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FLORIDA LAW WEEKLY

SEPTEMBER 10, 2010

FLORIDA RULES OF CIVIL PROCEDURE - AMENDMENTS - INADVERTENT DISCLOSURE OF PRIVILEGED MATERIALS

In Re: Amendments to the Florida Rules of Civil Procedure, 35 Fla. L. Weekly S494 (Fla. Sup. Ct. September 8, 2010)

In response to a request from the Florida Bar Attorney-Client Privilege Task Force, the Florida Bar Civil Procedure Rules Committee ("Committee") proposed new Rule 1.285, governing inadvertent disclosure of privileged materials. With the exception of subdivision (d), which set out factors the court may consider in resolving a dispute as to whether a privilege asserted under the rule is valid, the Florida Supreme Court adopted the new rule proposed by the Committee.

While existing case law addressed whether a party waives a privilege by inadvertently disclosing privileged materials, Rule 1.285 now sets forth a specific procedure that must be followed when such privileged materials are inadvertently disclosed.

Subdivision (a) requires a party, person, or entity asserting a privilege after inadvertently disclosing privileged materials to serve written notice of the assertion of the privilege on the party to whom the materials were disclosed within ten days of actually discovering the inadvertent disclosure.

Subdivision (b) provides that the party receiving notice of an assertion of privilege under subdivision (a) shall promptly return, sequester, or destroy the materials specified in the notice, as well as any copies of the material, and also promptly notify any other party, person, or entity to whom it has disclosed the materials of the fact that the notice has been served and of the effect of this rule.

Subdivision (c) allows any party receiving a notice made under subdivision (a) to challenge the assertion of privilege by serving notice of its challenge on the party, person, or entity asserting the privilege within twenty days of service of the original notice. The grounds for the challenge may include, but are not limited to, lack of privilege, lack of standing, failure to serve timely notice under this rule, and waiver based on the circumstances surrounding the production or disclosure of the materials. The failure to serve timely notice of challenge is a waiver of the right to challenge.

Subdivision (d) provides that when an order is entered determining that materials are privileged or that the right to challenge has been waived, the recipient of the materials shall give prompt notice of the court’s determination to any other party, person, or entity to whom it had disclosed the materials.

INSURANCE - UNINSURED MOTORIST - PRESERVATION OF ARGUMENT AS TO INCONSISTENT VERDICT AND EXCESSIVE/INADEQUATE VERDICT - REMAND FOR REVIEW OF JURY'S DAMAGE AWARD BASED ON ANALYSIS OF FACTORS OUTLINED IN F.S. § 768.043(2) - NO ABUSE OF DISCRETION IN DENYING INSURER'S MOTION FOR MISTRIAL BASED ON CROSS-EXAMINATION OF DEFENSE EXPERT WHICH ATTEMPTED TO SHOW EXPERT WAS "UN-AMERICAN" BECAUSE EXPERT OUTSOURCED TRANSCRIPTION JOBS TO INDIA AND A SEXUAL PREDATOR OR PERVERT BECAUSE HE MADE EXAMINEES WEAR FLIMSY PAPER ROBES DURING EXAMINATIONS

Progressive Select Insurance Company, Inc. v. Lorenzo, 35 Fla. L. Weekly D1973 (Fla. 4th DCA September 1, 2010)

The 4th DCA reversed and remanded the trial court's denial of defendant insurer's motions for new trial and remittitur after a jury verdict in favor of plaintiff in an uninsured motorist case. The trial court erred by concluding the defendant was arguing that the verdict was inconsistent, an objection that had not been preserved, when in fact the defendant was arguing that the verdict was excessive.

This case involved an automobile accident in which an uninsured motorist rear-ended the plaintiff's vehicle. When the plaintiff's insurer did not tender its uninsured motorist coverage upon demand, the plaintiff filed a complaint against the insurer. The insurer admitted the existence of coverage, but claimed the plaintiff's injuries were pre-existing and not caused by the accident.

The jury ultimately returned a verdict finding causation, but no permanent injury, awarding past medical expenses of $53,391 and future medical expenses of $514,750. It awarded nothing for future loss of earnings, past pain and suffering, or future pain and suffering. When the trial court asked counsel if there was any irregularity in the verdict, plaintiff's counsel answered no and defense counsel answered no from a form standpoint but yes from an evidentiary standpoint, which defense counsel indicated was an argument for another day.

The defendant filed a motion for new trial, renewed motion for directed verdict or, in the alternative, motion for remittitur, arguing that the verdict was excessive because the jury awarded lifetime future medical expenses without a finding of permanency. Believing defendant's argument to be that the verdict was inconsistent, the trial court denied these motions for defendant's failure to preserve the issue.

The 4th DCA stated that the line of demarcation between inconsistent and excessive or inadequate verdicts has been blurred, in part, because these arguments are often combined or intertwined.

The court clarified that an inconsistent verdict is an argument that can be made separately from an argument of excessiveness or inadequacy. A jury verdict which is truly inconsistent requires an objection prior to the discharge of the jury.

