THE WEEK IN TORTS

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

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PROPOSAL FOR SETTLEMENT BY ONE PLAINTIFF WHICH WOULD RESOLVE BOTH INJURY AND CONSORTIUM CLAIMS OF OTHER PLAINTIFF WAS AN INVALID JOINT PROPOSAL.

Audiffred v. Arnold, 40 Fla. Law Weekly S199 (Fla. April 16, 2015):

Plaintiff brought a proposal for settlement that offered to settle both her claims for damages and for her vehicle repairs, as well as her husband's loss of consortium claim. The final judgment exceeded the proposal amount.

The court reminded us that the offer of judgment statute was enacted in derogation of common law and must be strictly construed as a result. The purpose of the apportionment required set forth in the rule, is to enable each offeree to evaluate the terms and the amount of the offer as it pertains to him or her. The court reminded us that while the rule does not require an offer to be completely free of ambiguity, the proposal must be sufficiently clear to permit the offeree to reach an informed decision without the need for clarification. If the ambiguity within the proposal could reasonably affect the decision of the offeree, the proposal will not satisfy the particularity requirement.

In this case, although the proposal listed the plaintiff as the sole offeror, had it been accepted by the defendant, it would have resolved all pending claims by both the injured

plaintiff **and** the consortium plaintiff. The proposal had the effect of settling claims by two plaintiffs against one defendant. Thus, it was a "joint proposal," and the amounts had to be apportioned between the two plaintiffs to be valid.

The court held that when a single offeror submits a settlement of proposal to a single offeree, and the offer purports to resolve pending claims by or against additional parties who are neither offerors nor offerees, it constitutes a "joint proposal" that is subject to the apportionment requirement found in subsection (c)(3) of the rule. Because the statute and rule mandate apportionment under such circumstances that must be done to eliminate any ambiguity with regard to the resolution of claims by the non-offeror/non-offeree parties. The court upheld the First District's decision invalidating the proposal.

JOINT PROPOSAL FOR SETTLEMENT BY TWO DEFENDANTS WAS INVALID, WHERE IT DID NOT APPORTION THE AMOUNT ATTRIBUTABLE TO EACH OFFEROR--ERROR TO AWARD FEES TO THE DEFENDANT PURSUANT TO THE STATUTE.

Pratt v. Weiss, 40 Fla. Law Weekly S201 (Fla. April 16, 2015):

In this case, two different hospital entity defendants made a proposal to the plaintiff, making it clear that the proposal would resolve all pending matters between the plaintiff and the named defendants.

The Fourth District had affirmed the award of fees to the defendants. It had held that because the offer was made on behalf of the correct hospital entity that was allegedly responsible for the injury to the plaintiff, the proposal complied with the rule and statute even though it did not apportion amounts to each defendant (two separate entities).

The court observed that to the extent any alleged liability of the two defendants could be viewed as "coextensive," that still did not constitute an exception to the apportionment requirement, because **even where no logical apportionment could be made**, it is **nonetheless required** where more than one offeror or offeree is involved.

Thus, while it may have been difficult for the two entities to apportion the settlement amount based upon their purported liability, that is simply not a recognized element to disregard or circumvent the rule that requires apportionment of a settlement amount where a proposal is presented by multiple parties (when will the legislature abrogate this statute?!). It was therefore error to affirm the attorney's fees, and the supreme court reversed the Fourth District and found the proposal to be invalid.

CURRENT STATUTE AND RULE GOVERNING PROPOSALS FOR SETTLEMENT DO NOT REQUIRE THAT PROPOSALS FOR SETTLEMENT CONTAIN CERTIFICATE OF SERVICE--THE REFERENCE TO "HIS" CLAIMS RATHER THAN "HER" CLAIMS DID NOT RENDER THE PROPOSAL AMBIGUOUS, WHERE NO ONE BUT THE FEMALE PLAINTIFF HAD ASSERTED ANY CLAIMS.

Floyd v. Smith, 40 Fla. Law Weekly D848 (Fla. 1st DCA April 9, 2015):

After the plaintiff lost her case at trial, the defendants moved for fees and costs pursuant to their proposal for settlement. The female plaintiff asserted that the proposal's reference to "his" claims rendered the proposal ambiguous, and further argued that because the

PFS lacked a certificate of service (it was served electronically) it was insufficient to support a judgment.

