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 SEPTEMBER 25, 2015

FOURTH DISTRICT CERTIFIES CLAIMS BILL QUESTION AS ONE OF GREAT PUBLIC IMPORTANCE.

Searcy Denney v. State of Florida, 40 Fla. Law Weekly D2148 (Fla. 4th DCA September 16, 2015):

The Fourth District certified the following question as one of great public importance:

"After the enactment of §768.28, Florida Statutes, and the adoption of Florida Senate Rule 4.181(6), is it constitutionally permissible for the Florida legislature to limit the amount of attorneys' fees paid from a guardianship trust established by a legislative claims bill?"

Let's hope the court says "NO," in those cases attorneys work on for **years**.

AMENDMENTS TO THE FLORIDA BAR REGARDING LAWYER REFERRAL SERVICES.

In Re: Amendments to Rule Regulating the Florida Bar 4-7.22 – Lawyer Referral Services, 40 Fla. Law Weekly S507 (Fla. September 24, 2015):

The supreme court recognized the need for much greater regulation over non-lawyer

owned, for-profit attorney referral services. While the Florida Bar appointed a special committee to make recommendations, the supreme court felt much stricter regulations were necessary than those proposed by the Bar.

Thus, the court rejected the Bar's recommendations, instructing it to propose new amendments precluding Florida lawyers from accepting referrals from any lawyer referral service that is not owned or operated by a member of the Bar. It also ordered the Bar to further review any other regulations or rules that address lawyer referral services, to determine whether there are new rules necessary to implement that main rule.

NO ERROR IN REFUSING TO GIVE REQUESTED JURY INSTRUCTION ON PRESUMPTION OF NEGLIGENCE ARISING FROM DISCOVERY OF FOREIGN BODY--PLAINTIFFS ABLE TO PRESENT DIRECT EVIDENCE OF NEGLIGENCE, AND AT TIME OF NEGLIGENCE, PATIENT WAS MEDICATED BUT NOT UNCONSCIOUS.

Dockswell v. Bethesda Memorial Hospital, 40 Fla. Law Weekly D2141 (Fla. 4th DCA September 16, 2015):

After a man had surgery, a nurse came to his room to remove his drainage tube. The man was awake (although under the influence of pain medication). His wife was present at the time. Still, a 4.25 inch section of the tube was unknowingly left inside of him after the nurse removed the drain. Approximately four months later, after the man experienced continuing pain, a CT scan revealed a portion of the drain had remained in his body.

The plaintiff sought an adverse inference jury instruction based on the presence of a foreign body, as set forth in jury instruction 402.4c. The instruction is essentially a codification of *res ipsa loquitur*.

The hospital successfully opposed the instruction. It argued that the presumption of negligence does not apply when plaintiffs are aware of and have evidence of the culpable party.

The Fourth District affirmed the verdict for the Hospital. It found that the facts in evidence did not give rise to the use of the foreign body jury instruction because the plaintiffs were able to present direct evidence of negligence and at the time, the husband was medicated, but not unconscious, and his wife was in the room.

There were no genuine doubts surrounding the identity of the alleged culpable party or the events that led to the tube being left inside. Also, the foreign body instruction was not necessary to allow the jury to resolve the issues in the case, and the instruction only applied to one of the two claims at issue.

TRIAL COURT ERRED IN REDUCING JURY AWARDS FOR PAST AND FUTURE PAIN AND SUFFERING WITHOUT EXPLAINING THE NEED FOR REMITTITUR AND THE REASON FOR THE AMOUNT CHOSEN--COMPARING PAIN AND SUFFERING AWARDS IN OTHER CASES DID NOT PROVIDE A BASIS FOR AFFIRMING TRIAL COURT IN THIS CASE.

Arnold v. Security National Insurance Co., 40 Fla. Law Weekly D2153 (Fla. 4th DCA September 16, 2015):

Plaintiff sued his UM carrier after a car accident. He produced expert testimony to support the claim for past and future medical expenses related to a herniated disc caused by the accident. Plaintiff also produced evidence supporting his claims for past and future pain and suffering.

The specific evidentiary contention framing most of the arguments on appeal revolved around whether the plaintiff would have to undergo a disc fusion surgery in the future, and endure a life of pain if the surgery scheduled to occur after the trial was not substantially successful.

The jury returned a verdict awarding past and future medical damages and $1.3 million in past and future pain and suffering.

The trial court granted the plaintiff's motion for remittitur (though she denied the motion for new trial), stating that the future medical expenses should be remitted to $30,000 because the treating physician testified that the surgery planned would cost that much (and not $126,000 that the jury awarded.) The plaintiff did not appeal from that remittitur.

Additionally, while the trial judge found that the non-economic damages were not within a reasonable range, and were indicative of passion or prejudice or misconception, there were no specific reasons the court gave.

There is always a concern when a judge grants a remittitur or an additur, that the trial court is usurping the function of the jury. Here, the defendant had argued that the non-economic damages award shocked the judicial conscience.

