# THE WEEK IN TORTS

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

Provided By:

CLARK • FOUNTAIN • LA VISTA
PRATHER • KEEN & LITTKY-RUBIN

TRIAL & APPELLATE ATTORNEYS

www.ClarkFountain.com

***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.***

Provided By:
CLARK • FOUNTAIN • LA VISTA
PRATHER • KEEN & LITTKY-RUBIN

THE WEEK IN TORTS

**FLORIDA LAW WEEKLY**
**VOLUME 40, NUMBER 5**
**CASES FROM THE WEEK OF JANUARY 30, 2015**

**COVERAGE EXCLUDED UNDER ALCOHOL EXCLUSION OF POLICY FOR DEATH OF INSURED, KILLED WHILE OPERATING A JET SKI WHILE WITH A BLOOD ALCOHOL LEVEL IN EXCESS OF THE LEGAL LIMIT – IF THERE IS SOME CAUSAL RELATIONSHIP BETWEEN THE INSURED'S INTOXICATION AND HIS DEATH THE EXCLUSION APPLIES UNDER THE POLICY, EVEN IF THE INSURED'S INTOXICATION WAS NOT THE SOLE CAUSE OF THE ACCIDENT.**

**American Heritage Life Insurance Company v. Morales, 40 Fla. L. Weekly D250 (Fla. 3rd DCA Jan. 21, 2015):**

**The insured had purchased an accidental death and dismemberment life insurance policy from the insurer. The policy contained an alcohol exclusion provision excluding from coverage "any loss incurred as a result of . . . any injuries sustained while under the influence of alcohol or any narcotic unless administered upon the advice of a physician."**

**The insured died in a crash while operating a jet ski. The insurer denied coverage under the life insurance policy, citing the alcohol exclusion.**

**The insured was last seen alive around 10:00 p.m. when he left an island north of the Intracoastal. When he failed to return, the Coast Guard was called and his body was later found at approximately 7:44 a.m. The autopsy report indicated the cause of death was multiple blunt force traumatic injuries sustained in a front end collision with a fixed object. The toxicology report indicated the insured's blood alcohol level was .10, which is above the legal limit. The investigator concluded it was an alcohol related case and that alcohol contributed to the accident.**

**The beneficiary's expert agreed that the insured was operating the jet ski with a blood alcohol level in excess of the legal limit and that the insured collided with a fixed object. However, the expert opined though that the insured's blood alcohol level was not the sole cause of the accident because other factors contributed. The trial court granted the beneficiary's motion for summary judgment, denied the insurer's, and ordered the insurer to pay the policy benefits to the beneficiary.**

**The court reversed. It found that there was no issue of fact regarding whether alcohol contributed to the accident. The appeal focused then on the narrow and purely legal issue of whether in order for the alcohol exclusion to apply, did the insured's intoxication have to be one factor that contributed to the accident, or the sole cause.**

**The court found the alcohol exclusion provision in such accidental death policies serves to bar recovery of benefits if there is some causal relationship between the insured's intoxication and his death. Because the alcohol exclusion provision excluded "any loss incurred as a result of . . . any injury sustained while under the influence of alcohol" it applied to exclude coverage.**

**TRIAL COURT ERRED IN DENYING LOSS OF USE DAMAGES FOR 20 MONTH PERIOD DURING WHICH PLAINTIFF COULD NOT MOVE INTO A HOME THAT HAD A DEFECTIVE AIR CONDITIONING SYSTEM WHEN IT WAS CONSTRUCTED – TESTIMONY OF EXPERT REGARDING THE RENTAL VALUE OF THE HOME DURING THE REPAIR PERIOD WAS SUFFICIENT TO CONSTITUTE PRIMA FACIE EVIDENCE FOR VALUE OF LOST USE OF HOME DURING THE PERIOD.**

**Gonzalez v. Barrenechea, 40 Fla. L. Weekly D258 (Fla. 3rd DCA Jan. 21, 2015).**

**COURT REGISTRY FEE CHARGED BY CLERK OF THE CIRCUIT COURT QUALIFIES AS A "TAXABLE COST" UNDER RULE 9.400.**

**Miccosukee Tribe of Indians v. Bermudez, 40 Fla. L. Weekly D261 (Fla. 3rd DCA Jan. 21, 2015).**

**TRIAL COURT ERRED IN GRANTING MOTION TO COMPEL ARBITRATION, WHEN NURSING HOME PROVIDED ONLY SIGNATURE PAGE OF WHAT WAS A SEVEN PAGE ARBITRATION AGREEMENT.**

**Davis v. Hearthstone Senior Communities, 40 Fla. L. Weekly D268 (Fla. 2nd DCA Jan. 23, 2015):**

**During discovery, the estate requested that the nursing home provide a complete copy of the set of documents signed by the decedent upon her admission to the nursing home. The documents provided included only the signature page of what was alleged to be the arbitration agreement. A witness testified that the original arbitration document consisted of seven pages, but that it was the practice of the nursing home to retain in its file only the signature page, and to provide the first six pages to the resident. Based on the absence of the original six pages, the estate argued that the nursing home had failed to prove that there was a binding, valid and enforceable arbitration agreement.**

**This record explained that to enforce the arbitration agreement, e.g., the nursing home had to show a valid written agreement to arbitrate, an arbitrable issue, and that the right to arbitration had not been waived. The court concluded that the nursing home did not meet its burden of showing the existence of a valid written agreement, because a contract cannot stand if it is missing an essential term of an agreement.**

**Because this record did not include any terms of the alleged arbitration agreement, the agreement failed to indicate whether the arbitration was binding or non-binding, how many arbitrators were to be used, how the arbitrator was to be selected, or what issues were to be included. Although those details could have been included in the missing six pages and could become available as part of the record on remand, the record at the time the trial judge granted the motion to compel arbitration was devoid of those details and thus the nursing home failed to meet the first requirement to enforce the agreement.**

Kind Regards

CLARK • FOUNTAIN • LA VISTA
PRATHER • KEEN & LITTKY-RUBIN
TRIAL & APPELLATE ATTORNEYS

1919 N. Flagler Drive, West Palm Beach, Florida 33407
**866.643.3318 • www.ClarkFountain.com**