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
TRIAL & APPELLATE ATTORNEYS

THE WEEK IN TORTS

FLORIDA LAW WEEKLY
VOLUME 40, NUMBER 4
CASES FROM THE WEEK OF JANUARY 23, 2015

THE TRIAL COURT ERRED IN GRANTING A NEW TRIAL ON DAMAGES FOR THE INITIAL MEDICAL EVALUATION SOUGHT BY THE PLAINTIFF AFTER A ZERO VERDICT, BECAUSE TESTIMONY BY THE DEFENDANT'S EXPERT SUFFICIENTLY SUPPORTED THE CONCLUSION THAT THE IMPACT COULD NOT HAVE CAUSED ANY INJURY TO THE PLAINTIFF – THE JURY MAY RETURN A ZERO DAMAGES VERDICT DESPITE MEDICAL EXPENSES INCURRED FOR DIAGNOSTIC TESTING, WHEN THERE IS AN EXPERT MEDICAL OPINION WHICH CONFLICTS AS TO CAUSATION.

Schwartz v. Wal-Mart, 40 Fla. Law Weekly D215 (Fla. 5th DCA Jan. 16, 2015):

Plaintiff sued Wal-Mart alleging that as a result of its negligence, she was struck in the back by an ornamental pumpkin while shopping and sustained injuries. Wal-Mart admitted the negligent act, but vigorously contested causation and damages. After a three week trial, the jury returned a "zero damages" verdict, finding that Wal-Mart was not the legal cause of the plaintiff's losses.

Thereafter, the trial court granted the plaintiff's motion for new trial as to the issues of damages for the initial medical evaluation after the accident, and nothing more. The plaintiff appealed that order contending that the retrial on damages should not be so

limited. Wal-Mart cross-appealed arguing that it was error for the trial court to grant the new trial in the first place.

At trial, the plaintiff presented evidence supporting that she sustained injury and damages as a result of the incident. Wal-Mart countered with expert testimony, among others, a biomedical engineer, who opined that the degree of force exerted when the pumpkin struck the plaintiff was well below the injury-producing threshold.

In plaintiff's motion for new trial, she argued that at the very least, even if the jury found in Wal-Mart's favor on causation, it should have awarded her damages for at least the cost of the initial medical evaluation, because it was undisputed that she sought medical care and treatment almost immediately after the incident. She cited the general rule that even when a jury finds that a plaintiff is not injured as a result of the accident, the plaintiff is still entitled to recover expenses incurred for medical examination and diagnostic testing reasonably necessary to determining whether the incident caused injuries.

The court noted, however, that there are exceptions to this rule which do allow the jury to return a zero damages verdict despite medical expenses for diagnostic testing, such as when: (a) sufficient evidence is presented regarding certain factors, including pre-existing injuries, (b) lack of candor with treating physicians, (c) videos showing actual physical capabilities and (d) expert medical opinions which conflict as to causation. Here, Wal-Mart presented such evidence.

The court also concluded that the plaintiff's failure to object to the verdict form and the jury instructions precluded her from seeking relief. Question #1 on the agreed verdict form asked the jury to determine whether the negligence on the part of Wal-Mart was a legal cause of "loss, injury or damage" to the plaintiff. The jury was further instructed that if in answer to the first question "no," it should proceed no further other than to sign and date the verdict form.

Notably, the **plaintiff did not request that the court include an additional paragraph on the verdict form whereby if the jury answered this first question "no," then the jury would next be asked to determine whether it was reasonable and necessary for the plaintiff to have incurred medical expenses for her initial diagnostic care** and, if so, the amount of those expenses.

Additionally, plaintiff never moved for a directed verdict on the issue of recovery for those diagnostic bills and in failing to do so left the issue up to the jury. Therefore, because there was sufficient evidence to support the jury's finding that Wal-Mart did not cause any loss, injury or damage, and because the plaintiff elected to leave the issue up to the jury, the court found that the granting of a new trial was unwarranted and reversed for reinstatement of the verdict and entry of final judgment.

ARBITRATOR'S REMARKS DURING PROCEEDING WERE ALLOWABLE – ARBITRATOR DID NOT EXCEED JURISDICTION AFTER TRIAL COURT PREMATURELY CONFIRMED THE ORDER – NO ABUSE OF DISCRETION IN REDUCING LODESTAR ATTORNEYS FEE AMOUNT IN DETERMINING REASONABLE ATTORNEY'S FEES BECAUSE PARTY RECOVERED SUBSTANTIALLY LESS OF THE DAMAGES IT HAD SOUGHT.

Jomar Properties, LLC v. Bayview Construction Corp., 40 Fla. Law Weekly D206 (Fla. 4th DCA January 14, 2015):

The appellants challenged a final judgment based upon an arbitration award, claiming that the arbitrator showed "evident partiality" based upon comments made at the hearing. They further maintained that because the appellee sought confirmation of the award prior to the determination of pre-award interest, the arbitrator lost jurisdiction to make the award. Both parties challenged the trial court's award of attorney's fees, which the appellee felt was too low and the appellant felt too high.

The claim that the arbitrator's comments at the hearing showed "evident partiality" under § 682.13(1)(b) lacked merit. The standard for determining "evident partiality" is whether there was a "reasonable impression of partiality." In reviewing the arbitrator's comments, the court concluded they did not show any partiality, but instead showed the arbitrator took the time to understand the parties' positions; they did not suggest that the arbitrator was trying to give "tips" to one side.

In this case, the trial court did confirm the arbitration award prematurely, because the arbitrator had contemplated further determination on issues as evidenced in his award. Because the confirmation **was** premature, the arbitrator had not lost jurisdiction to address prejudgement interest.

Finally, the appellant argued that the appellee had not established market rates relative to the hourly rates charged by the associates and paralegals in one of the law firms representing the appellee. In this case, the attorneys testified regarding the reasonableness of the fees.

Because evidence of rates may be introduced through direct evidence of charges by lawyers under similar circumstances or opinion evidence, and because the appellant had stipulated that the appellee was not required to provide expert evidence as to the reasonableness of the fees, when the appellee introduced testimony of its lawyers as to the rates they charge other clients, the evidence was adequate to conclude the reasonableness of the rates charged.

However, on cross-appeal, the appellee asserted that the trial court's reduction of the Lodestar amount in determining the reasonable attorney's fees. While the appellee did prevail on liability on the issues of all of its claims, it had recovered substantially less damages than it had sought. The trial court took those results into consideration in its 13-page order determining the amount of the reasonable fee. Because the results obtained were less than sought, the trial court's reduction of the Lodestar was not an abuse of discretion.

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