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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40-YEAR OLD CLAIM FOR SEXUAL ABUSE BARRED BY STATUTE OF LIMITATIONS.

Firestone v. Temple Beth Sholom, 41 Fla. Law Weekly D240 (Fla. 3rd DCA January 20, 2016):

According to the plaintiff's complaint, in 1971 and 1972 while she was a minor, she was sexually abused by a teacher employed by the synagogue. Approximately 40 years later in 2013, she sued the temple. The complaint alleged that the delay in filing the claim was due to the traumatic nature of the abuse inflicted upon her which caused her to suffer repressed memory syndrome, and that she had no memory of the abuse until 2009 when it resurfaced.

The plaintiff argued that her repressed memory syndrome brought her within the provisions of §95.11(7), which states that for intentional torts based on abuse, actions may be commenced any time within seven years after the age of majority or within four years after the person leaves the dependency of the abuser, or within four years from the time of the discovery by the injured party of both the injury and the causal relationship. The express language of the statute is limited to **intentional** torts, however, and the plaintiff's theory of liability in this case was that the synagogue was **vicariously** liable or in breach of its fiduciary duty--**not** intentionally responsible (the abuser was not sued).

Additionally, the plaintiff asserted her claim came within the provision of §95.11(9), which provides that sexual battery offenses on victims under the age of 16 may be commenced "at any time." However, the subsection explicitly states it only applies to actions other than those which would have been time barred on July 1, 2010. Because the plaintiff's action was barred before that date, the court did not further address the issue.

DISMISSING CASE FOR FAILURE TO ATTACH CERTAIN EXHIBITS TO SECOND AMENDED COMPLAINT WITHIN TIME FRAME ORDERED BY COURT, TOO EXTREME A SANCTION WHEN COURT FAILED TO ARTICULATE FINDINGS.

Townhouses at Jacaranda v. Crain Atlantis Engineering, 41 Fla. Law Weekly D212 (Fla. 4th DCA January 20, 2016):

Dismissal was improper because the trial court failed to articulate findings warranting the extreme sanction of dismissal for a procedural error. Even if the court had articulated findings, dismissal with prejudice was too severe a sanction under these circumstances.

PERSONAL REPRESENTATIVE MAY INITIATE A COMPLAINT UNDER THE FLORIDA CIVIL RIGHTS ACT ALLEGING DISCRIMINATION ON BEHALF OF A DECEASED FORMER EMPLOYEE.

Cimino v. American Airlines, 41 Fla. Law Weekly D212 (Fla. 4th DCA January 20, 2016):

The purpose of the FCRA is to secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, pregnancy, national origin, age, handicap or marital status. A person under the statute includes a legal representative, and thus the personal representative of the aggrieved employee's estate may bring a claim.

IN A CRIMINAL CASE, THE COURT HELD THAT A PARTIAL READ-BACK OF THE WITNESS'S TESTIMONY OF THE STATE'S KEY WITNESS PLACED UNDUE EMPHASIS ON IT, AND BOLSTERED THE STATE'S VERSION OF THE EVENTS--ERROR NOT HARMLESS WHERE THE READ-BACK DID NOT INCLUDE RELEVANT TESTIMONY FROM CROSS-EXAM WHERE DEFENSE COUNSEL IMPEACHED THE DETECTIVE ON INCONSISTENCIES IN HIS TESTIMONY.

Gormady v. State, 41 Fla. Law Weekly D218 (Fla. 2nd DCA January 20, 2016):

During juror deliberations, the jury asked for a copy of the defendant's interview with the detective or the reporter's recording of the defendant's interview/confession with the detective. The trial judge asked the court reporter how long it would take to read the testimony, and she said it would take 30-45 minutes to prepare the transcript and 40 minutes to read it. The court advised the jury how long it was going to take and then let them decide if they wanted to have it read.

However, when the jury came back the judge then advised that it could have the testimony read to the extent they wanted to, but **could have it stopped** at any point. The judge then allowed the jury to stop hearing the read-back once the direct examination had mostly been read back. The court said there was no such thing as a rule of completeness.

The appellate court concluded that was error. The manner in which the testimony was read allowed the jury to hear the partial read-back, which placed undue emphasis on the

portion that served to bolster the State's version of events. While the trial court has broad discretion in granting or denying a request for a read-back, the trial court deprived itself of the ability to exercise at discretion by allowing the jury to modify the scope of the read-back request while it was going on. I imagine this rule would apply in a civil case too.

NO ERROR IN ENTERING SUMMARY JUDGMENT FOR DEFENDANT IN TRIP AND FALL WHERE THERE WAS NO EVIDENCE OF DEFECT IN THE STEP PLAINTIFF FELL ON.

Perez-Rios v. The Graham Companies, 41 Fla. Law Weekly D237 (Fla. 3rd DCA January 20, 2016):

The plaintiff tripped on a 4-inch high step leading from the pavement to a building owned by the defendant. The step was plainly visible, and the payment above and below the step was constructed of red brick. The step itself was constructed of white stone.

The photographs which the plaintiff authenticated indicated no particular defect, and there was no evidence of a foreign object on the step, uneven wear and tear, inadequate lighting, or wet or slippery conditions. When asked directly, the plaintiff could not identify any defects in the step and no contradictory evidence, such as an expert's report, was submitted in the record which could have created a disputed issue of fact.

Under these circumstances, the trial court properly entered summary judgment. Citing to "open and obvious" law, the court observed that some conditions are simply so obvious, so common and so ordinarily innocuous that they cannot be held as a matter of law to constitute a hidden dangerous condition.

TRIAL COURT ABUSED DISCRETION BY STRIKING PLAINTIFF'S PLEADINGS AND ENTERING FINAL JUDGMENT BECAUSE OF LATE DISCLOSURE OF EVIDENCE--EVIDENCE DID NOT SUPPORT FINDING THAT ACTIONS OF PLAINTIFF'S COUNSEL WERE WILLFUL, DELIBERATE OR CONTUMACIOUS.

Prater v. Comprehensive Health, 41 Fla. Law Weekly D238 (Fla. 3rd DCA January 20, 2016):

In yet another case where the trial judge struck the plaintiff's pleadings, the judge deemed the *Kozel* factors had been satisfied. However, the appellate court found there was not competent substantial evidence to support the conclusions that they had been met, and further found that the trial judge's sanction was too harsh for a late disclosure of evidence.

TRIAL COURT DEPARTED FROM ESSENTIAL REQUIREMENTS OF LAW BY ORDERING PETITIONER TO PROVIDE INFORMATION REGARDING HER CELL PHONE NUMBER AND HER CELL PHONE CARRIER--ORDER DIRECTING THE REVELATION OF SUCH INFORMATION VIOLATED HER FIFTH AMENDMENT RIGHTS.

Restrepo v. Carrera, 41 Fla. Law Weekly D240 (Fla. 3rd DCA January 20, 2016):

The trial judge had ordered the defendant to provide the cell phone numbers and/or names of providers used during the six-hour period before the time of the crash and six hours after. This was a violation of the defendant's Fifth Amendment rights. Because there was no adequate remedy on appeal, the order constituted a departure from the

essential requirements of law.

Kind Regards

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