THE WEEK IN TORTS

A Weekly Summary Of The Latest Case Decisions Critical To Those Helping Victims of Negligence

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TRIAL COURT DID NOT DEPART FROM ESSENTIAL REQUIREMENTS OF LAW IN ENTERING ORDER PERMITTING DEFENDANT'S EXPERT TO INSPECT DECEDENT'S CELL PHONE DATA FROM THE DATE OF THE ACCIDENT, WHERE THE DEFENDANT'S MOTION TO INSPECT THE CELL PHONE WAS SUPPORTED BY SPECIFIC EVIDENCE THAT THE PHONE WAS IN USE AT THE TIME OF THE ACCIDENT, AND THE ORDER ADEQUATELY SAFEGUARDED PRIVACY INTERESTS.

Antico v. Sindt Trucking, Inc., 39 Fla. Law Weekly D2149 (Fla. 1st DCA October 13, 2014):

Arguing a violation of Article 1, Section 23 of the Florida Constitution (privacy), the plaintiff objected to an order entered by the trial court allowing the defense expert to conduct a limited inspection of the cell phone that the decedent allegedly was using while driving when she was killed. The plaintiff sued for wrongful death, but the defendant asserted either comparative negligence or the use of the decedent's iPhone as the sole cause of her death, due to her being distracted by it.

The trial judge entered an order allowing the inspection, trying to balance the defendant's discovery rights against the plaintiff's privacy interest. Defendant asserted that the information was relevant because cell phone records show that the decedent had been texting in the minutes preceding the accident. There was also testimony from two witnesses that the decedent may have been utilizing her cell phone at the time of the accident, and testimony from the trooper supporting the assertion that she was using it.

The order stated that the petitioner's counsel could video the inspection which would be conducted at the defendant's expense, and in the presence of the plaintiff's attorney at an agreed time, place and date. The order enumerated the following steps to be followed by the expert: (1) Install write-protect software to ensure no alteration of the phone's hard drive would be made during the inspection; (2) Download a copy of the cell phone's hard drive, making a master copy, a review copy, and a copy for plaintiff's counsel; (3) Return the cell phone to plaintiff's counsel immediately after copying the hard drive; (4) Review only the data on the hard drive for the nine-hour period

permitted by the court including call records, text messages, web searches, etc.; (5) Prepare a summary of the data reviewed including type of data, use of data, etc.; (6) Provide the summary to the plaintiff's attorney prior to the dissemination of any more specific findings. The court ordered that Plaintiff's counsel should have ten days from the service to file a motion for protective order, or other form of objection to the release of all or a portion of the data, citing grounds for each objection; (7) It then said, if no objection was made by the plaintiff, then the defendant's expert could release his or her findings to the defendant's counsel.

After analyzing the order, the court found there was no departure from the essential requirements of law, and found that the order did properly balance the privacy interests with the right to discovery.

CRUISE TICKET COMMUNICATED FEDERAL COURT VENUE, SO DISMISSAL OF PLAINTIFF'S CASE BROUGHT IN STATE COURT WAS PROPER.

Royal Caribbean v. Clarke, 39 Fla. Law Weekly D2105 (Fla. 3rd DCA October 8, 2014):

Plaintiff was injured on a Royal Caribbean cruise. The first paragraph of the ticket contract indicated in bold and capital letters that it contained "important limitations" on the rights of passengers and that all disputes had to be litigated in the United States District Court for the Southern District of Florida in Miami.

Plaintiff brought her claim in state court, and Royal Caribbean moved to dismiss it for improper venue. The trial court denied the motion.

The Third District reversed, observing that the plaintiff failed to satisfy her burden of establishing the "non-enforcement" of the forum selection clause (the court noted such clauses are prima facie valid). The plaintiff offered no evidence to avoid enforcement of the clause.

Additionally, Royal Caribbean had no obligation to remove the case to federal court after plaintiff filed the negligence claim in Miami. Dismissal is the proper mechanism to enforce a forum selection clause.

PREVAILING DEFENDANT IS NOT ENTITLED TO APPELLATE ATTORNEYS' FEES PURSUANT TO PROPOSAL FOR SETTLEMENT, WHERE THE PLAINTIFF'S APPEAL WAS VOLUNTARILY DISMISSED BEFORE ANY BRIEFING OCCURRED.

Magic Tinting Window & Car Alarm v. Scottsdale Insurance Co., 39 Fla. Law Weekly D2106 (Fla. 3rd DCA October 8, 2014):

Even though the losing party--the insured--filed a notice of appeal in October of 2013, and did not voluntarily dismiss the appeal until August 18, 2014, its counsel was not entitled to fees pursuant to the proposal for settlement because no briefing had been done. The court found the insured could not be liable for the "de minimis" activity on the appeal, and reversed that order.

