

Copyright 2007 Florida Legal Periodicals, Inc.
FLORIDA JURY VERDICT REPORTER (FJVR)

MARCUS ZUNNER, by and through his court appointed guardian PATRICIA JOHNSON
vs. FLORIDA POOL PRODUCTS, INC. and WAL-MART STORES, INC.

Docket No.: 00-8744-CI-19; FJVR Reference No. 07:2-68

Verdict Date: **November 2, 2006**; Publication Date: **February 2007**

TOPIC: Punitive Damages - Product Liability - Dive Stick Pool Toy

RESULT: \$ 280,000 for Plaintiffs. (verdict)

(\$ 50,000 - past medical expenses; \$ 50,000 - past pain and suffering; \$ 120,000 - punitive damages against Florida Pool Products; \$ 60,000 - punitive damages against Wal-Mart).

Kimberly Zunner's (minor Plaintiff's mother) Negligence: 40%; Earlene Black's (minor Plaintiff's grandmother) Negligence: 25%; Ed Black's (minor Plaintiff's grandfather) Negligence: 10%; Defendant Florida Pool Product's Negligence: 10%; Defendant Consumer Product Safety Commission's Negligence: 10%; Defendant Wal-Mart's Negligence: 5%

STATE: Florida

COUNTY: Pinellas

JUDGE: Amy Williams

PLAINTIFF PROFILE: Age: 3

Sex: Male

PLAINTIFF ATTORNEY: Justin C. Johnson, Wesley Straw, and Matthew Emerson of Justin C. Johnson & Assoc., P.A., St. Petersburg; Michael Keane and Shirin Vesely of Keane, Reese, et al., St. Petersburg

DEFENDANT ATTORNEY: Daniel J. **Santaniello**, Anthony J. Petrillo, and Paul S. Jones of **Luks, Santaniello**, et al., Tampa for Florida Pool Products; Michael Reed, Kurt Spengler, and Barbara Flanagan of Wicker, Smith, et al., Orlando for Wal-Mart

CAUSE OF INJURY: On April 17, 2000, at approximately 3:30 p.m., in Largo minor Plaintiff was playing in a kiddie pool when he landed on a rigid dive stick pool toy. The dive stick entered minor Plaintiff's rectum and perforated his colon. Plaintiffs alleged that Defendant Florida Pool Products and Defendant Wal-Mart were liable and negligent for manufacturing and selling a defective product and failing to warn Plaintiffs of hidden dangers associated with the dive stick when used in shallow water. Defendants claimed that minor Plaintiff's mother and others were negligent in the supervision, care, and safety environment of minor Plaintiff and that the product when used as intended, in deep water by persons ages five and up with appropriate supervision, was safe. The product as purchased was retro-fitted pursuant to a Consumer Product Safety Commission recall; however, Plaintiffs allegedly never read the enclosed warnings or instructions and failed to install the enclosed safety caps on the dive sticks.

NATURE OF INJURY: Constipation; encopresis; abdominal pain; and psychological injuries. Minor Plaintiff required a surgical repair of the perforation and a temporary colostomy which was later successfully reversed. Minor Plaintiff was left with abdominal scarring. It was claimed that future complications could include adhesions, stricture, and an increased likelihood of bowel disease including cancer, and future lost earning capacity.

PLAINTIFF EXPERT WITNESSES: David Anaise, M.D., General Surgery, Tucson, AZ
Michael S. Maher, M.D., General & Forensic Psychiatry, Tampa
David Schmeltzer, Product Safety, Bethesda, MD
Carol Pollack-Nelson, Ph.D., Safety, Rockville, MD
Michael Shahnasarian, Ph.D., Life Care Planning, Tampa
Brenda B. Mulder, M.B.A., Economist, Tampa

DEFENDANT EXPERT WITNESSES: Esther Jacobowitz Israel, M.D., Pediatric Gastroenterology, Boston, MA for Florida Pool Products
Nathan T. Dorris, Ph.D., Human Factors, Atlanta, GA for Florida Pool Products
Dorothy A. Drago, M.A., Product Safety, Wakefield, MA for Florida Pool Products
Theodore H. Wasserman, Ph.D., Pediatric Neuropsychology, Boca Raton for Florida Pool Products

EDITOR'S NOTE: Plaintiffs asked for \$ 15,000,000 in compensatory damages and sought punitive damages ranging from \$ 32,000,000 to \$ 40,000,000. The case settled as to all parties for a confidential amount while the jury deliberated the punitive damages phase of the trial. Plaintiffs rejected Florida Pool's seven figure pre-trial offer.

PLAINTIFF'S ATTORNEY'S COMMENTS: Justin Johnson: After two days of deliberations, the jury initially returned a compensatory verdict that contained nine errors on fourteen questions. However, the jury also found that both Florida Pool Products' and Wal-Mart's conduct warranted punitive damages. Plaintiffs moved for a mistrial in that it was apparent that it was a compromised verdict. The court directed the jury to return a second compensatory verdict, and the jury again found Plaintiffs were entitled to punitive damages. Defendants' exposure for punitive damages in this case totaled \$ 4,000,000, and on the third day of deliberation during the evening hours of the twenty-eighth day at trial, the parties entered into a global settlement of all claims in this lawsuit and a separate lawsuit filed against multiple related entities. It is believed that Florida Pool and Wal-Mart exhibited a well-founded fear that this jury which had dealt so harshly with the minor child's family members, would exhibit the same behavior toward Defendants after twice returning a verdict that punitive damages were warranted. All parties were very surprised to find out following the confidential settlement on the record that the verdict returned by the jury for punitive damages only totaled \$ 180,000, which was a nominal amount of punitive damages in light of the resources of these Defendants. Wal-Mart refused to make any offers to settle through trial due to an indemnification agreement with the manufacturer and co-Defendant, Florida Pool. Florida Pool's highest offer until commencement of trial was \$ 1,200,000. On the Friday before trial, Florida Pools' policy limits of \$ 2,000,000 were tendered in exchange for a release of both Defendants. That offer was properly rejected until the global settlement of all claims, including claims pending in a separate action, could be obtained.

DEFENDANT'S ATTORNEY'S COMMENTS: Anthony Petrillo: The case was litigated for six years and the trial lasted one month.