

ORIGINAL

IN THE SUPREME COURT
STATE OF FLORIDA

Case No. 93,038

FILED

SID J. WHITE

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MICHAEL JON DiPIETRO and MYRA DiPIETRO,
a/k/a MYRA BELLIO, a/k/a MYRA J. CHANDLER,
a/k/a MYRA LaPOINT, a/k/a MYRA NO LAST NAME, a/k/a MYRA,

Petitioners,

v.

DAVID GRIEFER and ANN GRIEFER, his wife,
as Guardians of the Person and Property of
LAUREL B. GRIEFER, an Incompetent,

Respondents.

AMICUS CURIAE BRIEF
OF
FLORIDA DEFENSE LAWYERS ASSOCIATION

On Discretionary Review from the
Fourth District Court of Appeal

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STATEMENT OF THE CASE AND FACTS

The Florida Defense Lawyers Association accepts the statement of the case and of the facts contained in Petitioner's Brief. For purposes of the argument raised in this Brief,¹ the relevant facts are as follows.

Ms. Griefer was seriously injured when Mr. DiPietro's car hit her. She filed suit, and the jury assessed her damages as being in excess of two million dollars, finding her 70% at fault and Mr. DiPietro 30% at fault. Ms. Griefer appealed, raising four issues, one of which was the trial court's refusal to grant an additur. The District Court reversed, but on other grounds. After initially reversing for a new trial on all issues, the District Court on rehearing determined that no error had affected the jury's determination of damages, and accordingly remanded for a new trial on liability only.

That trial was conducted, and the second jury found Ms. Griefer 90% at fault and Mr. DiPietro 10% at fault. Again Ms. Griefer appealed, asserting a number of errors. Once again, the District Court reversed and remanded for still another trial. However, the District Court affirmed the trial court's determination that (if she prevails in the third trial) Ms. Griefer would be entitled to pre-judgment interest from September 4, 1991, the date that the jury in the first trial determined her total damages.

¹We express no opinion on any issue other than the award of pre-judgment interest.

SUMMARY OF ARGUMENT

In ruling on the question of pre-judgment interest, the District Court acted prematurely, rendering an improper advisory opinion on an issue which might well not recur in the third trial. Instead, it should simply have expressly declined to reach the issue.

If the Court reaches the merits, it should reverse. Florida law has always been clear that pre-judgment interest does not apply to unliquidated damage claims in personal injury cases. Damages are not liquidated if the ascertainment of their sum requires the taking of testimony to ascertain facts on which to base a value judgment.

Although Ms. Griefer's total damages are fixed, her recoverable damages are unliquidated and could be anywhere from zero to in excess of two million dollars. What the recoverable damages will be must depend on the taking of testimony to ascertain facts on which to base a value judgment as to the comparative fault of the parties.

The District Court's ruling that pre-judgment interest from the date of the first jury's verdict would be included in any judgment following the third trial was both premature and erroneous, and should be reversed.

ARGUMENT

PRE-JUDGMENT INTEREST SHOULD NOT BE AWARDED IN SITUATIONS IN WHICH UNRESOLVED ISSUES OF COMPARATIVE FAULT MAKE PLAINTIFF'S RECOVERABLE DAMAGES UNLIQUIDATED.

Initially, we suggest that the District Court's decision on this issue is premature. If a third jury should find that Mr. DiPietro was wholly without fault (not that unlikely an outcome in light of the decisions of the first two juries), the issue will not arise. Accordingly, the District Court should have done what it did with regard to several other issues--expressly decline to reach this issue. Instead, it issued an improper advisory opinion. This Court should vacate that part of the District Court's decision for that reason.

If the Court decides to reach the merits of this issue, it should reverse the District Court. In the present case, the jury in 1991 determined the extent of Ms. Griefer's total damages, assessing them at slightly over two million dollars. Ms. Griefer appealed, raising on appeal, inter alia, the trial court's refusal to grant an additur. The District Court affirmed the trial court on that point, but reversed on other grounds. On rehearing, the District Court directed that the new trial be on liability alone. Griefer v. DiPietro, 625 So.2d 1226 (Fla. 4th DCA 1993). The jury in that second trial assessed even more of the fault to Ms. Griefer, and she again appealed and obtained a reversal. Griefer v. DiPietro, 708 So.2d 666 (Fla. 4th DCA 1998). As a result, a third trial will now be required.

