IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 02-14638 CA 08

OTIS J. McDUFFIE,

Plaintiff,

v.

JOHN W. URIBE, M.D.,

Defendant.
_____/

ORDER ON PLAINTIFF'S MOTION FOR (1) ENTRY OF FINAL JUDGMENT AND (2) DETERMINATION OF PREJUDGMENT INTEREST

THIS CAUSE having come before the Court on May 27, 2010 on Plaintiff's Motion for (1) Entry of Final Judgment and (2) Determination of Prejudgment Interest, and the Court having considered Defendant's Memorandum in Opposition, Plaintiff's Reply and being otherwise advised, the Court finds:

In this personal injury action, Plaintiff seeks prejudgment interest for the economic damage portion of the jury's award arguing that the jury "fixed a date" upon which Plaintiff allegedly suffered a loss of earnings and thus this constitutes an out-of-pocket loss for which prejudgment interest is recoverable. The Court disagrees. Plaintiff has not cited a single personal injury case in Florida where a court has allowed prejudgment interest related to lost earnings. This Court declines to be the first because allowing prejudgment interest in this case would directly contravene established Florida law.

In Florida, the law is well settled that prejudgment interest is generally not allowed in personal injury cases. See, e.g., Amerace Corp. v. Stallings, 823 So. 2d 110, 112-13 (Fla. 2002); Lumbermans Mut. Cas. Co. v. Percefull, 653 So. 2d 389, 390 (Fla. 1995); Argonaut, Ins. Co. v. May Plumbing Co., 474 So. 2d 212, 214 n. 1 (Fla. 1985). The reason is that personal injury damages are too speculative and thus cannot be liquidated until determined by the jury through its verdict. Amerace, 823 So. 2d at 112-13. The Supreme Court, has, however, recognized a single, "narrow" or "limited" exception to this rule, where the plaintiff can establish that he or she has "suffered the loss of a **vested property right**." Amerace, 823 So. 2d at 113 (emphasis supplied) (citing Alvarado v. Rice, 614 So. 2d 498 (Fla. 1993)); see also Lumbermans, 653 So. 2d at 390 (recognizing that Alvarado provided a "narrow" exception in tort cases). Although Plaintiff suggests the prohibition against awarding prejudgment interest in personal injury cases is limited to non-economic, intangible damages, there is no law to support that statement.

Consistent with the foregoing, Florida courts have routinely denied prejudgment interest in personal injury cases. For example, in Scheible v. Joseph L. Morse Geriatric Center, 988 So. 2d 1130, 1134 (Fla. 4th DCA 2008), the personal representative of an estate brought suit against a nursing home for willful disregard of an advance directive under various theories including breach of contract. The court found that even though plaintiff's action was based upon a contract, it was still essentially one for the recovery of personal injury damages, and, thus, plaintiff was not entitled to pre-judgment interest. See also Aetna Cas. & Sur. Co. v. Langel, 587 So. 2d 1370, 1373-74 (Fla. 4th DCA 1991) (although action for recovery of uninsured motorist benefits/coverage is essentially based in contract, it is in essence a suit to recover personal injury damages and, accordingly, there is no right to prejudgment interest); Cooper v. Aetna Cas. & Sur. Co., 485 So. 2d 1367, 1368 (Fla. 2d DCA 1986) (same).

As one court explained, the "Alvarado exception" does not apply to "lost earnings" damages, which, by their very nature are speculative and often require supporting expert testimony:

> A review of Florida case law fails to reveal any cases in which the courts have applied the Alvarado exception to . . . lost earnings . . . . This Court is certain . . . that the Florida courts would not apply the Alvarado exception to the aforementioned damages because they are by their very nature unliquidated.

In re: Air Crash on Dec. 20, 1995, Near Cali, Columbia, No. 96-MDL-1125, 1998 WL 1770591, at *4 (S.D. Fla. Feb. 25, 1998).

The economic damages awarded in this case are the antithesis of a vested right. The case involved hotly contested issues as to the doctor's liability for losses along with contested, highly speculative testimony related to the claimed loss.

With respect to the contract, the evidence showed the Dolphins organization had the contractual right to terminate or renegotiate Plaintiff's 1999 contract at its discretion based on player performance or injury. (Plf's 1999 NFL Player Contract at p. 2, ¶11). Specifically, the contract provides:

> 11. SKILL, PERFORMANCE AND CONDUCT. Player understands that he is competing with other players for a position on Club's roster within the applicable player limits. **If at any time, in the sole judgement of Club, Player's skill or performance has been unsatisfactory as compared with that of other players competing for positions on Club's roster, or if Player has engaged in personal conduct reasonably judged by Club to adversely affect or reflect on Club, then Club may terminate this contract. In addition, during the period any salary cap is legally in effect, this contract may be terminated if, in Club's opinion, Player is anticipated to make less of a contribution to Club's ability to compete on the playing filed than another player or players who Club intends to sign or attempts to sign, or another player or players who is or are already on Club's roster, and for whom Club needs room.**

Likewise, pursuant to the NFL Collective Bargaining Agreement, Plaintiff's contract was not guaranteed. (1995-2003 NFL Collective Bargaining Agreement at p. 39, § 5(d)).

