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 26, 2015
AFFIRMANCE IN WRONGFUL DEATH NURSING HOME ARBITRATION CASE – CONCURRENCE BY JUDGE ALTENBERND.

Sheptak v. Transitional Hospitals, 40 Fla. Law Weekly D1420 (Fla. 2nd DCA June 17, 2015):

This arbitration agreement apparently required arbitration in front of an organization that had not been handling consumer claims since 2009, when the Minnesota Attorney General sued it for consumer fraud. While there was a case completely on point from the Second District, forcing the court to affirm the applicability of the arbitration and the non-sensical arbitration agreement involved in the case, Judge Altenbernd wrote:

It is impossible for Kindred Healthcare to provide that consideration for this contract and to fulfill its side of the bargain without an established form and while using outdated rules of dubious origin. This impossibility was created by Kindred Healthcare's choice to rely on forms that are at best woefully outdated. I see no reason why the judiciary should force the [plaintiffs] to arbitrate under these conditions. I would recognize their constitutional right to trial by jury.

NOTE: This case should motivate litigants to delve into these agreements closely to see if they unconstitutionally impair the right to trial by jury due to their own requirements.

COURT MUST RULE ON "OVERBREADTH" OBJECTION BEFORE REQUIRING THE FILING OF A PRIVILEGE LOG.

Eyec Trucking v. Santos, 40 Fla. Law Weekly D1404 (Fla. 4th DCA June 17, 2015):

Before written objections to requests for production of documents are ruled upon, documents are not considered "otherwise discoverable." Thus the obligation to file a privilege log does not arise.

Once objections are ruled upon, and the court determines what information is otherwise discoverable, then the party must file a privilege log citing which documents are privileged. If it is not done that way, then the party is faced with an unduly burdensome document request, where it must still obtain and review all of the documents to determine which are privileged, even though the court may later limit the scope of the request.

KNOWLEDGE OF POSSIBLE MALPRACTICE CANNOT BE IMPUTED TO AN EMERGENCY TEMPORARY GUARDIAN FOR PURPOSES OF THE STATUTE OF LIMITATIONS.

Barier v. JFK Medical Center, 40 Fla. Law Weekly D1410 (Fla. 4th DCA June 17, 2015):

A mother was appointed Guardian of her incapacitated son, and she filed a medical malpractice claim on his behalf. The trial court granted summary judgment on the statute of limitations determining that the statute had run from the time the mother was appointed an emergency temporary guardian and had knowledge of the possible malpractice.

In this case, the son was transported to JFK Medical Center from a substance abuse treatment based on an apparent overdose. After he was released, he returned to the treatment facility nine hours later. It reported he was in a lethargic state and unresponsive. Later that day he suffered a cardiac arrest and went into a coma.

The mother petitioned to be appointed the emergency temporary guardian, because he was in need of an emergency guardian to make medical decisions for him. The guardianship was to last 60 days. Before that period had actually expired, the mother was appointed as her son's plenary guardian.

The main issue in the appeal was whether the appointment as an emergency temporary guardian created a legal duty towards the son, such that any knowledge of medical malpractice could be imputed to the son and trigger the statute of limitations. The Fourth District ruled that such imputation knowledge could not occur until the ward was declared incompetent and a permanent guardian was appointed. Running the statute of limitations from the date of the appellant's appointment as permanent guardian, the notices of intent to initiate medical malpractice and the lawsuit were in fact timely served.

ERROR TO AWARD COSTS TO INSURER PURSUANT TO A PROPOSAL FOR SETTLEMENT WITHOUT MAKING FINDINGS OF FACT AS TO WHETHER SPECIFIC COSTS AWARDED WERE TAXABLE, AND IF NOT, WHY THEY WERE BEING AWARDED.

Rodrigo v. State Farm, 40 Fla. Law Weekly D1417 (Fla. 4th DCA June 17, 2015):

In an effort to reduce the overall cost of litigation and keep costs as low as justice will permit, the Florida Supreme Court has adopted the Uniform Guidelines for taxation of costs. Still, the Guidelines are only advisory, and trial courts have broad discretion in awarding otherwise non-taxable costs.

Accordingly, trial courts may deviate from the Guidelines depending on the facts as the justice may require. However, when doing so, the trial court is required to sufficiently identify what non-taxable costs are being awarded and is further required to make specific findings as to the unique and extraordinary circumstances justifying such an award.

TRIAL COURT DID NOT DEPART FROM ESSENTIAL REQUIREMENTS OF LAW IN ENTERING ORDER ALLOWING DEFENDANTS AND THEIR COUNSEL TO ENGAGE IN EX-PARTE COMMUNICATIONS WITH PLAINTIFF'S TREATING PHYSICIAN WHO MAY SEEM LIKE AN EMPLOYEE BUT IS ACTUALLY A NON-PARTY TO THE LITIGATION.

Damsky v. University of Miami, 40 Fla. Law Weekly D1422 (Fla. 3rd DCA June 17, 2015):

Although the trial court was presented with conflicting evidence on the issue of whether the treating physician was an employee of the University of Miami or not, the court found that by the trial court's determination resolving such conflicts, it was not at liberty to re-weigh the evidence.

