RECENT COURT DECISIONS

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NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS: TIME LAPSE BETWEEN EVENT AND PHYSICAL TRAUMA DOES NOT BAR RECOVERY

Zell v. Meek, 20 Florida Law Weekly S515, October 5, 1995

Gaylynn Meek, the plaintiff, and her parents returned to their apartment from a boating trip. She and her mother entered the apartment, while her father picked up a package that had been left at the front door. The package exploded and the father was killed. The apartment management company and the owner of the apartment complex had received bomb threats prior to the bombing, but did not warn the tenants or take any other steps in response to the threats.

The plaintiff sued the defendants alleging they were negligent in failing to take reasonable steps to protect the tenants from foreseeable criminal conduct. The plaintiff also alleged a cause of action for negligent infliction of emotional distress.

The trial court entered a summary judgment against the plaintiff on her claim for negligent infliction of emotional distress. The District Court of Appeal reversed and certified the question to the Supreme Court. The Supreme Court affirmed the District Court and found that the interval of time between the psychic trauma and the physical manifestation of injuries is one factor to be considered in proving causation.

The plaintiff did not suffer any significant physical injuries as a direct result of the explosion. While immediately after witnessing her father's death, she sustained psychic trauma and experienced insomnia, depression, and short-term memory loss, she did not develop any physical impairments until approximately nine months after the bombing, when she developed pain in her chest, a blockage in her esophagus, and pain in her hips and elbows.

The court discussed the impact rule. Prior to 1985, Florida courts adhered to the requirement that some physical impact to a claimant must be alleged and demonstrated before the claimant could recover damages for personal injury. This was known as the impact rule. However, in 1985, the Florida Supreme Court held that persons who suffer physical injury as a result of emotional distress arising from

their witnessing the death or injury of a loved one may maintain a cause of action for the negligent infliction of emotional distress without the necessity of an impact.

The court receded from language employed in the 1985 case that required the physical injury to occur within a short time after the psychic injury to allege a cause of action for the negligent infliction of emotional distress. The court enumerated the elements required to allege a cause of action for negligent infliction of emotional distress: (1) the plaintiff must suffer a physical injury, (2) the plaintiff's physical injury must be caused by the psychological trauma, (3) the plaintiff must be involved in some way in the event causing the negligent injury to another, and (4) the plaintiff must have a close personal relationship to the directly injured person. The court rejected imposing an arbitrary time period after which the manifestation of physical impairment would be conclusively presumed to not have been caused by the psychic trauma and held that the factual question of causation is to be decided on a case-by-case basis.

BRANCH BANK IN TOWN WITH POPULATION OF LESS THAN 5,000 MAY SELL INSURANCE STATEWIDE

N.B.D. Bank, N.A. v. Bennett, 67 F.3d 629 (7th Cir. 1995)

Another court has addressed the issue of a national bank selling insurance from a branch in a town with a population of less than 5,000. The National Bank Act (Section 92) provides that any national bank association located in any place the population of which does not exceed 5,000 inhabitants may, under regulations and rules prescribed by the Controller of the Currency, act as an agent for any fire, life, or other insurance company authorized by the authorities of the state in which the bank is located to do business in the state by soliciting and selling insurance and collecting premiums.

The Controller issued a regulation providing that Section 92 applies to branches as well as banks that have their sole offices in small towns. N.B.D. Bank operated a branch in Corydon, Indiana—a town with fewer than 5,000 residents. The Indiana Commissioner of Insurance issued N.B.D. a geographically limited license. The position of N.B.D. was that it was entitled to act as an agent throughout Indiana, and not just in the town of Corydon. The bank sued the Commissioner of Insurance seeking a declaration that she misinterpreted the National Bank Act. The district court entered a summary judgment for the commissioner, and the bank appealed.

The court of appeals held that Section 92 of the National Bank Act permits a bank located in a town with a population of 5,000 or less to sell insurance without regard to location of the customers. For purposes of the small town exemption, the court held a national bank is located and doing business at its premises, and not where the customer resides. The court noted that, in 1986, the Controller's office indicated that Section 92 limits the location of the sales office, not the location of the insureds. The court cited a District of Columbia Circuit Court opinion that held

the Controller's view was correct in *Independent Insurance Agents of America, Inc. v. Ludwig*, 997 F.2d 958 (DC Cir. 1993).

The court also noted that the only issue in this case was to whom should the bank be allowed to sell insurance. Indiana did not contend that the McCarran-Ferguson Act gave it authority to curtail activities authorized by Section 92. That issue is currently before the Supreme Court in the case of *Barnett Bank of Marion County, N.A. v. Gallagher*. Oral argument on that case was held in January 1996.

