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EDS:lam
02/01/99
BL-21706-PK

SUPREME COURT OF FLORIDA

SUPREME CT. CASE NO.: 93,038

4TH DCA CASE NOS.: 96-2481
96-2958, 96-2964 & 97-0223

L.T. CASE NO.: 90-20360-14

Florida Bar #710482

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.

REPLY BRIEF ON REVIEW AND ANSWER BRIEF ON CROSS-REVIEW

ON REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

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PREFACE

Throughout this Brief, the Plaintiffs/Appellants, David Griefer and Ann Griefer, as guardians of Laurel Griefer will be referred to collectively as "Plaintiffs" or as "the Griefers" or by the proper names where appropriate. The Defendants/Appellees, Michael Jon DiPietro and Myra DiPietro, will be referred to collectively as "Defendants" or by their proper names where appropriate. References to the record will be proceeded by "R." followed by the appropriate volume and page numbers. References to transcripts will be proceeded by "Tr." followed by the appropriate volume number and page number.

ARGUMENT

I. THE FOURTH DISTRICT COURT OF APPEAL ERRED REVERSIBLY BY DETERMINING THAT THE GRIEFERS ARE ENTITLED TO PREJUDGMENT INTEREST IN THIS PERSONAL INJURY CASE BY FINDING THAT THE DAMAGES WERE LIQUIDATED BY THE JURY IN THE FIRST TRIAL IN 1991.

The Griefers argue still that this Court has improvidently granted jurisdiction and that review of the District Court decision is unnecessary because the case is unique. However, the Fourth District's holding that interest accrues from the date of the entry of a jury verdict in a case based upon personal injuries, without making a distinction between intangible and future damages and out of pocket losses, expressly and directly conflicts with Alvarado v. Rice, 614 So.2d 498 (Fla. 1993) (which is not even discussed by the District Court); Easkold v. Rhodes, 632 So.2d 146, 147 (Fla. 1st DCA 1994); Rockman v. Barnes, 672 So.2d 890, 891 (Fla. 1st DCA 1994); and Smith v. Dunning, 467 So.2d 465 (Fla. 1st DCA 1985). The Griefers claim that jurisdiction is improvidently granted should be rejected.

On page 12 of their brief, the Griefers, as did the Fourth District Court of Appeal, incorrectly characterize the issue in this case. The issue is stated as if the DiPietros are liable, and it is only a question of "how much" which can be readily determined by review of the 1991 jury verdict.

The DiPietros are not liable to the Griefers for damages in any measure. A review of the verdict still intact in this case offers no clue as to the measure of damages owed by the DiPietros.

The damages in this case are not liquidated, readily ascertainable, and do not fit any other phrase which connotes the ability to know what damages, if any, are due the Griefers. Simply, prejudgment interest cannot attach since: "...the ascertainment of the exact sum requires the taking of testimony to ascertain facts upon which to base a value judgment." Asian Imports v. Pepe, 633 So.2d 551, 553 (Fla. 1st DCA 1994). This is why the Griefers' assertion on page 15 that prejudgment interest really becomes a mathematical computation once a verdict liquidates the damages as of the date certain is a formula that cannot be applied to the instant case at this point. The verdict at bar has not liquidated anything. How would a judge "merely compute" the amount due from the DiPietros from this verdict? It is respectfully submitted that this verdict is incomplete. It does not liquidate the amount of damages due. As a result, it is not the situation contemplated by Argonaut Insurance Company v. May Plumbing Company, 474 So.2d 212 (Fla. 1985) which decided that case on a complete verdict for out of pocket pecuniary losses. This is why the verdict in this case cannot "trigger" the obligation for prejudgment interest.

