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,

v.

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

PETITIONERS' INITIAL BRIEF ON MERITS

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CONSTITUTION:	
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STATEMENT OF CASE

This review is presented upon a certification of a question of great public importance, pursuant to Article V, Section 3(b)(4), *Fla. Const.*, by the District Court of Appeal, Fourth District.

This matter arose in the Circuit Court of Palm Beach County, Fifteenth Judicial Circuit. The Plaintiff, KATHERINE BROWN, filed suit against BILL T. SMITH, as personal representative of the Estate of HARRY A. HAYDEN, Deceased, seeking damages for personal injuries alleged to have occurred in an automobile accident in which the Defendant's decedent was the adverse driver. The matter was tried before a jury; at the conclusion of the evidence, the Defendant stipulated to liability. The jury returned a verdict finding that the Plaintiff sustained no damages causally arising from the accident.

The Plaintiff moved for a new trial and the Trial Judge entered an order granting a new trial on July 28, 1986. The Defendant appealed to the District Court of Appeal, Fourth District. On August 5, 1987, the District Court affirmed the Order Granting Motion for New Trial by a per curiam order with one judge dissenting. Upon motion by the Defendant, however, the District Court certified the following question to this Court:

> WHETHER THE REASONABLE MAN STANDARD, AS SET FORTH IN *BAPTIST MEMORIAL HOSPITAL V. BELL*, APPLIES TO THE TRIAL COURT'S DETERMINATION THAT THEY JURY VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, OR RATHER TO ITS PERCEPTION OF THE EVIDENCE.

This Defendant, on October 9, 1987, filed its Notice to Invoke Discretionary Jurisdiction of this Court.

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STATEMENT OF FACTS

The Plaintiff, KATHERINE S. BROWN, was involved in a motor vehicle accident on March 3, 1981. At the time she was the operator of a school bus; the adverse driver was HARRY A. HAYDEN (T: 194). Mr. Hayden was driving a Toyota automobile (T: 177).

KATHERINE S. BROWN had previously been involved in a motor vehicle accident on December 12, 1977 (T: 163-4). As a result of this 1977 accident, she was seen and treated by Dr. Charles Dalbey and Dr. Peter Sciarretta -- both of whom were orthopaedic surgeons (T: 140; 162-163). Dr. Dalbey determined that BROWN suffered neck and lower back injuries with severe limitation of neck movement (T: 142). She later developed complaints of hip pain (T: 153). After her discharge from Dr. Dalbey's care, BROWN was treated by Dr. Sciarretta; although she expressed back complaints to Dr. Sciarretta, her principal complaints related to her hip (T: 163, 167). Dr. Sciarretta saw her for the last time on January 29, 1981; he advised her that she should seriously consider a hip replacement within the next few months (T: 168-9).

On March 3, 1981, approximately four weeks after the last visit to Dr. Sciarretta, BROWN was involved in the accident out of which this lawsuit arose. In this second accident, she was treated by Dr. Burton Wallowick, another orthopaedic surgeon and a partner of Dr. Dalbey, who first saw her on March 10, 1981 (T: 233-234). Dr. Wallowick treated the patient conservatively, until December 15, 1983, for primary complaints relating to her hip, with some minor complaints of neck stiffness (T: 239-242, 256). On that date he performed hip replacement surgery and finally discharged BROWN in March, 1986 (T: 243; 247). Although she had been treated by Dr. Sciarretta for several years for orthopaedic complaints, particularly related to the hip condition, she avoided telling Dr. Wallowick either of this treatment or of Dr. Sciarretta's recommendation for hip replacement preceding the March, 1981 accident. (T: 250). Dr. Wallowick acknowledged

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that BROWN had a permanent impairment in respect to cervical and hip complaints prior to the March, 1981 accident although he had no clear idea as to how much (T: 249).

The defense, in the course of the cross-examination of the Plaintiff, established that she had denied on deposition in the present case being involved in any automobile accident prior to March 1981, (T: 204-5); she denied seeing Dr. Sciarretta more than once (she had seen a number of times over more than 2 years) and claimed not to remember retaining an attorney in respect to the 1977 accident (T: 206-7). She denied that Dr. Dalbey treated her for a neck injury, claimed that his treatment was only in respect to complaints which arose out of some lifting she did on a job, and denied that she had suffered any back injuries due to an accident prior to the present one (T: 211-212). She also insisted -- despite Dr. Sciarretta's recommendation of a hip replacement in January, 1981, that her hips were fine before the present accident (T: 214). In sum, there was substantial evidence that the Plaintiff had been less than honest, both in her testimony in the present cause and in the history given to the treating physicians.

