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 DECEMBER 11, 2015

TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF THE PLAINTIFF'S ER PHYSICIAN EXPERT REGARDING STANDARD OF CARE OF EMS PERSONNEL RESPONDING TO A 911 CALL--THERE WAS ADEQUATE SUPPORT FOR THE OPINION, AND IT WAS CLEAR THAT THE TESTIMONY WAS THE PRODUCT OF RELIABLE PRINCIPLES AND METHODS.

Baan v. Columbia County, 40 Fla. Law Weekly D2707 (Fla. 1st DCA December 8, 2015):

In this medical malpractice case, EMS was called for an 11-month old child in respiratory distress. EMS personnel left the scene within ten minutes of arriving, after showing the baby's aunt/caregiver how to use a nebulizer.

Approximately 50 minutes after the EMS personnel left, another 911 call brought news that the child was not breathing at all, and that he was blue, extremely clammy and cold to the touch. After being air-lifted to Shands Hospital he was pronounced dead the next day.

The plaintiff retained an ER physician expert who concluded that EMS breached the prevailing professional standard of care by failing to put the child in an ambulance equipped with oxygen on their first visit, and also concluded that the baby would have survived had that occurred.

In his deposition four years later, the doctor said he had reviewed all of the material provided and consistent with his affidavit, testified that the most critical breach of the care was EMS' failure to transport the patient to a medical facility for further definitive care after responding to the first 911 call. He pointed out that EMS violated its own protocol for respiratory distress, and concluded that the condition had deteriorated after EMS failed to transport him until his airway was obstructed by mucus, congestion and more likely than not, bronchial spasm, which is a narrowing of the airways from smooth muscle constriction.

Although the doctor conceded that something like a peanut in his upper airway or severe blunt trauma to the head could theoretically cause respiratory arrest, the doctor said there was no physical evidence of either, and neither would be consistent with the child's presentation on either the first or second run.

Even assuming EMS had recorded the child's vital signs accurately, the doctor testified that a more detailed assessment of the child should have been performed, given the child's historical diagnosis of asthma, and an 11-month old's inability to verbalize a need for help.

The defendant moved to exclude this expert testimony, finding it unreliable under *Daubert*. The defense asserted that because the doctor's opinions were rooted in the assumption that the child experienced respiratory arrest within one hour of the first EMS call, he must have been experiencing a detectable respiratory problem at the time of the first call, and because he allegedly rejected evidence that he should have accepted as true, his opinions were based on speculation.

The trial court agreed with the defense. It ruled the doctor's testimony was inadmissible under *Daubert*, and granted EMS' motion to exclude his testimony.

In forming opinions, an expert is entitled to rely on any view of disputed facts the evidence will support. Drawing all factual inferences in favor of the non-movant, the record provided adequate support for the doctor's opinion that when EMS responded to the first 911 call, it did not perform an adequate evaluation. Also, a neighbor testified that she had held the child over her shoulder during the entire time EMS personnel were on the scene during their first visit, and that the first responders did **not** conduct any examination of the baby, and did not even touch the baby.

Because of the neighbor's testimony that she observed the child's difficulty breathing prior to the EMS visit, and the testimony of another neighbor about the copious amounts of mucus and fluid coming from the child before the second visit, coupled with the testimony about the child's history of breathing problems and the undisputed fact that he had stopped breathing within minutes of the initial departure of EMS, the doctor's opinions that the child should have been taken to the hospital and would have survived but for EMS' failure to support him, were reliable.

According to *Frye*, expert opinion testimony is admissible if the expert is qualified and the opinion falls within the witness's expertise. *Frye* makes "pure opinion" testimony admissible, and the court said there was little question this testimony would be admissible under *Frye*.

However, because our legislature has adopted *Daubert*, the court applied that test and still found that, while an expert may be qualified by experience and that that experience,

standing alone, is a sufficient foundation rendering reliable *any* conceivable opinion the expert may express, in this case, the opinions amounted to much more than mere "*ipse dixit*."

Thus, according to the First District, these opinions were admissible even under *Daubert* "whose gatekeeping function was not intended to supplant the adversary system or the role of the jury."

SUMMARY JUDGMENT UPHELD WHEN NO GENUINE ISSUES OF FACT EXISTED TO COUNTER THE THAT ACCIDENT WAS NOT FULLY THE DECEDENT'S FAULT.

