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 DECEMBER 12, 2014

NO ABUSE OF DISCRETION IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL, PREMISED ON ASSERTION THAT TRIAL COURT ERRED IN ALLOWING PLAINTIFF TO PLAY PORTIONS OF DEFENDANT'S VIDEOTAPED DEPOSITION DURING CLOSING.

Borden Dairy Company of Alabama v. Kuhajda, 39 Fla. Law Weekly D2538 (Fla. 1st DCA December 5, 2014):

The case arose out of a truck accident. The defendant driver testified he was attempting to drive his 30 ft. delivery truck across five lanes of traffic coming from his left. With the aid of an aerial photograph exhibit at trial, he noted that the position of his truck and other traffic, including the plaintiff's vehicle on his left. He testified that a vehicle pulled out from a parking lot and blocked him. His videotaped deposition was admitted into evidence at trial without objection, and during his live testimony plaintiff's counsel impeached him with portions of his transcribed videotaped deposition.

The plaintiff asked the court if they could play a part of the videotaped deposition during closing. The defendant objected, and the trial court overruled the objection. During the actual closing, defendant did not renew its objection.

The court ruled that it was not within the trial court's discretion **not** to allow plaintiff to read the in the deposition of the defendant driver. The failure to permit the use of the testimony by a party when it's expressly authorized would have been reversible as a matter of law. Further, while not specifically addressed in Florida, there is no absolute prohibition from using videotaped depositions during closing argument.

Although it would have been error for counsel to have presented facts to the jury in closing that were not presented in the taking of evidence, here the video had already been presented to the jury was properly allowed.

UPON FINDING OUT THAT DEFENDANT HAD DESTROYED EVIDENCE, VIOLATED COURT ORDERS, WILLFULLY VIOLATED DISCOVERY ORDERS, AND JURORS ENGAGED IN MISCONDUCT BY FAILING TO DISCLOSE LITIGATION HISTORY, TRIAL COURT DID NOT ABUSE DISCRETION BY GRANTING NEW TRIAL AFTER JURY VERDICT FOR DEFENDANT.

Meadowbrook Meat Co. v. Catinella, 39 Fla. Law Weekly D2515 (Fla. 2nd DCA December 3, 2014):

A man was unloading a truck at the Meadowbrook Meat Company when he fell on a malfunctioning dock leveler. After the jury returned a verdict for the defendant, the plaintiffs moved for a new trial on the grounds that defendant had destroyed evidence, committed numerous discovery violations, and two jurors had failed to reveal their litigation history.

The trial judge set forth lengthy circumstances explaining how the defendant had destroyed evidence, had materially violated a variety of court orders, and had engaged in systematic, material, and willful discovery violations to the detriment of the plaintiff. The court also found that two jurors had engaged in misconduct by failing to disclose litigation history that was relevant and material to their jury service.

After the judge wrote that based on the totality of the circumstances, the jury verdict was contrary to the manifest weight of the evidence, and coupled that with the juror misconduct and the other violations, the appellate court found no abuse of discretion in ruling to grant the new trial.

ERROR TO ENTER DIRECTED VERDICT ON CAUSATION IN FAVOR OF TOBACCO DEFENDANTS--WHERE PLAINTIFF PRESENTED EVIDENCE THAT COULD SUPPORT FINDING THAT DEFENDANTS' CONDUCT WAS MORE LIKELY THAN NOT A SUBSTANTIAL FACTOR IN CAUSING HER INJURY, DIRECTED VERDICT WAS IMPROPER.

Whitney v. R.J. Reynolds, 39 Fla. Law Weekly D2537 (Fla. 1st DCA December 5, 2014).

TRIAL COURT ABUSED DISCRETION BY AWARDING DEFENDANT A NEW TRIAL ON THE BASIS OF NON-DISCLOSURES BY THREE JURORS DURING *VOIR DIRE*.

Weissman v. Radiology Associates of Ocala, 39 Fla. Law Weekly D2542 (Fla. 5th DCA December 5, 2014):

In this medical malpractice suit that resulted in a new trial for the plaintiff, the trial judge conducted juror interviews based on non-disclosures discovered post-trial. The trial court found the elements of *De La Rosa* were satisfied regarding non-disclosures by three of the jurors, and granted a new trial.

As to juror Mesa, the defendant asserted she failed to disclose her treatment and billing history with the defendant's group. The defendant claimed that the juror had received services from it, and that her account had gone into collections.

There had been a showing that the juror had been billed for services, but during the juror interview, the woman never testified that she had been to the defendant, received services or had bills that went into collection. Without the proper authentication of such documents and no witnesses, there was no evidence in the record to support the *De La Rosa* prong as to Mesa.

Juror Garcia had failed to disclose a chapter 13 bankruptcy proceeding from 2011. The plaintiff contended that the defendant's questions during *voir dire* were too imprecise regarding law suits to trigger a response about bankruptcy and the court agreed.

As to the third juror, Lewis, the defendant alleged she failed to disclose a chapter 7 bankruptcy and that she was a party to litigation. However, the court ruled the same way regarding the bankruptcy. As for her involvement in other lawsuits, the court had determined they were too remote in time to be material, and did not allow questioning on them.

Accordingly, the defendant failed to meet the *De La Rosa* test on that also and it was error for the trial judge to grant a new trial for the defendant based on the juror non-disclosures. The court reversed and remanded for entry of final judgment consistent with the verdict.

Kind Regards

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