THE WEEK IN TORTS

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

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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.

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THIRD DISTRICT PREVENTS COUNSEL FROM TRYING TO STIFF HIS APPELLATE LAWYER.

Feinzig v. Deehl & Carlson, 40 Fla. Law Weekly D1866 (Fla. 3rd DCA August 12, 2015):

In 2004, a trial lawyer entered into oral contracts with two appellate lawyers to assist him in the litigation of a major case. Under the contracts, the attorneys performed a combined total of 3,320 hours of trial support and appellate work.

After the appellate court overturned a large verdict for the plaintiffs, arrived at after a seven-week jury trial, the attorney refused to pay the appellate lawyers for their services, forcing them to actually sue him in December of 2011.

There was no dispute regarding the hourly rates or the reasonableness of the amounts billed, and notably there was not even a dispute that the appellate lawyers' entitlement to compensation was **not** contingent on the outcome of the case. The attorney, however, asserted that the payment was not due because he was not yet able to pay. In the alternative, the trial lawyer asserted that the appellate lawyers failed to complete work on the case by not accepting additional assignments that he asked them for and therefore, they forfeited all or part of their payments. He then asserted that the proposal for settlement that the appellate lawyers filed was ambiguous.

The trial court entered final judgment for the appellate lawyers for $192,000 for one and $82,000 for the other, which the Third District affirmed. The court then found that the mutual release language contained in the proposals for settlement was not ambiguous because a proposal for settlement conditioned upon the execution of a standard release identifying typical affiliates of a party does not create an ambiguity rendering a proposal unenforceable. In this case, the mutual release called for the law firms to release each other. The court also rejected the trial lawyer's argument that the statute of frauds barred the appellate lawyers' case. Because these contracts were intended to be performed within one year, the statute of frauds did not bar it.

CIRCUIT COURT IN ITS APPELLATE CAPACITY DID NOT VIOLATE CLEARLY ESTABLISHED PRINCIPLE OF LAW RESULTING IN A MISCARRIAGE OF JUSTICE THAT COULD BE ADDRESSED ON SECOND-TIER REVIEW, AFTER TRIAL JUDGE GRANTED SUMMARY JUDGMENT FOR MEDICAL PROVIDER REJECTING THE AFFIDAVIT OF THE INSURER'S ACTUARY BECAUSE IT WAS NOT SHOWN TO BE BASED ON PERSONAL KNOWLEDGE OR SUFFICIENT DATA AND RELIABLE PRINCIPLES.

State Farm v. Pembroke Pines MRI, 40 Fla. Law Weekly D1879 (Fla. 4th DCA August 12, 2015):

Second-tier certiorari is not a second appeal. It is extraordinary limited and narrow in scope.

In this case, the MRI provider sued State Farm based on its reduction of payment of its bills. The clinic had moved for summary judgment contending that its charge was reasonable and within the customary range.

The clinic argued that State Farm could not rely on the Medicare fee schedule to determine the reimbursement rate because the policy failed to clearly and unambiguously adopt it, pursuant to the statute (§627.736(5)a.2.f. (2011))(allowing an insurer to limit reimbursement of 80% to 200% of the Medicare schedule or 80% of the maximum allowed under Worker's Compensation).

The clinic filed an affidavit from the owner of another MRI facility in Broward County and submitted other bills of other providers, and State Farm opposed the motion by filing an affidavit from an actuary who relied on data provided by insurers, Medicare and other fee schedules.

The county court had ruled that the clinic made a *prima facie* showing of reasonableness and that State Farm did not carry its burden to show a disputed issue of material fact. The circuit court appellate division affirmed without discussion.

While State Farm asserted that the circuit court's procedure violated due process, its petition provided no explanation of how. Instead, the bulk of its petition focused on why the circuit court applied the wrong law. Because State Farm could not show a violation of a clearly established principle of law resulting in a miscarriage of justice that could only be addressed on second-tier certiorari, the Fourth District denied its petition.

TRIAL COURT DEPARTED FROM ESSENTIAL REQUIREMENTS OF LAW BY STAYING THE INSURER'S DECLARATORY ACTION ON COVERAGE PENDING THE RESOLUTION OF THE UNDERLYING TORT ACTION AGAINST THE INSURED--THE

TWO ACTIONS MUTUALLY EXCLUSIVE.

Homeowners Property & Cas. Co. v. Hurchalla, 40 Fla. Law Weekly D1887 (Fla. 4th DCA August 12, 2015):

The defendant was sued for injunctive relief and damages for making false statements that allegedly caused other defendants to void contracts that they had with the plaintiff. The insurer provided a defense under a reservation of rights, but later withdrew the defense. It then filed a complaint for declaratory judgment asserting that the policy did not require it to defend or indemnify the insured in the tort action.

Relying on *Higgins v. State Farm*, the Fourth District said the trial judge should have determined whether the two insurance actions were mutually exclusive, whether proceeding to a decision on the indemnity issue would promote settlement and avoid the problem of collusive actions between the claimant and the insured to create coverage where none exists, and whether the insured had resources independent of insurance so that it would become immaterial to the claimant about whether the conduct was covered or not by the insurance. The circuit court did not address any of those factors, but when the Fourth District did it found the actions were mutually exclusive, that a determination of whether the insurer had a duty to defend would likely promote settlement and would also avoid the potential for collusion between the insured and the plaintiff.

ERROR TO AWARD ATTORNEYS' FEES TO PLAINTIFF BASED ON OFFER OF JUDGMENT WHERE PLAINTIFF FAILED TO "STRICTLY COMPLY" WITH RULE 1.442--PLAINTIFF'S OFFER FAILED TO STATE WHETHER THE OFFER INCLUDED ATTORNEYS' FEES AND WHETHER THEY WERE PART OF A LEGAL CLAIM--STRICT COMPLIANCE WITH THE RULE IS THE PROPER TEST, NOT WHETHER THERE IS AN AMBIGUITY.

Board and Dairy Co. of Alabama v. Greenrock, 40 Fla. Law Weekly D1902 (Fla. 1st DCA August 14, 2015):

Plaintiffs filed proposals for settlement which did not state whether the proposal included attorneys' fees or whether attorneys' fees were part of the legal claim as required by Florida Rule of Civil Procedure 1.442(c)(2)(F). The trial court concluded that the failure to include fees language did not create an ambiguity, because the plaintiff never sought attorneys' fees in her complaint in the first place.

The First District observed that the supreme court has made a test with proposals for settlement one of "strict compliance" and not one of the "absence of ambiguity." The court then said it could see no reason why that standard would not apply to a case where attorneys' fees were not sought in the complaint. The court invalidated the proposal, but found that the holding conflicted with the Fourth District's decision in *Bennett v. American Learning Systems* and certified conflict.

Kind Regards

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