IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,304

DCA CASE NO., 4-86-1996

BILL T. SMITH, as Personal Representative of the Estate of Harry A. Hayden, deceased, and ALLSTATE INSURANCE COMPANY, a foreign corporation,

Petitioners,

vs.

KATHERINE S. BROWN,

Respondent.

ON PETITION TO INVOKE DISCRETIONARY REVIEW OF A DECISION OF THE FOURTH DISTRICT COURT OF APPEAL UPON CERTIFICATION OF A QUESTION OF GREAT PUBLIC IMPORTANCE

RESPONDENTS'S ANSWER BRIEF

INDEX

TABLE OF CITATIONS

STATEMENT OF CASE

The Respondent accepts the Petitioner's Statement of Case with one exception. While the jury returned a verdict in favor of the defendant, there was no finding that the plaintiff "sustained no damages causally arising from the accident" as argued in Petitioner's Brief. In fact, there was no interrogatory verdict, and the reasons for the jury's decisions are unknown.

STATEMENT OF FACTS

Plaintiff, KATHERINE S. BROWN, was involved in a very severe automobile accident in 1981, which was the subject of the case, below. The accident involved a collision between a vehicle being driven by Harry A. Hayden and a school bus being operated by MRS. BROWN. The impact was described by the only eye-witness as "horrifying." (T-137) The school bus turned over, and the Haydens were killed. (T-196)

The following uncontroverted evidence was offered by the plaintiff.

1. She sustained medical bills related to this accident in excess of $15,000.00 according to her treating physician, Dr. Wallowick. (T-249)

2. At the time of the accident in 1981 she worked two jobs as a school bus driver and construction cleaner, earning $125.00 and $200.00 a week, respectively; and was only able to continue working for three months following the accident. (T-190) She then had no other income through the date of the trial, almost five years later. (T-192,193)

3. The treating physician, Dr. Wallowick, testified that while she had a pre-existing injury and degenerative arthritis, she had also sustained a permanent injury to her neck and hips of 15%, related to the 1981 accident, within a reasonable degree of medical probability. (T-239, 248) Dr. Wallowick is a board certified orthopaedic

surgeon. (T-234)

4. The Court-Appointed physician, Dr. George May, also board certified in orthopaedics, testified that the plaintiff sustained a "significant injury as a result of the (1981) accident." (T-285); that she had a 5% permanent disability to her neck and 5% permanent disability to her back. (T-284) He found that she had sustained another 5% disability to her hip, half of which was attributable to the 1981 accident, and half of which pre-existed. (T-285)

Considering the above evidence of $15,000.00 in medical bills, lost earnings in excess of $16,000.00 annually, the testimony of two orthopaedic physicians confirming permanent injuries causally related to this accident, the jury nevertheless returned a verdict of zero.

Although it was contended at trial that all of the plaintiff's problems were pre-existing and related to a 1977 accident; Dr. Dalbey, the treating physician in 1977, testified that she had not sustained any disability as a result of the 1977 injury. When he saw her a year after that 1977 accident, and three years before the instant case, she had not suffered any disability as a result of the 1977 accident within a reasonable degree of medical probability. (T-159) Dr. Sciaretta, who also saw her following the 1977 accident, found her problem to be more severe. He said she sustained a 50% disability to her hip from the 1977 accident and a degenerative arthritic condition. (T-138,333) At that time

he indicated she would be confined to a wheelchair by 1979 if she did not let him do the surgery. (T-324) The plaintiff, however, continued to work two jobs and twelve hours a day up until the 1981 accident, after Dr. Sciaretta's prediction of her becoming an invalid. (T-184)

Neither Dr. Dalbey, nor Dr. Sciaretta, ever saw the plaintiff after the 1981 accident and were unable to offer any opinion with respect to how the injuries sustained in that accident affected her. Neither knew of her condition on the date they testified.

Dr. May testified that the plaintiff told him about a 1977 accident and additionally about an arthritic hip problem of 20 years duration. (T-277) Considering her entire medical history, he assigned a permanent disability from the 1981 accident to the left hip, neck and back as set forth below.

