IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 93,527

VIVIAN TRUJILLO,

Petitioner,

vs.

UNIROYAL TIRE COMPANY,
etc., et al.,

Respondents.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT CASE NO. 96-01411

BRIEF ON MERITS OF PETITIONER

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STATEMENT OF FACTS

a. Trujillo's Accident and Injuries

The Third District Court of Appeal reversed a trial court order granting a new trial for the Plaintiff, Vivian Trujillo, for injuries she sustained when her tire blew out, her vehicle left the roadway, flipped over and ejected her. (Op. p.2)[1]. It is undisputed that the blow out occurred because the tire had been improperly repaired with an external plug. (T.225). It is also undisputed that the blow out caused Vivian to lose control of her vehicle. (T.343, 312).

The Third District's opinion recognized that Trujillo "sustained several injuries" in this accident, "the most significant" of which was Trujillo's fractured spine, requiring her to be hospitalized for 19 days, placed in traction, fitted with a halo brace screwed into her skull, worn 24 hours a day for four months; strapped in a cervical collar for two months more; and enrolled in physical therapy. (Op. p.2; T.313, 433-436, 655). The less significant "other" injuries Trujillo sustained were a broken rib, and numerous bruises, cuts and scratches. (T.613-614). Trujillo presented undisputed expert and treating physician testimony that her injuries were permanent and her physical

[1] The opinion below is included in the Appendix to this brief and appears in the Record at R.822-828).

activities were restricted as a consequence of this accident. (Op. p.5; T.299, 316, 445-447, 450, 452, 493, 62-631, 662, 670).

b. Failure to Warn and Inadequate Warning Issues

Trujillo brought this suit against Uniroyal[2] for strict liability failure to warn that its tires should never be repaired with external plugs because they cause blowouts. (Op. p.2). All of the defense and Plaintiff's experts agreed that this tire failed because of an improper external plug repair. (T.402, 828, 833). There was no dispute that General Motors and Uniroyal did not include any warnings about external plug repairs in materials provided to the consumer or on the tire itself. (T.402, 828, 833).[3]

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[2] Uniroyal and General Motors presented a unified defense and at times in this brief are collectively referred to herein as "Uniroyal."

[3] The tire contained the following warning:

> Safety warning. Serious injury may result from tire failure due to underinflation or overloading. Follow owner's manual. (D. Exh. D)

The owner's manual included the warnings:

> If any tire does not look normal, check it with a pressure gage. (P. Exh. 7 at 1-1)
>
> * * * *
>
> CAUTION: To reduce the risk of loss of vehicle control and personal injury:
>
> • Tires must be properly inflated . . . (Id. at 5-16)
>
> * * * *
>
> Excessive speed, underinflation or excessive loading, either separately or in combination, can cause heat buildup and possible tire

The parties' dispute centered around whether a warning that such repairs are dangerous should be issued to the consumer or only to repair facilities. (Uniroyal's 3d DCA Initial Brief, p.3).

Plaintiff's expert Dennis Jordan, explained that these plugs destroy the tire and void the tire warranty, requiring that new tires be purchased. (T.824). Firestone's and Michelin's consumer warranty contained this information and caution not to use plug repairs. (T.827, 1000).[4] Jordan testified that he thought the warning of danger of plugging tires should be on the sidewall where everyone can see it because it is a dangerous condition that can cause serious injury and death. (T.890).

Richard Harrison, a Uniroyal employee and defense witness, testified in Trujillo's case that plugs leak air and that the correct way to plug a tire is to take it off the car, buff the inside and patch it. (T.400, 402). He testified that this is not in the warranty information, but service bulletins on proper maintenance were provided to repair facilities by the Rubber Manufacturer's Association. (T.400-401, 409). According to Harrison, warnings concerning proper repair procedure should be

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failure. (Id. at 5-21)

[4] Michelin's warning stated: "Do not use plug repairs. They may cause further damage to the tire. They are not always airtight and the plug may fail." Firestone's warning included language that: "It may suddenly fail causing serious personal injury." (See App. 1 and 2 to Trujillo's 3d DCA Appellate Brief).

conveyed only to the persons effecting the repairs, not to the consumer. (T.1321, 1347).

Defense expert Thomas Dodson testified in plaintiff's case that the tire was underinflated, most likely the result of a leaking repair. (T.412, 406-407). He said this was a bad repair. (T.413). He also agreed that plug repairs were not intended to be permanent and are improper because they do not seal the inner liner and that most plug repairs are unacceptable or poor. (T.406-408). Dodson said this was "common knowledge" in the tire industry. (T.411).

