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IN THE SUPREME COURT OF FLORIDA

CITY OF TAMPA,

Defendant/Petitioner,

vs. Case No. 80,804

J. D. LONG and
HELEN LONG,

Plaintiffs/Respondents.
_____/

PETITIONER'S JURISDICTIONAL BRIEF

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

PAMELA K. AKIN
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STATEMENT OF THE CASE AND FACTS

Respondents, J. D. Long and Helen Long ("Respondents") were the prevailing parties in a negligence action arising from an automobile accident involving the City of Tampa ("Petitioner"). The Petitioner filed a Motion for a New Trial and for a Remittitur based on the award of damages for medical expenses and the instructions given to the jury that subjective complaints of pain resulting from an initial organic injury may be included in the definition of an injury.

The trial court denied the Petitioner's motions and Petitioner filed an appeal with the Second District Court of Appeal to review the denial of the post-trial motions. On October 21, 1992, the District Court affirmed the judgments in favor of the Respondents.

The Petitioner timely filed its Notice to Invoke the Discretionary Jurisdiction of this court on November 20, 1992.

SUMMARY OF THE ARGUMENT

The District Court of Appeal held that the trial court did not err in instructing the jury regarding the inclusion of subjective complaints of pain in the definition of permanent injury. The decision of the district court in this case cannot be reconciled with the holding of the Third District Court of Appeal in Rivero v. Mansfield, 584 So.2d 1012 (Fla. 3d DCA, 1991), jurisdiction accepted, 592 So.2d 1091 (Fla. 1992), Supreme Court Docket No. 78-856.

The Rivero court held that giving the jury instructions that permanent complaints of pain constitute permanent injuries was the equivalent of awarding the plaintiff a directed verdict on the issue of permanency of injury and instructing the jury to ignore the testimony of the defense's medical experts. It is the Petitioner's contention that the decision of the Second District Court of Appeal expressly and directly conflicts with the decision in Rivero, which is presently before the Court.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a District Court of Appeal that expressly and directly conflicts with a decision of the Supreme Court or another district court of appeal on this same point of law. Art. V, §3(b)(3), Fla.Const. (1980); Fla.R.App.P. 9.030(a)(2)(A)(iv).

ARGUMENT

> The decision of the Second District Court of Appeal in this case expressly and directly conflicts with the decision of the Third District Court of Appeal in Rivero v. Mansfield, 584 So.2d 1012 (Fla. 3d DCA 1991), Cert. Accepted, Mansfield v. Rivero, 592 So.2d 1091, Fla. 1992, Supreme Court Docket No. 78-856

The district court of appeal held, despite Petitioner's argument to the contrary, that the trial court did not err in giving the plaintiffs' requested jury instructions regarding permanent complaints of pain being included within the definition of permanent injury in §627.737(2)(b), Fla.Stat. (1991), which section sets forth the tort threshold requirement.

The decision of the Second District Court of Appeal conflicts with the Third District Court of Appeal's decision in Rivero v. Mansfield, 584 So.2d 1012 (Fla. 3d DCA 1991). The Rivero court stated that the giving of jury instructions that indicate that permanent complaints of pain constitute permanent injury was the equivalent of granting a directed verdict to the plaintiffs on the issue of permanency of injury and instructing the jury to disregard the expert medical testimony presented by the defendants. Petitioner respectfully submits that this court should grant discretionary review and resolve this conflict by quashing the decision of the Second District Court of Appeal.

In the decision of the district court reported as City of Tampa v. Long, 17 FLW 2441 (Fla. 2DCA, October 21, 1992), the trial court order denying the Petitioner's Motion for a New Trial on the question of permanent injury instruction by the trial court was affirmed. The district court declined to follow the holding by the Third District Court of Appeal in Rivero v. Mansfield, 584 So.2d 1012 (Fla. 3d DCA 1991), and adhered to the apparent contrary holding in Johnson v. Phillips, 345 So.2d 1116 (Fla. 2d DCA 1977), Cert. Den. 358 So.2d 131 (Fla. 1978).

The court's refusal to follow the court's decision in Rivero ignores authoritative case law in the State of Florida on the issue of requested jury instructions regarding the tort threshold for "permanent injury". The Second District Court of Appeal appropriates its decision from a previous tort threshold case, Johnson, and applies it in a manner which confuses the definition

of "permanent injury" contained in Florida Statute §627.737(2)(b).

The district court has affirmed the trial court's inappropriate application of the district court's "threshold" decision in Johnson on the issue of the propriety and sufficiency of jury instructions in the instant case. If the district court's holding is affirmed, the jury instruction will act to obviate and overrule the tort threshold requirement, as set forth in the Florida Statutes.

The Second District Court of Appeal's decision in the instant case directly conflicts with the Third District Court of appeal in Rivero v. Mansfield, 584 So.2d 1012 (Fla. 3d DCA 1991). The court's opinion states that:

> The 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 effect, such an instruction directs the jury to disregard the testimony of defense medical experts and is tantamount to the court directing a verdict for plaintiffs on the issue of permanent injury. Id. 1014

The Third District Court of Appeal in Rivero correctly stated that permanent subjective complaints of pain do not constitute permanent injury. That court's decision is in keeping with the statutory meaning of "permanent injury", Florida Statutes §627.737(2)(b), and allows the jury to proper consideration to expert medical testimony from both parties, regardless of the outcome. This court should affirm the Third District Court of Appeal's rationale, as it pertains to this case, and should accept discretionary review of the matter at hand and quash the contrary

decision of the Second District Court of Appeal.

CONCLUSION

This court has discretionary jurisdiction to review the decision below, and the court should exercise that jurisdiction to consider the merits of Petitioner's argument.

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 25th day of November, 1992.

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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

CITY OF TAMPA,

Appellant,

v.

J. D. LONG and HELEN LONG,

Appellees.

Case No. 91-02378

Opinion filed October 21, 1992.

Appeal from the Circuit Court
for Hillsborough County;
J. Rogers Padgett, Judge.

Pamela K. Akin, City Attorney,
and Jack M. Larkin,
Assistant City Attorney,
Tampa, for Appellant.

Stevan T. Northcutt of Levine,
Hirsch, Segall & Northcutt, P.A.,
Tampa, for Appellees.

PER CURIAM.

We affirm the final judgment in favor of J. D. Long without discussion. As to the final judgment entered in favor of Helen Long, we approve the jury instructions for the reasons explained in Philon v. Reid, 602 So.2d 648 (Fla. 2d DCA 1992).

APPENDIX

But see Rivers v. Mansfield, 584 So.2d 1012 (Fla. 3d DCA 1991), jurisdiction accepted, 592 So.2d 1091 (Fla. 1992).

DANAHY, A.C.J., and THREADGILL and ALTENBERND, JJ., Concur.