A jury verdict that is either inadequate or excessive, but not inconsistent, may be raised in a motion for new trial without the necessity of an objection prior to the discharge of the jury. By raising the excessiveness issue in the motions for new trial and remittitur, defendant preserved the issue for consideration.

The 4th DCA reversed and remanded to the trial court with instructions to focus on whether the verdict was excessive given the jury's finding of no permanent injury under the factors outlined in F.S. § 768.043(2), which the trial court had not done based on its decision regarding preservation.

Another issue in this case was plaintiff's counsel's improper questioning of a defense expert. On cross-examination, plaintiff's counsel attempted to show the expert was "un-American" by outsourcing transcription jobs to India and a sexual predator or pervert because he made the examinees wear a very thin piece of paper cloth over their body. The trial court sustained defendant's objections, but denied the defense motion for mistrial. The 4th DCA found no error in the trial court's handling of this issue.

WRONGFUL DEATH - MEDICAL MALPRACTICE – EMERGENCY ROOM TREATMENT - PRESUIT REQUIREMENTS – DEFENDANTS WAIVED RIGHT TO CHALLENGE QUALIFICATIONS OF PLAINTIFFS' CORROBORATING EXPERT BY FAILING TO SPECIFICALLY PLEAD THIS ISSUE IN THEIR ANSWERS AND AFFIRMATIVE DEFENSES BEFORE STATUTE OF LIMITATIONS EXPIRED ON PLAINTIFFS' CLAIMS – TRIAL COURT ERRED IN DETERMING THAT EXPERT WAS NOT QUALIFIED AS A MATTER OF LAW WHERE THE ONLY EVIDENCE BEFORE THE COURT ON THIS ISSUE WAS EXPERT'S PRESUIT AFFIDAVIT AND HIS DISCOVERY DEPOSITION WHEREIN HE EXPLAINED HIS EXPERIENCE AS BOTH MED-EVAC PHYSICIAN AND LOCUM TENENS EMERGENCY ROOM PHYSICIAN AND DEFENDED HIS QUALIFICATIONS

Oliveros v. Adventist Health Systems/Sunbelt, Inc., 35 Fla. L. Weekly D1977 (Fla. 2d DCA September 3, 2010)

The 2d DCA reversed orders of dismissal wherein the trial court determined that the plaintiffs failed to comply with the presuit requirements by failing to submit a corroborating affidavit from a duly qualified medical expert.

The plaintiffs alleged that the wrongful death of Gonzalo Oliveros in June 2005 was caused by the negligence of the defendants upon Mr. Oliveros's presentation to the emergency room with an evolving cerebral bleed that ultimately resulted in a stroke. In October 2006, plaintiffs served the defendants with a notice of intent to sue, attaching an affidavit from Dr. Sichewski corroborating that there existed reasonable grounds for the plaintiffs' claim of medical malpractice. In April 2007, the plaintiffs filed their complaint in the trial court.

Just prior to trial in 2009, the defendants filed motions for leave to amend their answers and affirmative defenses and motions to dismiss, arguing that the plaintiffs failed to comply with the presuit corroborating affidavit requirement because Dr. Sichewski was not a qualified expert in emergency medicine. The trial court granted the motions to amend and the motions to dismiss, which resulted in a final resolution of the case because the statute of limitations had expired on the plaintiffs' claims.

The 2d DCA held the plaintiffs were prejudiced by the trial court's allowing the defendants to amend their answers and affirmative defenses in 2009 to include the issue of Dr. Sichewski's qualifications, as none of the defendants specifically and with particularity denied that the plaintiffs' expert's corroborating affidavit complied with presuit requirements in their initial answers and affirmative defenses in 2007.

The defendants raised the issue for the first time after the statute of limitations had expired. The court did not accept the defendants' argument that they could not ascertain whether the expert did not qualify under the statutory requirements until a discovery deposition was conducted in January 2009, as the defendants had almost one year from receiving the notice of intent to sue and several months from the filing of the complaint to investigate the plaintiffs' compliance with the corroborating affidavit requirement before the statute of limitations expired.

The defendants' failure to timely challenge the presuit corroborating affidavit operates to bar them from raising the issue just prior to trial, and the trial court abused its discretion in granting the motions for leave to amend answers and affirmative defenses.

The 2d DCA also held that the trial court erred in limiting its consideration of Dr. Sichewski's qualifications as an emergency medicine expert to the strictures of F.S. § 766.102(9), which defines an expert in emergency medicine as a licensed physician who has had substantial professional experience within the preceding five years while assigned to provide emergency medical services in a hospital emergency department.

The unrefuted testimony before the court established that Dr. Sichewski had extensive experience as both a med-evac physician and a locum tenens emergency room physician. The trial court could have considered this experience in determining whether Dr. Sichewski was qualified as an expert in emergency medicine pursuant to F.S. § 766.102(12), which allows the court

to qualify or disqualify an expert witness on grounds other than the qualifications in this section.

If the defendants had not waived the right to challenge Dr. Sichewski's qualifications, the 2d DCA would have remanded the matter for a new hearing, but such a remand was unnecessary given the ruling on the waiver issue. The 2d DCA reversed the orders dismissing the plaintiffs' complaint and remanded for further proceedings.

JLH/BRS/der/tsr