RISSMAN, BARRETT, HURT, DONAHUE & MCLAIN, P. A.

ATTORNEYS AT LAW

STEVEN A. RISSMAN
ROBERT C. BARRETT
JENNINGS L. HURT III
ROBERT A. DONAHUE
JOHN E. McLAIN III
RICHARD S. WOMBLE
JOHN P. DALY
STACIE B. GREENE
THEODORE N. GOLDSTEIN
RAYMOND A. LOPEZ
VANCE R. DAWSON
RICHARD B. MANGAN JR.
HENRY W. JEWETT II
DANIEL M. POLLACK
ART C. YOUNG
NICOLE D. RUOCCO
DANIEL T. JAFFE
BEATRIZ E. JUSTIN
J. GREGORY GIANNUZZI
DAVID K. BEACH
F. DEAN HEWITT
EDWARD M. COPELAND IV
DAVID R. KUHN
G. WILLIAM LAZENBY IV
R. CLIFTON ACORD II
ROBERT D. BARTELS

OF COUNSEL
ROBERT J. JACK

EXECUTIVE DIRECTOR
W. SCOTT PETERSON

201 EAST PINE STREET
15TH FLOOR
P.O. BOX 4940
ORLANDO, FLORIDA 32802-4940
TELEPHONE (407) 839-0120
TELECOPIER (407) 841-9726
ORLANDO@RISSMAN.COM

TAMPA COMMONS
ONE NORTH DALE MABRY HIGHWAY
11TH FLOOR
TAMPA, FLORIDA 33609
TELEPHONE (813) 221-3114
TELECOPIER (813) 221-3033
TAMPA@RISSMAN.COM

207 S. 2nd STREET
FT. PIERCE, FLORIDA 34950
TELEPHONE (772) 409-1480
TELECOPIER (772) 409-1481
FTPIERCE@RISSMAN.COM

WWW.RISSMAN.COM

PLEASE REPLY TO: ORLANDO

SEAN M. CROCKER
CHRISTOPHER E. DENNIS
SARAH E. EGAN
JONATHAN D. EICHELBERGER
JOSHUA T. FRICK
SUSAN R. FULLER
PAUL B. FULMER
JANNINE C. GALVEZ
ELISE J. GEIBEL
CHRISTOPHER A. HANSON
JEFFREY J. KERLEY
VICTORIA S. LUNA
LAURA F. LYTLE
DARIEN M. MCMILLAN
ERIC F. OCHOTORENA
KARISSA L. OWENS
JEREMY T. PALMA
JEFFREY M. PATNEAUDE
WENDY L. PEPPER
JONATHAN K. POLK
D. BLAKE REHBERG
KELLEY A. RICHARDS
JUAN A. RUIZ
BRYAN R. SNYDER
JILL M. SPEARS
LARRY D. SPENCER
MEREDITH M. STEPHENS
ELIZABETH M. STUART
F. PAUL TIPTON
NICOLETTE E. TSAMBIS
JASON R. URBANOWICZ
CHRISTINE V. ZHAROVA

FLORIDA LAW WEEKLY

OCTOBER 22, 2010

STANDARD JURY INSTRUCTIONS IN CIVIL CASES – AMENDMENTS – NEW AND REVISED INSTRUCTIONS ADRESSING USE BY JURORS OR POTENTIAL JURORS OF ELECTRONIC DEVICES THAT PERMIT COMMUNICATIONS

Standard Jury Instructions in Criminal Cases – Report No. 2010-01 and Standard Jury Instructions in Civil Cases - Report No. 2010-01, 35 Fla. L. Weekly S602 (Fla. Sup. Ct. October 21, 2010)

The civil jury instructions, newly renumbered and reorganized, ***see Standard Jury Instructions in Civil Cases – Report No. 09-01 (Reorganization of the Civil Jury Instructions)*** 35 So. 3d 666 (Fla. 2010), minimally account for recent technological advances. For example, instruction 202.2 – Explanation of the Trial Procedure, directs jurors not to conduct any work or investigation with respect to the case on which they are sitting, including internet research. ***Id. at 676.*** Similarly, civil instruction 700 – Closing Instructions, includes a paragraph directing jurors not to do any research about the case, including research on the internet.

The Florida Supreme Court modified the proposed amendments to preliminary jury instructions given prior to the start of voir dire, i.e., instruction 201.2 – Introduction of Participants and Their Roles, in civil cases, and instruction 1.1 – Introduction, in criminal cases – to include language in each of the instructions explaining the rationale behind prohibiting the use of electronic devices throughout the time of jury section and jury service.

INSURANCE – AUTOMOBILE
LIABILITY – DISCOVERY – INSURER FAILED TO ESTABLISH THAT TAKING OF DEPOSITION DUCES TECUM OF ITS ADJUSTER WILL RESULT IN IRREPARABLE HARM – PETITION FOR WRIT OF CERTIORARI DISMISSED

Allstate v. Archer, 35 Fla. L. Weekly D2250 (Fla. 2d DCA October 13, 2010)

Allstate sought a writ of certiorari to prevent the deposition duces tecum of one of its adjusters in this case.

Archer was driving a vehicle on March 22, 2006, in Daytona Beach, Florida, when he was struck by a car operated by Paul Michael Rucker. Mr. Archer's wife, Teresa, was a passenger in the vehicle driven by Mr. Archer at the time of the accident. The Archers sustained injuries and sought compensation against Rucker for their injuries and for loss of consortium.

