

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 4, 2016

STATE AND COMMON ARE LAW CLAIMS AGAINST INTERSTATE CARRIERS OF GOODS (LIKE UPS) GENERALLY PREEMPTED BY THE CARMACK AMENDMENT, UNLESS THE CLAIM ALLEGES CONDUCT OR HARM THAT IS SEPARATE AND DISTINCT FROM THE LOSS OR DAMAGE TO THE TRANSPORTED GOODS.

Milinar v. UPS, 41 Fla. Law Weekly S76 (Fla. 4th DCA March 3, 2016):

A professional artist sued UPS alleging that two oil paintings she had sent from a Pak Mail for transport to New York from UPS were unscrupulously removed from their packaging during shipment, and ultimately sold to a collector. While the paintings were valued at approximately \$20,000, Pak Mail offered her \$100 for the missing contents of the package based on the shipping contract.

After the plaintiff sued UPS, the trial court dismissed the claims, finding they were preempted by the federal Carmack Amendment. The Fourth District affirmed, reasoning that the allegations asserted did not involve conduct separate and distinct from the delivery, loss or damage to the goods, but were instead predicated on or closely related to the performance of the delivery contract. The plaintiff brought a conversion claim, a claim for profiting by criminal activity, a claim for unauthorized publication of name or likeness, and a claim under Florida's Deceptive and Unfair Trade Practices Act.

UPS had contended that the Carmack Amendment preempted the state law causes of action, because they stemmed from UPS' loss of the plaintiff's package. The supreme

court disagreed.

Looking at the complaint, plaintiff had alleged that UPS had selectively located the paintings based on their nature, probable worth and lack of insurance, and sent them to a lost item company for consideration exceeding the \$100 in liability coverage provided on all shipments. The complaint further alleged that UPS and the other defendants had systematically appropriated the paintings by falsely impersonating and representing themselves as part of a shipping enterprise rather than a fencing organization.

The plaintiff correctly pointed out that the case did not involve paintings that were stolen by a rogue UPS employee or a trespasser. Instead the common carrier had adopted and ratified the unscrupulous practices at issue. The supreme court found that to expand the Carmack Amendment preemption to cases where the plaintiff seeks to hold a carrier liable for larcenous misconduct (and not a negligent but good faith loss of goods) is beyond the purpose of the law, and repugnant to the statute's enactment.

The court reversed the dismissal of plaintiff's claims.

TRIAL COURT ABUSED DISCRETION IN DENYING DEFENDANT'S MOTION TO INTERVIEW ALTERNATE JUROR WHO HAD ALLEGEDLY MADE STATEMENTS TO DEFENDANT'S MOTHER, INDICATING THAT JURORS HAD TALKED ABOUT DEFENDANT'S CASE BEFORE IT WAS SUBMITTED TO THE JURY.

Phelps v. State, 41 Fla. Law Weekly D490 (Fla. 5th DCA February 26, 2016):

The defendant's mother filed an affidavit stating that she had a conversation with the alternate juror after he was excused, advising that even though the jurors had been instructed not to, they were talking about the case during the trial. Several jurors also indicated that they wanted to hear the defendant testify, and they could not understand why she would not testify if she was not guilty.

The trial court denied the motion to interview. It found that the affidavit did not indicate that the jurors had discussed and formulated opinions as to guilt before the close of evidence.

The appellate court reversed. It found that the ruling was an abuse of discretion.

A claim of premature deliberations may be asserted following an adverse jury verdict because the timing of deliberations does not inhere to the verdict. Therefore, it was a question for a judicial inquiry.

The fact that jurors had talked about the defendant's case before the case was submitted to the jury, and in violation of the trial court's instruction, and because at least two jurors were allegedly predisposed to find the defendant guilty before the jury deliberated, it was an abuse of discretion to deny the motion to interview.

Kind Regards



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1919 N. Flagler Drive, West Palm Beach, Florida 33407
866.643.3318 • www.ClarkFountain.com