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

REPLY BRIEF OF PETITIONER

STABINSKI & FUNT
757 N.W. 27th Avenue
Third Floor
Miami, FL 33125

BAMBI G. BLUM, P.A.
46 S.W 1st Street
Fourth Floor
Miami, FL 33131
305/371-3848

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INTRODUCTION

Uniroyal's answer brief tries to lose the forest for the trees. The jury's verdict was contrary to the manifest weight of the evidence and influenced by matters outside the record. The trial court meticulously detailed numerous grounds for granting a new trial in its order. The Third District, with a broad brush, dismissed some of the trial court's findings as "simply incorrect", and simply ignored the others. The opinion under review should be vacated.

ARGUMENT

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

The parties agree on the standard of review of a trial court's order granting a new trial on the ground that the verdict is against the manifest weight of the evidence. The parties disagree, however, as to whether reasonable persons could agree with the trial court's findings.[1]

a. The 99% comparative fault finding was against the manifest weight of the evidence.

[1] Uniroyal's argument about the additur it rejected is wholly irrelevant, except insofar as it demonstrates the trial court's shock at the jury's verdict and belief that such verdict gone awry could not stand.

Uniroyal has tailored its theory of the case to support the Third District's holding. However, the parties never disputed that the blowout was caused by the faulty plug repair and never disputed that Trujillo was not warned that tire failure could occur as a result of plug repairs. The parties also agreed that the "underinflation" of the tire was caused by the leaky, improper plug repair. Thus, the trial court's finding that "There was no evidence that Trujillo's alleged negligence caused the tire failure" was in accordance with the parties' understanding of this case, until the Third District deemed it "simply incorrect." Underinflation evidence did not and could not establish Trujillo's fault for causing the blowout. It was offered by Uniroyal solely to establish the sufficiency of the only warning Uniroyal gave -- that tires should not be run in an underinflated condition. Trujillo testified that she in fact read and followed this warning, always checked her tires for correct air pressure, checked the air in her tires the day before the accident and still had no idea that plug repairs were improper and dangerous. (T.300-301, 363, 368). It is patent that this warning could not and did not alert Trujillo to the dangers of performing plug repairs. Trujillo's failure to heed an inadequate warning is no basis for a 99% comparative fault finding.

This 99% comparative fault finding likewise cannot be supported by evidence that Trujillo was speeding, and failed to

properly coordinate braking and steering after the blowout to keep her vehicle from leaving the roadway. Nobody suggested that Trujillo's speed, steering or braking caused the blowout here. But for the blowout, this accident would not have happened.

The trial court did not determine that there was no comparative negligence on this record, only that a 99% comparative negligence finding was against the manifest weight of the evidence because it was undisputed that Trujillo did nothing to cause the defect in this tire. Reasonable persons could surely agree.

b. Seatbelt defense damages.

Uniroyal agrees that the Third District's opinion did not address the trial court's written findings that its expert Tomlinson's testimony was incompetent. Uniroyal justifies this omission arguing that the district court must have found that Trujillo waived the point by failing to object to Tomlinson's testimony at trial. However, Uniroyal did not argue this point in its main brief before the Third District. (See pp. 37-38 Uniroyal Initial Brief). Uniroyal's belated mention of a waiver argument in its reply brief did not properly place this issue before the court for appellate review. See General Mortgage Associates v. Campolo Realty & Mortgage Co., 678 So. 2d 431 (Fla. 3d DCA 1996). Uniroyal's argument here boldly assumes that the Third District ruled on a point not properly before it and just did not bother to articulate its holding. The Third District's omission violates the

appropriate standard of review of the trial court's order granting a new trial on this ground. See Baptist Memorial Hospital v. Bell, 384 So. 2d 145 (Fla. 1980).

In any case, no waiver occurred. Trujillo objected to Tomlinson's qualification to testify about injuries she sustained. The objection was overruled. (T.1411-12). It was indeed impermissible for Tomlinson to assail another expert's opinions, based on that expert's testimony alone. See Carlton v. Bielling, 146 So. 2d 915 (Fla. 1st DCA 1962)(holding that it is improper to elicit an opinion of a witness as to the validity of opinions expressed by plaintiff's expert witnesses).

> [T]he generally accepted rule ... operates to exclude testimony of experts given in answer to hypothetical questions which incorporate opinions, inferences and conclusions of others, as where the question is asked directly on those opinions, inferences and conclusions.

Id. at 916. Tomlinson's testimony was incompetent and, even if credited, could not support any finding that 100% of Trujillo's damages were caused by her failure to wear a seatbelt.

c. Improper and inconsistent verdict.

