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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CASES FROM THE WEEK OF JULY 17, 2015

WRIT OF CERTIORARI GRANTED FOR HOSPITAL ON AMENDMENT 7 ISSUE--EXTERNAL PEER REVIEW REPORTS MADE FOR PURPOSE OF LITIGATION DO NOT FALL WITHIN THE AMBIT OF AMENDMENT 7, BECAUSE THEY WERE NOT MADE OR RECEIVED IN THE COURSE OF BUSINESS.

Bartow HMA v. Edwards, 40 Fla. Law Weekly D1599 (Fla. 2nd DCA July 10, 2015):

The plaintiff in a medical malpractice case served the hospital with a request to produce that included a request for all documents created within the five years before the plaintiff's gallbladder surgery relating to the hospital's investigation or review of the physician's care and treatment of any patient. She also requested all documents pertaining to the hospital's investigation or review of her care and treatment.

The hospital responded stating that Amendment 7 only provides patients with the right to access records made or received in the course of business by a health care facility or a health care provider relating to adverse medical incidents, claimed that some of the requested documents did not fall within those parameters. It then filed a privilege log.

The court reviewed the documents determining that they were privileged. The court agreed to conduct an *in camera* inspection to determine if any of the documents on the privilege log did not fall within the ambit of Amendment 7.

Florida statutory privileges providing for the confidentiality of health care facility or provider peer review as conducted by a medical review committee or governing board, contains provisions that protect any document considered by the committee or board as part of its decision making process. Amendment 7 preempts the statutory discovery protections for the peer review process, by providing patients a right of access to any records made or received in the course of business by a health care facility or provider relating to any adverse incident.

The court held that the external peer review reports did not fall within the ambit of Amendment 7, because they were not made or received in the course of business. They were actually generated in response to letters sent by the hospital's counsel to the director of client services at a business called M.D. Review for external peer review. Because this kind of record is not kept in the ordinary course of a regularly conducted business activity, instead being generated for purposes of litigation rather than to fulfill a statutory duty, the court found they were not made or received in the course of business.

The plaintiff argued that the retention of M.D. Review by counsel was an attempt by the hospital to "outsource" the peer review process, in order to cloak it with the protection from discovery under Amendment 7. The court did not agree that the M.D. Review functions as the equivalent of a health care facility peer review. It does not perform the routine function of reviewing incidents for the hospital when medical negligence or other events occur as specified in Amendment 7. Instead it provides an expert opinion on the standard of care on sporadic occasions when litigation is imminent.

The court held it was not persuaded that the use of external peer review under these circumstances was an attempt to circumvent the disclosure requirements of Amendment 7. The hospital had already satisfied those requirements, according to the court, by providing access to numerous documents pertaining to internal adverse incident reports and peer review. The court did say that **its result may have been different if the hospital had not conducted an *internal peer review of the incidents in question*.**

Because the court ruled these reports were privileged, and the external peer review reports did not fall within the ambit of Amendment 7, it was a departure from the essential requirements of law to require their production.

PROPOSAL FOR SETTLEMENT, WHICH CLEARLY ANNOUNCED THAT IT ADDRESSED ANY AND ALL CLAIMS AND CAUSES OF ACTION RESULTING FROM AN ACCIDENT GIVING RISE TO THE LAWSUIT BROUGHT BY THE INJURED PLAINTIFF AGAINST THE DRIVER OF THE VEHICLE, WAS UNAMBIGUOUS AND ENFORCEABLE--PROPOSAL DID NOT NEED TO ADDRESS SPOUSE'S SEPARATE AND DISTINCT LOSS OF CONSORTIUM CLAIM.

Miley v. Nash, 40 Fla. Law Weekly D1589 (Fla. 2nd DCA July 10, 2015):

On rehearing, the court again evaluated a proposal for settlement which the trial court refused to enforce, finding it did not strictly comply with the statute and rule. The plaintiffs sued the defendant solely for his vicarious liability as the vehicle's owner. The wife was the injured victim, and the husband was the consortium plaintiff.

The defendant driver served a proposal for settlement to the wife in an "attempt to resolve all claims and causes of action resulting from the incident or accident giving rise to this lawsuit brought by plaintiff Martha Nash against defendant, Miley" (the driver). The

proposal required that the plaintiff wife dismissed both the driver and the owner. The proposal did not mention the husband or his loss of consortium claim.

The court found the proposal sufficiently identified the claims to be resolved, clearly indicating it was for all claims and causes of action resulting from the incident giving rise to the lawsuit brought by the plaintiff wife against the defendant driver. The court found it was not ambiguous that the loss of consortium claim was not included.

The court explained through use of the phrases “all claims” and “giving rise to the lawsuit” was appropriate because although the plaintiff brought only one count in the complaint she sought a full range of damages. The court said that while it may have been more specific to refer directly to the language used in the complaint in identifying the claims the proposal was attempting to resolve, the language used by the defendant in the proposal did not contain a level of ambiguity that would render the plaintiff wife unable to make an informed decision without needing clarification.

The court found that the proposal need not address the consortium claim and that the consortium plaintiff was still free to pursue his claim. Because the husband was not an offeree under the proposal, there was no need to address his claim.

There was also no ambiguity with the condition that the defendant would pay the money and resolve the claims against the driver and the owner. It was not necessary to apportion any amount attributable to the owner because he was solely vicariously liable. Under the most recent version of the rule, when a party is alleged to be solely vicariously liable, a joint proposal may be made without apportionment.

Kind Regards

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