Notwithstanding the defense experts' testimony that the dangers of plug repairs were properly conveyed to service stations and were common knowledge, Vivian testified that in 1991 she took four flat tires to different Uniroyal dealers listed in the Yellow Pages to be repaired. Each and every one of them plugged the tire externally. (T.640-642). This evidence was totally uncontroverted by Uniroyal. No repair person ever warned Vivian about repairs using an outside plug. (T.366, 368).

Vivian read the information on her tires and read over the owner's manual that came with her Suburban. (T.360, 363-365, 1115). There was no information that warned not to repair a flat tire with an outside plug or warned of any dangers associated with repairing a tire in this manner. Vivian testified that Uniroyal failed to

warn her of the risk involved in properly repairing punctures and that it should have told her not to plug the tire. (T.1122).

Uniroyal and General Motors defended on the theory that the accident happened because of "underinflation of the tires," albeit caused by a leaking plug repair, and that their broad warning not to underinflate tires was a sufficient warning in Vivian's case. (T.967-970, 976). Defense expert Dodson testified that tire underinflation can be caused by many things and that a warning not to plug tires is misleading and overly simplistic. (T.997-1000). Significantly, Dodson also testified that if he saw service people repairing his own tire with an outside plug, he would stop them and tell them not to do it that way. (T.1039).

Vivian testified that she followed defendants' warning about underinflation, owned her own air gauge, and in fact checked the air in her tires for underinflation the day before the accident. (T.301, 1119, 1129-1131). She testified that she can easily understand the language "Do not use plug repairs, they may cause further damage to the tire. They are not always airtight and the plug may fail." She said that such warning would not have confused her. (T.1182-1183, 1191).

c. Defense Issues

Uniroyal and General Motors also defended this case on grounds that Vivian was herself negligent for failing to wear a seatbelt and for not reacting properly to the blowout situation.

Defense accident reconstruction expert Tomlinson testified that Vivian was traveling at a speed of 72-75 m.p.h., and that she lost control of the vehicle because she locked the brakes after the blowout. (T.1377, 1383, 1510-1518). He said that had she been traveling at a lesser speed, she might have been able to stop before she left the roadway. (T.1518). Tomlinson also said that if she had worn a seatbelt her neck injuries would not have been so severe. (T.1502). He did not express any opinion that she would not have sustained her other injuries (cuts, bruises and broken rib) if she wore a seatbelt, and there was no evidence that the seatbelts in Vivian's vehicle were operational. Significantly, Tomlinson admitted that if the tire had not failed, this accident would not have happened. (T.1590).

Plaintiff's expert Nunn testified that this auto was traveling at 50-60 m.p.h and was equipped with a seatbelt with a comfort feature which allowed the wearer to move forward and the seatbelt would loosen. (T.229, 215). There was no law in effect at the time of this 1985 accident which required occupants of a vehicle to wear a seatbelt. (T.1608). Nunn testified that even if Vivian had worn her seatbelt, it may not have prevented her head from hitting the roof and her neck from fracturing. (T.249). Nunn testified that with or without the comfort feature, Vivian could have hit the roof in the rollover, even if she was restrained. (T.276). Nunn did not agree that the seatbelt would be locked into place because there

may not have been enough deceleration to lock it and the locking pendulum may not act in a rollover situation because it is designed for frontal impacts. (T.276).

d. The Jury Verdict

The jury found Uniroyal and General Motors liable for placing the product on the market with a defect by virtue of its failure to warn of the risk in failing to properly repair punctures in tires and that this defect was a legal cause of Vivian's damage. (T.1735). They calculated her economic damages solely in the amount of her $16,981 medical expenses and gave her nothing for lost wages and future damages. The jury calculated that Vivian's past pain and suffering was worth $10,000 and her future damages worth nothing, for total damages of $26,981. (T.1735). The jury found that Vivian was 99% comparatively negligent and also found that Vivian's failure to use her seatbelt caused 100% of her damages. Thus, despite the jury's finding of liability and causation against defendants, the jury awarded Vivian nothing.

e. New Trial Order

The trial court believed that this was a verdict gone awry for a multitude of good reasons expressed in its lengthy order granting a new trial. (R.817-821). The trial court found the jury's verdict inconsistent and fundamentally improper when it found that defendants were strictly liable and caused Vivian's damages and also found that Vivian's failure to wear a seatbelt was the 100%

cause of her damages. The trial court further found that the jury's finding of 99% comparative negligence and 100% for the seatbelt defense were contrary to the manifest weight of the evidence, since there was no evidence that Vivian's alleged negligence caused the tire to fail. There was likewise no testimony that Vivian would have sustained no injury if she had worn a seatbelt. It was moreover undisputed that the vehicle flipped over and that front end collisions, not rollovers trigger the seatbelt mechanism. The trial court found that defendants did not present the testimony of any medial doctors to prove how Vivian's spine injury was caused by failure to wear a seatbelt, and that Tomlinson, defendants' accident reconstruction expert, was not qualified to render any opinion on this point.