It has been vehemently argued throughout, that KATHERINE S. BROWN lied to the jury, her treating doctor, on interrogatories, depositions, and to the Court-Appointed physician. Yet, one should consider that the incident she was being quizzed about was an accident and medical treatment which had occurred almost ten years before the date of this trial. When one considers her background, it is apparent that this could contribute as much to her poor record as a historian, as any intent to deceive the trier of fact. She originally came to

Florida in 1931, as a child migrant worker. She got no further than the seventh grade because she had to work. She can read and write a little bit. Her adult life has been spent in occupations which could varyingly be characterized as laborer positions. (T-182, 184).

SUMMARY OF ARGUMENT

In reviewing the trial judge's order granting plaintiff a new trial, the District Court of Appeals' sole consideration was whether the judge abused his broad discretion. An abuse of discretion is measured by determining if "reasonable" men could differ as to the propriety of the trial court's action. If they could, the trial judge's ruling must remain undisturbed. This is the so-called reasonable test and at the appellate level it goes solely to the issue of whether the trial court abused it's broad discretion.

This differs from the test originally employed by the trial judge who must weigh the verdict against the proof and determine if the verdict is contrary to the manifest weight of the evidence. Once this initial step in the review process is completed it is not for the Appellate Court to revisit the sufficiency of the evidence as the Appellant suggests; but, rather to determine if the reversal was an abuse of discretion. To accomplish this the Appellate Court must look to the trial judge's order to determine if it was based on fact, or merely capricious, and thus an abuse of discretion.

In the instant case the trial judge's findings of fact supported the plaintiff and it became apparent that the verdict was against the manifest weight of the evidence. Accordingly, he granted a new trial. The Appellate Court,

reviewing that decision found that the trial judge's order was based on findings of facts and thus was not an abuse of discretion. It properly affirmed the granting of a new trial.

ARGUMENT

I. THE APPELLATE COURT PROPERLY LIMITED ITS REVIEW OF THE TRIAL JUDGE'S ORDER GRANTING A NEW TRIAL, TO THE ISSUE OF WHETHER SUCH AN ORDER WAS AN ABUSE OF DISCRETION, UNDER THE REASONABLENESS TEST. THE DETERMINATION OF THE WEIGHT AND SUFFICIENCY OF THE EVIDENCE WAS PROPERLY LEFT TO THE TRIAL JUDGE.

The trial court's decision to overturn a verdict comes to the Appellate Court clothed in a presumption of correctness. The Appellant has the burden to clearly demonstrate that the decision was an abuse of the Court's sound and broad discretion. Erwin v. Chaney, 160 So.2d 139 (Fla. App. 1st Dist., 1964), Morin v. Halpren, 139 So.2d 495 (Fla. App. 2nd Dist., 1962). In Gravel v. Blue Cross of Florida, Inc., 334 So.2d 158 (Fla. App. 3rd Dist., 1976), the Third District Court of Appeal even stated that such an abuse of discretion must be patent on the record.

The trial court has a much better vantage point than an Appellate Court to review the correctness of a jury's verdict. Staib v. Ferrari, Inc., 391 So.2d 295, (Fla. App. 3rd Dist., 1980). Because of the trial judge's unique contact with the trial and his opportunity to observe the testimony of the witnesses, he is in a better position to determine the accuracy of the verdict. Volk v. Goetz, 206 So.2d 250 (Fla. App. 4th Dist., 1967.

Thus, the Supreme Court, has been reluctant to interfere with an order granting a new trial because of the strong presumption that the discretion of the trial judge was properly exercised. In Ebersole v. Tepperman, 65 So.2d 564 (Fla. 1953) the court noted that it was entitled to know the judge's reasons for upsetting the verdict; but unless they were clearly erroneous, the Supreme Court would not overturn his decision. In the instant case, Judge Sholts, properly set forth the facts which comprised the manifest weight of the evidence. His order granting a new trial found:

> "2. That the treating physician, Dr. Burton Wollowick, and the Court-Appointed physician, Dr. George May both testified that the plaintiff sustained a permanent injury as a result of her accident of March 3, 1981."
>
> "3. That the plaintiff incurred approximately $15,000.00 in medical bills which the treating physician, Dr. Burton Wollowick testified were related to the automobile accident."
>
> "4. That the uncontroverted evidence indicated that the plaintiff was earning between $12,000.00 and $14,000.00 per year, and missed time after the accident and lost wages."
>
> "5. That the plaintiff sustained pain and suffering as a result of her injuries."

