ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO: 89,366

District Court of Appeal,
4th District - No. 94-2318

ALLSTATE INSURANCE COMPANY,

FL BAR NO.: 436194

Petitioner,

vs.

MYRDA MANASSE,

Respondent.

REPLY BRIEF OF PETITIONER, ALLSTATE INSURANCE COMPANY

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PREFACE

Petitioner, ALLSTATE INSURANCE COMPANY, will be referred to as "ALLSTATE", "Defendant", or "Petitioner". Respondent, MYRDA MANASSE, will be referred to as "MANASSE", "Plaintiff", or "Respondent".

The following record citations will be used:

R - Record On Appeal

T1- Transcripts of Hearings of June 28, 1994 and July 28, 1994

T2- Trial transcripts of April 25th and April 26, 1994

A - Appendix

STATEMENT OF THE CASE AND FACTS

Petitioner takes exception to two statements made by Respondent in her Statement of the Facts and Case. First, at page 1, Respondent asserts that there was no testimony from which the jury could have found that the Plaintiff would be free from pain and able to resume all prior activities. On the contrary, there was testimony that she had resumed a normal lifestyle following the August 1992 accident. She was engaged in a strenuous work schedule, as well as engaging in sporting and weightlifting activities. (T2. 16-17, 42-45, 47-52). She had plans to become a nursing assistant. (T2. 305). She had not had any medical or chiropractic care for over a year prior to trial. (T2. 112, 125). She had been discharged

by her chiropractor before being involved in the second accident. (T2. 18-19, 62-63).

Further, there was medical testimony that her disc at L5-S1 was only bulging following the first accident, and was not herniated. (T2. 81-83, 196-204, 206, 268-269). There was medical testimony that the condition of the Plaintiff's disc would not necessarily be symptomatic, and regarding lack of any objective findings to support pain complaints. (T2. 85, 206-208, 227-228, 231, 291-92, 296, 324-325, 329-330). Dr. Saiontz, a neurosurgeon who saw the Plaintiff after the first accident but before the second accident, did not find a disability or place any restrictions on her. (T2. 235). In short, there was ample evidence to support the jury's conclusion that the Plaintiff would not have future pain or restriction of her activities as a result of the August 1992 accident.

The second statement with which Petitioner takes exception is at page 2 of Respondent's brief where it is asserted that all testimony regarding future treatment related to pain relief. In fact, the only testimony regarding the need for any future care related to chiropractic visits on an occasional basis, with the chiropractor recognizing that there had been an aggravation in the Plaintiff's condition from the second accident. (T2. 146-147, 163-164). Further, the chiropractor testified that the continuation of care would not be limited to pain relief, but would also be of benefit to

slow the spinal aging process by increasing flexibility. (T2. 153). In Respondent's brief, she states that the "degeneration would result in increased pain." This is not an accurate characterization of the evidence. Dr. Saiontz specifically testified that although the Plaintiff would continue to have arthritic changes they would not necessarily cause any problems. They may or may not. (T2. 207-208). As set forth above, there is ample additional medical testimony that these type of degenerative changes are not necessarily symptomatic.

Finally, as to the last paragraph of the Respondent's Statement of the Facts and Case, Respondent attempts to characterize Petitioner's position in various respects. It is the position of ALLSTATE, supported amply by the evidence in the case, that there was disputed evidence on permanent injury, disputed evidence on whether the Plaintiff had in the past or would in the future experience pain and suffering as a result of the August 1992 accident, and disputed evidence as to whether the need for future medical expenses was related to either of the two accidents, or in fact unrelated causes, and whether the Plaintiff had any need for future medical treatment.

ARGUMENT

I. WHERE A JURY FINDS THAT A PLAINTIFF HAS SUSTAINED A PERMANENT INJURY AND

AWARDS FUTURE MEDICAL EXPENSES, BUT AWARDS NO FUTURE INTANGIBLE DAMAGES, IS THE VERDICT INADEQUATE AS A MATTER OF LAW?

