SUITS & DEALS

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called the new claim "totally absurd."

—By Maureen Castellano

$630,000 Accident Verdict — *Fitzgerald v. Pacella et al.*: A Marlton man who was severely injured when he was hit by a car while crossing a highway was awarded a $630,000 verdict by a jury earlier this month.

The jury in the four-week trial in Mount Holly, which ended on Nov. 6, returned a judgment of $700,000. However, the jurors found that the plaintiff, Robert Fitzgerald, was 10 percent liable for the accident on June 27, 1989. Fitzgerald, now 43, had been drinking the day he was struck while crossing Route 73 in Evesham in Burlington County.

Fitzgerald's drinking, in fact, was a critical factor in the case. The initial defense attorney, **Robert Baxter**, a partner with Mount Laurel's **Capehart & Scatchard**, argued in 1994 that Fitzgerald intentionally jumped in front of the car that struck him, either because he wanted to commit suicide or because he wanted to get money from an insurance claim. Therefore, Baxter argued before Superior Court Judge **E. Stevenson Fluharty** in Camden County, Fitzgerald's medical bills were not covered by the personal injury protection portion of the policies held by the owner and driver of the car.

Fluharty, in the PIP trial, sided with the plaintiff's attorney, **Francis Hartman**, ruling that there was insufficient proof that Fitzgerald intentionally tried to jump in front of the car, driven by defendant Kevin Sheehan, then 19, and owned by co-defendant Heather Pacella, then 21, both of Medford.

On the eve of the trial on liability and damages, Hartman and his partner, **Charles Nugent Jr.**, both of the Moorestown firm of **Hartman and Nugent**, moved before Superior Court Judge **Lawrence Eleuteri** in Mount Holly to bar the admission of evidence about Fitzgerald's alleged suicide attempt or alleged intention to generate an insurance claim. The plaintiff's attorneys argued that the defense was collaterally estopped from raising the issue of intentional conduct by Fitzgerald because it had already been settled by Judge Fluharty in the PIP trial.

Defense attorney **Donald Chierici Jr.**, of Moorestown's **Chierici & Wright**, countered that the jury should be permitted to hear such evidence to make sense of the accident. Chierici had taken over the case because the carrier for Pacella had tendered its $15,000 liability policy. Chierici says he represents the excess carrier, State Farm leg amputation.

Chierici adds that Sheehan, the driver, and Pacella, a passenger, testified that Sheehan swerved onto the shoulder of the highway to avoid Fitzgerald but that he then quickly moved to get in front of the car. Sheehan testified that when he swerved back onto the highway to avoid Fitzgerald, he jumped back, thus causing the accident.

Hartman, who handled the liability portion of the case, countered that Sheehan never tried to brake, never used his horn and made no real effort to avoid Fitzgerald.

Moreover, says attorney Nugent, "Sheehan had four versions of what happened, and on the night of the accident he told police that Fitzgerald was trying to cross the road. He changed his story between the PIP trial and the final trial on whether he hit his brakes, but admitted in the PIP trial that he never applied his brakes."

Judge Eleuteri denied the plaintiff's motion. However, Hartman and Nugent renewed the motion with Superior Court Judge **John Sweeney**, who was assigned the trial. He concluded he had the authority to reverse Eleuteri, and he did.

Chierici says he went to the Appellate Division seeking an interlocutory appeal, but was turned down.

So, the jury was permitted to hear or see evidence only about Fitzgerald's blood-alcohol concentration. Chierici says a state police report placed the blood level at 0.153 percent, although one defense expert placed the level at 0.18 percent at the time of the accident.

Chierici says he will recommend to the carrier that it appeal.

"It was not a good liability outcome but not a bad damages outcome," says Chierici. He adds that the policy was worth $1.1 million.

— By Tim O'Brien