

71,304

FILED
SUPREME COURT

IN THE SUPREME COURT OF FLORIDA 23 1987

JANE BUTTLEY
Deputy Clerk
original

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' REPLY BRIEF ON MERITS

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STATEMENT OF FACTS

The Plaintiff's description of the accident omits essential additional facts. Although the Haydens, who were occupants of a small Toyota automobile, were killed in the accident, their deaths occurred after their vehicle struck a cement utility pole following its collision with the school bus operated by Mrs. BROWN (T: 135). The bus did not strike the utility pole. Mrs. BROWN described her condition after the accident as being more scared than hurt (T: 198). It was not until 8 days after the accident that Mr. BROWN first visited Dr. Wallowick, the treating orthopaedic physician. (T: 234).

Although Mrs. BROWN offered evidence of medical bills totaling in excess of \$15,000, the Plaintiff is not correct in her statement that it is uncontroverted that these bills were related to this accident. These bills were incurred in the course of Dr. Wallowick's treatment -- which eventually led to the hip replacement which had been recommended prior to the accident, herein, by Dr. Sciaretta.

Although Dr. Wallowick rendered an opinion that the Plaintiff sustained a disability related to this accident, he did not treat the Plaintiff prior to this accident and predicated his causation opinion upon the history related by the Plaintiff -- a history which was manifestly incomplete. Indeed Dr. Wallowick was totally unaware that the Plaintiff's complaints which he treated were precisely the complaints which were treated as recently as four weeks prior to the 1981 accident, herein, by Dr. Sciaretta, and that the condition which he diagnosed as requiring surgery was precisely the condition for which Dr. Sciaretta had diagnosed as requiring surgery on that last visit to his office several weeks before this accident (T: 250, 253).

Although Dr. Dalby, who treated Mrs. BROWN following her 1977 accident, did not ascribe any permanent disability to her hip as a result of that accident, he did acknowledge a disability; his opinion was that the hip disability preceded the 1977 accident (T: 153-157). Dr. Sciaretta, who treated her for several years for neck and back

complaints and hip problems, saw her from December 1978 to January 29, 1981 (T: 162-172). Whether her disability was as a result of the 1977 accident, or was a result of degenerative disease, was in some dispute; what was not in dispute was that she was diagnosed as having the same upper and lower spine complaints and serious hip problems before this accident as afterwards (T: 144, 153, 169-172).

The Plaintiff suggests that the passage of time may explain her lapse of memory in respect to her complaints and their relationship to the prior accident. In fact, the Plaintiff not only failed to inform Dr. Wallowick of her prior accident, but also failed to advise him that her complaints had been treated continuously for almost 5 years, and that she had previously been diagnosed as needing a hip replacement. She denied, on questioning in depositions, that she had any hip or back problems preceding the accident in this case; she also denied that she had been involved in any prior automobile accidents, although she had retained an attorney to represent her in pursuing a claim in respect to the 1977 accident (T: 205-207; 208; 210-21). Her deposition was taken in 1984, less than 7 years, not 10 years, after the 1977 accident as suggested by the Plaintiff.

It is clear, upon a review of the facts that while there was some evidence to support a causative link between the 1981 accident and the Plaintiff's complaints, there was substantial evidence which indicated that there was not a causative link, and that the complaints preceded the 1981 accident. The evidence which indicated that the complaints pre-existed the 1981 accident also cast grave doubts as to the reliability of the evidence adduced by the Plaintiff to support a causative link since that latter evidence was dependent upon the reliability of the history received by Dr. Wallowick -- a history which was demonstrably inaccurate and incomplete.

ARGUMENT

The Plaintiff's brief does not address the issue raised in this appeal. Indeed, the Plaintiff appears to argue only that reasonable men could differ as to the force and effect of the evidence in this cause. The test for review of a Trial Judge's grant of new trial is not whether reasonable men could differ as to the force and effect of the evidence, but whether they could differ as to the Trial Judge's determination that the manifest weight of the evidence favored the party suffering the adverse jury verdict. The Plaintiff's admission that the evidence was balanced between the parties is therefore a concession that the Trial Judge was in error.

CONCLUSION

For the reasons set forth herein, and in the Initial Brief, the Petitioners request that this Court quash the order of the District Court and remand this cause with instructions to reverse the Order of the Trial Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Craig Lekach, Esquire, 201 S.E. 14th Street, Fort Lauderdale, FL 33316 and Sharon Wolfe, Esquire, 44 West Flagler Street, Suite 700, Courthouse Tower, Miami, FL 33130, by U. S. Mail, this 23rd day of December, 1987.

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