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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THE SUPREME COURT RECEDES FROM THE DECISION IN *STANLEY* TO THE EXTENT THAT IT SUPPORTS THE ADMISSION OF SOCIAL LEGISLATION BENEFITS AS AN EXCEPTION TO THE COLLATERAL SOURCE RULE OF EVIDENCE--EVIDENCE OF FUTURE MEDICARE BENEFITS IS NOT ADMISSIBLE.

Joerg v. State Farm, 40 Fla. Law Weekly S553 (Fla. 2nd DCA October 15, 2015):

Pursuant to the collateral source statute, §768.76, trial courts must reduce awards by the total of all amounts which have been paid for the benefit of the claimant or which are otherwise available from all collateral sources. However, under the statute, there are also no reductions for collateral sources for which a subrogation or reimbursement right exists. Medicare, Social Security, Workers' Compensation and Medicaid are not collateral sources because the right reimbursement exists.

Rewind to *Florida Physician's Ins. Reciprocal v. Stanley*, where the court there had allowed defendants to introduce evidence of free or low cost charitable government programs available in the community, asserting those benefits could meet the needs of the plaintiff's disabled son, and further finding that such evidence did not violate the collateral source rule.

The court observed how difficult a time Florida courts have had trying to apply *Stanley*, and how courts have stretched to find it does **not** govern the admissibility of payments

made by a private health insurer or Medicare or Medicaid.

In this case, the plaintiff was also a developmentally disabled adult living with his parents, and entitled to reimbursement from Medicare for his medical bills. The trial judge granted the plaintiff's motion to prevent State Farm from introducing evidence of the son's future Medicare or Medicaid benefits.

The Second District, however, found the decision to clash with *Stanley*. It held that because the plaintiff's Medicare benefits were free and unearned, they should not be excluded by the collateral source rule.

The supreme court reversed, quashing that position once and for all. It found that the government is able to enforce the right of reimbursement of Medicare benefits, which makes it apparent that the exclusion of "evidence" of Medicare and other similar collateral source benefits will not result in an undue windfall to the plaintiff as courts have worried.

Additionally, the holding is consistent with the recognition of the inherently prejudicial effect of evidence of collateral source benefits. The court found it was speculative to calculate damage awards based on benefits that a plaintiff **has not received and may never receive**.

Finally, to consider Medicare, Medicaid and other similar social legislation benefits as an exception to the general rule that precludes admission of collateral sources, circumvents the purpose of the collateral source rule. It is a basic principle of law that tortfeasors should not receive a windfall due to benefits available to the injured party, no matter how those benefits were accrued. The court agreed with the dissent in *Stanley* that those who insure against the actions of tortfeasors should not get a benefit, and tortfeasors should not enjoy a windfall at the expense of taxpayers who fund social legislation benefits.

The court ultimately concluded that the trial judge **properly excluded** evidence of the plaintiff's eligibility for future benefits from Medicare, Medicaid and other social legislation as collateral sources and was correct to refuse to allow State Farm to present confusing, prejudicial and speculative evidence of the plaintiff's future entitlement to Medicare benefits, when State Farm would not otherwise be permitted to seek a reduction of the value of those benefits from any award the plaintiff might receive. The abrogation of *Stanley* is a major "fairness" shift in the law.

IN CAMERA REVIEW NECESSARY TO DETERMINE WHETHER PHOTOGRAPHS PROVIDED EVIDENTIARY VALUE PLAINTIFF CLAIMED, AND WHETHER THE PLAINTIFF COULD OBTAIN "SUBSTANTIALLY EQUIVALENT" PHOTOGRAPHS WITHOUT UNDUE HARDSHIP.

City of Port St. Lucie v. Follano, 40 Fla. Law Weekly D2260 (Fla. 4th DCA October 7, 2015):

The City sought certiorari review of an order compelling production of photographs which it claimed were protected work product. The trial court found the photographs discoverable, but failed to conduct an *in camera* review before making that inspection.

In this case, the trial court departed from the essential requirements of law by failing to conduct an *in camera* review before determining that the photographs were discoverable. Such review was necessary to determine whether the City's photographs provided the

evidentiary value defendant claimed, and also whether defendant could obtain the "substantially equivalent" photographs without undue hardship.

The evidentiary hearing is necessary to determine whether the plaintiff could make the requisite showing of need and undue hardship, and in doing so, the trial court should review the materials *in camera* to determine whether the plaintiff can meet his or her evidentiary burden under the rule.

A SUCCESSOR JUDGE MAY RECONSIDER AN ORDER OF A RECUSED JUDGE DISMISSING A COMPLAINT BASED ON STATUTE OF LIMITATIONS AND STATUTE OF REPOSE, HOWEVER, BECAUSE PLAINTIFF FAILED TO INDICATE HOW THE GROUNDS ALLEGE FOR RECUSAL IMPACTED THE RECUSED JUDGE'S RULINGS, AND FAILED TO DEMONSTRATE ANY PREJUDICE HE SUFFERED FROM THE INITIAL JUDGE'S ENTRY OF ORDER OF FINAL DISMISSAL, THERE WAS NO BASIS FOR RECONSIDERATION.

