OA 4-5-99

FILED
SID J. WHITE
JAN 6 1999
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO. 93,038

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,

-vs-

DAVID GRIEFER and ANN GRIEFER, his wife, as Guardians of the person and property of LAUREL B. GRIEFER, an incompetent,

Respondents.
_____/

BRIEF OF AMICUS CURIAE ACADEMY OF FLORIDA TRIAL LAWYERS

CARUSO, BURLINGTON,
BOHN & COMPIANI, P.A.
Suite 3A/Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
(561) 686-8010
Attorneys for Amicus Curiae
Academy of Florida Trial Lawyers

CERTIFICATE OF TYPE SIZE & STYLE

Appellant hereby certifies that the type size and style of the Initial Brief of Appellants is Times New Roman 14pt.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PREFACE

This case is before the Court on a Petition for Review to resolve an alleged conflict between different District Courts regarding the computation of interest on damage awards in personal injury actions. The Academy of Florida Trial Lawyers is a state-wide voluntary association of more than 3,000 attorneys, whose practices emphasize litigation for the protection of personal and property rights of individuals. The issue before this Court is of state-wide significance, and involves a fundamental consideration in the provision of fair compensation to injured plaintiffs. Therefore, the Academy has requested leave to appear as Amicus Curiae in this case to address issues involved in this Court's consideration.

ARGUMENT

THE FOURTH DISTRICT PROPERLY DETERMINED THAT INTEREST SHOULD RUN FROM THE DATE OF THE VERDICT IN A PERSONAL INJURY ACTION.

The Fourth District properly held that interest should run from the date that the jury originally determined the amount of the Plaintiffs' damages, since that is the point at which the Plaintiffs' loss was liquidated. This is consistent with the policy underlying prejudgment interest, as well as the existing framework for damage determinations in jury trials as reflected in the jury instructions, verdict form, and rules relating to the calculation of personal injury damages. To hold otherwise would result in an inequitable windfall to defendants in such cases, and would create doctrinal and practical anomalies which could not be justified.

In ARGONAUT INSURANCE CO. v. MAY PLUMBING CO., 474 So.2d 212 (Fla. 1985), this Court unequivocally established Florida law that prejudgment interest is an element of pecuniary damages and is not to be awarded as a penalty for any wrongful act of the defendant, but rather as a means of making the plaintiff whole. In adopting the "loss theory" of prejudgment interest, this Court stated (474 So.2d at 215):

> Under the "loss theory,"...neither the merit of the defense nor the certainty of the amount of loss affects the award of prejudgment interest. Rather, the loss itself is a wrongful deprivation by the defendant of the plaintiff's property. Plaintiff is to be made whole from the date of the loss once a finder of fact has determined the amount of damages and defendant's liability therefor.

This Court emphasized that (Ibid), "Once a verdict has liquidated the damages as of a date certain, computation of prejudgment interest is merely a mathematical computation." Thus, the verdict, not the judgment, was deemed to be the critical determination of damages for purposes of the interest calculation.

This Court has previously held that prejudgment interest is not normally appropriate in personal injury actions,[1] see PARKER v. BRINSON CONSTRUCTION CO., 78 So.2d 873 (Fla. 1955). In that case, this Court quoted with approval from its prior decision in JACKSON GRAIN CO. v. HOSKINS, 75 So.2d 306, 310 (Fla. 1954), as follows:

> Apparently an exception to the allowance of [prejudgment] interest has been made in personal injury cases because of the speculative nature of some items of damage, such as mental anguish, and the indefiniteness of items such as future pain and suffering. *Farrelly v. Heuacker*, 118 Fla. 340, 159 So. 24. See also *Penny v.*

---

[1]/This Court has recognized an exception to that rule for out-of-pocket payments of medical expenses for which a personal injury plaintiff may obtain prejudgment interest, ALVARADO v. RICE, 614 So.2d 498 (Fla. 1993).

Atlantic Coast Line R. Co., 161 N.C. 523, 77 S.E. 774, Ann.Cas. 1914D, 992.

It is significant that in the FARRELLY case cited therein, this Court justified the exception in personal injury cases on the basis that "the amount and the measure of damages is largely discretionary with the jury and is inconsequence unliquidated until the trial" (Emphasis supplied. Citations omitted), 159 So. at 25. Thus, even the seminal cases on this point support the conclusion that it is the verdict which liquidates personal injury damages. Therefore, consistent with the "loss theory" explained in ARGONAUT, a plaintiff should be entitled to an award of interest from the date of the verdict, in order to be made whole.

