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 3
CASES FROM THE WEEK OF JANUARY 16, 2015

NEGLIGENT SECURITY FALLS UNDER "PREMISES LIABILITY" (AND NOT ORDINARY NEGLIGENCE), AND THUS, THE TRIAL COURT DID NOT ERR IN ALLOWING THE DEFENDANT TO INTRODUCE EVIDENCE REGARDING THE PLAINTIFF'S STATUS AS A TRESPASSER.

Nicholson v. Stonybrook Apartments, 40 Fla. Law Weekly D159 (Fla. 4th DCA January 7, 2015):

The plaintiff was shot in the leg by a third-party while attending a party at the complex's common area. The complex alleged that the plaintiff was a trespasser at the time she was shot. The plaintiff moved to exclude any evidence regarding her status as a trespasser, arguing that her status on the land was irrelevant because her lawsuit sounded in ordinary negligence, and not premises liability.

In ordinary negligence cases, the defendant owes the plaintiff a duty of reasonable care, regardless of the relationship between the defendant and the plaintiff. However, in premises liability cases, the defendant's duty to the plaintiff is dependent on the plaintiff's status to the land. §768.075 provides that a person or organization owning or controlling an interest in real property is not liable for any civil damage for the death or injury or damage to any "discovered or undiscovered trespasser."

Basically, in a premises liability case, the only duty a property owner owes to an undiscovered trespasser is to refrain from causing intentional harm. The only duty it owes to a discovered or known trespasser is to refrain from gross negligence and intentional harm, and to warn of known conditions that are not readily observable by others. There is an overlap however, when a property owner injures the trespasser as a result of the owner's "active conduct," as opposed to the condition of the premises.

The Fourth District explained that no Florida court has ever considered whether negligent security cases are governed under standards of premises liability, or those of ordinary negligence. It did point to a body of law supporting the former.

Ordinary negligence, the court wrote, involves active negligence, meaning that the tortfeasor actually does something to harm the injured party. Premises liability, conversely, involves passive negligence, meaning the tortfeasor's "failure to do something" to its property resulted in harm to the injured party. As negligent security actions concern the landowner's failure to keep the premises safe and secure from foreseeable criminal activity, it follows that they fall under the umbrella of premises liability, as opposed to ordinary negligence.

The court finally observed that had the plaintiff been shot one block from the apartment complex, she would have had no basis to sue the complex, pointing out that her theory of liability was totally dependent upon her being shot on the complex's land. This illustrated further that the suit stemmed from premises liability, and not ordinary negligence.

NON-LAWYERS NOT AUTHORIZED TO SELL PERSONAL SERVICE OR QUALIFIED INCOME TRUST FORMS OR KITS IN THE AREA OF MEDICAID PLANNING--IT CONSITUTES THE UNLICENSED PRACTICE OF LAW FOR A NON-LAWYER TO RENDER LEGAL ADVICE REGARDING THE IMPLEMENTATION OF FLORIDA LAW TO OBTAIN MEDICAID BENEFITS.

The Florida Bar Re: Advisory Opinion – Medicaid Planning Activities by Nonlawyers, 40 Fla. Law Weekly S14 (Fla. January 15, 2015).

TRIAL COURT PROPERLY RULED BEACH RESORT OWED NO DUTY OF CARE TO PLAINTIFF INJURED SEVERAL MILES AWAY FROM THE RESORT--LANGUAGE OF STATUTE BARRED PLAINTIFF'S THEORY OF LIABILITY.

Hall v. West, 40 Fla. Law Weekly D122 (Fla. 2nd DCA January 7, 2015):

Plaintiff suffered serious injury when struck by a speeding car driven by a man visiting a resort. The driver had consumed alcoholic beverages before and after arriving at the resort, and was intoxicated. The resort's security personnel told the driver to leave the premises, and escorted him and his friends to their car. Two hours later, and 13 miles away, the driver struck the plaintiff with a blood alcohol level at .188.

Plaintiff asserted that the resort failed to recognize patrons who entered the premises intoxicated, failed to prevent patrons from being served excessive amounts of alcohol, failed to ensure that an intoxicated patron left the premises safely, failed to employ responsible individuals to exercise due care in dealing with intoxicated patrons, and failed to employ responsible individuals to follow the policies and procedures to ensure intoxicated patrons leave the premises safely.

