THE WEEK IN TORTS

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CASES FROM THE WEEK OF JUNE 13, 2014

COURT REVERSES AMENDED FINAL JUDGMENT AND INSTRUCTS TRIAL COURT TO STRIKE INSURER AS A DEFENDANT BASED ON VIOLATION OF NON-JOINDER STATUTE

State National Insurance Co. v. Robert, 39 Fla. L. Weekly D1181 (Fla. 4th DCA June 4, 2014):

Section 627.4136(1) (the non-joinder statute) prohibits the court from adding an insurer to a final judgment, without first determining whether the condition precedent of that section is met (*i.e.*, requiring the plaintiffs to obtain a verdict or settlement). Without a finding regarding such resolution, the insurer may not be added to an amended final judgment.

AFTER DOCTOR AT NURSING HOME DETERMINED THAT RESIDENT LACKED CAPACITY TO GIVE INFORMED CONSENT OR TO MAKE MEDICAL DECISIONS, THE COURT RULED THE NURSING HOME RESIDENT WAS BOUND BY THE ARBITRATION PROVISION IN NURSING HOME ADMISSION AGREEMENT SIGNED BY THE PATIENT'S SON, BECAUSE THE RESIDENT WAS THE INTENDED THIRD-PARTY BENEFICIARY OF THE AGREEMENT

Mendez v. Hampton Court, 39 Fla. L. Weekly D1191 (Fla. 3rd DCA June 4, 2014):

The son of a nursing home resident appealed a trial court's order compelling arbitration of a claim he filed on behalf of his father against a nursing home, for the alleged negligence in the care of the father. On the day the father was admitted, a doctor determined the father lacked the capacity to give informed consent or make medical decisions, and therefore the son signed the forms (although he was not acting under a power of attorney at that time). He signed the agreement indicating he was the resident's representative.

After the father's eye became infected and had to be removed, the father gave his son the power of attorney, and the son brought suit against the facility. The facility moved to compel arbitration, which the trial court did.

Even when third-party beneficiaries do not sign contracts containing arbitration agreements, a non-signatory to an arbitration agreement may be bound to arbitrate, if the non-signatory has received something more than an "incidental or consequential benefit" from the contract, or if the non-signatory is a specifically intended third-party beneficiary of the contract.

In this case, the father was not merely the *incidental* beneficiary of the agreement; he was the intended third-party beneficiary. The court disagreed with other decisions which distinguished the enforceability of arbitration clauses as to third-party beneficiaries.

The court acknowledged that waiver of a jury trial is a matter of great consequence, and that jury trials reflect the ideas of democracy, local decision-making, and civic virtue upon which our form of government is built.

Still, people may forego a right to a jury trial for the extensive protections provided by the legal system and agree to faster, cheaper, private and a less comprehensive method of resolving disputes provided by arbitration (if that were only true….).

The court concluded that the father was bound by the arbitration provision contained in the agreement executed by his son because the father was the intended third-party beneficiary of the agreement.

IN THIS UNIQUE CASE (THE COURT CALLED IT THAT), THE TRIAL COURT IMPROPERLY ALLOWED THE DEFENDANT TO OBTAIN FINAL SUMMARY JUDGMENT IN THE AMOUNT OF THE LIABILITY INSURANCE POLICY LIMITS, THEREBY BARRING ANY CHANCES FOR THE PLAINTIFF TO PURSUE A SUBSEQUENT BAD FAITH CLAIM, SIMPLY BECAUSE THE INSURED FILED FOR BANKRUPTCY

Whritenour v. Thompson, 39 Fla. L. Weekly D1197 (Fla. 2nd DCA June 6, 2014):

The plaintiff sued defendant for injuries sustained in a car accident. The defendant had $300,000 in BI coverage, and her insurance company retained defense counsel who filed an answer and defenses and advised the defendant to file for bankruptcy. The defendant listed the plaintiff's personal injury claim on her bankruptcy petition at a value in excess of one million dollars, and on the same day, the bankruptcy court issued an automatic stay.