The Fourth District reversed. It rejected the insurance company's argument that the comparison of pain and suffering awards in other cases showed a basis to affirm the trial court. The court observed how comparison data may be stale or not representative. Also, the transcript of the hearing that defendant used, did not provide insight as to what factors affected the court's decision to arrive at the total she did. On this record the court reversed for entry of an order asking the judge to make the necessary findings and conclusions to support the court's remittitur of the jury's award for pain and suffering.

ACTION BARRED BY TWELVE-YEAR STATUTE OF REPOSE--THE POOL FILTER WAS A COMPONENT PART OF THE SWIMMING POOL, AND DID NOT CONSTITUTE AN IMPROVEMENT TO REAL PROPERTY, THUS EXEMPTING IT FROM THE STATUTE OF REPOSE.

Dominguez v. Hayward Industries, 40 Fla. Law Weekly D2159 (Fla. 3rd DCA September 16, 2015):

A man sustained a severe head injury when the filter on his swimming pool exploded. He and his wife sued the manufacturer and the distributor of the filter, as well as the installer of the pool and the intermediate distributor of the pool filter. The defendants argued that the statute of repose barred the claim, and that there was no exception to the statute of repose because the pool filter was component part that did not constitute an improvement to real property. The trial court agreed.

The issue on appeal was whether the component part could be thought of as an "improvement" to real property. An improvement is defined as "a valuable addition made to property (usually real estate) or an amelioration in its condition amounting to more than

mere repairs or replacement of waste, costing labor or capital, and intended to enhance its beauty, value or utility, or to adapt it for new or further purposes."

Because the pool filter was a component part of the swimming pool and maintained its fundamental characteristics even when connected to real property, it was not an improvement to real property within the context of §95.031. The court also found the plain and obvious meaning of that statute supported the conclusion. Thus, unfortunately the statute of repose barred the claim.

TRIAL COURT IMPROPERLY ENTERED ORDER COMPELLING DEFENDANT TO DISCLOSE TO PLAINTIFF POST-ACCIDENT PHOTOGRAPHS OF AREA WHERE PLAINTIFF WAS INJURED, WHERE PLAINTIFF FAILED TO EXERCISE DUE DILIGENCE IN OBTAINING SUBSTANTIALLY EQUIVALENT MATERIALS TO THE PRIVILEGED PHOTOGRAPHS.

Seaboard Marine v. Clark, 40 Fla. Law Weekly D2164 (Fla. 3rd DCA September 16, 2015):

An employee of a stevedoring company was injured while working at a terminal at the Port of Miami. During the loading process or cargo containers onto ships, a top loader operated by another employee ran over the plaintiff and crushed his legs which were later amputated.

Immediately following the accident, attorneys for the defendant took 91 post-accident photos of the area in which the accident occurred. It also preserved 90 minutes of surveillance footage from the terminal the night of the accident.

The plaintiff filed a motion to compel the photographs after defendant objected to producing them. Plaintiff presented no evidence at the hearing indicating that he had attempted to obtain any post-accident photographs taken either by his own lawyer or by the county.

A party requesting such privileged materials has a considerable burden to show that the party has both a significant need and an undue hardship in obtaining the substantial equivalent. Because this case was devoid of any efforts by the plaintiff to obtain substantially equivalent materials to the privileged post-accident photographs, and because no witnesses were taken and there were no attempts to obtain other non-privileged photographs, the court issued the writ of certiorari.

TRIAL COURT DID NOT ABUSE DISCRETION BY ADMITTING EVIDENCE OF PAYMENTS MADE BY DEFENSE TO DEFENDANT'S EXPERT WITNESSES--ERROR TO AWARD DAMAGES FOR FUTURE MEDICAL EXPENSES WHERE EVIDENCE DID NOT ESTABLISH THAT PLAINTIFF WAS REASONABLY CERTAIN TO INCUR SUCH EXPENSES.

Vazquez v. Martinez, 40 Fla. Law Weekly D2170 (Fla. 5th DCA September 18, 2015):

After plaintiff was rear-ended, she sued the defendant driver. During trial, the court allowed the plaintiff to present evidence that over the past three years payments totaling almost $700,000 were made by the defense or its agents to the defendant's expert. The defendant argued that the evidence was irrelevant because she did not have any direct financial relationship with any of the experts and instructing the jury on payments made by representatives of the defendant improperly implied the existence of insurance.

The court disagreed. Whether the party has a direct relationship with any of the experts does not determine whether the discovery of the doctor-law firm relationship or doctor-insurer relationship is allowed. The purpose of the rule is to expose any potential bias between a party and an expert. Evidence of that bias may be found in the financial ties between all of a litigant's agents, including a litigant's law firm or insurer, and the expert.

However, the court reversed the jury's $50,000 award for future medical expenses as finding it unsupported by the evidence. In this case, both experts opined that the plaintiff did not need future surgery or follow-up treatment. While the experts recognized that the plaintiff might need "over the counter" medications or chiropractic or physical therapy, neither believed that they would be beneficial. Thus, there was no competent substantial evidence to establish that the plaintiff was reasonably certain to incur expenses for future medical treatment.

Kind Regards

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