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.

FLORIDA LAW WEEKLY

VOLUME 39, NUMBER 45

CASES FROM THE WEEK OF NOVEMBER 7, 2014

WHERE TRIAL COURT RULED THAT THE ISSUE OF THE PIP SETOFF WOULD BE ADDRESSED POST-VERDICT, AND DEFENDANT FAILED TO PRESENT ANY EVIDENCE OF PIP PAYMENTS, DEFENDANT COULD BE PENALIZED FOR REASONABLY RELYING ON THE TRIAL COURT'S ERRONEOUS MID-TRIAL RULING--COURT SETS OFF PIP BENEFITS FROM JURY'S VERDICT.

Moody v. Dorsett, 39 Fla. Law Weekly D2256 (Fla. 2nd DCA October 29, 2014):

The jury returned a verdict for the plaintiff for approximately $11,000. Prior to trial, the plaintiff's insurance carrier had paid $5,400 in PIP benefits.

During the trial, the defense counsel brought to the trial court's attention a misunderstanding between the parties regarding whether the setoff procedure was an evidentiary matter for the jury or whether it would be handled post-verdict. Over plaintiff's objection, the trial court ruled it would be handled post-verdict. Thus, defense counsel did not introduce any evidence of the PIP payments.

Pursuant to *Caruso v. Baumle*, 880 So. 2d 540 (Fla. 2004), where the supreme court concluded that unless there is a stipulation otherwise, the defense must present evidence of the PIP benefits so the jury can reduce the verdict by the setoff, the court explained that normally the defendant in this case would have waived her right to the setoff. However, in this particular case, where the defendant had reasonably relied on the trial court's erroneous mid-trial ruling, the court held she could not be penalized for

doing so. Had the trial judge allowed the defendant to present the evidence, she would have done so.

ERROR TO DISMISS COMPLAINT BASED ON STATUTE OF LIMITATIONS--STATUTE OF LIMITATIONS DID NOT APPEAR ON THE FACE OF THE COMPLAINT AND THUS COULD NOT BAR THE CAUSE OF ACTION AS PLED ON A MOTION TO DISMISS.

Forbes v. Lehner, 39 Fla. Weekly D2271 (Fla. 3rd DCA October 29, 2014).

DEFENDANT WHO UTILIZED THE SERVICES OF INJURED PLAINTIFF SUPPLIED BY A HELP SERVICES COMPANY, WAS ENTITLED TO WORKER'S COMPENSATION IMMUNITY--A PARTY MAY NOT RELY ON AN AFFIDAVIT THAT CONTRADICTS OR REPUDIATES PRIOR DEPOSITION TESTIMONY TO DEFEAT A MOTION FOR SUMMARY JUDGMENT.

Baker v. Airguide Manufacturing, LLC, 39 Fla. Law Weekly D2272 (Fla. 3rd DCA October 29, 2014):

The plaintiff was working for an employment agency, which supplied employees to short-handed companies. The company placed the plaintiff with an air conditioning duct manufacturing company.

A machine designed to punch holes in aluminum air ducts, unexpectedly activated and injured the plaintiff's right index finger. Her immediate supervisor helped her wash the wound. The plaintiff successfully filed a work comp. claim with her employer supply company. Thereafter, she sued the air conditioning duct manufacturer in circuit court.

In her deposition, the plaintiff stated she reported directly to the air conditioning company in the mornings, was trained to use the machines by its employees, was monitored and reprimanded by them, and was assigned weekly hours and tasks by its management. The employment agency basically only issued her paychecks and sent supervisors to the air conditioning company premises to check on its employees.

Two days before the summary judgment hearing and four months after her deposition, the plaintiff filed an affidavit and an errata sheet to her deposition that materially conflicted with some of the statements she made during her deposition. Based on these changes, the plaintiff argued there was a genuine dispute of material fact as to whether the air conditioning company possessed the requisite degree of "control" over her, to establish immunity under the common law "borrowed servant" doctrine.

The court reminded us that its well-established Florida law under the *Ellison* Rule, that a party may not create an affidavit that contradicts or repudiates prior deposition testimony, simply to defeat a motion for summary judgment. In her affidavit, the plaintiff changed her testimony to state that she checked in with the employment agency every morning, and that the air conditioning company had only limited authority to direct her work, to determine her hours or to terminate her.

Irrespective of this contradiction issue, the court found defendant was entitled to immunity as a "help supply services company" under §440.11(2), Fla. Stat. anyway. This statutory immunity was in addition to the common law "borrowed servant" doctrine (developed to cover employers utilizing other companies' employees to complete their

work under circumstances indicating that the borrowing employer is the *de facto* employer of the borrowed employee at the time of the injury).

Employers can establish the right to work comp. immunity by either meeting the three-prong test for common law borrowed servant immunity, or by establishing that the injured employee came from a help services supply company. The three-prong test for "borrowed servant" is whether: (1) there was a contract for hire, either express or implied between the special employer and the employee; (2) the work being done at the time of the injury was essentially that of the special employer; and (3) the power to control the details of the work resided with the special employer.

In instances like here, however, where the plaintiff's actual employer is clearly a help supply services company, it was unnecessary to even get to the "borrowed servant" analysis.

Kind Regards

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