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 DECEMBER 18, 2015

TRIAL COURT ERRED IN AWARDING COSTS FOR "REAL TIME" COURT REPORTING AND OVERHEAD EXPENSES IN ABSENCE OF A CLEAR FINDING SUPPORTING THE AWARD OF SUCH COSTS--TRIAL COURT ALSO ERRED IN AWARDING EXPERT FEES WHERE THE OPPOSING PARTY SPECIFICALLY OBJECTED TO SETTING AN EXPERT WITNESS FEE WITHOUT PRESENTATION OF EVIDENCE, AND THE PREVAILING PARTY FAILED TO PRESENT EVIDENCE THAT THEY WERE REASONABLE AND NECESSARY.

The Field Club v. Alario, 40 Fla. Law Weekly D2734 (Fla. 2nd DCA December 9, 2015):

The plaintiffs sought taxable costs as a prevailing party in excess of $130,000. The trial court ultimately awarded them $47,000. The defendant still appealed from that amount sought.

Looking first to "real time" court reporting fees, the Uniform Guidelines allow for a reasonable court reporter's *per diem* for the reporting of evidentiary hearings, trial and post-trial hearings. However, the Guidelines do not clearly provide for the taxation of real time court reporting fees.

While the court acknowledged that a trial judge does have the discretion to deviate from the Guidelines where it has been shown that the requested costs were "**reasonably necessary under the unique circumstances of the case**," the trial court had not made

any such findings, and thus, the appellate court struck the $2,600 for real time fees.

The defendant also challenged the trial court's award of "miscellaneous" taxable costs, including online investigations, preparation of Freedom of Information Act requests, background checks, overnight shipping and the production of a DVD that was not used at trial. The Guidelines do not provide for the taxation of these costs, and appellate courts have consistently held that certain costs and expenses are not taxable because they are considered overhead.

While such expenses are not typically taxable, again, the court does have discretion to award costs if it finds that they are "**reasonably necessary under the unique circumstances of the case**." There was no such finding here, and the miscellaneous costs award was also stricken.

The defendant also challenged the award of $10,000 for the plaintiff's expert and $2,500 for the treating doctor. They were also entered in error.

In this case, the plaintiff specifically objected to setting an expert witness fee without the presentation of evidence. The defendant filed a written response to the plaintiff's motion to tax costs and an objection.

The plaintiffs never presented competent evidence that their requested expert fees were reasonable and necessary. They relied solely on their trial attorney's affidavit asserting that all requests were reasonable and related to the case. They did not present any testimony at an evidentiary hearing from expert witnesses qualified in the relevant fields (an omnibus witness who is not proficient in each area of the expertise cannot support the claim). These costs were also stricken.

COURT MUST CONSIDER WHETHER DISCLOSURE TO CERTAIN "THIRD-PARTIES" ARE STILL PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE.

Las Olas River House Condo Association v. Lorh, LLC, 40 Fla. Law Weekly D2714 (Fla. 4th DCA December 9, 2015):

A condominium association sought a writ of certiorari to quash an order compelling it to produce documents over the assertion of the attorney-client privilege. The petitioners were defendants in a lawsuit brought by a corporate owner of two commercial units in the condominium, its corporate lessee, and the individual who was the authorized representative of both corporate plaintiffs.

In response to a motion to compel, the trial court ordered the production of documents exchanged among some of these individuals, finding that the privilege was waived because the documents were received by or copied to third-parties, *i.e.,* either the association's community association manager, the immediate supervisor or both (both of whom were employees of the association's property management company acting as the agent of the association pursuant to a contract).

The trial court compelled the production without an *in camera* inspection, doing so because the two individuals were not "employees" of the association within the meaning of *Southern Bell Telephone v. Deason*, 632 So. 2d 1377 (Fla. 1994) (adopting a subject matter test to determine whether corporate communications with counsel are privileged).

The Fourth District quashed the trial court's order, ordering that the trial court should have conducted a hearing pursuant to the *Deason* test, and should have determined via an *in camera* inspection whether the privilege as to each document or class of documents was waived by disclosure to the property manager and his supervisor. The failure to make this determination was a departure from the essential requirements of law.