On pages 16-17 of the brief, the Griefers argue that the result in the Fourth District is consistent with the Argonaut decision which relied in large measure upon and approved the reasoning in Bergen Brunswig Corporation v. State Department of Health and Rehabilitative Services, 415 So.2d 765 (Fla. 1st DCA 1983) rev. den. 426 So.2d 25 (Fla. 1983). The Griefers' argument fails to address the following precept stated by the Bergen

Brunswig court: "...in Florida there has evolved a principal that prejudgment interest may be awarded when damages are a fixed sum or an amount readily ascertainable by simple calculation and not dependent upon the resolution of conflicting evidence, inferences, and interpretations." 415 So.2d 765, 767. Emphasis supplied.

This is precisely what is required by a third jury trial and why prejudgment interest cannot be assessed under the circumstances of this case. Unlike the contract cases upon which the Griefers rely, the third jury's determination of the percentage of the DiPietros' responsibility is required before any real damages verdict exists.

In addition, both the Griefers and the Fourth District have failed to take into account the importance of the lack of any prior indebtedness by the DiPietros to the Griefers to which interest may attach. The Bergen Brunswig court in large measure relied upon Tech Corp. v. Permutit Company, 321 So.2d 562 (Fla. 4th DCA 1975) which in turn based its decision upon this Court's ruling in Everglade Cypress Company v. Tunnicliffe, 107 Fla. 675, 148 So. 192 (1933). In Everglade Cypress, the Court stated: "[t]he theory on which interest is allowed on any fund is that it may be held in such way that it may be put to work and earn it, that is to say, that the relation of debtor and creditor exists between the owner and user of the fund rather than that of a fiduciary or trustee." 107 Fla. at 681, 148 So. at 194. Emphasis added.

The determination by the third jury that the DiPietros owe the Griefers something, if anything, must exist before interest can

attach. Now, there is no underlying pre-existing obligation or relationship between the parties by judgment or otherwise. The absence of this connection renders the often repeated phrase "the jury verdict fixed the damages due as of a certain date" as the basis to award prejudgment interest in contract cases inapplicable to this, a personal injury case because there are no damages due.

The Griefers statement on page 17 of the brief that the DiPietros are "indebted" to the Griefers for a sum certain is untrue. The Bergen Brunswig, and Tech Corp. courts have, as their basis, an underlying indebtedness or liability to which interest may attach whether or not the debt is actually due at that time or unsatisfied. The Griefers claim that their loss occurred in 1988. However, the bridge over which prejudgment interest may travel from the 1991 jury verdict to the third jury verdict--indebtedness prior to or on 1988--is not present here.[1]

The Griefers also contend that Palm Beach County School Board v. Montgomery, 641 So.2d 183 (Fla. 4th DCA 1994) does not involve a liquidated damage claim with a sum fixed by the jury that remained undisturbed through a subsequent liability proceeding. This contention is wrong. The holding was that a successful claimant is entitled to prejudgment interest on such a claim from the jury verdict to the entry of a judgment. Montgomery, 641 So.2d at 184. There, the award remained undisturbed as to the judgment

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[1] Interestingly, the Griefers do not claim interest from 1988. Apparently, this is a recognition of the inchoate nature of personal injury damages which cannot be ascertained until a full judgment is entered in their favor.

in favor of the plaintiff which was affirmed. This is not the situation here.

The Griefers argue that it is callous for the DiPietros to assert that they have not delayed the ultimate receipt of the money, if any, by them and to contend that it is inequitable to continue to claim interest where there is no incentive to settle. They argue that the DiPietros are the cause of the delay of the payment to Laurel due to errors by the trial court which the Griefers contend were caused by the DiPietros. (Griefers' brief, pp. 22-26) The DiPietros made the argument not to be callous, but to point to the fact that legislatures in other states which permit the recovery of prejudgment interest in personal injury cases do so with the goal of encouraging settlement and to discourage the delay of resolution of cases.[2] Florida follows the common law rule that in the absence of such a statute or rule, prejudgment interest is not available to plaintiffs in cases such as this. Zorn v. Britton, 120 Fla. 304, 307, 162 So. 879, 881 (1935).[3]

For example, the result rendered by the Fourth District Court of Appeal is unfair because, even if the DiPietros are considered "judgment debtors", they cannot tender the amount of any judgment to stop interest from running or place an amount in the Court

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[2] See, eg, Colwell v. Mentzer Investments, Inc., 1998 WL 177699 (Colo. App.).

