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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SUPREME COURT FINALLY RELEASES NEW PRODUCTS LIABILITY INSTRUCTIONS.

In re Standard Jury Instructions in Civil Cases, 40 Fla. Law Weekly F163 (Fla. March 26, 2015):

In a process that began in the committee years ago, and first made its appearance in front of the Florida Supreme Court in 2012, the Florida Supreme Court approved amendments and provided an overhaul to the standard jury instructions applicable to products liability cases. Notably, as the court described in the decision, the strict liability instruction found in 403.7 as amended, now provides separate definitions for manufacturing defect and design defect, but retains both the consumer expectations and the risk/benefit tests used to define a design defect.

The court also noted how there is **no** instruction found in 403.11 (Inference of Product Defect or Negligence) based on government rules, that there is **no** "preliminary issue" instruction (403.13), and there is **no** actual instruction on crash-worthiness and enhanced injury claims (as previously set forth in 403.16).

The new instructions point out that in general, plaintiffs are not required to prove privity to establish strict liability, but if it is necessary to submit a factual issue on privity to the jury, it gets submitted in the style of a "preliminary charge" on the status of duty.

Also, in the comments to instruction 403.7 on strict liability, the committee explicitly states that in some instances it may be appropriate to instruct the jury that in addition to the designer and manufacturer, **any** "distributor, importer, or seller in the chain of distribution **is liable for injury caused by a defective product**." The instruction comments also reflect that when strict liability and negligence claims are tried together, in order to clarify differences between them, it may be necessary to add language to the strict liability instructions to the effect that a product is defective if unreasonably dangerous even though the seller **has exercised all possible care** in the preparation and sale of the product (*i.e.*, cannot apportion fault among strictly liable and negligent tortfeasors).

RELATED NOTE: Whenever committees propose amendments to rules or to the jury instructions, they elicit comments through the Florida Bar News. On these instructions, there were literally only seven attorneys who provided comments, three of whom were in our law firm. As it turns out, the supreme court **adopted every suggested change** we made. Being able to have a true and positive impact on the law is something everyone should consider when changes are proposed, especially because we often end up living with these changes for decades to come.

DEFENDANT MANUFACTURER'S FAILURE TO PLACE A WARNING ON THE BIKE WHICH INJURED THE PLAINTIFF, TO ALERT THAT OCCURRED, WAS NOT THE PROXIMATE CAUSE OF THE INJURIES, AND DIRECTED VERDICT SHOULD HAVE BEEN GRANTED (THE PROXIMATE CAUSE WAS ACTUALLY THE ROAD DEBRIS THAT GOT CAUGHT IN THE FRONT SPOKES CAUSING THE WHEEL TO SUDDENLY STOP).

Trek Bicycle Corp. v. Miguelez, 40 Fla. Law Weekly D669 (Fla. 3rd DCA March 18, 2015):

The plaintiff was riding his bike on the highway. An object got caught in the front wheel spokes and caused the wheel to suddenly stop, after the object hit the front carbon fiber forks of the bike. Plaintiff asserted that the manufacturer should have placed a warning on the bike to advise that damaged carbon fiber could fail suddenly and cause serious injury or death requiring someone to immediately stop riding their bike, if they suspected that the bike had been impacted or crashed with something. The plaintiff further asserted that had such a warning been on the bike, he would not have purchased it (or not purchased a bike with carbon fiber forks).

The court explained that the issue of proximate cause is generally a fact question, concerned with "whether and to what extent the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred." The conduct alleged in this case, failure to warn that damaged carbon fiber could fail suddenly, was not--according to the court--the conduct which was the cause of the proximate cause of the injury in the case. Instead, road debris getting caught on the front spokes, and then causing the wheel to suddenly stop, was the proximate cause.