EVIDENCE INSUFFICIENT TO SUPPORT A FINDING OF "OUTRAGE" AGAINST A PATHOLOGIST WHO PERFORMED AUTOPSY AND DISPOSED OF DECEDENT'S ORGANS (BUT EVIDENCE DID SUPPORT CLAIM AGAINST THE HOSPITAL)--ERROR IN GIVING THE JURY INSTRUCTION REGARDING ORGANS BECAUSE THEY WERE NOT A "DEAD HUMAN BODY."

Winter Haven Hospital v. Liles, 39 Fla. Law Weekly D2109 (Fla. 2nd DCA October 8, 2014):

A woman's mother died in the emergency room, complaining of shortness of breath and abdominal pain. Her daughter asked for an autopsy, and she signed the requisite consent provided to her.

When the daughter received the results, she did not agree with the cause of death. She inquired about a second autopsy at the funeral home handling her mother's burial. The funeral home advised her however, that her mother's internal organs had not been returned to her body after the autopsy. Upon contacting the hospital, she learned that the organs had been incinerated.

There was extensive evidence at trial regarding the standard of care, the deficient consent, and the disposal and/or retention of internal organs. The pathologist testified that in 30 years, he had never had a family request the examined organs, and believed the disposal was appropriate as it was done in accordance with the way he was taught at the University of Florida.

At trial, the jury awarded the plaintiff $1 million in damages for severe emotional distress, and punitive damages also in the amount of $1 million. The jury did not award punitive damages against the doctor himself, but did against his group.

The hospital argued that the trial court erred in failing to treat the case as one of medical malpractice. The court disagreed. In order to have medical negligence, the actions must have resulted in personal injury or death to the claimant. Additionally, the autopsy did not constitute the "rendering of medical care or services."

The hospital also claimed that the trial judge erred in instructing the jury that a cremation could not be performed until a legally authorized person gave written authorization. Cremation is defined as any mechanical or thermal process whereby a "dead human body" is reduced to ashes and bone fragments. In this case, the organs were disposed of and incarcerated as biomedical waste. Because the decedent's organs did not constitute a "dead human body" or human remains, it was error to give the instruction. The instruction was harmful because it was undisputed that the plaintiff had not given written consent for such cremation.

The court also concluded there was no basis to support the jury's finding of outrage against the hospital for the actions of the doctor. The doctor had received the autopsy permission form and medical chart, but never spoke to the plaintiff and was just simply not aware of her wishes. He had never in his career had a family ask for the return of the organs thus, should not have known about the plaintiff's wish. There was no support of the outrage tort against the doctor.

However, the court did find there was evidence of outrage as to the hospital. The plaintiff had testified that she specifically informed the staff at the hospital that she did not want her mother cremated, and the evidence was undisputed that the hospital's policy was to incinerate organs that had been placed in biohazard bags after an autopsy. Also, the consent form failed to inform the plaintiff that her mother's organs would be incinerated, or how they would be incinerated. While cremation and incineration are treated differently under the law, the plaintiff testified she believed that her mother's organs were cremated against her mother's wishes.

Finally, the court reversed the award of punitive damages against the doctor, but noted that the plaintiff could be able to prove a claim on retrial for the hospital's actions independent of the doctor.

SUBSTITUTED SERVICE ON THE SECRETARY OF STATE WAS SUFFICIENT IN THIS CASE AGAINST A COLUMBIAN CITIZEN, WHERE THE EFFORTS AT SERVICE WERE DILIGENT EVEN THOUGH THERE WAS NOT COMPLIANCE WITH EITHER THE HAGUE CONVENTION OR THE INTER-AMERICAN SERVICE CONVENTION ON LETTERS ROGATORY AND ADDITIONAL PROTOCOL.

Alvarado-Fernandez v. Mazoff, 39 Fla. Law Weekly D2115 (Fla. 4th DCA October 8, 2014):

The Columbian citizen driver rented a car from Alamo, and purchased supplemental liability insurance. After injuring the plaintiff, the woman went back to Columbia.

The plaintiff filed an affidavit of compliance shortly after commencing suit in which he stated that the Secretary of State accepted service of process on behalf of the defendant and he had attempted to serve the copy of the summons and complaint via first class international mail to her last known address. The mailing never reached the defendant. The plaintiff sought to serve the defendant two more times, and obtained eight extensions of time in which to serve the defendant. Plaintiff ultimately effected substituted service by serving the Secretary of State in accordance with §48.161 and then mailed the summons and complaint to the defendant's last known address which also went unclaimed.