[3] It should be noted that the Griefers' second appeal in the Fourth District Court of Appeal involved issues of pretrial misconduct due to their failure to comply with the discovery rules and trial court orders resulting in their expert being allowed to testify on a limited basis.

registry. See, e.g., Devolder v. Sandage, 575 So.2d 312, 313 (Fla. 2d DCA 1991). What amount would DiPietro tender? Would 10% of the amount be sufficient since that is what the jury last awarded? If DiPietro paid more than the Griefers actually recover by the third jury's verdict, would he be entitled to an offset for the payment of interest for the loss of use of the amount not ultimately recovered by the Griefers? It is sufficient to say that under these circumstances, prejudgment interest should not be recoverable.

Undoubtedly, the Griefers are entitled to interest upon actual, out of pocket losses they incurred as a result of the accident should a third liability trial result in a verdict against the DiPietros. This is because they have sustained an actual loss in the vested right to that money. Alvarado, supra. However, the Griefers gloss over the fact that future damages is included in the amount of the first jury verdict. Clearly, these damages cannot be considered to be out of pocket expenses. Prejudgment interest cannot attach to future or intangible losses to which there is no vested interest and since there is no wrongful withholding of payment. Parker v. Brinson Construction Company, 78 So.2d 873 (Fla. 1955); Jackson Grain Company v. Hoskins, 875 So.2d 306 (Fla. 1954).

The graphs included in the Griefers' brief and the arguments based upon them should not be considered by the Court as they were not presented below.[4] Moreover, there is no foundation as to the

[4] Sheldon v. Tiernan, 147 So.2d 593 (Fla. 2d DCA 1962).

basis or foundation for the results shown by the graphs which also include future and intangible damages. However, even if considered, the results are speculative at best. The timing of investing in the various markets may result in a profit or a loss. Gain is not guaranteed. And, whether the DiPietros could have made money by investing does not overcome the common law holdings of this Court which are that the Griefers are not entitled to interest on anything but tangible, out of pocket expenses for medical care and are not entitled to interest for future damages, and intangible damages.

The Fourth District's ruling must be reversed to adhere to the well founded rule that absent a statute which has procedural safeguards for both parties not present here, prejudgment interest is not awardable in cases such as the one at bar. Prejudgment interest should not be awarded in cases such as this until a full verdict is returned in the Griefers' favor thereby establishing the measure of damages; and a vested interest by the Griefers in those damages resulting in a debtor, creditor relationship for which the obligation for the payment of interest to the Griefers arises at that time. Accordingly, the Fourth District Court of Appeal's decision to the contrary must be reversed.

II. THE TRIAL COURT PROPERLY PRECLUDED DR. SNYDER FROM TESTIFYING IN THE PLAINTIFFS' CASE-IN-CHIEF; AND THE FOURTH DISTRICT COMMITTED REVERSIBLE ERROR IN DETERMINING THAT THE TRIAL JUDGE ABUSED HIS DISCRETION.

The Griefers argue that this Court should not review the grounds for reversal of the jury verdict set forth by the Fourth

District Court of Appeal. They state that it is a mere attempt at a "second appeal". They also argue that there is no policy reason, precedential benefit, nor is there a claim that the Fourth District did not accurately deal with the facts or the positions of the parties. The Griefers contend there is simply no reason to "write" on these issues. (Griefers' brief, pp. 32-33)

None of the above reasons cited by the Griefers include the concept of justice. The DiPietros understand the limited jurisdiction of the Court. But this Court is the last repository of justice in the State. Once jurisdiction is demonstrated, this Court surely will look to determine whether the intermediate appellate court unjustly usurped the trial judge's broad discretion in dealing with the pretrial disclosure of witnesses and the subject matter of his testimony. Binger v. King Pest Control, 401 So.2d 1310, 1313 (Fla. 1981). In fact, this Court will exercise its discretion and review the record and decide ancillary questions to those which open the door to jurisdiction. Ocean Trail Unit Owners Association v. Meade, 650 So.2d 4, 6 (Fla. 1995).[5]

The Griefers argue that there can be no prejudice because of the length of litigation and thus, the DiPietros were able to "anticipate" what a brand new expert in the case would opine.

