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Supreme Court of Florida

Case No. 90,534

District Court of Appeal,
Fourth District, Case No. 95-4002

L.T. Case No. 93-5601 (04)
17th Judicial Circuit Court
In and For Broward County, Florida
Honorable Patricia W. Cocalis

AUTO BUILDERS SOUTH FLORIDA, INC.,
a Florida corporation,

Petitioner,

vs.

DANIEL M. BUCCI,

Respondent.
_______________________________________/

****

AMENDED
REPLY BRIEF OF THE PETITIONER,
AUTO BUILDERS SOUTH FLORIDA, INC.

****

Respectfully submitted,

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SUMMARY OF REPLY ARGUMENT

This appeal should not be dismissed for lack of jurisdiction. Under Article V, Section 3(b)(4) of the Florida Constitution, this Court has jurisdiction to review any decision of a District Court of appeal that passes upon a question certified by it to be of great public importance.

With respect to the first certified question in this case, the Court has inherent authority to rephrase the question to reflect the issue properly certified and "passed upon" -- i.e., whether an award of future economic damages with no corresponding award of future non-economic damages is an inadequate verdict as a matter of law? Contrary to the Respondent's argument, the issues of public importance presented in this case are not limited to automobile cases involving a threshold finding of "permanent" injury.

Furthermore, the first question presented is not whether an award of *past* medical expenses without a corresponding award of *past* non-economic damages is an inadequate verdict. Florida courts have consistently held that awarding an injured plaintiff past medical expenses with nothing for pain and suffering is an inadequate verdict when there is uncontradicted evidence that the injured party suffered at least some pain from the injury. The first question is whether the same rule should apply to an award of *future* medical expenses without a corresponding award of *future* non-economic damages. The decisions relied upon by the Respondent which did not deal with an award of *future* medical expenses are inapposite to the present case.

The first question should be answered in the negative. Evidence of permanent injury and an award of future medical

expenses does not in and of itself automatically render a zero verdict for future intangible damages inadequate as a matter of law. Cases can and do exist where a plaintiff is permanently injured and incurs future medical expense, yet does not sustain future intangible damages.

As to the second certified question, the Respondent did not offer a jurisdictional argument for dismissal; therefore, the Petitioner makes no reply except to respectfully suggest that the better phrasing of the second question is found in the body of the court's decision: "Should a party be required to object to an inadequate verdict, which is based on the jury's answers to special interrogatories, prior to the discharge of the jury, as required for classic cases of inconsistent verdicts?"[1]

The general rule is that a party is obligated to object to an *inconsistent* verdict prior to discharge of the jury, but may challenge an *inadequate* verdict by post trial motion. The issue in this case is whether a different rule should apply where the claim of an inadequate verdict is also based on the jury's answers to special interrogatories? The Petitioner submits that this question in should be answered in the affirmative.

The Respondent has failed to address the District Court's concern over the "recurring problems" highlighted by this case; specifically, the problem presented where the jury's award of zero damages appears not only inadequate but logically inconsistent with other findings on the special verdict form. Cases are having to be retried because juries are not being properly instructed and courts are not given the opportunity to obviate the need for a new trial

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[1] Allstate, 681 So.2d at 783.

by requiring an objection to an inconsistent award.

The circular problem with the Respondent's argument is that it begins by asserting as an accepted premise that which is actually the issue to be resolved; i.e., *whether* a special interrogatory verdict finding liability on the part of the defendant and awarding past and/or future economic damages, while awarding zero damages for corresponding noneconomic damages, is an "inadequate" or an "inconsistent" verdict requiring a contemporaneous objection?

Given the advent of tort reform in Florida, the required use of interrogatory verdicts, and the existing case law on the subject, the Petitioner finds the answer to this question most succinctly set forth in Judge Altenbernd's concurring opinion from Cowen v. Thornton, 621 So.2d 684 (Fla. 2d DCA 1993). The jury's verdict in this case is both inconsistent and inadequate and if the plaintiff had objected to this patent inconsistency before the jury was discharged, the jury could have been reinstructed and may have reached a legal verdict. Quite simply, a party who wishes to appeal such a verdict should be required to preserve the error by an objection prior to discharge of the jury.

Therefore the Petitioner respectfully submits that this Court should take jurisdiction over this action; answer the District Court's first certified question in the negative; and answer the second certified question in the affirmative.

REPLY ARGUMENT

THIS APPEAL SHOULD NOT BE DISMISSED FOR LACK OF JURISDICTION TO REVIEW DECISIONS OF DISTRICT COURTS THAT PASS UPON QUESTIONS CERTIFIED TO BE OF GREAT PUBLIC IMPORTANCE.

