



New trial ordered for family of woman who choked on slaw

The Fourth District Court of Appeal decided three wrongful death cases, ruling twice in favor of the families bringing the cases.

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2012-06-29 12:00:00 AM

The families in two separate wrongful death cases have won reversals from the Fourth District Court of Appeal, but the ruling in a third case favored the defendant in a drunken-driving manslaughter case.

Jodi Benjamin, the daughter of Marlene Gagnon, appealed a final judgment favoring Tandem Healthcare Inc., which operated a West Palm Beach nursing home where the woman died.

An Alzheimer's patient, Gagnon had a well-documented swallowing disorder, the result of polio contracted as a child that left her throat partially paralyzed. Gagnon ate by taking small bites of soft food while under supervision.

At trial, the nursing home's position was Gagnon died of a heart attack, but her attorney tried to show she died from choking on coleslaw. Evidence was offered of an employee, Ian Samsoundar, who said a nursing assistant ran into the kitchen yelling "somebody choked on some food."

Samsoundar also maintained the kitchen manager called a staff meeting after the incident and said Gagnon choked on coleslaw and cautioned staff to be more careful with food trays.

Palm Beach Circuit Judge Donald Hafele did not allow Samsoundar's testimony based on Tandem's argument it was inadmissible hearsay. The witness could not identify the nursing assistant, and the kitchen manager hadn't witnessed the event.

However, Samsouandar and the kitchen manager were employees making statements within the scope of their employment, Judge Fred Hazouri wrote in his opinion Wednesday.

Hazouri, with a concurrence from Judge W. Matthew Stevenson, ruled the error was not harmless.

"From opening statement to closing, counsel for Tandem told the jury that it was not possible for Mrs. Gagnon to have choked because 'someone would have seen or heard her choking,' " Hazouri stated. "By excluding this testimony, the estate was denied the opportunity to establish that there were people ... who heard or saw Mrs. Gagnon choking."

The jury sided with Tandem. The appellate panel remanded the case for a new trial.

Judge Dorian Damoorgian dissented because the majority relied on the assumption that when the agent of a company speaks against its own interest, it is assumed they've made an adequate investigation.

"I remain unconvinced that the statements made demonstrated any indicia of reliability," he said.

He also cited other evidence outside of the hearsay statements. Nursing assistants tried to clear Gagnon's throat with oral sweeps and the Heimlich maneuver, both unsuccessfully. At the emergency room, food was suctioned from her throat.

Gagnon, 62, had only been at the nursing home nine days when she died.

"It was a disputed issue at trial as to whether she was actually left unattended. Our position was that she was left unattended," said Rebeccal Vargas, appellate attorney for Benjamin. Vargas, a partner at Kreuzler-Walsh, Compiani & Vargas in West Palm Beach, said her client is excited about getting a new trial "and to get a chance to try to rectify this wrong."