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FLORIDA LAW WEEKLY

APRIL 29, 2011

**TORTS - PREMISES LIABILITY -
SLIP AND FALL - ZERO DAMAGES AWARD FOR LOSS OF CONSORTIUM**

Aguilera v. Equity One, LLC, 36 Fla. L. Weekly D833 (Fla. 3d DCA April 20, 2011)

This is a slip and fall case where plaintiff, Ms. Aguilera, injured her right shoulder and arm. After trial, the jury returned a verdict in favor of Ms. Aguilera that contained awards for several, but not all, elements of damage and also found her 90% at fault. Ms. Aguilera's moved for a new trial based on the jury's failure to award damages for future medical expenses, loss of future earnings and her husband's loss of consortium.

According to the 3d DCA, the trial court erred in failing to grant a new trial on the issues of Ms. Aguilera's loss of future earnings and her husband's alleged loss of consortium after the jury returned a verdict for those items for zero

damages. The 3d DCA held there had been uncontradicted evidence that established at least some damages in those categories.

The 3d DCA cited several cases which held a zero verdict for a loss of consortium claim was inadequate where a spouse presented substantial and undisputed evidence sufficient to require an award of at least nominal damages. However, the 3d DCA rejected Ms. Aguilera's contention that a new trial should be granted based on a zero award of future medical expenses where conflicting evidence existed and a reasonable juror could believe that plaintiff sustained no future medical damages.

The 3d DCA affirmed in part and reversed in part and remanded the cause for a new trial to determine future earnings and the husband's loss of consortium, subject to a 90% reduction for comparative negligence.

**INSURANCE - AUTOMOBILE
LIABILITY - EXCESS LIABILITY - UMBRELLA POLICY**

Harco Nat'l Ins. Co. v. Adrienne D. Hammond, 36 Fla. L. Weekly D835 (Fla. 3d DCA April 20, 2011)

Defendant, Harco Ins. Co., appealed a trial court order granting partial summary judgment and declaratory relief in favor of plaintiff, Adrienne Hammond, which found the umbrella policy at issue had provided coverage for plaintiff's claims. The 3d DCA reversed the trial court's partial summary judgment.

In 2008, plaintiffs were involved in a motor vehicle accident with a truck operated by Tiles & Stones, Inc. (Lessee) who leased the truck from Blue Water Holdings - Doral, Inc. ("Gator"). At the time of the accident, Gator had two insurance policies with defendant in effect. The primary policy had a limit of \$1 million, and the umbrella policy had a limit of \$20 million.

Defendant paid plaintiff the \$1 million limit of Gator's primary policy and acknowledged that Lessee was covered under the primary policy. Defendant, however, contested the claim

that the umbrella policy provided coverage to lessee and maintained only Gator had been protected under the umbrella policy.

The trial court interpreted the language of the umbrella policy to include lessee as an "insured" and that the truck had been a "covered auto" under the policy. The 3d DCA disagreed and held that only Gator had been covered by the umbrella policy because of the unambiguous provision that any person to whom Gator had leased or rented one of its automobiles was not an insured.

Plaintiffs argued that because the term "automobile" had not been defined in the insurance policy it must therefore refer solely to passenger vehicles. Citing *State Farm Fire & Casualty Co. v. Castillo*, 829 So. 2d 242 (Fla. 3d DCA 2002), the 3d DCA declined to change the plain meaning of the policy terms to provide coverage where clearly none was provided or intended.

**TORTS - PREMISES LIABILITY - S/F -
HOTEL POOL AREA STEP DOWN CREATED DANGEROUS CONDITION**

Slaats v. Sandy Lane Residential, LLC, et al., 36 Fla. L. Weekly D836 (Fla. 3d DCA April 20, 2011)

Elizabeth and Henk Slaats, plaintiffs, sued Sandy lane residential LLC, defendant, for injuries Ms. Slaats sustained when she fell while exiting the hotel pool area, allegedly caused by a step down which created a dangerous condition.

On motion for summary judgment, defendant claimed no liability because the step down was an open and obvious condition. Plaintiffs opposed the motion and filed an affidavit of an expert stating the step down created a unique, special hazard. The trial court agreed with defendant that the step down was open and obvious and entered summary judgment against plaintiffs.

On appeal, plaintiffs argued that the trial court had erred in entering summary judgment for two reasons. First,

plaintiff's argued was that discovery had yet to be completed, and second, that there were genuine issues of material fact regarding whether the step down presented a unique, special hazard. The 3d DCA agreed with plaintiffs and held that in negligence cases dependent on expert testimony, summary judgment should be restricted to extraordinary circumstances where there are no genuine issues of material fact. As such, the 3d DCA reversed and remanded the cause back to the trial court.