Respondent relies on six cases at pages 4 through 7 of her brief to support her position that if the jury finds a Plaintiff has sustained a permanent injury and awards an amount for future medical expenses, there must be an award for future intangible damages as a matter of law. None of those cases are on point, and all of them are readily distinguishable. Respondent does not address the cases which are most directly on point to the facts of the present case.

Five of the cases deal with failure of the jury to award any amount for pain and suffering, primarily dealing with past pain and suffering, in the face of unrefuted evidence. Mason v. District Board of Trustees of Broward Community College, 644 So.2d 160 (Fla. 4th DCA 1994); Daigneault v. Gache, 624 So.2d 818 (Fla. 4th DCA 1993), rev. denied, 634 So.2d 623 (Fla. 1994); Harrison v. Housing Resources Management, Inc., 588 So.2d 64 (Fla. 1st DCA 1991); Een v. Rice, 637 So.2d 331 (Fla. 2d DCA 1994); Thornburq v. Pursell, 446 So.2d 713 (Fla. 2d DCA 1984).

It should be noted that in Mason, although there was a contention that the jury was required to award damages for both past and future pain and suffering, the court reversed only on the failure to award damages for past pain and suffering, specifically recognizing the extremely broad

discretion which must be accorded to the finder of fact due to the speculative nature of future damages. Where, as in the present case, there was conflicting evidence as to whether the Plaintiff would experience these future damages, the court found the failure to award them was appropriate.

The only case Respondent cites which deals with an inadequate and inconsistent verdict awarding future medical expenses but no future pain and suffering is Butte v. Hughes, 521 So.2d 280 (Fla. 2d DCA 1988). Although the specific facts of the injury are not stated in the case, it appears that there was no dispute in the evidence that the Plaintiff had a significant and permanent injury, but the only dispute related to whether his problems were caused by the accident or a pre-existing condition. Also, distinct from the present case, there does not appear to have been any evidence that the medical treatment would be of benefit for reasons other than pain relief.

Respondent does not address the case which is factually most closely on point to the present case, Simpson v. Stone, 662 So.2d 959 (Fla. 5th DCA 1995), nor any of the number of other similar cases where appellate courts held appropriate awards of medical expenses without awards for pain and suffering, so long as the evidence supports the verdict. See City of Miami v. Smith, 165 So.2d 748 (Fla. 1964); Sweet Paper Sales Corp. v. Feldman, 603 So.2d 109 (Fla. 3d DCA 1992); Fitzgerald v. Molle-Teeters, 520 So.2d 645 (Fla. 2d DCA 1988),

rev. denied, 529 So.2d 694 (Fla. 1988); White v. Martinez, 359 So.2d 7 (Fla. 3d DCA 1978).

The Academy of Florida Trial Lawyers in its Amicus Brief relies upon the no-fault statute, Section 627.737(2), Florida Statutes, contending that where the jury finds a permanent injury it has necessarily, pursuant this statute, found that it is a "significant" injury. Therefore, according to the Academy, such injury must logically cause pain, suffering, or inconvenience. This reasoning is flawed in that the subsection of the statute which would apply here is 627.737(2) (b) which states that the Plaintiff may be entitled to recover intangible damages if the jury finds a "permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement." There is no provision that the injury found must be "significant". There is also no provision in the statute that a jury must award intangible damages if a permanent injury is found. Like Respondent, the Academy ignores case law on point where appellate courts have upheld, under appropriate facts, the finding of permanent injury and award of future medical expenses, but no award of future intangible damages.

In conclusion, there could be any number of situations where medical treatment is of benefit, but for reasons unrelated to pain relief. There are already cases on point, as set forth in Petitioner's Initial Brief and above, addressing exactly these type of circumstances. The Fourth

District majority's holding in the present case will create situations where the evidence supports a jury declining to award future intangible damages notwithstanding award of future medical expenses, yet the jury will not be permitted to make such an award, even though properly supported by the evidence. Petitioner can think of no other situation where a jury would be instructed that they must make a specific finding and award of damages notwithstanding that there is evidence to the contrary. It is respectfully submitted that the question of future damages should remain one to be decided according to the facts of each individual case, and where, as here, the evidence supports an alternative reason for future medical treatment, the jury should be permitted to find a permanent injury and award future medical expenses, but decline to award future intangible damages. This is particularly true where all of the Fourth District judges acknowledged that the jury followed the instructions given.

