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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WHEN THE AMOUNT OF JUDGMENT IS MODIFIED ON APPEAL, POST-TRIAL INTEREST ACCRUES FROM THE DATE OF THE ORIGINAL JUDGMENT RATHER THAN FROM THE DATE OF THE VERDICT.

Shoemaker v. Sliger, 41 Fla. Law Weekly D391 (Fla. 5th DCA February 12, 2016):

In this medical malpractice case, the jury rendered a verdict in excess of $7 million (finding the defendant 40% at fault), and then limited the damages to the amount of the caps. After the medical malpractice caps damages were declared unconstitutional, the court reduced the part of the judgment reducing the award of wrongful death non-economic damages pursuant to §766.118. The court then remanded the case to the trial court to enter an amended judgment in accordance with the jury verdict, and without any reduction under the statute (affirming as to all other issues).

In submitting the amended final judgment, the plaintiff sought interest from the date of the jury verdict, pursuant to rule 9.340(c). The trial court entered it accordingly.

Ordinarily, interest on money judgments in tort cases begins to accrue on the date that the trial court **enters the judgment**, fixing the amount of the monetary award. On the other hand, when a jury's verdict does not end with a money judgment, and an appeal is taken that results in the appellate court reversing and remanding for entry of a money judgment, rule 9.340(c) sets the post-trial interest accrual date as of the **date of the**

verdict.

Otherwise, without the rule, in a case where a money judgment was not entered but should have been, interest would only begin to accrue after the appellate court ruled and the mandate issued, etc., regardless of how many months had intervened between the verdict and the entry of the actual judgment. As the Fifth District explained, delaying interest in that fashion would financially punish the successful plaintiff by depriving post-trial interest for a considerable time, and the rule avoids that unfair result.

This case however, involved entry of a money judgment where the amount of the award was modified after an appeal. The Fifth District held there is no logical reason to employ the rule and held that to do so would be an illogical, unjust interpretation of the rule, which would unjustly punish defendants (not sure why the same principle does not apply, but it does not according to the Fifth District).

The Fifth District acknowledged that the Fourth District had reached a different conclusion in *Hyundai v. Ferayorni*, applying the interest from the date of the verdict on the remitted amount. The Fifth District also observed, however, that the Fourth had also issued an earlier opinion reaching a contrary result.

Accordingly, the Fifth District remanded for entry of an amended money judgment, awarding post-trial interest from the date of the original judgment rather than from the date of the verdict.

TRIAL COURT ERRED IN DISMISSING CASE BASED ON COUNSEL'S FAILURE TO APPEAR AT A CASE MANAGEMENT CONFERENCE WITHOUT A FINDING OF WILLFULNESS OR FLAGRANCE.

Jenkins v. Allstate Property Cas. Insurance, 41 Fla. Law Weekly D381 (Fla. 2nd DCA February 10, 2016):

Plaintiffs sued Allstate for denying coverage for their car accident. Their attorney served (but did not file) an amended complaint which the trial court dismissed with leave to amend. Counsel missed that deadline and without leave of court, later filed a second amended complaint over a month after the time had passed. In response to a motion to dismiss based on the untimely filing, the attorney filed an affidavit from his paralegal stating that the failure to respond timely occurred because the paralegal's wife had recently passed away, and he had neglected to open the mail addressed to the attorney.

Several months after that, plaintiffs' counsel was suspended by the Bar for 60 days, although the record did not reflect why. After a hearing on Allstate's motion to dismiss the second amended complaint, the trial court then entered an order finding that although the parties had notice of the hearing, counsel for the plaintiffs failed to disclose his suspension and inability to appear in court. The trial court sanctioned the attorney.

Over a year after that, Allstate filed a motion to compel overdue answers and objections to interrogatories and requests to produce. The parties agreed to a date for production.

About eight months after that, the trial court entered a form order setting a case management conference. It stated that the failure to appear would result in dismissal. Plaintiff did not appear, and the trial judge dismissed the case without prejudice.

Although rule 1.200(c) allows a trial court to dismiss a case management conference and dismiss an action where the party fails to attend the conference, the order must contain findings that the party's actions were "flagrant, willful, persistent or otherwise aggravated." While the court observed that the transcript of the hearing reflected understandable skepticism on the part of the trial judge about the attorney's explanation for his failure to attend the conference, neither the order nor the transcripts reflected a finding of such willfulness, flagrance, etc.

The appellate court ordered the trial judge on remand to conduct such proceedings with respect to the attorney's failure to attend the case management conference, but found that the record did not support dismissal.

TRIAL COURT ERRED IN DISMISSING COMPLAINT FOR FAILURE TO PROSECUTE WHERE PLAINTIFF FILED A NOTICE OF FILING AND A MOTION TO AMEND WITHIN THE 60-DAY GRACE PERIOD.

Zuppardo v. Dunlap and Moran, 41 Fla. Law Weekly D395 (Fla. 2nd DCA February 12, 2016):

After two years of inactivity, the trial court sent a notice pursuant to rule 1.420 indicating that there had been no record activity in the case for ten months, and that if none would occur in the next 60 days, the action would be dismissed. In response, plaintiff filed a notice of filing which set forth a new address for his attorney, and attached a brief explaining the delay in the case.

In serving the notice, the attorney misspelled the opposing counsel's email address which generated an alert from the eFiling system to serve the notice in an alternative manner. The attorney did do that. Additionally, the plaintiff filed a motion to amend the complaint 60 days after the inactivity order, but did not have a proposed amended complaint attached to it as required by the rule.

The defendant argued for dismissal. The test for record activity, however, allows **any filing of record to preclude dismissal**.

It was inarguable that the plaintiff filed a notice of filing and a motion for leave to amend within the 60-day grace period. While the defects in those pleadings may have prevented them from affirmatively moving the case forward, the rule does not allow an analysis of a filing's substance. Once the pleading is filed timely, the inquiry ends. Thus, it was error to dismiss the plaintiff's complaint for failure to prosecute.

Kind Regards

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