**TORTS - MEDICAL MALPRACTICE - NEW TRIAL -
JUROR INTERVIEW - AFFIDAVIT IN SUPPORT OF MOTION FOR POST
TRIAL JUROR INTERVIEW WAS FACIALLY INSUFFICIENT - FAILURE
TO DISCLOSE PRIOR LITIGATION WAS NOT RELEVANT OR MATERIAL**

Simon v. Maldonado, 36 Fla. L. Weekly D839 (Fla. 3d DCA April 20, 2011)

Defendants, Dr. Simon, South Florida Orthopedics, Inc. and HealthSouth Corp., appealed a final order granting a new trial after a jury verdict and juror interview. Plaintiff, Maria Maldonado, cross-appealed the denial of the admission of a **Fabre** defendant on the verdict form and the denial of cross-examination of Dr. Simon on her medical background. The 3d DCA reversed the order granting a new trial and affirmed the issues on cross-appeal.

Plaintiff brought an action against Dr. Simon, South Florida Orthopedics and HealthSouth Corporation alleging negligent failure to diagnose and treat plaintiff's daughter's cancer. After trial, the jury returned a defense verdict finding no negligence on the part of Dr. Simon.

Ten days after the jury returned a verdict, plaintiff filed a motion for new trial alleging the trial court had erred by not allowing plaintiff to impeach Dr. Simon on her background and training. Plaintiff further alleged the trial court had erred by permitting the defense to argue the subsequent treating physician had been negligent in the care and treatment of the minor plaintiff. Plaintiff's post-trial motion neither

requested a juror interview nor alleged any factual basis for such an interview.

More than 10 days after the jury verdict, plaintiff filed a motion to interview jurors for the first time and alleged that juror Subaran had failed to disclose that she previously had been involved in an automobile accident and that she had also concealed material facts relevant to the issues in the case. The motion was filed with an affidavit of plaintiff's counsel stating that it was his "good faith belief" that Subaran had been involved in an auto accident.

The trial court granted the motion to interview juror Subaran after plaintiff filed a supplemental motion to interview jurors alleging, "it would appear that juror Subaran . . . may have been a named party defendant to a number of prior lawsuits." After the hearing, a new trial was ordered on the basis of Subaran's alleged nondisclosures.

Dr. Simon appealed the final order. Dr. Simon argued the affidavit filed by plaintiff in support of the motion to interview jurors had been factually insufficient, and even if sufficient, the trial court had erred in ordering a new trial because the alleged undisclosed claims were not relevant or material to the issues at trial. Dr. Simon also contended plaintiff's motion had been untimely filed and without good cause and therefore the trial court had abused its discretion in ordering a new trial.

The 3d DCA agreed that the affidavit was not factually sufficient to require the juror interview because a moving party must make sworn factual allegations that, if true, would require the trial court to order a new trial in order to get a post-trial juror interview. Furthermore, the 3d DCA held the trial court must determine exactly what type of information will be elicited from the jurors prior to the interview.

The 3d DCA also agreed with Dr. Simon that the facts revealed in the juror interview were not relevant or material to the issues tried. The 3d DCA relied on a three-part test to determine whether the party seeking a new trial on the basis of

juror nondisclosure has met the burden of establishing entitlement to it. In order to establish entitlement to a new trial, the complaining party must show: (1) that the information is relevant and material to jury service; (2) that the juror must have concealed the information during questioning; and (3) that the failure to disclose the information was not attributable to the complaining party's lack of diligence. See *De La Rosa v. Zequeira*, 659 So. 2d 241.

Applying the *De La Rosa* test, the 3d DCA reasoned "the mere possibility that a juror was involved in prior claims does not show in and of itself that [the juror's] point of view was affected so as to deprive the defendant of a fair and impartial trial." Because plaintiff could not show that any alleged disclosure was material and relevant, the 3d DCA ruled the first prong of *De La Rosa* had not been met.

The 3d DCA declined to reach Dr. Simon's argument that the motion to interview was not timely filed and held the accompanying affidavit failed to state a legally sufficient reason to conduct a juror interview. As such, the trial court abused its discretion not only in ordering a juror interview, but also in ordering a new trial based on the alleged nondisclosure of a juror.

Plaintiff cross-appealed the trial court's ruling excluding cross-examination trial testimony of Dr. Simon to show she received low-rating evaluations during her residency. During its case in chief, plaintiff proffered evidence to show that as a result of the low ratings Dr. Simon brought a gender discrimination lawsuit against the co-defendant. The 3d DCA affirmed the trial court's ruling that the probative value of the low evaluation ratings did not outweigh the potential harmful effect of the discrimination suit and the confusion that such evidence would have brought into the overall trial.

The last issue on cross-appeal was whether evidence of the subsequent treating doctor's alleged negligence had been admissible to show the cause of plaintiff's injuries. The 3d DCA found that the trial court had been correct in admitting evidence of the subsequent, treating doctor's alleged

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negligence, and was correct in allowing the subsequent, treating doctor as a **Fabre** defendant on the jury verdict form since it was not shown that Dr. Simon was liable as a matter of law.

RBM/MQW/smm/tsr