The first point of the Respondent's brief contends that this appeal should be dismissed for lack of jurisdiction because the District Court did not actually "pass upon" the questions which it certified to be of great public importance. [Answer Brief at 3-4]. *See*, Gee v. Seidman & Seidman, 653 So.2d 384 (Fla. 1995).

> Under article V, section 3(b)(4) of the Florida Constitution, this Court has jurisdiction to review "any decision of a district court of appeal that passes upon a question certified by it to be of great public importance." (Emphasis added). Because the district court specifically stated that it did not address the issue contained in the question certified to this Court, we are without jurisdiction to entertain the question. Revitz v. Baya, 355 So.2d 1170 (Fla. 1977).

Gee, 653 So.2d at 384.

With respect to the first certified question in this case, the Petitioner must concede the Respondent's point, but only in part.

In Bucci v. Auto Builders South Florida, Inc., 690 So.2d 1387 (Fla. 4th DCA 1997), the Fourth District Court's first question "re-certified" the same question certified in Allstate Ins. Co. v. Manasse, 681 So.2d 779 (Fla. 4th DCA 1996); i.e.:

> 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?

Allstate, 681 So.2d at 784.

In the present case, however, there was no express finding by

the jury that the plaintiff sustained a permanent injury. [R. 454-56; T. 330-32]. As correctly pointed out by plaintiff's counsel at trial, a factual finding of permanent injury, as a "threshold" to recovery of future damages, is only applicable to automobile cases and, thus, is inapplicable to the present case. [T. 320]. Florida Statute § 627.737. Therefore, the question of whether the plaintiff sustained a "permanent injury" was never submitted to the jury in this case. [T. 317-20].

This fact standing alone, however, does not warrant dismissal of this appeal for lack of jurisdiction merely because the District Court's phrasing of the certified question was not as artfully drafted as it could have been (and particularly not where the court did not actually phrase the question but, rather, simply re-certified a question which had been constructed in the context of a different, albeit similar, case). In such a situation, this Court has the inherent authority to rephrase the question to reflect the issue properly certified and passed upon; i.e., whether an award of future economic damages with no corresponding award of future non-economic damages is an inadequate verdict as a matter of law? By simply deleting Allstate's reference to the jury's finding of permanent injury, the question before this Court should be:

> 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?

In support of this rephrasing, the Petitioner would respectfully point out that the issues of great public importance presented in this case regarding the adequacy (or inadequacy) of economic damages awards without a corresponding award of non-

economic damages are in no way limited to automobile cases involving a threshold finding of "permanent" injury. For example, Mason v. District Bd. of Trustees of Broward Community College, 644 So.2d 160 (Fla. 4th DCA 1994), which was relied upon in both Allstate and Bucci appears to have been a premises liability case,[2] and Cowen v. Thornton, 621 So.2d 684 (Fla. 2d DCA 1993), cited by both the majority and the dissent in Allstate, was a negligent supervision case.

Furthermore, the fact that the present case does not arise from an automobile accident did not prevent the Respondent from moving for a new trial based upon the argument that the evidence of plaintiff's "permanent injury" rendered the jury's award of future medical expenses, without an award of future non-economic damages, "inadequate" as a matter of law.[3] The Respondent also appealed as "inadequate" the jury's award of past medical expenses without an award of past non-economic damages, but the court in Bucci reversed the jury award of past damages on the authority of Mason, *supra*, and the decision to do so formed no part of the court's re-certification of the future damages question presented in Allstate.

As to the second certified question in this case, the Respondent did not offer a similar jurisdictional argument for dismissal; therefore, the Petitioner makes no reply except to respectfully suggest that the better phrasing of the second

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[2] While there is no discussion of exactly how the plaintiff was injured in Mason, the Petitioner derives this supposition from the court's statement that "there was no error in the trial court's instruction that appellant was an *uninvited licensee*." Mason, 644 So.2d at 160, fn. 1 (emphasis added).

[3] [R. 457-61 and Initial Brief to the 4th DCA, *passim*].

question is found in the body of the court's decision:

> Should a party be required to object to an inadequate verdict, which is based on the jury's answers to special interrogatories, prior to the discharge of the jury, as required for classic cases of inconsistent verdicts?

Allstate, 681 So.2d at 783.[4]

Either way the certified question is phrased, the District Court clearly "passed upon" the issue by stating that "we conclude Bucci preserved the issue of an inadequate verdict for review, and again certify the second question certified in Manasse." Bucci, 690 So.2d 1388-89, *citing,* Allstate, 681 So.2d at 784.