II. IF SUCH A VERDICT REQUIRES A NEW TRIAL, MUST THE PLAINTIFF HAVE OBJECTED BEFORE THE DISCHARGE OF THE JURY?

First, Respondent quotes language from the Fourth District's opinion in this case to the effect that the court had not previously required an objection prior to discharge of the jury to review an inconsistent verdict. On the contrary, the Fourth District has in a number of cases required a contemporaneous objection where the problem with the form of

the verdict related to inconsistency, as opposed to being limited to inadequacy. See Robbins v. Graham, 404 So.2d 769 (Fla. 4th DCA 1981); Lindquist v. Covert, 279 So.2d 44 (Fla. 4th DCA 1973); Shofner v. Giles, 579 So.2d 861 (Fla. 4th DCA 1991); Hendelman v. Lion Country Safari, Inc., 609 So.2d 766 (Fla. 4th DCA 1992), rev. dism,, 618 So.2d 209 (Fla. 1993); Moorman v. American Safety Equipment, 594 So.2d 795 (Fla. 4th DCA 1992), rev. denied, 606 So.2d 1164 (Fla. 1992); Odom v. Carney, 625 So.2d 850, fn. 1 (Fla. 4th DCA 1993).

In addition to the cases cited above and in Petitioner's Initial Brief, the Third District very recently decided the case of Delva v. Value Rent-A-Car, 22 Fla. L. Weekly D358 (Fla. 3d DCA February 5, 1997). In Delva the Plaintiff was awarded past medical expenses of $20,034, past pain and suffering of $20,000, future medical expenses of $1,000,000 over 50 years, reduced to present value of $480,000, and no future intangible damages. The court assumed arguendo that the award for future expenses was legally inconsistent with the $0 award for future pain and suffering, but appeared to implicitly reject the holding of the Fourth District majority in this case that such awards would in all cases be legally inconsistent. Significantly, the court found that the problem, if any, was one of inconsistency of the verdict so as to require a contemporaneous objection and the verdict to be resubmitted to the jury for correction. The problem did not relate to the adequacy (in Delva the issue was excessiveness)

of the verdict because the total amount was appropriate pursuant to the evidence, but the problem related only to the manner in which the jury had allocated the amount.

The same reasoning applies in the present case where there is no contention that the total amount of the award that the jury made to the Plaintiff was inadequate or unsupported by the evidence. In fact, it has been conceded both by the Respondent and the Fourth District that the jury could well have made different findings on permanency, amount of medical expenses, etc., so as to have properly awarded the Plaintiff less than it did, and even nothing at all. Rather, the problem, if any, with the present verdict is its allocation as inconsistent. For instance, if the jury had awarded the same $2,000 for past pain and suffering, $9,000 for future medical expenses, and $1,000 for future pain and suffering, there would be no argument to be made concerning the adequacy or inconsistency of the verdict. It has been recognized that verdicts which are inconsistent will generally also be inadequate, but in the present case, the problem with the verdict, if any, is limited to inconsistency. It is clear that it would serve no legitimate purpose to allow a party to make a tactical decision to decline to raise the inconsistency at the time the verdict is returned, when any problem could easily be corrected by the jury, and then obtain a whole new trial.

Respondent in her brief expresses the "fear" that the same jury would not give her "fair compensation" if it reconsidered the verdict. However, Appellant does not complain about the total amount of the compensation as being legally unsupportable. If this "fear" was the reason that she did not ask that the matter be resubmitted to the jury, this is plainly an improper attempt at a "second bite at the apple" and she should not be entitled to a new trial. Avoidance of a new trial is the whole reason for the cases holding that the appropriate procedure when there is a facial inconsistency in a verdict is to resubmit the matter to the same jury. If the jury still will not make an award that they are legally required to make, the party has met their obligation to do all they can to try to get the inconsistency corrected without the necessity of a new trial.