The court said the possibility of encountering road debris in the manner the plaintiff unfortunately experienced, did not have to do with the lack of warnings, but had to do with the conditions of the road. The danger of the front tire rotation suddenly stopping is one independent of the materials used in the bike's construction. Thus, to link the failure to

warn of the "potential of damaged carbon fiber to fail," to the plaintiff's choice of bicycle is a concept that stretched proximate cause too far.

The court reversed the $800,000 final judgment for the plaintiff, reversing for the entry of directed verdict for the defendant.

IN ANOTHER TOBACCO CASE, COURT UPHELD VERDICT FOR THE PLAINTIFFS.

R.J. Reynolds Tobacco Co. v. Ballard, 40 Fla. Law Weekly D670 (Fla. 3rd DCA March 18, 2015):

The court found sufficient evidence for the jury to conclude that the plaintiff was addicted to R.J. Reynolds cigarettes and that the addiction was the legal cause of his bladder cancer. The trial court also properly denied the defendant's motion for directed verdict on membership in the class.

Finally, the court found that because the comments made by the plaintiff's counsel in closing and in rebuttal did not deny the defendant's right to a fair trial, the trial court did not abuse its discretion in denying the tobacco defendant's motion for new trial.

CERTIORARI NOT AVAILABLE WHEN A NON-FINAL ORDER DENIES OR LIMITS DISCOVERY AS TO THE SUFFICIENCY OF THE CREDENTIALS OF A PHYSICIAN WHO SIGNS A PLAINTIFF'S PRESUIT AFFIDAVIT – NO MATERIAL INJURY SO NO CERT.

Plantz v. John, 40 Fla. Law Weekly D673 (Fla. 2nd DCA March 18, 2015):

The doctor had a pending motion to dismiss the plaintiff's case for failing to comply with presuit notification. He wanted to challenge the sufficiency of the credentials of the doctor who signed the presuit affidavit. The defendant doctor commenced formal discovery concerning the affiant doctor's credentials.

After the doctor expert had been deposed twice (once for four hours and once for nine hours) the doctor then requested non-party hospitals to produce records of his staff status at those facilities. He also asked plaintiff's counsel to produce all previous notices of intent containing the opinions signed by the expert doctor.

Plaintiff objected and trial court sustained the objection. The defendant did a petition for writ of certiorari.

The court first observed that it was unclear as to whether the doctor had a right to engage in the discovery of the credentials of a person who merely signs a presuit affidavit and is not currently listed as an expert witness expected to testify in the first place. **Assuming** that discovery **was** available, the court was also unclear as to the scope of the discovery and what discretion the trial court would have in limiting it, especially in light of the depositions the doctor gave.

Irrespective of those factors, any possible error within the denial of the discovery would not result in material injury. Instead, the doctor could raise the issue in a petition for writ of certiorari, in the event that his pending motion to dismiss got denied by the trial court.

POLICY LANGUAGE STATING THAT REIMBURSEMENTS "SHALL" BE SUBJECT TO LIMITIATIONS IN §627.736, INCLUDING "ALL FEE SCHEDULES," WAS SUFFICIENT TO GIVE NOTICE OF INSURER'S ELECTION TO LIMIT REIMBURSEMENTS BY USE OF THE MEDICARE FEE SCHEDULE.

Allstate Fire and Insurance v. Stand-Up MRI, 40 Fla. Law Weekly D693 (Fla. 1st DCA March 18, 2015):

Plaintiff argued that Allstate failed to give notice in its policy that it would use the Medicare fee schedules to limit benefit reimbursements, and did so contrary to the *Virtual Imaging* case.

In *Virtual Imaging*, the court considered the PIP notice issue involving a Geico policy. Under the PIP law, there are two ways to determine whether expenses are reasonable for purposes of insurer reimbursements: (1) A fact-dependent methodology that takes into account the service provider's usual and customary charges, community-specific reimbursement levels, and other relevant information; and (2) introduced by the legislature in 2008, reimbursements for medical services limited to the use of fee schedules as identified in §627.736(5)(a)(2).

