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THE WEEK IN TORTS

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CASES FROM THE WEEK OF AUGUST 8, 2014

TRIAL COURT ERRED IN EFFECTIVELY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT UNDER THE GUISE OF A MOTION IN LIMINE – A MOTION IN LIMINE HEARING MAY NOT SERVE AS A VEHICLE FOR THE PRESENTATION OF AN UNNOTICED MOTION FOR SUMMARY JUDGMENT.

Otero v. Gomez, 39 Fla. L. Weekly D1604 (Fla. 3rd DCA July 30, 2014):

In a case where a man was injured by a car as he rode his bicycle, he asserted that his view of oncoming traffic was obstructed by a wall which had been constructed on the defendant's property. He sought to introduce expert witness testimony that the wall obstructed a "sight triangle" and violated certain county ordinances and D.O.T. standards.

The defendant filed a motion in limine to exclude that expert's testimony, arguing that any evidence concerning county ordinances or sight triangles and property violations were not relevant, because the defendant owed no duty to the plaintiff (under *Williams v. Davis*, 974 So.2d 1052 (Fla. 2007) the Supreme Court held that a private land owner owes no duty to a motorist for torts arising from foliage located wholly within the bounds of the land owner's property).

Four days after filing his motion in limine, the defendant moved for summary judgment, again relying on *Williams*. Defendant never noticed a hearing on the motion for summary judgment.

Days before trial, the trial court heard the parties' pre-trial motions, including the motion in limine regarding the violations evidence and the defendant's assertion that he had no duty to the plaintiff. The trial court ultimately granted the motion in limine, prompting the defendant to move to dismiss the complaint. The trial court did dismiss the complaint and canceled the trial.

Under Rule 1.510(c), a party must set a motion for summary judgment for hearing **20 days** after the filing of a motion for summary judgment. Here, the motion was filed only 14 days prior to the commencement of trial. That insufficient notice required reversal.

Additionally, a hearing on a motion in limine may not serve as a vehicle for the presentation of an unnoticed motion for summary judgment. Because that occurred here, the final judgment was reversed.

ERROR TO ENTER SUMMARY JUDGMENT IN FAVOR OF INSURER AFTER INSURED FAILED TO APPEAR FOR A MEDICAL EXAMINATION WITHOUT FINDING A MATERIAL BREACH BY THE INSURED OR A FINDING OF PREJUDICE TO THE INSURER BECAUSE OF THE NON-COMPLIANCE

Bush v. State Farm, 39 Fla. L. Weekly D1575 (Fla. 2nd DCA July 30, 2014):

Based on the recent decision in *State Farm v. Curran*, the court held that an insured's failure to comply with an insurance policy's compulsory medical examination clause does not result in an automatic forfeiture of coverage.

Instead, when an insured breaches a compulsory medical examination provision, the prejudice caused by the breach is an element of the affirmative defense that an insurer has the burden of pleading and proving.

ALLEGATIONS THAT DEPARTMENT CREATED KNOWN HAZARDOUS CONDITION INVOLVING HIDDEN DANGER OF WHICH DEPARTMENT WAS AWARE AND FAILED TO CORRECT OR WARN AGAINST, IS NOT ENCOMPASSED BY SOVEREIGN IMMUNITY.

Bergmann v. F.D.O.T., 39 Fla. L. Weekly D1590 (Fla. 1st DCA July 30, 2014):

The appellant sought recovery alleging that F.D.O.T. created a known hazardous condition which led to the collision. The allegations of the complaint indicated that the condition involved a hidden danger and that F.D.O.T. was aware of the hazard but failed to correct or warn of it. As these assertions encompass an "operational level" of function, sovereign immunity did not apply.

TRIAL COURT DEPARTED FROM ESSENTIAL REQUIREMENTS OF LAW IN ORDERING PRODUCTION OF ATTORNEY-CLIENT PRIVILEGED DOCUMENTS UNDER THE CRIME-FRAUD EXCEPTION WITHOUT AFFORDING THE DEFENDANT AN EVIDENTIARY HEARING TO OFFER A REASONABLE EXPLANATION OF ITS CONDUCT OR COMMUNICATIONS.

Merco Group of the Palm Beaches v. McGregor, 39 Fla. L. Weekly D1594 (Fla. 4TH DCA July 30, 2014).

WHERE SERVICE IS EFFECTED IN COMPLIANCE WITH HAGUE SERVICE CONVENTION, ANY ADDITIONAL REQUIREMENTS IMPOSED BY FLORIDA LAW ARE PREEMPTED.

Puigbo v. Medex Trading, 39 Fla. L. Weekly D1603 (Fla. 3rd DCA July 30, 2014).

A MOTION FOR REHEARING TAKEN FROM A NON-FINAL ORDER GRANTING SUMMARY JUDGMENT (AS OPPOSED TO THE ACTUAL FINAL SUMMARY JUDGMENT) MAY STILL BE CONSIDERED AN AUTHORIZED PREMATURE MOTION, TOLLING THE TIME FOR THE FILING OF THE NOTICE OF APPEAL.

Marin v. Smart Cars, 39 Fla. L. Weekly D1609 (Fla. 3rd DCA July 30, 2014).