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 hand[le]d appeals for attorneys throughout the State.

THE WEEK IN TORTS

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Jurors Cough Up Their Phones

SUPREME COURT APPROVES INSTRUCTION ON JURORS' USE OF ELECTRONIC DEVICES.

In Re: Standard Jury Instructions in Civil, Criminal, and Contract & Business Cases – Jurors' Use of Electronic Devices, 39 Fla. Law Weekly S723 (Fla. December 4, 2014):

The court approved an amendment to the Florida Rule of Judicial Administration 2.451 (use of electronic devices). The rule provides that electronic devices will be removed from all members of a jury panel before jury deliberations begin. The presiding judge may also remove electronic devices at other stages of the trial. If the devices are removed from members of the jury panel during the trial, the judge may order them returned during recesses.

The rule also made clear that during court proceedings, jurors cannot use their electronic devices to take photos or videos or to transmit or access data or texts. At all times jurors are prohibited from using the devices to research information about the case or to communicate with others about the case or juror deliberations.

ESTATE HAS STANDING TO BRING BREACH OF CONTRACT ACTION AGAINST EMPLOYER LIABILITY INSURER AFTER CONSENT JUDGMENT--HOWEVER,

WORKER'S COMPENSATION IMMUNITY PREVENTED RECOVERY FOR NEGLIGENCE ANYWAY.

Morales v. Zenith Insurance Co., 39 Fla. Law Weekly S721 (Fla. December 4, 2014):

A man was crushed to death by a palm tree while working for Lawn's Nursery. Thereafter, his surviving wife entered into a workers' comp. settlement agreement with the employee, based on the workers' comp. portion of the policy.

In a separate wrongful death case, which was ongoing when the parties entered into the settlement agreement, the estate obtained a default judgment against the employer for $9.525 million. After the insurer refused to pay the tort judgment, the estate sued the insurer in state court under the employer liability policy, alleging that the insurer had breached it. The case was removed to federal court and the Eleventh Circuit certified several questions to the Florida Supreme Court to be answered.

The Eleventh Circuit first asked whether the estate had standing under the tortfeasor's employer liability policy to sue the insurer for breach of contract. Because there was a judgment entered, under the non-joinder statute, the Supreme Court ruled plaintiff **did** have standing.

However, in answering the question asked by the Eleventh Circuit about whether the workers' comp. exclusion in the employer liability policy excluded coverage for the tort judgment against the employer, the Supreme Court also held that it did. In looking at the policy as a whole, the court found that Part One addressed workers' compensation, and Part Two was the employer's liability insurance.

Reading the provisions together, it was clear that the workers' comp. exclusion barred coverage of claims arising from bodily injuries which the employer was required to pay benefits under workers' comp. law, *i.e.*, claims covered by the workers' comp. insurance portion of the policy. The court explained that the employer liability insurance was a "gap filler" to provide protection to the employer for those situations where the employee has a right to bring a tort action despite the provisions of the workers' comp. statute (*e.g.*, co-employees for gross negligence or intentional tort).

However, because workers' comp. is the exclusive remedy available to an injured employee and this was a plain negligence case, **there was no claim against the insurer** anyway.

Even though in this case the employer had violated its statutory duty to maintain workers' compensation insurance and even though the employee's claim was also barred by a separate employee exclusion, the Fourth District applied the policy's workers' comp. exclusion to hold that the employer was not entitled to coverage.

Finally, the Eleventh Circuit asked whether the release in the insurer workers' comp. settlement agreement precluded the estate from collecting the tort judgment. It cited to §440.20(11)(c)-(d) of workers' comp. law which contains a section on election and waiver, and stated that any settlement and agreement constituted an election of remedies by the claimant. Thus, once the party elected the consideration describing the settlement agreement--in this case a lump sum payment under workers' comp. law--that was the sole remedy for the death, Florida law explicitly authorizes such election.

COLLATERAL SOURCE STATUTE DOES NOT ALLOW FOR SET-OFF OF UNEMPLOYMENT COMPENSATION BENEFITS.