Respondent goes on at page 12 to argue concerning various matters which are completely outside the record in this case, and continues in the ensuing pages to discuss, or at least imply, the possible improper consideration of the jurors of matters outside the evidence. It should be noted that there is absolutely no indication in the present case that the jurors failed to properly consider the elements of damage in accordance with the evidence presented, or of any unfair bias about these type of lawsuits by any members of the jury panel. In any event, the matters and concerns raised by Respondent on pages 12 through 14 are appropriately dealt with in voir dire

to eliminate any jurors who have improper biases or prejudices. None of the arguments cited are justification for a new trial in the present case.

Respondent's suggestion that the order of the verdict form should be rearranged would effectively put the "cart before the horse" in having the jurors consider issues of damages before they have even reached the threshold or preliminary issues to determine whether such damages should be awarded. Respondent's suggestions would not eliminate confusion in the current verdict form, but would likely increase the potential for inconsistent verdicts.

The Academy of Florida Trial Lawyers also makes a brief argument that the verdict was inadequate rather than inconsistent and that the Plaintiffs should not be required to resubmit the issue to the same jury. ALLSTATE would rely on its argument as set forth above in response to the Academy's brief.

III. WHETHER THE TRIAL JUDGE ERRED IN DETERMINING THAT ALLSTATE'S OFFER OF JUDGMENT WAS NOT MADE IN GOOD FAITH.

Petitioner agrees with the general proposition that there is a presumption of correctness of the trial court's findings of fact. However, it is also well established that the trial judge's exercise of discretion is subject to appellate review, and should be reversed where there is abuse of discretion.

Pursuant to the applicable case law, the trial judge abused his discretion in denying ALLSTATE's entitlement to attorneys' fees pursuant to its Offer of Judgment where the evidence in the case showed a reasonable basis for the amount of the offer. There were extensive conflicts in the evidence as to permanency, relation of the Plaintiff's back condition to the accident in question as opposed to other causes, and to what extent the Plaintiff had in the past or would in the future experience any pain and suffering as a result of the injury. There was also evidence that the Plaintiff had not had extensive medical treatment in the past related to the August 1992 accident. There was a clear dispute in the testimony as to whether the Plaintiff had even suffered a herniated disc in that accident, or merely had a minimally bulging disc, and whether such disc condition was even related to the accident in question as opposed to other activities in which the Plaintiff engaged. The Plaintiff had continued to engage in a normal lifestyle including work activities, plans to further her education, pregnancy and childbirth, sporting, weightlifting, and other strenuous physical activities. The Plaintiff had had no medical or chiropractic care for a period of approximately a year prior to the time that ALLSTATE made the Offer of Judgment. It is clear that there was a more than reasonable basis for the amount of the offer, even beyond the specific factors enumerated by ALLSTATE's counsel at the hearing.

Otherwise, on this issue Petitioner would rely on its Initial Brief, except to bring to the court's attention the recent case of People's Gas System, Inc. v. Acme Gas Corporation, 22 Fla. L. Weekly D205 (Fla. 3d DCA January 15, 1997). Appellants contended that an award of attorneys' fees pursuant to minimal offers of judgment by Appellees was improper where their total claim was in the amount of $3.5 million and the offers were in the respective amounts of $2,500. The court rejected the argument that the offers were not made in good faith where liability strongly favored the Appellees. The court concluded that there was a reasonable foundation for the amounts of the offers, notwithstanding that they were very minimal in relation to the total damages.

Although liability issues were not present in the instant case, the People's Gas case is instructive. Where, as here, the evidence, though not without conflict, was ample to support ALLSTATE's evaluation of the likely range of the verdict, it is respectfully submitted that the trial judge abused his discretion in denying entitlement to attorneys' fees.

CONCLUSION

The decision of the Fourth District Court of Appeal should be reversed, and the cause remanded for determination of the amount of trial and appellate attorneys' fees to which ALLSTATE is entitled.