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 REPLY BRIEF

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

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REPLY TO THE CASE AND FACTS

The Respondents state that when the Defendant's doctor was asked whether objective evidence would be necessary to a finding of permanent injury, the doctor said that each case had to be evaluated on its own merits. (Answer Brief page one).

The Respondents then reasoned from the foregoing statement that here, the experts were in agreement that subjective complaints of pain can constitute a permanent injury, but the experts differed on whether Mrs. Long's complaints of pain were sincere (Answer Brief at page two).

What the doctor said was that each case had to be evaluated on its own merits and the specific findings in each case. "You cannot make a general statement like that. It's too terribly general." (R. 422).

Respondent's counsel then uses the statement the Petitioners' doctor said could not be made because it was too general to reach the conclusion that the experts agreed and then argued from that false premise (see for example Answer Brief at pages five and six). Such a conclusion is not supported by the record.

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.

REPLY TO RESPONDENTS' ARGUMENTS A AND B

A. and B.

The Rivero decision is not materially distinguishable from this case and the Rivero decision is not poorly reasoned.

In Rivero v. Mansfield, 584 So.2d 1012 (Fla. 3rd DCA 1991), the court rejected the plaintiff's proposed jury instruction regarding subjective complaints and 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 did sustain a permanent injury within a reasonable degree of medical probability, in light of all the testimony.

This court approved that portion of the Rivero decision, Mansfield v. Rivero, 18 F.L.W. S99, S101 (Fla. February 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.

Apparently, what this court is saying is that the additional

requested instruction is superfluous, misleading and contrary to the wording of the statute. Respondents' counsel would like the court to believe that subtleties such as "may include" versus "include" are readily distinguishable and discernable by a jury which hears jury instructions read to it once in a rather rapid manner without an opportunity to question the subtle nuances of the English language. What the jury does recall is that the judge did mention something that subjective complaints of pain could be the basis for a finding of permanent injury.

In Standard Jury Instructions--Civil Cases, 18 F.L.W. S99 (Fla. Feb. 4, 1993), the court authorized the publication and use of standard jury instruction 6.1d Motor Vehicle No Fault Threshold Instruction.

That instruction asks the jury to determine the issue of permanency, by determining whether the claimant sustained an injury as a result of the incident complained of which consists in whole or in part of a permanent injury within a reasonable degree of medical probability, other than scarring and disfigurement. No mention is made of subjective complaints.

In the comment section to the jury instructions, the commentators stated that §627.737(2) (Florida Statutes, 1991), does not define "permanent injury within a reasonable degree of medical probability" and that such an injury, or the lack thereof is established by expert testimony. Therefore, the instructions do not attempt to define the terms and leave their explanation to the testimony of the experts and argument of counsel.

While the opinion does not rule on the correctness of the instructions, such an instruction is consistent with this court's decision in Mansfield v. Rivero, supra.

The Respondents are correct in stating that the Johnson v. Phillips case, 345 So.2d 1116 (Fla. 2d DCA 1977), cert. denied, 358 So.2d 131 (Fla. 1978), is support for their position that permanent injury may include permanent subjective complaints of pain resulting from an initial organic injury. The Johnson court did not decide or mention whether or not it was proper to instruct the jury regarding subjective complaints being the basis for a finding of permanent injury. Additionally, the standard jury instructions in civil cases, supra, make no mention of the Johnson case, supra.

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 Steven T. Northcutt, Esquire, P. O. Box 3429, Tampa, Florida 33601-3429, attorney for Plaintiffs/ Respondents, this 4th day of May, 1993.

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