In American Employers Insurance Company v. Taylor, 476 So.2d 281 cause dismissed, 485 So.2d 426 (Fla. App. 1st Dist., 1985), the First District Court of Appeals noted that while an Appellate Court is on the same footing

as a trial judge in determining the correct law to be applied, it is at a disadvantage in evaluating questions of fact. In that case, the trial judge has a superior opportunity to judge the testimony and evidence adduced at trial. Obviously, in the instant case, Judge Sholts did not feel that KATHERINE S. BROWN had orchestrated a set of lies.

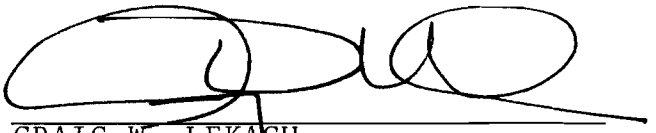
In weighing the court's decision under the reasonableness test, the standard for reversal of a new trial order becomes whether such order was "arbitrary, fanciful or unreasonable or that no reasonable man would adopt such a view." Saunders v. Smith, 382 So.2d 1254 (Fla. App. 4th Dist., 1980). As pointed out in Rivera v. White, 386 So.2d 1233, (Fla. App. 3rd Dist., 1980) " an order granting a motion for new trial is not measured on appeal by whether the jury verdict is supported by [substantial competent] evidence, but instead is measured by whether the trial court abused its discretion in granting a new trial." Thus, the consideration at this juncture should be whether there are facts in the records to support the court's findings contained in it's order granting a new trial. As seen in the "Statement of Facts", infra, there is abundant evidence to support such findings. The reasonableness test applied to an appellate court decision is limited to the single issue of whether the trial judge abused his sound and broad

discretion. Scandanavian World Cruises v. Cronin, 509 So.2d, 1277 (Fla. App. 3rd Dist., 1987). Interestingly, this argument is supported by the Ashcroft decision relied upon by petitioners. In Ashcroft v. Calder Race Course, Inc., 492 So.2d 1309 (Fla., 1986) the Supreme Court of Florida overturned an Order granting remittitur because it failed to list any reasons why the verdict was against the manifest weight of the evidence. The instant case avoids the pitfalls of Ashcroft, since Judge Sholts made specific findings of fact in his order, which are well supported in the record. Thus, the order granting a new trial is neither capricious nor an abuse of discretion. The uncontroverted testimony established that she sustained $15,000.00 in medical bills (T-249), lost wages of $325.00 a week over the next five years; and suffered a significant disability as a result of the 1981 accident. (T-284-5) Interestingly, Dr. May indicated that half of this disability was related to pre-existing injuries and half to the 1981 accident. The plaintiff never argued in this case that the injuries which KATHERINE S. BROWN suffered at the time of the trial were totally a result of the 1981 accident, but attempted to provide testimony which would apportion the injuries for the jury. The loss of $15,000.00 in medicals and $16,000.00 in wages annually, should have been a sufficient basis for a verdict.

Even if the Appellate function required a determination that the trial judge's decision comports with the manifest weight of the evidence and therefore is "reasonable", the facts of the instant case as set forth above meet such a test. It is apparent that reasonable men could differ. There is clearly not an avalanche of evidence negative to the plaintiff such that no reasonable man could agree with the trial judge. Accordingly, his decision to grant a new trial should be affirmed.

CONCLUSION

For the reasons set forth herein the respondent repsectively requests this Court to affirm the decisions of the trial judge and the Fourth District Court of Appeal.



CRAIG W. LEKACH
LEKACH & KLITZNER
201 S.E. 14 Street
Fort Lauderdale, Florida 33316
305-522-0088

Attorney for Respondent