SUPREME COURT OF FLORIDA

CASE NO. 89,366

ALLSTATE INSURANCE CO.,

Petitioner,

vs.

MYRDA MANASSE,

Respondent.
_____/

AMICUS BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS

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STATEMENT OF INTEREST OF AMICUS

The Academy of Florida Trial Lawyers is a statewide voluntary association of approximately 4,000 attorneys, whose practices emphasize litigation, and in large part involve cases arising out of personal injuries and wrongful death.

The objectives of the Academy are:

a. To uphold and defend the principles of the Constitution of the United States and the Florida Constitution;

b. to advance the science of jurisprudence;

C. To train in all fields and phases of advocacy;

d. To promote the administration of justice for the public good;

e. To uphold the honor and dignity of the profession of law;

f. To encourage mutual support and cooperation among members of the Bar;

g. To work diligently to promote public safety and welfare while protecting individual liberties;

h. To encourage public awareness of the adversary system and uphold and improve the adversary system, assuring that the courts shall be kept open and accessible to every person for redress of injuries and that the right to trial by jury shall be secure to all and remain forever inviolate.

The Academy, representing its member attorneys, is substantially interested in the issues involved in this action, the resolution of which will have widespread effects upon persons injured by the acts of others, and on the civil justice system throughout the state of Florida.

STATEMENT OF THE FACTS

The Academy adopts the statement of facts in the opinion of the District Court of Appeal, Fourth District.

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ARGUMENT

WHERE A JURY FINDS THAT A PLAINTIFF HAS SUSTAINED A PERMANENT INJURY AND AWARDS FUTURE MEDICAL EXPENSES, BUT AWARDS NO FUTURE GENERAL DAMAGES, THE VERDICT IS INADEQUATE AS A MATTER OF LAW, AND THE PLAINTIFF NEED NOT OBJECT BEFORE THE DISCHARGE OF THE JURY.

Where a jury in an automobile accident case finds that a plaintiff has sustained a permanent injury and awards future medical expenses but no future general damages, the verdict is inadequate as a matter of law.

The parties and the District Court of Appeal have done a thorough job of reviewing the many cases on permanency, inadequacy, and inconsistency, and the Academy will not attempt to repeat that effort here. Rather, the Academy will focus on the plain language of the no fault statute, and on the longstanding principles of Florida law regarding damages and judicial review of damages.

Under §627.737(2), the automobile "no fault" statute, "a plaintiff may recover damages in tort for pain, suffering, mental anguish and inconvenience because of bodily injury, sickness, or disease" caused by an automobile accident only if the plaintiff's injury consists in whole or in part of:

(a) Significant and permanent loss of an important bodily function.

(b) Permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement.

(c) Significant and permanent scarring or disfigurement.

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(d) Death.

Thus, a jury that has found a permanent injury has found that the defendant's negligence proximately caused the plaintiff to suffer one of those four kinds of permanent injuries listed in the statute -- a significant and permanent injury. Such an injury logically cannot be one that does not cause pain, suffering or inconvenience.

When the plaintiff has suffered one of those kinds of permanent injury proximately caused by the defendant's negligence, the plaintiff is entitled under the statute to recover from the defendant for "pain, suffering, mental anguish and inconvenience." *Id.*

Pain, suffering, mental anguish and inconvenience are general damages. See Ephrem v. Phillips, 99 So. 2d 257 (Fla. 1st DCA 1957), cert. denied, 101 So. 2d 816 (Fla. 1958); see generally, e.g., Powers v. Johnson, 562 So.2d 367, 368 (Fla.2d DCA 1990), rev. denied, 570 So.2d 1304 (Fla. 1990) (referring to such damages as "general damages"). General damages are damages that "actually and necessarily result from the alleged breach or wrong." Augustine v. Southern Bell Telephone & Telegraph Co., 91 So. 2d 320, 323 (Fla. 1956) (emphasis added).

Because such damages ***necessarily*** result from a personal injury, an award of zero for pain, suffering, mental anguish and inconvenience, when the defendant has caused the plaintiff to sustain a permanent loss of a significant bodily function, a permanent injury within a reasonable degree of medical probability, significant and permanent scarring or disfigurement, or death, is

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inadequate as a matter of law. A permanent injury of the nature described in §627.737(2) cannot be sustained without causing at least some "pain, suffering, mental anguish" or, at the very least, "inconvenience."

When a jury makes a finding that a defendant is liable to a plaintiff for a breach of duty, the plaintiff has established a violation of her legal rights and is entitled to at least some damages. Lassiter v. International Union of Engineers, 349 So. 2d 622, 625-626 (Fla. 1977). Under §627.737(2). when a jury has found that the defendant's breach of duty caused permanent injury to the plaintiff, the plaintiff is entitled to be compensated for "pain, suffering, mental anguish and inconvenience" proximately caused by the invasion of the plaintiff's legal rights. The plaintiff is entitled to recover compensatory damages for those elements.

