THE WEEK IN TORTS

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

Provided By:

CLARK • FOUNTAIN • LA VISTA
PRATHER • KEEN & LITTKY-RUBIN

TRIAL & APPELLATE ATTORNEYS

www.ClarkFountain.com

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.

FLORIDA LAW WEEKLY
VOLUME 41, NUMBER 8
CASES FROM THE WEEK OF FEBRUARY 26, 2016

FULL EXTENT OF DAMAGES SHOULD BE DECIDED IN UM ACTION AND BE BINDING ON THE BAD FAITH CASE--INSURER CANNOT MOOT AMOUNT OF DAMAGES IN UM CASE BY CONFESSING JUDGMENT AND TENDERING POLICY LIMITS.

Fridman v. Safeco Insurance Co., 41 Fla. Law Weekly S62 (Fla. February 25, 2016):

In this auto case where the insured had suffered several herniations, the insurer failed to tender its $50,000 policy limits until about six months before trial (and about three years after the accident). At that point, the plaintiff had refused to accept the policy limits. Then, the insurance company tendered a new check, and without any settlement language, filed a "confession of judgment" and a separate motion for "entry" of confession of judgment. The plaintiff objected to this, and argued that the case should go to trial because the jury's verdict would fix the damages in an ultimate bad faith case.

The trial court denied the motion to confess judgment, finding that to do so otherwise would ignore the plain legislative intent of §627.727(10) which governs the damages recoverable in a bad faith action.

The case proceeded to trial, and the jury awarded damages of $1 million. The trial judge entered final judgment for $50,000 (the policy limits), and then reserved jurisdiction to determine the plaintiff's right to amend the complaint to seek and litigate bad faith

damages listing the amount of those damages in excess of $980,000.

When the insurance company appealed to the Fifth District, the appellate court reasoned that the only case involved was a UM case (because the plaintiff rightfully had not included a bad faith claim in his underlying complaint), and ruled that when the insurance company confessed judgment in the amount of the policy limits, the issues between the parties as framed by the pleadings became moot. The court ruled that the trial judge simply should have entered final judgment, and the plaintiff still would have had a sufficient basis to pursue a bad faith claim to seek the full amount of damages that could be afforded in a subsequent bad faith action.

The supreme court disagreed with the Fifth District. Finding that the issue implicated the heart of UM and first party bad faith litigation, it then noted that an insured is entitled to a determination of liability and the full extent of his or her damages in the UM case before litigating the first party bad faith claim, as that is a key to first party bad faith.

The court concluded that an insured is entitled to a jury determination of liability and the full extent of his or her damages which may be in excess of the policy limits in the underlying UM case, **prior to litigating** a first party bad faith cause of action. It then held that this determination is binding on the subsequent bad faith action, provided that the parties have had the opportunity for appellate review of any trial errors that were timely raised.

Finally, a final judgment reserving jurisdiction to consider a motion to amend to add the bad faith cause of action is a proper approach, as is including the verdict amount in the final judgment.

APPELLATE FEES UNDER §627.428 SHOULD BE AWARDED "CONDITIONED" UPON PETITIONER PREVAILING IN THE UNDERLYING PROCEEDINGS.

State Farm v. Pro Health Pain Relief, 41 Fla. Law Weekly D422 (Fla. 3rd DCA February 17, 2016):

An award of attorneys' fees pursuant to §627.428(1) should be "conditioned" upon the insured/assignee ultimately prevailing in the underlying proceeding (they cannot be awarded outright).

ERROR TO GRANT NEW TRIAL ON *DAUBERT* OBJECTION NOT MADE UNTIL AFTER TRIAL.

Rojas v. Rodriguez, 41 Fla. Law Weekly D423 (Fla. 3rd DCA February 17, 2016):

Defendant admitted liability in this auto accident, and the case was tried on whether the plaintiff's herniated disc was caused by the accident. A neurosurgeon testified that the herniated disc was consistent with the twisting of the body that the plaintiff testified occurred when the vehicle spun after the impact. Defense counsel objected to the neurosurgeon's testimony on the basis that it was outside of the scope of his expertise, and thus he was not an accident reconstructionist or biomechanical expert. The trial judge overruled the objection.

