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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THE IMPACT OF THE SUPREME COURT'S HARMLESS ERROR DECISION IN *SPECIAL* BEGINNING TO BE FELT--ALSO, UNEMPLOYMENT BENEFITS ARE *NOT* A COLLATERAL SOURCE.

Hurtado v. Desouza, 40 Fla. Law Weekly D891 (Fla. 4th DCA April 15, 2015):

The Fourth District revisited this plaintiff's verdict in an automobile accident case on rehearing, in a case where defendant rear-ended plaintiff while he was stopped at a traffic light.

In opening statement, plaintiff's counsel told the jury that immediately after the accident, the defendant did not check on the plaintiff or apologize. Mid-sentence, the defense lawyer requested a sidebar and expressed concern that plaintiff's counsel was about to suggest that defendant attempted to flee the scene of the accident. He asserted these facts were irrelevant and prejudicial because the defendant had admitted liability.

Plaintiff's counsel responded that his client suffered mental anguish due to the defendant's failure to check on him after the accident, and defendant's failure to apologize (as well as his delay in admitting liability). Plaintiff's counsel argued that the defense had opened the door in *voir dire*, by telling the jury that they admitted liability and plaintiff filed suit.

Ultimately, the defense lawyer tried to convince the trial judge that Florida law did not support a claim for mental anguish, on the theory that the defendant did not show care post-accident. The court denied the motion for mistrial as well as gave the curative instruction. Plaintiff's counsel told the jury that the plaintiff, a commercial pilot, was unable to fly for two years because of the accident, and explained that he ended up losing his house in foreclosure and could not seek medical treatment because he had no health insurance (and the plaintiff testified to these facts).

In the original appeal, the Fourth District found error in plaintiff tying the mental anguish claim to the defendant's post-accident conduct, as well as in highlighting the "rich vs. poor" issue. It concluded, though, the error was harmless.

However, in light of the supreme court's decision in *Special v. West Boca Medical Center*, 39 Fla. Law Weekly S676 (Fla. Nov. 13, 2014), the court on rehearing determined it could no longer say that these errors were harmless. The test for harmless error, as the court explained, now **requires the beneficiary of the error to prove that the error complained of did not contribute to the verdict**. The beneficiary of the error must prove that **there is no reasonable possibility that the error complained of contributed**.

The court found there was no way the plaintiff could sustain that burden in this appeal. The Fourth District reversed the $1 million plus verdict for the plaintiff, and ordered a new trial.

On cross-appeal, the court also addressed whether unemployment compensation is a collateral source subject to a set-off under §768.76. In analyzing the plain language of the statute, the court found unemployment compensation did not fall within that statute.

As it explained, the purpose of §768.76 is to prevent double recovery by the claimant, but because unemployment compensation benefits are not specifically listed in §768.76, and cannot be interpreted as a collateral source under any of its provisions, it was error for the trial court to set-off any of those benefits from the final judgment.

ATTORNEY-CLIENT PRIVILEGE IS NOT DEFEATED BY AN OPPONENT SHOWING RELEVANCE AND NECESSITY--COURT GRANTS WRIT OF CERTIORARI.

Florida Power & Light Co. v. Hicks, 40 Fla. Law Weekly D894 (Fla. 4th DCA April 15, 2015):

Plaintiff sued FP&L for violation of the Florida Whistleblower's Act, intentional infliction of emotional distress and fraud. When plaintiff filed a request to produce, FP&L responded with objections based on the attorney-client privilege and filed a privilege log.

After an in-camera inspection, the circuit court required production of certain documents that contained information "that could not be reasonably obtained from another source" finding that the privilege should be broken and the documents provided.

The court reminded us that unlike the work product doctrine, attorney-client privilege is not defeated by an opponent making a showing of relevance and necessity. The attorney-client privilege is not concerned with the litigation needs of the opposing party, and instead the purpose of the privilege is to encourage full and frank communication between attorneys and clients.

That significant goal of the privilege would be severely hampered if insurers were aware that their communications with their attorneys, which were not intended to be disclosed, could be revealed upon request by the insured. The court granted the writ.

FOURTH DISTRICT FINDS RENTER OF CONSTRUCTION EQUIPMENT *NOT* SUBCONTRACTOR SUBJECT TO WORKER'S COMPENSATION IMMUNITY.

