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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FLORIDA LAW WEEKLY

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CASES FROM THE WEEK OF JANUARY 9, 2015

TRIAL COURT ABUSED DISCRETION IN AWARDING PLAINTIFF NEW TRIAL AND FUTURE NON-ECONOMIC DAMAGES--A VERDICT IS NOT INADEQUATE AS A MATTER OF LAW JUST BECAUSE THE JURY FINDS THE PLAINTIFF HAS SUFFERED PERMANENT INJURY BUT DOES NOT AWARD FUTURE INTANGIBLE DAMAGES.

Buitrago v. Feaster, 40 Fla. Law Weekly D81 (Fla. 2ND DCA December 31, 2014):

Plaintiff was injured in a four-car collision. After a lengthy trial, the jury awarded plaintiff money for past medical expenses, future medical expenses, lost wages, and past non-economic damages. It awarded nothing for future non-economic damages.

The plaintiff moved for a new trial claiming that the evidence and the verdict established that she was legally entitled to future non-economic damages, relying on *Allstate v. Manasse* for the proposition that the jury's finding of permanent injury automatically entitled her to recover future non-economic damages as a matter of law. The trial court granted plaintiff's motion.

The Second District reversed. It found that the supreme court's decision in *Allstate v. Manasse* expressly rejected the notion that a verdict is inadequate as a matter of law

when a jury finds permanent injury but does not award future intangible damages. Instead, the correct standard to apply in considering a motion for new trial based on an allegedly inadequate award of non-economic damages is "whether the verdict is against the manifest weight of the evidence."

In this case, the plaintiff did not argue that standard to the trial court and the record made clear that the trial court did not consider the weight of the evidence in granting the new trial. Because the trial court based its decision on an erroneous view of the law, it resulted in abuse of discretion.

In reversing, the court remanded for a reconsideration of the issue in light of the proper legal standard.

ERROR TO ADMIT STILL PHOTOGRAPHS ALLEGEDLY DEPICTING SURVEILLANCE CAMERA FRAMES OF THE PARTY IN THE ABSENCE OF AUTHENTICATION OR IDENTIFICATION TESTIMONY FOR THE UNDERLYING VIDEO.

Lerner v. Halegua, 40 Fla. Law Weekly D93 (Fla. 3rd DCA December 31, 2014):

While the somewhat bizarre factual scenario from which this case arose is not really relevant to the legal proposition, the case addressed the authentication of still photographs made from a surveillance video.

The court recognized that in some instances a videotape may be authenticated under the "silent witness" theory, when there is no individual videographer able to testify regarding the videotape taken by a remotely controlled surveillance camera. In that instance, a witness responsible for the videotape system may confirm the accuracy of the time and date upon which the tape was made, and confirm whether or not it was edited or tampered with.

Pursuant to §90.901, authentication identification of evidence is required as a condition precedent to admissibility. Because the person who authenticated the frames from the surveillance video did not personally observe the events, nor did he have responsibility for the operation, placement or maintenance of the video camera in question, and because he had no direct knowledge regarding the procedure for retrieving or copying the portions of the video which might be pertinent to the investigation, the evidence fell short of being sufficient to authenticate the photographs and video. Thus, those photographs were not admissible.

ERROR TO ENTER SUMMARY JUDGMENT FOR DEFENDANTS ON BASIS OF NO DUTY TO WARN WHEN THERE WAS A FACTUAL ISSUE AS TO WHETHER THE DEFECT WAS LATENT WHICH CAUSED THE PLAINTIFF TO FALL THROUGH A PAINTED-OVER SKYLIGHT ON A WAREHOUSE ROOF.

Phillips v. Republic Financial, 40 Fla. Law Weekly D103 (Fla. 5th DCA January 2, 2015):

A man fell through a warehouse's painted-over skylight, and the plaintiff sued alleging that the defendants had control over the warehouse, and had a duty to warn of a latent defect. The plaintiff worked for a roofing repair company that was hired to work on the warehouse's corrugated metal roof. The contract required plaintiff to clean and paint the roof, and clean and caulk the existing skylights. The roof contained skylights and had

very little pitch. Neither the plaintiff nor his assistant attempted to view the skylights from within the warehouse, or map them before performing the work.

Generally, one who hires an independent contractor is not liable for injuries sustained by that contractor's employees in their work. The two exceptions are (1) if the owner has been actively participating in the construction to the extent that he directly influences the manner in which the work is performed; and (2) if the owner owes a duty to warn of latent concealed perils which by the exercise of due care by the visitor could not have been known to him.

Plaintiff claims that the skylight that plaintiff fell through was a latent defect in the roof, because it was covered with paint and not visible from the roof. Even though a land owner does not have a duty to protect an independent contractor from hazards of the job that cause the job to be dangerous, that applies to "usual hazards," and in this case the painted-over skylight was not patently obvious to all.

The other issue in this case involved control over the leased premises. Pursuant to the financial services agreement, two of the defendants did not have the power to possess or control the property. Therefore summary judgment in favor of those defendants was correct.

With respect to the third defendant who operated the warehouse and paid for roof repairs, there was also no evidence that it exercised control over the property on the date of the incident, and therefore summary judgment was appropriate.

CAUSE OF ACTION EXISTS FOR COVERAGE BY ESTOPPEL, WHERE INSURER MAKES STATEMENTS AND UNDERTAKES ACTIVITIES WHICH LEAD THE INSURED BUSINESS OWNER TO BELIEVE SHE HAD COVERAGE FOR THE UNDERLYING ACTION--THE TRIER OF FACT DETERMINES THE ULTIMATE WEIGHT TO GIVE THE INSURER'S CONDUCT VERSUS THE REASONABLENESS OF THE INSURED'S RELIANCE.

Bishop v. Progressive, 40 Fla. Law Weekly D119 (Fla. 1st DCA January 6, 2015).

Kind Regards

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