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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TRIAL COURT ERRED IN INCREASING DAMAGES AWARDED TO PLAINTIFF FOR PAIN AND SUFFERING VIA AN ADDITUR, WHEN THE VERDICT WAS REASONABLY BASED ON EVIDENCE.

Ortega v. Belony, 41 Fla. Law Weekly D33 (Fla. 3rd DCA December 30, 2015):

A man suffered a broken neck and wore a "halo" for three months while his break mended (instead of having surgery). During that time, he lived with his brother who assisted him with his bathing and other needs. He experienced difficulty sleeping, and on one occasion had to go back to the hospital to have the screws in the halo tightened. At the end of the three months, the plaintiff was substantially better, suffering only from mild neck pain.

Less than a year after the accident, plaintiff sought treatment for neck pain from an orthopedic spinal surgeon, but at that point his neck fracture had almost completely healed. The doctor recommended surgery, which the plaintiff again refused instead opting for three injections. After the injections, the plaintiff felt almost normal, and by the time of trial had no difficulty performing the activities of daily living and had not returned to seek treatment from the doctor in over a year. He did not intend on having any future surgical procedures either.

The jury found the plaintiff 70% comparatively negligent, but awarded him his full $32,000 in past and future medical expenses. It awarded "zero" damages for past and future pain

and suffering. Believing that number to be contrary to the evidence, the trial court ordered the jury to reconsider the award. After additional deliberations, it awarded the plaintiff $5,000. Plaintiff moved for an additur which the trial judge granted, awarding an additional $250,000.

The well-established test for determining the adequacy of a jury verdict is simply whether a jury of reasonable people could have returned that verdict. The trial judge may not sit as the seventh juror.

In this case, the court concluded that, as a matter of law, a jury of reasonable persons could not have reached a $5,000 award for pain and suffering on the evidence presented. The record did not establish that the jury was improperly influenced by prejudice, passion or corruption. Instead, the jury saw a stoic plaintiff whose injuries healed quickly after a three month recovery, and one who needed no future medical treatment. Although the plaintiff suffered a severe permanent injury in the car accident, he had proven to be "resilient in his recovery" and by the time of trial felt almost normal.

The court reversed for reinstatement of the jury's verdict. Nice reward for his resilience and stoicism!

THE COURT MAY ONLY AWARD ATTORNEY'S FEES WHEN THEY ARE EXPRESSLY PROVIDED FOR BY STATUTE, RULE OR CONTRACT.

City of Miami Beach v. Deutzman, 41 Fla. Law Weekly D10 (Fla. 3rd DCA December 23, 2015):

The plaintiff moved for and was awarded attorney's fees, without any cited basis for so doing. As it is impermissible to award fees unless there is a statute, rule or contractual provision providing for them, the court reversed.

AN AFRICAN AMERICAN JUROR'S INITIAL STATEMENT THAT HE WOULD NOT FOLLOW THE LAW WAS A VALID RACE-NEUTRAL REASON FOR THE STATE'S PEREMPTORY STRIKE.

Johnson v. State, 41 Fla. Law Weekly D10 (Fla. 3rd DCA December 23, 2015).

TRIAL COURT PROPERLY AWARDED A 1.5 MULTIPLIER WHERE NO OTHER ATTORNEY IN THE RELEVANT MARKET WOULD AGREE TO REPRESENT THE PLAINTIFF UNDER THE CONTINGENCY FEE AGREEMENT SHE NEEDED-IMPROPER TO AWARD FEES FOR COUNSEL'S TRAVEL TIME AND COSTS FOR TRAVEL EXPENSES.

Citizens Property v. Pulloquinga, 41 Fla. Law Weekly D30 (Fla. 3rd DCA December 30, 2015):

The plaintiff had a homeowner's insurance policy with Citizens when her home was destroyed by fire. She gave an EUO with no attorney present, and provided documents to support the loss. Citizens gave her $5,000 but made no other payments. She eventually had to file an action to obtain payment under the policy.

For the two years between the date of the fire and trial date, the plaintiff was required to maintain payment of her mortgage and provide for alternative housing. This left her in a

dire financial situation.

Citizens then accused the insured of arson, threatened §57.105 sanctions when she filed suit, and claimed there was no coverage. Approximately 27 depositions were taken from Jacksonville to Key West, and multiple hearings were held, including four summary judgment motions. The case was set for trial twice, and summary judgment was eventually entered in the plaintiff's favor on all of Citizens' defenses. On the eve of a rescheduled trial, Citizens capitulated and agreed to pay the full policy limits as well as the insured's attorney's fees and costs.

