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 25, 2015

NEW TRIAL REQUIRED WHEN JURY FOUND OUT THAT CAPTAIN HAD NOT RECEIVED A CITATION FROM THE FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION FOR THE ALLEGED NEGLIGENT ACT IN A BOATING ACCIDENT.

Soto v. McCulley Marine Services, Inc., 40 Fla. Law Weekly D2770 (Fla. 2nd DCA December 16, 2015):

In this wrongful death action, the Estate argued that the decedent drowned due to the negligence of the defendants, when its captain moored a tugboat and a barge to a dock in a configuration that allegedly caused currents to suck the decedent under the vessels, despite his use of a life jacket.

During the trial, the court answered a juror's question by informing the jury that the captain had not received a citation from an officer of the Florida Fish and Wildlife Conservation Commission for his conduct. It is well established that the failure to receive a citation is not admissible in a negligence action, and in this case, the court ruled the Estate did not open the door to such evidence, as defendants alleged.

While the Estate argued that the defendants were negligent because they violated certain Coast Guard regulations, that was permissible and analogous to a plaintiff in an auto case

arguing that the defendant was negligent because he or she ran a stop sign or failed to obey some other traffic regulation. However, arguing that a defendant violated a provision of the law is not the same thing as (nor does it open the door) telling the jury that a law enforcement officer issued or did not issue a citation.

Here, defendants' closing emphasized the "no citation," and in these circumstances the error of admitting it required a new trial.

IN DENYING MOTION FOR DISQUALIFICATION, TRIAL JUDGE EXCEEDED SCOPE OF PERMISSIBLE CONSIDERATIONS BY EVALUATING THE MOTIVATIONS FOR THE MOTION.

Messianu v. Pigna, 40 Fla. Law Weekly D2784 (Fla. 3rd DCA December 16, 2015):

When the trial judge received the motion to disqualify, the order denying it had the trial judge stating that the moving party's concerns emanated from a prior adverse ruling and nothing more.

Because the judge did more than strictly evaluate the legal sufficiency of the petitioner's factual claims, she looked beyond the four corners of the affidavit to evaluate the alleged motivations of the petitioner. To do so was impermissible.

Regardless of whether the trial court's motivational analysis was accurate, once the court delved into the petitioner's concerns, it ran afoul with the directive in Rule 2.330(f), requiring the evaluation of the motion to be limited to its legal sufficiency. The writ of prohibition was granted.

NO ERROR IN DENYING MOTION TO QUASH SERVICE OF PROCESS ON GROUND THAT ATTEMPT TO SERVE DEFENDANT IN FRANCE VIA FEDERAL EXPRESS WAS NOT VALID UNDER HAGUE CONVENTION.

Portalp International v. Zuloaga, 40 Fla. Law Weekly D2791 (Fla. 2nd DCA December 18, 2015):

In this case, where the plaintiff served the defendant in France by Federal Express, the court looked at article 10(a) of the Hague Convention, as well as the commentaries on the history of the Hague Convention negotiations, and concluded that the article does intend to permit service by mail. In looking at the article, the court found that service of process by mail is consistent with the intent and expectations of the signatories as well as the principals deemed controlling in the interpretation of international agreements.

The defendant tried to assert that the article did not allow the initial service by mail, and only allowed service of documents once "service" was effected. The court rejected this theory and found that in compliance with §48.194(1) (which provides that service outside the United States must be required to conform with the principles of the Hague Convention), the service by Federal Express was valid.

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