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[5] This Court relied upon Lawrence v. Florida East Coast Railway, 346 So.2d 1012 (Fla. 1977) in Meade. Justice England concurred in the opinion which stated in footnote 3 that the court may consider any error in the record properly before it. While the DiPietros recognize that a constitutional change occurred between Lawrence and Meade, this Court still will undertake review of issues other than those jurisdictional as demonstrated by the additional cases cited by the DiPietros in their initial brief.

(Griefers' brief, pp. 38-39) This assertion may have been true had the Griefers not added the "human factors" expert and allowed him to be deposed three days before the "discovery cutoff" set forth in the trial court's order and thirteen days before trial. Not only did the DiPietros not know what Dr. Snyder would say, their expert could not counter it and was not familiar with the terms Dr. Snyder used in most of his opinions. ("Shrunk transcript" II, pp. 13, 44-48, 58-59; Tr. VII, 26-27) This is exactly the situation which was disapproved of in Florida Marine Enterprises v. Bailey, 632 So.2d 649 (Fla. 4th DCA 1994) rev. den. 641 So.2d 345 (Fla. 1994).

The "Hobson's choice" which confronted the Griefers was: go to trial without an expert to counter, or engage in a frantic attempt to locate an expert then have that expert prepared to testify in twelve days. This is precisely the type of prejudice the Binger court allowed trial courts the discretion to remedy and is the type of prejudice which results in sanctions against those who places such a Hobson's choice before the opponent. Grau v. Branham, 626 So.2d 1059 (Fla. 4th DCA 1993).

The statement by the Griefers at page 39 of their brief quoted from the Fourth District Court of Appeal pointedly highlights the mistaken finding that Dr. Benedict was fully capable of addressing each and every opinion of Dr. Snyder. Flatly, he was not, as the record demonstrates.

On pages 40-41, the Griefers argue that the Fourth District was right to rely upon its earlier decision in Keller Industries v. Volk, 657 So.2d 1200 (Fla. 4th DCA 1995) rev. den. 666 So.2d 146

(Fla. 1995). The Keller court reversed an order excluding Keller Industries' only witness on liability. The Court suggested that the trial court could have used the alternative of striking only the prejudicial testimony from presentation to the jury. That is precisely what the trial judge did in this case. He allowed Dr. Snyder's testimony to the extent the parties could agree which was predicated upon the extent to which Dr. Benedict could counter Dr. Snyder's opinions. The DiPietros offered to allow Dr. Snyder to testify in those areas that their only expert could, and this was rejected by the Griefers. And, how the Griefers can state that Dr. Fogerty did not testify to the theories of their case is a mystery solved by a simple reading of his testimony. (Tr. V, 28-30; 39-41; 84-85; 93; 106-107; 110) The Griefers' statement that they had no expert in the human factors "realm", highlights the prejudice if Dr. Snyder was allowed to testify as the DiPietros had no expert in that "realm". Dr. Snyder was the Griefers' second expert to be presented on liability issues, not their only one. Keller is completely inapposite to the case at bar.

The Griefers deny that they took a "all or nothing" approach and point out that there is no record reference. (Griefers' brief at p. 42) In open court, DiPietros' counsel stated there were two areas to which Dr. Benedict could testify. (R. Supplemental Index, dated May 2, 1997, p. 12)

The trial judge did not abuse his very broad discretion granted by this Court. An examination of the factors outlined in Binger leads to this an escapable conclusion. Within the time

constraints, the DiPietros had an inability to cure the prejudice inherent in the inability to be able to present their own expert witness on the topics to which Dr. Snyder would testify. The prejudice could be cured, but again, this would have disrupted the orderly and efficient trial of the case as scheduled. Given the presence of these factors, the Fourth District Court of Appeal should not have disturbed the Judge's discretion in this case. Binger 401 So.2d at 1313-1314.