To use fee schedules to limit reimbursements, the court said that insurers cannot take advantage of the Medicare fee schedules to limit reimbursement, without notifying its insured by electing those fee schedules in its policy.

The dispute in this case involved whether Allstate's policy language **"adequately"** notified the insureds of the election to limit reimbursements via the Medicare fee schedule. The court found that the policy language advising that any amounts payable under the coverage would be subject to all limitations in §627.736…including, but not limited to, all fee schedules…was enough to provide sufficient notice of Allstate's election to limit reimbursements by use of the fee schedules.

The court also distinguished Allstate's policy from the Geico policy in *Virtual Imaging*. Geico had failed to indicate in any way that it intended to limit reimbursement to a predetermined amount of set reasonable medical expenses. By contrast, Allstate's policy expressly limited reimbursements to all fee schedules in the statute, consistent with *Virtual Imaging*'s simple notice requirement.

WHERE PLAINTIFF SERVED NOTICE OF VOLUNTARY DISMISSAL OF ONE DEFENDANT AFTER THAT DEFENDANT FILED A MOTION TO COMPEL ARBITRATION, TRIAL COURT WAS WITHOUT JURISDICTION TO ORDER THAT DEFENDANT TO PROCEED WITH ARBITRATION--NOTICE OF VOLUNTARY DISMISSAL TERMINATES TRIAL COURT'S JURISDICTION OVER A PARTY.

Williams v. Jursinski, 40 Fla. Law Weekly D705 (Fla. 2nd DCA March 20, 2015):

Florida Rule of Civil Procedure 1.420(a)(1) gives plaintiffs the right to voluntarily dismiss an action at any time before a hearing on a motion for summary judgment, or if none is served or if the motion is denied, before retirement of the jury in a case tried before a jury or before submission of a nonjury case to the court. When considering the plaintiff's power to voluntarily dismiss, the court has recognized that until the line drawn by the rule is crossed, the plaintiff's right to voluntary dismissal is **"absolute."**

Even though the court observed that the plaintiff may have gained a tactical advantage by voluntarily dismissing when it did, the court does lose jurisdiction when the dismissal is filed.

TRIAL COURT DID NOT ERR IN DENYING PLAINTIFF'S MOTION TO AMEND TO SUBSTITUTE WIFE OF DEFENDANT FOR DEFENDANT, BECAUSE COMPLAINT DID NOT RELATE BACK AND WAS THUS BARRED BY THE STATUTE OF LIMITATIONS.

Russ v. Williams, 40 Fla. Law Weekly D709 (Fla. 1st DCA March 20, 2015):

Plaintiff filed a complaint against the defendant alleging he was the owner and operator of the other vehicle in the crash. A week after the statute of limitations expired, he filed a motion for summary judgment stating that his wife was the sole owner of the vehicle. In response, plaintiff filed a motion for leave to file an amended complaint to substitute the wife for the husband, purportedly to correct this misnomer.

Under *de novo* review, the court found that the relation back doctrine did not apply. Generally, the doctrine does not apply when it seeks to bring an entirely new party defendant to the suit after the statute of limitations has expired. Only when there are separate parties who have a sufficient identity of interests such that the addition will not prejudice the new party, does the complaint relate back.

Cases where an identity of interest exception has been applied to allow the addition of a new party defendant after the expiration of a statute, generally involve the substitution of "one corporate entity for another." The gist of the exception is that the relation back doctrine applies when the new defendant is essentially **"one in the same"** as the existing defendant.

This case did not involve two corporate entities that were effectively one in the same. Instead, it involved two separate individuals. The fact that they were married is immaterial because each spouse still has their own legal rights and obligations and the law is clear that one spouse is not responsible for the torts of another.

Even though the wife became aware of the original complaint during the time the statute had run, because the husband had not done anything to mislead the plaintiff, that did not change the fact that she was not timely sued.

Kind Regards

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