Ognenovic v. David J. Giannone, Inc., 40 Fla. Law Weekly D2261 (Fla. 4th DCA October 7, 2015).

COURT FOUND NON-ECONOMIC DAMAGE AWARD IN EMPLOYMENT DISCRIMINATION CASE EXCESSIVE.

Olen Properties v. Cancel, 40 Fla. Law Weekly D2262 (Fla. 4th DCA October 7, 2015):

In light of *City of Hollywood v. Hogan*, which suggests there may be a cap on non-economic damages in a sex discrimination case, the jury's award far in excess of that cap required remittitur.

ERROR TO GRANT MOTION TO BIFURCATE WHERE BIFURCATED CLAIMS ARE INEXTRICABLY INTERWOVEN.

Fortin v. T & M Lawn Care, 40 Fla. Law Weekly D2263 (Fla. 4th DCA October 7, 2015):

The court found that bifurcation would not simplify the trial because the claims were interwoven, and instead would cause inconvenience and prejudice to the plaintiff in presenting her case.

TRIAL COURT MAY NOT CONSIDER MATTERS OUTSIDE THE FOUR CORNERS OF THE COMPLAINT WHEN GRANTING A MOTION TO DISMISS.

Kowallek v. Rhem, 40 Fla. Law Weekly D2264 (Fla. 4th DCA October 7, 2015):

A trial judge dismissed a case based on an order entered in a separate county court case, setting certain conditions precedent for the plaintiff to follow. However, without the plaintiff invoking the issues from that case, it was error for the trial court to go outside the four corners of the complaint to dismiss it.

WAIVER OF LIABILITY SIGNED BY A PARTICIPANT IN A PAINTBALL TOURNAMENT BEFORE THE TOURNAMENT BEGAN CLEARLY FOCUSED THE SIGNATORY ON PAINTBALL COMPETITION AND NOT THE VENDOR AREA, AND DID NOT "UNAMBIGUOUSLY" RELEASE THE PROPERTY OWNER FROM LIABILITY FOR THE INJURIES SUSTAINED.

Peterson v. Flare Fittings, 40 Fla. Law Weekly D2279 (Fla. 5th DCA October 9, 2015):

The plaintiff was participating in a paintball tournament at Disney's Wild World of Sports complex. Two days before the tournament, while the plaintiff walked through the vendor area, he was injured when a balloon labeled with one of the vendor's corporate logos made contact with his head, causing his knees to buckle, knocking off his sunglasses and leaving him dazed and in pain. The plaintiff sought medical treatment at a hospital but after negative x-ray results, was discharged with prescribed muscle relaxants and pain relievers.

Two days later, when he returned to compete in the paintball competition, he was required to sign a waiver which clearly addressed his participation in the paintball tournament.

The plaintiff later sued Disney and several other defendants for the injuries he sustained by the balloon. Disney filed a motion for summary judgment arguing it was entitled to summary judgment as a result of the waiver he signed.

In reversing the trial court's entry of summary judgment, the court reminded us that exculpatory clauses are disfavored in the law and are strictly construed against the party seeking to be relieved of liability.

Additionally, the court rejected Disney's argument that the reference to injuries that were suffered before, during or after participation included the incident in the vendor area two days before the competition. The court also reversed summary judgment against the vendor whose balloon hit the plaintiff, because it failed to meet the high burden of demonstrating that plaintiff could not prevail, and establishing a lack of liability on their part. All those defendants did was assert that the plaintiff's evidence was insufficient to prevail on the merits, when it was their burden to prove entitlement to summary judgment.

A MOTION FOR DISQUALIFICATION MUST BE SWORN TO BY A PARTY SIGNING IT, AND THAT AN ATTORNEY FOR THE PARTY SEPARATELY CERTIFIED THAT THE MOTION AND THE CLIENT'S STATEMENTS ARE MADE IN GOOD FAITH.

D.W.Q. v. M.E.Q., 40 Fla. Law Weekly D2286 (Fla. 5th DCA October 7, 2015):

Federal Rule of Judicial Administration 2.330 requires only that the motion to disqualify be sworn by the party signing it, and that the attorney for the party, separately certify that the motion and the client's statements are made in good faith. There is no requirement that the party have personal knowledge of the facts alleged, nor that the motion be accompanied by sworn affidavits of persons with such knowledge.

If the facts in the motion were not true, then the laws prohibiting perjury in judicial proceedings and rules regulating the conduct of attorneys are considered adequate to control any envisioned abuse.

Kind Regards

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