THE WEEK IN TORTS

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

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Clark Fountain welcomes referrals of personal injury, products liability, medical malpractice and other cases that require extensive time and resources. We handle cases throughout the state and across the country. Since 1997, Florida Bar Board Certified Appellate Attorney, Julie H. Littky-Rubin has prepared and disseminated The Week In Torts to fellow practitioners. Ms. Littky-Rubin handles trial support and appeals for attorneys throughout the state.

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ERROR TO ENFORCE SETTLEMENT WHEN NO MEETING OF THE MINDS ON EVERY ESSENTIAL ELEMENT OF THE AGREEMENT.

Thompson v. Maurice, 39 Fla. Law Weekly D2357 (Fla. 4th DCA November 12, 2014):

In this wrongful death case which killed the plaintiff's son, plaintiff's counsel sent a demand letter to Geico enumerating four conditions for acceptance: (1) receipt of an affidavit of no additional insurance coverage; (2) a certified copy of the policy; (3) tender of a property damage check in the amount of $1,830 made payable to the estate; and (4) tender of the settlement draft of the full bodily injury limits made payable to the estate and to the firm.

Within the 30-day time frame, Geico responded to the plaintiff's demand letter, mirroring the four requirements set forth, and providing the affidavit, the policy, the property damage check and the settlement draft.

However, the letter then went on to state that Geico was **also** including a release, requiring the release of all claims as part of the demand, and also contained indemnification language.

After the plaintiff filed suit, the defendant moved to enforce the settlement, which the trial court granted.

The Fourth District reversed. It explained that because the plaintiff's settlement offer did not contain any indemnification language, simply enumerating a closed list of conditions,

which would have constituted acceptance by Geico, when Geico conditioned its acceptance upon execution of a release which also introduced broad indemnification language, it injected a new essential element of the agreement into the negotiations. Because Geico failed to meet its burden to determine mutual assent as to "every essential element" of the agreement, there was no meeting of the minds and thus no agreement to settle.

ARBITRATION PANEL RULING THAT NEITHER PARTY PREVAILED FOR THE PURPOSE ATTORNEYS' FEES, WAS NOT EVIDENCE OF AN "ARBITRATOR EXCEEDING THE ARBITRATORS' POWERS."

Greener Technology Solutions v. Geltech, 39 Fla. Law Weekly D2360 (Fla. 4th DCA November 12, 2014):

To vacate an arbitration award, a party must show one of the enumerated grounds set forth in §682.13. Here, the appellant argued that the panel finding that neither party prevailed for attorney's fees was a decision in excess of the arbitrator's powers pursuant to the statute.

The Fourth District not only rejected that specific argument. It then wrote, that even assuming arguendo that the panel erroneously concluded that there was no prevailing party, that was not a basis upon which to vacate the award anyway.

WHERE DEFENDANT'S PROPOSAL FOR SETTLEMENT WAS REJECTED IT WAS ERROR TO DENY THE MOTION FOR ATTORNEY'S FEES ON THE GROUNDS THAT THE PROPOSAL WAS AMBIGUOUS AS TO THE INDENTITY OF THE OFFEREE.

DFC Tamarac, Inc. v. Joge Investments, 39 Fla. Law Weekly D2364 (Fla. 4th DCA November 12, 2014):

The Defendant served a proposal for settlement that tracked the language used by the plaintiff in the complaint and stated that the offer was to be made to "Plaintiff, FATOU N. JACKSON, a minor, by and through her mother and guardian, COUMBA JACKSON, individually."

After a defense verdict, and a motion for attorney's fees, the plaintiff claimed that there was an ambiguity in identifying the offeree. Because the language used was the same exact language as used in the complaint, the court refused to find there could be an ambiguity. Thus, it was error for the trial court to refuse to award the defendant attorney's fees.

TRIAL COURT ERRED IN DENYING WITHOUT AN EVIDENTIARY HEARING THE DEFENDANT'S MOTION TO QUASH CONSTRUCTIVE SERVICE.

Boca Stel 2, LLC v. JPMorgan Chase, Fla. Law Weekly D2379 (Fla. 5th DCA November 14, 2014):

A defendant must be able to demonstrate the invalidity of service of process by clear and convincing evidence before a motion to quash can be granted. However, a motion to quash entitles the movant to a full evidentiary hearing, to ascertain whether the defendant evaded service, did not reside in Florida or his whereabouts were unknown. Without such a hearing, it was error to deny the motion.

TRIAL COURT PROPERLY FOUND THAT POLICY DID NOT COVER INSUREDS FOR NEGLIGENT SUPERVISION OF A CHILD WHO WAS SEXUALLY BATTERED BY THE INSUREDS' SON WHILE IN THE CARE OF THE INSUREDS--EXCLUSION WAS CLEAR AND UNAMBIGUOUS.

Dueno v. Modern USA Insurance Co., Fla. Law Weekly D2383 (Fla. 5th DCA November 14, 2014):

The plaintiff sued the homeowners for their negligent supervision of a minor who was sexually battered by their son (another minor) while in their care. The policy contained a sexual molestation exclusion stating that the policy did not contain coverage for bodily injury "arising out of actual or alleged sexual molestation or harassment, corporal punishment, or physical or mental abuse; …."

Rejecting the reasoning in *Westmoreland v. Lumbermens* case (where the court found "arising out of" language to be ambiguous), the court observed that any arguments based on *Westmoreland* have to fail because it is no longer good law based on subsequent precedent. The exclusion was valid and unambiguous.

Kind Regards

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