Compensatory damages are "those amounts necessary to compensate adequately an injured party for losses sustained as the result of a defendant's wrongful or negligent actions." Bidon v. Dept. of Professional Regulation, 596 So. 2d 450, 452 (Fla. 1992). "The fundamental principle of the law of damages is that the person injured by . . . wrongful or negligent act or omission shall have fair and just compensation commensurate with the loss sustained in consequence of the defendant's act which [gave] rise to the action." Hanna v. Martin, 49 So. 2d 585, 587 (Fla. 1951). When the jury has determined that the defendant's negligence caused the plaintiff a permanent injury, the award of zero noneconomic damages violates this "fundamental principle of the law of damages." It

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fails to compensate the plaintiff for the loss sustained in consequence of the defendant's act.

Such a verdict is contrary to the law. It is inadequate as a matter of law.

The traditional remedy for an inadequate verdict in Florida has long been the grant of a new trial. Short v. Grossman, ***245 So.*** 2d 217 (Fla. 1971); Griffis v. Hill, 230 So. 2d 143 (Fla. 1969); Radiant Oil Co. v. Herring, 200 So. 376, 378 (Fla. 1941). The law is well established that the court should grant a new trial when the jury did not consider all of the elements of damages or all of the issues submitted. Id.

This traditional power of the courts to review the adequacy of the verdict has remained essentially undisturbed for more than fifty years. The Supreme Court recently reaffirmed this power in Poole v. Veteran Auto Sales & Leasing, ***668*** So. 2d 189, 191 (Fla. 1996).

In Poole, this Court interpreted a provision of the 1986 Tort Reform Act. Section 768.74(1), Florida Statutes provides:

> In any action to which this part applies wherein the trier of fact determines that liability exists on the part of the defendant and a verdict is rendered which awards money damages to the plaintiff, it shall be ***the responsibility of the court, upon proper motion, to review the amount of such award to determine if such amount is excessive or inadequate*** in light of the facts and circumstances which were presented to the trier of fact.

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(emphasis added). The statute goes on to empower the court to grant a remittitur or additur, or in the alternative a new trial. §§768.74(2), (4).

In Poole, this Court held that this provision did not alter "the longstanding principles applicable to the granting of new trials on damages." 668 So. 2d at 191. Thus, it long has been, and still is, the responsibility of the court to consider, when properly raised in a post trial motion, whether an award of damages is inadequate.

The possibility that a verdict may be both inadequate and inconsistent does not change this longstanding principle. The inconsistency of a verdict cannot deprive the plaintiff of the right to judicial review, pursuant to a motion for new trial, of the adequacy of the verdict. See, e.g., Cowart v. Kendall United Methodist Church, 476 So. 2d 289 (Fla. 3d DCA 1985); see generally Massey v. Netschke, 504 So. 2d 1376 (Fla. 4th DCA 1987).

To require a plaintiff to raise the adequacy of the verdict before the jury is discharged would require the plaintiff to resubmit the issue of damages to the very jury that already has shortchanged her, rather than to the court. Such a requirement would deprive the plaintiff of this important right of judicial review of the adequacy of damages so firmly established in our case law and statutes.

This Court should affirm the decision of the Fourth District, and the long line of Florida cases preceding it, and hold that the failure to challenge the adequacy of a verdict before the jury is

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discharged does not waive the plaintiff's right to challenge the adequacy of the damages award via a motion for new trial.

CONCLUSION

Where a jury in an automobile accident case finds that a plaintiff has sustained a permanent injury and awards future medical expenses but no future general damages, the verdict is inadequate as a matter of law. The plaintiff has the right to judicial review of the inadequacy of the damages, and may raise the issue in an appropriate motion for new trial. The decision of the Fourth District should be affirmed.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was furnished via U.S. Mail to: HENRY L. KAY, ESQUIRE, 230 Royal Palm Way, Suite 305, Palm Beach, Florida 33480; JOE HANKIN, ESQUIRE, 515 North Flagler Drive, Suite 203, West Palm Beach, Florida 33401; JAMES P. COOKSEY, ESQUIRE, 2601 Broadway, Suite 3, West Palm Beach, Florida 33402; K. JACK BREIDON, ESQUIRE, Breidon & Associates, 3101 Terrace Avenue, Naples, Florida 33104; and MICHELE I. NELSON, ESQUIRE, Paxton, Crow, Bragg, Smith & Keyser, P.A., Barristers Building, Suite 500, 1615 Forum Place West Palm Beach, Florida 33401 this 3 day of March, 1997.

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