The trial court further found that the failure to use Vivian's verdict form, which instructed the jury not to consider Vivian's failure to wear a seatbelt in considering the comparative negligence issue, i.e., negligent maintenance and operation of the vehicle, contributed to the jury's confusion and necessitated a new trial. The verdict form given improperly permitted the jury to "double dip" on the issue of comparative fault and the seatbelt defense by allowing the jury to consider the seatbelt issue in assessing comparative fault, and then once again in reducing Vivian's damages.

The trial court also found the size of the damages awarded shockingly low and against the manifest weight of the evidence. The defendant did not put on any medical testimony rebutting that Vivian's medical condition was permanent, yet there was no award for future pain and suffering. The evidence also undisputedly showed that Vivian missed about six months of work, but the jury awarded her no lost wages.[5]

Since the effect of the jury's reductions netted Vivian a zero verdict, the trial court ordered an additur in the amount of the original jury award $26,981, and refused any reduction for comparative negligence or the seatbelt defense. The trial court gave General Motors and Uniroyal 15 days to pay this pittance or accept the option of a new trial on all issues. (R.817-821).

General Motors and Uniroyal chose not to pay, opted for the new trial, and took an appeal instead. (R.797).

f. Appellate Reversal of New Trial Order

The Third District reversed the new trial order and reinstated the $0 jury verdict. The Third District's reversal was based on the following holding:

> . . . there was substantial competent evidence to support the jury's verdict. The trial judge's conclusion that there was no evidence that plaintiff's alleged negligence caused the tire failure is simply incorrect. (Op. p.6).

[5] The court said it would make a reduction for collateral source payments for such wages -- it did not leave this deduction to the jury. (T.1103, 1458).

The opinion mentions but does not address the trial court's findings of fundamental impropriety and inconsistency in the verdict, nor the incorrect verdict form, which allowed the "double dip" for the seatbelt issue on comparative negligence and damages, independent grounds for awarding Trujillo a new trial.

The Third District reversed the new trial order on damages because:

> The trial court further found that "the damages awarded were inadequate given all the circumstances and against the manifest weight of the evidence."
>
> The law is clear that a verdict is against the manifest weight of the evidence only when it is clear, obvious, and indisputable that the jury was wrong. In applying this standard, we conclude that the trial court abused its discretion in granting a new trial. (Op. p.7)(citations omitted).

This Court accepted jurisdiction to review the Third District's decision.

POINTS ON APPEAL

I. THE THIRD DISTRICT APPLIED AN INCORRECT STANDARD OF REVIEW OF THE TRIAL COURT'S NEW TRIAL ORDER.

II. ANY NEW TRIAL AWARDED SHOULD BE ON COMPARATIVE NEGLIGENCE AND DAMAGES ONLY.

SUMMARY OF ARGUMENT

The Third District opinion reversing the trial court's order granting a new trial applied an incorrect standard of review. The standard applied by the Third District does not, as it must, give

any deference to the trial court's favored vantage point, nor take into account whether reasonable persons could agree with trial court's findings. Instead, the appellate court concludes that the jury's verdict had evidentiary support, casts off the trial court's finding as "simply incorrect" and reweighs the evidence itself in the face of an agreement by the parties which supports the trial court's finding. Moreover, the appellate court's recitation of the damage facts alone establishes that reasonable persons could agree with the trial court's finding that the damages awarded were shockingly inadequate.

The Third District's opinion furthermore acknowledges but fails to address two of the grounds for new trial that the trial court expressed in its order, i.e., fundamental impropriety and inconsistency of the verdict, and an erroneous verdict form. Florida law requires an appellate determination that a trial court's written findings in support of a new trial meet the abuse of discretion test, or be left undisturbed. The record below establishes that reasonable persons could agree with the trial court's findings on these points.

