

PREMISES LIABILITY

PALM BEACH CIRCUIT COURT

Award to 6-Year-Old Who Fell During Exercise Class, Fractured Finger

A jury awarded more than \$430,000 to the family of a child who fractured a finger during a fitness class in Boca Raton.

Britney Andrews, who was 6 at the time in November 2017 incident, was instructed to run outside the fitness facility while holding a kettlebell. She fell, and the kettlebell broke her left pinkie finger. The finger is deformed and may require fusion to improve its appearance.

Britney's family sued the facility, alleging the outdoor activity was too dangerous. The defense conceded liability, and the jury awarded damages of \$430,775.

Case: Andrews v. Pilates of Boca

Case No.: 50-2018-CA-007321-XXXX-MB

Plaintiffs attorneys: Todd R. Falzone and Karina Rodrigues, Kelley | Ustul, Fort Lauderdale

Defense attorneys: Olga Butkevich and Barry A. Postman, Cole, Scott & Kissane, West Palm Beach

MEDICAL MALPRACTICE

PALM BEACH CIRCUIT COURT

Defense Argued Doctor Properly Evaluated Patient's Symptoms

A jury sided with a family physician who allegedly overlooked a patient's pleural effusion, a fluid buildup between the lungs and chest.

John Flanagan, who had undiagnosed lung cancer, was hospitalized for nearly two weeks in Las Vegas to drain the fluid. He claimed that had his effusion been diagnosed a week earlier by Dr. Stacie Ginsberg of Coral Springs, his hospitalization would have lasted only a day or two. He sued the physician, alleging symptoms, such as respiratory difficulty and a chest cold, should have prompted a chest X-ray but were misdiagnosed as bronchitis.

The physician's lawyers argued Flanagan did not demonstrate a symptom that warranted an X-ray. The jury found for the defense.

Case: Flanagan v. Ginsberg

Case No.: 50-2017-CA-003783-XXXX-MB

Plaintiffs attorneys: David H. Gold and Jonathan Gold, Gold & Gold, Boca Raton

Defense attorneys: Robert J. Cousins and Scott C. Sankey, Quintairos, Prieto, Wood & Boyer, Fort Lauderdale

South Florida Lawyers Land \$4.6M Verdict After Comparing Damages to Defense-Expert Fees

by Raychel Lean

Christopher Drury of Dimond Kaplan & Rothstein in Miami teamed with Todd Wallen of Wallen Kelley in Coral Gables to land a \$4.6 million verdict for a woman injured in a roll-over car crash caused by a driver allegedly high on heroin.

And once the defendant conceded liability, the plaintiffs team decided to try a novel approach to requesting damages — by comparing their numbers to what the defense was paying its experts.

"We took the defense orthopedic surgeon's hourly rate, which was \$1,100 per hour for the inconvenience of coming to testify at trial, and we said, 'We're not asking you for \$1,100 per hour for pain and suffering. We're only going to ask you for one tenth of that: \$110 per hour,'" Drury said. "Certainly, Mrs. [Elizabeth] Winkeljohn's pain and suffering is far more inconvenient than the inconvenience the doctor had in coming to testify."

Drury and Wallen said they asked for 12 hours of pain and suffering per day for the rest of their client's life — about 35 years, according to experts — at a rate they noted was less than even the defense's cheapest expert, who charged \$400 per hour.

"Whether they thought that my pain-and-suffering explanation was interesting, or whether they disregarded it or not, I'll never know," Drury said. "But I do think it got them thinking, 'Wow, the defense have paid a lot for experts, and this lady's really hurt and she deserves real money for it.'"

Plaintiff Elizabeth Winkeljohn's life changed around midday on Sept. 17, 2017, as she followed her husband's car along Summerlin Road in Fort Myers. They were returning from spending a few days out of town after Hurricane Irma cut power at their Coral Gables home, when a Toyota Avalon came careening toward them, driving on the wrong side of the road.

After almost hitting her husband, driver Scott Callari veered toward Winkeljohn, who had her 9- and 10-year-old children in the back seat. Windows shattered as Winkeljohn's car flipped one and a half times, and landed upside down, according to her attorneys.

