THE WEEK IN TORTS

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

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TRIAL COURT PROPERLY DENIED AWARD OF ATTORNEY'S FEES TO PLAINTIFFS WHERE PROPOSAL FOR SETTLEMENT FAILED TO STATE WHETHER ATTORNEY'S FEES WERE PART OF THE CLAIM, AND ALSO FAILED TO STATE WHETHER PUNITIVE DAMAGES WERE PART OF THE CLAIM - STRICT COMPLIANCE IS REQUIRED.

Colvin v. Clements and Ashmore, P.A., 41 Fla. Law Weekly D200 (Fla. 1st DCA January 15, 2016):

The plaintiff in this medical malpractice case served a proposal for settlement offering to resolve all claims, including but not limited to any claims for punitive damages against the defendant, for $20,000 "inclusive of costs and attorney's fees." The defendant rejected the proposal and the plaintiff's verdict beat it at trial.

When the plaintiffs moved for attorney's fees pursuant to their proposal, the defendant asserted the proposal for settlement was invalid, because it failed to state whether the attorney's fees were "part of" the legal claim, and also failed to state whether punitive damages were "part of" the claim.

While the trial court recognized the absurdity of requiring a proposal to state whether attorney's fees and punitive damages are part of the legal claim when the plaintiff had not even sought fees or such damages in the complaint (nor could she have), the trial court still recognized the rule of law requiring strict compliance with rule 1.442 and §768.79.

Rejecting the Fourth District's more reasonable approach in *Bennett v. American Learning Systems*, where the court found that even though the proposal had not perfectly adhered to rule 1.442, it was not ambiguous and would have made no sense to require a defendant to state in its offer that the offer did not include attorney's fees when the plaintiff does not claim an entitlement to them in the first place, finding that a more recent First District case reaffirmed the holding, reiterating that rule 1.442 and §768.79 must be strictly

construed.

The court continued to recognize a conflict with the *Bennett* case and certified it.

NO DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW WHEN THE TRIAL JUDGE ALLOWED INSURER TO AMEND COMPLAINT TO ADD FIRST-PARTY BAD FAITH CLAIM AFTER ENTERING PARTIAL FINAL JUDGMENT IN ITS FAVOR.

The First Liberty Insurance Co. v. O'Neill, 41 Fla. Law Weekly D156 (Fla. 4th DCA January 13, 2016):

At the time of the circuit court's ruling, the Fourth District had not yet addressed the issue of whether the insureds, after obtaining a favorable result on their claim for benefits, could amend their complaint to add a first-party bad faith claim (instead of filing a new action). There is a split of authority from the First District (allowing a motion to amend to add a bad faith claim in the existing action) and the Fifth District (requiring the insured to pursue a subsequent separate bad faith action).

Given the lack of binding authority and the split of authority, the court said it could not find that the circuit court's decision to follow the First District's authority was a departure from the essential requirements of law (and the Fourth District reminded us that a departure from the essential requirements of law necessary for granting a writ of certiorari means something more than simple legal error). Thus, the court was compelled to deny the petition, and said it could not decide the underlying issue until a final appealable judgment is entered.

WHILE DISMISSAL NOT APPROPRIATE BASED ON *RES JUDICATA*, IT WAS APPROPRIATE BASED ON COLLATERAL ESTOPPEL.

Kowallek v. Rehm, 41 Fla. Law Weekly D157 (Fla. 4th DCA January 13, 2016):

Plaintiff had sued the various defendants for negligence, alleging they improperly trimmed a tree on a utility easement located on his property. In that case, he sought to address tree trimming procedures to prevent future damage to his property. A final judgment was rendered, ordering that the plaintiff had 30 days to remove the vegetation in the easement and if he did not do so, the defendants could remove it, which they did.

Plaintiff then sued the defendants claiming negligence, trespass and destruction of private property. The trial court dismissed that second action on the basis of *res judicata* and collateral estoppel.

Res judicata is a judgment on the merits rendered in a former suit between the same parties or their privies, upon the same cause of action, by a court of competent jurisdiction, and is conclusive not only as to every matter which was offered or received to sustain or defeat the claim, but as to every other matter which might, with propriety, have been litigated and determined in that action.

Similarly, the doctrine of collateral estoppel bars re-litigation of the same issue between the same parties, which has already been determined by a valid judgment, even where the present and former cause of action are not the same. While collateral estoppel and *res judicata* are affirmative defenses that may not ordinarily form the basis for a motion to dismiss, they may be appropriate where a plaintiff has specifically incorporated prior

proceedings into his complaint.

While res judicata was not appropriate because the causes of action alleged were different from the first (they were based on events that occurred **after** the entry of final judgment), the trial court did not err in dismissing on the basis of collateral estoppel, because plaintiff attempted to re-litigate some of the same issues from the first case, *i.e.*, removal of vegetation on his property.

DENIAL OF LEAVE TO PERPETUATE TESTIMONY BY TERMINALLY ILL PERSON IS A MATTER WHICH MAY BE ENTERTAINED BY PETITION FOR WRIT OF CERTIORARI.

Toomey v. The Northern Trust, 41 Fla. Law Weekly D160 (Fla. 3rd DCA January 12, 2016):

In a case involving the construction of a trust agreement, it was improper for the trial judge to issue a protective order preventing the depositions of two witnesses who had direct conversations with the settlor regarding his intentions in the execution and administration of the trust.

Both witnesses were in their 70's, and one witness suffered from an end-stage chronic pulmonary disease. The trial court should have allowed the perpetuation of testimony under these circumstances.

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.

Kind Regards

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