THE WEEK IN TORTS

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

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SUPREME COURT ADOPTS "NO REASONABLE POSSIBILITY" TEST FOR HARMLESS ERROR.

Special v. West Boca Medical Center, 39 Fla. Law Weekly S676 (Fla. 4th DCA November 13, 2014):

In this medical malpractice wrongful death case, a woman died at West Boca Medical Center within hours of giving birth. Plaintiffs alleged that the defendant was negligent both in administering anesthesia and in monitoring the decedent. The defendant asserted that the woman's death was caused by an amniotic fluid embolus (AFE) which is an allergic reaction that develops when a mother's blood mixes with amniotic fluid.

The trial judge had precluded an area of cross examination of one of defendant's experts regarding the "over-diagnosis" of the AFE condition, and also precluded certain evidence related to the defense's alleged "witness tampering" of the deputy chief medical examiner who had performed the autopsy on the deceased mother.

The district court had found both rulings erroneous. The question for both the district and supreme courts was whether the error was "harmful" or not.

The Fourth District had articulated a "more likely than not" standard for evaluating harmless error. In other words, the beneficiary of the error in a civil case must show that

it was “more likely than not” that the error did not influence the trier of fact and thereby contribute to the verdict.

However, the supreme court decided to adopt the criminal standard for harmless error, articulating it as:

> To test for harmless error, the beneficiary of the error has the burden to prove that the error complained of did not contribute to the verdict. Alternatively stated, **the beneficiary of the error must prove that there is no reasonable possibility that the error contributed to the verdict.**

The court explained its rationale for adopting this rule, stating that the test acts in a manner so as to conserve judicial resources while protecting the integrity of the process. Additionally, the court felt the test strikes the proper balance between the parties.

While the party that seeks relief must identify the error and raise the issue before the appellate court, the test properly places the burden of proving harmless error on the beneficiary of the error. Requiring the beneficiary of the error to demonstrate that there is no reasonable possibility that the error contributed to the verdict discourages efforts to introduce error into the proceedings.

The court noted that the reasonable possibility test also strikes the appropriate balance between the need for finality and the integrity of the judicial process. The test recognizes that “not all errors have a reasonable possibility of contributing to the verdict, but the test affords relief on account of errors that do.”

Time will tell on how this standard affects the finality of jury verdicts which, anyone reading this case may question. Justice Pariente, Justice Polston and Justice Canady dissented from this decision adopting the application of the criminal standards in civil cases.

SUPREME COURT ADOPTS APPELLATE RULE CREATING A NEW “ENUMERATED” NON-FINAL ORDER.

In Re: Amendments to Florida Rule of Appellate Procedure 9.130, 39 Fla. Weekly S675 (Fla. November 13, 2014):

The supreme court adopted Rule 9.130(a)(C)(x)(xi).

From now on, any orders determining as a matter of law that a party is not entitled to immunity under §768.28(9) or any orders deciding as a matter of law that a party is not entitled to sovereign immunity, will be considered appealable non-final orders as enumerated under the rule.

THE FOURTH DISTRICT REVERSES SUMMARY JUDGMENT FINDING COVERAGE FOR THE PLAINTIFF.

Allstate Insurance Co. v. Manzo-Pianelli, 39 Fla. Law Weekly D2301 (Fla. 4th DCA November 5, 2014):

Defendant Proctor was the permissive driver of a vehicle owned by Seiden. She caused an accident injuring the plaintiff, Manzo-Pianelli. The owner had an insurance policy with

State Farm that had $100,000 in coverage and an umbrella policy with Allstate that provided $1 million in coverage. State Farm tendered its limits and the plaintiff sought to recover against Allstate. Allstate denied coverage.

Two years later, the plaintiff sued her own UM carrier. That carrier, USAA, filed a third-party complaint against Allstate, the plaintiff, as well as the permissive driver, seeking a determination as to the priority of coverage. Three years later (five years after the accident), the plaintiff amended her complaint to add a cause of action against the driver. However, she never named the owner as a defendant.

