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**FILED**

SID J. WHITE

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IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

CITY OF TAMPA,

Defendant/Petitioner,

vs.

Case No. 80,804

J. D. LONG and  
HELEN LONG,

Plaintiffs/Respondents.

**PETITIONER'S INITIAL BRIEF**

ON REVIEW FROM THE DISTRICT COURT OF APPEAL  
SECOND DISTRICT, STATE OF FLORIDA

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### STATEMENT OF THE CASE

Respondents, J. D. Long ("Husband") and Helen Long ("Wife") ("Respondents") were the prevailing parties in a negligence action which arose from an automobile accident involving the City of Tampa ("Petitioner") in which the Respondents both claimed injuries. The jury returned a verdict in favor of the Respondents. The Petitioner filed a Motion for a New Trial and for a Remittitur based on, among other things, the award of damages to the Wife for future medical expenses and the instructions given to the jury regarding the Wife's injuries that the words permanent injury within a reasonable degree of medical probability may include subjective complaints of pain resulting from an initial organic injury.

Petitioner's motions were considered and denied by the trial court, judgment was entered for the Respondents and Petitioner filed its appeal with the Second District Court of Appeal to review the denial of its post-trial motions. On October 21, 1992, the District Court affirmed the judgments in favor of the Respondents. In so doing, the district court affirmed the trial court's denial of Petitioner's Motion for a new trial on the issue of whether the trial judge erred in giving the foregoing jury instruction. City of Tampa v. Long, 605 So.2d 1345 (Fla. 2d DCA 1992). The Petitioner timely filed its Notice to Invoke the Discretionary Jurisdiction of this court on November 20, 1992. On February 23, 1993, this court accepted jurisdiction and dispensed with oral

argument pursuant to Florida Rule of Appellate Procedure 9.320.

**STATEMENT OF FACTS**

Respondents, J. D. LONG and HELEN LONG were husband and wife (T. 309). Both were involved in an automobile accident on December 20, 1988, when their automobile was struck by a vehicle owned and operated by the Petitioner (R. 500). The Petitioner admitted liability for the accident (R. 551) and the trial was held to determine permanency and damages only (T. 428, R. 580). The jury returned a verdict in favor of the Husband, finding that he had not sustained a permanent injury, but awarding him some monetary damages (R. 565-566). The jury also returned a verdict in favor of the Wife finding that she had sustained a permanent injury and awarding the Wife monetary damages (R. 567-568).

The Wife's injuries consisted mostly of neck pain and some low back pain. Her diagnosis was arthritis of the neck--actually more of a sprain. (T. 15). The Wife had arthritis before the automobile accident and had complained of, among other things, pain on the left side of her neck with restricted mobility, tenderness of the neck caused by arthritis, pain in the left shoulder and neck for which she had x-rays and received treatment (T. 44, 45 & 48). The Wife's treating physician testified that objective findings were something he could prove and subjective complaints were something that the patient complains of which is not easy to prove (T. 45). The treating physician testified that when he examined the Wife she said her neck was painful (T. 45-56). The wife's treating physician further testified that the Wife's

complaints were subjective and that when somebody tells him they hurt, he has to believe them and when he re-examines them medically and finds a lot of the same symptoms, he has to agree with the subjective complaint or what the patient tells him (T. 117, 121, 136).

The doctor that examined the wife on behalf of the Petitioner testified that she complained of neck and low back pain. Substantially all, if not all, of the tests that he performed on the Wife during a physical examination were negative. However, the patient did complain of pain during some of the tests. All of the x-rays were normal except for the findings associated with the aging process. The examining doctor's opinion was that there was no evidence of permanent injury following the accident, but only subjective complaints which were recorded as such (T. 394-402, 420-421.)

