THE WEEK IN TORTS

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

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FIRST DISTRICT CONCLUDES THAT AMENDMENT 7 IS PREEMPTED IN CERTAIN INSTANCES BY THE PATIENT SAFETY AND QUALITY IMPROVEMENT ACT.

Southern Baptist Hospital of Florida v. Charles, 40 Fla. Law Weekly D2422 (Fla. 1st DCA October 28, 2015):

The court began by observing how Article 10, Section 25 of the Florida Constitution (generally referred to as Amendment 7), which was adopted in 2004, has given access to adverse medical incident records from medical providers. The court said Amendment 7 provides a means (albeit often a punitive one), to improve the quality of health care by bringing medical errors to light.

In 2005, Congress took action to improve patient safety in the health care industry with the passage of the Patient Safety and Quality Improvement Act--yet another way (in addition to medical malpractice litigation) to address medical errors.

According to the court, the Act was intended to replace a culture of blame and punishment, with a culture of safety that emphasizes communication and cooperation. The Act, created a voluntary confidential non-punitive system of data sharing of health care errors, for the purpose of improving the quality of medical care and patient safety. The court explained that the Act envisions that each participating provider or member would establish a Patient Safety Evaluation system (PSE system), in which relevant

information is collected, managed and analyzed.

Once the information is collected in the PSE system, the provider then forwards it to its Patient Safety Organization (PSO), which then serves to collect and analyze the data and provide feedback and recommendations.

In order to encourage and incentivize participation, a protected legal environment was created in which providers would be comfortable sharing data both within and across state lines, without the threat of information being used against them. Privilege and confidentiality protections attached to the shared information known as "patient safety work-product" (PSWP).

Information collected becomes "PSWP" if collected through a PSE system. However, it loses its protection once it is removed from that system by the provider.

In this case, the hospital's employees were instructed to enter information into the PSE system, with the assurance of confidentiality based upon the PSWP protections in the Act. It is in this area where occurrence reports are collected regardless of whether they contain "adverse medical incidents."

The court said that the plain language of the Act is clear, and that it makes a document "PSWP" if it is placed into a PSE system for reporting up to a PSO and does not exist *outside* of the PSE system because the documents in this case meet that definition, they had to be regarded as PSWP, which is privileged, confidential and non-discoverable.

The court further explained that under the supremacy clause, this Act "preempts" because it provides that "notwithstanding any other provision of federal, state or local law…"

The plaintiffs argued that the information in this case was collected for the **dual purpose** of submission to the PSO **and** to the health care provider's obligation to comply with federal, state or local laws in accrediting or licensing requirements, therefore, it was not subject to the Act. The court rejected that argument. It said while Amendment 7 can provide a litigant with broad access to records relating to adverse medical incidents, in this instance, with the other requirements for the Act met, it found that the federal law preempted the Act.

TRIAL COURT DEPARTED FROM ESSENTIAL REQUIREMENTS OF LAW BY COMPELLING PARTY AND PARTY'S ATTORNEY TO PRODUCE EMAIL STRING BETWEEN THE TWO, WITHOUT AFFORDING AN EVIDENTIARY HEARING TO ADDRESS THE CLAIM OF PRIVILEGE, AND WHY THE CRIME-FRAUD EXCEPTION PRECLUDED THE USE OF THAT PRIVILEGE.

Brannon v. Palcu, 40 Fla. Law Weekly D2413 (Fla. 4th DCA October 28, 2015):

An expert and attorneys who were representing him in this proceeding, sought review of an order compelling them to produce a specific email string between them, which the court set aside from discovery in a sealed envelope. The respondent in the case that sought information to demonstrate that the psychologist had perpetuated a fraud or obstructed justice when he testified against the respondent/plaintiff in his criminal case.

The defendants argued that the communications were protected by attorney-client privilege, but the plaintiff asserted that the crime-fraud exception precluded the use of

that privilege.

After an *in camera* review, the trial court concluded that the email string had to be produced. However, defendants argued that the trial court was required to conduct an evidentiary hearing before ordering this production. The Fourth District agreed and quashed the order with directions that an evidentiary hearing must be conducted when the crime-fraud exception is at issue.

TRIAL COURT ABUSED DISCRETION BY GRANTING MOTION TO STRIKE SECOND AMENDED COMPLAINT AS A SHAM, WHERE THE MOTION DID NOT EVEN ALLEGE THAT THE COMPLAINT CONTAINED ANY FALSE OR SCANDALOUS ALLEGATIONS--SIMPLY BECAUSE THE FIRST AMENDED COMPLAINT PURPORTEDLY CONTAINED FACTUAL ALLEGATIONS THAT WERE FALSE, WAS NOT A BASIS FOR STRIKING THE SECOND AMENDED COMPLAINT ON THE SAME BASIS.

Wildflower, LLC v. St. Johns River Water Management, 40 Fla. Law Weekly D2454 (Fla. 5th DCA October 30, 2015):

Under Rule 1.150(a), a party may move to strike the pleading or any part thereof as a sham, before the cause is set for trial. The court shall hear the motion, and shall take evidence from the respective party. If the motion is sustained, the pleading to which the motion is directed shall be stricken.

In this case, the motion to strike did not even allege the falsity of any factual allegation in the second amended complaint. Instead, it was based upon a factual allegation in the first amended complaint that the defendant asserted was false. Without any showing that the allegation in the second amended complaint was plain fiction and undoubtedly false, the trial court abused its discretion in striking the complaint.

Additionally, while generally affirmative defenses such as *res judicata* and lack of standing, often require some factual proof in order to be sustained (because affirmative defenses are ordinarily not raised by a motion to dismiss), there is an exception when the face of the complaint is sufficient to demonstrate the existence of the defense.

On the face of this complaint there was nothing to suggest the plaintiff lacked standing. It was also error to dismiss based on *res judicata*, when there were factual issues raised by the complaint.