THE WEEK IN TORTS

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CASES FROM THE WEEK OF MAY 23, 2014

ERROR TO DISMISS PLAINTIFF'S CASE BASED ON SURVEILLANCE DVD BELYING HIS CLAIMS

Guillen v. Vang, 39 Fla. L. Weekly D1014 (Fla. 5th DCA May 16, 2014):

The DVD showing the injured plaintiff performing activities he claimed he could not did not constitute "clear and convincing evidence" that he "sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." Thus, any discrepancies between his testimony and the surveillance DVD were best resolved by a jury, and it was error to dismiss the plaintiff's case with prejudice for fraud on the court.

HOSPITAL VISITOR IN HOSPITAL KITCHEN UNINVITED LICENSEE – HOWEVER, ERROR TO GRANT SUMMARY JUDGMENT ON DUTY TO WARN WHEN THERE WAS A GENUINE ISSUE OF MATERIAL FACT OF WHETHER THE DEFENDANT KNEW OF THE WET FLOOR AND THE PLAINTIFF'S PRESENCE IN THE KITCHEN

Denniser v. Columbia Hospital, 39 Fla. L. Weekly D990 (Fla. 4th DCA May 14, 2014):

While her mother was sick for a week, the plaintiff visited the hospital frequently. On one visit, she went in to a kitchen through a closed unlocked door to get some tea. Inside the kitchen area, she allegedly slipped and fell on the wet floor causing injury. After falling, the plaintiff testified that a person dressed in hospital scrubs--presumably a hospital employee--said to her "Be careful. It's wet."

The plaintiff sued the hospital asserting she was an invitee, and that the hospital breached its duty of care by failing to warn her of the concealed and dangerous condition of the floor. However, the risk manager testified that the kitchen area was for use only by employees and the staff of the hospital, and had posted signs that said Pantry and Staff Only.

The hospital moved for summary judgment arguing that the plaintiff lost her status as an invitee, and became an uninvited licensee or trespasser by going into an area of the hospital that was beyond the scope of her invitation. As such, the hospital asserted it was only required to warn the hospital of concealed dangers if her trespass was discovered. The hospital denied that any employee was aware of the plaintiff's presence in the kitchen before she fell.

The court affirmed the motion for summary judgment finding there was no issue of fact as to whether the plaintiff lost her status as an invitee by going into a part of the premises that was beyond the scope of her invitation.

Still, there is a duty to warn an uninvited licensee or trespasser of any known or concealed dangers when the owner discovers their presence. Here, there was no record evidence that the plaintiff's presence in the kitchen was **not known** before she fell, and the facts were not sufficient to enable the trial court to reasonably determine that no genuine material fact existed. Thus, summary judgment on that basis was improper.

DISPUTED ISSUES OF FACT REGARDING WHETHER THE INSUREDS APPEARED FOR THEIR EXAMINATION UNDER OATH PRECLUDED ENTRY OF SUMMARY JUDGMENT

Solano v. State Farm, 39 Fla. L. Weekly D993 (Fla. 4th DCA May 14, 2014):

The plaintiffs had property damaged in Hurricane Wilma, and although State Farm made payments in 2006, plaintiffs hired a public adjuster in 2009, who asked State Farm to reopen the claim. The adjuster then submitted a claim in excess of $200,000.

State Farm inspected the property with the adjuster and made an additional payment for some damage, and notified the plaintiffs that they would continue to investigate the other damage claims. After the adjuster submitted several additional sworn proofs of loss, the damage amount claim was increased.

After the third proof of sworn loss, State Farm asked the plaintiffs to submit to an EUO. The plaintiff was examined and deferred almost entirely to the public adjuster, and to his wife. At the end of his interview, the plaintiff refused to allow his wife and co-plaintiff to submit to an EUO, because he felt it might put her under too much stress.

Later, State Farm informed them that they deprived it of a meaningful EUO and ultimately after more back and forth, even the wife appeared to testify. State Farm's attorney refused to continue with the EUO because of the filing of the lawsuit and pending litigation.

The trial court granted State Farm's motion for summary judgment based on the plaintiffs' failing to submit to a meaningful EUO, which was a condition precedent for the policy.

The court reversed. Observing that while a total failure to comply with the condition precedent can preclude an insured from recovering, in this case, the insureds cooperated to some extent, creating a fact question as to whether the condition was breached to the extent of denying the insured any recovery under the policy.

CONSTRUCTIVE SERVICE BY PUBLICATION UNDER §49.011 CANNOT CONFER A COURT WITH JURISDICTION OVER A PERSON

Milanick v. State, 39 Fla. L. Weekly D1013 (Fla. 5th DCA May 16, 2014):

The state brought a civil action to recover costs and fees awarded by the Florida Commission on Ethics. The Ethics Commission had entered an order with which the defendant never complied.

The state attempted to personally serve the defendant, but was unsuccessful. It then constructively served him instead.

The defendant filed a special appearance and moved to quash and dismiss because he had not been personally served. He argued the trial court lacked jurisdiction over him.

Section 49.011 states that service by publication may be made in any action or proceeding to enforce any legal or equitable lien or claim to any title or interest in real or personal property within the jurisdiction of the court or any fund held or debt owing by any party on whom process can be served within Florida. However, constructive service by publication under this statute does not confer personal jurisdiction. Thus, the court was compelled to reverse for lack of jurisdiction.