Her injuries were severe. Among them: a herniated disc on her spine,



Christopher Drury and Todd Wallen represented a Coral Gables woman whose car flipped upside down when a driver, allegedly high on heroin, crashed into her.

mild traumatic brain injury and chronic post-traumatic stress disorder. Winkeljohn's seatbelt also caused her left shoulder to dislocate, and part of her knee bone chipped off when it hit the inside of her car.

Though Callari was initially prosecuted for driving under the influence of drugs or alcohol, that charge was dropped when he pleaded guilty to failure to submit to testing, according to Drury.

"Unfortunately, the State Attorney's Office in Fort Myers did not really do the things that my co-counsel and I did to prove that he was under the influence of heroin at the time of the crash," Drury said.

Drury and Wallen deposed the emergency-room doctor who evaluated Callari, and concluded that the driver had passed out at the wheel after taking heroin. A Florida State trooper seconded that, testifying that Callari twice admitted to snorting heroin and continuing to drive.

"He [the trooper] drove across the state of Florida and testified, I think because he thought that there needed to be justice in this case," Drury said.

The defendant's insurer Progressive Corp. agreed to settle over the children's injuries, according to Drury, but it was a different story for Winkeljohn. She sued Callari for negligence in June 2018.

"He [Callari] only carried \$100,000 per person bodily injury liability coverage, so it was sort of amazing that there was no offer presuit by Progressive," Drury said.

The defendant ultimately admitted liability, leaving Winkeljohn to prove damages at trial.

Defense attorneys Kenneth Hazouri of DSK Law in Orlando and Richard Adams of Cole Scott & Kissane in Miami declined to comment.

But they alleged Winkeljohn wasn't as badly hurt as she had claimed, and that some of her injuries stemmed from underlying conditions. They argued jurors need only award past and future medical expenses.

Drury and Wallen countered with testimony from their client's treating doctors, who said although she had experienced depression, she'd never complained about her neck, left shoulder,

der, left knee or right hip before the crash, and had no history of neurological treatment for a head injury.

"She had no history of any of that stuff, and the treaters were very clear that this was all a result of the crash and it was serious," Drury said.

What's more, the defendant's psychologist agreed that Winkeljohn had PTSD after conducting a compulsory medical exam, according to Drury.

Self-proclaimed fans of allowing pictures to do the talking, Drury and Wallen also showed jurors illustrations of Winkeljohn's medical procedures, in the hope the jury would better understand the science.

"I can say 'anterior cervical discectomy and fusion,' and it'll go in one ear and out the other," Drury said. "But if they've got a picture of it, and they hear an orthopedic surgeon talking about how you've got to make an incision on the throat and push all of the visceral tissue out of the way to get back to the spine, and then excise the disc, and put a bone graft into a cage, then lock that in place with other pieces of metal, they get that."

Jurors awarded Winkeljohn \$375,000 for lost earnings, \$1.03 million in past and future medical expenses, \$2.25 million in past and future pain and suffering, and \$1 million in punitive damages.

In addition to physical pain, Drury said his client feels extreme guilt over not being able to protect her children from the accident.

"She knows that it's not her fault, but she just can't get over the fact that she exposed them to that, and that this was a sunny day at noon," Drury said. "No one would expect to be hit by someone under the influence of heroin in the middle of a sunny day. And now, whenever she's driving, even during the day, she just thinks at any moment, someone impaired under the influence of drugs or alcohol could hit her and her children."

The defense has moved to reduce the award, arguing it's excessive and that Callari can't afford it.

Raychel Lean reports on South Florida litigation for the Daily Business Review. Send an email to lean@alm.com, or follow her on Twitter via @raychellean.

Case: Elizabeth Winkeljohn v. Scott Lenord Callari

Case No.: 2018-020841-CA-01

Description: Auto negligence

Filing date: June 19, 2018

Verdict date: March 5, 2020

Judge: Miami-Dade Circuit Judge Mavel Ruiz

Plaintiffs attorneys: Christopher Drury, Dimond Kaplan & Rothstein, Miami; Todd Wallen, Wallen Kelley, Coral Gables

Defense attorneys: Richard Adams, Cole Scott & Kissane, Miami; Kenneth Hazouri, DSK Law, Orlando

Verdict amount: \$4,662,572.14