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
VOLUME 40, NUMBER 35
CASES FROM THE WEEK OF AUGUST 28, 2015

PRETRIAL STIPULATION CONSIDERED A VERY IMPORTANT TOOL IN LITIGATION.

Palm Beach Polo Holdings v. Broward Marine, 40 Fla. Law Weekly D1932 (Fla. 4th DCA August 19, 2015):

The issue of whether the underlying claim was barred by the statute of limitations was memorialized in the pretrial stipulation and was thus, by definition and policy, a matter officially considered to be an issue in dispute during the trial. However, the trial court concluded that because the statute was not framed in the preliminary instructions to the jury and because the appellants did not argue it in their opening statement, the defense was not properly raised, and was waived.

The Fourth District disagreed. It took the opportunity to remind judges and litigators that the "trump card" upon which all parties to a new litigation can always rely is The Pretrial Stipulation. Judge Ciklin observed that any previous skirmishes or dust-ups or contentious pretrial issues become mostly irrelevant once the parties prepare and stipulate to the final agreed upon "executive summary" as to what the impending trial will be about and the specific issues that remain on the table. The Pretrial Stipulation is one of the most "coveted and effective pretrial devices" enjoyed by the trial court and all the parties, according to the court.

Everyone connected with the trial, from the witnesses to well-prepared and efficient lawyers, benefit from a mandated and duly enforced Pretrial Stipulation.

The court noted how the Pretrial Stipulation is a "powerful blueprint" that fully enables a well-run and fair trial. It also stated that The Pretrial Stipulation prescribing issues on which the case is to be tried are binding upon the parties and the court and should be strictly enforced.

The Fourth then rejected the argument that because the statute of limitations issue was not in the preliminary instructions to the jury or referenced in the opening statement, that it was of no consequence.

EXCLUSION EXCLUDING COVERAGE FOR "PHYSICAL ABUSE" APPLIED TO THE FACTS OF THE CASE--SUMMARY JUDGMENT FINDING NO COVERAGE UPHELD.

Miglino v. Universal Property & Cas., 40 Fla. Law Weekly D1910 (Fla. 4th DCA August 19, 2015):

The insured lent a gun to his sister who then used it to shoot her son-in-law (he and her daughter were in the middle of an ugly divorce). The son-in-law sued the insured's sister, alleging that she intentionally shot him, and asserting a negligent entrustment claim against the insured. The Universal policy had an exclusion for damages arising out of "sexual molestation, corporal punishment or physical or mental abuse."

The plaintiff asserted that the shooting did not fit within the classic definition of "physical abuse." However, the Fourth District rejected cases cited from other jurisdictions which found physical abuse to include torture, torment, humiliation, or degradation, and finding that physical abuse **did** subsume the instance at issue. The court also found that the lack of a definition in the policy did not render it ambiguous, instead giving ordinary meaning to the terms.

FOURTH DISTRICT FINDS ALLSTATE'S PIP POLICY LANGUAGE INHERENTLY UNCLEAR, NECESSITATING REVERSAL OF SUMMARY JUDGMENT.

Orthopedic Specialists (a/a/o Kelli Serridge) v. Allstate Insurance Co., 40 Fla. Law Weekly D1918 (Fla. 4th DCA August 19, 2015):

Still addressing cases emanating from the supreme court's seminal decision in *Virtual Imaging*, the Fourth District analyzed the language in Allstate's policy to ascertain whether the policy conveyed the insurer's "election" to reimburse the providers pursuant to the Medicare fee schedules set forth in §627.736(5)(a)2.

The Fourth found the policy language ("This coverage shall be subject to any and all limitations authorized by Section 627.736….") inherently unclear. The court agreed with the plaintiff providers that the "shall be subject to" provision in the endorsement is ambiguous, because it is unclear as to whether Allstate had actually and in fact elected to limit its reimbursements to the providers under the Medicare fee schedules, or if it were simply announcing that it was "reserving" its right to elect to do so. Without a proper election an insured may not pay the bills of providers based strictly on a "200% of Medicare" computation.

The First District reached the opposite conclusion in a different case (finding the "subject

to" provision giving sufficient notice of Allstate's election to limit reimbursements by using the fee schedules) and the Fourth District certified conflict.

SUCCESSOR JUDGE PROPERLY DENIED MOTION FOR RECONSIDERATION OF PREDECESSOR JUDGE'S ORDER DISMISSING COMPLAINT VALID, WHERE PLAINTIFF FAILED TO INDICATE HOW GROUNDS ALLEGED FOR RECUSAL IMPACTED THE RECUSED JUDGE'S RULINGS, AND ALSO FAILED TO DEMONSTRATE ANY PREJUDICE.

