# THE WEEK IN TORTS

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

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**CASES FROM THE WEEK OF AUGUST 14, 2015**

## NO COVERAGE UNDER INSURED'S PERSONAL AUTO POLICY FOR THE DEATH OF AN INFANT WHO WAS LEFT FOR SEVEN HOURS IN A PARKED VAN DRIVEN BY THE INSURED FOR A DAYCARE CENTER--COVERAGE EXCLUDED UNDER EXCLUSION FOR "ANY VEHICLE OTHER THAN YOUR COVERED AUTO WHICH IS FURNISHED OR AVAILABLE FOR YOUR REGULAR USE."

*Bryant v. Windhaven Insurance Co.*, 40 Fla. Law Weekly D1836 (Fla. 3rd DCA August 5, 2015):

This incident occurred when the driver of a van used to transport children to and from a daycare center, left the infant in a carseat in the back of the van for seven hours. The child died from the effects of the summer heat.

The insurance company issued a personal automobile insurance policy covering the operation of a sedan--but **not** the daycare van involved in the child's death--owned and operated by Mr. Hernandez. Mr. Hernandez, the van driver for the daycare center, picked up the infant that day, drove the van to the daycare center, and parked it in front of it, where it remained throughout the time the infant's death was discovered.

When the daycare center, its landlord and Mr. Hernandez were sued by the estate for wrongful death, Mr. Hernandez notified his insurance company and requested a defense, an indemnity under his personal policy.

However, under the policy there was an exclusion stating that there was no liability coverage for any insured "for any vehicle while it is being used for or in the course of 'your' employment or occupation." The exclusion also said it will not provide coverage for any vehicle other than "your covered auto" which is furnished or available for your regular use.

The court ruled the employment exclusion applied to Mr. Hernandez's use of the daycare

center van. However, the estate argued that the cause of the infant's death was not Mr. Hernandez's use of the van, because the death occurred while the van was parked at the daycare center. The court rejected that argument finding a direct causal connection between the use of the van and the infant's tragic death.

Ultimately, the court affirmed the final judgment in favor of the insurer.

**TRIAL COURT DEPARTED FROM ESSENTIAL REQUIREMENTS OF LAW BY ENTERING AN ORDER GRANTING A LAW FIRM'S FORMER CLIENT IMMEDIATE ACCESS TO THE FIRM'S FILES, WHERE THE ORDER WOULD HAVE NULLIFIED THE FIRM'S RETAINING LIENS--WHERE A VALID RETAINING LIEN IS ASSERTED, THE ATTORNEY MAY RETAIN THE PROPERTY UNTIL THE ATTORNEY HAS BEEN PAID; OR IF THE CLIENT CAN DEMONSTRATE A PRESSING NEED FOR THE PROPERTY, UNTIL ADEQUATE SECURITY FOR PAYMENT HAS BEEN POSTED.**

*Conde & Cohen v. Grandview Palace*, 40 Fla. Law Weekly D1837 (Fla. 3rd DCA August 5, 2015):

A law firm was retained by a condominium association to represent it in a number of matters. Following a change in the association's board, new counsel was retained. Upon learning of this action, the law firm asserted five retaining liens.

Unable to convince the firm to release its files in the five cases, the association filed an action seeking injunctive relief, and a declaration that the law firm's contingency fee agreements were unenforceable and the retaining liens invalid. The association also wanted new counsel to be able to copy the old firm's files.

The trial court entered an order granting immediate access to all the files held by the firm without taking any testimony.

The appellate court reversed. It noted that it is well established in Florida that an attorney has a right to a retaining lien on all of the client's property in the attorney's possession until the attorney is paid. When a valid retaining lien has been asserted, the attorney asserting it may retain the property subject to the lien until the attorney has either been paid, or if the client can demonstrate a pressing need for the property, until adequate security for the payment has been posted.

Because, in this case, no determination had been made as to the validity of the law firm's retainer agreements or the liens, the trial court departed from the essential requirements of law in compelling the law firm to hand over its files.