Upon the foregoing, the Petitioner respectfully submits that the Respondent's request for dismissal of this appeal for want of jurisdiction should be rejected by this Court.

CERTIFIED QUESTION NO. 1

DOES A FINDING OF A PERMANENT INJURY AND AN AWARD OF FUTURE MEDICAL EXPENSES RENDER A ZERO VERDICT FOR FUTURE INTANGIBLE DAMAGES INADEQUATE AS A MATTER OF LAW?

The Respondent's answer to the first certified question is dedicated almost in its entirety to demonstrating the "inadequacy" of the plaintiff's recovery in this case "on its merits" and, in doing so, the argument mostly misses the point.

First of all, the first question presented is not whether an award of past medical expenses without a corresponding award of

[4] Here again, there is nothing in the certified question or the substance of the issue presented to suggest that it should be limited to automobile cases or special interrogatory verdicts finding "permanent injury." Rather, Florida Statute § 768.77 requires the use of itemized verdicts "[i]n *any* action to which this part applies..." (emphasis added).

past non-economic damages is an inadequate verdict. Florida courts have consistently held that a jury verdict awarding an injured party the exact amount of past medical expenses and nothing for pain and suffering is an inadequate verdict as a matter of law when there is uncontradicted evidence that the injured party suffered at least some pain from the injury.[5] Rather, the first question certified in Allstate and re-certified in Bucci is whether the same rule should apply to an award of *future* medical expenses without a corresponding award of *future* non-economic damages. Therefore, the cases relied upon by the Respondent which did not deal with an award of future damages are inapposite to the present case.[6]

In all fairness, the cases cited which arguably support the Respondent's position are Butte v. Hughes, 521 So.2d 280 (Fla. 2d DCA 1988), Harrison v. Housing Resources Mgt., Inc., 588 So.2d 64 (Fla. 1st DCA 1991), and the majority decision in Allstate Ins. Co. v. Manasse, 681 So.2d 779 (Fla. 4th DCA 1996), each of which held under the facts of those cases that it was not reasonable for the jury to conclude that there would be zero future intangible damages associated with a permanent injury and future medical expenses.

In stark contrast, the courts in Dyes v. Spick, 606 So.2d 700 (Fla. 1st DCA 1992), and Simpson v. Stone, 662 So.2d 959 (Fla. 5th DCA 1995), refused to upset allegedly "inadequate" future

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[5] Bucci, 690 So.2d at 1388 ("Pursuant to Mason, the jury's failure to award Bucci past noneconomic damages, in light of its award of past medical expenses, renders its verdict inadequate as a matter of law."). *See also*, Daigneault v. Gache, 624 So.2d 818 (Fla. 4th DCA 1993), and cases cited therein.

[6] *See*, Daigneault, *supra;* Mason, *supra;* Cowen v. Thornton, 621 So.2d 684 (Fla. 2d DCA 1993); Casper v. Melville Corp., 656 So.2d 1354 (Fla. 4th DCA 1995); Een v. Rice, 637 So.2d 331 (Fla. 2d DCA 1994).

damage awards, holding that under the evidence presented in those cases, it could not be said that a jury of reasonable people could not have reached the verdicts they did. Therefore, since the trial court does not sit as "a seventh juror," nor does a reviewing court reserve the prerogative to overturn a damage verdict with which it merely disagrees, the jury verdicts were allowed to stand despite the plaintiff's claims of "inadequacy."

Upon similar reasoning, Judge Klein dissented from the majority decision in Allstate because he disagreed that a finding of permanent injury and an award of future medical expenses *required* a jury to award future noneconomic damages as a matter of law. Allstate, 681 So.2d at 784-85 (Klein, J., dissenting). Rather, Judge Klein stated that he would have adopted the reasoning of Dyes which he quoted:

> The nature of future damages is such that much discretion must be afforded to the finder of fact. While as to past damages we have a record that allows us to scrutinize very closely what has already happened, the same cannot be said as to future losses. Due to the somewhat speculative nature of what may occur in the future, it is perhaps not unwise to afford great latitude to the jury in its determinations as to these damages. The evidence in this regard in the instant case reflects the uncertainty of predicting future pain and suffering.

Allstate, 681 So.2d at 784-85 (Klein, J., dissenting), *quoting,* Dyes, 606 So.2d at 704.

In short, the question presented is one of analogy; i.e., whether the same rule which applies to an award of past medical expenses without a corresponding award of past non-economic damages should also apply to an award of future medical expenses without a corresponding award of future non-economic damages? Based upon the

reasoning of Dyes, Simpson, and the dissent in Allstate, the Petitioner respectfully submits that the first certified question should be answered in the negative. Evidence of a permanent injury and an award of future medical expenses does not in and of itself automatically render a zero verdict for future intangible damages inadequate as a matter of law. Cases can and do exist where a plaintiff is permanently injured and incurs future medical expense, yet does not sustain future intangible damages.