After the plaintiff rested his case, the defense moved for a mistrial based on the neurosurgeon's testimony as inappropriately falling within an accident reconstructionist's

expertise or a biomechanical engineer's expertise (neither qualifications of which he had).

After the verdict for the plaintiff, the defense once again renewed its objection to the doctor, but never raised a *Daubert* objection. The trial court asked the defendant to file a written motion so the plaintiff could properly respond. The defendant's motion for new trial and/or remittitur asserted that the neurosurgeon's testimony was outside of his area of expertise, and raised *Daubert* for the first time.

The trial court granted the motion citing to *Perez v. Bellsouth Telecommunications* (holding that a physician's proposed testimony was inadmissible under the *Daubert* test). The plaintiff appealed. The trial judge filed an amended order explaining that the doctor's testimony was outside of his scope of expertise and inadmissible under *Daubert*, and because the plaintiff had put on no other expert testimony as to causation, ordered a new trial.

The court stated that the appeal hinged on whether the post-trial *Daubert* objection was timely, which it found it was not. **The failure to raise *Daubert* prior to the end of the trial was fatal to the defendant's case**, especially when the neurosurgeon was on the plaintiff's witness list for ten months before the start of trial. Because *Daubert* makes the trial judge a gatekeeper, it stands to reason that such an objection must be timely raised to allow the trial court to perform its role properly. The court explicitly refused to rule whether the testimony would have been admissible under *Daubert* in the first place.

FEDERAL MEDICAID ACT'S ANTI-LIEN PROVISION DOES NOT PREEMPT FLORIDA'S MEDICAID THIRD-PARTY LIABILITY ACT, WHEN THE LIEN IS ON A WRONGFUL DEATH SETTLEMENT (INSTEAD OF ON A LIVING VICTIM'S SETTLEMENT).

Hernandez v. Agency for Health Care Administration, 41 Fla. Law Weekly D424 (Fla. 3rd DCA February 17, 2016):

In this wrongful death case, the estate filed a petition in probate court to determine the amount of the Medicaid lien. Rather than allow the apportionment, the agency argued that under the formula in Florida's Medicaid Third-Party Liability Act, it was entitled to a specific, non-negotiable amount prior to any wrongful death apportionment. *See*, §409.910(11)(f). The estate cited to *Arkansas v. Ahlborn*, arguing that the Federal Medicaid Act's anti-lien provision preempted Florida's Medicaid Third-Party Act.

In this case of first impression, involving a lien on a wrongful death settlement proceeds, the court looked at the plain language of the Federal Anti-Lien Statute which explicitly states that "no lien may be imposed against the property of any individual **prior to his [her] death** on account of medical assistance…." (42 U.S.C. §1396p(a)(1)). The court agreed that this language clearly reflected Congress's intent to apply the anti-lien provision only to *living* Medicaid recipients.

Because this case involved a lien in a wrongful death case, *Ahlborn* and the other cases did not apply. Instead, the court held that the decision in *Ross v. Agency for Health Care*, 947 So. 2d 457 (Fla. 3rd DCA 2006), where the court held that the agency had to be paid in accordance with Florida's Medicaid Third-Party Act in a wrongful death case, did apply.

LAW OF THE CASE ONLY APPLIES WHEN THE APPELLATE COURT RULES ON THE CONTESTED ISSUE IN THE PRIOR APPEAL.

Francois v. University of Miami, 41 Fla. Law Weekly D427 (Fla. 3rd DCA February 17, 2016):

When a trial court's conclusion and the appellate court's ruling do not expressly involve questions that were decided on appeal, the appellate decision is not necessarily law of the case. Law of the case is a doctrine that is limited to rulings on questions of law actually **presented and considered** in the former appeal.