Over a year later, the plaintiff filed an emergency motion for relief from the bankruptcy stay in the negligence action. The bankruptcy court granted the plaintiff's motion and modified the automatic stay to permit the plaintiff to pursue the

insurance carrier. The order also provided that in the event that the plaintiff wanted to proceed against the insurance company for an excess judgment, the plaintiff could file another motion for relief.

The parties litigated the negligence case until the defendant filed a motion for summary judgment. At that hearing, the defendant's bankruptcy attorney argued that the defendant had no liability personally, and that the plaintiff's maximum recovery was the liability insurance limits of $300,000. He argued that the bankruptcy court gave the plaintiff permission to proceed against the defendant in name only and to the extent of available insurance coverage. Undeterred by the lack of sworn evidence, counsel argued that the bankruptcy trustee did not have any desire to pursue a bad faith claim.

Ultimately, the trial court granted summary judgment in favor of the plaintiff for the $300,000 policy limits. The trial court interpreted one case to mean that the plaintiff was not entitled to proceed to a jury determination of the negligence action because she failed to file an action for bad faith *prior* to the defendant being discharged in bankruptcy.

Plaintiff also argued that the viability of a potential bad faith action was not a legal basis upon which to grant summary judgment in her underlying negligence action. The court agreed. The plaintiff's negligence action, and her subsequent potential bad faith case were two separate and distinct causes of action.

Under Florida law, a bad faith action is a separate cause of action that does not arise until an insured is legally obligated to pay an excess judgment. A plaintiff must first obtain a judgment in a negligence action, and that determines liability in the amount of resulting damages, because that determination is essential to a potential suit against an insurance company for its bad faith handling of a liability claim against its insured.

Notably, a tortfeasor's bankruptcy filing does not change this procedure. Nothing about a tortfeasor's bankruptcy filing and discharge changes this procedure. The only difference is that the bankruptcy trustee brings the bad faith action against the insurance company.

The bankruptcy court's order granting relief from the stay expressly permitted the plaintiff to pursue the defendant's insurance company in order to prosecute the negligence action through final judgment. Also, there was no express language limiting the plaintiff's recovery to the policy limits, and the bankruptcy court's instructions to file another motion for relief in the event the plaintiff wanted to proceed against the insurance company for an excess verdict, belies such an interpretation.

ERROR TO ENTER SUMMARY JUDGMENT FOR DEFENDANT OWNER OF VEHICLE ON BASIS THAT DRIVER OF VEHICLE WAS NOT AN EMPLOYEE OF THE DEFENDANT OWNER AND HAD STOLEN THE VEHICLE--FACTUAL ISSUES AS TO WHETHER THE DRIVER OF THE VEHICLE WAS DRIVING IT WITH THE OWNER'S KNOWLEDGE AND CONSENT PRECLUDED SUMMARY JUDGMENT

Bellamy v. Ameri-Pride, 39 Fla. L. Weekly D1206 (Fla. 2nd DCA June 6, 2014):

Plaintiff was rear-ended by a vehicle owned by Ameri-Pride and driven by Cesar Calihua. Plaintiff sued Ameri-Pride, which defended by saying that Calihua was never its employee, and alleging that he had actually stolen the vehicle.

Because the facts in the record did support an inference that the driver was driving the vehicle with Ameri-Pride's knowledge and consent (notwithstanding Ameri-Pride's assertion to the contrary) along with other evidence, an issue of fact existed.

Ameri-Pride also contended that the plaintiff's affidavit related to an offer of compromise of claim that would be inadmissible under §90.408. The court said that may or may not be the case, but the record did not disclose whether the plaintiff's claim was disputed when he spoke with the director of operations. Even disregarding an offer to compromise, the other facts created an inference which made a material issue of fact that precluded summary judgment.