Consistent with this, Plaintiff's expert, Ralph Cindrich testified that a player's contract is not guaranteed and the team has no obligation to keep a player who cannot perform. (T. Cindrich at 86, 141, 165). It is well understood that a player could be injured at any time and, under the collective bargaining agreement and the player's contract, that player could be released. (Id. at 86, 116, 165). Further, he testified that the contract's skill and performance clause gives the team sole discretion to terminate a contract if a player does not perform at a satisfactory level or is anticipated to make less of a contribution to the Club than another player the team intends to sign or has signed. In other words, under this type of contract, "the Club can get rid of them at any time they want." (Id. at 140-41; see also id. at 151.)

On this record, there is no basis to contend Plaintiff enjoyed a "vested right" regarding his NFL contract. Rather, the 2001-2004 "contract years" of Plaintiff's 1999 NFL Player Contract consisted of contingent "expectancies" because – at all times – the Dolphins were entitled to terminate or renegotiate their relationship with Plaintiff based on his performance or injury status. Indeed, although the 2001-2004 contract potentially provided for $15.5 million in compensation, and that was what Plaintiff sought (i.e., $1,000,000 for 2001; $3,500,000 for 2002; $5,000,000 for 2003; 6,000,000 for 2004), the jury only awarded $10 million.

While Plaintiff argues vigorously in support of prejudgment interest, he fails to cite a single case like the present one. In Argonaut, 474 So. 2d at 212, the insurer filed a subrogation action after paying on a claim related to a loss of property. As such, the amount in dispute was a predetermined, liquidated amount in a contract context. Likewise, Nova Southeastern University of Health Science, Inc. v. Sharick, 21 So. 3d 41 (Fla. 2009), and Suncrete Corp. v. Industrial Park Construction & Engineering Corp., 519 So. 2d 647 (Fla. 2d DCA 1987), each involved a breach of contract. Finally, Barnes Surgical Specialties, Inc. v. Bradshaw, 549 So. 2d 1189 (Fla.

2d DCA 1989), was a contract case and it involved a liquidated sum for commissions. Consequently, these cases do not support Plaintiff's motion for prejudgment interest in this personal injury context.

Finally, even if prejudgment interest was available under the facts of this personal injury case, the Court may apply principles of equity to deny such an award. As the Second District Court of Appeal most recently acknowledged:

> [I]nterest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to **considerations of fairness**. It is **denied** when its exaction would be **inequitable**. . . .

Perdue Farms, Inc. v. Hook, 777 So. 2d 1047, 1054 (Fla. 2d DCA 2001) (emphasis supplied) (quoting Flack v. Graham, 461 So. 2d 83, 84 (Fla. 1984)). The court continued:

> The Argonaut decision did not establish an inflexible rule that requires trial judges to assess prejudgment interest in every case regardless of the circumstances. **Depending on the equities** of a given case, an award of prejudgment interest may be **a windfall** to the plaintiff and **an unfair burden on the defendant**.

Hook, 777 So. 2d at 1054 (quoting Volkswagen of Am., Inc. v. Smith, 690 So. 2d 1328, 1331 (Fla. 1st DCA 1997)).

In Hook, a plaintiff-inventor sought speculative lost-profits damages based on the defendant-company's alleged theft of plaintiff's proprietary chicken-preparation techniques. The jury agreed with the plaintiff's position and awarded $27 million in damages. The trial court later assessed $14 million in prejudgment interest. Id. at 1049-50, 1053-55. On appeal, the Second District reversed the award of prejudgment interest finding it was grossly inequitable under the circumstances. Id. at 1054. Specifically, the court noted the jury could have found that the plaintiff's process was not a trade-secret, that the defendant did not misappropriate the plaintiff's process and that the award to plaintiff stretched the outer limits of the value potential of the process.

So too, equitable principles squarely militate against an award of prejudgment interest here. As in Hook, Defendant disputed liability and the jury could have found that Plaintiff's claimed losses were the result of his initial injury and not the action of the doctor. Moreover, as explained above, Plaintiff's "expert" testimony regarding the "value" of his "lost earning capacity" was highly speculative and concerned inherently **non-guaranteed** NFL contracts. On these facts, it would be inequitable to award nearly $5,000,000 in prejudgment interest. Accordingly, on this additional basis, Plaintiff is not entitled to prejudgment interest.

Based on this order, final judgment will be entered in the amount of the verdict minus the agreed $598,000 setoff.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida on this 8 day of July, 2010.

MICHAEL A. GENDEN
Circuit Court Judge

Copies Furnished to:
Joel Eaton, Esquire
Herman J. Russomanno, Esquire
Robert J. Borrello, Esquire
Stuart N. Ratzan, Esquire
Charles Michael Hartz, Esquire
Wendy F. Lumish, Esquire