THE WEEK IN TORTS

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

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RULE 1.310(B)(6) DOES NOT PREVENT A PARTY FROM DEPOSING OFFICERS NOT IDENTIFIED BY THE CORPORATION IN RESPONSE TO RULE 1.310(B)(6) NOTICE, WHEN THAT DESIGNEE ACTUALLY TESTIFIES THAT OTHER OFFICERS HAVE THE SAME OR SIMILAR KNOWLEDGE.

RaceTrac Petroleum v. Sewell, 39 Fla. Law Weekly D2419 (Fla. 3rd DCA November 19, 2014):

This case involved an accident that happened when a driver flew out of a RaceTrac gas station and collided with the plaintiff's daughter, seriously injuring her.

Pursuant to Florida Rule of Civil Procedure Rule 1.310(b)(6), the plaintiff sought to depose the corporate representative with the most knowledge of "selecting locations" for RaceTrac gas stations, and the corporate representative with the most knowledge of selecting the location for the subject gas station. In response to the notice, RaceTrac identified the director of real estate as the appropriate corporate representative.

During the person's deposition, she testified that other people were also tasked with selecting sites, etc. Plaintiff's counsel then wanted to take the depositions of those three high-level current and former RaceTrac officers also. RaceTrac tried to prevent those attempts by arguing that rule 1.310(b)(6) provides the mechanism for a corporate entity to identify the person with knowledge of the relevant matters and because this witness

had provided the information as requested, no more depositions could be compelled of additional corporate representatives.

Essentially, RaceTrac argued that unless the rule designee fails to give the information requested, a plaintiff may not compel the deposition of any other corporate representatives, even if they are identified by the rule 1.310(b)(6) designee as having knowledge of the same subject matter.

The court disagreed. Noting that rule 1.310(b)(6) was amended to conform with Federal Rule of Civil Procedure 30(b)(6) and permits the deposition of a legal entity through a representative knowledgeable as to specifically identified issues. The rule expressly provides that the outlined procedure is not exclusive, and does not preclude the taking of deposition by any other procedure authorized by the rule.

The court then found that the rule appears to contemplate the ability of a party to take additional depositions of corporate representatives, albeit subject to all general discovery provisions of rule 1.280. The court also noted that the parties had stipulated that Florida **has not** adopted the "apex doctrine" which effectively shields upper level executives and corporate officers from depositions absent a showing that they have unique or special knowledge. In this case, the trial court limited the depos to one hour on the discrete testimony about site selection.

NO ERROR IN DENYING ATTORNEY'S FEES FOR ENFORCEMENT OF SETTLEMENT AGREEMENT, WHEN NO MOTION FOR FEES WAS FILED UNDER RULE 1.525.

Finnegan v. Compton, 39 Fla. Law Weekly D2402 (Fla. 4th DCA November 19, 2014):

The parties to a will contest enter into a settlement agreement. The agreement contained a provision for attorney's fees if legal action needed to be brought to enforce. Such an action did have to be brought, and the final judgment entered retained jurisdiction to "enter further orders as are proper," but did not specifically mention attorney's fees.

Several months later, the plaintiff filed a motion for attorney's fees which the trial court denied. The appellate court affirmed the denial of fees because there was neither a timely motion for attorney's fees under Rule 1.525, nor did the final judgment determine an entitlement to fees.

The court explained how there are two scenarios to satisfy Rule 1.525's construct. The first is when a party seeks attorney's fees and complies with the Rule within 30 days of the filing of the judgment. The second is when the court has already determined entitlement to fees as part of the relief granted. Under that scenario, it is superfluous to have to file another motion for fees.

The Fourth District refused to create the exception desired by the plaintiff, which would have allowed fees on the mere reservation of jurisdiction.

ERROR TO DISMISS CASE FOR LACK OF PROSECUTION WHERE THERE WAS RECORD ACTIVITY DURING THE 60-DAY PERIOD FOLLOWING SERVICE OF NOTICE OF LACK OF PROSECUTION, AND A TIMELY ATTEMPT TO SHOW GOOD CAUSE WHY THE CASE SHOULD REMAIN PENDING.

Morla v. Armani Investments, LLC, 39 Fla. Law Weekly D2414 (Fla. 3rd DCA November 19, 2014).

TRIAL COURT NOT REQUIRED TO HOLD EVIDENTIARY HEARING BEFORE RULING ON MOTION TO DISMISS MEDICAL MALPRACTICE ACTION BASED ON PLAINTIFF'S FAILURE TO MEET PRE-SUIT REQUIREMENTS--DEFENDANT NOT ENTITLED TO CERT REVIEW OF ORDER DENYING MOTION TO DISMISS.

Nieves v. Viera, 39 Fla. Law Weekly D2421 (Fla. 3rd DCA November 19, 2014):

The defendant doctor in a medical malpractice case questioned whether the physician who had filed an affidavit in support of plaintiff's claim met the requirements of §766.203(2). **While the doctor never requested an evidentiary hearing** to go over the affidavit, this defendant still filed a petition for writ of certiorari based on the fact that the trial court failed to hold such an evidentiary hearing.