The trial court awarded plaintiff's attorney a 1.5 multiplier (seems like it warranted a 2.0, but that's just me), finding that the case required "significant high quality time, labor and effort" by the insured's counsel who obtained an excellent result of the full policy limits. The trial court also found the difficulty and complexity of the positions taken by Citizens, precluded the lawyer's ability to work on other cases, and interfered with the plaintiff's counsel's ability to procure new business.

The court observed the case involved the total destruction of the plaintiff's home and personal property, the very difficult circumstances of keeping her mortgage current, and not being able to live in that home, while also being relegated to meager living conditions during that time.

The evidence regarding the multiplier showed that the plaintiff interviewed seven attorneys who would have accepted her case with an up-front fee arrangement and a few others who would have accepted it if she would be willing to agree to a partial settlement. However, she was not financially able to pay up-front fees and could not agree to a partial settlement because of the amount remaining on her mortgage. Thus, she was forced into an all or nothing position.

The trial court heard direct evidence that there were no other attorneys willing to accept her case who were willing to take the case on a contingency and to try it to final judgment. The court concluded that the finding in favor of a multiplier on that basis was supported by competent and substantial evidence. The court also found the trial judge appropriately applied the multiplier after considering the other *Quanstrom* factors.

However, the court did reverse the award for travel time. Under the Uniform Guidelines, travel time should not be awarded, nor should travel expenses under these circumstances. It was also error to award expenses for backup expert fees, where the plaintiff did not establish the necessity of the fee.

SHERIFF AND DEPUTY ARE NOT JOINT TORTFEASORS AND THEREFORE, JOINT TORTFEASOR EXCEPTION TO HOME VENUE PRIVILEGE DID NOT APPLY TO CHANGE VENUE.

Hunter v. Shaw, 41 Fla. Law Weekly D43 (Fla. 1st DCA December 31, 2015):

The state and its agencies and subdivisions including county sheriffs, enjoy a home venue privilege. That means that venue in civil actions brought against the state or one of its agencies properly lies in the county where the state, agency or subdivision maintains its principal headquarters.

There are only four exceptions to this privilege, one of them being when the state entity

has acted as a "joint tortfeasors." Joint tortfeasors are usually defined as two or more negligent entities whose conduct combines to produce a single injury.

Defendants who are vicariously liable--like the sheriff and his deputy--are not joint tortfeasors within the meaning of this exception. They are principal and master, subject to respondeat superior, and while the two doctrines have been confused, in the truest sense, masters and servants are not joint tortfeasors when the only relationship which the master has to the tort of the servant, is that he is his employer.

UNFLATTERING COMMENTS FROM THE BENCH ARE NOT ENOUGH TO REQUIRE DISQUALIFICATION, UNLESS THEY INDICATE THAT THE JUDGE HAS PRE-JUDGED THE CASE OR WAS BIASED.

Pilkington v. Pilkington, 41 Fla. Law Weekly D66 (Fla. 5th DCA December 31, 2015):

The trial judge concluded that a motion to disqualify was untimely and legally insufficient. The judge also included a factual comment in the order, that the Petitioner argued could be construed as impermissibly passing upon the truth of facts alleged in the motion. The trial judge inaccurately implied on the record something about the petitioner's presence at a hearing, but made no comments attempting to refute the petitioner's charges of partiality.

The court discussed issues of timeliness regarding the date of a hearing, and the date that the petitioner actually learned of the ruling because of reviewing the transcript. Because the court disposed of the petition on other grounds, though, it did not address the timeliness issues.

The judge had made some comments ("I'll concede that the chronology doesn't make it look real good for the petitioner"…"I agree with you, it doesn't look good, but looks can be deceiving,"…"I understand but I think I enter the order of removal notwithstanding his attempt to play catch up, he violated the trust code and violated his fiduciary duty and admitted it").

Comments from the bench, even unflattering remarks which reflect observations or mental impressions, are not legally sufficient to require disqualification. Additionally, the petitioner's allegation that the judge made several highly questionable rulings was not a basis for disqualification because such rulings **without more** are not legally sufficient for disqualification.

The court denied the petition seeking a writ of prohibition.

Kind Regards

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