THE WEEK IN TORTS

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

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CASES FROM THE WEEK OF APRIL 10, 2015

ERROR TO GRANT SUMMARY JUDGMENT FOR LAW FIRM WHO REPRESENTED BOTH PARENTS IN THE WRONGFUL DEATH OF A CHILD CASE WHEN THEY WERE DIVORCED WITHOUT OBTAINING INFORMED CONSENT TO THE JOINT REPRESENTATION.

Pitcher v. Zappitell, 40 Fla. Law Weekly D774 (Fla. 4th DCA April 1, 2015):

After their daughter died in a car accident, the father retained a lawyer to represent him for the wrongful death action. That same lawyer also represented the mother (who was divorced from the father). Prior to the litigation, the parents settled with one of the two defendants.

After trial against the second defendant, the jury awarded the father substantially less than the mother ($200,000 for his pain and suffering versus $4,000,000 for the mother's).

The father sued the lawyer and his firm for malpractice. He alleged that they had failed to obtain his informed consent to joint representation pursuant to Rule of Professional Conduct 4-1.7(b)(4). The father argued the firm's joint representation of the parties compromised its ability to represent his interests.

The record revealed that the mother had made derogatory statements about the father and his relationship with his daughter during her deposition. In his suit, the father alleged that the firm neglected to apprise him of the mother's inflammatory statements before his own deposition was taken, and failed to properly prepare him. The father also alleged that the firm's concurrent representation of the parties led to the firm's unwillingness and reluctance to impeach the negative trial testimony of the mother.

The lawyer moved for summary judgment, arguing that the father was able to and did, offer trial testimony himself which responded to the matters, that the depositions were never entered into evidence, and that there was no dispute regarding causation.

The trial judge granted summary judgment for the firm and the lawyer finding that the alleged conflict of interest could not in and of itself form the basis of a legal malpractice suit. The court also based its ruling on the element of causation finding that there was no evidence that the alleged conflict caused the disparate awards. The court further found as a matter of law that to get there would require speculation and inference stacking.

The Fourth District disagreed. The court suggested that a violation of a rule of professional conduct could be the basis of a legal malpractice suit (it did not actually hold that, but "suggested" it), but found that the trial court's decision was not based solely on that idea. The trial court recognized that a violation of the rule of professional conduct did not constitute negligence *per se* but could be evidence of negligence.

Still, the trial court erred for three reasons. First, its decision to grant summary judgment appears to have been based on the element of causation which the trial court believed to be unprovable. The trial court based its summary judgment finding on the idea that the father had not proven sufficient evidence to establish causation in opposition to the motion for summary judgment. The court reminded us, though, that the non-movant does not have the burden of proof in a summary judgment proceeding (so that was error).

Summary judgment may not be granted based on a finding that the plaintiff has not come forward with any evidence of causation in a summary judgment proceeding; that improperly shifts the burden to the non-movant.

Second, to the extent the trial court had found the burden had shifted to the father, that was error as well, because the evidence submitted by the defendant lawyer and law firm did not establish a lack of causation. There was no evidence to "conclusively establish" that the lawyer's alleged conflict of interest did not in **any way** contribute to the outcome of the underlying wrongful death case.

Finally, the father's theory of causation was not so attenuated that it required speculation or inference stacking. The father made the simple argument that his attorney's conflict of interest compromised his attorney's preparation and presentation of the case, which led to hugely disparate awards.

The Fourth District concluded with a good quote which should help in opposing motions for summary judgment from here forward:

> We recognize that "[s]ummary judgments have made a very substantial contribution to the speedy and efficient administration of justice," but "**the right to trial by jury is a concept so deeply imbedded in our jurisprudence** that

> only in those cases where there is no issue whatever of material fact and it is made to appear that the moving party is entitled to a judgment as a matter of law should one be granted." (Citations omitted).

COURT REVERSES FOR IMPOSITION OF §57.105 FEES.

Law v. Law, 40 Fla. Law Weekly D792 (Fla. 3rd DCA April 1, 2015):

In a dissolution of marriage case, the former wife served the law firm representing the husband with a motion for §57.105 sanctions. She knew that when it entered into its agreement with the former husband, that the wife held a protected homestead interest in the property, and was exempt from a claim for fees owed. Still, the firm pursued those fees.

Concluding that the record in the case showed no legal basis to support the law firm's claim against the divorcing couple's marital home or proceeds therefrom, the court reversed, and held that the trial judge should have imposed §57.105 fees against the firm.

TRIAL COURT PROPERLY AWARDED AN HOURLY RATE HIGHER THAN THE PLAINTIFF'S CONTRACTUALLY OBLIGATED RATE, BECAUSE THE CONTRACT CONTAINED A CONTINGENT, ALTERNATE FEE RECOVERY CLAUSE--TRIAL COURT DID NOT ABUSE DISCRETION IN AWARDING IT A MULTIPLIER AFTER COMPLETELY CONSIDERING THE *QUANSTROM* FACTORS.

TRG Columbus Development Venture, Ltd. v. Sifontes, 40 Fla. Law Weekly D796 (Fla. 3rd DCA April 1, 2015):

A man entered into a preconstruction contract to purchase a condominium. He made a $60,000 deposit which was 20% of the purchase price. The contract required the developer to substantially complete the project within two years. Five months later, the parties executed a subsequent agreement to extend the completion date.

