THE WEEK IN TORTS

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

Provided By:

CLARK • FOUNTAIN • LA VISTA
PRATHER • KEEN & LITTKY-RUBIN

TRIAL & APPELLATE ATTORNEYS

www.ClarkFountain.com

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.

FLORIDA LAW WEEKLY
VOLUME 41, NUMBER 5
CASES FROM THE WEEK OF FEBRUARY 5, 2016

SECOND DISTRICT ADMONISHES THAT DEFENSE LAWYER'S GAMESMANSHIP IN USING A *FABRE* DEFENSE, ENTITLED THE PLAINTIFF TO A NEW TRIAL.

Edwards v. Rosen, 41 Fla. Law Weekly D295 (Fla. 2nd DCA January 29, 2016):

A man's wife died and multiple physicians were sued as a result. After multiple settlements, there was one physician left.

In that doctor's original answer, he raised as a conditional *Fabre* defense that if any co-defendants were dismissed from the case, that he would adopt at the time of dismissal all allegations asserted by the plaintiffs against those co-defendants for the purposes of placing them on the verdict form. The court refused to allow the hospital to be put on as a *Fabre* defendant however, holding that a named defendant could not rely on the pure vicarious liability of a non-party to establish the non-party's fault (which would have been the case here).

When the trial judge struck the hospital as a *Fabre* defendant, the defendant doctor then moved *ore tenus* to amend his *Fabre* defenses to specifically include the two doctors for whom the vicarious liability was alleged as *Fabre* defendants. Notwithstanding plaintiff's objection, the trial court allowed it, and the case proceeded to trial 12 days later with three of the non-party defendants as *Fabre* defendants.

During plaintiff's case in chief, he presented evidence that all the treating physicians were negligent, relying on the defendant's *Fabre* defense in arguing in that manner. On the last day of trial, defense counsel withdrew the *Fabre* defense. Plaintiff's counsel immediately objected, moved for a mistrial, and claimed that the withdrawal was prejudicial and premeditated. Plaintiff's counsel argued that the prejudice came because plaintiff had tailored his case to account for the defendant's Fabre defendants.

The trial court refused to grant a new trial, finding that the plaintiff should have amended his complaint to add in the *Fabre* defendants.

The Second District reversed, holding that the trial court abused its discretion in denying the plaintiff's motion for new trial. While trial courts have broad discretion in considering motions for new trial, a new trial should be granted when the trial judge feels that substantial justice was not accomplished by the jury's verdict. Though mere disagreement with the verdict of a jury is not sufficient to warrant a new trial, a trial court should grant one when the jury "has been deceived as to the force and credibility of the evidence" or has been influenced by considerations outside of the record.

Considering the totality of the errors and improprieties, the Second District ruled a new trial was warranted. In light of the belated amendment of the *Fabre* defense, the last minute withdrawal of the defense, and the trial court's failure to give a curative instruction to the jury, the plaintiff was prejudiced to such an extent that his attorney could not cure it.

The court looked at cases where defendants have used the affirmative defense of comparative negligence of the plaintiff as a tactic, only to withdraw it after some evidence of a plaintiff's negligence was admitted (in a case called *Hartong*, defendant used *Fabre* as a means of prejudicing the plaintiff with evidence of his decedent daughter's alcohol and hydrocodone use and then ultimately withdrew the defense).

The court distinguished *Hartong* in another case (where the court said there could be an amendment), finding the negligence of the plaintiff to be different from the negligence of another party. Also, the court did not believe the plaintiff could amend his complaint to add non-party defendants, because here they had been settled with or otherwise dismissed from the case (again, different from alleging the plaintiff's own comparative negligence). To plead a non-party on the verdict form under *Fabre*, a defendant must plead the negligence of the non-party as an affirmative defense, and specifically identify the non-party.

While recognizing that a defendant may waive any defense, the Second District said such a right is not *carte blanche* "to engage in gamesmanship or abuse procedure." The court admonished that the gamesmanship was an attempt by the defendant doctor's attorney to exert control over the plaintiff's presentation of his case.

