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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PLAINTIFF WAIVED ANY ARGUMENT REGARDING A NEW TRIAL BASED ON AN INCONSISTENT VERDICT, BECAUSE COUNSEL FAILED TO OBJECT TO THE SUBMISSION OF JURY INSTRUCTIONS AND THE VERDICT FORM WHICH REQUIRED THE JURY TO SEPARATELY DECIDE THE ISSUE OF CAUSATION IN A TOBACCO CASE.

Baker v. R.J. Reynolds, 40 Fla. Law Weekly D476 (Fla. 4th DCA Feb. 18, 2015):

The jury in this case found that the decedent was a member of the *Engle* class, but that his lung cancer and death were not caused by the defendant's negligence or by unreasonably dangerous or defective cigarettes. Plaintiff contended that the jury's verdict was internally inconsistent because after it found the decedent was a member of the *Engle* class, it could not find the death not related. Plaintiff asserted that when the jury found the decedent was a member of the *Engle* class, it was then precluded from finding that his lung cancer and death were not caused by the defendant's negligence. The defendant asserted that the claimed inconsistency was the direct result of the plaintiff's submitted jury instructions and verdict form and that plaintiff invited error. The Fourth District agreed and affirmed the denial of the motion for new trial.

PLAINTIFFS NOT ENTITLED TO "FOREIGN BODY" INSTRUCTION IN MEDICAL NEGLIGENCE CASE, WHERE PLAINTIFFS WERE ABLE TO PRESENT DIRECT EVIDENCE OF NEGLIGENCE.

Dockswell v. Bethesda Memorial, 40 Fla. Law Weekly D480 (Fla. 4th DCA Feb. 18, 2015):

The plaintiff was admitted to the hospital for surgery, which included placement of a drainage tube to evacuate post-operative fluid. The next day, a nurse came to remove the drainage tube (his wife was present) and they watched her do it. They later realized that a 4.25-inch section of the tube was unknowingly left inside of him. Approximately four months later he continued to experience pain in the region until a cat scan revealed that a portion of the drain remained in his body.

The plaintiff sued the hospital, asserting that the tube was negligently removed with excessive speed and force, and that the nurse negligently failed to inspect the drainage tube to ensure it was removed entirely, which resulted in the fragment being overlooked.

At the charge conference, plaintiff sought a jury instruction, establishing a presumption of negligence using Standard Jury Instruction 402.4c on foreign bodies.

Recognizing the distinction between the two claims and the instruction, the trial court sought a proposed set of instructions to apply the foreign body instruction only to the negligent inspection claim, and not to the alleged excessive speed and force during the removal claim. Neither the plaintiffs nor the hospital submitted those instructions as requested.

The trial court ultimately denied the requested instruction explaining that the plaintiffs had the ability to present direct evidence of the nurse's negligence, whereas the word "discovery" in §766.102 (the basis for the instruction) suggests a situation where a patient is **uncertain** as to where responsibility for negligence lies.

On appeal, the plaintiffs assert that because of the discovery of the drainage tube fragment inside the plaintiff, they were entitled to the standard jury instruction on foreign bodies.

The court reminded us that it had previously found a plaintiff was not entitled to this instruction where she was not unconscious when her injury occurred, but there was no mystery as to how the injury occurred, and there was only one possibly culpable defendant. Thus, she was able to adduce sufficient direct evidence.

The court explained that the presence of some direct evidence of negligence should not deprive a plaintiff of a *res ipsa* inference, but there comes a point where the plaintiff can introduce enough direct evidence of negligence to dispel the need for one.

The court found there was enough direct evidence in this case. The Fourth also said that because the parties failed to submit proposed instructions that the trial judge requested, which would have differentiated the claims, plaintiffs failed to preserve the issue of whether the foreign body instruction may have been properly applied to a claim of negligent inspection.

DEFENDANTS WERE DENIED DUE PROCESS BY HAVING A JUDGMENT ENTERED AGAINST THEM WITHOUT A NOTICE OF HEARING ON THEIR VERIFIED MOTION FOR ENTRY OF FINAL JUDGMENT.

Sarasota Estate & Jewelry Buyers v. Kane, 40 Fla. Law Weekly D486 (Fla. 2nd DCA February 20, 2015).

MOTIONS FOR PROHIBITION BASED SOLELY ON A JUDGE'S ADVERSE RULINGS ARE NOT WELL TAKEN.

Kazran v. Buchanan, 40 Fla. Law Weekly D488 (Fla. 4th DCA February 20, 2015).

ERROR TO SUA SPONTE TRANSFER VENUE WITHOUT GIVING PARTIES NOTICE AND OPPORTUNITY TO RESPOND.

Kunselman v. Offices of Governor, 40 Fla. Law Weekly D493 (Fla. 1st DCA February 23, 2015):

A court may not transfer an action without giving the appellants notice and opportunity to respond. In this instance, the appellees concede that the court did so in error.

Kind Regards

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