Ognenovic v. Giannone, 40 Fla. Law Weekly D1926 (Fla. 4th DCA August 19, 2015):

Plaintiff sued the defendant for fraud, civil theft and other causes of action. In an amended complaint, plaintiff alleged a count for equitable estoppel which defendants moved to dismiss arguing there was no such cause of action in Florida, and even if there were, such action was time barred. The plaintiff then voluntarily dismissed the count without prejudice in February.

In June, the initial trial judge *sua sponte* entered an order of recusal. 15 days later, plaintiff filed a motion for relief from his voluntary dismissal, as well as from the trial court's original order dismissing the case, based on the recusal.

Because the plaintiff failed to indicate how the grounds for the recusal impacted the recused judge's rulings on these specific motions, and failed to demonstrate any kind of prejudice suffered from the entry of the initial order of dismissal (or because it was based on a clearly mistaken interpretation of the law), the successor judge correctly affirmed the original rulings.

TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT FOR DEFENDANT ON CLAIM THAT IT WAS VICARIOUSLY LIABLE FOR THE PHYSICIAN'S NEGLIGENCE, BECAUSE THERE WAS NO PLEADING THAT DEFENDANT WAS VICARIOUSLY LIABLE FOR THOSE PHYSICIANS.

Wilson v. Stone, 40 Fla. Law Weekly D1936 (Fla. 3rd DCA August 19, 2015):

The Estate alleged in this medical malpractice case that the University of Miami was vicariously liable for the actions of all of "its agents, parent agents, servants and/or employees." However, it only specifically identified one physician in the complaint as associated with the University.

When the University moved for final summary judgment claiming it was not responsible for the care and treatment provided by a decent doctor, the Estate responded only to the issue of whether the University was liable for the doctor's actions.

Later, at the hearing the Estate argued for the first time that the University might be vicariously liable for the negligence of other physicians, but rather than seeking leave to amend the complaint, the Estate requested the trial judge grant the University only a partial summary judgment as to the liability of the one identified physician. The trial court denied this request and entered final summary judgment in favor of the University.

The plaintiff asserted it was denied due process because it was not given an opportunity to present evidence on the University's vicarious liability. The court then said the claim was without merit, because on a motion for summary judgment, the trial court considers

only the issues raised in the pleadings.

Therefore, because the University of Miami's vicarious liability for the negligence of other physicians was not sufficiently pled, there was no entitlement to additional summary judgment proceedings, and no due process violation occurred. The trial court did not err in granting final summary judgment for the University as to the only doctor identified in the pleadings.

ERROR TO DENY DEFENDANT NURSING HOME'S MOTION TO COMPEL ARBITRATION SIGNED BY RESIDENT SISTER AS ATTORNEY-IN-FACT.

Santa Rosa Investors v. Mitchell, 40 Fla. Law Weekly D1939 (Fla. 1st DCA August 19, 2015):

The plaintiff argued that the durable power of attorney agreement limited the sister's ability to act as an attorney-in-fact for claims involving liquidated damages, because the current claim involved "unliquidated" damages. The court rejected that argument.

However, there were questions regarding the durable power of attorney agreement. The nursing home alleged that the phrase "liquidated or liquidated" in the durable power of attorney agreement was an obvious clerical error which should have read "liquidated or unliquidated." With that broad grant of power, the nursing home claimed that the sister had the authority to sign the arbitration agreement, and thus the arbitration agreement should rightfully compel the two sisters to arbitration.

The sisters on the other hand, claimed that the language of the durable power of attorney clearly limited the attorney-in-fact's power to pursue only **liquidated** damages. Thus, they argued that the sister lacked the authority to bind the plaintiff to arbitration, because the requested remedy included unliquidated damages.

The court said that instead of ruling on whether the phrase "liquidated or liquidated" (no typo) in the durable power of attorney agreement was ambiguous, the trial court should have made factual findings regarding the parties' intent. The court also failed to note that the limiting phrase "liquidated or liquidated" would have been an anomaly in the durable power of attorney agreement because it granted sweeping ranges of other authority to the attorney-in-fact.

The court reversed for the trial judge to conduct further proceedings to make appropriate findings of fact regarding the intent of the sisters in creating the power of attorney, and noted that parol evidence could be used.

Kind Regards

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