After the unit was completed, the purchaser declined to close and demanded return of his deposit which was refused. The man argued that the agreement extending the completion date was void, and that he was entitled to the return of his deposit.

The trial court entered judgment for the purchaser and awarded him fees. The trial court determined that his attorney was entitled to be compensated for 297 hours for trying the case, which was determined to be a reasonable hourly rate of $400 per hour (more than the contract rate). Because the attorney had been engaged on a contingency basis, the trial court also heard evidence regarding whether his attorney was entitled to a multiplier. After an evidentiary hearing, the trial court entered a detailed final order finding he was entitled to a multiplier of 2.0.

While under those circumstances, a court may not award an hourly rate higher than the one the client is contractually obligated to pay, there is an exception when there is a contingency fee contract which includes an alternate fee recovery clause (which was the case here). It was acceptable for the trial court to enter an amount more than the contractual rate.

As to the multiplier, the court admonished that the developer read the first *Quanstrom* prong (about not being able to obtain competent counsel and needing a multiplier to do so) "too narrowly." *Quanstrom* requires a trial court to consider evidence in support of each of the three prongs to award the multiplier. The order on appeal reflected that the trial court undertook the complete consideration of the factors.

By exclusively focusing on the first prong about whether the relevant market required a multiplier, the developer argued that the purchase presented no evidence to demonstrate that the relevant market required a multiplier for competent counsel. There have been appellate courts, as this Court noted, which have found that *Quanstrom*'s first prong is not satisfied when such evidence is absent.

Because in this case, though, evidence was adduced during an evidentiary hearing that many south Florida lawyers were taking condominium deposit recovery cases on a contingency fee basis, intending to settle them for a tiny percentage of the full deposit without going to trial, the trial court heard direct evidence that competent counsel willing to both take such cases on a contingency fee basis and try them to final judgment were few in number. Thus, with regard to the first prong, the trial court's finding in favor of a multiplier was supported by substantial competent evidence.

NO ABUSE OF DISCRETION IN ENTERING DEFAULT DUE TO DEFENDANT'S WILLFUL DISCOVERY VIOLATIONS, INCLUDING DELETION OF EMAILS, CONCEALMENT OF MATERIAL WITNESSES, LYING DURING DEPOSITIONS, PROVIDING FALSE TESTIMONY BEFORE THE TRIAL COURT, ETC.

Briarwood Capital v. Lennar Corp, 40 Fla. Law Weekly D798 (Fla. 3rd DCA April 1, 2015):

While the striking of pleadings or entering a default for noncompliance with an order compelling discovery is the most severe of all sanctions, and should only be employed in extreme circumstances, or where there is a deliberate and contumacious disregard of the court's authority, here, because of the party's "staunch refusal" to follow the trial court's orders, the default was entirely appropriate.

INSURED WAS ENTITLED TO RECOVER STATUTORY FEES IN CONNECTION WITH DECLARATORY JUDGMENT ACTION HE FILED REGARDING UM COVERAGE--WHERE INSURER INITIALLY DISPUTED THE ENTITLEMENT TO "STACKING" OF BENEFITS AND IT LATER CONFESSED ON THE ISSUE, THAT WAS TANTAMOUNT TO A CONFESSION OF JUDGMENT.

Shirtcliffe v. State Farm, 40 Fla. Law Weekly D801 (Fla. 5th DCA April 2, 2015).

IN A DECLARATORY ACTION WHERE PLAINTIFF CONTENDED THAT THE INSURER WAIVED ITS RIGHT TO DENY COVERAGE AND WAS ESTOPPED FROM DENYING DUE TO CANCELLATION OF POLICY FOR THE INSURED'S NON-PAYMENT OF PREMIUM, THE TRIAL COURT ERRED IN ALLOWING THE INSURED TO INTRODUCE EVIDENCE REGARDING THE LONG NUMBER OF YEARS THE INSUREDS HAD BEEN INSURED, BECAUSE IT WAS NOT RELEVANT AND APPEALED TO SYMPATHY.

Government Employees Insurance Co. v. Kisha, 40 Fla. Law Weekly D802 (Fla. 5th DCA April 2, 2015):

Plaintiffs sued GEICO for cancelling their policy for non-payment of premiums prior to her automobile accident and claim for PIP benefits. During the trial, plaintiffs testified as to how long they had been insured with GEICO, and about how they had a long-standing relationship with the insurer. Counsel focused on the 17 years of being insured.

The court found this evidence had no relevance, and was only introduced to elicit sympathy. This in turn, undermined GEICO's opportunity for a fair trial and the court reversed the jury's verdict.

AN ORDER IS NOT APPEALABLE WHEN IT CONTAINS A PARTIAL FINAL JUDGMENT, WHERE REMAINING CLAIMS ARE RELATED AND THE ORDER DOES NOT DISPOSE OF THE ENTIRE CASE AS TO ANY PARTY.

McMichael v. Zachos, 40 Fla. Law Weekly D804 (Fla. 1st DCA April 2, 2015).

Kind Regards

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