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 32
CASES FROM THE WEEK OF AUGUST 7, 2015

TRIAL COURT ERRED IN REFUSING TO ALLOW BACKSTRIKING – ISSUE NOT PRESERVED.

Aquila v. Brisk Transportation, 40 Fla. Law Weekly D1743 (Fla. 4th DCA July 29, 2015):

A woman and her minor child were involved in a multi-vehicle accident which paralyzed the child and severely injured the mother.

During jury selection, the parties tentatively accepted six jurors allowing for the further selection of alternates. The court dismissed the 23 other potential jurors. Before the six jurors were sworn, one of them indicated he could not serve because of interference with a prepaid vacation. The court dismissed that juror. The defense counsel then moved for a mistrial because the dynamics of the jury had changed. The parties and the judge discussed several ways to remedy the problem.

In discussing solutions, they centered on moving the first proposed alternate into the jury panel, but when both plaintiff and defendant wanted the right to backstrike jurors, the court adamantly refused to allow any backstriking. After a recess, the plaintiff insisted on the right to backstrike, however, did so **without naming any particular juror** on the selected panel that was subject to backstriking after moving the alternate onto the jury panel. Although one of the parties had moved for a mistrial, plaintiff's counsel did not agree to a mistrial but continued to insist on the right to backstrike as jury selection

continued. The court denied the backstriking and then swore in the five selected jurors with plaintiff's counsel noting his objection to the denial of the backstriking.

At the end, the parties selected two additional alternates. **Plaintiff's counsel did not request to backstrike a member of the panel that had been sworn. He accepted the jury without mentioning his prior objection to the disallowance of backstriking.**

Although the trial court erred in refusing to allow the backstriking of the panel originally selected, the court held that the issue was not preserved. The right to the unfettered exercise of peremptory challenges includes the right to view the panel as a whole before the jury is sworn. A trial judge may not selectively swear individual jurors prior to the opportunity of the counsel to view the entire panel. However, the error must be preserved.

The purpose of requiring the opponent of the prohibition of backstriking to identify a juror on the panel upon which an available peremptory challenge would have been used had backstriking been allowed, is to alert the trial court that the party is not satisfied with the panel as stands. After the additional three hours of jury selection here, the plaintiff's attorney voiced no further objection to any of the jurors, and accepted the jury. Therefore, the trial court and the appellate court assumed he was satisfied with the panel members, and the issue was not preserved.

TRIAL COURT ERRED IN SUSTAINING STATE'S PEREMPTORY CHALLENGE TO AN HISPANIC JUROR, WITHOUT CONDUCTING A GENUINENESS ANAYSIS.

West v. State, 40 Fla. Law Weekly D1746 (Fla. 4th DCA July 29, 2015):

When the state exercised a peremptory challenge against a prospective juror and the defense asked for a race neutral reason, the state said it was striking her because she was unemployed. Then the judge said she was not unemployed, but rather a housekeeper, to which the state said it did not want a housekeeper on the jury.

When the defendant argued that the reason was pretextual, the trial court--without any analysis to pretext or genuineness--summarily sustained the peremptory challenge without any genuineness analysis. That was error and the court reversed.

TRIAL COURT ERRED IN GRANTING MOTION TO ENFORCE A MEDIATED SETTLEMENT AGREEMENT WHICH THE PARTY NEVER AGREED TO AND DID NOT SIGN. TO BE VALID, MEDIATION AGREEMENTS MUST BE SIGNED BY ALL PARTIES.

Gardner v. Wolfe & Goldstein, 40 Fla. Law Weekly D1750 (Fla. 4th DCA July 29, 2015).

TRIAL COURT WAS WITHOUT JURISDICTION TO ENTER FINAL JUDGMENT CONFIRMING ARBITRATION AWARD, WHILE AN INTERLOCUTORY APPEAL WAS PENDING.

Publix Supermarkets v. Conte, 40 Fla. Law Weekly D1753 (Fla. 4th DCA July 29, 2015):

Florida Rule 9.130(f) prohibits a lower tribunal from entering an order disposing of a case during the pendency of an interlocutory appeal. However, final judgments and subsequent orders entered during the pendency of an interlocutory appeal, are entered without jurisdiction and are a nullity, but may be reinstated once the appeal concludes.

The major issues in this case actually involved the defendant's arguments regarding disqualification of a neutral arbitrator, based on a business relationship he had with one of the other arbitrators on the panel. That issue was not addressed by the majority, but in a concurring opinion by Judge Klingensmith, the court concluded there was no legal basis to reverse under the circumstances. At most, Publix in this case only established the mere appearance of bias that was remote, uncertain and speculative but not enough to establish evident partiality which was required. The court affirmed the $2.8 million arbitration award the panel entered for the plaintiff against Publix.

NEITHER A DOCUMENT DETAILING POLICIES AND PROCEDURES FOR HANDLING ADVERSE MEDICAL INCIDENTS GENERALLY, NOR A DOCUMENT CONTAINING GENERAL CREDENTIALING INFORMATION UNRELATED TO AN ADVERSE MEDICAL INCIDENT, WOULD BE DISCOVERABLE UNDER AMENDMENT 7.

Bartow HMA v. Kirkland, 40 Fla. Law Weekly D1799 (Fla. 2nd DCA July 31, 2015):

Under Amendment 7, a patient is entitled to any of the hospital's records relating to any adverse medical incident. There is no requirement that the records be relevant to any pending litigation.

Additionally, Amendment 7 trumps the application of the statutory discovery protections set forth in §§395.0191, 395.0193, 395.0197 and 766.101, to the extent that documents for which those protections are asserted, contain reports of adverse medical incidents.

Amendment 7 however, does not require production of documents relating to general policies and procedures of health care facility peer review or risk management committees or other documents that do not contain information about **particular adverse medical incidents.**

Thus, neither a document detailing policies and procedures for handling adverse medical incidents generally, nor a document containing general credentialing information unrelated to an adverse medical incident are discoverable under Amendment 7.

Kind Regards

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