ARGUMENT

I. THE THIRD DISTRICT APPLIED AN INCORRECT STANDARD OF REVIEW OF THE TRIAL COURT'S NEW TRIAL ORDER.

The jury found Defendants strictly liable for causing Trujillo's damages; found Trujillo 99% comparatively negligent; and

found that 100% of Trujillo's damages were caused by her failure to wear a seatbelt. The trial court found this verdict fundamentally inconsistent and improper, and furthermore found that the 99% comparative negligence and 100% seatbelt defense findings were against the manifest weight of the evidence.

a. Applicable Standard of Review

In E.R. Squibb and Sons, Inc. v. Farnes, 697 So. 2d 825, 826 (Fla. 1997), this Court clarified the applicable standard of appellate review for an order granting a new trial:

> [T]he trial judge can and should grant a new trial if the manifest weight of the evidence is contrary to the verdict. In making this decision, the trial judge must necessarily consider the credibility of the witnesses along with the weight of all of the other evidence. The trial judge should only intervene when the manifest weight of the evidence dictates such action. However, when a new trial is ordered the abuse of discretion test becomes applicable on appellate review. The mere showing that there was evidence in the record to support the jury verdict does not demonstrate an abuse of discretion.
>
> Due to procedural concerns and the trial court's favored vantage point, this "abuse of discretion" standard is highly deferential:
>
> In reviewing [an order for a new trial], the appellate court should apply the reasonableness test to determine whether the trial judge abused his [or her] discretion. If reasonable [persons] could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion.

Id. at 826, quoting, Smith v. Brown, 525 So. 2d 868, 869-87 (Fla. 1988) and Baptist Memorial Hospital, Inc. v. Bell, 384 So. 2d 145, 146 (Fla. 1980)(citations omitted from text).

b. Comparative Negligence

The character of the comparative negligence alleged, other than Trujillo's failure to wear a seatbelt, did not, as the trial court found, support a 99% finding. The parties in this case agreed that the blowout was caused by leakage of air from the plug repair. (Uniroyal's Initial Br. 3d DCA p.2). The Third District's opinion correctly states that "the parties ultimately agreed that the tire blew due to an improper repair." (Op. p.2). Any alleged chronic underinflation of Trujillo's tires may have shown that she was negligent in maintaining her vehicle, but could not be and was not the cause of this blowout. The alleged chronic underinflation of this tire was because air leaked from the improper plug repair. Uniroyal's expert Dodson testified:

> Based on my complete examination its my opinion that over deflection was most probably caused by a leaky repair...
> ... the leaky repair ultimately resulted in the tire running over deflected generating heat and causing its ultimate demise.
> Q Could you tell me for how long was that repair leaking?
> A No, sir. Because there is no way for me to evaluate with certainty whether or not someone may have reinflated the tire on several occasions so that the inflammation pressure would go up and down. It's impossible to make that judgment from the physical evidence. (T.412).

It is plain from the foregoing, that Dodson faulted the leaky repair for the tire's underinflation and demise and, furthermore, had no idea whether Vivian ran the tire in an underinflated condition for an extended period of time prior to the blowout.

The Third District's statement "that there was testimony that the plaintiff's tires suffered from underinflation, which condition could have caused the blowout" is inaccurate. (Op. p.6). Defendants' point was that underinflation can cause tires to fail and, ergo, its warning that tires should not be run in an underinflated condition was adequate. However, where, as here, the undisputed cause of the underinflation is a leaky and dangerous plug repair, the warning not to run tires in an underinflated condition is obviously and woefully inadequate.

Moreover, the defense did not take the position that Vivian's speed was the cause of the blowout or that reducing her speed alone could have saved her. Rather, the defense expert testified that Vivian could have come to a stop on the roadway after the blowout if she properly coordinated steering and braking her van. (T.1517). Defense expert Tomlinson agreed that this accident would never have happened if the tire had not failed. His testimony was hardly certain evidence of Vivian's fault, let alone 99% fault:

> Q If Mrs. Trujillo had been traveling the speed limit, would this accident have ever occurred?
>
> A Well, it's kind of hard to say. It wouldn't have gone the distance that it did.

> It depends, would have depended upon what she did, input. Maybe if she made the steering wheel input and then put the brakes on, it could have gone off, but if you steer down the road and brake, if she did a hard braking, it should come to rest in that area, but hard braking is not what you do when you have a tire blow. (T.1517).

The jury's pinning of 99% of the blame for this accident on Vivian based on disputed and speculative evidence regarding her speed and braking reaction to a blow out caused by a leaky repair was plainly against the manifest weight of the evidence. This alleged comparative negligence was all about second guessing Vivian's response to an emergency situation created by defendants.