Defendants argue that prejudgment interest is not appropriate because there is still uncertainty regarding the amount of the damages after a verdict in a personal injury case. In this case, the comparative negligence finding subsequently resulted in a reduction in the amount of Plaintiffs' damages. However, as this Court explained in ARGONAUT, under the "loss theory," neither the merit of the defenses nor the uncertainty of the damages affects the plaintiff's entitlement to an award of prejudgment interest, 474 So.2d at 215. In fact, although ARGONAUT was a contractual subrogation case, it was precisely a determination of comparative negligence which rendered some uncertainty regarding the amount of the plaintiff's damages. Nonetheless, this Court determined that that uncertainty did not preclude

the award of prejudgment interest on the portion of the total damages for which the defendant was determined to be responsible. The same result should obtain here.

The fact that the verdict is recognized in Florida jurisprudence as constituting the liquidation of Plaintiffs' personal injury damages is reflected in Florida's Standard Jury Instructions and Verdict Forms adopted by this Court. Florida Standard Jury Instruction 6.10 instructs the jury regarding the reduction of future pecuniary damages to present value in personal injury cases. The language of that instruction is clear that the jury is to make that determination based on the date of its verdict, Fla.St.J.Inst. 6.10. That conclusion is further supported by the model forms of verdict itemizing personal injury damages, see Model Form of Verdict 8.1 and 8.2. To require the jury to engage in those complicated calculations without the verdict being the operative date for interest calculation, would make those computations a mere futile exercise.

Clearly, the reduction to present value is based on the same principle as prejudgment interest, i.e., it is a recognition of the time value of money. However, if the time value of the award is not determined as of the date of the verdict, but rather at some future and undetermined date, the jury's present value calculation is meaningless and does not bear any logical relationship to the concept of fair compensation. The case sub judice is an excellent example of that, since the jury's

calculations regarding future economic losses was made approximately eight years ago, yet the Defendants argue that the Plaintiff is not entitled to any compensation for the loss of use of that money during that entire period of time. Under Defendant's argument, the jury's reduction to present value of the Plaintiffs' future economic damages bears no reasonable relationship to the Plaintiffs' actual loss. The Fourth District expressly noted that concern in its decision, GRIEFER v. DiPIETRO, 708 So.2d 666, 673 (Fla. 4th DCA 1998).

Fla.R.App.P. 9.340(c) also demonstrates that Florida's jurisprudence relies on the verdict as the operative date for purposes of interest calculations on damages. That rule provides:

> When a judgment of reversal is entered which requires the entry of a money judgment on a verdict, the mandate shall be deemed to require such money judgment to be entered as of the date of the verdict.

It is important to note that Rule 9.340(c) does not require that the judgment on mandate adopt the exact damages awarded in the verdict. In GREEN v. RETY, 616 So.2d 433 (Fla. 1993), the Third District had previously ordered a remittitur of a verdict but, on a subsequent appeal, ruled that the judgment on mandate should have been entered as of the date of the verdict, with interest accruing from that date, RETY v. GREEN, 595 So.2d 1036 (Fla. 3d DCA 1992). The Third District certified to this Court the question of whether Rule 9.340(c) applied in that

situation, Ibid. This Court determined that even though, after mandate, the Plaintiff still had the option to reject the remittitur (but did not), Rule 9.340(c) was properly applied under those circumstances. This Court stated that Rule 9.340(c) did not require that the trial court must have entered judgment in the original proceedings, but only that a verdict must have been returned, 616 So.2d at 435. This Court determined that the rule applied, and that "all interest will be computed from the date of the verdict" (Ibid).

It is also significant to note that Justice Grimes concurred in the majority opinion in RETY, although he concluded that the language of the rule did not apply. Justice Grimes stated that, since there was no requirement to enter a judgment upon remand because as a prerequisite the plaintiff would have to accept the remittitur (which he did), the exact requirements of the rule were not satisfied. Nonetheless, Justice Grimes agreed with the affirmance of the Third District's decision, stating (Ibid):

> However, the decision we affirm is consistent with the spirit of the rule because the net result permits the plaintiff to recover interest from the date of the verdict on the money he was entitled to recover in the first place.

That same consideration of fairness applies in the case sub judice, as well as other personal injury actions.

