

## Assignment #1 - Writing Assignment

**Writing Assignment - You Be The Judge:** using your best skills of analysis, play the role of an appellate court judge. Write a brief Holding in which you tell me a) what is the outcome (re: should the decision of the trial court stand [affirmed], or should it be overturned [reversed]) and, b) why? But remember – it is not your “opinion” that matters. Instead, it is only the law. So, in writing your holding, your reasoning must be based solely on the application of the law to the facts. In other words, you are telling me a) whether or not the trial court should have used summary judgment and why, and b) if summary judgment was improper whether or not the original defendant should be liable and why. You will be assessed not only on what you decide, but how you got there. This will be submitted in class.

### ***Soldano v. O’Daniels***

**Facts:** This action arises out of a shooting death occurring on August 9, 1977. (NOTE: shooting was result of a fist fight which escalated out of hand) Plaintiff’s father [Darrell Soldano] was shot and killed by one Rudolph Villanueva on that date at defendant’s Happy Jack’s Saloon. This defendant owns and operates the Circle Inn which is an eating establishment located across the street from Happy Jack’s. Plaintiff’s primary cause of action against the defendant was Negligence.

Plaintiff alleges that on the date of the shooting, a patron of Happy Jack’s Saloon (what we may consider a “Good Samaritan”) came into the Circle Inn (from across the street) and informed a Circle Inn employee (defendant’s bartender) that a man had been threatened at Happy Jack’s. He requested the employee either call the police or allow him to use the Circle Inn phone to call the police. (NOTE: this appeal was heard in 1983 – before cell phones – so the only other option would have been to use a public pay phone)

That employee allegedly refused to call the police and allegedly refused to allow the patron to use the phone to make his own call. (NOTE: there was nothing in the record that disclosed the physical location of the telephone — whether on the bar, in a private office behind a closed door or elsewhere)

Plaintiff alleges that the actions of the Circle Inn employee were a breach of the legal duty that the Circle Inn owed to the decedent (which would make O’Daniels, owner of the Circle Inn, partially liable for Soldano’s death)

Defendant argues that the request that its employee call the police is a request that it *do* something. He points to the established rule that one who has not created a peril ordinarily does not have a duty to take affirmative action to assist an imperiled person. It is urged that the alternative request of the patron from Happy Jack’s Saloon that he be allowed to use defendant’s telephone so that he personally could make the call is again a request that the defendant *do* something — assist another to give aid. Defendant pointed out that the law which imposes liability for negligent interference with a third person giving aid to another does not impose the additional duty to *aid* the good samaritan.

The lower court dismissed the case, citing the principle that generally, a person does not have a legal responsibility to help another unless he created a dangerous situation in the first place. NOTE: trial court, in dismissing the case, granted summary judgment – **be sure you know what it is and when is it proper for a judge to use it.**

Soldano appealed.

**Issue:** Does a business establishment incur liability for wrongful death if it denies use of its telephone to a Good Samaritan who explains an emergency situation occurring without and wishes to call the police?

**NOTE:** Think of the rule of law discussed in class in *Kuehn v. Pub Zone*, because it may apply here too. HINT: If there is a duty, then there may be liability. But, if there is no duty, there may never be liability. The key is determining whether or not a duty exists.

## **Stinton v Robin's Wood, Inc.**

**Facts:** At approximately 4:00 p.m. on August 9, 2001, the then 78-year-old Ethel Flanzraich (hereinafter the decedent), slipped and fell on steps in front of 52 Greentree Road in Monticello (hereinafter the subject property). The defendant, Robin's Wood, Inc., owned the subject property where the decedent fell.

On or about January 21, 2003, the decedent commenced this action against the defendant to recover damages for the injuries she allegedly sustained in the fall, including fractures of her left leg and arm. In her bill of particulars, the decedent alleged that her fall was caused by the negligent application of paint to the steps. The defendant identified Anthony Monforte as its employee who painted the steps.

Pursuant to a preliminary conference order dated August 4, 2003, party depositions were to be held on October 8, 2003. After the defendant failed to produce either Monforte or another representative for the **deposition**, the Supreme Court [**NOTE:** The "Supreme Court" here refers to the highest level trial court in New York] ordered the defendant's deposition to be held on April 2, 2004. Again, the defendant failed to produce either Monforte or another representative for the deposition. On July 16, 2004, the Supreme Court so-ordered the parties' stipulation that the defendant would produce its representative for the deposition within 30 days. Despite that so-ordered stipulation, the defendant failed to produce either Monforte or another representative for a deposition.

On August 18, 2004, the decedent moved to strike [**NOTE:** a motion to strike is a judge's order to eliminate all or a portion of a parties complaint/answer from the record] the defendant's answer based upon the defendant's failure to produce its representative for a deposition. In opposition, the defendant argued that it made diligent efforts to produce Monforte for the deposition by sending him letters advising him to appear for the various deposition dates and requesting that he contact the defendant's counsel. The final letter sent to Monforte on May 24, 2004, noted that, if he failed to make arrangements to be deposed by June 4, 2004, the defendant would subpoena him for a deposition. Significantly, all of the letters sent to Monforte were mailed in care of the defendant at the defendant's address.

In an affirmation by the defendant's counsel in opposition to the motion, he affirmed that he had been informed by his client, without stating when, that the defendant no longer employed Monforte. The defendant's counsel asserted that, on August 24, 2004, the defendant served Monforte with a subpoena, demanding that Monforte appear for a deposition on August 31, 2004.

On September 20, 2004, the Supreme Court granted the decedent's motion to strike the defendant's answer. Upon reargument, the defendant maintained that the Supreme Court overlooked evidence that it did not act willfully or contumaciously in failing to appear for a deposition since Monforte was no longer in its employ and, thus, it had no one to produce with personal knowledge regarding the painting of the steps at the subject property. On November 9, 2004, the same court and justice denied the defendant's motion for leave to reargue.

Thereafter, on March 14, 2005, the Supreme Court conducted an inquest on the issue of damages, and upon its conclusion, directed that a judgment be entered in the decedent's favor in the sums of \$150,000 for future pain and suffering, \$300,000 for past pain and suffering, and \$22,631 for medical expenses.

On the next day, March 15, 2005, the decedent died. Following the substitution of the plaintiff Joyce Stinton, as executrix of the decedent's estate, on March 17, 2006, a judgment was entered in the plaintiff's favor in the principal sum of \$472,631.

Meanwhile, the defendant moved to set aside the damages awarded for future pain and suffering, arguing that, since the decedent died the day after the future pain and suffering award was made, that award "is now 'overcompensation' as [the decedent] is clearly no longer suffering from her alleged injury."

**Issue:** Did the trial court abuse its discretion by striking Robin's Wood's answer?

**NOTE:** To properly analyze this case, you will need to determine when is it proper for a court to grant a motion to strike AND whether in this particular instance it was proper.