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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TRIAL COURT DID NOT COMMIT A GROSS ABUSE OF DISCRETION IN SETTING ASIDE AN *EX PARTE* DEFAULT, OBTAINED, WHEN THE PLAINTIFF'S ATTORNEY KNEW FROM PRESUIT CONTACTS THAT THE DEFENDANT WAS REPRESENTED BY COUNSEL AND INTENDED TO DEFEND ON THE MERITS – NOTICE OF AN APPLICATION FOR DEFAULT SHOULD BE SERVED WHEN THE PLAINTIFF KNOWS THAT THE DEFENDANT IS BEING REPRESENTED BY COUNSEL WHO INTENDS TO DEFEND; A DEFENDANT'S ATTORNEY'S UNCOOPERATIVENESS, NEGLIGENT OR INCOMPETENCE DOES NOT EXCUSE PLAINTIFF'S COUNSEL FROM FAILING TO GIVE NOTICE.

MW v. SPCP Group, 40 Fla. Law Weekly D336 (Fla. 3rd DCA Feb. 4, 2015):

Before suit, plaintiff's attorney wrote the defendant two letters and demanded the policy limits on behalf of a minor injured at an apartment complex. The plaintiff's attorney and the defendant's attorney also engaged in a telephone conference. When the defendant failed to answer the plaintiff's Complaint, the plaintiff obtained a clerk's default without providing notice to the defendant, or to the defendant's attorney. The trial court reversed and the plaintiff appealed.

The court observed that the plaintiff faces a "high, almost insurmountable standard of review," when it comes to vacating defaults. The judge's decision to vacate a default can only be overturned upon a showing of a gross abuse of discretion.

Additionally, while the defense attorney was uncooperative, neglectful and incompetent, the court found that was all irrelevant to the appeal. The trial court did not set aside the default based upon excusable negligence, but rather it set it aside because the plaintiff failed to give notice.

Without a finding that the trial court grossly abused its discretion, the court affirmed the order vacating the default.

SIMPLY BECAUSE AN EXCULPATORY CLAUSE DOES NOT CONTAIN EXPRESS LANGUAGE RELEASING A DEFENDANT FROM LIABILITY FOR HIS OR HER OWN NEGLIGENCE OR NEGLIGENT ACT, DOES NOT RENDER AN EXCULPATORY CLAUSE INEFFECTIVE

Sanislo v. Give Kids the World, 40 Fla. L. Weekly S79 (Fla. Feb. 12, 2015):

A family went to "camp" at a non-profit organization, that provides free "story book" vacations to seriously ill children and their families at its resort village. They signed a release as part of the application process, and then another one when they arrived. The release stated they would not hold anyone responsible for any liability "whatsoever" in connection with every activity that could possibly occur there.

While at the resort, the family participated in a horse-drawn wagon ride. The wagon was equipped with a lift to enable people in wheelchairs to participate. The plaintiff mother stepped onto the wheelchair lift of the wagon to pose for a picture, and the lift collapsed, causing her injuries. The jury found for the plaintiffs, and on appeal the defendant argued that the lower court erred in denying the pretrial motion for summary judgment, based on the affirmative defense of release.

The plaintiffs argued that express language regarding negligence must be present to render an exculpatory clause effective to bar an action for negligence, because the Supreme Court has held that indemnification agreements which are similar in nature to exculpatory clauses, require specific provisions protecting the indemnity for its own negligence in order for it to be effective. While the Fifth District has allowed this kind of exculpatory clause to bar recovery (as it did in this case), the First, Second, Third and Fourth Districts did not, which allowed this case to be brought to the Supreme Court on conflict.

In this case, the court found that the language of the agreement clearly conveyed that the defendant would be released from any liability, including its own negligence due to every possible activity. Notwithstanding the absence of the terms negligence, or "negligent acts," the court held that the exculpatory clause did not render the agreement *per se* ineffective to bar a negligence action. Exculpatory clauses are, therefore, only unambiguous and unenforceable where the language unambiguously demonstrates a clear and understandable intention to be released from liability, so an ordinary and knowledgeable person would know what he or she is contracting away. The court reversed the jury's verdict. (Justices Lewis, Pariente, and Quince dissented, finding the ruling leaves open Florida's most vulnerable citizens to catastrophe).

SUPREME COURT REVERSES FOURTH DISTRICT'S ENTRY OF DIRECTED VERDICT IN A NEGLIGENT SECURITY CASE – RECORD CONTAINED EVIDENCE TO SUPPORT A FINDING THAT THE LANDLORD'S BREACH MORE LIKELY THAN NOT CONTRIBUTED TO THE DEATH, INCLUDING EVIDENCE THAT THE APARTMENT HAD A SECURITY GATE WHICH WAS INOPERABLE.