III. NEITHER DR. SNYDER'S NOR DR. FOGERTY'S TESTIMONY IS ADMISSIBLE AS REBUTTAL EVIDENCE AND THE FOURTH DISTRICT ERRED IN REVERSING ON THIS GROUND.

On pages 44-45, the Griefers argue that Dr. Snyder should have been allowed to testify as a rebuttal witness. They list matters to which Dr. Fogerty did not testify. They summarily state that Dr. Benedict testified quite extensively on human factors issues. As demonstrated by the initial brief and the record, Dr. Benedict did not testify outside the scope of matters to which Dr. Fogerty testified in the plaintiffs' case in chief. And, there are numerous matters to which Dr. Benedict could not testify to which Dr. Snyder could. The trial judge did not abuse his discretion by not allowing Dr. Snyder to testify on rebuttal. Driscoll v. Morris, 114 So.2d 314, 315 (Fla. 3d DCA 1959)

On pages 45-46 of their brief, the Griefers argue the Fourth District Court of Appeal was correct to rule that Dr. Fogerty should have been allowed to testify on rebuttal because the testimony would have shown that Dr. Benedict's calculations were

erroneous and therefore, unsupportive of his lower speed estimate of the DiPietro vehicle. In fact, Dr. Fogerty's opinion would have added nothing. Dr. Benedict's calculations were shown to be erroneous and resulted in a higher speed calculation than he originally testified to at length before the jury. (Tr. VI, 138-145, 161) This is why Zanoletti v. Norle Properties, 688 So.2d 192 (Fla. 3d DCA 1997) is unsupportive of the Griefers' position. The defense theory as to the speed and height of the vehicle was disproved through cross-examination of Dr. Benedict himself. Dr. Benedict made the calculations indicating that before the jury. To have Dr. Fogerty make those same calculations before the same jury adds nothing and is not proper rebuttal upon which to base the reversal of a jury verdict. The Fourth District Court of Appeal erred in doing so.

ARGUMENT TO ISSUE RAISED ON CROSS-PETITION

IV. A NEW TRIAL WAS REQUIRED WHEN THE PRESIDING JUDGE RECUSED HIMSELF FOR HIS PREJUDICIAL CONDUCT DURING THE JURY TRIAL, AND IT WAS ERROR FOR THE SUCCESSOR JUDGE TO DENY POST-TRIAL MOTIONS AND ENTER A FINAL JUDGMENT BASED ON EVIDENCE HE NEVER HEARD.

The DiPietros question whether this is properly on review in this Court. The Griefers did not file a cross-notice to invoke this Court's discretionary jurisdiction. The Griefers did not file a cross-petition to gain discretionary review. However, a search of the rules provides no guidance as Fla.R.App.P. 9.120 does not provide for cross-review. This is not an original proceeding, so the filing of an initial petition would not gain review in this Court without filing a notice. The DiPietros question the commencement of review in this Court by the filing of what amounts to an initial brief and would request that the review be stricken in the event this Court finds the procedure improper--albeit there are no rules governing the question.

On the merits, the Griefers argue that the District Court's order should be affirmed in any event because Judge Moe "recused himself" and because the successor judge entered a final judgment in her post trial motions in this case. It will be shown below that neither of these issues would merit affirmance.

Under this argument the Plaintiffs assert that since Judge Moe entered an order of recusal on the Plaintiffs' motion following entry of the verdict but before the post-trial motions and the entry of judgment, a new trial is warranted. They claim that the judgment cannot be entered by Judge Reasbeck, who presided at the

Plaintiffs' insistence. It will be demonstrated that the Plaintiffs' motion for recusal was untimely and that their argument asks this Court to sanction the Plaintiffs' trial tactics of "lie in wait" until the return of the jury verdict. All of the grounds upon which the Plaintiffs base their motion to recuse Judge Moe were known by them prior to the return of the jury verdict.

