the campaign related reasons, the defendant also asserted that the judge's rulings were also adverse, and did not allow defendant enough time to do certain things. Neither of those reasons was legally sufficient to disqualify the judge.

DISMISSAL FOR FRAUD CONTINUES TO REAR ITS UGLY HEAD.

Middleton v. Hager, 40 Fla. Law Weekly D2649 (Fla. 3rd DCA November 25, 2015):

Defendant sought to dismiss the plaintiff's complaint based on her uncontested failure to disclose material information concerning her prior accidents and medical history that were directly related to pertinent causation and damage elements of the claims. The lower court referred the motion to a general magistrate, and after an evidentiary hearing, the magistrate focused on six enumerated misrepresentations. He found evidence establishing that the plaintiff had provided false testimony and affirmative misinformation on multiple occasions throughout the course of discovery concerning prior accidents, and highly relevant and critical medical history.

The magistrate made further findings that the plaintiff's sworn answers were in fact false, and not the result of poor memory or confusion. He found the lies had resulted in an almost successful effort to mislead the defendants and interfere with their ability to determine the truth about her prior 2004 head-on collision, as well as her significant and material past medical diagnoses, and treatment for the identical medical problems involved in the second accident.

The magistrate also expressly found that the plaintiff did not offer any corroborating testimony about her loss of memory of events prior to the subject accident, and found that the plaintiff's testimony and demeanor during the evidentiary hearing, including her explanation for her present inability to recall was not credible.

Finally, the magistrate determined that the plaintiff's discovery responses were not mere inconsistencies or failures to remember. However the magistrate did not discuss the claim.

After a hearing on the exceptions, the trial court entered a seven-page detailed order, rejecting the magistrate's recommendation that it deny the motion to dismiss, finding that the magistrate's ultimate conclusion that the plaintiff had not engaged in a deliberate scheme to interfere with the judicial system's ability to impartially adjudicate her claim was not supported by the competent substantial evidence and was contrary to the magistrate's findings of fact. Despite the magistrate's recommendation to the contrary, the trial court dismissed the case for fraud.

The appellate court concluded that the trial judge had not re-weighed the evidence or substituted his own findings for that of the magistrate, but rather, correctly determined that although the findings of fact were supported by competent substantial evidence, the magistrate misconceived the legal effect of the evidence. Because the trial court properly and correctly determined the legal effect of those findings and credibility determinations, the trial judge dismissed the complaint, and the Third District upheld that dismissal.

TRIAL COURT ABUSED DISCRETION IN EXCLUDING TESTIMONY OF EXPERT BIOMEDICAL ENGINEER, WHERE PROPER TESTIMONY WAS RELEVANT TO DISPUTED ISSUES CONCERNING THE VELOCITY AND DIRECTIONAL FORCES INVOLVED IN THE ACCIDENT.

Taylor v. Coulver, 40 Fla. Law Weekly D2654 (Fla. 1st DCA December 1, 2015):

Because the defendant's biomechanics expert had testimony relevant to the disputed issues of velocity and directional forces involved in the accident and thus, to causation, the trial court clearly abused its discretion in refusing to admit this relevant testimony. The First District reversed the final judgment and remanded for a new trial.

QUESTIONS OF FACT AS TO WHETHER MEDICAL MALPRACTICE INSURER ACTED IN BAD FAITH.

Samiian v. First Professionals Insurance Co., Inc., 40 Fla. Law Weekly D2656 (Fla. 1st DCA December 1, 2015):

A man with a wife and two minor children went in for liposuction. At the end of the work day, the doctor left him in the care of a surgical technologist who administered medication intravenously. The patient suffered cardiac arrest and died despite the best efforts of the

EMTs the technologist summoned. The doctor put his carrier on notice and the carrier retained an attorney. Recognizing the indefensibility of the case, the insurer, FPIC, tendered its policy limits.

Simultaneously, however, the attorney FPIC retained for the doctor had offered to arbitrate, but did so without conditioning the offer upon a limitation of damages. The plaintiffs accepted the offer and the arbitration panel awarded the survivors approximately $35,000,000, which was ultimately $43,000,000, when costs and attorneys' fees were added in.

When the doctor sued his carrier for bad faith, the carrier asserted it was entitled to summary judgment because it tendered its limits, and it was not legally responsible for the decision to offer to arbitrate.

The court reversed summary judgment. Noting that the doctor's bad faith claim did not allege that the failure to pay or tender the policy limits, and rather, contended that FPIC breached duties owed to the doctor and acted in bad faith by making an offer to arbitrate, which entailed admitting liability without conditioning the offer upon a limit of general damages, and found issues of fact existed. The deceased patient had earned over $2,000,000 per year, and the complaint asserted that by admitting liability for economic damages and offering to arbitrate, was never in the doctor's best interest.

Because there were material issues of fact regarding whether the decision to arbitrate was the doctor's unilateral decision or not, and whether the offer was in the best interests of the doctor, summary judgment was reversed.

Kind Regards

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