
10/6/00 - Judge MICHAEL JOHN BROWN - CV 327092 - SCHWARTZ (Douglas B. Levy of West, Christoffel, Konigsberg & Zickerman, P.C.) v MANDELCO (David L. Curl of William B. Blaser & Associates) - PERSONAL INJURY - REAREND. Plntf, male, age 36, owner of 4 Roses & More Flower Stores, operating a new Porsche 911 Carrera, which, he alleged, had best-rated performance brakes, admitted he was travelling five to ten miles per hour over the speed limit, when he passed Dfnt's and her boyfriend's vehicles. Plntf alleged he switched from center lane, into the right lane, and stopped before the crosswalk, in front of Golf 'N' Stuff, on Tanque Verde Road, for two to three seconds, to permit four pedestrians to cross, from the median, to the Golf 'N' Stuff. Further, Plntf alleged, vehicles had already stopped in the left lane and center lane, so Plntf moved to the right lane, and brought his vehicle to a stop. Plntf alleged he made a safe lane change and stopped just prior to being rear-ended by Dfnt. Plntf called two investigating Tucson police officers, who testified Dfnt had consumed six to nine beers, in the two

hours immediately preceding the accident, and Dfnt was DUI and impaired at the time of the accident. Police officers testified Dfnt failed three field sobriety tests. (Plntf was precluded from admitting evidence of Dfnt's two post-accident breathalyzer tests indicating she had a blood alcohol of .151 and .148 on the RBT-IV breathalyzer. Judge Brown held a pretrial Frye evidentiary hearing to determine scientific reliability of the RBT-IV breathalyzer device used immediately post-accident. The RBT-IV had been taken out of use shortly after the instant accident, because it was impossible to determine its accuracy. Dfnt called Chester Flaxmayer, a criminalist and toxicologist, who testified that because of the RBT-IV's inability to confirm an appropriate sample had been taken of deep lung air, the machine could not be considered generally accepted in the scientific community.) On cross, one of the officers, who administered the field sobriety tests, testified that only a severe head injury could affect the results of a field sobriety test and, in his opinion, Dfnt was moderately intoxicated. On cross, police officer admitted he was unaware Dfnt's head struck the windshield and did not know there were two cracks in the windshield, in a star pattern. Other investigating officer testified he saw no evidence of head trauma to Dfnt, and people with head trauma have difficulty with the date and time and are confused and dazed. Additionally, investigating officer testified Dfnt advised him she had her seat belt on. Police officer also testified he reviewed the results of a field sobriety test, and noted five errors in the walk and turn, and three errors in the one-leg stand, and Dfnt also failed HGN tests. It was the police officer's opinion, based on his experience, Plntf had six to nine beers, and alcohol affected Dfnt's perception and reaction times. On cross, police officer also admitted Dfnt's license was not restricted and a normal driver requires fifty feet to react, when travelling forty-miles-per-hour, and would require an additional one-hundred-forty feet to stop. Plntf

argued Dfnt failed to wear her prescription eyeglasses, which would have corrected her 20/200 nearsight vision, in her left eye. Plntf argued Dfnt, who had no intention of stopping for the four pedestrians, despite the fact that Plntf and two other vehicles had stopped, was one hundred percent at fault. Dfnt, female, age 49, employed in customer service at Bashas', admitted she was on Prozac the day of the accident, had worked a part-shift, then went home to visit her mother and father. Dfnt also testified she went home to get something to eat, then went to the Casa del Rio, to meet two friends. Dfnt alleged she had had two beers in the two hours she as at the bar, and left to return home to cook dinner for her boyfriend. Dfnt alleged she did not need to wear eyeglasses and only wore them once in a while to the movies. Dfnt alleged she was not wearing a seat belt and struck her head on the windshield, but refused to go to the hospital, because she believed she would be alright. Dfnt alleged her vehicle was travelling forty-miles-per-hour, when her head struck the windshield, and her head injuries caused her to slur her speech, and her knee injuries had made it difficult to stand immediately post-accident. Dfnt argued investigating police officers performed poor post-accident investigation, because they failed to discover that her head had struck the windshield, mistakenly noted she was wearing her seat belt at the time of the accident, and failed to inspect her vehicle for windshield damage. Additionally, Dfnt argued, Plntf executed a sudden lane change and a very abrupt stop, and was comparatively at fault. Dfnt called her boyfriend, who was following her vehicle, who testified he had had one beer, at Casa del Rio. Boyfriend also testified he observed Plntf's vehicle cut in front of Dfnt's and stop suddenly, and, when he went to Dfnt's vehicle, he saw her head had hit the windshield, and, when he helped her out of the car, he saw that she was not wearing her seat belt. On cross, boyfriend admitted he had stated in his deposition that he