Moreover, Judge Reasbeck clearly had the authority to entertain post-trial motions and enter the judgment upon the jury's verdict even though he did not sit through the trial. Also, if there is error in the change of trial judges, it is due to the Plaintiffs' decision to "roll the dice" through the return of the verdict and the error is invited.

The Plaintiffs also never objected to Judge Reasbeck hearing post-trial motions or entering a judgment on the verdict. Thus, these arguments are clearly not properly reserved for review.

The successor judge to a judge who presided over trial has the authority to rule on post-trial motions such as a motion for new trial. Leibovit v. Garfunkle, 67 So. 98, 99 (1914); The General Hospital of Greater Miami, Inc. v. Gager, 160 So.2d 749, 751 (Fla. 3rd DCA 1964); Sears Roebuck and Co. v. Polchinski, 636 So.2d 1369, 1371 (Fla. 4th DCA 1994). Indeed, a successor judge has a duty to rule on post-trial motions. Otis Elevator Company v. Gerstein, 612 So.2d 659, 660 (Fla. 3rd DCA 1993). The Plaintiffs' initial claim that Judge Reasbeck did not have the authority or ability to rule on post-trial motions is clearly without merit.

Still, the Plaintiffs claim the contrary is true. They argue

that long ago it was decided that a successor judge cannot correct errors of law committed by his predecessor. The judge could not review and reverse the final orders or decrees of the predecessor. They argue that a logical extension of this rule is that the successor judge may not enter a final order on evidence heard by the predecessor judge. They cite Groover v. Walker, 88 So.2d 312, 313 (Fla. 1956) and Beattie v. Beattie, 536 So.2d 1078 (Fla. 4th DCA 1988) in support. (Plaintiffs' Answer Brief/Initial Brief on Cross-Review, pp. 46-49)

A successor judge cannot sit as an appellate court and decide issues of law following the entry of a final order or judgment. However, a successor judge may always revisit the interlocutory rulings of the predecessor. The successor judge is not bound by the intermediate rulings entered prior to a final disposition of the case. American Fire and Casualty Co. v. Tillberg, 199 So.2d 782, 785 (Fla. 2nd DCA 1967); Valdez v. Chief Judge of the Eleventh Judicial Circuit of Florida, 640 So.2d 1164 (Fla. 3rd DCA 1994). The successor even has the obligation to correct rulings on matters of law of the predecessor judge. Raymond, James and Associates, Inc. v. Zumstorchen Investment, Ltd., 488 So.2d 843, 845 (Fla. 2nd DCA 1986). Judge Moe never ruled on the Griefers' post trial motions.[6]

At bar, no final judgment was entered when Judge Reasbeck took over from Judge Moe. Thus, the rule set forth in Groover has no

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[6] This is why Anders v. Anders, 376 So.2d 439 (Fla. 1st DCA 1979) is inapplicable here. Broward County v. Mitten, 421 So.2d 814, 815 (Fla. 4th DCA 1982).

applicability here and does not support Plaintiffs' position that Judge Reasbeck could not act to hear post-trial motions (for the first time) or indeed, rule on other issues previously ruled upon by Judge Moe prior to the entry of the final judgment.

Additionally and importantly, the judgment was not entered upon evidence heard and determined by the predecessor judge since the case was tried to a jury. The evidence was not weighed by Judge Moe and a judgment would not have been entered upon Judge Moe's findings. This fact distinguishes the authorities relied upon by Plaintiffs and serves to reinforce the authority Judge Reasbeck had to entertain post-trial motions and enter the judgment on appeal.

