THE WEEK IN TORTS

A Weekly Summary Of The Latest Case Decisions Critical To Those Helping Victims of Negligence

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NO NEED TO COMPLY WITH PRE-SUIT REGARDING CLAIM THAT DURING COURSE OF SURGERY PLAINTIFF WAS ADMINISTERED CONTAMINATED HEPARIN THAT HAD BEEN RECALLED BY THE SUPPLIER.

Holmes Regional Medical Center v. Dumigan, 39 Fla. Law Weekly D2570 (Fla. 5th DCA December 12, 2014):

In this case, a man who went in for cardiac bypass surgery left a double amputee when, during the course of surgery, he was administered contaminated heparin which caused him to develop a severe bacterial infection that ultimately led to his injuries. The plaintiffs sued the hospital for failing to have adequate procedures in place to respond to the heparin supplier's recall. The complaint notably did not name any of the physicians or medical personnel, and did not allege that the administration of the heparin was below the standard of care.

The suit was not based upon the hospital's vicarious liability for the negligence of healthcare workers, and only focused on the administrative policies and actions of the hospital in responding to the recall of the contaminated heparin.

The Fifth District engaged in very helpful analysis, both discussing the threshold for certiorari, as well as when a plaintiff must comply with pre-suit notice requirements under the Medical Malpractice Act.

First, the court reminded us that a petitioner must establish a departure from the essential requirements of law, along with a consequent material injury in the absence of an

adequate remedy on appeal which together equate to "irreparable harm" required for certiorari. The court noted that the irreparable harm for the failure to comply with pre-suit comes when a court improperly denies a motion to dismiss for failure to follow such requirements, and the defendant loses the cost savings benefits that the Medical Malpractice Act was intended to create.

The court gave examples of those instances when ordinary (not medical) negligence occurs (dropping of hot tea on the plaintiff, improper collection and labeling of a urine specimen for a drug test, and sexual assault), and also noted cases where courts have found the wrongful act **was** directly related to the improper application of medical services and the use of professional judgment or skill, which requires compliance with the pre-suit requirements under the Act. Some of those examples were the negligent operation of a mammography machine that burst a plaintiff's silicone breast implant, and the burning of a patient by an improperly calibrated machine during the course of physical therapy.

In this case, the court held no medical judgment or skill was exercised by the hospital, and also, the allegedly wrongful act occurred months before the plaintiff's surgery. Additionally, because the hospital's decision to administer the heparin was not the gravamen of the complaint (it was the **recall**), the wrongful act really arose out of an alleged failure of an administrative policy and therefore did not involve professional medical judgment or skill.

PLAINTIFF WAIVED THE RIGHT TO COMPLAIN ABOUT THE DIRECTED VERDICT IN FAVOR OF THE UM CARRIER.

Millsaps v. Kaltenbach, 39 Fla. Law Weekly D2553 (Fla. 4th DCA December 10, 2014):

The plaintiff sued the defendant for negligence in an automobile accident. The defendant raised the actions of a phantom vehicle as an affirmative defense. Plaintiff amended her complaint to sue the phantom vehicle, and in turn her UM carrier, State Farm.

During the charge conference, plaintiff's counsel abandoned the UM claim against State Farm advising the court that plaintiff did not want to blame the unidentified vehicle. As a result, the court directed a verdict in favor of the insurer and plaintiff did not object.

Thereafter, the jury instructions and verdict form were drafted to include the question of the unidentified driver's negligence, but only as an affirmative defense to the plaintiff's claim against the defendant. Plaintiff's counsel had no objection to the jury instructions or to the verdict form.

In this posture, where the plaintiff essentially waived the UM claim, the Fourth District said she had no right to complain about the issue on appeal and affirmed on all issues presented.

OFFER OF JUDGMENT STATUTE DOES NOT APPLY IN ADMIRALTY CASES.

Schmieder v. NCL America, 39 Fla. Law Weekly D2559 (Fla. 3rd DCA December 10, 2014).

A CLAIM FOR §57.105 FEES IS PREMATURE ON APPEAL, UNLESS THE OPPOSING PARTY FILES SOME TYPE OF PAPER CLAIM OR DENIAL.

Reznek v. Chase Home Finance, 39 Fla. Law Weekly D2559 (Fla. 3rd DCA December 10, 2014):

In a mortgage foreclosure action, the appellant challenged the trial court's order denying her motion for entitlement to attorneys' fees. Prior to filing her initial brief, she served the defendant with a motion pursuant to §57.105, advising that if the appellee did not file a confession of error within 21 days of service, the appellant would file the motion. The appellee did not confess error however, leading the appellant to file the motion for sanctions.

The court explained that the statute and rule are crafted to allow a party to seek sanctions against another party who has "filed a paper or otherwise asserted a claim or defense not supported by material facts or would not be supported by existing law to those facts." However, before a party may file the sanctions motion, the opposing party has 21 days to evaluate the assertion. When the non-moving party does **not** file a paper that challenges the claim, nor does it have the opportunity to assert an oral argument, to challenge the claim defense or contention, there is nothing for the non-moving party to "withdraw." Without such a filing, the motion for fees was premature.

ORDER PREVENTING PLAINTIFFS FROM TAKING DISCOVERY TO LEARN THE CONTENTS OF *EX-PARTE* COMMUNICATIONS BETWEEN DEFENDANT AND PHYSICIAN WHO TREATED PLAINTIFF, DID NOT INFLICT THE KIND OF HARM THAT CAN BE REVIEWED BY CERTIORARI.