Ciceron v. Sunbelt Rentals, 40 Fla. Law Weekly D897 (Fla. 4th DCA April 15, 2015):

A man was working on a job site building a large retail store. His employer was a demolition company. The general contractor had subcontracted work to the plaintiff's employer, as well as to an electrical contractor, and a welding contractor.

These two subcontractors rented scissor lifts from defendant Sunbelt under separate contracts. The rental agreements provided that Sunbelt was to deliver the scissor lifts, repair them if necessary, and pick them up. They were to remain on the construction site while the project was ongoing. Sunbelt employees were not responsible for operating the scissor lifts on the site after delivering them, except as necessary for repairs.

The plaintiff alleged that on the day of the accident, one of the scissor lifts had become inoperable. A Sunbelt employee came to the site and attempted to remove it with a truck that had a broken a winch. Plaintiff alleged that because the employee was unable to load the lift onto the struck, he summoned the assistance of the plaintiff and his coworkers to assist. In the process of doing that, the plaintiff suffered serious bodily injury, resulting in the amputation of his leg.

The plaintiff had received worker's comp. benefits from his employer. Sunbelt moved for summary judgment arguing that it was protected by horizontal immunity. The trial court granted summary judgment, finding that Sunbelt was a subcontractor on the project, thereby entitled to horizontal immunity.

Since 2004, when the legislature revived the doctrine of horizontal immunity, employees of subcontractors and sub-subcontractors working at construction sites, have been precluded from suing other contracting entities working on the same construction site.

The court observed, however, that the term "subcontractor" is not defined in the statute. Looking to the mechanics' lien statute which the court decided was not exactly on point, the Fourth District found that entities like Sunbelt which rent equipment for use by contractors and subcontractors seem a little different. The core concept for extending worker's comp. immunity from tort liability to subcontractors revolves around the notion that contractors sublet part of their contractual obligations to subcontractors. The court found that important to this case, was the idea that an entity working solely for itself (rather than performing contract work for another), did **not** meet the criteria for a statutory employer.

Here, Sunbelt employees were not being used during the course of construction to operate the lifts. Sunbelt was not hired to operate the scissor lifts to assist with any of the welding or structural work that the welding subcontractor was hired to perform, nor was it hired to operate the scissor lifts to assist with the electrical work the associated industry subcontractor was hired to perform. Instead, Sunbelt was hired to deliver, pick up and repair scissor lifts which "on occasion" would involve a repair at the construction site. It

was also hired to teach employees of associated industries and the welding subcontractor how to operate the scissor lifts. However, neither of those two contractors "sublet" to Sunbelt any of the work it had contracted with the general contractor to perform.

Thus, Sunbelt was not a contractor protected under §440.10(1)(e), and was not entitled to horizontal immunity.

AMENDED STATUTE REQUIRES RECIPIENT OF MEDICAID BENEFITS TO CONTEST AMOUNT DESIGNATED AS A RECOVERED MEDICAL EXPENSE BY PETITION TO THE DIVISION OF ADMINISTRATIVE HEARINGS--PLAINTIFF DOES NOT HAVE A CLEAR LEGAL RIGHT TO HAVE HER DISPUTE RESOLVED IN THE CIRCUIT COURT.

Suarez v. Port Charlotte HMA, 40 Fla. Law Weekly D906 (Fla. 2nd DCA April 17, 2015):

The circuit court determined that it lacked jurisdiction to resolve a dispute between the plaintiff and the Agency for Health Care Administration (AHCA) regarding the amount the agency was entitled to recover for past medical expenses from the plaintiff's settlement with a third-party defendant in her medical malpractice action. §409.910 was amended in 2013 to add subsection 17(b), which outlines a procedure by which a Medicaid recipient may contest the amount designated as recovered medical expense damages payable to the agency, pursuant to another paragraph. After the amendment, recipients have to bring their challenges by **petition** to the Division of Administrative Hearings.

In this case, the plaintiff argued that the 2012 version of the statute should apply to her because she filed her action prior to the effective date of the 2013 amendment. However, the court said because the settlement was not reached with the defendant doctor until 2014 after the statute became effective, AHCA had no right to recovery until that time, and the 2013 version of the statute controlled.

The court ruled the plaintiff could not obtain a writ of mandamus because she did not have a clear legal right to have her dispute resolved in the circuit court, and the circuit court was not required to maintain jurisdiction over the proceedings.

Kind Regards

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