Finally, as to the Respondent's contention that the legislative history and intent of the Florida Tort Reform Statutes compel an opposite result, the Petitioner respectfully disagrees. Nothing in the statutory materials relied upon by the Respondent supports the contention that an award of future medical expenses in and of itself renders a zero verdict for future non-economic damages inadequate as a matter of law. Quite frankly, the statutory criteria cited by the Respondent for "judicial scrutiny" of jury verdicts would appear to have the opposite effect.

CERTIFIED QUESTION NO. 2

> **SHOULD A PARTY BE REQUIRED TO OBJECT TO AN INADEQUATE VERDICT, WHICH IS BASED ON THE JURY'S ANSWERS TO SPECIAL INTERROGATORIES, PRIOR TO THE DISCHARGE OF THE JURY, AS REQUIRED FOR CLASSIC CASES OF INCONSISTENT VERDICTS?**

As a general matter, the Petitioner does not take issue with the Respondent's survey of Florida case law dealing with inconsistent and inadequate verdicts. In fact, virtually all of this case law was set forth in the Petitioner's initial brief.

> It has long been the general rule that a party is obligated to object to an *inconsistent* verdict prior to discharge of the jury, but may challenge an *inadequate* verdict by post

trial motion.

Cowen, 621 So.2d at 688 (Altenbernd, J., concurring) (emphasis added), *citing*, Nix v. Summitt, 52 So.2d 419 (Fla. 1951); Higbee v. Dorigo, 66 So.2d 684 (Fla. 1953); Cowart v. Kendall United Methodist Church, 476 So.2d 289 (Fla. 3d DCA 1985). Nevertheless, almost none of the controlling case law dealing with "inadequate" versus "inconsistent" verdicts does so in the specific context of the special interrogatory verdicts which are required by Florida Statute § 768.77, and when the underlying factual scenario which informs the general rule has changed, so should the rule.

The matter which is specifically put in issue by the present case, and which is unaddressed in the Respondent's answer brief, is the question "whether *a different rule* should apply where the claim of an inadequate verdict is also based on the jury's answers to special interrogatories." Bucci, 690 So.2d at 1388-89 (emphasis added). Specifically, "[s]hould a party be required to object to an inadequate verdict, which is based on the jury's answers to special interrogatories, prior to the discharge of the jury, as required for classic cases of inconsistent verdicts?" Allstate, 681 So.2d at 783. The Petitioner respectfully submits that the District Court's second certified question in Bucci and Allstate should be answered affirmatively.

Furthermore, the Respondent has failed to address the District Court's concern over the "recurring problems highlighted by this case"; specifically, "the problem presented where the jury's award of zero damages appears *not only inadequate* but *logically inconsistent* with other findings it has made on the special verdict form." Allstate, 681 So.2d at 783 (emphasis added). "Cases are

thus having to be retried because juries are not being properly instructed. Nor are juries being given the opportunity to obviate the need for a new trial by the requirement of an objection to an inconsistent award." Allstate, 681 So.2d at 784 (Klein, J., dissenting), *citing*, Simpson, *supra*. The Petitioner submits that this is an extremely significant basis for answering the certified question in the affirmative; however, since the issue was briefed initially, and the Respondent offered virtually no response in opposition, the Petitioner can offer no further reply.

Further still, the Petitioner expressly stated that the certified question should be answered affirmatively, not (as the District Court stated) because "a *different* rule should apply," but, rather, upon the well established rule that any defect as to the form of a verdict is waived by the failure to object thereto; Higbee v. Dorigo Hotel Runnymede, Inc., 66 So.2d 684 (Fla. 1953); and upon the assertion that the "defect" the plaintiff complains of in this case -- i.e., an interrogatory verdict awarding economic damages without a corresponding award of noneconomic damages -- is, in fact, "inconsistency," and not "inadequacy."

