

# 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  
VOLUME 40, NUMBER 41

CASES FROM THE WEEK OF OCTOBER 9, 2015

### **PCA AFFIRMING \$10,000,000 FINAL JUDGMENT IN DEFECTIVE TIRE BLOWOUT CASE.**

While I do not normally report on PCAs, my excitement over this one got the better of me.

In October of 2013, my partners, Don Fountain and Hampton Keen, obtained a verdict in excess of \$11,000,000 against Continental Tire for our client, Tracey Parker, her first-grade teacher husband, Ed, and their three sons.

Continental insisted that Mrs. Parker had been operating her vehicle on a flat tire for thousands of miles. It cast blame against *Fabre* defendants GM, and Mr. Parker himself.

On October 1, 2015, in *Continental Tire the Americas v. Parker*, 4D14-113, Fourth District Court of Appeal Judges Ciklin, May and Forst *per curium* affirmed the jury's decision reached after three weeks' of trial, and which followed six intense years of litigation.

Notably, Continental never offered the Parkers a single penny to settle the case before (or even during) trial.

### **IN A PCA WITH SPECIAL CONCURRENCE, JUDGE DISCUSSES DUTY OF SHERIFF AND APPLICATION OF SOVEREIGN IMMUNITY IN WRONGFUL DEATH CASE.**

*Cobb v. Ashley*, 40 Fla. Law Weekly D2211 (Fla. 1<sup>st</sup> DCA September 30, 2015):

This case was actually a PCA--but Judge Makar provided a detailed special concurrence, which explained the facts and analysis.

In the wee hours of the morning, a 37-year old, emotionally disturbed woman who had previously been Baker Acted, called the police for assistance at her apartment. She told the dispatcher that she had purchased a gun, and needed help unjamming it. When the deputy arrived, she told her the same story, said she was not familiar with the gun, was using it and cocked it, and could not un-cock it, so she took the gun outside and discharged one round into her laundry basket. She advised the deputy she was afraid that if there was any crime, someone would think it was she who did it.

The officer unjammed the gun, left it on the table, and the woman promptly fatally shot herself in the head.

In bringing a wrongful death case, the estate sued, arguing the Sheriff breached a duty by creating a risk to the woman, which proximately and foreseeably resulted in her killing herself.

The Sheriff moved to dismiss, arguing the decision about whether to arrest an individual is a discretionary one, and that he was immune from tort liability. The estate argued its case was not based on a failure to arrest theory, pointing instead to the case of *Wallace v. Dean*, where police deputies responded to a 911 call, and found the woman completely unconscious and unresponsive. Rather than summoning assistance, they assured concerned neighbors that the woman was not in need of medical attention, and departed. She died several days later.

The supreme court in that case observed that because the deputy had undertaken to respond to the 911 call, engaged the decedent, and completed a safety check, it left the decedent in the "zone of risk" by not doing anything, so the court found there was a duty owed.

The court then explained that the safety check was an operational "professional and general service" for which governmental tort duty did apply.

In this case, the estate argued that the deputy had undertaken to assist the decedent, having chosen to assist her in unjamming her gun, making it operable, so that the Undertaker's Doctrine applied. The deputy then had to perform that task in a non-negligent manner.

The Sheriff responded that the deputy only had a general duty to the public at large absent a special relationship, and therefore, no duty existed. Because the call was not an emergency involving an individual who was in obvious medical distress and in need of attention, the Sheriff distinguished the *Wallace* case.

In his concurring opinion, Judge Makar agreed this situation was similar to *Wallace*. He observed that a duty can still arise whether the call for service is urgent or not. He then wrote that a call that is not "urgent," may seem to even make claim of "service" stronger.

Because there was little discussion about the immunity issue in the briefs, however, Judge Makar ruled with the majority and agreed that the court had to defer to the trial

judge and affirm his conclusions. The court relied on the presumption of correctness as to the immunity issue, because the plaintiff failed to rebut it.

The concurring opinion really seems to support the idea that a duty **did** exist--at least at the dismissal stage, but that the case was affirmed due to lack of argument regarding immunity.

**ERROR TO ENTER DEFAULT AS SANCTION FOR DEFENDANT'S NON-COMPLIANCE OF TRIAL COURT'S ORDER DIRECTING HER TO FILE AN ANSWER, WITHOUT AFFORDING HER AN OPPORTUNITY TO BE HEARD AND SHOW THAT THE NON-COMPLIANCE WAS NOT WILLFUL OR IN BAD FAITH.**

*Hendrix v. Department Stores National Bank*, 40 Fla. Law Weekly D2215 (Fla. 4<sup>th</sup> DCA September 30, 2015):

Without an opportunity to be heard, the final default judgment was void. The court remanded for a noticed hearing on the motion.

**TRIAL COURT SHOULD NOT DISMISS WHEN RESOLUTION OF ISSUES REQUIRES IT TO MAKE FACTUAL DETERMINATIONS OUTSIDE THE PLEADINGS.**

*Flite v. Medi-Trans, Inc.*, 40 Fla. Law Weekly D2224 (Fla. 4<sup>th</sup> DCA September 30, 2015):

The trial court granted the defense motion to dismiss either because the defendant was entitled to immunity under Work. Comp., or because in an earlier settlement, there was a release of the defendant by the plaintiff.

However, because resolution of both of these issues required the court to make factual determinations outside of the pleadings, such a ruling was error and the court reversed and remanded for the judge to consider the issues by way of summary judgment or an evidentiary hearing.

Kind Regards



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