THE WEEK IN TORTS

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

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BECAUSE "CLAIMS BILL" IS A MATTER OF "LEGISLATIVE GRACE," COURT UPHELD REDUCTION OF FEES TO LAW FIRM WHO SUCCESSFULLY REPRESENTED THE FAMILY OF A BRAIN-INJURED CHILD FOR YEARS, AND HAD ITS FEES CUT DOWN TO VIRTUALLY NOTHING.

Searcy Denney Scarola Barnhart & Shipley v. State, 40 Fla. Law Weekly D1647 (Fla. 4th DCA July 15, 2015):

Searcy Denney represented the family of a baby who sustained a catastrophic brain injury in 1997 as a result of the negligence of employees at Lee Memorial Health System. The jury awarded the baby over $28 million in damages and awarded his parents another $2.3 million. The trial court found that Lee Memorial was an independent special district of the state of Florida and pursuant to the sovereign immunity damage limitation set forth in Section 768.28(5), entered judgment against the hospital in the amount of $200,000.

Searcy Denney, after a successful appeal, moved for a claims bill which was finally passed in 2012. The legislature directed Lee Memorial to appropriate $10 million, with an additional $5 million payable in annual installments to the Guardianship of the minor, to be used exclusively for his benefit. No monies were appropriated for the use or benefit of either parent, and the claims bill also limited the amount of attorneys' fees, lobbying fees, costs and other similar expenses to $100,000.

The various attorneys who worked on the file petitioned the guardianship court to approve a closing account statement transferring $2.5 million to them (premised on the 25% fee cap provision set forth in Section 768.28(8)). They asserted that the limitation in the claims bill was unconstitutional. The parties presented evidence that the firms had devoted more than 7,000 hours representing the family at trial and on appeal and during the claims bill process, and had incurred more than $500,000 in costs. The guardianship court found that it lacked judicial authority to contravene the language of the claims bill.

After an analysis of the history of sovereign immunity ("the king can do no wrong" and any compensation the king may pay for his misdeeds is done as a matter of grace not upon compulsion), the Fourth District refused to award these firms any additional monies based on that rationale.

The court observed that a claims bill is a voluntary recognition of the legislature's moral obligation and is therefore firmly entrenched in the sphere of legislative discretion. Notwithstanding that the $100,000 did not come close to covering the attorneys' fees--let alone the $500,000 in costs expended--and acknowledging (as counsel espoused) that if there is no reasonable financial incentive for lawyers to take these type of cases the injured will go unrepresented, the Fourth District still affirmed the guardianship court's ruling. It observed that to what extent that injured victims rights will go unrepresented was a matter beyond the court's focus.

Judge Ciklin dissented vociferously, noting this was a crucially important issue that will have deep and profound ramifications for many Floridians for many years to come. He opined that the claims bill limitation on attorneys' fees and costs was an unconstitutional impairment on the Edwards family and the firm's right to contract as they asserted.

Judge Ciklin felt compelled to state in his dissent that Aaron's parents, the two individuals who love him most, steadfastly insisted that their firm be compensated for over decades worth of legal services and pursuant to a valid arms-length and Florida Supreme Court approved contingency fee agreement the result, the risk of which the firm was contractually obligated to assume could have been zero. He admonished that no apparent public service was served by obliterating the contract between the Edwards family and their lawyers, nor did it pass constitutional muster. Therefore, he wrote, it should not be upheld.

LITIGATION PRIVILEGE CANNOT BE APPLIED TO BAR FILING OF CLAIM FOR MALICIOUS PROSECUTION, WHERE THE ELEMENTS OF THE TORT ARE SATISFIED--CONFLICT CERTIFIED.

Fischer v. Debrincat, 40 Fla. Law Weekly D1635 (Fla. 4th DCA July 15, 2015):

Generally, the litigation privilege extends to the protection of the judge, parties, counsel and witnesses, and arises immediately upon the doing of any act required or permitted by law in the due course of judicial proceedings. The Florida Supreme Court extended the litigation privilege doctrine beyond its traditional application to defamatory statements, holding that absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior so long as the act has some relation to the proceeding.

The Third District has held that the litigation privilege may apply to bar a cause of action for malicious prosecution, concluding that the defendant's acts of filing a complaint and

briefly prosecuting a civil case are protected by the litigation privilege, because those actions indisputably occurred during, and were related to the judicial proceeding.

The Fourth District disagreed. It said that although the commencement or continuation of an original criminal or civil justice proceeding is an act occurring during the course of a judicial proceeding and may have some relation to the proceeding, malicious prosecution could never be established if the defendant were afforded absolute immunity under the litigation privilege, and would essentially abolish the tort in Florida.

The court concluded that the litigation privilege cannot be applied to bar the filing of a claim for malicious prosecution.