Looking at the language of §768.125, the court noted that the legislature barred plaintiff's theory of recovery. The statute excuses the resort from liability for injury or damage "caused by or resulting from" the intoxication of the person served. On that basis alone, the court affirmed the trial court's summary judgment.

The court also rejected that the *Bardy v. Walt Disney* case creates an exception to this statute. That case held that Disney had a duty to refrain from ordering its employees to leave the premises, unless it reasonably believed that the employee could drive safely after a guard ordered an intoxicated employee to move his car and leave the premises. Finding the instant facts to be meaningfully different from *Bardy* the court reiterated no duty owed to the plaintiff.

AS LONG AS AN INDIVIDUAL WAS A CITIZEN OR RESIDENT OF FLORIDA AS OF THE CUT-OFF DATE OF 11/21/96, HIS OR HER SMOKING RELATED ILLNESS AND SMOKING RELATED ILLNESS MANIFESTED ON OR BEFORE THAT DATE, AND RESULTED FROM THE INDIVIDUAL'S ADDICTION TO CIGARETTES CONTAINING NICOTINE, THE COURT HELD THE INDIVIDUAL IS A MEMBER OF THE *ENGLE* CLASS AND ENTITLED TO TAKE ADVANTAGE OF THE ONE-YEAR FILING WINDOW.

Damianakis v. Philip Morris, 40 Fla. Law Weekly D130 (Fla. January 7, 2015):

However, the court in this tobacco case certified conflict with two other cases that decided otherwise.

TRIAL COURT DID NOT ERR IN DENYING MOTION TO DISMISS THE PLAINTIFF'S BREACH OF POLICY CLAIM AGAINST THE INSURER WITH PREJUDICE, BUT THE COURT <u>DID</u> DEPART FROM THE ESSENTIAL REQUIREMENTS OF LAW IN DENYING THE MOTION TO SEVER THE PLAINTIFF'S BREACH OF POLICY CLAIM AGAINST THE INSURER, FROM NEGLIGENCE CLAIM AGAINST THE INSURED.

Starr Indemnity v. Morris, 40 Fla. Law Weekly D147 (Fla. 3rd DCA January 7, 2015):

Starr was the insurance provider for a fishing company. The plaintiff slipped on a bucket on the deck of the ship and suffered serious injury. She subsequently sued the boating company for negligence, and added a breach of contract claim against the insurance company. The plaintiff's breach of contract claim was not premised on liability coverage, but rather on the fact that the plaintiff was an omnibus insured under the insurer's medical coverage clause, which she argued contractually entitled her to recover medical costs.

The insurer filed a motion to dismiss based on Florida's non-joinder statute (providing that a liability insurer cannot be joined in the tort suit against an insured until a settlement or verdict is entered). The trial court denied the motion, finding the non-joinder statute did not apply because plaintiff alleged she was an **insured** and therefore, had a direct action.

However, the legislative intent behind the non-joinder statute is to ensure that the availability of insurance has no influence on the jury's determination of the insured's liability and damages. The plaintiff was correct in her assertion that the non-joinder statute did not "technically" apply when she alleged she was an insured under the policy, but the legislative intent mandates that the direct action against the insurance company be severed to prevent jurors from discovering that an insurance company could be held responsible for the judgment.

The trial court should have *severed* the claim, and because the failure to do so would cause irreparable harm, the court granted the petition.

TRIAL COURT DEPARTED FROM ESSENTIAL REQUIREMENTS OF LAW IN DENYING PLAINTIFF'S MOTION FOR PROTECTIVE ORDER AND REQUIRING NON-PARTY WHO RESIDED AND WORKED IN PENNSYLVANIA TO BE DEPOSED IN BROWARD COUNTY.

Philadelphia Indemnity v. Carlton, 40 Fla. Law Weekly D153 (Fla. 4th DCA January 7, 2015):

Because the defendant here failed to demonstrate that the individual deponent was an officer, director, or managing agent of the corporate plaintiff such that the non-resident could be deposed in Broward County where plaintiff had instituted its action for declaratory judgment, the trial court departed from the essential requirements of law in requiring an out-of-state witness to come to Broward County to give a deposition.