**WRIT OF CERTIORARI ISSUED WHEN CIRCUIT APPELLATE COURT FAILED TO FOLLOW DISTRICT COURT RULING WHICH WAS LAW OF THE CASE.**

*United Automobile v. Comprehensive Health Center*, 40 Fla. Law Weekly D1839 (Fla. 3rd DCA August 5, 2015):

In this PIP case where the insured failed to show up for her IME, the circuit appellate court ignored the law of the case doctrine. The doctrine applies where successful appeals are taken in the same case. It provides that questions of law decided on appeal to a court of ultimate resort, must govern the case in that court and the trial court, through all subsequent stages of the proceedings.

Pursuant to the doctrine, a lower court cannot change the law of the case as established by the highest court hearing the case. Instead, the trial court must follow prior rulings of the appellate court, as long as the facts on which such decisions are based continue to be the facts of the case. Absent extraordinary circumstances, the ruling of the appellate court in an earlier appeal is binding on the lower court on remand.

In this case, the Third District had denied the health care provider's petition for writ of certiorari, and concluded that the circuit court had not departed from the essential requirements of law when it held that the insured's failure to attend the IME was unreasonable.

When the appellate division on the second appeal refused to apply that law as established by the Third District in the first case (even though the Florida Supreme Court issued a related but distinguishable decision), that action constituted a departure from the essential requirements of law.

**TRIAL COURT ERRED IN TRANSFERRING VENUE ON THE BASIS OF FORUM NON CONVENIENS, WHERE THE DEFENDANT'S MOTION TO TRANSFER WAS BASED UPON THE IMPROPRIETY OF PLAINTIFF'S VENUE SELECTION AND DEFENDANT ARGUED FOR THE FIRST TIME AT THE HEARING THAT MOTION WAS BASED ON FORUM NON CONVENIENS.**

*Hall v. Animals.com*, 40 Fla. Law Weekly D1843 (Fla. 5th DCA August 7, 2015):

The defendant did not file a motion to transfer venue based on forum non conveniens. Thus, the trial court erred in entertaining such an argument without giving the plaintiff advance notice.

**NO BASIS FOR THE JURY TO FIND PLAINTIFF WAS 30% AT FAULT FOR THE ACCIDENT.**

*Bodiford v. Rollins*, 40 Fla. Law Weekly D1844 (Fla. 5th DCA August 7, 2015):

The plaintiff sustained significant injuries when he was rear-ended by the defendant while waiting for traffic to clear to make a left turn. The defendant appealed the judgment resulting from the jury verdict, which had awarded damages in excess of $1 million. The plaintiff cross-appealed arguing there was no basis for the jury's finding that he was 30% at fault for the accident.

The court affirmed on the defendant's appeal, but reversed on the cross-appeal, finding that the judge should not have denied plaintiff's motion for judgment notwithstanding the verdict. The record showed no evidence that the plaintiff had breached any legal duty, or failed to use reasonable care. Thus, there was no evidence to support the jury's finding that the plaintiff was negligent and comparatively at fault.

**TRIAL JUDGE'S GENERAL OBSERVATIONS ACKNOWLEDGING AWARENESS OF EVENTS IN THE COMMUNITY WAS NOT A BASIS FOR THE JUDGE'S DISQUALIFICATION--ADVERSE RULINGS ON EVIDENTIARY MATTERS ALSO NOT A BASIS.**

*Forehand v. Walton County*, 40 Fla. Law Weekly D1855 (Fla. 1st DCA August 7, 2015):

Plaintiffs sued Walton County in part for inverse condemnation and injunctive relief, alleging they suffered property damage caused by a county drainage project. During the trial, the plaintiffs submitted photographs of erosion from storm events ranging from ordinary Florida downpours to large rain storms.

At the close of the arguments made on the county's motion for directed verdict, the trial judge referred to the evidence and testimony submitted by the parties, stating he was aware of storm damage in a neighboring county resulting from the same storm. At the end of the trial, he ruled in favor of the county.

The plaintiffs moved to disqualify the judge. They asserted that he demonstrated bias by relying on his personal knowledge of the neighboring storm, and adverse evidentiary rulings.

The court denied the writ of prohibition. Its review of the record showed that the judge's passing reference to knowledge of events from a neighboring county caused by a storm failed to show basis for disqualification. Trial judges are permitted to be aware of events in their own community such as storms, flooding, construction projects and so on. It is also well established that a judge's adverse rulings may not serve as a basis for disqualification.

***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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