had had two beers at the Casa del Rio. Dfnt also called an eyewitness pedestrian, who testified Plntf cut-off Dfnt and brought his vehicle to a sudden unexpected stop. (Court denied Dfnt's motion to preclude Plntf from claiming property damage. Dfnt argued property damage had been paid by Travelers Insurance and arbitrated by State Farm Insurance, pursuant to the intercompany arbitration agreement. Court agreed to listen to any post-trial arguments that the property damage was subject to subrogation and binding on Plntf.) Based on the testimony of the investigating officers, Court instructed jury it could award punitive damages against Dfnt, and if it found Dfnt had acted wantonly or wilfully, it could elect not to assess any comparative fault against Plntf. Plntf sustained cervical, thoracic, and lumbar soft tissue injuries, plus a shoulder strain and sprain. Plntf called Jonathan Ostrowski, M.D., a physiatrist, who testified Plntf's injuries were causally related, as was the course of physical therapy over a five-month period post-accident, and a series of trigger-point injections. Plntf also called Philip P. Tygiel, P.T., a physical therapist, who testified Plntf's injuries and treatment were causally related. Dfnt argued Plntf had been involved in a 1991 bicycle accident, in which he claimed permanent injuries, including a torn anterior cruciate ligament of the knee. Dfnt argued Plntf admitted he had been receiving chiropractic care for four to five years before the 1991 bike accident, and admitted that in 1993 he advised his treating physician he still had pain in both knees, slippage in his left knee, pain in both thumbs, pain when sitting for a long time, sensitive elbows, frequent headaches, occasional upper back stiffness, sleep problems, and he could not exercise as hard as before the 1991 accident. Plntf admitted, on cross, his back hurt whenever he slept on a strange bed, that he had been to Europe, Hawaii, Florida, and horseback riding in the White Mountains, and, contrary to his testimony, his chiropractor had been treating him before the

instant accident. Dfnt also called Jim Miner, who laid a foundation for the surveillance videotape taken of Plntf, at Chuck E. Cheese's Pizza. Prayer: Just and reasonable compensatory and punitive damages; \$4,359.04 medical expenses; plus \$7,505.44 property damage. Plntf filed a \$35,000 offer of judgment - Dfnt filed a \$3,300 offer of judgment (per D). Following Court's ruling that breathalyzer tests were inadmissible, Plntf made a demand for policy limits and then, on the day before trial, indicated he would accept \$12,500 - Dfnt countered with a \$7,500 offer (per D) (P & D). (Carrier: State Farm Insurance.) During closing arguments, Plntf's counsel argued liability and asked jury to award Plntf \$25,000 past compensatory damages, \$10,000 future compensatory damages, and \$50,000 punitive damages. Defense counsel argued liability and, in the alternate, suggested Plntf's medical expenses, plus \$10,000 (per D) or \$5,000 (per P) was adequate compensation. Four day trial. By stipulation, nine jurors deliberated. (Two jurors, both women, did not drink alcohol. Alternate was one of the two non-drinkers. One juror had a brother-in-law who had a DUI.) Jury out one-plus hours. FOUND FOR DFNT. UNANIMOUSLY. (Plntf made motion for new trial, based on Court's failure to admit evidence regarding Dfnt's blood alcohol content, as measured by the RBT-IV breathalyzer. Because State Farm Insurance failed to settle for its insured's policy limits, pursuant to Plntf's time limit demand, State Farm extended open coverage, which would have paid the full amount of any compensatory and punitive damage verdict.)