Practical considerations also mandate that the verdict be deemed the operative date for determining the commencement of interest. There is no rule of procedure requiring that a judgment be entered at any particular time after entry of a verdict. Whether a judgment is entered soon after the verdict (with the post-trial motions to be addressed thereafter), or the entry of judgment is withheld pending resolution of post-trial motions, is usually a matter of the trial court's preference.

For example, in PALM BEACH COUNTY SCHOOL BOARD v. MONTGOMERY, 641 So.2d 183 (Fla. 4th DCA 1994), the post-trial motions were addressed prior to entry of final judgment, which delayed the entry of judgment until approximately six months after the jury verdict. The court held that interest should run from the date of the verdict, consistent with this Court's analysis in ARGONAUT.

However, in McNITT v. OSBORNE, 371 So.2d 696 (Fla. 3d DCA 1979), the judgment was apparently entered soon after the verdict, and post-trial motions were not resolved for some time thereafter. After those motions were resolved, the defendant argued that interest on the judgment should not run until after the post-trial motions were resolved, and the judgment was rendered final for appellate purposes. The Third District rejected that contention, and held that interest should commence from the judgment.

A comparison of PALM BEACH COUNTY v. MONTGOMERY, supra, and McNITT v. OSBORNE, supra, should make clear that a personal injury plaintiff's right to interest should not depend on whether the trial court prefers to resolve post-trial motions prior to or after entry of judgment. A ruling that interest commences from the date of the verdict eliminates any concern regarding the procedure chosen by the trial court, and ensures certainty, uniformity, and fairness in the application of damage calculations.

A further practical consideration is addressed in Defendant's brief, albeit in a meritless argument. The Defendant's contention that awarding interest from the date of the verdict would discourage settlement by giving the plaintiff an incentive to delay is, frankly, surrealistic. Plaintiffs in personal injury cases, especially catastrophic injury cases such as the case sub judice, have absolutely no motive to delay the payment of damages. In such cases, the damages are desperately and immediately needed to obtain medical care, enable the plaintiff to obtain non-medical assistance such as modifications to homes and vehicles, and to compensate for loss of earnings over an extended period of time. To suggest that a plaintiff has a motivation to delay payment in order to obtain interest for the loss of use of that money is simply out of touch with reality.

In fact, in McNITT v. OSBORNE, supra, the Third District addressed this consideration in rejecting the defendant's argument that interest should not begin to run until post-trial motions are resolved (371 So.2d at 697, n.2):

> Under the contrary holding adopted by the trial court, a litigant could suspend the running of interest merely by filing a frivolous post-trial motion.

That same practical consideration supports the Fourth District's ruling here. Otherwise, a defendant has every motivation to delay entry of the judgment, despite the verdict, in order to obtain the benefit of the investment value of the damage award during that period of time. Requiring interest to run from the date of the verdict levels the playing field as to the time value of money. As discussed previously, that concern is recognized in the Florida Standard Jury Instructions, Standard Verdict Forms, and the appellate rules.

For the reasons stated above, the Fourth District's decision should be approved, and this Court should hold that a plaintiff in a personal injury action is entitled to interest from the date the jury's verdict liquidates the damages. This is consistent with the "loss theory" of prejudgment interest, and is simply a recognition of the time value of money. Such a ruling is also consistent with the Florida Standard Jury Instructions and Model Verdict Forms adopted by this Court, and is further supported by Fla.R.App.P. 9.340(c). It is also fundamentally fair.

CONCLUSION

For the reasons stated above, the Fourth District's decision should be approved.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to ARTHUR J. ENGLAND, JR., ESQ. and PAUL C. SAVAGE, ESQ., 1221 Brickell Ave., Miami, FL 33131; BENJAMIN J. WEAVER, JR., ESQ. and DIANNE J. WEAVER, ESQ., 700 S.E. 3d Ave., Ste. 100, Ft. Lauderdale, FL 33316; EDWARD D. SCHUSTER, ESQ., 110 S.E. 6th St., 20th FL, Ft. Lauderdale, FL 33301; C. DANIEL PETRIE, JR., ESQ., 315 S.E. 7th St., Ste. 300, Ft. Lauderdale, FL 33301, by mail, this 4th day of January, 1999.

CARUSO, BURLINGTON,
BOHN & COMPIANI, P.A.
Suite 3A/Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
(561) 686-8010
Attorneys for Amicus Curiae
Academy of Florida Trial Lawyers

By: _____
PHILIP M. BURLINGTON
Florida Bar No. 285862

C:\WPFILES\DIPIETRO\PLEADING\BRF\GG