THE WEEK IN TORTS

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TRIAL COURT DID NOT ABUSE DISCRETION BY EXCLUDING TESTIMONY OF DEFENDANT REGARDING ACCIDENT SCENE MEASUREMENTS HE TOOK SEVERAL DAYS BEFORE TRIAL--ERRONEOUS AWARD OF DAMAGES FOR LOSS OF FUTURE EARNING CAPACITY RESULTED FROM ERRONEOUS CALCULATIONS GIVEN TO JURY BY PLAINTIFF IN CLOSING ARGUMENT

Killner v. David, 39 Fla. L. Weekly D1147 (Fla. 5th DCA May 30, 2014):

Plaintiff was riding a motorcycle on a highway with a posted speed limit of 45 mph. The defendant exited a parking lot by turning left onto the highway and collided with her. The defendant testified he did not see the plaintiff's motorcycle until immediately before the collision.

The defendants listed James Ipser as an expert in accident reconstruction. The witness list also disclosed the defendant himself as a witness on the topic of liability and damages. The defendant withdrew Ipser shortly thereafter.

The plaintiffs filed a synopsis of witness testimony describing the engineer that viewed the videotape surveillance and calculated the plaintiff's speed and her opportunity to avoid the defendant. The synopsis further disclosed that plaintiffs' expert would present a breakdown of the surveillance video and animation of the accident.

The next day, defendants filed separate witness testimony synopses, but did not list an accident reconstructionist or the defendant as a witness. There was no discussion of distance, measurements, or the plaintiff's speed.

Two weeks later, the trial began. The plaintiffs' expert used accident scene measurements and detailed surveillance footage to establish the plaintiff's speed at the time of the accident. However, plaintiffs' expert never physically measured the accident scene opting to use computer programs, Google Aerial and Google Earth Pro for such measurements.

When the defense called the defendant himself to challenge the plaintiffs' expert's measurements, counsel asked him if he had gone out and taken measurements to identify the point of impact. The court admonished the defendants that such testimony was not coming in because it was never listed, and it was being disclosed long after discovery cut off. The defendant then tried to ask more questions which the court ruled could not be asked because they were never covered in any depositions. Oddly, the defendant himself had measured the accident scene and wanted to offer those measurements against plaintiffs' witness's reconstruction.

Using *Binger*, the court said that while the plaintiffs should have expected the defendant to testify at trial based on prior disclosures, the ability to cure the prejudice was hampered because plaintiffs' expert had already fully testified and been released before plaintiffs ever learned of this testimony (is that the **only** reason it was unfair prejudice?!). The court also found that defendants having waited to reveal the defendant's measurements until he testified, was "concerning." The appellants had engaged in a deliberate strategy of first disclosing and then withdrawing an accident reconstructionist who would have testified about these critical distances and none of the documents the defendants filed with the lower court demonstrated the defendant's intent to challenge the plaintiffs' expert's measurements and calculations.

Finally, allowing the defendant to testify in this manner would have disrupted the trial because all parties would have needed a recess to engage in further discovery, see inspection, etc. (Personally, I think I would have just said it defies all commonsense and fair play to let the defendant take his own measurements the Sunday before trial and testify about them, but I guess that's just me!)

Based on the math error made by the plaintiffs' attorney in closing, the earning capacity award was $30,000 less than the jury awarded and needed to be adjusted accordingly.

SUMMARY JUDGMENT REVERSED WHERE QUESTIONS OF FACT EXIST AS TO WHAT CAUSED TRIP AND WHETHER OBJECT WAS OPEN AND OBVIOUS

Richards v. Walt Disney World, 39 Fla. L. Weekly D1143 (Fla. 5th DCA May 30, 2014):

Court concluded a question of fact existed as to what caused the plaintiff to trip, and whether the object that caused the trip and fall was open and obvious.