The Allstate policy provided that it would pay damages when an insured person "becomes legally obligated to pay…." The definition of insured were named insureds, resident relatives, or dependents. The permissive driver was neither a named insured, nor a resident relative of the insured.

Allstate argued that the permissive user was not afforded coverage under the policy because the coverage was limited to damages which an "**insured**" person "becomes legally obligated to pay." In this instance, the owner was the insured. As he was never named as a defendant, he could not be legally obligated to pay damages since the statute of limitations had run.

The plaintiff countered that the permissive user was an omnibus insured covered under the policy. Alternatively, she asserted the driver's actions were covered based on vicarious liability and the dangerous instrumentality rule.

The Fourth District reversed. It said there was a disputed issue of fact regarding whether the owner could ever be legally obligated to pay the claim. There were also questions about whether Allstate misrepresented coverage in its letter and whether tolling/relation-back or other doctrines would apply. Allstate admitted that if the owner had been named as a defendant, they would have had a legal obligation to pay the claim.

COURT REVERSES AWARD OF ATTORNEY'S FEES UNSUPPORTED BY EXPERT TESTIMONY.

Miller v. Bank of New York Mellon, 39 Fla. Weekly D2309 (Fla. 4th DCA November 5, 2014):

An award of attorney's fees must be supported by expert evidence, and testimony given only by the lawyer claiming the fees, is clearly inadequate. Without such expert testimony, the Fourth District reversed the trial court's order.

THE FOURTH DISTRICT UPHOLDS THE JUDGE'S AWARD OF A NEW TRIAL TO THE DEFENDANT BASED ON PLAINTIFF'S IMPROPER CLOSING ARGUMENT.

Hill v. New Horizons of the Treasure Coast, 39 Fla. Law Weekly D2311 (Fla. 4th DCA November 5, 2014):

In a case containing almost no facts, the Fourth District upheld the trial judge's grant of a new trial based on plaintiff's improper closing argument. Citing to a case, the court stated that the closing argument shifted the focus of the case from compensating the plaintiff to punishing the defendant.

Because the purpose of damages is to compensate, not make the defendant take responsibility or say it was sorry, and the attorney's arguments improperly suggested that the defendant should be punished for contesting damages at trial, the argument was improper. Such argument is designed to inflame the emotions of the jury rather than prompt a logical analysis of the evidence in light of the applicable law.

TRIAL COURT ERRED BY SUA SPONTE ENTERING AN ORDER SANCTIONING THE DEFENDANT FOR A DISCOVERY VIOLATION, BY STRIKING THE DEFENDANT'S PLEADINGS, ENTERING DEFAULT ON LIABILITY AND ORDERING A TRIAL ON DAMAGES, WITHOUT NOTICE OR OPPORTUNITY TO BE HEARD AND WITHOUT SANCTIONS EVEN BEING REQUESTED.

Celebrity Cruises v. Fernandes, 39 Fla. Law Weekly D2313 (Fla. 3rd DCA November 5, 2014):

From the get-go, this action filed by a seaman allegedly injured during a fight with another crew member while aboard a Celebrity cruise ship was filled with defense counsel bad behavior. Starting with the notice filed by plaintiff's counsel of unavailability for ten weeks (only three months after the case was filed), the cruise line defendant filed all sorts of things in an attempt to move the case forward.

Without detailing all of the many antics that went on here, ultimately, in response to the plaintiff's motion to compel other crew member depositions (that the cruise line defendant was obfuscating), the trial judge not only granted the motion, but then also found that the failure to comply with the court's original order was intentional delay and prejudicial to the plaintiff, and then struck defendant's pleadings ordering a trial on damages only.

The court reversed this order. It felt there was a total lack of notice to the defendant that sanctions were going to be considered, much less opposed, and a lack of opportunity to present evidence on the issue required reversal.

Additionally, the plaintiff never even moved for sanctions or asked for an order to show cause as to why sanctions should not be imposed. There was also the need to have an evidentiary hearing for the court to determine whether striking the defendant's pleadings--the most severe of all sanctions--should be imposed.

