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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SUMMARY JUDGMENT IN FAVOR OF DEFENDANT SUBCONTRACTOR UPHELD IN WRONGFUL DEATH CASE.

Moradiellos v. Gerelco Traffic Controls, 40 Fla. Law Weekly D2047 (Fla. 3rd DCA September 2, 2015):

An asphalt surveyor was working on a stretch of the Florida Turnpike. His job was to determine where road surface markings and traffic lines were to be painted after the asphalt was laid down. He was equipped with a headlamp and flashlight.

According to his supervisor, the surveying crew typically used a rack of portable lamps provided by another subcontractor. The supervisor did not request the lamps the night leading to the accident because the crew was working in an area closed to traffic away from where heavier machines were laying asphalt. Also, the lights worked sporadically.

The decedent was hit and killed by a dump truck owned by his employer. This particular summary judgment arose from the claim against the subcontractor that the estate claimed failed to keep the high mast light near the accident in working order.

The evidence was that the subcontractor had taken down the light so a temporary road could be built where it stood. After that was done, the subcontractor put the light back up and reconnected it to its power source but it failed to function. Inspectors noted and told

the subcontractor at least four times that the light and other lights along the widening project were not lit, and needed to be fixed.

A mere seven days before the accident, the subcontractor's crew had attempted to activate the light by changing its power source. Before that work was finished, the crew was tasked with repairing a light problem in the area of a toll booth which the subcontractor decided was a higher priority. In total, the **light remained out for almost a year and a half before the accident**.

The plaintiff sued based on the "unrelated works" exception, as well as "gross negligence." The court stated at the outset that the "unrelated works" exception applies only to employees and **fellow** employees. In this instance, the statute excluded the subcontractor because the language excludes those who have secured payment of compensation coverage for their employees. *See*, §440.02(15)(c)2. Because the exception applies only to co-employees and the subcontractor who secured the payment of compensation was **not** an "employee," the subcontractor could not be a fellow employee subject to the exception to the immunity.

Thus, because the subcontractor secured compensation, it was entitled to immunity unless the accident was caused by gross negligence pursuant to §440.10(1)(e)(2).

Noting that the difference between simple and gross negligence (if the course of conduct is such that the likelihood of injury to other persons or property is known by the actor **to be imminent, or clear and present**, that negligence is gross, whereas other negligence would be simple) the court found plaintiff did not show gross negligence.

While it acknowledged that the fact that a street light on a highway is not functioning does create a certain level of danger by increasing the possibility that diminished lighting conditions may play a role in causing an accident that was not enough for gross negligence. Also, the subcontractor was managing a situation where the lights were being continually deactivated by accident or design.

While the light had been inoperable for almost a year and a half, the court found the fact that there were no incidents made it less of an "imminent" danger. The court found that the lower lighting conditions did create a possibility of harm (required to prove simple negligence) but did not create a condition where the accident could probably and most likely occur, which is required to prove gross negligence. Thus, summary judgment was held to be proper.

APPELLATE FEES AWARDED AGAINST PARTY AND HIS COUNSEL FOR FILING A FRIVOLOUS APPEAL WHICH WAS PRECLUDED BY THE LAW OF THE CASE.

Aghion v. Franco Investments, 40 Fla. Law Weekly D2051 (Fla. 3rd DCA September 2, 2015):

A party took an appeal after the court denied his motion to enforce the mandate from a decision below, and the appellate court decided the issues adversely to him.

The court found the appeal was governed and clearly precluded by the law of the case. As a result, the court awarded attorneys' fees joint and severally against the party **and** his attorney for bringing a frivolous appeal.

TRIAL COURT ERRED IN DENYING AN AWARD OF ATTORNEYS' FEES TO THE PREVAILING DEFENDANT WHERE THERE WAS NO FINDING THAT THE OFFER OF JUDGMENT WAS NOT MADE IN GOOD FAITH--THE FACT THAT A CO-DEFENDANT IS LIABLE FOR PAYMENT OF DEFENDANT'S ATTORNEYS' FEES PURSUANT TO AN INDEMNIFICATION AGREEMENT IS *NOT* A VALID REASON FOR DENYING AN AWARD OF FEES TO A DEFENDANT PURSUANT TO THE DEFENDANT'S OFFER OF JUDGMENT WHICH MEETS THE STATUTORY REQUIREMENTS FOR ENTITLEMENT TO FEES.

Key West Seaside, LLC v. Certified Lower Keys Plumbing, 40 Fla. Law Weekly D2052 (Fla. 3rd DCA September 2, 2015):

After a trial where the defendant was not found to be liable, the defendant moved for attorneys' fees pursuant to an offer of judgment. The trial court denied the motion, basing its ruling on the testimony of the prevailing party's attorney that the attorneys' fees were billed to and paid for on behalf of a co-defendant, pursuant to an indemnification agreement between it and that co-defendant.

For that reason, and because the trial court felt that that attorney made arguments adverse to the prevailing party (although it would not find that the offer of judgment was made in bad faith), the judge refused to grant fees. However, because the offer met the statutory requirement for entitlement to fees, and because the trial court did not rule it was made in bad faith, the offer of judgment was valid. The fact that another party or non-party may have paid these fees is of no consequence to the question of whether the offeror is entitled to fees pursuant to the statute.

STATUTE OF LIMITATIONS FOR ACTIONS BASED ON CONDITIONS RELATED TO A PRISONER'S CONFINEMENT IS ONE YEAR PURSUANT TO §95.11(5)(g), NOT FOUR YEARS AS SET FORTH IN §768.28(14).

Green v. Cottrell, 40 Fla. Weekly D2058 (Fla. 1st DCA September 3, 2015):

Because §95.11(5)(g) is the more specific of the two applicable statutes, and it was also more recently enacted, it applies. The court certified conflict.

CLAUSE STATING THAT PLAINTIFF WAS WILLING TO CONSIDER ANY SUGGESTED CHANGES TO THE RELEASE OF LIABILITY DID NOT RENDER THE PROPOSAL FOR SETTLEMENT UNENFORCEABLE--IT WAS ERROR TO STRIKE THE PROPOSAL AS OVERLY BROAD, VAGUE AND AMBIGUOUS.

Wallen v. Tyson, 40 Fla. Law Weekly D2072 (Fla. 5th DCA September 4, 2015):

The personal representative of the defendant decedent appealed the trial court's decision striking her proposal for settlement as being overly broad, vague and ambiguous. The contested clause stated that the plaintiff was willing to consider any suggested changes to the release. The trial court struck the proposal as vague and ambiguous.

The personal representative had attached a complete release and indemnity agreement to the proposal, stating that the plaintiff would expressly release the defendant from specific things described in the complaint. The release contained terms specifically noting it was not a "general" release, and specifically notified the plaintiff that he could pursue all unpaid damages from any person with the exception of the offering defendant.

Proposals for settlement are only unenforceable when there is an existing ambiguity that creates a necessity for interpretation or choice **among two or more possible meanings** rather than potential ambiguities that might occur in future revisions of the proposals. There is no case suggesting that the mere offer to negotiate terms of an otherwise acceptable settlement proposal or an attached general release renders the proposal vague.

The only reason for striking the proposal provided in the trial court's order was that the defendant offered to consider any changes the plaintiff suggested for the release. None of the cases cited suggest that the terms of the proposal were so overly broad, vague or ambiguous as to render it unenforceable. Thus, without any precedent, to rule as the trial court did would discourage a proposing party from offering to negotiate terms of a settlement or release. The court reversed the trial court's ord

Kind Regards

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