At the request of Respondents, the court instructed the jury that the words permanent injury within a reasonable degree of medical probability may include permanent subject complaints of pain resulting from an initial organic injury (T. 427-431, T. 479, R. 556). The Petitioner had requested the traditional charge (T. 428, R. 580). The Petitioner objected to the Respondents' requested instruction (T. 428, 430). The Petitioner contends that the court erred in instructing the jury that permanent injury may include permanent subject complaints.

SUMMARY OF THE ARGUMENT

The trial court erred in giving the Respondents' requested instruction regarding permanent complaints of pain being included within the definition of permanent injury. The giving of the instruction was tantamount to directing a verdict for the Respondents and instructing the jury to disregard the testimony of the defense expert. This court has determined that a case in which the denial of a similar instruction was cited to be error, was without merit and specifically approved a jury instruction following the statutory language.

### ARGUMENT

THE APPELLATE COURT ERRED IN AFFIRMING THE TRIAL COURT'S FAILURE TO GRANT A NEW TRIAL AFTER THE TRIAL COURT INSTRUCTED THE JURY THAT THE WORDS PERMANENT INJURY WITHIN A REASONABLE DEGREE OF MEDICAL PROBABILITY MAY INCLUDE PERMANENT SUBJECTIVE COMPLAINTS OF PAIN RESULTING FROM AN INITIAL ORGANIC INJURY.

Section 627.737(2), Florida Statutes, 1991, sets forth the criteria a person injured in an automobile accident has to meet in order to recover damages in tort. The only criterium applicable here is subsection (2)(b). That section requires the injured person to prove a permanent injury within a reasonable degree of medical probability. The statute is explicit and does not mention subjective complaints.

The only issues that went to the jury were permanency and damages; the Petitioner having conceded liability before trial. On the issue of permanency, after having initially instructed the jury in accordance with Section (2)(b), (R. 478), over the Petitioner's objection, the trial court further instructed the jury that:

The word permanent injury within a reasonable degree of medical probability may include permanent subjective complaints of pain resulting from an initial organic injury (R. 479).

The additional instruction given logically leads a jury to conclude that subjective complaints of pain following an organic injury are of necessity a permanent injury even in the face of competent medical testimony that no permanent injury occurred. The additional instruction was superfluous, misleading and contrary to the wording of the statute.



The district court found that the trial court had not erred in giving the Respondents' requested instruction regarding subjective complaints of pain being included within the definition of permanent injury under the tort threshold requirement set forth in the statute for the reasons explained in Philon v. Reid, 602 So.2d 648 (Fla. 2d DCA 1992).

The Philon opinion, supra, noted conflict between its decision in Johnson v. Phillips, 345 So.2d 1116 (Fla. 2d DCA 1977), cert. denied, 358 So.2d 131 (Fla. 1978), and the Third District's contrary holding in Rivero v. Mansfield, 584 So.2d 1012 (Fla. 3d DCA 1991), jurisdiction accepted, 592 So.2d 1091 (Fla. 1992). In Philon, the district court stated it was adhering to its opinion in Johnson because of Sullivan v. Price, 386 So.2d 241 (Fla. 1980), and the objective medical evidence and testimony contained in the Philon records which it concluded supported a finding of permanent injury to the plaintiff. This court has now accepted jurisdiction of Reid v. Philon, No. 80,467 (Fla. Jan. 19, 1993).

As to the Johnson case referred to in Philon, the Second District Court of Appeal was called upon to determine whether or not there was sufficient evidence to sustain a jury's finding of permanent injury based upon the evidence presented in that case. There, the plaintiff had suffered a brain concussion and a neurosurgeon testified that the plaintiff's subjective complaints were, within reasonable medical probability, permanent. Those two factors taken together were, in the opinion of the court, sufficient evidence from which the jury could have found a

permanent injury under Section 627.737(2), Florida Statutes. The Johnson court interpreted the words "permanent injury" in the aforesaid statute to include permanent subjective complaints of pain resulting from an initial organic injury. The court did not decide or mention whether or not it was proper to instruct the jury regarding subjective complaints being a basis for a finding of a permanent injury.