IN THIS UNIQUE PROCEDURAL QUAGMIRE, WHERE THE TRIAL COURT GRANTED SUMMARY JUDGMENT FOR THE DEFENDANT COMPANY WHICH CONSTRUCTED A DEFECTIVE GUARDRAIL ON THE BASIS OF *SLAVIN* BECAUSE THE D.O.T. ACCEPTED THE CONSTRUCTION WITH A PATENT DEFECT, THE COURT SHOULD HAVE ALSO GRANTED SUMMARY JUDGMENT FOR THE DEFENDANT DESIGNER OF THE GUARDRAIL--WHILE THE DESIGNER HAD NO STANDING TO APPEAL THE DENIAL OF SUMMARY JUDGMENT AS TO IT; UNDER THESE DISCRETE FACTS, FINAL APPEAL OFFERED NO ADEQUATE REMEDY AND THEREFORE CERT WAS THE PROPER REMEDY TO SEEK REVIEW.

Transportation Engineering, Inc. v. Cruz, 39 Fla. Law Weekly D2333 (Fla. 5th DCA November 7, 2014):

This case involved a project undertaken by the D.O.T., to erect median guardrails to reduce the number of fatal accidents caused by median crossover on the turnpike. However, the D.O.T. did not provide safeguards to prevent vehicles from becoming

impaled on the guardrail end of the emergency crossovers in the midst of construction. The trial judge had allowed the contractor who constructed those guardrails out on summary judgment based on *Slavin*, but refused to allow the designer out, without giving an explanation for why not.

This ruling deprived the designer of its opportunity to have the jury consider the contractor as potentially responsible party for purposes of apportionment if, in a subsequent appeal, the appellate court rejected the argument about patent defect under *Slavin*. Also, because the D.O.T. had accepted the project with the defect, the designer too should have been relieved of liability.

ERROR TO AWARD ATTORNEY'S FEES PURSUANT TO PROPOSAL FOR SETTLEMENT WHERE A COUNT HAD BEEN VOLUNTARILY DISMISSED BEFORE THE DETERMINATION OF LIABILITY.

Scherer Construction v. The Scott Partnership Architecture, 39 Fla. Law Weekly D2339 (Fla. 5th DCA November 7, 2014):

When a case is voluntarily dismissed without prejudice, it is improper for the trial court to render judgment awarding attorney's fees pursuant to proposal for settlement.

ARBITRATION CLAUSE AND ADMISSION AGREEMENT TO NURSING HOME WAS UNENFORCEABLE WHERE NURSING HOME RESIDENT DID NOT SIGN THE ADMISSION AND FINANCIAL AGREEMENT AND RESIDENT'S WIFE WHO SIGNED THE AGREEMENT DID NOT HAVE AUTHORITY TO SIGN ON THE RESIDENT'S BEHALF--RESIDENT'S WIFE SIGNED AGREEMENT ONLY IN HER INDIVIDUAL CAPACITY AS THE RESPONSIBLE PARTY; RESIDENT WAS NOT A THIRD-PARTY BENEFICIARY OF THE AGREEMENT BECAUSE NOBODY SIGNED THE AGREEMENT ON BEHALF OF THE RESIDENT OR AS THE RESIDENT'S LEGAL REPRESENTATIVE.

Sovereign Healthcare v. Yarawsky, 39 Fla. Law Weekly D2346 (Fla. 2nd DCA November 7, 2014).

ERROR TO DENY A MOTION TO COMPEL ARBITRATION BECAUSE PORTIONS OF ARBITRATION AGREEMENT WERE OBSCURED DUE TO A PHOTOCOPYING ERROR WHERE THE REMAINING TERMS WERE SUFFICIENTLY CLEAR AND DEFINITE TO FORM A CONTRACT.

Glenbrook v. Sayre, 39 Fla. Law Weekly D2348 (Fla. 2nd DCA November 7, 2014):

Due to a photocopying error, the arbitration agreement had certain omitted portions. However, because those portions did not alter the parties' intent to create a binding contract to arbitrate, the remaining terms of the agreement were sufficiently clear and definite to form a contract and therefore arbitration was proper.

Kind Regards

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