THE WEEK IN TORTS

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

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FLORIDA LAW WEEKLY

New named insured, new UM rejection

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CASES FROM THE WEEK OF FEBRUARY 20, 2015

WHEN THE NAMED INSURED ON THE POLICY IS CHANGED, THE INSURER MUST OBTAIN A NEW WAIVER OF UM BENEFITS.

Chase v. Horace Mann Ins. Co., 40 Fla. L. Weekly S97 (Fla. 1st DCA Feb. 19, 2015):

A man procured $100,000/$300,000 in liability limits on an insurance policy, and selected reduced UM coverage in the amount of $25,000/$50,000. His daughter was listed as a "driver" but not a "named" insured on the policy and had no right to select UM limits.

At some point, the insurer removed the father as the sole named insured and made the daughter the sole named insured. It changed the vehicle to one she had acquired days before. The vehicle was titled only in the daughter's name and at the same time, the insurer issued a new policy to the father as the sole named insured.

The insurer argued that the change of the named insured constituted a change to the existing policy, and therefore did not automatically require it to allow the new insured to make certain waivers. However, the Supreme Court found the policy in question was

indeed a new policy, because the only "named insured" had not previously been a named insured and, thus, had never had an opportunity to make any of the express waivers required by law.

Although the daughter's policy retained the same liability limits as her father's previous policy, she had not been a named insured on the first policy. Being listed as a named insured on the new policy made it the first time that the only named insured on the policy had the opportunity to make a statutorily required waiver and, therefore, the failure to obtain such a waiver resulted in a finding that the policy provided UM coverage under the policy.

TRIAL COURT IMPROPERLY ORDERED PRODUCTION OF DEFENDANT'S QUARTERLY SAFETY COMMITTEE REPORTS WHERE PLAINTIFF HAD OBTAINED THE REQUESTED INFORMATION OR ITS SUBSTANTIAL EQUIVALENT, AND HAD NOT MADE A SUFFICIENT SHOWING OF NEED OR UNDUE HARDSHIP.

Millard Mall Services v. Sunrise Mills, 40 Fla. L. Weekly D384 (Fla. 4th DCA Feb. 11, 2015):

In a slip and fall case at the Sawgrass Mall, plaintiff sought a subpoena duces tecum to the corporate representative including all records, incident reports, etc. The defendant objected to the production, filing an affidavit stating that their quarterly safety committee reports were not discoverable because they included incident reports, etc.

Plaintiff had availed herself of the ordinary tools of discovery, obtained relevant information about the incident she was involved in and similar prior incidents on the property. Even if some of those documents which were objected to were relevant to the issue of the regularity of these occurrences, plaintiff had the ability to obtain substantially equivalent information through discovery directed to defendants. Those efforts had enabled her to obtain a list of incidents on the premises for three years predating the accident.

Even if the privileged documents could potentially lead to the discovery of relevant admissible evidence as claimed by the plaintiff's attorney, their relevance was one factor among several to be considered. The mere fact that the documents might yield some information about the incident is not enough without more to show undue hardship.

Because the information sought by the plaintiff were documents created in the course of defendant's investigation, and because plaintiff failed to make a sufficient showing of need or undue hardship, the trial court's order compelling disclosure was a departure from the essential requirements of law.

Judge Warner dissented from the majority opinion written by Judges Damoorgian and Klingensmith. She refused to find that the individual incident reports were made in anticipation of litigation. (Instead, she said they were reports used to promote safety and determine whether proper maintenance was being done at the mall, and should have been discoverable).

TRIAL COURT DID NOT ABUSE DISCRETION BY GRANTING NEW TRIAL AFTER A DEFENSE VERDICT, BASED UPON A FINDING THAT DEFENDANT HAD DESTROYED EVIDENCE, VIOLATED COURT ORDERS, ENGAGED IN WILLFUL

DISCOVERY VIOLATIONS, AND THERE WAS JUROR MISCONDUCT REGARDING NON-DISCLOSURE OF PAST LITIGATION HISTORIES.

Meadowbrook Meat Co. v. Cantinella, 40 Fla. L. Weekly D402 (Fla. 2nd DCA Feb. 11, 2015):

The plaintiff was unloading a truck at a meat company when he fell and suffered injuries. After the jury's defense verdict, plaintiff appealed.