THE TRIAL COURT DID NOT DEPART FROM THE ESSENTIAL REQUIREMENTS OF LAW IN STAYING THE PROCEEDINGS OF A CASE BROUGHT FOR UNPAID LEGAL FEES, WHERE THE CLIENT FILED A COUNTERCLAIM ALLEGING LEGAL MALPRACTICE, PENDING THE RESULTS OF THE FLORIDA BAR DISCIPLINARY CASE INITIATED BY THE CLIENT/COUNTER-CLAIMANT.

Florida Wellness & Rehab, Inc. v. Libman, 40 Fla. Law Weekly D2741 (Fla. 3rd DCA December 9, 2015):

A trial court enjoys broad discretion to order or refuse a stay of action pending before it. Because there was no clearly established principle of law preventing the trial judge from staying the civil proceedings relating to a pending bar grievance, there was not a departure from the essential requirements of law when the court issued a stay.

TRIAL COURT ERRED IN STRIKING FORMER COUNSEL'S CHARGING RETAINING LIEN WITHOUT TAKING EVIDENCE AS TO WHETHER THE FORMER ATTORNEY WAS ENTITLED, BASED ON THE ANSWER TO SEVERAL FACTUAL QUESTIONS.

Parrish & Yarnell v. Spruce River Ventures, 40 Fla. Law Weekly D2746 (Fla. 2nd DCA December 11, 2015):

One of the defendants moved to disqualify the plaintiff's attorney alleging he had violated several bar rules. The attorney moved to withdraw, requesting it based on irreconcilable differences. The attorney reiterated that he had a conflict of interest, but could not reveal the details and the court granted the motion to withdraw.

At that point, the firm filed a notice of asserting a charging and retaining lien in this contingency fee case. The defendant moved to strike the charging lien, claiming it was based on a contingency fee agreement and the firm was not entitled to recovery because it had voluntarily withdrawn.

When the case settled, the defendant raised four affirmative defenses in response to the charging lien: (1) that the petition to enforce the charge of a retaining lien was barred by the Rules Regulating the Florida Bar; (2) that defendant was entitled to a setoff for any malpractice damages caused by the firm; (3) that the petition was barred by the doctrine of unclean hands; and (4) the petition was barred by the doctrine of waiver and estoppel stemming from the firm's voluntary withdrawal.

The defendant filed a notice of hearing, specifying that the issue was whether the firm was entitled to a charging lien as a matter of law, and requesting a two-day evidentiary hearing if the court declined to strike the lien on that basis. The firm requested an evidentiary hearing, and the defendant argued that it would be appropriate only if the court found that the retaining and charging lien was legally sufficient. The trial court granted the motion to strike the lien, reasoning that the law firm was not entitled to it because there was no recovery and because the plaintiff's attorney had withdrawn from the case.

The court reversed. It ruled there should have been evidence taken at the hearing to determine if the lien was sufficient as a matter of law. Moreover, because a motion to strike only tests the legal sufficiency of a claim, it is reversible error for a court to grant a motion to strike where the pleading presents a bona fide issue of fact that may be supported by evidence. A claim should not be stricken simply because a judge believes its proponent will ultimately be unable to produce sufficient evidence. To the contrary, the trial court must resolve all doubts in favor of the pleading and keeping in mind that the striking of the pleading is an extreme measure that is disfavored.

In this case, the court found that the records showed that the issue of whether the law firm was entitled to a charging or retaining lien turned on several factual questions, such as whether there was a recovery, whether the fee agreement provided for a contingent or hourly fee, whether the attorney withdrew from the case voluntarily, and whether the allegations of misconduct against the plaintiff's attorney should effect his entitlement to fees.

The court made factual determinations based on the record **before** it addressed the merits of the claim that the law firm was entitled to a charging and retaining lien, as well as to the affirmative defenses. The case was reversed and remanded for an evidentiary hearing.

APPELLATE COURT, ON ITS OWN INITIATIVE, SANCTIONS AN ATTORNEY FOR FILING A FRIVOLOUS APPEAL AS PROSCRIBED BY §57.105(1).

In the Interest of: A.T.H., 40 Fla. Law Weekly D2758 (Fla. 1st DCA December 14, 2015):

In this family law matter, an attorney who filed a "patently meritless" appeal, failed to comply with the Rules of Judicial Administration, and responded late to the court's show cause order, was properly sanctioned and ordered to pay attorneys' fees to the other side.

Kind regards

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