The jury's 99% comparative fault findings on these facts was, as the trial court found, against the manifest weight of the evidence. The Third District violated the proper standard of review of the trial court's finding in this regard. The Third District's holding misapplied and misapprehended the test of its reviewing power. Squibb, supra, makes clear that "the mere showing that there was evidence in the record to support the jury verdict does not by itself demonstrate an abuse of discretion." Id. at 826; Smith v. Brown, 525 So. 2d 868 (Fla. 1988); Clough v. Christopher, 711 So. 2d 610 (Fla. 5th DCA 1998).

When the Third District assailed the trial judge's conclusion that there was no evidence that Vivian's negligence caused the tire failure as "simply incorrect" it applied an incorrect standard of review and incorrectly reweighed the evidence.

> Mere disagreement from an appellate perspective is insufficient as a matter of law to overturn a trial court on the need for a new trial. The trial judge "was in a much better position than an appellate court to pass on the ultimate correctness of the jury's verdict."

Baptist, 384 So. 2d at 145.

Reasonable persons could agree and the parties themselves did in fact agree that there was no evidence that Plaintiff's negligence caused the defect in this tire. The trial judge's findings were not an abuse of discretion under this Court's and the Fifth District's holdings and the Third District erred in assailing these findings and overturning the new trial order.

c. Seatbelt Defense Damages

The Third District's finding of conflicting evidence on the injuries Vivian sustained because she was not wearing a seatbelt overlooks that a new trial was ordered because defense expert Tomlinson's testimony on this point was incompetent, since he had no medical expertise. The trial court specifically found in its new trial order that:

> Regarding the seat belt defense, there was no testimony that Trujillo would have sustained no injuries if she had been wearing a seat belt. It was contrary to the manifest weight of the evidence for the jury to find that if Trujillo was wearing a seat belt, she would not have suffered any injuries at all, no matter how slight.... Defendants did not present the testimony of any medical doctors to prove how the mechanics of Plaintiff's

> injury (C-2 fracture) was caused by her failure to wear a seat belt. The only testimony that Defendants presented on causation of Plaintiff's injuries in relation to her failure to wear a seat belt was through Lawrence Tomlinson, who was unqualified to render an opinion on the mechanics of Plaintiff's injuries. While Tomlinson was qualified to testify as an accident reconstruction expert, he was not qualified as to the biomechanics of Plaintiff's injuries, and his opinions could not be used by Defendants to prove how the particular injuries sustained by Plaintiff were caused in relation to the accident. Moreover, Tomlinson testified that the facts as to the mechanics of Plaintiff's injury he used in order to render his opinion that Plaintiff's injuries were caused by her failure to wear a seat belt, were only what counsel for Defendants told him that Dr. Goodgold (expert for Plaintiff) testified to. It is improper for an expert to base his opinion on unsworn recitation by the Defendants' attorney, and any such testimony is incompetent. Moreover, Goodgold's testimony was contrary to Tomlinson's testimony, so Tomlinson could not have based his opinions on Goodgold's testimony. Further, Lawrence Tomlinson, testified only as to the C-2 fracture, and did not attribute Plaintiff's other injuries, including bruises, cuts, stitches to her legs, a broken rib, and various scratches, to her failure to wear a seat belt. (R.817-821).

The Third District's opinion impermissibly credits Tomlinson's testimony without addressing the trial court's finding that it was incompetent and without making its own determination that the trial court's findings in this regard were without record support.[6] The

[6] The Third District could not so hold on this record. Tomlinson was an accident reconstruction expert, not a medical doctor. He could not testify as to the cause of plaintiff's injuries. Laffman v. Sherrod, 565 So. 2d 760 (Fla. 3d DCA 1990).

Third District was bound to do so before it could set aside the new trial order. See Baptist Memorial Hospital v. Bell, 384 So. 2d 145 (Fla. 1980). The Third District not only incorrectly credited Tomlinson's incompetent testimony, it also mischaracterized his testimony, and gave it undue weight.

In order to find that Trujillo's failure to wear a seatbelt was the 100% cause of her damages, defendants had the burden to prove that, but for plaintiff's failure to wear her seatbelt, she would not have been injured at all. Tomlinson's testimony did not meet this burden. Tomlinson did not testify that had Trujillo "been belted she would not have hit her head on the roof", as the Third District's opinion holds. (Op. p.4). Tomlinson testified only that Trujillo would not have hit her head on the roof hard

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Defendants had listed a competent witness, Dr. Robert Hartog, on the biomechanics of the injury and on how the failure to wear a seatbelt caused plaintiff's injuries. Defendants, however, chose not to call Dr. Hartog as a witness. (R.717). The only competent evidence in this case was that plaintiff's injuries would have occurred with or without the seatbelt.

