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.

FLORIDA LAW WEEKLY
VOLUME 41, NUMBER 6
CASES FROM THE WEEK OF FEBRUARY 12, 2016

WHERE CONTEMPORANEOUS OBJECTION TO ATTORNEY MISCONDUCT IS SUSTAINED AND A CURATIVE INSTRUCTION IS GIVEN, PARTY WHO BELIEVES ERROR HAS NOT BEEN CURED MUST ALSO CONTEMPORANEOUSLY MOVE FOR A MISTRIAL.

Aris v. Applebaum, 41 Fla. Law Weekly D327 (Fla. 3rd DCA February 3, 2016):

Without many facts, the Third District explained that the plaintiffs had objected to a clearly improper question posed at trial by the defendant's attorney. The trial judge sustained the objection, and upon plaintiffs' request, the question was stricken from the record and the jury was instructed to disregard the question. However, plaintiffs did not seek any additional curative instruction, nor did they move for a mistrial.

After what was apparently a defense verdict (or at least a verdict the plaintiffs wanted to appeal, it is unclear from the decision), the plaintiffs moved for a new trial on this basis. The Third District ruled the error was not properly preserved because plaintiffs never sought an additional curative instruction (after the jury was instructed to disregard the question), nor did they move for a mistrial.

The Third District reminded us that the only exception to the preservation requirement is where the error complained of is fundamental. The court stated that upon its review of the record, the objected-to question did not constitute fundamental error (though we do

not know what it is) rendering the failure to contemporaneously move for mistrial, fatal.

CIRCUIT COURT ERRONEOUSLY FOUND EMERGENCY SERVICES PROVIDER ENTITLED TO HAVE ITS BILL PAID, REGARDLESS OF THE EXISTENCE OF A DEDUCTIBLE IN THE INSURANCE CONTRACT.

Progressive Select v. Florida Emergency Physicians, 41 Fla. Law Weekly D335 (Fla. 5th DCA February 5, 2016):

The county court had ruled that under the PIP statute, when a provider of emergency services timely submits its bill within the 30-day window contemplated by the statute, it is entitled to have its bill paid regardless of the existence of a deductible in the insured's insurance contract.

The court rejected that ruling. Citing to other recent cases, it noted that courts have recently rejected such a position and quashed orders just like it. Thus, the emergency services providers are subject to the deductible just like all other providers, notwithstanding the explicit language of §627.736(4)(c).

SHERIFF DID NOT OWE DUTY OF CARE TO A WOMAN WHO STRUCK A DEAD HORSE LYING ON THE ROADWAY, AND WAS SERIOUSLY INJURED WHEN HER CAR FLIPPED AS A RESULT.

Manfre v. Shinkle, 41 Fla. Law Weekly D337 (Fla. 5th DCA February 5, 2016):

On a dark road shortly before sunrise, a woman was driving her car in a rural part of Flagler County when she struck a dead horse lying in the roadway. She was traveling at approximately forty-five miles per hour, and the collision with the dead animal caused her vehicle to flip and land on its roof, causing her significant injuries.

She filed suit against the sheriff, whose deputy had been called out when a report of two horses roaming the side of the road came in. There was no evidence that the plaintiff had any contact with the sheriff prior to her accident. When the deputy responded, he watched as the horses ran up the driveway towards a residence and went back into the pasture. Evidence was presented at trial that the glow from the lights on the patrol car may have spooked the horses and caused them to return to the pasture. The deputy cleared the call without getting out of his car, or attempting to make contact with the property owner.

One of the horses apparently reemerged from the pasture and proceeded to the roadway, where it was struck and killed by a motorist. The dead animal was lying on the roadway when the plaintiff came along. She hit the horse and it flipped her vehicle.

The jury reached a verdict for the plaintiff. However, the sheriff appealed, arguing that it owed no duty to the plaintiff, and even if a duty were owed, the action was barred by sovereign immunity.

Noting that there is "no catalogue that lists every circumstance that may give rise to a duty of care," the court explained that where questions of duty arise in connection with potential governmental liability, there is a general guide called the "public-duty" doctrine. Of the *Trianon* categories, this case potentially fell within the "enforcement of laws and protection of the public safety." Pointing to a statute regarding a sheriff's duty to impound

livestock running on highways, the court found that the statute created a duty to the public at large, not to individuals like the plaintiff. The court also found that the sheriff owed no common law or statutory duty of care to the plaintiff.

The court then looked at the special tort duty exceptions, arising when certain conduct of law enforcement officers creates a special duty to the injured party. The premise of that theory is that a police officer's decision to assume control of a particular situation or individual is accompanied by a corresponding duty to exercise reasonable care. When evaluating whether a duty was created by a foreseeable zone of risk, it is not enough that the risk merely exists or that a particular risk is foreseeable; rather the defendant's conduct must "create or control" the risk before the liability may be imposed.

Here, the deputy never took control over any situation or individual (including the plaintiff). Therefore, he never placed anyone within a "zone of risk."

The court also rejected that the undertaker's doctrine applied here (one who undertakes gratuitously or for consideration to render services is responsible for liability for physical harm resulting, if the failure to exercise such reasonable care increases the risk of such harm or the harm suffered, because of the other's reliance upon the undertaking).

The deputy's arrival upon the scene did not increase any zone of risk as the court found. In fact, his arrival actually caused the horses to re-enter the pasture and lessened the risk that had already existed.

Plaintiff could not have relied on the deputy's undertaking because she had had no contact with the sheriff's deputy prior to her accident. The court ultimately reversed the final judgment for the plaintiff and remanded with instructions to enter judgment for the sheriff.

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