The defendant sought to dismiss based on insufficient service. The defendant asserted that plaintiff failed to comply with the Hague Convention as well as with the Inter-American Service Convention on Letters Rogatory and Additional Protocol (IASC).

Notably, the Hague Convention is expressly inapplicable in cases where the location of the person to be served is unknown. Thus, it did not apply. The provisions of the IASC--unlike the Hague Convention--are not mandatory. Because the IASC is not a self-executing treaty, without the aid of any enacting legislative provisions, is not the equivalent to an act of the legislature, and does not have the status of supreme law of the land. Thus, strict compliance with its provisions to the exclusion of utilizing any other methods is not required.

When a party conceals his or her whereabouts, substitute service is acceptable. In this case, the plaintiff made diligent attempts to locate the defendant, seeking the information from Alamo multiple times (the information was deficient), and even going so far as to hire two different attorneys in Columbia in an attempt to find the defendant.

The court concluded that based on the extraordinary circumstances of this case, the trial judge acted within its discretion in granting the plaintiff several extensions of time to search for the defendant, and also did not err in denying the defendant's motion to dismiss.

MOTION TO DISQUALIFY TRIAL JUDGE INSUFFICIENT WHEN BASED ON INNUENDO AND NOT FACT.

Keitel v. Agostino, 39 Fla. Law Weekly D2121 (Fla. 4th DCA October 8, 2014):

There were several related cases between the parties, and three of them were in front of Judge Cox while the fourth was in front of Judge Sasser. Judge Cox agreed that all the cases could be transferred to his division. However, Judge Sasser denied the petitioner's motion to transfer. At a hearing in February of 2014, Judge Sasser stated she had communicated with Judge Cox. Judge Cox then all of a sudden recused himself from all of the cases on March 5, 2014.

Without any reference to anything of record, the petitioner stated it believed that Judge Sasser defamed him and sabotaged his case in front of Judge Cox, causing Judge Cox to have prejudice and recuse himself. The petitioner sought to take the depositions of both Judges Cox and Sasser. The court observed that nothing Judge Sasser said at the hearing was sufficient to disqualify her because she was discussing pending matters.

Petitioner moved to disqualify Judge Sasser arguing that she had maliciously continued to defame and sabotage him to other judges. He also alleged that the lawyer with whom Judge Sasser discussed being deposed at the hearing, "felt fear and intimidation" and "personally felt threated" but that lawyer filed no affidavit. Judge Sasser denied the motion as legally insufficient.

The Fourth District observed that the purported incidence of defamation and sabotage were tied to nothing; nothing in the record, nothing the judge said at a hearing, and nothing from anyone who heard a defamatory statement. While the petitioner may have felt afraid at the hearing, nothing the judge said could have reasonably induced his fear. Legally sufficient motions for disqualification cannot be based upon rumors or gossip about what the trial judge allegedly said to unidentified people at unidentified times. There was also nothing improper with Judge Sasser communicating with Judge Cox on related cases.

Finally, the court said the petitioner could not bootstrap his attempt to depose the judge, into a conflict that would force her recusal. The general rule is that litigants may not probe into a judge's mental process by setting her for deposition. The court denied the petitioner's writ of certiorari. I'm sure this attorney relishes the day he is back in front of Judge Sasser.

AFTER MOTION TO DISQUALIFY TRIAL JUDGE WAS GRANTED, SUCCESSOR JUDGE WHO DID NOT CONDUCT THE TRIAL COULD NOT COMPETENTLY RULE ON THE DEFENDANT'S MOTION FOR NEW TRIAL, BECAUSE IT REQUIRED WEIGHING THE CREDIBILITY OF WITNESSES AND COMPETING WITNESS TESTIMONY TO RESOLVE CONFLICTS IN EVIDENCE.

McCloud v. State, 39 Fla. Law Weekly D2128 (Fla. 1st DCA October 9, 2014):

Once the trial judge was appropriately disqualified (after the trial), the successor judge who did not conduct the trial could not competently rule on the motion for new trial because it required weighing the credibility of witnesses in competing witness testimony.

Without much explanation, the court noted that "under these circumstances" a successor judge who was not present at trial could not competently assess the weight of evidence as required to resolve the motion for new trial. Therefore the court did reverse and remand for new trial (suggesting that the demonstration of bias in the original judge, and the inability of another judge to review the testimony required a new trial in and of itself).

Kind Regards

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