ORIGINAL

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 93,527

VIVIAN TRUJILLO,

Petitioner,

vs.

UNIROYAL TIRE COMPANY,
a foreign corporation, et al.,

Respondents.

RESPONDENT'S BRIEF ON JURISDICTION

On Petition to Invoke Discretionary
Jurisdiction to Review a
Decision of the Third District Court of Appeal

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INTRODUCTION

This brief is filed on behalf of Defendants, Uniroyal Tire Company ("Uniroyal") and General Motors Corporation ("General Motors") in response to Plaintiff, Vivian Trujillo's Petition for Review of a Third District Court of Appeal decision. The Third District reversed an order granting a new trial with directions to reinstate the jury's verdict.

References to the record and transcript of trial will be designated by the symbols "R" and "T," respectively.

STATEMENT OF THE CASE AND FACTS

On June 29, 1985, Plaintiff, Vivian Trujillo, and ten passengers were traveling in her 1984 Suburban on a straight, good road when she felt a quick "jiggling and immediate boom." (T. 379) She slammed on the brakes and lost control of the vehicle. It left the roadway, rolled over, and Plaintiff was ejected. (T. 321, 380) Plaintiff, who was unbelted, sustained a spinal fracture which did not cause any neurological damage.

Plaintiff sued the tire manufacturer, Uniroyal, and the vehicle manufacturer, General Motors, alleging a defect in the tire caused the accident. (R.1-45) After abandoning manufacturing and design defect theories, Plaintiff claimed that she should have been warned about proper repair methods so she could have directed the repair facility to make the correct repair. (T. 1139) Thus, the sole liability question posed to the jury was whether Defendants failed to warn Plaintiff of the risk in failing to properly repair punctures in tires, and whether this defect a legal cause of damage to Plaintiff? (R. 692-94)

The jury returned a verdict for Plaintiff, but found her negligence was responsible for 99% of her damage. It awarded $16,981 in past economic damages and $10,000 for past pain and suffering. The jury also found that 100% of Plaintiff's damages were caused by her failure to wear a seat belt. (R. 692-94)

From the moment the verdict was returned, it was apparent the court disagreed with the jury's decision. The court immediately called counsel to side bar to discuss the jury's findings and commented that given the size of the verdict, it

would be disinclined to reduce the verdict based on the jury's findings of comparative fault and failure to wear a seat belt.

In fact, however, the jury's verdict was well supported by the evidence. As to comparative fault, there was evidence that the tire had been run in a chronically underinflated condition and such negligence could, lead to a tire failure. (T. 958) There was also proof that Plaintiff's negligence in operating the vehicle after the tire failure was the cause of the accident and Plaintiff's injury. This negligence included speeding and hard braking, both of which allowed the vehicle to go off the road. If the vehicle remained on the roadway, it would not have overturned. (T. 224, 244, 1517-18)

Turning to the seat belt defense, Defendant's expert testified that had Plaintiff been belted, she would not have hit her head in a manner which Plaintiff's doctor said caused the injury nor would she have been ejected. (T. 1412, 1500-02, 1507)

As to damages, Plaintiff's own doctor testified that Plaintiff's injury was, in essence, a broken bone from which Plaintiff has completely recovered. (T. 662, 652, 660, 667) Additionally, there was proof that in the year of the accident, Plaintiff was fully paid her wages from collateral sources. (T. 1102) Thereafter, in subsequent years, Plaintiff's income actually increased. (T.619, 1099-1104)

Ultimately, the court gave Plaintiff an (unrequested) additur from $0 to $26,981 with no reductions for comparative fault or the seat belt defense. (R. 817-21) Alternatively, the court ordered that a new trial be had on all issues.

The court made several findings in support of this order. First, it found the verdict as to comparative fault and the seat belt defense was against the manifest weight of the evidence. Second, the court found the verdict was inconsistent in its finding that a defect caused Plaintiff's damages, but that 100% of Plaintiff's damages were caused by the failure to wear a seat belt. Third, the verdict form allowed the jury to "double dip" on the seat belt defense. Finally, the court found that the damage award was against the manifest weight of the evidence.