Damsky v. University of Miami, 39 Fla. Law Weekly D2560 (Fla. 3rd DCA December 10, 2014):

Plaintiffs sued the University of Miami for medical malpractice which took place during a surgery performed on the plaintiff at Jackson Memorial Hospital. In the course of preparing the case, the attorneys for the University had *ex-parte* contacts with a gastroenterologist who treated the plaintiff for problems resulting from the surgery at Mt. Sinai Medical Center. The plaintiffs petitioned for a writ of certiorari to quash the portion of the lower court's order finding that any communication between Dr. Barkin and the University were privileged, and that *ex-parte* communications were permissible.

While defendants may speak to a plaintiff's treating physicians if they are employees of the defendant, the parties disagreed as to whether the case came within the ambit of that exception.

Before the court would look at that issue, however, it looked at a detailed analysis of orders reviewable by certiorari. The court observed that a petition for writ of certiorari is an original action seeking an extraordinary remedy. It differs from an appeal in many ways, namely that the standard of review is much higher than the standard governing an appeal of right.

Because a certiorari requires a showing of irreparable harm, the court said **few non-final orders qualify for its use**.

Mere legal error without irreparable harm even if the essential requirements of law have been departed from, is not the basis for a certiorari. In reviewing the order before it, the court said it is clear it did not inflict an irreparable harm that could not be remedied on direct appeal, because this order was an interlocutory ruling denying discovery, and did

not furnish the occasion for the court's intervention through certiorari. Additionally, there was no worry about future contacts between the defendant and the doctor because the order was limited, and at oral argument the defendant acknowledged that under the existing trial order there could be no future communications.

CIRCUIT COURT APPELLATE DIVISION DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW IN FINDING THAT INSURER WAS REQUIRED TO PAY ADDITIONAL PIP BENEFITS AFTER THE $10,000 POLICY LIMITS WERE EXHAUSTED--THERE MUST BE A SHOWING OF BAD FAITH BEFORE AN INSURER CAN BE HELD LIABLE FOR BENEFITS ABOVE THE STATUTORY LIMIT.

Geico Indemnity v. Gables Insurance Recovery, 39 Fla. Law Weekly D2561 (Fla. 3rd DCA December 10, 2014):

Following the Fourth District's decision in *Northwood Sports Medicine*, the court stated that a post-suit exhaustion of benefits should be treated no differently than a pre-suit exhaustion of benefits, even though Geico breached its contract by not paying plaintiff's bills at the outset.

The court allowed second-tier certiorari because it found that the appellate division's ruling would potentially affect large numbers of claimants, as well as a large number of PIP claims processed by insurers. Also, it found the error results in a miscarriage of justice.

Hopefully another district will see the error of this ruling's ways.

CLAIM THAT TRIAL COURT ERRED IN AWARDING A PLAINTIFF A NEW TRIAL ON PAST ECONOMIC DAMAGES ONLY, AND SHOULD HAVE ORDERED A NEW TRIAL ON BOTH LIABILITY AND DAMAGES WAS NOT PRESERVED, WHERE THE DEFENDANTS OPPOSED THE MOTION FOR ADDITITUR ONLY ON THE GROUND THAT THE JURY'S VERDICT WAS CORRECT AND FAILED TO CONTEND THAT THEY SHOULD HAVE BEEN AFFORDED A NEW TRIAL ON LIABILITY.

Witherell v. Larimer, 39 Fla. Law Weekly D2574 (Fla. 5th DCA December 12, 2014):

In a case of hotly contested liability, the jury found both parties 50% at fault, found the plaintiff sustained a permanent injury and awarded past medical expenses. However, it awarded nothing for non-economic damages. The trial judge agreed that the zero award for non-economic damages was inconsistent with the finding of permanent injury, and instructed the jury that it had to award money. It came back with $1.

The plaintiff moved for an additur or, in the alternative, a new trial on past non-economic damages, arguing that the one-dollar verdict on non-economic damages was not supported by the evidence in light of the uncontested evidence that he suffered as a result of his injuries and the award for medical expenses.

The defendant opposed the motion only on the basis that the jury's verdict was correct. Noticeably absent from the response was any request that if the trial court **did** grant a new trial, it should address both liability and past non-economic damages. Because the defendants argued that issue for the first time on appeal, the court found it was not preserved, and affirmed the trial court's order granting the new trial on non-economic damages only.

ERROR TO DISMISS A COMPLAINT AGAINST A STATE AGENCY BASED ON A FINDING THAT THE PLAINTIFF FAILED TO COMPLY WITH PRE-SUIT REQUIREMENTS UNDER §768.28(6)(A).

Rivers v. Florida Department of Corrections, 39 Fla. Law Weekly D2589 (Fla. 1st DCA December 12, 2014):

Because a trial court may not consider matters outside the four corners of the complaint, and did so in this case in finding there was not proper compliance with pre-suit notice requirements, it was error for the court to dismiss the plaintiff's complaint.

CIRCUIT COURT LACKED JURISDICTION TO ENTER AMENDED FINAL JUDGMENT WHILE APPEAL OF ORIGINAL FINAL JUDGMENT WAS PENDING.

Jallali v. Knightsbridge Village Homeowners' Association, 39 Fla. Law Weekly D2548 (Fla. 4th DCA December 10, 2014):

While the original final judgment was pending on appeal, the circuit court entered an amended final judgment. The court quashed the amended final judgment because the lower court lacked jurisdiction to enter it.

The court provided the following rule of thumb: While an appeal is pending, the trial court retains jurisdiction with regard to those matters which do not interfere with the power and authority of the appellate court or the rights of a party to the appeal, under consideration by the appellate court. However, if these issues are under such consideration, the court is without jurisdiction to do anything further.

Kind Regards

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