IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 93,527

FILED
SID J. WHITE
JUL 27 1998
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

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

JURISDICTIONAL 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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STATEMENT OF FACTS

The Third District Court of Appeal reversed an 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). The opinion below recognizes 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 for four months and strapped in a cervical collar for two months more. (Op. p.2). The less significant other injuries Trujillo sustained were a broken rib, and numerous bruises, cuts and scratches. Trujillo presented undisputed expert and treating physician testimony that her injuries were permanent and her physical activities were restricted as a consequence of this accident. (Op. p.5).

Trujillo brought this suit against Uniroyal for strict liability failure to warn that its tires should never be repaired with external plugs because they cause blowouts. (Op. p.2). The jury found that Uniroyal was strictly liable for causing Trujillo's damages; that Trujillo was 99% comparatively negligent; and that 100% of Trujillo's damages were caused by her failure to use a seatbelt, resulting in a $0 verdict for Trujillo. The jury had

BAMBI G. BLUM, P.A.
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awarded her only $10,000 for past pain and suffering in addition to an agreed upon sum for medical expenses. (Op. p.5).

The trial court ordered a new trial for several reasons. First, "the verdict was inconsistent and fundamentally improper" because the jury's finding that Defendant, Uniroyal, was strictly liable for placing a defective product on the market which caused Plaintiff's damages, was inconsistent with the jury's findings that Plaintiff's failure to wear a seatbelt was a 100% cause of her damages. (Op. pp.1,5,7). Second, the jury's findings of 99% comparative negligence and 100% for the seat belt defense were contrary to the manifest weight of the evidence. (Op. pp.1,5). The trial court found that the verdict form used contributed to this result because it improperly allowed the jury to "double dip" on the issues of comparative fault and the seat belt defense, by allowing the jury to consider the seatbelt issue in assessing comparative fault, and once again in reducing Trujillo's damages. (Op. p.6). The trial court further found that the damages of $10,000 Trujillo was awarded for past pain and suffering, and $0 for future pain and suffering, were shockingly low and against the manifest weight of the evidence. (Op. p.6).

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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).

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 the seatbelt defense, 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 petition by Trujillo ensued.

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SUMMARY OF ARGUMENT

The Third District opinion reversing the trial court's order granting a new trial applied a standard of review which expressly and directly conflicts with decisions of this Court. 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. This opinion expressly and directly conflicts with decisions which require 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.

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FOURTH FLOOR, 46 SOUTHWEST FIRST STREET, MIAMI, FLORIDA 33130-1610 • TEL. (305) 371-3848

ARGUMENT

THE STANDARD OF REVIEW APPLIED BY THE THIRD DISTRICT COURT OF APPEAL IN REVERSING THE NEW TRIAL ORDER EXPRESSLY AND DIRECTLY CONFLICTS WITH SUPREME COURT AND FIFTH DISTRICT AUTHORITY ON POINT.

In E.R. Squibb and Sons, Inc. v. Farnes, 697 So. 2d 825, 826 (Fla. 1997), the supreme 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.

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FOURTH FLOOR, 46 SOUTHWEST FIRST STREET, MIAMI, FLORIDA 33130-1610 • TEL. (305) 371-3848

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).

a. Reviewing court failed to apply reasonableness test to trial court's findings.

The standard of review applied by the Third District expressly and directly conflicts with the standard of review mandated by Squibb, Smith, Baptist, and Clough. The Third District reversed the order granting a new trial upon the finding that there was "substantial competent evidence to support the jury's verdict" and deeming the trial court's conclusion that there was no evidence of Plaintiff's comparative negligence which caused the tire failure "simply incorrect." Squibb 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, 1998 Fla. App. Lexis 5520 (Fla. 5th DCA 1998). "Simply incorrect" is not the standard of review prescribed by this Court:

> 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.

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The trial court found that it was undisputed that absent a defect, this blowout would not have occurred. The Third District reweighed the evidence and made an appellate finding of a factual dispute on this point. (Op. p.6). Indeed, this appellate fact-finding cannot be squared with the opinion itself which correctly notes that:

> The parties ultimately agreed that the tire blew due to an improper repair, an external plug used rather than an internal patch. (Op. p.2).