Far more importantly, the Petitioner argued at length that the District Court erred in reversing the trial court's denial of the plaintiff's motion for new trial, under the specific facts of this case, where the trial judge could not be said to have abused her discretion in denying the plaintiff's motion for new trial because the plaintiff waived any objection to the "inadequate" verdict by failing to object to the jury's "inconsistent" answers to special interrogatories prior to the discharge of the jury. Here again, the Respondent offered little or no substantive response and the

Petitioner, therefore, offers no further reply.[7]

In short, the Respondent's entire position on this issue basically reasserts the general rule that "when a verdict is inadequate as a matter of law a plaintiff has no obligation to object before the jury's discharge." [Answer Brief at 12]. The circular problem with the Respondent's argument is that it begins by asserting as an accepted premise that which is actually the issue to be resolved; i.e., *whether* a special interrogatory verdict finding liability on the part of the defendant and awarding past and/or future economic damages, while awarding zero damages for corresponding noneconomic damages (and thereby arguably rendering the verdict inadequate as a matter of law), is an "inconsistent" or an "inadequate" verdict (or both) requiring a contemporaneous objection to preserve the issue for review by motion for new trial or appeal?

The Petitioner respectfully submits that given the advent of tort reform in Florida, the required use of interrogatory verdicts, and the existing case law on the subject, the answer to this question is not quite as "well settled" as the Respondent apparently thinks it is. In this regard, the Petitioner's argument is most succinctly set forth in Judge Altenbernd's concurring opinion from Cowen v. Thornton, 621 So.2d 684 (Fla. 2d DCA 1993):

> *The jury's verdict in this case is both inconsistent and inadequate*. Because the jury answered a special interrogatory verdict form, it expressly found that the defendant's

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[7] Somewhat surprisingly, the Respondent even wrote a separate statement of the facts of this case "to emphasize that it was rather clear to all parties and the judge that the jury was attempting to (and actually did) compromise the verdict." [Answer Brief at 1-2].

> negligence was a legal cause of damage, and then awarded *no damages*. If the plaintiff had objected to this *patent inconsistency* before the jury was discharged, the jury could have been reinstructed and may have reached a legal verdict.
>
> It has long been the general rule that a party is obligated to object to an *inconsistent* verdict prior to discharge of the jury, but may challenge an *inadequate* verdict by post trial motion. Nix v. Summitt, 52 So.2d 419 (Fla. 1951); Higbee v. Dorigo, 66 So.2d 684 (Fla. 1953); Cowart v. Kendall United Methodist Church, 476 So.2d 289 (Fla. 3d DCA 1985). In the past, the typical general verdict form stated: "We find for the plaintiff and assess damages at $_____." When the jury awarded zero damages on such a verdict form, the result was not patently inconsistent. In such circumstances, it was not illogical to permit a posttrial challenge to the substance of a verdict in the absence of a prior challenge to the verdict's procedural accuracy.
>
> Since the enactment of section 768.77, Florida Statutes (1991), most tort cases are now submitted to the jury with *an interrogatory verdict form that usually causes a zero verdict to be both inconsistent and inadequate*. I am inclined to believe that *a party who wishes to appeal such an erroneous verdict should be required to preserve the error by an objection prior to discharge of the jury*.

Cowen, 621 So.2d at 688 (Altenbernd, J., concurring) (emphasis added).

Furthermore, "even if the current law lacks certainty, clarification will not occur so long as courts, recognizing the problem, defer a definitive answer." Simpson v. Stone, 662 So.2d 959 (Fla. 5th DCA 1995) (Harris, J., specially concurring). Therefore the Petitioner respectfully submits, this Court should take jurisdiction over this action and answer the

District Court's second certified question in the affirmative.

CONCLUSION

Upon the foregoing, the Petitioner, Auto Builders South Florida, Inc., respectfully submits that:

(1) The Fourth District Court's first certified question should be answered in the negative: a finding of a permanent injury and an award of future medical expenses does *not* automatically render a zero verdict for future noneconomic damages "inadequate as a matter of law."

(2) The Fourth District Court's second certified question should be answered in the affirmative: a party should be required to object to an "inadequate" verdict, if based upon the jury's "inconsistent" answers to special interrogatories, prior to the discharge of the jury.

(3) The Fourth District Court erred in reversing the trial court's denial of the plaintiff's motion for new trial under the specific facts of this case where the trial judge could not be said to have abused her discretion in denying the plaintiff's motion for new trial because the plaintiff waived any objection to the "inadequate" verdict by failing to object to the jury's "inconsistent" answers to special interrogatories, prior to the discharge of the jury.

Accordingly, the decision of the Fourth District Court should be reversed and the case remanded with instructions to reinstate the trial court's final judgment which was entered upon the jury's verdict.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail this 3rd day of November, 1997, to:

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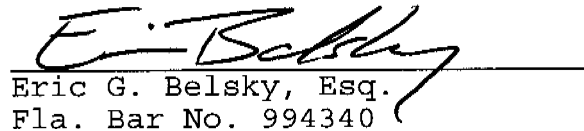
By: 
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