Tomlinson's causation opinion was inadmissible because his opinion was based on inadequate underlying data. Tomlinson testified that the facts he relied on to render his causation testimony were based solely on what defendants' counsel told him Dr. Goodgold, Vivian's medical expert, had testified to. (T.1565-1566). Tomlinson did not review Dr. Goodgold's deposition or the underlying medical records. He said he read Dr. Goodgold's trial testimony during the trial. (T.1565). Further, Tomlinson had no personal knowledge of the underlying facts. Defendants' counsel's hearsay recitations of another expert's (contrary) testimony was clearly an insufficient basis for Tomlinson to form an opinion. See Husky Indus., Inc. v. Black, 434 So. 2d 988, 992 (Fla. 4th DCA 1983).

enough to cause a C-2. fracture, a medical opinion he had no qualification to give:

> Q Mr. Tomlinson, would Mrs. Trujillo have hit her head against any interior portion that may have been brought in by elastic deformation.... Assuming that she had been belted?
>
> A Not to the extent where you get hyper -- a flexion of the neck, no. You may be touching things, but not to the point where you're really loading it. (T.1502).

Tomlinson also agreed that had Trujillo been belted, she would have hit her head on the door:

> A ... but we know it hit the fence post, we know it came down and hit hard, relatively hard on the driver's side to create the damage we see in HHH here and put a little slight buckling in that, in the roof, but at this point in time where it hits here the driver is, would be on her left side and the loading would be putting her against the door, not vertically up into the roof. (T.1411).

The Third District cannot have inferred from this (albeit incompetent) testimony, that Trujillo would not have suffered any injury at all if she had worn her seatbelt. There was furthermore undisputed evidence that plaintiff suffered scratches, stitches and a broken rib in this accident, unrelated to her failure to wear a seatbelt.

Defendants did not meet their burden to establish through qualified medical testimony that, if Trujillo had worn her belt, she would not have suffered any or even less significant injuries. The Third District's conclusion that defendants are not liable at

all because Trujillo would not have sustained the exact same injuries if she had worn a seatbelt, is not a proper appellate review of this record or application of the seatbelt defense.

Reversal is mandated because reasonable persons could surely agree with the trial court that the jury's 100% reduction of damages attributable to the seatbelt defense could not possibly be sustained on the record evidence. See E.R. Squibb, 697 So. 2d 825.

d. Improper and Inconsistent Verdict, Verdict Form

Trial courts are required to give express reasons which support the finding that the verdict is against the manifest weight of the evidence or was influenced by matters outside of the record. Baptist Memorial Hospital v. Bell, 384 So. 2d 145 (Fla. 1980). The trial court's order expressly found an inconsistency and fundamentally improper verdict and an improper verdict form which allowed a "double dip" on comparative negligence and the seatbelt defense, as grounds for a new trial. The Third District's opinion improperly reversed the trial court's order without considering or testing these underpinnings:

> In reviewing this type of discretionary act of the trial court, the appellate court should apply the reasonableness test to determine whether the trial judge abused his discretion. . . . As we stated in *Cloud*, the ruling should not be disturbed in the absence of a clear showing that it has been abused, and there has been no such showing in the instant case.

Id. at 146. Baptist requires affirmance of the new trial order because no abuse of discretion was shown on this ground.

Additionally, reasonable persons could once again agree with the trial court that there was a fundamental inconsistency in the jury's finding that the defendants were strictly liable for the defect which caused Vivian's damages and yet find that 100% of her damages were attributable to her failure to use the seatbelt. The trial court correctly realized the jury's 99% comparative negligence finding and 100% reduction of damages was more likely the product of an improper jury instruction, than the jury's proper resolution of the disputed evidence based on an improper jury instruction. Even the Third District's opinion acknowledges that Vivian suffered injuries other than her spine injury, which was the sole object of the seatbelt defense.

The jury instructions and verdict form did not follow Insurance Co. of North America v. Pasakarnis, 451 So. 2d 447 (Fla. 1984), prevailing Florida law on the seatbelt defense. The trial court ordered a new trial principally because the jury instructions and verdict form improperly invited the jury to consider the seatbelt defense in their comparative negligence finding, and once again in reducing plaintiff's damages.