The court concluded by noting that its holding was not that defendants may not waive or withdraw a defense. Instead, the court was cautioning that engaging in the kind of unfair procedural maneuvering utilized by the defendant's trial counsel in this case, a defendant will risk a new trial.

UM INSURER ENTITLED TO A NEW TRIAL BASED ON COMBINATION OF STATEMENTS BY PLAINTIFF'S COUNSEL IN CLOSING COUPLED WITH THE DISPLAYED POWER POINT SLIDES, EMPHASIZING THE IMPERMISSIBLE

STATEMENTS.

State Farm v. Gold, 41 Fla. Law Weekly D257 (Fla. 4TH DCA January 27, 2016):

In this UM trial against State Farm, the trial judge instructed the jury that the plaintiff was insured under a State Farm policy with UM benefits and that State Farm was responsible for any injuries or damages sustained by the plaintiff, legally caused by the accident.

The plaintiff's closing began with counsel telling the jury that the plaintiff had purchased UM coverage "so this wouldn't happen." He continued by arguing that State Farm had denied his claim, forcing him to face down a stack of medical bills, and that he had been carrying the burden with him, while State Farm never took responsibility for the damages or the injuries. Counsel argued that State Farm would never take responsibility until the jury forced it to with its verdict.

While plaintiff's counsel was making that statement, a power point slide was visible to the jury that read "Michael Gold has been carrying a debt. State Farm promised to pay stacks of medical bills. Paying the price for someone else's mistake State Farm refuses to take responsibility for the debt it owes to Mr. Gold, forcing us to bring them to trial."

State Farm objected both to the comment and the slide. After one or two minutes, the jury was removed while the slide was still displayed. At the end of the plaintiff's closing argument, another power point slide was displayed that said "Gold has done the right thing all along. Has the defendant?" The jury found for the plaintiff.

Although an attorney is accorded great latitude in closing arguments, that leeway is not unbridled, as the Fourth District reminded us. A motion for new trial should be granted when a party's closing argument is so highly prejudicial and inflammatory that it denies the opposing party its right to a fair trial. Comments suggesting an insurance company has refused to own up to its responsibility are improper.

The plaintiff conceded the arguments were improper, but said they were fleeting and thus harmless. Counsel made only one at the beginning and one at the end.

However, the court found that the display of the power point slide during the bench conference provided further opportunity for the jury to be influenced by the message, which was just partly why the comments were far from inconsequential.

The Fourth District held that the cumulative effect of the plaintiff's counsel's closing arguments and the trial court's jury instruction that focused the jury's attention on State Farm's "liability," rather than on the issue of damages, compelled reversal. The court noted that it was not convinced that the instruction would have necessarily been improper on its own, but in conjunction with plaintiff's counsel's statements it painted a clear picture in the jury's mind of a company breaking an obligation, rather than a company attempting to determine actual damages attributable to the accident at issue.

The court punctuated its reversal with a finding that it could not say the error was harmless under the new decision in *Special*, because there was a reasonable possibility that the cumulative effect of the trial court's instruction and plaintiff's counsel's improper statements contributed to the verdict.

TRIAL COURT DEPARTED FROM ESSENTIAL REQUIREMENTS OF LAW IN

ORDERING INSURER TO PRODUCE PORTIONS OF ITS ADJUSTER'S CLAIMS FILES TO MEDICAL PROVIDER, IN FIRST PARTY NON-BAD FAITH CASE.

State Farm v. Premier Diagnostic Centers, 41 Fla. Law Weekly D278 (Fla. 3rd DCA January 27, 2016):

The court made clear that well-settled law prohibits the trial court from ordering an insurance company to produce portions of its adjuster's claims files in first party **non-bad faith** cases.

Citing to cases where courts issued writs when the issue of coverage was unresolved, and those when the courts have ruled that the insurance company's claim files, manuals, guidelines and documents concerning claims handling procedure were irrelevant without bad faith, and to cases finding orders compelling the production of matters claimed to be protected by attorney-client or work-product privilege (which can apply to investigative materials), it found the order erroneous. The court issued the writ and quashed the decision compelling the production.

