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.

FLORIDA LAW WEEKLY
VOLUME 40, NUMBER 31
CASES FROM THE WEEK OF JULY 31, 2015

TRIAL COURT ERRED IN DISMISSING EQUITABLE SUBROGATION ACTION ON THE BASIS THAT THE TORTEFEASOR AND TORTFEASOR'S INSURER HAD NOT PAID THE ENTIRETY OF THE INJURED PARTY'S DAMAGES--THE RIGHT TO EQUITABLE SUBROGATION ARISES WHEN PAYMENT HAS BEEN MADE OR JUDGMENT HAS BEEN ENTERED SO LONG AS THE JUDGMENT REPRESENTS THE VICTIM'S ENTIRE DAMAGES.

Allstate Insurance Co. v. Theodotou, 40 Fla. Law Weekly D1713 (Fla. 5th DCA July 24, 2015):

After the jury found her liable for over $11 million in a personal injury action, the defendant and her insurance company filed an equitable subrogation action against the subsequent treating health care providers, claiming they were subsequent tortfeasors who were responsible for a substantial portion of the damages in the underlying personal injury action.

The issue in the case was whether an initial tortfeasor or her insurer could make an equitable subrogation claim against a subsequent tortfeasor, when the initial tortfeasor was precluded from bringing a subsequent tortfeasor into the original personal injury action. Here, Allstate paid its $1.1 million dollar policy limits, but the remainder of the judgment remained unpaid.

In this case, where the injured plaintiff sought to recover only from the initial tortfeasor, and the tortfeasor was not permitted to file a third-party complaint against the medical providers or introduce evidence of their negligence to have their portions of fault determined, the court held, it was not fair for the medical providers to argue that the original tortfeasors were not entitled to equitable subrogation because they had not paid the entirety of the judgment. Instead, the tortfeasor ought to be able to seek subrogation from the subsequent tortfeasors because she was obligated to pay more than her fair share.

Put simply, the court agreed with the tortfeasors that the right to equitable subrogation arose **not** when the payment had been made, but when the judgment was entered; so long as the judgment represented the victim's entire damages.

The court explained that while the injured victim deserves to be made whole, the policy goal of insuring that liability is correctly apportioned and that parties are not held liable for more than their fair share must also be considered. The court found that the appropriate way to address the two competing policy concerns (the defendant cannot pay the full judgment and the insurance company already paid its full policy limits) is to allow them to seek equitable subrogation from the medical providers before having to pay the full judgment.

Judge Berger concurred in part and dissented in part. She opined that because the law currently precludes initial tortfeasors from filing independent equitable subrogation claims against subsequent tortfeasors **until the entire debt is paid**, she would affirm the judgment.

The court still certified a question to the Florida Supreme Court, asking whether a party that has had judgment entered against it is entitled to seek equitable subrogation from a subsequent tortfeasor when the judgment has not yet been fully satisfied.

ORDER STRIKING REQUEST FOR JURY TRIAL BASED ON EXPRESS WAIVER IN NURSING FACILITY RESIDENCY AGREEMENT, NOT REVIEWABLE BY CERTIORARI.

Walter v. Sunrise Senior Living, 40 Fla. Law Weekly D1687 (Fla. 2nd DCA July 22, 2015):

The trial court struck the request for a jury trial based on an express waiver contained within the nursing facility residency agreement signed by the decedent. Orders striking demands for trial by jury are not reviewable by certiorari. They may only be raised on direct appeal.

SUBSTITUTE SERVICE AT PRIVATE MAILBOX NOT EFFECTIVE WHERE PLAINTIFF FAILED TO DEMONSTRATE THAT PRIVATE MAILBOX WAS THE ONLY ADDRESS FOR DEFENDANT DISCOVERABLE THROUGH THE PUBLIC RECORDS--UNSUCCESSFUL ATTEMPTS TO SERVE DEFENDANT AT OTHER ADDRESSES INSUFFICIENT TO INVOKE SERVICE UNDER §48.031(6).

Krisztian v. State Farm, 40 Fla. Law Weekly D1689 (Fla. 4th DCA July 22, 2015):

State Farm as subrogee of its insured was suing a defendant driver from an auto accident. State Farm made several attempts to serve the defendant unsuccessfully. After several

times, the defendant successfully quashed service, State Farm filed an affidavit attesting it made a diligent search (describing its efforts), after serving defendant at a private mailbox.

State Farm failed to meet the requirements of §48.031(6). While the trial court found that this address was the only one discoverable through the public records, the evidence did not support that finding.

Even though State Farm was unsuccessful in its attempts to serve the defendant at other addresses, that was insufficient to invoke substituted service and the defendant's motion to quash should have been granted.

COURT ERRED IN GRANTING DEFAULT AS A SANCTION WITHOUT CONSIDERING THE FACTORS ENUMERATED IN *KOZEL,* AND MAKING EXPLICIT FINDINGS AS TO EACH FACTOR.