The court explained that the case law falls far short of establishing an unremitting principle that an evidentiary hearing must always be conducted, or called for *sua sponte* by a trial judge before ruling upon a motion to dismiss in a medical malpractice case based on the plaintiff's failure to meet pre-suit.

Additionally, certiorari relief from the denial of a motion to dismiss is appropriate only if the petitioner establishes three elements: (1) a departure from the essential requirements of law, (2) resulting in material injury for the remainder of the case (3) that cannot be corrected on post-judgment appeal.

The only question before the court was whether the trial court departed from the essential requirements of law when it denied the motion to dismiss without calling *sua sponte* for an evidentiary hearing. This fell far short of meeting the certiorari requirements.

TRIAL COURT COMMITTED CLEAR ERROR BY REFUSING TO CONSIDER THE GENUINENESS OF STATE'S PROFERRED RACE-NEUTRAL REASONS FOR STRIKING TWO AFRICAN-AMERICAN PROSPECTIVE JURORS--A REMAND FOR A NEW TRIAL.

Ellis v. State, 39 Fla. Law Weekly D2427 (Fla. 3rd DCA November 19, 2014).

TRIAL COURT ABUSED DISCRETION IN AWARDING PLAINTIFF A NEW TRIAL BASED UPON THE DETERMINATION THAT THE VERDICT WAS AGAINST MANIFEST WEIGHT OF THE EVIDENCE OR THAT DETERMINATION WAS PREMISED AT LEAST IN PART ON THE TRIAL COURT'S ERRONEOUS LEGAL CONCLUSION THAT THE JURY COULD NOT REJECT UNCONTROVERTED EXPERT TESTIMONY RELATIVE TO CAUSATION IN FAVOR OF LAY TESTIMONY AND EVIDENCE.

Schmidt v. Van, 39 Fla. Law Weekly D2434 (Fla. 1st DCA November 20, 2014):

In this case where the appellate court reversed the trial court's determination that the jury verdict (for the plaintiff) was against the manifest weight of the evidence for a **second time**, the court found it was error for the trial judge to conclude that the jury could not reject uncontroverted expert testimony relative to causation in favor of lay testimony and evidence.

The court explained that because it was unable to determine whether the trial court would have granted a new trial but for the error of law, it had to once again remand the case to the trial court for reconsideration in light of the correct principles.

INSURER DID NOT WAIVE ITS ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGES BY FILING SUIT FOR DECLARATORY JUDGMENT, AND REFORMATION OF A *CUNNINGHAM* AGREEMENT.

Markel American Insurance Co. v. Baker, 39 Fla. Law Weekly D2437 (Fla. 5th DCA November 21, 2014):

The court found that the filing of a reformation action (which involves a question of intent) does not automatically result in the waiver of attorney-client privilege. Simply because the party's statements concerning his intent on forming a contract could be impeached by confidential communications between the party and his attorney does not give the opposing party a right to have those confidential communications disclosed.

In this case, the court found the plaintiff was able to mount a defense to the action without using the privileged communication because the insurer had to prove either a mutual mistake or a unilateral mistake coupled with inequitable conduct by the other parties to the agreement before the contract could be reformed. Though the plaintiff would not be privy to the insurer's attorney-client communications, she could defend by presenting her own witnesses showing the absence of mutual mistake. If the insurer claims it committed a unilateral mistake and there was inequitable conduct by the plaintiff, she can likewise defend that claim without using the insurer's attorney-client communications.

The court concluded that the insurer's corporate representative and its counsel could have their depositions taken because the party's intent, as well as the discussions between the attorneys for the respective parties, were relevant. However, there could be no questioning regarding privileged matters because there was no waiver of their privilege.

ARBITRATION AGREEMENT THAT DID NOT LIMIT PLAINTIFF'S AVAILABLE REMEDIES UPHELD--HOWEVER, TRIAL COURT ERRED IN REQUIRING THE PARTIES TO APPLY ALABAMA SUBSTANTIVE LAW AND FLORIDA PROCEDURAL RULES.

Hancock v. Northport Health, 39 Fla. Law Weekly D2444 (Fla. 5th DCA November 21, 2014):

The arbitration procedure provisions of the agreement required the arbitrator to apply the substantive law of the state in which the facility is located or federal law or both as may be applicable to the dispute and that each party has the right to engage in discovery consistent with the Alabama Rules of Civil Procedure.

The nursing home conceded that Florida substantive law applied. However, it asserted that the court should apply Florida substantive law and the Alabama Rules of Civil Procedure because the estate failed to make a convincing claim as to why that should not be the case.

WHERE DEFENDANT CLAIMED THAT PLAINTIFFS WAIVED THE RIGHT TO ARBITRATE BY PREVIOUSLY LITIGATING THE MATTER IN COURT, IT WAS ERROR FOR THE TRIAL COURT TO CONCLUDE THAT THE WAIVER ISSUE WAS FOR THE ARBITRATOR--CLAIM OF WAIVER OF RIGHT TO ARBITRATE BASED ON PRIOR LITIGATION CONDUCT IS PRESUMPTIVELY ONE FOR THE COURT TO DECIDE.

Cassedy v. Hofmann, 39 Fla. Law Weekly D2450 (Fla. 1st DCA November 24, 2014).

Kind Regards

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