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 handles trial support and appeals for attorneys throughout the state.

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CASES FROM THE WEEK OF MARCH 6, 2015

RAPE DOES NOT ARISE OUT OF ONE'S EMPLOYMENT AND THEREFORE THE CLAIM AGAINST THE VICTIM'S EMPLOYER WAS NOT SUBJECT TO ARBITRATION--A VENUE PROVISION IN AN ARBITRATION DOES NOT WAIVE THE ABILITY TO RAISE FORUM NON CONVENIENS.

Club Mediterranee, S.A. v. Fitzpatrick, 40 Fla. Law Weekly D500 (Fla. 3rd DCA Feb. 25, 2015):

A woman working for Club Med was attacked and sexually assaulted by an unknown assailant in her employer-provided dormitory room. Her employment agreement included a provision stating that any claim or controversy "arising out of her employment" would be submitted to arbitration, and that the arbitration would be conducted in Miami under the commercial arbitration rules of the AAA.

When deciding whether a claim falls within the scope of an arbitration agreement, courts focus on factual allegations in the complaint rather than on legal causes of action asserted. In this instance, the court easily concluded that the plaintiff's employer was not entitled to invoke the arbitration clause, because the claim had nothing to do with her employment by Club Med. The attack did not occur during working hours, or at or near her work place, etc.

However, the trial judge erred in denying the motion for forum non conveniens, construing the parties' agreement that any arbitration would be conducted in Miami as a waiver of the forum non conveniens challenge. The trial court should have given consideration to the Kinney factors, and was mistaken in construing the venue provision in the arbitration clause as a waiver of such challenge. The court reversed the portion of the order of the trial court, and remanded for consideration pursuant to Kinney.

TRIAL JUDGE ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF BASED ON FINDING THAT DEFENDANT'S CONDUCT WAS "INHERENTLY DANGEROUS" ACTIVITY--ALSO

ERRED IN FAILING TO DIRECT A VERDICT FOR THE DEFENDANT ON THE ISSUE OF PUNITIVE DAMAGES WHERE THE CONDUCT WAS CLEARLY NOT GROSS AND FLAGRANT.

The L.E. Myers Co. v. Young, 40 Fla. Law Weekly D541 (Fla. 2nd DCA Feb. 27, 2015):

In this very tragic accident, FPL had contracted with Myers to install concrete poles along a roadway. Myers contracted with various other contractors to accomplish this. On the day of the accident, while Myers personnel were digging the hole for these 85 ft./21,000 lb. concrete poles they were going to install, the crane operator moved the flatbed slightly off of the main road. The pole was hanging off the truck. Myers did not have a traffic plan in place, nor did it block traffic because the flatbed was located off the roadway.

While the tractor trailer was parked on the side of the road waiting for the team to install the pole, a man was waiting for traffic to clear so he could turn left into a pawn shop, he was hit by someone behind him traveling at 91 m.p.h. in a 40 m.p.h. zone, weaving in and out of traffic. Without braking, the defendant driver hit the plaintiff into the flatbed truck, and he was severely injured and ultimately killed by the pole hanging off of it.

The trial judge had granted partial summary judgment for the plaintiff on a threshold issue, finding that Myers was engaged in an inherently dangerous activity (installing these poles and having the truck on the side of the road). The court reversed, finding there was a question of fact as to whether there was an inherently dangerous activity under these circumstances, where the concrete pole was still on the trailer and the trailer was parked on the side of the road, not necessarily posing a peculiar inherent risk. Because it was error for the trial court to grant summary judgment for the plaintiff, the court reversed for a new trial.

The trial judge had also refused to direct a verdict on punitive damages for the contractor Myers. The plaintiff asserted that failing to have a traffic plan (plaintiff asserted there were no warning signs or cones in place but there was evidence to the contrary) constituted punitive damages.

The Second District disagreed. While recognizing that the contractor was arguably clearly negligent in how it handled the traffic flow around the work at the time leading up to the accident, there was "no view of the evidence" presented that would support a conclusion that Myers' conduct was of a gross or flagrant character that evinced a reckless disregard for human life and therefore, reversed for entry of directed verdict in favor of the defendant on the punitive damages claim.

A PERSON WHO SLIPS AND FALLS ON A TRANSITORY FOREIGN SUBSTANCE IN A BUSINESS MUST PROVE THE ESTABLISHMENT HAD ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE DANGEROUS CONDITION, BUT DOES NOT APPLY RETROACTIVELY TO ACCIDENT OCCURING PRIOR TO JULY 1, 2010 WHEN THERE ARE ALLEGATIONS OF ACTIVE NEGLIGENCE AGAINST THE ESTABLISHMENT--CONFLICT CERTIFIED.

Glaze v. Worley, DBA Chick-Fil-A, 40 Fla. Law Weekly D555 (Fla. 1st DCA March 3, 2015):

A minor fell at a Chick-Fil-A in 2005. He was walking to the restroom through a common area and slipped in water. The area was adjacent to a service door, and a witness described that the water was coming out of the doorway into the hallway.

The First District explained there was a great deal of confusion concerning the retroactive application of §768.0755, which became effective on 7/1/10.

In the First District, the court ruled that denial of summary judgment was error, even though there was no specific evidence of how long the liquid had been on the floor. That is because there were allegations of "active negligence" by the employees of the premises. The First District concluded that because of the alleged active negligence in failing to exercise reasonable care in the maintenance, inspection, repair, warning, or mode of operation of the business premises, potential liability would attach under both the pre or post-2010 statute.

Conversely, the Third and Fourth Districts have found that the Section should be applied retroactively as a procedural rather than a substantive statute, because a statute merely changed the burden of proof for proving a slip and fall case.

The First District said that the shift in statutes was far more than a simple procedural change to the burden of proof. Even though retroactivity was not dispositive in this case, the court did certify conflict. It also found that the component of active negligence in causing the condition which led to the slip and fall was a crucial distinction in this particular case.

Kind Regards

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