Pasakarnis required that the seatbelt defense be treated, not as an issue of comparative negligence, but solely as an issue of

damages. Trujillo's proposed jury instructions and verdict form, appended hereto, followed Pasakarnis' form. (R.640-667)(App. 1).

Trujillo's Requested Instructions 6A and 8A state in pertinent part:

> On the defense, the issues for your determination are whether the Plaintiff Vivian Trujillo was herself negligent in the operation of the vehicle, in the maintenance of the tire, and if so, whether such negligence was a contributing legal cause of the accident. (App. 1).

Trujillo's Requested Instruction 20A (seatbelt defense) states in pertinent part:

> An additional question for your determination on the defense is whether some or all of Vivian Trujillo's damages were caused by her failure to use a seatbelt. (App. 1).

Trujillo's proposed verdict form actually instructed the jury not to make any reduction in its comparative negligence determination for the failure to use a seatbelt. (App. 1).

The defendants' instructions and verdict form (R.668-672), also appended hereto for comparison purposes, did not draw the required distinction between comparative negligence and damages. (App. 2).

Defendants' Requested Jury Instruction No. 5 states:

> ... the issue for your determination is whether the Plaintiff herself was negligent in the operation of the vehicle [and maintenance of the tire] and if so whether such negligence was a contributing legal cause of the damage complained of. (App. 2).

Defendants' Requested Jury Instruction No. 18 (seatbelt defense) states:

> An additional question on the defense is whether some or all of Vivian Trujillo's damages were caused by her failure to use a seatbelt. (App. 2).

The instructions given by the trial court followed the defendants' form, and ignored the "cause of the accident" vs. "cause of the damage" distinction, framing both comparative negligence and the seatbelt defense as damage issues. (R.676-691)(App. 3). The verdict form asked whether there was negligence on the part of the plaintiff which was a legal cause of her damage and asked whether failure to use the seatbelt contributed substantially to producing any of the plaintiff's damages. The verdict form did not instruct the jury not to consider the seatbelt issue in their comparative negligence finding. (R.692-694)(App. 4).

Thus, the instructions and verdict form invited the jury to consider the seatbelt defense in calculating the percentage of Trujillo's comparative negligence (99%) and again in reducing her damages by 100% to zero. Presuming as we must, that the jury did, as it was instructed to do, in resolving the disputed evidence, there is no question there was an improper "double dip", which was the main reason the trial court ordered a new trial.

Since this trial, the jury instructions on the seatbelt defense have been totally revamped because, even a correct instruction based on Pasakarnis, frequently misled juries and

caused "double dipping." Now the seatbelt defense is treated exclusively as an issue of comparative negligence, and does not serve as a basis for any further reduction of damages. See Ridley v. Safety Kleen Corp., 693 So. 2d 934 (Fla. 1996).

The lower court's new trial order correctly recognized that:

> Reversible error occurs when an instruction is not only an erroneous or incomplete statement of the law, but is also confusing or misleading.
>
> * * *
>
> The test is not whether a particular jury was actually misled, but "instead the inquiry is whether the jury might reasonably have been misled."

Gross v. Lyons, 1998 Fla. App. Lexis 5312 (Fla. 4th DCA 1998), question certified, 1998 Fla. App. Lexis 11960, quoting, Florida Power & Light Co. v. McCollum, 140 So. 2d 569 (Fla. 1962). The verdict form was misleading and the verdict was obviously against the manifest weight of the evidence. The trial court remedied this defect by its new trial order, and the Third District simply ignored it.

e. Damages Inadequate

The Third District's standard of review of the damage evidence also runs afoul of Squibb, Smith, Baptist, and Clough, by not applying a reasonableness test. The jury awarded Trujillo her past medical expenses in the stipulated amount of $16,981. The trial court found that the jury's award of $0 damages for past lost earnings and $10,000 past and $0 future noneconomic damages were

shockingly inadequate and against the manifest weight of the evidence. The Third District applied a standard which focused solely on whether "it was clear, obvious and indisputable that the jury was wrong." (Op. p.7). The standard applied gave no deference to the trial court's ruling which has extensive record support.

