THE WEEK IN TORTS

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

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CASES FROM THE WEEK OF NOVEMBER 27, 2015

TRIAL COURT ERRED BY FAILING TO DISMISS CLAIMS FOR PAIN AND SUFFERING AND LOSS OF EARNINGS, WHERE THE PLAINTIFF GAVE FALSE OR MISLEADING ANSWERS TO QUESTIONS IN THREE DEPOSITIONS CONCERNING THE EXTENT, DURATION AND SEVERITY OF HIS PAIN AND SUFFERING AND ABILITY TO WORK.

Jimenez v. Ortega, 40 Fla. Law Weekly D2609 (Fla. 5th DCA November 20, 2015):

In this case where the plaintiff suffered a serious injury to his heel in a car accident, the defendant agreed to liability, as well as to the costs the plaintiff sought for medical expenses and the damage to his truck. The issues in the case were only about lost wages and pain and suffering.

Over the course of the pretrial proceedings, the plaintiff was deposed three times and in each one gave false or misleading answers central to the disputed issues in his case, namely the extent, duration and severity of his pain and suffering, and his ability to work.

During the first deposition, plaintiff sought to establish and embellish the extent of his injuries, but then surveillance video showed him pulling his trash can up his driveway while carrying but not using his cane, driving his stick-shift Jeep, walking in front of a toolshed to a hot water heater without using his cane, and driving his Jeep to a water sports boat store.

When he was deposed a second time he had to be prompted by his attorney to clarify the extent of his injuries. He then reiterated that his pain was a "5" when sitting and a "9 to 10" when walking.

When he was deposed a final time six years later, he revised some of his earlier answers and filed an errata sheet revising his testimony.

Finally at trial, the plaintiff admitted on cross-examination that there was testimony from his depositions that was not true. Based on those admissions, the defendant moved to dismiss the case for fraud, but only with respect to those claims about which he was untruthful.

The court reminded us that when a party lies about matters pertinent to his own claim or a portion of it, and perpetrates a fraud that permeates the entire proceeding, dismissal of the whole case is proper. With that said, misconduct falling short of that test may support a more limited dismissal, but a dismissal nevertheless.

The plaintiff's sole argument on appeal relied on the policy favoring the adjudication of claims on their merits. Highlighting the fact that he did not cling to false statements throughout the proceedings, he alleged that because he came clean at trial, he argued that dismissing the action would subvert the purpose of a trial (a search for truth) and would provide no incentive for a less than truthful person to tell the truth in the future.

Finding that position to be "nonsense," the court said when reviewing a case for fraud it should consider a proper mix of factors, and carefully balance a policy favoring adjudication on the merits with competing policies to maintain the integrity of the judicial system. Utilizing that test and based on the record, the court agreed that the dismissal of those claims in dispute was proper.

COURT PROPERLY DISMISSED WRONGFUL DEATH SUIT AGAINST BANK, FOR SUICIDE OF DECEDENT.

Surloff v. Regions Bank, 40 Fla. Law Weekly D2598 (Fla. 4th DCA November 18, 2015):

The decedent suffered from mental and physical impairments. He went to meet with representatives at the bank regarding obtaining a mortgage, and because of his condition, several family members went with him. The family members informed the bank's representatives about his anxiety related to financial matters and explained that he had an inability to deal with complex information, especially negative financial information. The decedent's family specifically requested that the bank not contact him except with regard to ministerial or document requests. The bank agreed to the family's terms, and over the course of the loan process, repeatedly reaffirmed their commitment not to contact the decedent about complex financial information.

Subsequently, the decedent received a letter by mistake informing him that his loan was denied. As a result, he became upset. The decedent's family again reiterated his fragility to the bank.

Bank representatives even met with the decedent's doctor, who also reiterated his permanent disability and fragile condition. The decedent's doctor also had extensive notes regarding his proclivity for self-harm.

