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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CASES FROM THE WEEK OF JUNE 19, 2015

TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION TO AMEND HER COMPLAINT BEFORE SUMMARY JUDGMENT WAS HEARD--ERROR FOR THE COURT TO FIND THAT THE REVISED VERSION OF EVENTS WAS TOO ATTENUATED FROM THE ORIGINAL CLAIMS, BECAUSE THAT IS NOT A BASIS FOR DENYING LEAVE TO AMEND.

Grover v. Karl, 40 Fla. Law Weekly D1388 (Fla. 2nd DCA June 12, 2015):

Plaintiff was injured when a fight broke out at a bar. In the original complaint, plaintiff alleged that she fell when another bar patron intentionally attacked her. At her deposition, however, she testified that she fell when a fight among other bar patrons resulted in the manager getting shoved and as a result, unintentionally falling on her.

The defendants moved for summary judgment based on the plaintiff's testimony, arguing that the allegations of her complaint were contradicted by her testimony, and there was no material dispute that defendants had no notice of the danger and opportunity to prevent it.

Shortly before the hearing on the motion for summary judgment, the plaintiff moved for leave to amend her complaint. The proposed amended complaint alleged that plaintiff's injuries were caused when the manager intentionally grabbed her arm, and pushed or pulled her, until her feet became entangled and she fell. In opposition to the summary

judgment motion, plaintiff filed an affidavit explaining that her testimony about the manager being shoved into her unintentionally was an assumption on her part, and the affidavit was necessary to correct the assumption.

The trial court granted the motion for summary judgment on the original complaint, and denied the motion for leave to amend. It reasoned that the plaintiff's new allegations as related to the manager were too attenuated to allow an amendment of the complaint, and that the plaintiff instead should file a new action (she had added the manager to the lawsuit).

The law states that all doubts about allowing amendments should be resolved in favor of allowing them, so that cases can be resolved on their merits. As a general rule, refusal to allow an amendment constitutes an abuse of discretion unless it clearly appears that (a) allowing the amendment would prejudice the opposing party, (b) the privilege to amend has been abused, or (c) amendment would be futile.

The record did not reflect that the trial court considered whether any of those exceptions were met. The appellate court acknowledged the difficulty the trial judge had, acknowledging that a party's version of the basic facts were revised from the original complaint, to a post-deposition affidavit, then culminating in an amendment motion filed on the brink of a summary judgment hearing.

However, a denial on such a motion based solely on a determination that a revised version of events contained in a proposed amendment is too far afield from the original claims, without a finding of prejudice, abuse of privilege or futility, is simply not a sufficient basis to deny leave to amend.

The court affirmed the summary judgment as to the original complaint, but reversed and remanded for the trial court to consider the plaintiff's motion for leave to amend under the proper standard.

A PARTY WHO OPTS-OUT OF A CLASS ACTION RETAINS THE RIGHT TO PROCEED INDIVIDUALLY, BUT NOT TO LAUNCH A COMPETING CLASS ACTION OF "OPT-OUTS" SEEKING THE SAME RELIEF RESOLVED IN THE ORIGINAL CLASS.

Bay Area Injury Rehab Specialists v. USAA, 40 Fla. Law Weekly D1359 (Fla. 2nd DCA June 10, 2015):

A medical provider who had opted-out of a PIP lawsuit against USAA (the lawsuit sought damages because USAA conditioned payment of benefits on an unlawful requirement that a separate Disclosure and Acknowledgment Form be submitted every time an insured patient received health care services). It then filed a separate lawsuit seeking declaratory relief, injunctive relief to compel PIP payments, and damages. Plaintiff sought to proceed for itself, as well as for other fellow opt-out class members.

The trial court found (and the Second District affirmed) that class action status was inappropriate for declaratory and injunctive relief claims even if they had not been raised in the original class action case, *Goodwiller v. USAA*.

Additionally, parties who opt-out of class actions retain the right to proceed individually, but not to launch competing class actions of opt-outs, seeking the same relief that was

involved on a class basis in a prior lawsuit. The purpose of a class action is to provide litigants who share questions of law and fact with an economically viable means of addressing their needs in court, but that applies to only one class.

The court ultimately held that the opt-out plaintiff could pursue its monetary claims against USAA individually.

ORDERS DISMISSING COMPLAINT AGAINST TWO DEFENDANTS WITHOUT PREJUDICE AND WITH LEAVE TO AMEND WERE NON-APPEALABLE NON-FINAL ORDERS.

Pullins v. Garcia, 40 Fla. Law Weekly D1398 (Fla. 1st DCA June 15, 2015).

Kind Regards

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