SUMMARY JUDGMENT UPHELD FOR AUTOMOBILE DEALER THAT SOLD AN ALLEGEDLY DEFECTIVE TRUCK WHICH OVERTURNED AND SEVERELY INJURED THE PLAINTIFF IN A ONE CAR ACCIDENT.

Lesnik v. Duval Ford, 41 Fla. Law Weekly D281 (Fla. 1st DCA January 28, 2016):

The original purchaser of a Ford F-250 ordered a 6 inch lift kit which was installed by a subcontractor of Duval Ford. During the ownership of the truck, the owner also modified the suspension system to increase the towing capacity and replaced the tires. Approximately two years after purchasing the vehicle, he sold it, and Burkins Chevrolet re-sold it to the plaintiff. Burkins Chevrolet conducted a routine inspection, which revealed no obvious issues with the truck.

After experiencing some shaking issues, the plaintiff had the truck repaired. He then increased the horsepower and again replaced the tires. Shortly thereafter, as the plaintiff was driving the truck, the steering and suspension suddenly failed, which caused the truck to flip over, and severely injured the plaintiff.

Plaintiff's expert had testified in his deposition that he had no opinions about Burkins Chevrolet doing anything that may have caused the accident, and that he had no opinion as to whether the truck was defective when Duval Ford had sold it to the original purchaser.

After both dealers moved for summary judgment, the expert then filed an affidavit. This time, he recited several sources of information and offered opinions regarding the negligence of Burkins Chevrolet. Neither the expert nor plaintiff's counsel made any attempt to explain the differences between the deposition testimony when the expert had no opinion, and the subsequently filed affidavit.

Based on precedent established by *Ellison v. Anderson*, the trial court found the affidavit irreconcilably inconsistent with the expert's earlier deposition testimony, without any explanation for the inconsistency. The court granted the dealer's motion to strike the affidavit.

The First District then found no abuse in the trial court's discretion in applying that rule (a litigant, when confronted with an adverse motion for summary judgment, may not contradict or disavow prior sworn testimony with contradictory sworn affidavit testimony).

Finding no evidence of defect or vicarious responsibility in the original dealer, and with the affidavit of the expert being stricken, the court ruled there was no evidence that either defendant had any responsibility, or that Burkins Chevrolet had any duty to warn.

ON A MOTION FOR REHEARING, THE COURT REITERATED THAT THE MOTION TO DISQUALIFY WAS LEGALLY SUFFICIENT TO THE EXTENT THAT IT RELIED UPON SPECIFIC CAMPAIGN RELATED ISSUES, INCLUDING THE FACT THAT AT LEAST ONE OF THE OPPOSING PARTY'S ATTORNEYS WAS PLAYING A SIGNIFICANT ROLE IN THE JUDGE'S CURRENT ONGOING REELECTION CAMPAIGN.

Rivera v. Bosque, 41 Fla. Law Weekly D284 (Fla. 5th DCA January 29, 2016):

The motion to disqualify alleged that the plaintiff was being represented by two attorneys from the same firm, and that both were involved in the trial judge's current ongoing reelection campaign.

While reminding us that the timing, nature and extent of participation in the judge's campaign are relevant factors to be evaluated when considering whether a motion for disqualification based on counsel's campaign-related activities are legally sufficient or not, it is clear that involvement in a relatively limited nature in a judge's campaign is not grounds for disqualification.

In this case, the court found that counsel's involvement was of a significant ongoing and current nature, constituting sufficient legal grounds for disqualification.

In a concurring opinion, one judge noted that merely being one of at least 19 lawyers to host a fundraiser in and of itself, should not be sufficient to warrant the recusal of a judge, but in this case, the motion for disqualification also alleged specific acts of preferential treatment also.

Kind Regards

CLARK • FOUNTAIN • LA VISTA
PRATHER • KEEN & LITTKY-RUBIN
TRIAL & APPELLATE ATTORNEYS

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