§768.79 does not mandate a certificate of service; it merely requires the offer be "served" upon the party to whom it is made. A prior version of Rule 1.442 did include a requirement for a certificate of service, but that no longer is the case. Additionally, Rule 2.516 changed the requirements for service of documents most notably requiring service by email.

The court concluded that because the emails produced for the hearing on the motion to tax costs strictly complied with the requirements for service, there was no basis to invalidate it due to a lack of a certificate of service. The court also rejected the plaintiff's claim that the typo "gender error" in the proposal resulted in any ambiguity which could have affected the consideration of the proposal. Because she was the only party to the case besides the defendants, there could be no confusion when the proposal offered to settle "his" claims.

ERROR TO DENY MOTION TO DISMISS, ABATE, OR STAY MALPRACTICE ACTION WHERE UNDERLYING LITIGATION ON WHICH MALPRACTICE ACTION WAS BASED WAS STILL PENDING.

Armour v. Hass, 40 Fla. Law Weekly D807 (Fla. 4th DCA April 8, 2015):

The defendants in a legal malpractice action sought certiorari on an order denying their motion to dismiss, abate or stay. It was undisputed that the underlying litigation on which the malpractice was based was still pending. While the trial court had stayed the trial and discovery as to damages, it allowed the action to proceed, which included discovery as to liability.

Until there is a judgment against the plaintiffs in the underlying action, a malpractice claim is a hypothetical and damages are speculative.

Even though the plaintiffs had already suffered damages by incurring attorney's fees and defending the underlying action, that is not an exception to the general rule about the case arising after the **resolution** of the underlying case, and the experience of "redressable harm."

FOURTH DISTRICT AFFIRMS TRIAL COURT ON EVIDENTIARY (AND DIRECTED VERDICT) RULINGS WHICH LED TO VERY LITTLE RECOVERY FOR THE PLAINTIFF IN THIS WRONGFUL DEATH CASE.

Jones v. Estate of Nye, 40 Fla. Law Weekly D814 (Fla. 4th DCA April 8, 2015):

In this wrongful death action arising out of a car accident, the jury found the decedent at fault for his own death due to his failure to wear a seatbelt, and awarded low damages, likely based upon the evidentiary rulings made by the trial court.

Before trial, the defense had moved in limine to prevent the jury from learning that the defendant driver was a police officer who fled the scene (because he ultimately admitted liability). He claimed that the probative value of that fact was substantially outweighed by the danger of unfair prejudice and the jury might punish him for his behavior. The Estate argued the evidence was relevant to damages because the facts increased the mental anguish of the man's survivors. The trial court determined the probative value was

substantially outweighed by the danger of unfair prejudice and the Fourth District affirmed the ruling to exclude the evidence.

However, the trial court did allow what appeared to be hearsay evidence. The decedent had been married three times, and the personal representative (his adult child from his first marriage) testified that she never mentioned to her sister that her father's present wife had been spending a lot of his money on drugs and alcohol. During the defense case, counsel read into evidence over a hearsay objection, a portion of the sister's deposition (she resided in Tennessee and did not come live) where she testified that her father had financial issues, and that her sister had told her that the wife was spending money on drugs and alcohol. Plaintiffs argued the sister's testimony was "hearsay upon hearsay" but the trial judge ruled it was an admission of a party opponent. The Fourth District agreed, and even found that the decedent himself, who may have been the authority for the information, could make an admission because the privity of the Estate exists between the declarant and the party against whom the statements are being used.

Finally, plaintiff had moved for a directed verdict on comparative negligence based on the fact that the decedent's seatbelt was inoperable. The plaintiff had presented evidence that the decedent had always worn a seatbelt, but was not wearing it on the morning of the accident because there was an obstruction in it (the wife believed that coins from the turnpike had fallen in and they had not had a chance to get it repaired before the accident). The defense argued that there was a jury question as to whether there was negligence on the part of the decedent which resulted in the belt's inoperability. During closing, the defense argued that the plaintiff's theory of how the coins got stuck in the seatbelt was not believable, and that the decedent was negligent in not getting it fixed anyway.

The Fourth District agreed with all of these rulings and affirmed the final judgment which embodied the jury's verdict finding the decedent 70% negligent, and awarding the Estate just slightly over $300,000 in total damages (before the reduction for comparative).