Although Dr. Wallowick concluded that the Plaintiff sustained a permanent impairment which he causally related to the present accident, his identification of a causative nexus was predicated upon the history of the Plaintiff which was shown to have been demonstrably false, especially in relation to the hip problem, but also to the back complaints. Although Dr. Wallowick was aware that the Plaintiff had some pre-existing problems, he was unaware of the extent of these problems: in particularly he was not advised, and did not know, that Dr. Sciarretta had diagnosed an identical condition one month prior to the March, 1981 accident (T: 250).

Upon this evidence, the jury obviously doubted the Plaintiff's credibility and determined that her complaints preceded the March, 1981 accident.

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SUMMARY OF ARGUMENT

The proper standard of review by an appellate court of a trial judge's grant of a new trial on the basis that the jury verdict is against the manifest weight of the evidence is whether no reasonable man can agree with the trial judge's finding that the "manifest weight" -- i.e. the clear, plain and indisputable weight -- of the evidence was contrary to the decision of the jury. In applying this standard, the appellate court cannot ask the question of whether there is some competent, substantial evidence to support the determination that the trial judge thought the jury should have made. To do so would be to concede to the trial court the assumption of the jury's function. The proper question that the appellate court should ask is, rather, whether the clear, plain and indisputable weight of the evidence supports the determination that the trial judge thought the jury should have made and, concomitantly, whether only a very slight weight of evidence supports the verdict the jury actually rendered. If no reasonable man could respond affirmatively to these latter questions, then the grant of a new trial should be reversed on appeal.

The body of evidence in the cause below was at least evenly balanced and at most more heavily weighted to the finding made by the jury. Under such circumstances no reasonable man could answer the proper question affirmatively and agree with the trial judge that the manifest weight of the evidence was adverse to the jury verdict.

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ARGUMENT

THE REASONABLE MAN STANDARD OF APPELLATE REVIEW OF A TRIAL COURT ORDER GRANTING A NEW TRIAL ON THE GROUND THAT THE VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE APPLIES TO REVIEW OF THE TRIAL COURT FINDING THAT THE MANIFEST WEIGHT OF THE EVIDENCE WAS CONTRARY TO THE JURY'S DETERMINATION.

The issue presented in this appeal involves a consideration of the proper sphere of review by a trial judge of a jury's verdict upon a motion for new trial and a further consideration of the proper sphere of appellate review of a trial judge's decision to grant a new trial.

A trial judge may grant a new trial in a case tried before a jury upon a determination by him that the jury verdict was either: 1) against the manifest weight of the evidence, or 2) was influenced by considerations outside the record. *Wackenhut Corp. v. Canty*, 359 So.2d 430 (Fla. 1978). In making his determination that a verdict is against the manifest weight of the evidence, the trial judge does not sit as a seventh juror to consider the evidence anew as a factfinder, but acts to review the evidence against the manifest weight standard. *Laskey v. Smith*, 239 So.2d 13 (Fla. 1970). In doing so the trial judge must give proper consideration and due deference to the jury's function as factfinder. *Ashcroft v. Calder Race Course, Inc.*, 492 So.2d 1309 (Fla. 1986); *Andrews v. Tew*, 512 So.2d 276 (Fla. 2d DCA, 1987).

In the course of a trial, it is initially the trial judge's function to determine if there is some competent evidence to support each party's position; if there is some evidence which might support a verdict, then it becomes solely the function of the jury, as factfinder, to weigh the evidence, determine its probative force, reconcile its contradictions and determine questions of credibility. *Parsons v. Reyes*, 238 So.2d 561 (Fla. 1970); *Montgomery v. Florida Jitney Jungle Stores, Inc.*, 281 So.2d 302 (Fla. 1973). After rendition of the verdict by the jury, the trial judge may, upon proper motion for a new trial, review the jury's determination against the "manifest weight of the evidence"

standard. This function, however, is a "review" function, and in performing it the trial judge may not act as a seventh juror, performing anew the jury's function of weighing the evidence, determining its probative force, reconciling its contradictions or determining questions of credibility. The proper scope of the trial judge's function at this stage is to determine whether the verdict is not in accord with the clearly evident, plain and indisputable weight of the evidence. *Grand Assembly, Etc. v. New Amsterdam Co.*, 102 So.2d 842 (Fla. 2d DCA 1958). *Erlacher v. Leonard Brothers Transfer*, 106 So.2d 201 (Fla. 2d DCA, 1958).

