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Improper Mid-Trial Juror Switch in Products Liability Trial Was Harmless, South Florida Court Rules

"The important thing is that everybody received a fair trial," defense counsel said.

By Raychel Lean

A judge's impromptu decision to allow mid-trial changes to jury composition came under scrutiny in a divided opinion from the Florida's Fourth District Court of Appeal, which denied a new trial against medical device manufacturer Stryker Corp., and could create a ripple effect on products liability jury instructions.

William Cavanaugh's family sued after he died during lung-removal surgery, claiming medical professionals misused a defective suction device meant for removing blood and surgical waste fluids.

As Stryker had recalled the device, Neptune 2, over a prior death, it told hospitals to use it only as a last resort, according to Wednesday's opinion, which said labeling warned against using it for surgeries like Cavanaugh's.

Claims against the hospital and nurse settled, and jurors returned **a defense verdict** for Stryker. But a dispute over alternative jurors and jury instructions triggered an appeal.

When the trial stretched beyond its anticipated two weeks, one juror's vacation meant missing a weekend of deliberations. And though the defendant was OK with waiting until Monday, the plaintiff sought an alternate juror.

But instead of seating the first alternate, St. Lucie Circuit Senior Judge George Shahood asked if either side wanted to seek their removal with a peremptory strike — something that's not allowed after a jury's been sworn, the opinion said.

The Fourth DCA found this violated Florida Rule of Civil Procedure 1.431(g), which says alternates can only replace jurors in the order they're called. However, the majority labeled the error harmless, reasoning it hadn't happened because of any "tactical gamesmanship" by Stryker.

"It was the plaintiff that initiated the removal of one of the jurors, rather than take a weekend recess. And it was the trial court that sua sponte provided both of the parties with a peremptory challenge to the first alternate juror," the opinion said.

It was a win for Daniel B. Rogers and his Shook, Hardy & Bacon team in Miami. Courtesy Photo

The majority panel — Judges Dorian Damoorgian and Alan Forst — pointed to similar cases where juror removal was harmless because the selected alternate had been present throughout, and no prejudice was apparent.

It was a win for Shook, Hardy & Bacon's Miami managing

partner Daniel Rogers, who said he was pleased his client's product "was not being improperly blamed for this gentleman's unfortunate death."

"The important thing is that everybody received a fair trial," Rogers said.

The Shook, Hardy defense team includes attorneys Hildy M. Saste, William P. Geraghty and Jennifer M. McLoone.

'Look the gift horse in the mouth'

But dissenting Judge Edward Artau reasoned it wasn't harmless to grant a peremptory strike just before closing arguments, and noted the Fifth DCA has found that encourages tactical gamesmanship. He said the defendant had benefited from hearing juror's reactions.

"Because a juror's questions may reveal a juror's impression of the evidence that has already been presented, the concern over 'tactical gamesmanship' is even greater when jurors have been permitted to ask questions," Artau wrote.

Artau said although Judge Shahood thought he was being fair, Stryker got the upper hand.

"Perhaps it is aspirational to have expected the manufacturer to 'look the gift horse in the mouth,' and reject the court's gratuitous offer," Artau wrote. "But adherence to the law requires much more than common courtesy in accepting a gift. Here, it required the manufacturer to reject the court's gratuitous offer."

Plaintiffs attorney Jack Scarola of Searcy Denney Scarola Barnhart & Shipley in West Palm Beach said he was disappointed, but "strongly committed to pursue justice on behalf of the Cavanaugh family, despite this temporary setback."

"Judge Artau's thoughtful and well-reasoned dissent accurately identifies the major flaws in the majority's opinion," Scarola said. "You cannot purposely violate the clear provisions of the Rules of Civil Procedure in the final hours of a three-week-long trial, provide one party with the unilateral ability to change the composition of the jury, and then dismiss the consequences as 'harmless error.' "

Scarola worked with Searcy Denney colleague Michael Kugler, Paul Silva and Peter Somera Jr. of Somera & Silva in Boca Raton, and Andrew A. Harris and Adam Richardson of Burlington & Rockenbach in West Palm Beach.

'Significant decision'

The parties also disagreed over jury instructions about design defects, leading the Fourth DCA to decide how to apply a 2015 state Supreme Court decision *Aubin v. Union Carbide Corp*.

It held that instructions for design defect claims should follow a consumer expectations test, meaning a seller is liable if its product is unreasonably dangerous for consumers. But it didn't prohibit the use of a different test, which the Fourth DCA found was apt for complex products.

Under the risk-utility test, the expectations of trained professionals are more important.

"Ordinary consumers would not be purchasing the Neptune 2 and would not have formed expectations regarding the product," the opinion said. "The rationale for the consumer expectations test—that a manufacturer plays a central role in establishing the consumers' expectations for a particular product, which in turn motivates consumers to purchase the product—simply does not apply to the Neptune 2 device."

Rogers said the opinion will likely trigger discussions about amendments to the Florida standard instructions for products liability.

"For product manufacturers, medical device manufacturers and others with complex products and the attorneys who defend those products, this is a very significant decision in my opinion," Rogers said. "It's the first one I know of since Aubin to say that you can use the risk-benefit test when judging the defectiveness of a complex product."

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