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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NO DEPARTURE FROM ESSENTIAL REQUIREMENTS OF LAW IN DENYING DEFENDANTS' MOTION TO ABATE MEDICAL MALPRACTICE ACTION TO ENABLE THE ADMINISTRATIVE LAW JUDGE TO DETERMINE WHETHER THE INJURIES FELL WITHIN NICA--DEFENDANTS FAILED TO MAKE A *PRIMA FACIE* SHOWING OF ANY ENTITLEMENT TO NICA'S PROVISIONS.

Children's Medical Center v. Kim, 40 Fla. Law Weekly D1245 (Fla. 4th DCA May 27, 2015):

The complaint alleged that malpractice occurred in treating the brain-injured child during the days and weeks after the birth and not within the "immediate post-delivery period in the hospital." §766.302(2). The plaintiffs never sought nor accepted NICA benefits, and the defendants (pediatricians) did not provide any **obstetrical** services, nor did they provide pre-delivery notice as required to claim immunity from civil suit under NICA.

Even if the injuries the child suffered were arguably compensable under NICA, the exclusiveness of NICA did not apply. Here, the plaintiffs pursued their claim as a civil action against the doctors who were **not** covered persons or entities under the NICA statute. As such, petitioners failed to make a *prima facie* showing of any entitlement to NICA's exclusive remedy provisions, and the court denied the petition accordingly.

THE FACT THAT CERTAIN FINANCIAL INFORMATION MAY BE DISCLOSED IS NOT A SUFFICIENT REASON IN AND OF ITSELF TO PRECLUDE A DEPOSITION--TRIAL

COURT PROPERLY ISSUED AN ORDER LIMITING SUBJECT MATTER PENDING DEPOSITION TO THE SPECIFIC ISSUES FRAMED BY THE AMENDED COMPLAINT.

Kauffman v. Duran, 40 Fla. Law Weekly D1256 (Fla. 3rd DCA May 27, 2015):

In this legal malpractice case, the plaintiff sought to take the deposition of a non-party witness who had joint business dealings involving the parties. The witness filed a motion for protective order regarding the irreparable harm he would suffer from having to produce financial information on his personal investments, etc. sought in the subpoena.

Because the man was a material witness in the underlying action, the fact that certain financial information had to be disclosed was not reason enough to preclude the deposition. In fact, the court observed that his testimony--based on the allegations of the complaint--could be extremely relevant.

The trial court understood the danger of exposure, and protected the witness by issuing an order limiting the subject matter of the pending deposition to the specific issues framed by the amended complaint. The court also appointed a special magistrate to attend the deposition to ensure that nothing other than the issues of the underlying case were addressed. As such, the court found there was no departure from the essential requirements of law.

UNIVERSITY MEDICAL SCHOOL MAY BE VICARIOUSLY LIABLE FOR ITS EMPLOYEES WHO FAILED TO GIVE NICA NOTICE, BUT IT WAS NOT REQUIRED TO GIVE NOTICE ITSELF BECAUSE A MEDICAL SCHOOL IS NOT A PARTICIPATING HOSPITAL OR DOCTOR.

University of Miami v. Ruiz, 40 Fla. Law Weekly D1264 (Fla. 3rd DCA May 27, 2015):

Plaintiffs filed a medical malpractice suit against the University of Miami School of Medicine after their son was born (in **1998** – justice delayed!) with a serious brain injury caused by oxygen deprivation during the course of labor and delivery. Plaintiffs sued the University of Miami for both their direct negligence, and their vicarious negligence based on the actions of their employees.

After the plaintiffs filed suit, the case was abated to allow an Administrative Law Judge to determine whether the injury was compensable under NICA. The ALJ found that the injury was compensable, but found that the two doctors had not complied with the notice requirements. The plaintiffs held their decision to choose NICA benefits in abeyance, while deciding to accept NICA benefits as their exclusive remedy while pursuing their civil suit against UM.

The court first took an opportunity to explain that giving a patient notice of NICA participation does not entitle a party to immunity. Rather, the party's direct involvement in the "labor and delivery" of a child who suffers a NICA compensable injury, is what entitles that party to invoke NICA's immunity. Because only hospitals with participating physicians, and participating physicians themselves are required to give notice, only those two categories of people can ever waive NICA immunity when they are directly involved in a labor and delivery and do not give notice.

In this case, UM had no obligation to give NICA notice, so it was immune for any direct acts of negligence. However, because the two doctors were negligent during their direct

involvement in the labor and delivery, and were **employees** of UM, the medical school could be held "vicariously" responsible for the doctors' failure to give notice.

EVIDENCE SUPPORTED INSURER'S CONTENTION THAT WIFE WHO WAS LISTED AS AN ADDITIONAL DRIVER UNDER THE POLICY WAS ACTING AS AN AGENT OF HER HUSBAND WHO WAS THE NAMED INSURED WHEN SHE REJECTED UM COVERAGE.

Progressive American v. Grossi, 40 Fla. Law Weekly D1289 (Fla. 5th DCA May 29, 2015):

The husband was the named insured and the wife was an additional driver on the policy. While the policy was in effect--over a three-year period--the wife made numerous coverage modifications to the policy. The husband reaped the benefits of those modifications by experiencing "reduced" premiums. After each change was made, the husband was sent a policy declaration reflecting the changes. He never challenged the authority of his wife to make any of the changes. One of the last modifications was the wife's rejection of UM coverage.

The insurer argued that the wife acted either as her husband's actual or apparent agent and, as an agent, had the authority to reject the UM coverage. The plaintiffs argued that only the husband as the named insured could reject UM coverage, and the wife lacked actual or apparent authority to reject it.

The court disagreed that the husband could not reject UM coverage through an agent (in this case, his wife). There was also ample evidence to support the insurer's contention that the wife acted as her husband's agent in modifying the coverage of the policy creating, at the very least, disputed issues of material fact necessitating the reversal of summary judgment.

Kind Regards

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