Just as the jury's performance of its function of weighing the evidence and determining questions of credibility is measured against the standard of "manifest weight of the evidence" so to the trial judge's function in reviewing this jury function is measured against a standard: that set forth by this Court as the "reasonableness" standard in *Baptist Memorial Hospital, Inc. v. Bell*, 384 So.2d 145 (Fla. 1980):

> In reviewing this type of discretionary act of the trial court, the appellate court should apply the reasonableness test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion.

Bell, however did not specify what it was that reasonable men were to use as a guide in agreeing or disagreeing with the propriety of the action taken by the trial court and, subsequent to the enunciation of the *Bell* standard, the appellate courts' opinions demonstrated some confusion as to the precise manner in which the reasonableness test is to be applied to the trial judge's performance of his function. A careful consideration of the respective and appropriate functions of judge and jury, however, provides a clear method of analysis.[1/] Since it is the exclusive province of the jury to weigh the evidence, determine credibility and resolve conflicts, the proper application by the appellate court of the "reasonableness" test in evaluating the propriety of the trial judge's

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1/ This methodology was subsequently elaborated upon by this court in Ashcroft v. Calder Race Course, Inc., 492 So.2d 1309 (Fla. 1986).

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grant of a new trial cannot be met by looking to the evidence to see if there is some support therein for the trial judge's finding that the verdict should have been the contrary to what it was. That is, the focus of the test and the question to be asked is not whether no reasonable man can agree with the trial judge that there is some evidence to support a verdict for x even though the jury has found for y. To do so would be to concede to the trial judge the assumption of the jury's function. Instead, the question to be asked is whether no reasonable man can agree with the trial judge that the manifest weight of the evidence supports a verdict for x even though the jury has found for y. Put another way, the grant of a new trial cannot be upheld simply because it can be said that at least one reasonable man agrees with the trial judge that there is some evidence to support a verdict for x although the jury found for y. It is not the trial judge's function to determine that there is some evidence to support a finding contrary to that of the jury. Since his function, rather, is to determine if the verdict accords with the manifest weight of the evidence, the question is whether one reasonable man agrees with the trial judge that the manifest weight -- that is, the clear, evident and indisputable weight -- of the evidence does not support a verdict as found by the jury.

In the present cause, it was clear that there was evidence which could support the Plaintiff's contention that she sustained injuries as a result of the accident in this case. Such evidence came from the Plaintiff's own testimony and of that of Dr. Wallowick. The credibility of the Plaintiff's testimony and of the history which she gave to various physicians, however, was subject to substantial question. The reliability of Dr. Wallowick's testimony was also subject to great doubt since it was predicated upon the history given by the Plaintiff who had failed to apprise him that she had been treated for several years -- and as recently as but a month previous -- for the very symptoms and conditions for which he was treating her, supposedly as a result of the accident. As reviewed in the factual statement, there was substantial evidence that indicated that the Plaintiff's symptoms and complaints preceded the accident in this case, and were in fact

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due to a prior accident or a pre-existing condition. It cannot be said, upon a reasonable man standard, that the manifest weight of evidence was to the effect that the Plaintiff's injuries causally flowed from this accident. At most, as in *Erlacher*, supra, it can be said that the evidence was in roughly equal balance. As this Court noted in *Ashcroft*, the application of the "reasonableness" standard to the trial judge's grant of a new trial under such circumstances can result in approval of the action of the trial judge only if he was the trier of fact with the initial function of weighing and interpreting the evidence. Since, however, his action is a review function, the application of the "reasonableness" standard can result in affirmance of his grant of new trial only if a reasonable man could say that the manifest weight of the evidence favoured the Plaintiff's contention as to causation. Where, as here, there was substantial evidence contradicting such a contention, no reasonable man could determine that the manifest weight of the evidence supported the Plaintiff's contention. This analysis was correctly grasped herein by the dissent of Judge Walden who aptly noted that the grant of a new trial in effect rendered the trial judge in this case a seventh juror.

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CONCLUSION

For the reasons set forth herein, the Petitioner respectfully asks this Court to give answer to the certified question that the reasonable man standard of appellate review applies to the Trial Court's determination that the verdict was against the manifest weight of the evidence and not to the Trial Court's weighing or perception of the evidence. In the event of such an answer, the Petitioner respectfully requests that this Court quash the decision below and return this cause to the District Court of Appeal, Fourth District, with instructions to reverse the Trial Court's order granting new trial and to order the entry of judgement in accordance with the jury's verdict.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing & Appendix have been furnished to Craig Lekach, Esquire, 201 S.E. 14th Street, Fort Lauderdale, FL 33316 and Sharon Wolfe, Esquire, 500 Roberts Building, 28 West Flagler Street, Miami, FL 33131, by U. S. Mail, this 16th day of November, 1987.

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