Chappelle v. South Florida Guardianship, 40 Fla. Law Weekly D1696 (Fla. 4th DCA July 22, 2015):

In a case involving lottery winnings, an incapacitated ward and a fight among numerous family members, the trial court found defendants' conduct to be egregious. The court found defendants had missed mediation sessions, failed to provide discovery, failed to attend court proceedings and showed disrespect and disregard for the court process. The court then entered default as a sanction for the defendant's conduct.

While the conduct may have been egregious, there was no consideration of the factors in *Kozel*. *Kozel* required an evidentiary hearing, with findings of evidence to support each factor. Judicial default cannot be entered without explicit findings as to each *Kozel* factor, and the failure to consider those factors is **by itself** a basis for remand.

COURT ASSESSED ATTORNEY'S FEES AGAINST APPELLANT AND COUNSEL BECAUSE OF A FRIVOLOUS CLAIM IN INITIAL BRIEF WHERE APPELLEE ASSESSED OPPOSING COUNSEL HAD MADE MISLEADING STATEMENTS TO THE TRIAL COURT.

Aspen Air Conditioning v. Safeco Insurance, 40 Fla. Law Weekly D1701 (Fla. 3rd DCA July 22, 2015):

In the brief filed by the plaintiff in a case involving a bond claimed against its insurance company, plaintiff's counsel misrepresented the position the insurance company had taken at the motion to dismiss hearing in the underlying case. The insurer defendant had filed a motion for sanctions after complying with the relevant Safe Harbor requirements of §57.105 and Rule 9.140. In response, the plaintiff argued that its actions were in good faith, and were merely asserting defense counsel's positions to the trial court.

The court concluded that the insurance company's counsel did not make any misrepresentations to the trial court, instead accurately relaying the facts. It then found that one section of the plaintiff's initial brief was wholly without factual or legal basis in how it characterized defendant's argument at the motion to dismiss hearing. As such, the court awarded reasonable attorney's fees including prejudgment interest to be paid to the insurance company pursuant to §57.105.

WHERE PLAINTIFF FILED A MOTION FOR EXTENSION TO ACCEPT THE PROPOSAL, BUT DEFENDANT DID NOT AGREE, AND PLAINTIFF TOOK NO STEPS TO HAVE THE MOTION HEARD, PLAINTIFF'S MOTION FOR EXTENSION WAS INEFFECTIVE--ERROR TO DENY DEFENDAN'T MOTION FOR FEES AFTER VOLUNTARY DISMISSAL WHEN IT WAS NOTIFIED BY THE DEFENDANT THAT ITS NOTICE OF ACCEPTANCE OF THE PROPOSAL 90 DAYS LATER WAS UNTIMELY.

Three Lions Construction v. The Namm Group, 40 Fla. Law Weekly D1703 (Fla. 3rd DCA July 22, 2015):

The plaintiff asked for an extension in which to consider defendant's proposal for settlement. The defendant refused. The plaintiff made no effort to have the motion heard.

More than 90 days later, plaintiff then served a notice of acceptance of the settlement proposal. After being notified by the defendant that the purported acceptance was untimely, the plaintiff filed a notice of voluntary dismissal. The court does not say if it was with or without "prejudice." The defendant then filed a motion for fees pursuant to the proposal for settlement, and the trial court denied the motion without explanation.

The court reversed. It found the motion for extension to accept the proposal was ineffective to toll the time for acceptance to the proposal, because the defendant had refused to agree, and the plaintiff did not obtain a hearing prior to the expiration of the time for acceptance.

Because the defendant's proposal was proper, it was entitled to fees based on that proposal.

NOTE: It is unclear to me how this case can be reconciled with *MX Investments v. Crawford*, 700 So. 2d 640 (Fla. 1997), which held that the offer of judgment statute does not provide a basis for attorney's fees unless the dismissal is made with prejudice (perhaps this one was, but it does not say). Perhaps this conflict will be addressed on rehearing.

COURT COMPELS ANOTHER ARBITRATION IN A NURSING HOME CASE.

FI-Evergreen Woods v. Robinson, 40 Fla. Law Weekly D1711 (Fla. 5th DCA July 25, 2015):

The nursing home's admissions director testified that when she entered the patient's room, the patient was alert, lying on the bed, with her husband standing nearby. The director told the patient she was there with admission documents which needed to be signed. The patient responded she wanted her husband to review and sign the documents. He then proceeded to do so, and the documents included the arbitration agreement. The signatures were done in the presence of both the patient wife and the admissions director. During the process, the admissions director expressly noted the arbitration agreement, and explained that the facility **did not require** entering into an arbitration agreement as a condition to admission.

The trial court initially found the husband was not authorized to sign the arbitration agreement on these facts. The appellate court reversed. It concluded that a non-signatory to an arbitration agreement is bound when the person is authorized to act as the agent of the person sought to be bound. Because the husband signed the agreement

in his wife's presence while acting within the scope of his apparent authority, any information contained in the arbitration agreement was properly imputed to the wife, and she was bound by his signature.

Kind Regards

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