TRIAL COURT DID NOT ERR IN FINDING *SLAVIN* DOCTRINE APPLICABLE TO CLAIM AGAINST DESIGN COMPANY--EVIDENCE SUPPORTED FINDING THAT WHILE DESIGN COMPANY WAS NEGLIGENT, DESIGN WAS ACCEPTED AND DISCOVERABLE BY FDOT WITH THE EXERCISE OF REASONABLE CARE.

McIntosh v. Progressive Design, 40 Fla. Law Weekly D160 (Fla. January 7, 2015):

Plaintiff appealed an adverse jury verdict stemming from a tragic car accident that resulted in the death of the plaintiff's father. Plaintiff argued that the trial court erred in finding that the *Slavin* doctrine applied to the design company, that the evidence did not support the jury's finding that the completed intersection had been accepted before the accident, and that the design defect was latent. The Fourth District found no error and affirmed the defense verdict.

In this case, Pembroke Pines asked FDOT to install traffic signals at an intersection. FDOT hired TEI Engineers and Planners who in turn hired Progressive Design and Engineering to design the signals. The design company submitted the traffic signal it designed to FDOT, which provided it to Broward County Traffic Engineering.

During the review process, an FDOT employee commented that a special signal might be necessary to make sure drivers did not see the wrong indication from the quite large, almost diamond-like, interchange design. The design company responded to the comment and FDOT approved their response. Plaintiff's expert opined the FDOT probably spent only a couple of hours reviewing the design plan, while the design company would have spent hundreds of hours. After the design plans were reviewed and almost complete, there was a meeting and FDOT accepted the final comments.

A Broward County employee testified that its acceptance was conditional with final acceptance occurring after the "burn-in." Broward County did not object to the traffic signal's sequencing and conditionally approved the intersection. The design company's engineer described the "burn-"in period as a contractor warranty period where the contractor maintained the traffic signals if something went wrong. After the "burn-in" period concluded, FDOT would then transfer control of the intersection to Broward County for maintenance purposes.

The plaintiff moved for directed verdict based on *Slavin* arguing that Broward County had not accepted the project because the "burn-in" period had not ended. Yet, the trial court denied the motion. The trial court instructed the jury on *Slavin* over plaintiff's objection, and said that if it found the design of the intersection was accepted by FDOT, it had to determine whether FDOT knew about the defects; if it found that FDOT knew of the defects, or should have discovered them, then the verdict should be for the design company.

The jury found the design company was negligent. But it also found FDOT accepted it, and that the negligent design was discoverable with the exercise of reasonable care.

The Fourth District reminded us that *Slavin* was born out of a need to limit a contractor's liability to third persons. As long as a defect is patent and the work is accepted, the law insulates the contractor.

The plaintiff's argument that acceptance did not occur because of the 90-day "burn-in" period had allowed the contractor to correct any errors was rejected. The design company asserted that its work had been completed and accepted by the FDOT months before the accident, and therefore, it no longer had control. The court agreed.

The real dispute was whether the acceptance of the design company's work was to be by FDOT which controlled the project and accepted the design company's design, or by Broward County which would ultimately maintain the intersection. In this case, FDOT controlled the acceptance and each step along the way, was the party in control and bore the burden of correcting the patent defects.

TRIAL COURT DEPARTED FROM ESSENTIAL REQUIREMENTS OF LAW IN PERMITTING PLAINTIFF TO VIEW A POST-ACCIDENT SURVEILLANCE VIDEO BEFORE HER DEPOSITION--FAIRNESS REQUIRED THAT THE DEFENDANT BE PERMITTED TO DEPOSE THE PLAINTIFF BEFORE TURNING OVER THE VIDEO.

Hankerson v. Wiley, 40 Fla. Law Weekly D195 (Fla. 4th DCA January 7, 2015):

In finding that the benefit of the surveillance video may be irreparably lost if the plaintiff is permitted to view the video before the defendant has an opportunity to question the plaintiff, the court found irreparable harm for certiorari jurisdiction, and granted the writ and quashed the order of the circuit court.

Essentially, it is error when a trial court permits a plaintiff to view a post-accident surveillance video before allowing a defendant to depose the plaintiff. The court emphasized that a bright line rule is preferable in this area because it will impose uniformity and avoid disparate rulings based primarily on the identity of the trial judge.

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