TRIAL COURT IMPROPERLY ENTERED ORDER COMPELLING DEPOSITION OF OUTSIDE ATTORNEY WHO WAS DIRECTLY INVOLVED IN LITIGATION (EVEN THOUGH NOT COUNSEL OF RECORD) WHERE RESPONDENTS FAILED TO SATISFY CASE LAW REQUIREMENTS FOR TAKING DEPOSITION OF OPPOSING COUNSEL.

Eller-I.T.O. Stevedoring Co. v. Pandolfo, 40 Fla. Law Weekly D1426 (Fla. 3rd DCA June 17, 2015):

Taking the deposition of opposing counsel in a pending case is an extraordinary step which will rarely be justified. It can only be allowed when the party seeking to take the deposition has shown that (1) there is no other means that exist to obtain the information than to depose opposing counsel; (2) that the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case.

Without making a showing of these requirements (which the respondent in this case did not) certiorari was proper.

TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEES AND COSTS UNDER ITS INHERENT POWER WITHOUT MAKING FINDINGS OF BAD FAITH CONDUCT.

Goldman v. Estate of Goldman, 40 Fla. Law Weekly D1432 (Fla. 3rd DCA June 17, 2015):

While a trial court has inherent authority to impose attorney's fees against an attorney for bad faith conduct, there must be an express finding of such bad faith conduct that is supported by detailed factual findings describing the specific acts of bad faith conduct that resulted in the unnecessary incurrence of attorney's fees, before an award be upheld.

Additionally, the amount of the award of fees must be directly related to the attorney's fees and costs that the opposing party has incurred as a result of the specific bad faith conduct of the attorney, and the sanction is only appropriate after notice and opportunity to be heard.

THERE IS NO BRIGHT LINE REQUIREMENT THAT PLAINTIFF MUST PERFECT SERVICE PRIOR TO A HEARING ON A MOTION TO DISMISS IN ORDER TO GRANT AN EXTENSION OF THE 120-DAY PERIOD--TRIAL COURTS GENERALLY ABUSE DISCRETION FAILING TO GRANT AN EXTENSION OF 120-DAY TIME PERIOD WHEN THE STATUTE OF LIMITATIONS HAS RUN.

Green v. Lingle, 40 Fla. Law Weekly D1435 (Fla. 1st DCA June 18, 2015).

TRIAL COURT ABUSED DISCRETION IN ORDERING HOSPITAL TO PRODUCE CONFIDENTIAL CONTRACTS BETWEEN PROVIDERS AND HEALTH INSURANCE ENTITIES WHICH PIP INSURERS SOUGHT BECAUSE THEY CONTAINED INFORMATION REGARDING NEGOTIATED REIMBURSEMENT RATES--ORDER EXCEEDED SCOPE OF DISCOVERY – CONFLICT CERTIFIED.

Shands Jacksonville Medical Center v. State Farm, 40 Fla. Law Weekly D1447 (Fla. 1st DCA June 22, 2015):

After State Farm paid Shands for medical services provided to 29 of its insureds, it sent letters to Shands requesting certain information regarding the invoices for treatment. The requests were submitted pursuant to Section 627.736(6)(b) which required health care providers to provide certain information to PIP carriers.

Shands sent State Farm medical records and information regarding Medicare and other materials, but refused to send copies of third-party contracts with medical insurers containing negotiated discount rates from its regular charges with the third-parties. The trial court compelled the production of this and insisted that Shands make a witness available for deposition on the topic.

The court engaged in a detailed statutory analysis and concluded that while the documents the trial court ordered may have been relevant and discoverable in the context of litigation over the

reasonableness of the charges, they were clearly not the types of documents specifically delineated. Accordingly, State Farm was not entitled to those documents.

The court then certified conflict with the Fourth District's opinion in Kaminester, where the medical provider argued that the statute did not authorize depositions duces tecum but only allowed the production of specified documents. This court found discovery of the facts was indeed limited to the production of documents.

PORTION OF EXPERT'S REPORT SUMMARIZING HIS OPINIONS REGARDING CAUSATION BETWEEN THE ACCIDENT AND THE SURGERY UNDERGONE BY PLAINTIFF WERE RELATED TO THE ACCIDENT, WERE NOT PRIVILEGED, AND WERE DISCOVERABLE.

SCI Funeral Services v. Walthour, 40 Fla. Law Weekly D1459 (Fla. 1st DCA June 22, 2015):

The respondent underwent spinal surgery as a result of a motor vehicle accident and suffered a perforated colon that occurred during surgery. Plaintiff had both an auto and a medical malpractice case.

The defendant retained an expert who prepared a report summarizing his opinions. When plaintiff sought a copy of the expert's report, there were four redacted paragraphs reportedly containing standard of care opinions (defendant advised he had only testified regarding causation) to which defendant asserted work-product privilege.

While plaintiff moved to compel production of the entire report based on the need to cross-examine the doctor about his motive and bias, they notably never argued that the standard of care opinion was relevant to any issue to be litigated at trial.

The case before the court was involving the personal injury action. The plaintiff was not seeking damages from the auto defendant related to any malpractice. Instead, the defendant retained the doctor to render an opinion as to whether there was a causal connection between the accident and the surgery, and the expert disclosure specifically limited the expert's testimony to pre-existing injuries and to opine whether the alleged injuries for which he underwent surgery were related. The court ultimately ruled that the paragraph related to causation was discoverable but the others were not

Kind Regards

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