Panzera v. O'Neal and Publix, 40 Fla. Law Weekly D2661 (Fla. 2nd DCA December 2, 2015):

At 3:00 in the morning, a man walked to I-75, climbed a fence, and entered the interstate where he was struck by a Publix semi tractor-trailer driver. The man was wearing a dark shirt and there were no street lights on the interstate in the area of the accident. The semi's engine was equipped with a governor that limited the speed of the truck to 65 m.p.h. (5 m.p.h. under the speed limit). The physical evidence--long skid marks--met up with the driver's testimony that he applied his brakes strongly and steered to the left to avoid the man as soon as he saw him, but was unable to avoid the collision.

At the hearing on the motion for summary judgment, the defendant asserted that plaintiff presented no admissible evidence or expert testimony to refute the Florida Highway Patrol officers' conclusion that the decedent caused the accident.

The court agreed. It found there was no admissible evidence to create a genuine issue of material fact and affirmed the summary judgment.

In doing so, the court admonished that many litigants labor under the misconception that they need only "argue or proffer any fact that they believe to be in conflict to survive a motion for summary judgment," but reminded us that to prevail the evidence must be admissible and create a colorable issue of material fact.

Because in this case the plaintiffs raised only "speculative," rather than genuine issues of material fact, there was no basis to reverse the appropriately entered summary judgment.

TRIAL COURT HAD NO JURISDICTION OVER DECLARATORY ACTION TO DETERMINE A MEDICARE ADVANTAGE ORGANIZATION'S RIGHT TO REIMBURSEMENT OF PAYMENTS FROM AN INSURED'S SETTLEMENT--THERE WAS NO EXHAUSTION OF MANDATORY ADMINISTRATIVE REMEDIES AND FLORIDA'S COLLATERAL SOURCE RULE IS EXPRESSLY PREEMPTED BY THE MEDICARE ACT.

Humana Medical Plan v. Reale, 40 Fla. Law Weekly D2678 (Fla. 3rd DCA December 2, 2015):

This case arose out of a routine slip and fall against a condominium. The case settled for $135,000. The woman was enrolled in a Humana Medicare Advantage plan under Medicare Part C. Humana expended benefits of $19,155.41 on behalf of the plaintiff.

Humana sought full reimbursement, which plaintiff declined to pay. However, plaintiff did

not take an administrative appeal of Humana's determination that the full amount was owed.

Humana sued the plaintiff and her attorney in federal court, seeking reimbursement. Plaintiffs moved to dismiss on the theory that the Medicare Act did not provide Humana with an express or implied right of action for reimbursement. Humana then dismissed her case against the plaintiff and her attorney, and brought another federal case against the condominium defendant's insurer.

The plaintiffs then brought a declaratory judgment action in circuit court, asserting that Humana's payments constituted a collateral source under §768.76, and that statute controlled repayment, not Medicare's Secondary Payor Act.

The trial judge denied the motion to dismiss, and pursuant to the formula provided by the collateral source statute, calculated the reimbursement amount at $3,600.

The court engaged in a helpful analysis of the Medicare framework, explaining how there are four parts, and how Medicare Advantage under Part C is intended to allow beneficiaries to have access to a wide array of private health plan choices to expand health care options. The Secondary Payor Act then has Medicare ultimately responsible for payment of Part C's health care cost, but insists upon other insurances paying first (Workers' Compensation, PIP, etc.).

The court ruled that plaintiffs failed to exhaust mandatory administrative remedies, and even if they had, the claim was subject to exclusive federal jurisdiction.

The court also found that §768.76 is expressly preempted by Part C's broad and unambiguous preemption provision found in 42 U.S.C. §1395w-26(b)(3). The plain language of the statute expressly excludes consideration of Medicare benefits as collateral sources in two separate provisions and there is a broad preemption clause in Part C of the Medicare Act.

Finding there was no jurisdiction in circuit court to determine Humana's reimbursement rights, the court vacated the judgment and reversed and remanded with instructions to dismiss the complaint for lack of jurisdiction.

If anything, this case makes clear you need to be **very careful** with respect to reimbursements owed to insurers under Medicare Part C plans.

Kind regards

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1919 N. Flagler Drive, West Palm Beach, Florida 33407
866.643.3318 • www.ClarkFountain.com