SUMMARY JUDGMENT REVERSED IN PART AND UPHELD IN PART IN AN ACTION AGAINST A DEFENDANT OPERATING A SCHOOL AND A RESIDENTIAL TREATMENT FACILITY, WHERE A MINOR WITH BEHAVIORAL DISORDERS WAS INJURED WHILE BEING RESTRAINED.

Townes v. The National Deaf Academy, 41 Fla. Law Weekly D437 (Fla. 5th DCA February 19, 2016):

A young woman was admitted to The National Deaf Academy (NDA) following an acute psychiatric in-patient admission at another facility. NDA operates a school and residential treatment facility for the deaf who also suffered from psychiatric and behavioral disorders.

Before going there, the young woman was diagnosed with bipolar disorder, intermittent explosive disorder, impulse control disorder not otherwise specified, conduct disorder and post-traumatic stress disorder. During her admission, and NDA psychiatrist established a plan of care for her that included a therapeutic aggression (TACT) control technique, involving staff members physically restraining the resident. One day the young woman left the campus, and when she returned she began to throw rocks at the staff and buildings, causing several windows to shatter. Several staff members tried to verbally de-escalate the situation, and when unsuccessful, physically restrained her. The physical restraint resulted in an injury to her leg that ultimately resulted in the need for an above-the-knee amputation.

The plaintiffs sued the school, alleging negligence and failing to properly care and control the plaintiff. They later amended their complaint to assert two alternative claims for medical malpractice based on the same factual allegations, and then two more counts based on violations of the Florida Mental Health Act. The trial court granted the motion for summary judgment on all claims.

The court reversed in part and affirmed in part. On Counts I and II, it found that there was some doubt as to whether the injury resulted from the decision involving medical skill or judgment, even though NDA argued that the TACT protective hold was medical treatment because it was part of the patient's care plan. The disputed issues of fact on this point, however, precluded summary judgment.

As to Counts III and IV, for medical malpractice, the court found summary judgment was proper because the statute of limitations had run and there had been no presuit. While the plaintiffs claimed that there was no evidence that this "school" was a medical facility, the court found in the record evidence demonstrating that the plaintiff's first attorney was aware as early as years before that the injuries could have resulted from medical malpractice, evidenced from the notice sent to the school's counsel.

The court also reversed the summary judgment on the Baker Act claims, finding they

related back. Because the amended complaint arose from a common core of operative facts shared with the original complaint, and because the school was given fair notice of the general fact situation out of which the claim or defense arose, it was reversible error for the trial court to determine that those counts did not relate back and dismissed them.

WHEN A PARTY FAILS TO VOLUNTARILY DISMISS CLAIM WITHIN 21 DAYS OF RECEIVING NOTICE UNDER §57.105, FEES MAY STILL BE AWARDED EVEN AFTER THE VOLUNTARY DISMISSAL.

Tedrow v. Cannon, 41 Fla. Law Weekly D446 (Fla. 2nd DCA February 19, 2016):

This case arose out of a dog bite, where the owner had displayed the statutorily required "bad dog" sign, relieving him from strict liability. The defendant served the plaintiff with a motion for attorney's fees under §57.105 based on the statutory language. 21 days passed, but then ultimately plaintiff filed a notice of dismissal.

The court ruled that the defendant was in fact entitled to fees under these circumstances, because the 21 days had passed before the time the plaintiff voluntarily dismissed the case. However, the court prohibited the defendant from using any privileged information between the plaintiff and her counsel to prove his entitlement to fees based on the legal analysis.

Kind Regards

CLARK • FOUNTAIN • LA VISTA
PRATHER • KEEN & LITTKY-RUBIN
TRIAL & APPELLATE ATTORNEYS

1919 N. Flagler Drive, West Palm Beach, Florida 33407
866.643.3318 • www.ClarkFountain.com