Uniroyal has once again missed the point that if trial courts must give written reasons for granting a new trial on grounds either that the verdict is against the manifest weight of the evidence or influenced by matters outside of the record, it follows that the reviewing court must consider those grounds in reversing

the order and may not simply ignore them. See Baptist Memorial Hospital, supra. None of the cases cited by Uniroyal support a contrary argument, e.g., Heckford v. Florida Dept. of Corrections, 699 So. 2d 247 (Fla. 1st DCA 1997); Tripack Machinery, Inc. v. Hartshorn, 644 So. 2d 118 (Fla. 2d DCA 1994); American Employers Ins. Co. v. Taylor, 476 So. 2d 281 (Fla. 1st DCA 1985); State Farm Mutual Automobile Ass'n v. Gage, 611 So. 2d 39 (Fla. 4th DCA 1992). The issue of the improper and inconsistent verdict was properly before the Third District because it was framed in the order under review as a ground in support of a new trial. Id. (holding that in reviewing order granting new trial, appellate court considers the sufficiency of only those grounds specified in the order). Uniroyal's attempts to discredit the trial court's findings in this appellate proceeding is not a substitute for a Third District ruling.

The trial court's new trial order recognized a fundamentally improper and inconsistent verdict after comparing Trujillo's proposed instructions and verdict form on the issues of comparative negligence and the seatbelt defense with the ones given and proposed by Uniroyal.[2] Trial courts may grant new trials even for

[2] While the inconsistency issue was not articulated at the charge conference, Trujillo objected to Uniroyal's seatbelt and comparative negligence jury instructions and filed its proposed instructions and verdict form. (T.15442-43, 1460-61, 1476-77). The verdict form given to the jury was prepared by Uniroyal in accordance with the court's rulings at the charge conference. (T.1477-78).

unpreserved errors that are fundamental. See Cronin v. Kitler, 485 So. 2d 440 (Fla. 2d DCA), rev. denied, 492 So. 2d 1333 (Fla. 1986).

Uniroyal's argument that its instruction and verdict followed Insurance Co. of N. America v. Pasakarnis, 451 So. 2d 447 (Fla. 1984) is incorrect. Uniroyal's instructions asked whether Trujillo was herself negligent in operating her vehicle which was a cause of her damage and asked, "in addition", if her failure to wear a seatbelt was a cause of her damage, without further instruction not to consider the seatbelt issue on the comparative negligence interrogatory. This is not compliant with Pasakarnis. Uniroyal's defense of the jury's findings as not necessarily indicative of error is wishful thinking. Even instructions which followed Pasakarnis faithfully, frequently resulted in a "double dip" -- which is why the seatbelt instructions are now treated exclusively as an issue of comparative negligence.

It was moreover pointless to send the jury back to deliberate further when the instructions and verdict form were hopelessly flawed and an invitation to inconsistency. The jury could not have found Uniroyal liable and also that 100% of Trujillo's injuries were caused by her failure to wear a seatbelt where, as here, the seatbelt defense was asserted solely as to her neck injuries and it was undisputed that she suffered a broken rib, bruises and scratches in this accident.

d. Damages inadequate.

It is undisputed that Trujillo was hospitalized for 19 days in traction; lived 24 hours a day in a halo brace for four months; was unable during that time to eat or bathe alone and wore a cervical collar for two months thereafter. It is also undisputed that Trujillo had to give up the activities she enjoyed the most after her accident. It is furthermore undisputed that Trujillo suffered a permanent injury. Uniroyal's argument that the jury awarded Trujillo nothing for future damages because she is not a complainer or malingerer and $10,000 for past pain and suffering because her injury "was in essence a broken bone" proves that the verdict is shockingly inadequate and against the manifest weight of undisputed evidence.

Uniroyal's reliance on State Farm Mut. Auto Ins. v. Brooks, 657 So. 2d 17 (Fla. 3d DCA 1995) is misplaced. There was no reason for disbelieving Trujillo's or her experts' testimony.

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

There is no issue of defect to be retried. The error here occurred in the jury's double deduction for the seatbelt defense in determining both comparative fault and damages. Further, the jury's damage award was shockingly inadequate. Thus, issues of comparative negligence and damages must be retried. There is no flaw in the jury's finding that Uniroyal was liable for the defect on the evidence here and Uniroyal does not point to any, or cite any authority which supports its contention otherwise.

III. UNIROYAL'S DIRECTED VERDICT ARGUMENT WITHOUT MERIT.

Uniroyal has reraised its unsuccessful argument for a directed verdict. This argument should be no better received by this Court.

Uniroyal argues its warning that "serious injury may result from tire failure due to underinflation" clearly conveys the message that flat tires should not be repaired with external plugs because they leak. However, Trujillo testified that she in fact read and followed this warning, always checked her tires for correct air pressure, checked the air in her tires the day before the accident and still had no idea that plug repairs were improper and dangerous. (T.300-301, 363, 368). Trujillo's expert, Jordan testified that Uniroyal's warning about underinflation was not a warning not to do external plug repairs on flat tires. (T.828, 832-833). Moreover, Uniroyal's own experts did not testify that the underinflation warning clearly conveyed a warning regarding the dangers of plug repairs. Rather, they testified that underinflation could be caused by many conditions too numerous to identify, so that a warning of underinflation was most comprehensive and effective. (T.967-970, 976). The jury's finding that there was a failure to warn of this danger was eminently correct on this record.