In a lengthy order, the court set out circumstances it believed warranted a new trial, including that defendant had destroyed evidence (requiring an adverse inference instruction), had materially violated a variety of court orders, and had engaged in a systematic material and willful set of discovery violations which prejudiced the plaintiffs. The court also found that two jurors had engaged in misconduct by failing to disclose litigation history that was relevant and material to their jury service.

The defendant urged the appellate court to find that the trial court abused its discretion by concluding that the circumstances detailed in the order warranted a new trial. Although the defendant argued that the trial court's observations were unsupported by the record, after thoroughly reviewing the record on appeal the court agreed that the trial court **did not** abuse its discretion under these circumstances.

UNIVERSITY OF MIAMI MEDICAL SCHOOL WHICH WAS NEITHER A "HOSPITAL" NOR A "PHYSICIAN PARTICIPATING IN NICA" COULD INVOKE NICA'S IMMUNITY FOR ITS DIRECT LIABILITY, WHEN ITS EMPLOYEES OR PARTICIPATING DOCTORS WHO HAVE WAIVED NICA IMMUNITY – NICA IMMUNITY DOES NOT APPLY TO ALLEGATIONS AGAINST MEDICAL SCHOOLS BASED ON VICARIOUS LIABILITY.

University of Miami v. Ruiz, 40 Fla. L. Weekly D416 (Fla. 3rd DCA Feb. 11, 2015):

A baby was born at Jackson, a hospital owned by the Public Health Trust of Miami-Dade County. The plaintiffs asserted that UM and PHT were both directly negligent and vicariously negligent.

The plaintiff sought NICA benefits. The ALJ determined that the baby's injury was compensable. The ALJ also specifically found that PHT served the plaintiffs NICA notice as required, but that the doctors had failed to comply with the notice requirements. The ALJ made no finding whether UM itself had given or was required to give notice of NICA participation under the statute.

The court addressed the narrow issue of whether an entity that is neither a hospital nor a physician participating in the NICA plan may invoke NICA's immunity from suit, when its employees are participating doctors who have waived their personal NICA immunity, by failing to comply with NICA's notice provision. NICA immunity applies to entities when the allegations of the complaint indicate they were directly involved in the medical care provided during or immediately after labor and delivery. NICA immunity does not apply to allegations based on such entities' vicarious liability for the medical malpractice of their employees.

In passing NICA, the Legislature sought to shelter medical personnel providing obstetrical services from increasingly high costs of medical malpractice insurance. NICA requires

participating physicians and hospitals give notice so that patients are aware they are waiving their rights to civil suits in the event of a birth-related neurological injury. Although NICA's notice provision makes no reference to NICA's immunity provision, it is well established that a party who is required to give notice waives the right to assert the exclusivity of the remedies.

When there is compliance with NICA's notice provision by some but not all of the NICA participants, the claimant is faced with the choice of accepting NICA benefits to the exclusion of any and all civil remedies he or she may have, or eschewing the NICA benefits to take the chance at a civil suit.

If the negligent acts occurred within the scope of employment, an employer will be liable for the negligence of its employees to the extent those claims rely on vicarious liability and to the extent the employee is unable to assert a valid defense including immunity.

While UM is immune for any direct involvement it had in the medical malpractice, it is still subject to vicarious liability for its doctors.

UM is also immune for its direct acts of negligence. The only way a party who is otherwise entitled to NICA immunity can waive its immunity is by failing to comply with the notice provisions. Because there was no NICA notice requirement for UM, it could not have waived any immunity to which it would have otherwise been entitled, by failing to give notice. UM is neither a hospital with a participating physician on its staff, nor a participating physician and, therefore, the NICA notice requirements do not apply to it.

However, as to vicarious liability, UM was not being sued for its own negligence, but for the negligence of its employees. Because that claim is not based on UM's direct involvement in the labor and delivery, it is **unable to invoke NICA's immunity provision** on its own behalf. Instead, UM's liability is directly linked to the liability of the employees under a theory of vicarious liability.