A REASONABLY PRUDENT PERSON WOULD BE IN FEAR OF NOT RECEIVING AN IMPARTIAL REVIEW OF PENDING POST-TRIAL MOTIONS BASED ON HOSTILITY BETWEEN JUDGE AND ONE OF THE PLAINTIFF'S ATTORNEYS, WHO HAD QUESTIONED JUDGE'S SUITABILITY FOR APPOINTMENT TO THE FEDERAL BENCH.

Perrotto v. R.J. Reynolds, 40 Fla. Law Weekly D1636 (Fla. 4th DCA July 15, 2015):

In this tobacco case, the trial judge denied the plaintiff's motion to disqualify made before trial, based on alleged hostility between the judge and one of her attorneys. The alleged hostility arose in a different, unrelated tobacco case, where the judge issued a 15-page order granting a motion for new trial based largely on counsel's courtroom behavior. Within that order, the judge detailed the attorney's conduct characterizing it as misleading and a fraud on the court.

This hostility between the two carried over into the proceedings concerning the judge's nomination for appointment to the federal bench. The judge furnished the nominating committee a copy of the order as a writing sample, and thereafter the attorney sent the committee a letter challenging the facts and questioning the judge's suitability for appointment to the federal bench.

The attorney selected another attorney in his firm to represent the plaintiff during trial, after the judge who wrote the letter, denied his client's motion to disqualify. However, one day the attorney was present in the courtroom to observe a portion of the closing and after the jury returned its plaintiff's verdict.

According to the plaintiff, she and her attorney approached the bench to thank the judge, and as they were walking away from the bench, the judge commented that she had seen the other attorney in the courtroom and she would never forgive him for what he did to her. The plaintiff alleged that it appeared that the judge was "highly emotional and on the verge of tears as she said this." In the affidavit, the other attorney noted how the judge said she would never forget what he did, took it personally, that it was very hurtful and made her cry. She added that she would never forgive that attorney.

While trial judge's expressions of dissatisfaction with counsel or a party's behavior do not generally warrant disqualification, here, the judge's alleged inability to restrain her utterances or her emotions in front of the plaintiff would, if true, show that the experience profoundly affected her and made her future impartiality reasonably suspect. The source of the prejudice was personal and unrelated to the plaintiff's case. Based on this, the court concluded that a reasonably prudent person would be in fear of not receiving a fair

and impartial judicial review of the pending matters.

A FEE JUDGMENT THAT DOES NOT MAKE FINDINGS REGARDING REASONABLE NUMBER OF HOURS AND A REASONABLE HOURLY RATE IS FUNDAMENTALLY ERRONEOUS ON ITS FACE--COURT SHOULD HAVE CONSIDERED CONTINGENCY FEE RISK MULTIPLIER.

Nalasco v. Buckman, Buckman & Reid, 40 Fla. Law Weekly D1643 (Fla. 4th DCA July 15, 2015):

In addition to making no findings regarding the number of hours spent or the hourly rate, the court refused to apply a multiplier, suggesting it believed that this securities case was not "multiplier" eligible. However, this actually fell within category 2 (tort and contract claims).

Also, because the court found there was a 50/50 chance of success, a multiplier could be applied of 1.5 to 2 according to *Quanstrom*, and the trial judge should have considered that.

While there can be no attorneys' fees awarded for time spent litigating the amount of fees, there is prejudgment interest on a fee award accruing from the date that entitlement to fees is determined.

STATUTORY AMENDMENTS ALLOWING FOR PRESUIT *EX PARTE* INTERVIEWS BETWEEN POTENTIAL DEFENDANTS AND POTENTIAL CLAIMANTS' TREATING HEALTH CARE PROVIDERS, AND REQUIRING POTENTIAL CLAIMANTS TO SIGN WRITTEN WAIVERS OF FEDERAL PRIVACY PROTECTION CONCERNING RELEVANT MEDICAL INFORMATION PRIOR TO INSTIGATING MEDICAL MALPRACTICE LAWSUITS, ARE CONSTITUTIONAL AND NOT PREEMPTED BY HIPAA.

Weaver v. Myers, 40 Fla. Law Weekly D1676 (Fla. 1st DCA July 21, 2015):

The plaintiff challenged the validity of certain 2013 amendments to the medical malpractice presuit notice sections found in Section 766.106 and 766.1065. The amendments **allow for presuit ex parte interviews between potential defendants and the potential claimants treating health care providers**, and also require the potential claimant to **sign a written waiver of federal privacy protection** concerning relevant medical information, prior to instigating a medical malpractice lawsuit.

Plaintiffs raised four state constitutional challenges and one federal preemption challenge: (1) violation of separation of powers; (2) violation of the constitutional limitation on special legislation; (3) an impermissible burden of the constitutional guarantee of free access to courts; (4) violation of the decedent's constitutional right to privacy; and (5) preemption by HIPAA.

Before the amendments, the five methods of informal discovery in pre-suit did **not** include interviews of treating health care providers. Now there is one more.

After specific constitutional analyses of these provisions *vis à vis* the arguments raised, the court found no preemption of HIPAA, and no violation of the state constitution, upholding the 2013 amendments as constitutional.

Kind Regards

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