Uniroyal's second directed verdict argument is that it had no duty to warn the consumer about improper plug repairs. Uniroyal argues that its warranties instructed consumers not to repair the

tire themselves and Trujillo relied on repair a facility to repair her tire, thus establishing an unpled "learned intermediary" affirmative defense.

To begin with, this argument plainly ignores the testimony of Trujillo's expert Jordan that manufacturers should warn of the dangers of plugging on the sidewall of the tire where consumers can see it because plugging can cause serious injury or death. He also testified that Firestone's and Michelin's warranties directly warned the consumer of the damages of plug repairs. (T.827, 890, 900). It takes no leap in logic to conclude from this evidence that Jordan's opinion was that the consumer should have been warned.

Uniroyal's contention that its warning that owners should not repair tires excuses its duty to warn about improper plug repairs is belied by other warnings appearing on the tire sidewall and consumer information concerning explosions due to improper mounting, which is also work for repair facilities. (T.832, 1302). Moreover, simply because a repair facility is hired to do the work does not mean an owner has no say on how those repairs should be made. Trujillo herself said that she would not have permitted such a repair if she had known of the dangers. Indeed, defense expert Dodson testified that if he saw a repair person applying an external plug to his tires he would stop them and tell them not to do it. (T.1039). Furthermore, the "learned intermediary" doctrine

has not been pled or argued below and is therefor waived. See Robbins v. Newhall, 692 So. 2d 947 (Fla. 3d DCA), rev. denied, 699 So. 2d 1375 (Fla. 1997). It is also a defense that cannot prosper as a matter of law on the facts here -- where Trujillo took four flat tires to four different Uniroyal dealers and each one improperly plugged the four flat tires. If anything, an "ignorant intermediary" theory applies here.

Uniroyal's third directed verdict argument is that there was no evidence of causation because Vivian did not recall the circumstances surrounding the repair of her tire, thus making the causal link between the alleged failure to warn and her accident speculative. This argument is also meritless.

The Restatement 2d of Torts § 402A, accepted as the doctrine of strict liability in West v. Caterpillar Tractor Co., Inc., 336 So. 2d 80 (Fla. 1976), provides that a seller is responsible for injuries caused by an unreasonably dangerous product. Comment (h) provides:

> Where, however, [the seller] has reason to anticipate that danger may result from a particular use ... he may be required to give adequate warning of the danger (see comment j) and a product sold without such warning is in defective condition.

The rule in negligence cases was explained by the court in Stanley Industries, Inc. v. W. M. Barr & Co., 784 F. Supp. 1570, 1574 (S.D. Fla. 1992):

> The question framed for causation in the negligent failure to warn category is: Had the seller supplied an adequate warning, would the injured plaintiff have changed his behavior so as to avoid injury? *See* Madden, *The Duty to Warn in Products Liability: Contours and Criticism*, 89 W.Va.L.Rev. 221, 270 (1987).

And,

> Unless it be said that the failure to warn was not, as a matter of law, a proximate cause of plaintiff's injury, the issue of proximate causation is one for the jury.

Giddens v. Denman Rubber Mfg. Co., 440 So. 2d 1320 (Fla. 5th DCA 1983).

Trujillo testified that she in fact read and followed the information in the warranty and on the sidewalls that came with her Suburban and its tires. It was undisputed that there was no warning regarding the danger of improper plug repairs in this literature or on the sidewall. Trujillo testified that she would have understood a warning of this danger phrased similarly to that in the Firestone and Michelin warranties. Moreover, she testified on cross-examination by defendants that had she known of this information she never would have allowed any repair facility to repair her tire with an outside plug and this accident would not have happened.[3] It is plain from the foregoing evidence, that had

[3] The trial court's jury instruction to disregard this testimony based on Drackett Products Co. v. Blue, 152 So. 2d 463 (Fla. 1963) was erroneous. In Drackett, the bottle of Drano contained a clear warning of the precise danger that caused the injury. The plaintiff just did not read it. Therefore, the court

this warning been contained in the information provided to Vivian that she should have read it, understood it and followed it. The details of when the tire was repaired, who repaired it and whether it was repaired before are plainly irrelevant, and their absence does not entitle defendants to a directed verdict.

Uniroyal's directed verdict arguments should be rejected.

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,

STABINSKI & FUNT
757 N.W. 27th Avenue
Third Floor
Miami, FL 33125

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correctly struck as speculative testimony plaintiff's testimony about what she would have done had she read the warning. Here there was no warning at all in the material which was provided to and read by Trujillo. Her testimony about not permitting such repairs was competent and admissible. See Stanley Industries, supra.

BAMBI G. BLUM, P.A.
46 S.W. 1st Street
Fourth Floor
Miami, FL 33130
305/371-3848

By:_____
BAMBI G. BLUM
Fla. Bar No. 370991

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner was mailed this 14th day of April, 1999, to:

Wendy F. Lumish, Esq.
Carlton, Fields, Ward, Emmanuel,
Smith & Cutler, P.A.
4000 NationsBank Tower
100 S.E. Second Street
Miami, FL 33131
305/530-0050
Attorneys for Appellants

_____