Hurtado v. Escobar, 39 Fla. Law Weekly D2462 (Fla. 4th DCA November 26, 2014):

Plaintiff was rear-ended at a traffic light. He was a commercial pilot who had been laid off, and was receiving unemployment compensation at the time of the accident. He testified he had earned $12,000 in unemployment compensation in 2009, and $15,000 in 2010. He had not worked as a pilot for the two years following the accident.

The jury awarded him over $1 million in damages.

The defendants tried to get unemployment benefits set-off, arguing that they fell within the purview of the collateral source statute. The Fourth District reminded us that common law prohibited set-off of collateral source benefits, and it was only when §768.76 abrogated the rule, that the law allowed for certain setoffs.

The plain meaning of the statute is always the starting point in any statutory interpretation. According to the plain meaning, unemployment benefits do not fall within §768.76(2)(a)1.-4. Under section (2)(a)1., unemployment compensation is not provided pursuant to the United States Social Security Act, except Title XVIII and Title XIX. It is also not provided under any federal, state, or local income disability act.

Because unemployment compensation does not involve sickness or injury, it also does not fall within §443.091(1)(d). Because unemployment compensation benefits are not specifically listed in §768.76, and cannot be interpreted as a collateral source under any of its provisions, it was error for the trial court to set them off.

ERROR TO PERMIT OFFICER WHO ASSISTED IN ACCIDENT INVESTIGATION TO TESTIFY THAT DEFENDANT VIOLATED RIGHT-OF-WAY, AND THAT PLAINTIFF DID NOT--JURORS SHOULD NOT BE INFORMED OF AN INVESTIGATING OFFICER'S DETERMINATION OF WHO CAUSED ACCIDENT--NEW TRIAL REQUIRED.

Shaver v. Carpenter, 39 Fla. Law Weekly D2470 (Fla. 2nd DCA November 26, 2014):

This case stems from a collision between a motorcycle and a car at an intersection. The motorcycle hit the car, and both of the motorcycle riders were injured.

At trial, the jury awarded damages to the plaintiffs, and found that the defendant was 95% at fault for the collision and the plaintiff 5%. However, the court ruled that the verdict was tainted by evidence that the trial court should have excluded.

First, the court had allowed a trooper to give an opinion about which driver violated the right-of-way. Then, it also permitted the plaintiff's counsel to read the defendant's answers to surveillance interrogatories to the jurors, when defendant never intended to play the surveillance tape. Based on these rulings, the court reversed for a new trial.

Because it is clear that jurors should never be informed of the investigating officer's determination of who caused the accident and who was cited, it is clear why that testimony was erroneous. The law does not simply prohibit testimony about whether the citations were issued or not. Here, the officer clearly *suggested* who would have been cited.

As to the surveillance interrogatories, the defendant disclosed that the two plaintiffs had been surveilled for eight days. Defense counsel advised that he did not intend to introduce the surveillance videos at trial or put any testimony on concerning the surveillance, and the only reason for introducing the surveillance interrogatories would be to disparage the defendant by showing that he was spying on the plaintiff.

While answers to interrogatories may be introduced into evidence, they must be relevant. In this instance, because defendant was **not** using the surveillance, they were not relevant, and plaintiffs did use them to simply denigrate the defendant.

NO ABUSE OF DISCRETION IN TRIAL COURT'S DENIAL OF ORTHOPEDIC CENTER'S MOTION FOR PROTECTIVE ORDER, WHERE TRIAL COURT CORRECTLY HELD THAT PLAINTIFF WAS ENTITLED TO DEPOSE THE PERSON FROM THE ORTHOPEDIC CENTER WITH THE MOST KNOWLEDGE TO IDENTIFY THE CASES WHERE THE EXPERT PHYSICIAN TESTIFIED AS AN "EXPERT" AS OPPOSED TO A "TREATER."