FAILURE TO READ POLICY CONSTITUTES CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW AND THUS BARS RECOVERY

General Insurance of Roanoke, Inc. v. Page, 464 S.E. 2d 343 (Va. 1995)

Page, the plaintiff, quit school in the seventh grade and indicated that he dropped out because "he couldn't understand what he was reading." He worked at various jobs and then served in the United States Navy. He subsequently acquired skills as a mechanic and opened his own business as an automotive mechanic. He contacted an insurance agent to help him with his insurance needs and, commencing in 1981, defendant Baker began his association with the plaintiff as an independent insurance agent.

In 1983, Page built a new building which consisted of a shell, at a cost of approximately $20,000. He then notified Baker that he needed insurance in the amount of $20,000 on the building during construction and that he would later need to update coverage on the completed building. Page also requested insurance in the amount of $15,000 on some new equipment.

Upon completion of the shell, Page caused extensive additional work to be performed. Plumbing costs exceeded $4,000. Other improvements included an electrical system and a heating system. Upon completion, the building was worth about $35,000. The plaintiff also purchased all new shop tools and increased his parts inventory.

Approximately two weeks after moving into the new building, the plaintiff showed the defendant his parts inventory and the new shop tools. The defendant agent obtained a policy through Reliance Insurance Companies, stating on its face that the coverage on the building was $20,000 and personal property of others was $15,000. The plaintiff testified that he never read or even looked at the policy and that he just put it in a desk drawer. Subsequently, the building and contents were destroyed by fire. Inventory loss was estimated at over $17,000, the tool loss at over $40,000, and the building loss at $25,000 to $30,000.

The plaintiff sued the defendant, alleging that he was negligent in failing to procure adequate property insurance coverage. The trial court entered a judgment in favor of the plaintiff, and an appeal was taken to the Supreme Court. The Supreme Court held that the insured's failure to read the policy, or have someone read it to him, constituted a negligence as a matter of law and thus barred recovery.

The court was aware that the plaintiff had difficulty reading; however, the court wrote that the plaintiff should have had his wife or someone else read him the policy if he was not able to read it himself. The court wrote that the policy plainly stated that the face amount on the building was $20,000 and the amount of coverage on personal property of others was $15,000.

The court had not addressed this particular issue in prior cases. Prior decisions on the issue of failure to read involved contract cases rather than negligence cases. The court chose to apply the same rule to negligence actions and held that failure to read the policy constituted contributory negligence and barred recovery.

IF AGENT AND INSURED KNOW INSURANCE APPLICATION CONTAINS FALSE INFORMATION, INSURER IS NOT BOUND BY THE APPLICATION

Simmons v. Allstate Life Insurance Company, 65 F.3d 526 (6 Cir. 1995)

The suit was brought in state court and removed to federal court based upon diversity of citizenship. The plaintiff was attempting to recover the proceeds of a life insurance policy which she alleged was in effect at the time her husband died. The trial court found for the defendant, Allstate Life Insurance Company, and an appeal was taken.

The deceased told his brother-in-law, a North Carolina agent, that he was interested in purchasing life insurance while the agent was visiting him in Michigan. The agent told the decedent and his wife that the application would have to be completed in North Carolina because the agent was not licensed in Michigan.

Subsequently, an application was prepared that contained incorrect information. The agent knew that the decedent had been shot in the head previously, that he had been hospitalized on several occasions, that he suffered from epilepsy, that his driver's license had been suspended, and that the prior shooting was believed to be drug-related.

The application was for a $1 million life insurance policy. The agent checked boxes on the form which indicated that the decedent had no significant medical problems and had not suffered any revocation of driving privileges as a result of prior moving violations. The agent also wrote a letter to Allstate indicating that based upon the applicant's lifestyle he was "an excellent risk and to issue him a policy would not adversely affect Allstate in any way." He also indicated that the applicant was "healthy and clean-cut." The agent gave the decedent a temporary agreement pending review of the entire application. The $500,000 temporary policy was not to be effective until all required medical exams were conducted.

In March 1992, the applicant disappeared. Subsequently, his wife received notice from Allstate that the company would not issue the requested insurance policy because essential medical records had not been supplied as promised. In April 1992, the decedent's body was discovered in the trunk of a car parked at the Detroit airport. He had been shot in the head.

The plaintiff filed suit for payment of the $500,000. She subsequently amended the complaint and abandoned the claim for $500,000 and sought recovery of $1 million. The trial court granted a summary judgment in favor of Allstate. The court wrote that Allstate never accepted the application for the $1 million life insurance policy.

The appellate court affirmed the trial court and also wrote that, even if the plaintiff attempted to recover under the temporary $500,000 policy, Allstate would be successful because of Michigan's "connivance exception." That rule provides that, if both the insured and the agent know that the information contained in the application forwarded to the insurer is untrue and calculated to deceive, then the insurer is not bound by the application.

Thus, the circuit court of appeals affirmed the trial court. The circuit court of appeals also found that the appellant should be sanctioned for prosecuting a frivolous appeal against Allstate. The court remanded the case to the district court to impose double costs and attorney's fees against the plaintiff.