Sanders v. ERP Operating, 40 Fla. Law Weekly S85 (Fla. Feb. 12, 2015):

Two young women were killed in a "gated community" apartment complex. They had been shot to death by unknown assailants inside their apartment, and there was no sign of forced entry (though things were stolen from the apartment). The evidence revealed that in the three years prior to the murders, there had been two criminal incidents where the gate had been broken and perpetrators followed residents onto the premises. The plaintiffs asserted that the defendant had failed to maintain the premises in a reasonably safe condition by failing to maintain the front gate, having adequate security, preventing dangerous persons from gaining access to the premises, and protecting and warning residents of dangerous conditions and criminal acts.

The jury found the apartment owner 40% responsible and awarded damages of $4.5 million. The defendant moved for a new trial and JNOV, which the trial court denied. The Fourth District reversed, finding directed verdict was proper. That court concluded that without proof of how the assailants gained entry into the apartment, the plaintiffs simply could not prove causation.

The Supreme Court disagreed. Finding evidence such as the broken gate and the existence of prior opportunistic crimes, it held a reasonable jury **could have** determined that the defendant's failure to maintain the security gate, and the failure to have the courtesy officer visible, probably allowed the assailants to get to the decedents' door without being detected.

In order for a court to remove a case from the trier of fact and render a directed verdict, there can only be **one** reasonable inference to be drawn from the plaintiffs' evidence. However, where the jury has to draw multiple inferences from direct evidence to reach a decision regarding the defendant's negligence, the jury is entitled to make the ultimate factual determination. Based on this, the Supreme Court reversed the Fourth District granting a directed verdict.

COURT REVERSES FINAL JUDGMENT WHEN CERTAIN STATEMENTS WERE NOT REDACTED OUT OF MEDICAL RECORDS, AND DEFENSE ATTORNEY CHOSE TO CAPITALIZE ON THE ERROR DESPITE THE COURT'S PRIOR HEARSAY RULING.

Andreaus v. Impact Pest Management, 40 Fla. L. Weekly D357 (Fla. 2nd DCA Feb. 6, 2015):

The plaintiff slipped and fell on the floor in the common area of her condominium. She sued the pest control company and the association, claiming she had slipped on pesticide that had been sprayed on the tile floor outside the elevator.

Before trial, plaintiffs filed a motion in limine to exclude as inadmissible hearsay any mention in the plaintiff's medical records, that she slipped on spilled water. The records contain such statements but the source of the statements was unknown

Plaintiff's counsel had reviewed 1500 pages of medical records and made the redactions in accordance with the court's ruling. As it turned out, there were two references to the spilling of water that were left in the medical records due to clerical error. The trial court agreed with defense counsel that because the records had already been admitted into evidence and published to the jury, that the plaintiff had to live with it.

The appellate court wrote there was "no question that the trial court abused its discretion in allowing this inadmissible evidence to go to the jury and that the error was extremely prejudicial to the plaintiff's case." It was even more troubling to the court that counsel requested to introduce inadmissible evidence under these circumstances. Noting the court's abhorrence of "gotcha" tactics, the court reversed and remanded for a new trial.

TRIAL COURT ERRED IN DISMISSING ACTION AGAINST PHARMACY ON BASIS THAT IT OWED NO DUTY, IN CASE WHERE PLAINTIFF ALLEGED IT WAS NEGLIGENT TO FILE PRESCRIPTIONS AS WRITTEN WITHOUT QUESTION.

Oleck, N.A. v. Daytona Discount, 40 Fla. L. Weekly D370 (Fla. 5th DCA Feb. 6, 2015):

A doctor was prescribing certain anti-anxiety and pain medications for the decedent. The pharmacy had filled at least 30 of the prescriptions all written by the same doctor. It filled them without question even though they were issued too closely in time and days before the plaintiff should have exhausted the preceding prescription. After the man died, the personal representative sued the pharmacy.

The trial court dismissed finding the pharmacy owed no legal duty to the decedent. However, the court reversed. It said that pharmacists are required to exercise a degree of care that an ordinarily prudent pharmacist would under the same or similar circumstances. The duty of care extends beyond simply following the prescribing physician's directions.

A pharmacist's duty simply cannot be satisfied by "robotic compliance" with the instructions of the prescribing physician. While the court could not say whether the claims would survive a summary judgment or prevail at trial, the court was unwilling to hold as **a matter of law** that the pharmacy was not negligent in filling the prescriptions.

Kind Regards

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