Despite all of this, a bank employee continued to speak with the decedent, even though he was repeatedly admonished not to. Two days later, the employee told the decedent the loan was denied, and he went to a motel, ingested a large amount of medication, and died in the hospital three days later.

The plaintiff brought a wrongful death claim for negligent undertaking and negligent infliction of emotional distress. They alleged that because the bank voluntarily assumed to handle the loan without contacting the decedent, it owed a duty of reasonable care, and breached that duty by knowingly communicating with the decedent and traumatizing him.

The trial court dismissed the case finding that the bank owed no duty. It ruled the bank never had any knowledge that the decedent would commit suicide, and there was no nexus between the bank's duty and the decedent's suicide.

The court reminded us that no liability generally exists for another's suicide in the absence of a specific duty of care. One can assume such a duty by taking control and custody of another, and in some instances professionals may have a duty to treat patients in accordance with professional standards and may be negligent for suicide. However, legal duty requires more than just foreseeability alone. It requires one to be in a position to control the risk. In cases of psychiatric facilities they are liable for a patient's self-harm because they are in a position to exercise measures to prevent suicidal patients from inflicting injuries on themselves. But where a patient commits suicide **outside** a facility's range of observation and control, no duty is present.

In this case, the bank did not assume a specific duty of care to prevent the decedent from committing suicide. Although the bank knew allegedly of the decedent's mental state, and agreed to withhold complex financial information, the bank could not undertake a duty to prevent the decedent's suicide because the decedent was not in the bank's custody or control.

Ultimately, the court held that the bank owed no duty since there was no special relationship between the bank and its client.

ERROR TO AWARD A MULTIPLIER.

Federated National Insurance Co. v. Joyce, 40 Fla. Law Weekly D2606 (Fla. 5th DCA November 20, 2015):

After a denial of coverage based on an alleged material misrepresentation in the plaintiffs' homeowner's insurance application, the plaintiff prevailed. During discovery, it came to light that the plaintiffs had actually disclosed their prior claims which had been the basis for the denial of coverage.

The insurance company acknowledged the error and the parties settled. Ultimately, the trial court awarded the plaintiffs over $38,000 as a lodestar for attorneys. The trial court then awarded a multiplier of 2.0.

The court reversed. It observed that the application of a multiplier is the exception not the rule, and the presumption is overcome only in rare and exceptional circumstances. The court found this was not a complicated case, either because the plaintiffs falsified

their insurance application or the insurance company made an error. There were no "esoteric legal issues" or "complicated factual disputes" to resolve (the buzz phrases for a multiplier apparently).

Because this was not one of those rare or exceptional cases in which the award of a multiplier was appropriate, the court reversed.

CLAIMS BASED ON AN INCIDENT THAT OCCURS ON A NAVIGABLE WATERWAY ARE SUBJECT TO A THREE-YEAR STATUTE OF LIMITATIONS--EQUITABLE TOLLING NOT AVAILABLE UNDER THESE FACTS.

Lupola v. Lupola, 40 Fla. Law Weekly D2614 (Fla. 1st DCA November 23, 2015):

The plaintiffs were injured in a boating incident on a public waterway. Just under four years later, the plaintiffs sued the defendant for the operation of the boat, and brought a product liability claim against the raft's manufacturer.

The plaintiff sought to avoid the federal maritime statute of limitations by asserting equitable tolling. She said that her marital relationship was "controlled" by her husband, he instructed her not to discuss the accident or her injuries with anyone else and his domineering actions prevented her from seeking legal assistance.

There was no evidence in this case that the plaintiff's husband had entered into any type of agreement or conspiracy with his father (the defendant boat driver), which might have triggered equitable tolling or equitable estoppel. The plaintiff never said that her husband prevented her from pursuing her claim. She simply asserted that her husband prevented her from finding out whether she had a claim at all. However, her alleged ignorance of legal rights could not delay the accrual of the statute of limitations.

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