To be sure, the appellate opinion itself reflects that Trujillo's injuries were grievous, incapacitating and permanent. The vehicle left the roadway and flipped over between one and two and one-half times. (T.215). Trujillo fractured her spine, was hospitalized for 19 days in traction, placed in a cumbersome halo brace for four months (unable to eat or bathe alone), and fitted with a cervical collar for two months thereafter. It was undisputed that at the very least, plaintiff was out of work for six months after her accident, and that plaintiff returned to work on a part-time basis after those six months. (T.302, 330). Vivian, without dispute, suffered permanent loss of rotation in her neck, permanent loss of sensation and numbness in her scalp, permanent pain in her neck and permanent memory loss. (T.444, 446, 465, 627-628). It was also undisputed that Vivian's enjoyment of riding horses, ATC's and boats was terminated by this accident. (T.299, 316, 450, 670).

The jury's award of $0 for future pain and suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience, or loss of capacity for enjoyment of life is

improper, considering that plaintiff's permanent disability was uncontested in this case. The only medical experts who testified in this trial were Dr. Joseph Goodgold, who evaluated plaintiff with a 12% permanent disability, and Dr. John Dusseau, who evaluated plaintiff with a 4% permanent disability. (T.689). Defendant put forth no evidence whatever to dispute plaintiff's damages.

The Third District opinion agrees that testimony from Trujillo's treating and expert physician that she sustained a permanent injury was undisputed, concerned medical matters and was not open to doubt from any reasonable point of view.[7] A plethora of authority has held on the same facts that plaintiff should get a directed verdict on the permanency issue. See State Farm Automobile Ins. Co. v. Orr, 660 So. 2d 1061 (Fla. 4th DCA 1995); Allstate Ins. Co. v. Thomas, 637 So. 2d 1008 (Fla. 4th DCA 1994); Jarrell v. Churm, 611 So. 2d 69 (Fla. 4th DCA 1992).

Consequently, reasonable persons could agree with the trial court that the damage verdict was against the manifest weight of the evidence on the permanency issue alone, as well as on the extensive evidence of her arduous recovery and past loss of earnings.

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[7] The opinion's reference to symptoms that Trujillo did not report, did not discredit the doctors' testimony on the issue of permanency. Allstate Ins. Co. v. Thomas, 637 So. 2d 1008 (Fla. 4th DCA 1994).

II. ANY NEW TRIAL AWARDED SHOULD BE ON COMPARATIVE NEGLIGENCE AND DAMAGES ONLY.

In the event this Court agrees that the trial court's order awarding a new trial should be reinstated, Vivian respectfully submits that there is no need to retry the defendants' liability here. The error in this case focuses solely on the issues of comparative negligence and damages. See Ridley v. Safety Kleen Corp., 693 So. 2d 934, 944 (Fla. 1996), as clarified on denial of rehearing, (retrial issue of comparative negligence based on seatbelt defense but not on liability for causing underlying accident).

The issues here are clearly identifiable: (1) defendants' liability for failure to warn of the improper plug repair and (2) the defense of comparative negligence, i.e., plaintiff Trujillo's alleged negligent maintenance and negligent driving; (3) as well as the seatbelt defense. The error did not occur in the finding of liability on the part of the defendants, but rather in the jury's double deduction for the seatbelt defense in determining both Trujillo's comparative negligence and damages.

Similarly, in Shufflebarger v. Galloway, 668 So. 2d 996 (Fla. 3d DCA 1996)(en banc), a medical malpractice case, the defendant doctor Shufflebarger was improperly prevented from including another doctor who had settled with the plaintiff on the verdict form. The jury found Shufflebarger negligent. Shufflebarger argued on remand that he should be allowed to relitigate the facts

of his own negligence in addition to the omitted Fabre defendant. The court rejected this argument, holding that on retrial the jury should be instructed that Shufflebarger was negligent as a matter of law, so that the issues for the second jury were the liability of the omitted doctor and, if applicable, an apportionment of damages between the two doctors. The court held that:

> Allowing Dr. Shufflebarger to relitigate the question of his own negligence would unfairly give him that proverbial second bite at a decided issue.

Id. at 997. See Figueredo v. Keller Industries, Inc., 583 So. 2d 432, 433 (Fla. 3d DCA), rev. denied, 595 So. 2d 52 (Fla. 1991)("cause is remanded for a new trial as to the issues which may be fairly said to have been impacted by the errors in question.").

CONCLUSION

WHEREFORE, Petitioner, Vivian Trujillo, respectfully requests this Court to reverse the Third District Court of Appeal, reinstate the trial court's award of a new trial and grant Vivian Trujillo a new trial on the issues of comparative negligence and damages only.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief on Merits of Petitioner was mailed this 21st day of January, 1999, to:

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