THE WEEK IN TORTS

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CASES FROM THE WEEK OF JUNE 27, 2014

THE SPOUSE'S LOSS OF CONSORTIUM CLAIM SURVIVED THE DEATH OF THE DECEASED'S SPOUSE – CONFLICT CERTIFIED

Randall v. Walt Disney World, 39 Fla. L. Weekly D1316 (Fla. 5th DCA June 20, 2014):

The plaintiff and her husband had visited Walt Disney World, and alleged that one of the roller coasters caused injuries to the husband's head and neck. During the pendency of the case, the husband died. The wife--a consortium claimant--filed a suggestion of death, but failed to move under Rule 1.1260 to substitute herself as P.R. within 90 days to maintain the husband's personal injury action. The trial court then dismissed the action as well as the loss of consortium claim.

The Fifth District noted that it had previously determined that a loss of consortium claim survives the death of the injured spouse. However, the Third District certified conflict with that case, holding the claim does not survive.

The court said it rejected the Third District's analysis that the damages available in a loss of consortium claim were the same as are available in a wrongful death claim, namely because the court observed that not all personal injury cases will translate into wrongful death cases. Because it reiterated that a loss of consortium claim survives the death of a deceased spouse, the court reversed the trial judge's dismissal of the plaintiff's loss of consortium claim and remanded for reinstatement of the claim.

A MINIMAL PROPOSAL FOR SETTLEMENT OFFER CAN BE MADE IN GOOD FAITH IF THE EVIDENCE DEMONSTRATES AT THE TIME IT WAS MADE THE OFFEROR HAD THE REASONABLE BASIS TO CONCLUDE THAT ITS EXPOSURE WAS NOMINAL

Citizens Property Insurance Corp. v. Perez, 39 Fla. L. Weekly D1271 (Fla. 4th DCA June 18, 2014):

The Fourth District ruled to award fees in favor of the insurance company and against the insured based on a nominal proposal for settlement, finding that it was made in good faith. Because there was evidence to support that the insurer had only faced nominal exposure because the insured failed to report the alleged damage to the home for nearly four years, the insurers offer to pay only a nominal amount was done in good faith.

GENERAL ALLEGATION OF COMPLIANCE WITH STATUTORY CONDITIONS PRECEDENT TO §768.28 SUFFICE – THREE YEAR PERIOD FOR FILING NOTICE OF CLAIM DOES NOT RUN FROM TIME OF INCIDENT, BUT FROM THE DATE THE CLAIM ACCRUES

Exposito v. University of Miami School of Medicine, 39 Fla. L. Weekly D1293 (Fla. 3rd DCA June 18, 2014):

A baby was born prematurely suffering from seizures, cerebral palsy, cortical blindness, etc. Just under four years later, her attorney sent written notices of claim under §768.28(6) to the various defendants. The date of incident was shown to be the date slightly under four years before.

A year after that, the plaintiff filed her complaint, alleging that all the statutorily required conditions precedent to the maintenance of the claim had been performed. The defendants moved asserting the case belonged in NICA. An administrative law judge later dismissed the NICA claim finding that the baby's low birth weight disqualified her from the statutory plan.

The defendants then moved to dismiss the complaint by arguing that plaintiff filed outside of the statute of limitations, and that she failed to comply with §768.28(6) by not filing her notices of claim within three years.

The court reversed the trial judge's dismissal of the plaintiff's claims. It first found that generally alleging compliance with statutory conditions precedent is sufficient with the plain language of Rule 1.120(c). It said that nothing in §768.28 requires greater specificity in the complaint.

The court then rejected the defendant's argument on statute of limitations. The defendant asserted that the three-year time frame ran from the date of the baby's birth which they claim was the incident. However, a cause of action for medical malpractice may accrue at a later date than the incident, when not all of the elements of the plaintiff's claim have accrued by that date. Arguing that a claim is barred by the statute of limitations is an affirmative defense, and is not appropriate for disposition on the face of the complaint.

EXTENDED PIP PROVISION OF POLICY WAS AMBIGUOUS AS TO WHETHER THE INSURER'S LIABILITY FOR EXTENDED PIP BENEFITS WAS LIMITED TO $10,000 OR WHETHER THE INSURER WAS REQUIRED TO

PAY ALL THE MEDICAL EXPENSES WITHOUT LIMITATION--BECAUSE AMBIGUITY MUST BE CONSTRUED AGAINST THE INSURER AS THE DRAFTER OF THE POLICY, THE TRIAL COURT SHOULD NOT HAVE ENTERED SUMMARY JUDGMENT IN THE INSURED'S DEC ACTION

Spaid v. Integon Indemnity Corp., 39 Fla. L. Weekly D1299 (Fla. 1st DCA June 18, 2014).

BECAUSE PROPOSALS FOR SETTLEMENT MUST STRICTLY COMPLY WITH THE RULE, AN OFFER WHERE THE OFFEROR FAILED TO STATE WITH PARTICULARITY THE AMOUNT OFFERED TO SETTLE PUNITIVE DAMAGES WAS NOT VALID

R. J. Reynolds v. Ward, 39 Fla. L. Weekly D1328 (Fla. 1st DCA June 24, 2014):

The proposal for settlement stated that punitive damages were included in the amount of the proposal whether pled or unpled and that acceptance would extinguish any present or future claims for punitive damages.

However, both the statute and the rule require the offeror to state with particularity the amount proposed to settle any claim for punitive damages whenever such a claim exists. The failure to specify an amount to settle the punitive damage claim violated the rule and thus could not be upheld.