Orthopedic Care Center v. Parks, 39 Fla. Law Weekly D2473 (Fla. 3rd DCA November 26, 2014):

The defendant in a personal injury case hired a physician at the Orthopedic Care Center to conduct a CME. Thereafter, the plaintiff noticed a deposition duces tecum of the physician, and asked the physician to bring records reflecting all the exams involved in workers' comp. and personal injury claims for the last five years.

The doctor brought a list of approximately 205 names, but said he could not identify which names on the list were patients he had "treated," versus those upon which he performed CME exams.

It was after that deposition that the plaintiff's counsel followed up with a subpoena directed to a representative of Orthopedic Care Center with the most knowledge regarding which of the people or cases on the list provided by the doctor were actual patients of the doctor (Dr. Garcia). The Orthopedic Center then filed its objection and motion for protective order, stating the subpoena imposed burdensome obligations, violated §456.057 regarding disclosure of non-party compulsory medical examination data and without prior notice.

The trial court overruled the objection. The Orthopedic Care Center appealed.

In *Elkins v. Syken*, the Florida Supreme Court found that the district court's opinion had struck a reasonable balance between a party's need for information covering expert witness's potential bias and the witness's right to be free from burdensome and intrusive production requests. Both *Elkins* and Rule 1.280 focus on the discovery to be provided by an expert, and requires the expert to identify those cases where the expert testified by deposition or trial.

The doctor here testified that, of the list of 205 cases where he testified or gave a deposition, 70% were on behalf of the defense and 30% were on behalf of the plaintiff. Later, when asked to identify those cases where he testified as an expert only, the doctor was unable to do so. He eventually disclaimed his original estimated percentages.

Because the doctor could not differentiate those names on the list, the plaintiff was entitled to seek the information to further discover the extent of potential bias.

The court ruled that the order did not implicate §456.057 because it did not require Orthopedic Care Center to provide any reports or information regarding the patients' medical conditions. Further, it was the doctor who provided the plaintiff with the names of certain patients, by producing the undifferentiated list. The trial court's order simply required Orthopedic Care Center to review the list and to differentiate the names of patients treated by Dr. Garcia from the names of individuals upon whom he performed a CME as a retained expert from those he treated.

TRIAL COURT DEPARTED FROM ESSENTIAL REQUIREMENTS OF LAW BY ORDERING PRODUCTION OF MATERIAL CLAIMED TO BE TRADE SECRETS, WITHOUT CONDUCTING NECESSARY INQUIRY IN DETERMINING WHETHER THE INFORMATION REQUESTED CONSTITUTED TRADE SECRETS.

Sea Coast Fire v. Triangle Fire, 39 Fla. Law Weekly D2480 (Fla. 3rd DCA November 26, 2014):

To determine whether requested information constitutes a "trade secret," the trial court may perform an *in camera* inspection or other document examination. The trial court may also conduct an evidentiary hearing. In a case where it is undisputed that the information is a trade secret an inspection may not be required.

In this case, the trial court ruled without conducting a necessary inquiry which departed from the essential requirements of law.

TRIAL COURT DEPARTED FROM ESSENTIAL REQUIREMENTS OF LAW IN COMPELLING DISCOVERY OF DEFENDANT'S LITIGATION FILE WHICH PLAINTIFF CLAIMED WAS NECESSARY TO DEFEND DEFENDANT'S MOTION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO OFFER OF JUDGMENT--DISCOVERY OF LITIGATION FILE NOT NECESSARY TO DETERMINE WHETHER OFFER MADE IN GOOD FAITH--WORK-PRODUCT PRIVILEGE EXTENDS TO MOTIONS FOR ATTORNEYS' FEES AND THE PLAINTIFF FAILED TO PROVE NEED OR UNDUE HARDSHIP, AND INFORMATION FROM THE FILE PLAINTIFF SOUGHT WAS OPINION WORK-PRODUCT WHICH IS ABSOLUTELY IMMUNE FROM DISCOVERY.

Butler v. Harter, 39 Fla. Law Weekly D2487 (Fla. 1st DCA December 2, 2014).

Kind Regards

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