At the time of this accident, Rucker was fleeing from the police in a stolen vehicle. The records contained a copy of the police report and the criminal judgment convicting him for driving with a suspended license, grand theft, leaving the scene of an accident involving injuries, and fleeing or attempting to elude the police. It appeared that the car he was driving was stolen from a Mr. Robinson, who had insurance on the car with Allstate.

At the time of the accident, Rucker apparently lived in the same house or apartment as Mr. Robinson. Allstate maintained that Mr. Rucker paid rent to sublease space from Robinson and that Rucker was not an additional insured on Allstate's auto

liability policy under the policy's definition of "resident." The Archers disagreed and argued that Mr. Rucker was an additional insured as a resident of Mr. Robinson's home and that he had coverage even if he was operating the insured vehicle as a thief.

The Archers filed a negligence action against Rucker in Hillsborough County. The complaint did not name Robinson as a defendant and did not seek any relief from him as the owner of the car. The complaint merely alleged that Rucker was operating a "motor vehicle" and that he "negligently" caused it to collide with the Archer's vehicle.

Allstate concluded that its duty to defend was dependent on the allegations of the complaint and that the complaint did not identify a vehicle insured by Allstate or allege any factual basis for it to have coverage for Rucker. It did not file an appearance on behalf of Rucker, and Rucker did not otherwise appear in the lawsuit. Mr. Archer obtained a default judgment in the amount of $574,382 against Mr. Rucker, and Mrs. Archer obtained a default judgment in the amount of $349,650.50 against Mr. Rucker.

The Archers filed a lawsuit against Allstate containing counts for declaratory relief and damages against Rucker. The Archers sought to depose the adjuster involved in this claim and to review the claims file as discovery directed to the count for declaratory relief.

The 2d DCA concluded that, based on the unusual circumstances of the case, allowing the depositions to take place would not result in irreparable harm.

MEDICAL MALPRACTICE - WRONGFUL DEATH – VOLUNTARY BINDING ARBITRATION – ARBITRATION PANEL PROPERLY REJECTED PLAINTIFF ESTATE'S CLAIM THAT STATUTE ALLOWS $250,000 NON-ECONOMIC DAMAGE AWARD PER CLAIMANT PER DEFENDANT

Deno v. Lifemark Hospital of Florida, 35 Fla. L. Weekly D2271 (Fla. 3d DCA October 13, 2010)

This was an appeal of an arbitration award in a medical negligence case. The question was how to interpret F.S. § 766.207 (2008), which provided for voluntary binding arbitration of medical negligence claims. The 3d DCA concluded that the arbitration panel correctly interpreted the statute.

The estate of William S. Deno filed a notice of intent which alleged medical malpractice by Lifemark Hospital of Florida, Inc., Dr. Abdul-Rahman Jaraki and Jaraki Medical Care, P.A. The claim was negligence in the performance of a heart procedure on William S. Deno, following which he died.

Lifemark made an offer to arbitrate under F.S. § 766-207. Dr. Jaraki and Jaraki Medical Care, P.A. made a separate offer to arbitrate. The estate accepted the offers and the two arbitration proceedings were consolidated.

In a proceeding under F.S. § 766.207, the liability of the defendants is admitted. The only issue is damages. Defendants who submit to arbitration under F.S. § 766.207 are jointly and severally liable for all damages assessed. ***F.S. § 766.207(7)(h).***

The issue before the appellate court was how to calculate the statutory limitation on non-economic damages. The statute provides that "[n]on-economic damages shall be limited to a maximum of $250,000 per incident …" ***F.S. § 766.207(7)(b)***. This has been interpreted to mean $250,000 per claimant per incident. ***St. Mary's Hosp., Inc. v. Phillipe,*** 769 So. 2d 961, 972 (Fla. 2000). The arbitration panel awarded $250,000 in non-economic damages to each of the three claimants, Elizabeth D. Deno, Demi Deno and William Deno, for a total award of non-economic damages of $750,000.

The estate argued that the award was too low. The estate contended that the statute allows a $250,000 non-economic damage award per claimant per defendant. In this case there were three defendants. According to the Estate, there should have been a $750,000 non-economic damage award against each of the three defendants for a total of $2,250,000. The arbitration panel rejected the Estate's "per defendant" argument.

The 3d DCA agreed with the arbitration panel. Under the statute, the arbitration panel awards both economic damages and non-economic damages. ***Id. F.S. § 766.207(a), (b).*** Non-economic damages are capped at $250,000 per incident and this has been interpreted to mean $250,000 per claimant per incident. The text of the statute says nothing of a "per defendant" calculation.

CIVIL PROCEDURE – ERROR TO DENY MOTION TO SET ASIDE DEFAULT

Johary Aviation v. Turan, 35 Fla. L. Weekly D2283 (Fla. 5th DCA October 15, 2010)

The trial court erred in denying a motion to set aside a default because Johary Aviation had filed a motion to dismiss and a motion for more definite statement before the default was entered. These motions precluded the entry of a default.

TORTS – SCHOOL BOARDS – BECAUSE SCHOOL BOARD DID NOT HAVE CONTROL OVER STUDENT AT TIME OF ACCIDENT, TRIAL COURT DID NOT ERR IN DISMISSING COMPLAINT WITH PREJUDICE

Winslow v. School Board of Alachua County, 35 Fla. L. Weekly D2284 (Fla. 1st DCA October 15, 2010)

Julie Winslow appealed a final order dismissing with prejudice her second amended complaint seeking damages for injuries suffered by her daughter, Tiffany Chancey, when she walked into traffic at a school bus stop and was struck by a motor vehicle. Because the School Board did not have control

over this student at the time of the accident, the School Board had no duty to the student.

RBM/RJJ/smm/tsr