Although the extent of Ms. Griefer's total damages has been assessed, the extent to which Mr. DiPietro must pay those damages (i.e., the recoverable damages) remains open. A third jury might find him wholly without fault, or might agree with the first jury that he was 30% at fault, or with the second jury that he was 10% at fault, or may have some other assessment entirely. Until, however, there is a binding determination of the comparative negligence of the parties, the extent of Ms. Griefer's recoverable damages will remain unknown.

Since Ms. Griefer's recoverable damages could be anywhere from zero to in excess of two million dollars, those damages are unliquidated. Florida law has always been clear that pre-judgment interest does not apply to unliquidated damage claims in personal injury cases. Jackson Grain Co. v. Hoskins, 75 So.2d 306 (Fla. 1954); Zorn v. Britton, 120 Fla. 304, 162 So. 879 (1935).

In Alvarado v. Rice, 614 So.2d 498 (Fla. 1993), this Court recognized a limited exception to that rule, holding that a personal injury plaintiff would be entitled to pre-judgment interest on past medical expenses if the plaintiff had made actual out-of-pocket payments on those bills at a date prior to entry of judgment. Since plaintiff in Alvarado had not, in fact, paid the medical bills, the Court held that she was not entitled to pre-judgment interest as to those items. In recognizing the exception in Alvarado, however, the Court left intact the general rule.

A claim for damages is held to be liquidated in character if the amount is fixed, has been agreed upon, or is capable of

ascertainment by mathematical computation or operation of law. Asian Imports, Inc. v. Pepe, 633 So.2d 551 (Fla. 1st DCA 1994); Robinson v. Loyola Foundation, Inc., 236 So.2d 154 (Fla. 1st DCA 1970). Damages are not liquidated if the ascertainment of their exact sum requires the taking of testimony to ascertain facts on which to base a value judgment. Asian Imports, Inc. v. Pepe, supra. Patently, the amount which Mr. DiPietro will ultimately owe Ms. Grierfer cannot be determined without the taking of testimony, in the form of the third trial, to establish comparative fault. Indeed, it is possible that the third jury will find Mr. DiPietro wholly free of fault, in which case he will owe Ms. Grierfer nothing. It is also possible that they will find him 100% at fault, in which case she will recover more than two million dollars. Thus, even though the total amount of damages is fixed, the amount of recoverable damages is unliquidated.

In Palm Beach County School Board v. Montgomery, 641 So.2d 183 (Fla. 4th DCA 1994), the Fourth District affirmed a lower court's award of interest from the date of the verdict, rather than from the date final judgment was entered, noting that six months had passed between the date of the jury verdict and the date final judgment was entered following a ruling on post-trial motions. The Fourth District held that the jury verdict liquidated the amount of plaintiff's damages, and that plaintiff was accordingly entitled to pre-judgment interest on those damages from the date of verdict to the date of final judgment. The First District, however, has ruled directly to the contrary.

We submit that the correct path is shown by the First District Court of Appeal's decision in Rockman v. Barnes, 672 So.2d 890 (Fla. 1st DCA 1996). In that automobile negligence action, the jury rendered a verdict for plaintiff. In affirming that decision, the First District held that interest accrued from the date judgment was entered, not from the date the verdict was rendered. In Rockman, the date the verdict was rendered provided both a date certain and a sum certain, since the judgment entered on the verdict was affirmed on appeal. Nonetheless, the First District held, interest would not be awarded for the period between the date of the verdict and the date of final judgment. The First District acknowledged conflict with the Fourth District's decision in Palm Beach County School Board v. Montgomery, supra.

Even if Palm Beach County School Board v. Montgomery, supra, were applied, it does not advance Ms. Grier's position. In that case, the jury's verdict was allowed to stand by both the trial judge and the District Court of Appeal. Thus, the recoverable damages were fixed by the jury's verdict, which remained undisturbed. That is not true in the instant case.

Here, although the amount of plaintiff's total damages has been fixed, the amount of her recoverable damages remains uncertain. Only after another trial, when a jury weighs the evidence and inferences and decides the issues of comparative fault, will the extent of plaintiff's recoverable damages be fixed. It is only then that interest should begin to run.

CONCLUSION

The District Court's ruling that interest would begin to run on the date of the first jury's verdict was error, and should be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail on this 19th day of November, 1998, to:

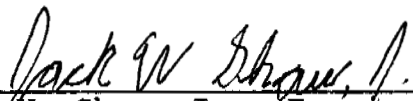
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