TRIAL COURT ERRED IN DIRECTING A VERDICT FOR PLAINTIFFS AGAINST THE SCHOOL BOARD FINDING THERE WAS A LEGAL DUTY TO MAKE DISCIPLINARY REPORTS AVAILABLE TO TEACHERS.

School Board of Miami-Dade County v. Martinez-Oller, 40 Fla. Law Weekly D826 (Fla. 3rd DCA April 8, 2015):
A high school spontaneously pitched an 8 lb. text book at a classmate after he called her a "b---ch." The book fractured the boy's eye socket. Although the teacher was standing in front of the class about 2 ½ feet from the two students at the moment the incident transpired, she was helpless to prevent the actions.

All parties agreed the teacher did nothing wrong. Instead, the plaintiffs asserted that the school board (the principal) was negligent for **not** disseminating the girl's prior disciplinary record to the teacher, so she would have been better informed and prepared for such outbursts.

Students in public schools have a federally protected right of privacy in their educational records. The records kept at this high school were accessible only by the principal and the vice principal. Because neither of them had any legitimate educational interest in this student's records prior to the date of the accident, the school board could not have had a legal duty to make the student's records available to her teacher. As the court observed, under the trial court's logic, the school principal would had to have disseminated the

student's disciplinary reports to **all** of her classroom teachers--maybe to all of the teachers and employees in the school--who might attain some degree of supervisory authority over the student on the chance she might misbehave. However, such a rationale is antithetical to the reason for federal and state student privacy laws.

While the school's legal duty was to properly supervise student activity on school's grounds, there was no duty to disseminate disciplinary reports. The court reversed, and remanded the jury's verdict for entry of judgment in favor of the school board.

THE 2011 AMENDMENT TO §55.03, FLORIDA STATUTES, APPLIES TO ANY INTEREST THAT ACCRUED AFTER THE EFFECTIVE DATE OF THE AMENDMENT ON A JUDGMENT ENTERED *BEFORE* THE EFFECTIVE DATE OF THE AMENDMENT.

R.J. Reynolds v. Townsend, 40 Fla. Law Weekly D853 (Fla. 1st DCA April 9, 2015):

In 2011, §55.03 on "interest" was amended by the legislature to provide that the interest rate would fluctuate annually. The court ruled that while the plaintiff had a vested right in the 2010 interest rate as applied to interest accrued until the 2011 amendment became effective, after that time the plaintiff no longer had a vested right in the post-judgment interest rate that was previously in place.

Because the amendment did not provide any language limiting its application to judgments entered after its effective date, and because the plaintiff did not have a vested right in the prior version's interest rate after the effective date of the amendment, the court reversed the trial court's order, and remanded with instructions for the trial court to apply the 2011 amendment's interest rate, to the interest accrued **after** 7/1/11 (the effective date).

ERROR TO ENTER SUMMARY JUDGMENT FOR THE DEFENDANT ON THE BASIS THAT THE EVIDENCE FAILED TO ESTABLISH THAT THE DECEDENT WAS A "HABITUAL DRUNKARD" OR THAT THE DEFENDANT SERVED ALCOHOLIC BEVERAGES TO THE DECEDENT WITH THE KNOWLEDGE THAT HE WAS A HABITUAL DRUNKARD--FACT QUESTIONS EXISTED.

Evans v. McCabe, 40 Fla. Law Weekly D863 (Fla. 5th DCA April 10, 2015):

Plaintiff sued the defendant alleging that the bar served the decedent too much alcohol knowing, or should have known that he was a habitual drunkard. His level of intoxication caused him to crash his car into a tree and die.

While the defendant bar filed affidavits and deposition testimony in support of its motion for summary judgment, the plaintiffs provided evidence from the decedent's girlfriend and family members attesting to his regular attendance at the bar and his excessive and habitual use of alcoholic beverages.

He also filed an affidavit from an expert who opined that based on his review of the evidence, the bar had knowledge that the decedent was a habitual drunkard at the time it last served him alcoholic beverages. Plaintiffs asserted that this evidence, at the very least, created a genuine issue of material fact. The court agreed and reversed the entry of summary judgment.

Kind Regards

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TRIAL & APPELLATE ATTORNEYS

1919 N. Flagler Drive, West Palm Beach, Florida 33407
866.643.3318 • www.ClarkFountain.com