In addition, the trial judge did not "recuse himself." The Plaintiffs moved for his recusal. While the Defendants certainly took issue with the factual assertions of the Plaintiffs in support of recusal, this Court knows that the trial judge could not take issue with the assertions. It is easy to speak in terms of "concession" when to oppose the allegations results in recusal anyway. Fla. R. Jud. Admin. 2.160.

There was no "concession" of bias or prejudice. The Court was specifically in doubt as to the legal sufficiency of the motion. (R. 338) Moreover, Fla. R. Jud. Admin. 2.160(f) directs a Judge to determine the legal sufficiency of the motion and shall not pass on the truth of these allegations. Under these constraints, the Plaintiffs' characterization of Judge Moe's Order of Recusal has a

concession or bias against them is improper.[7]

An examination of the affidavits in support of recusal reveal complaints of facial expressions indicating boredom with the Plaintiffs' case, bias against the Plaintiffs, and times where the Judge spoke harshly to Plaintiffs' trial counsel. (R. 210-218) These actions occurred during trial and before return of the verdict. Only after the verdict was the motion to recuse brought by Plaintiffs. The motion was not brought within a reasonable time even though it was brought within the outer time limit provided in Fla. R. Jud. Admin. 2.160(e). In construing reasonableness, this Court has held under the predecessor rule that:

> "One of the purposes of this timeliness requirement is to avoid the adverse effect on the other party to the proceeding and the problems of a retrial with its resulting costs and delay. A motion for recusal is considered untimely when delayed until after the moving party has suffered an adverse ruling unless good cause for delay is shown." Fischer v. Knuck, 497 So.2d 240, 243 (Fla. 1986).

The trial tactic of waiting until a ruling is obtained or a verdict is entered before bringing a motion for recusal, especially where the facts upon which the recusal is brought are known beforehand, is uniformly disapproved.

> "We have noted that 'prompt application avoids the risk that the party is holding back a recusal application as a fall-back position in

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[7] A judge's expression of contrary opinions, expressions of disbelief of a witness, hostility, and facial expressions are legally insufficient for disqualification. Newman v. Eade, 627 So.2d 116 (Fla. 4th DCA 1993); Michaud Berger v. Hurley, 607 So.2d 441, 445 (Fla. 4th DCA 1992); Natemen v. Greenbaum, 582 So.2d 643, 644 (Fla. 3d DCA 1991); Sikes v. Seaboard Coastline Railroad, 429 So.2d 1216 (Fla. 1st DCA 1983).

> the event of adverse rulings on pending matters'." United States v. Brinkworth, 68 F. 3d 633, 639 (2nd Cir. 1995), citing In Re: I. V. M., 45 F. 3d 641, 643 (2nd Cir. 1995)

Waiting until the return of the verdict has also been specifically disapproved. Reilly v. Southeastern Pennsylvania Transportation Authority, 489 A.2d 1291, 1300 (Pa. 1985) [Party waives right to recuse by waiting until after return of verdict to raise recusal issue]. If there is an error committed by Judge Reasbeck in ruling on post-trial motions and entering the judgment, it was certainly invited by the Plaintiffs who waited until after the return of the verdict to seek Judge Moe's recusal. Also, Judge Reasbeck should not be held in error by entering the judgment in question and ruling on the post-trial motions since no objection was ever presented to Judge Reasbeck that he had no authority to do so. Dober v. Worrell, 401 So.2d 1322 (Fla. 1981).

In summary, no reversible error occurred when Judge Reasbeck presided over post-trial proceedings and entered the judgment. The Plaintiffs' requested the change of judges. Accordingly, the verdict and judgment must be affirmed.

CONCLUSION

WHEREFORE, due to the foregoing, the Petitioners respectfully request that this Court enter an order reversing the Fourth District Court of Appeal's award of prejudgment interest on intangible and future damages. In addition, the Petitioners respectfully request that this Court reverse the Fourth District Court of Appeal's award of a new liability trial for the reasons stated herein and for the reinstatement of the jury verdict with interest to run based upon past, out-of-pocket, pecuniary losses only.