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 finding as much was not an abuse of discretion under this Court's and the Fifth District's holdings.

b. Reviewing court failed to apply reasonableness test to damage determination.

The Third District's standard of review of the damage evidence also expressly and directly conflicts with Squibb, Smith, Baptist, and Clough, by not applying a reasonableness test. The trial court found that the $10,000 in past and $0 in future damages were shockingly inadequate and against the manifest weight of the evidence on the facts of this case. The Third District applied an "abuse of discretion" standard which focused solely on whether it

BAMBI G. BLUM, P.A.
FOURTH FLOOR, 46 SOUTHWEST FIRST STREET, MIAMI, FLORIDA 33130-1610 • TEL. (305) 371-3648

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 opinion reflects that Trujillo's injuries were grievous, incapacitating and permanent. She 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. She was out of work for four months and has limited ability to participate in the physical activities she enjoys the most.

The opinion also reflects 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.[1] 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 Assn 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). See also Shaw v. Puleo, 159 So. 2d 641

[1] 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).

BAMBI G. BLUM, P.A.
FOURTH FLOOR, 46 SOUTHWEST FIRST STREET, MIAMI, FLORIDA 33130-1610 • TEL. (305) 371-3848

(Fla. 1964). 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.

c. Grounds for new trial not tested at all must be affirmed.

It is axiomatic that:

> The discretion to grant or deny a motion for new trial is given to the trial judge because of his direct and superior vantage point. In accordance with Wackenhut [Corp. v. Canty, 359 So. 2d 430 (Fla. 1978)], the trial judge must give express reasons which will support his finding that the verdict is against the manifest weight of the evidence or was influenced by consideration of matters outside of the record.

Baptist Memorial Hospital, 384 So. 2d 145 (Fla. 1980).

The Third District's opinion recognizes that the trial court's order expressly found an inconsistency and fundamentally improper verdict and an improper verdict form which allowed a "double dip" on the comparative negligence and seatbelt defense, as grounds for a new trial. Reversal without addressing these grounds is in express direct conflict with the holding in Baptist that:

> 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.

BAMBI G. BLUM, P.A.
FOURTH FLOOR, 46 SOUTHWEST FIRST STREET, MIAMI, FLORIDA 33130-1610 • TEL. (305) 371-3848

Id. at 146. Baptist requires affirmance of the new trial order because no abuse of discretion was shown on these grounds.[2]

CONCLUSION

WHEREFORE, Petitioner, Vivian Trujillo, respectfully requests this Court to accept jurisdiction over this cause.

Respectfully submitted,

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 33130
305/371-3848

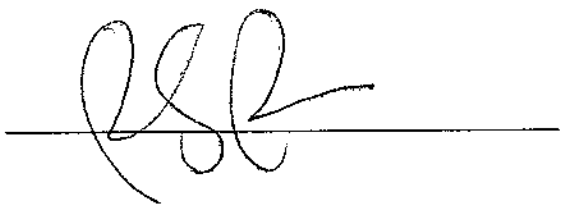
By: _____
BAMBI G. BLUM
Fla. Bar No. 370991

[2] In any event, reasonable persons could surely agree with the trial court that there was a fundamental inconsistency in the jury's finding that the Defendant was strictly liable for the defect, which caused Plaintiff's damages and yet find that 100% of her damages were attributable to her failure to use the seatbelt, in light of the fact that the opinion acknowledges that Trujillo suffered injuries other than her spine injury, which was the sole object of the seatbelt defense.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief of Petitioner was mailed this 24th day of July, 1998, 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



BAMBI G. BLUM, P.A.
FOURTH FLOOR, 46 SOUTHWEST FIRST STREET, MIAMI, FLORIDA 33130-1610 • TEL. (305) 371-3848

Appendix

1. Opinion from Third District Court of Appeal.

2. Order granting motion for new trial.