The Sullivan case referred to in Philon dealt only with the issue of whether sufficient evidence of permanent injury had been presented by the plaintiff as a matter of law thereby entitling the plaintiff to have the jury instructed on future damages and to justify the entry of the mortality tables into evidence. This court, in Sullivan, did not address the issue involved in the instant case.

The question in the instant case is whether or not the trial judge should have given the Second District Court's interpretation of the threshold statute in Johnson to the jury in the form of an instruction.

In Jones v. Smith, 547 So.2d 201 (Fla. 3d DCA, 1989), the court held that the trial court committed reversible error when it refused to instruct the jury that "the words permanent injury include subject complaints of pain resulting from an initial organic injury", Jones at 201.

In Rivero v. Mansfield, 584 So.2d 1012 (Fla. 3d DCA 1991), the trial court had refused to instruct the jury that the words permanent injury as used in the Florida No-Fault Law, " . . .

include permanent subject complaints of pain resulting from an initial organic injury." Rivero at 1013. Instead, the court instructed the jury that in order for the plaintiff to recover, a permanent injury within a reasonable degree of medical probability must be proved. The jury did not find that the plaintiff had suffered a permanent injury. The plaintiffs argued that the trial court erred in failing to give the requested instruction. The appellate court disagreed and in so doing, receded from its opinion in Jones, supra.

In an en banc opinion, the Rivero court held an instruction that permanent injury includes permanent subjective complaints of pain incorrectly informs the jury that under the statute permanent pain is always permanent injury. In fact, the court determined that such an instruction directs the jury to disregard the testimony of defendant's medical experts and is tantamount to the court directing a verdict for the plaintiffs on the issue of permanent injury. The court further held that the trial court's instruction tracking the language of the statute was appropriate because it properly informed the jury that its obligation was to determine whether the plaintiff had sustained a permanent injury within a reasonable degree of medical probability, in light of all the testimony.

This court has now reversed Rivero, on other grounds 18 Fla. L. Weekly 599 (Fla. Feb. 4, 1993). In so doing this court found the plaintiff's cross-petition claiming that the subjective complaint instruction should have been given was without merit and

further approved the decision of the Third District concerning the instruction given, i.e., the instruction tracking the language of the statute.

As shown, there was conflicting evidence presented at the trial regarding the Wife's permanent injury. It is submitted that the conflicting evidence is typical of what occurs in trials that revolve around the issue of whether or not a soft tissue injury sustained in an automobile accident is a permanent injury entitling the injured person to receive damages in tort.

If after hearing such testimony, the jury is instructed, as a matter of law, that the term permanent injury may include subjective complaints of pain, the jury need not even consider the opinion of the defense medical witnesses because their testimony would be irrelevant. In order to be relevant, such defense medical witnesses would have to testify that the plaintiff was not in fact complaining of subjective complaints of pain or that the subjective complaints were not permanent.

Absent the erroneous instruction, the jury could have chosen to believe the defense physician's opinion that the Wife suffered no permanent injury even though she had subjective complaints which were noted as such.


The district court's decision below is in direct conflict with the Third District's opinion in Rivero v. Mansfield and this court's opinion in Mansfield v. Rivero. Petitioner asserts that the foregoing cases correctly state the law, i.e., a jury should be instructed in accordance with the statutory language. Such

decisions are in keeping with the statutory meaning of "permanent injury" as defined in the statute and allow juries to give equal consideration to medical experts for both sides. Therefore, this court should now reverse the decision of the district court below.

**CONCLUSION**

Instructing the jury that subjective complaints of pain may constitute permanent injury was prejudicial error and Petitioner is therefor entitled to a new trial.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by U. S. Mail to J. D. Long and Helen Long, 2905 - 25th Street, Tampa, Florida 33605, and Steven T. Northcutt, Esquire, P. O. Box 3429, Tampa, Florida 33601-3429, attorney for Plaintiffs/Respondents, this 22 day of March, 1993.

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