TRIAL COURT ERRED ON FAILING TO RULE ON MOTION FOR CHANGE OF VENUE TO MORE CONVENIENT FORUM BASED ON § 47.122, AND IN DENYING A MOTION BASED ON THE "PLACE OF PAYMENT" RULE, A FACTOR THAT IS APPLICABLE TO ANALYSIS UNDER § 47.011.

ILD Corp. v. New Link Network, 40 Fla. L. Weekly D424 (Fla. 2nd DCA Feb. 13, 2015):

The trial court entered a boilerplate order denying a motion to transfer venue. The failure to rule on the factors raised by § 47.122 was error.

ERROR TO GRANT SUMMARY JUDGMENT FOR DEFENDANT ON BASIS THAT THERE WAS NO EVIDENCE THAT ADVANCED WARNING SIGNS FOR INTERSECTION WERE CONSTRUCTED USING DEFENDANT'S DESIGN, WHERE THERE WAS CONFLICTING EVIDENCE AS TO WHO THE DESIGNER WAS – TRIAL COURT ALSO ERRED IN RULING PROFESSIONAL ENGINEER MAY AVOID LIABILITY BASED SOLELY ON SIGNING AND SEALING OF SUBSEQUENT SET OF DESIGN PLANS BY A SUCCESSOR ENGINEER.

Villa Nueva v. Reynolds, Smith and Hills, 40 Fla. L. Weekly D427 (Fla. 5th DCA Feb. 13, 2015):

The accident occurred in June of 2007 at a rural intersection. Seven years before, defendant RS&H submitted a set of plans which contained the proposed design of the project to the county. The county determined that the plans required several unrelated modifications and undertook the changes without input from RS&H. Two years later, the county submitted a set of plans very similar to those plans. The county's plans had altered several portions of the project, including speed limit changes. However, they did not alter the placement of the advance warning signs contained in RS&H's plans.

Plaintiff sued both RS&H and the county, alleging negligent design of the project based on improper placement of these advance warning signs for the subject intersection. RS&H moved for summary judgment asserting that the plans **it** designed were not used for the construction of the advanced warning signs, and the county had assumed full liability for the project, by signing and sealing the subsequent set of plans; also, that the county assumed full liability under *Slavin* for all patent defects by accepting the finished roadway.

The trial court granted the defendant's motion for summary judgment, finding that the plaintiff's case was based on an expert's uncertainty as to whether any work on the advance warning signs was completed prior to the adoption of the county plans. The plaintiff's opposition to summary judgment had highlighted the testimony of the expert, however, which established uncertainty concerning the portion of the project that was completed prior to the submission. Even though the trial court had conflicting evidence before it, it impermissibly weighed it, and granted summary judgment.

RS&H argued that *Slavin* also extinguished its liability, when the county accepted the project but failed to raise the issue by cross-appeal. Because the trial court did not address *Slavin* in its summary judgment, it therefore by implication ruled in favor of the plaintiff. Thus, without having raised the issue on appeal, it was not preserved.

The court also reversed the trial court's ruling that the professional engineer may avoid liability for negligent design plans, based solely on the signing and sealing of a subsequent set of plans by a successor engineer. **Simply because a successor engineer signs and seals design plans, it does not take on the full and exclusive responsibility for the plans of the successor engineer**. Putting one's name to plans which were not prepared by him does not absolve the person of responsibility.

TRIAL COURT CORRECTLY CONSTRUED STATUTE AS ALLOWING FOR DIFFERENT UM COVERAGE LIMITS AMONG INSUREDS.

Germany v. Darby, 40 Fla. L. Weekly D436 (Fla. 1st DCA Feb. 16, 2015):

A man was involved in a work related auto accident with an uninsured motorist. The policy provided UM coverage: $500,000 for executives and their families but only up to $30,000 for all other insureds, including employees like the plaintiff.

The trial court construed the statute -- § 627.727(1) as allowing for different coverage limits among insureds. Finding there is no blanket prohibition against an insurance policy containing general conditions affecting coverage, or exclusions on coverage as long as the limitation is consistent with the purposes of the UM statute, the trial court ruled properly, and that the distinctions did not violate the statute.

Kind Regards

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