The Third District reversed and Plaintiff's motion for rehearing was denied. Plaintiff now seeks review based on alleged direct and express conflict as to the standard of review or an order granting a new trial.

SUMMARY OF THE ARGUMENT

Plaintiff seeks review of this case based on an alleged conflict with decisions of this Court and others concerning the standard of review. A review of the district court order reveals however, that the court properly applied the standard.

In those instances where the trial court found that there was **no** evidence to support the jury's verdict, in fact, there was substantial competent evidence. Thus, no reasonable person would agree with the trial court's post-verdict determination. As to the remaining issues, the reasonableness test was inapplicable since Plaintiff failed to preserve the issues for review. Thus, it was not within the trial court's discretion to void the jury verdict based on unpreserved error.

ARGUMENT

I. THERE IS NO EXPRESS OR DIRECT CONFLICT BETWEEN THIS CASE AND THE DECISIONS OF THE SUPREME COURT AND FIFTH DISTRICT.

Petitioner asserts that the decision of the Third District is in conflict with decisions of this Court and the Fifth District on the issue of the standard of review for an order granting a new trial. Specifically, Plaintiff asserts that the court applied an incorrect standard in reaching its conclusion that the new trial order should be reversed. Review should be denied because this decision does not directly and expressly conflict with decisions of this Court or the Fifth District.

A. The Third District Applied the Proper Standard as to the Trial Court's Findings Concerning the Manifest Weight of the Evidence.

As Petitioner points out, this Court in E.R. Squibb and Sons v. Farnes, 697 So. 2d 825 (Fla. 1997) recently enunciated the standard for review of an order granting a new trial. Simply stated, the court must determine whether "reasonable [persons] could differ as to the propriety of the action taken by the trial court, . . [if so] then the action is not unreasonable and there can be no finding of an abuse of discretion. Id. at 826-27 (citing Baptist Mem. Hosp. Inc. v. Bell, 384 So. 2d 145, 146 (Fla. 1980)).

Applying this test, the Court, found there was an evidentiary basis for the jury verdict and extensive evidentiary support for the trial court's order. Id. at 827. As such, the

court was "unable to say, after viewing the record as a whole, that reasonable persons could not have concluded that the verdict . . . was against the manifest weight of the evidence." Id. at 828 (citing Smith v. Brown, 525 So. 2d 868, 870 (Fla. 1988)).

While Petitioner claims that the district court opinion failed to follow Supreme Court precedent, incredibly, Petitioners never even cited Squibb or Baptist, to the district court. Nonetheless, the standard was properly applied.

Looking first at Plaintiff's comparative fault, the trial court found that "[T]here was no evidence that Trujillo's alleged negligence caused the tire failure," (R. 818) and as such, ruled that the verdict on comparative fault was against the manifest weight of the evidence. In fact, as the Third District found, the record is replete with evidence of Plaintiff's negligence:

> There was testimony that the plaintiff's tires suffered from chronic under inflation which condition could have caused the blowout. There was additional testimony that plaintiff was speeding at the time the tire blew and that she responded poorly by locking her brakes. As noted above, the defendant's expert, Tomlinson, testified that plaintiff was driving 75 mph when the tire failed. He opined that had she been traveling between 55 and 67 mph her vehicle would not have gone off the road. He further testified that had she not slammed on her brakes the car would not have left the roadway and overturned. This evidence, along with other highly disputed facts of this case, created credibility issues which were properly for the jury to decide.

Trujillo v. Uniroyal, 711 So. 2d 606, 608 (Fla. 3d DCA 1998).

In light of this evidence, the district court properly found that "the trial judge's conclusion that there was no evidence that Plaintiff's alleged negligence caused the tire failure is simply incorrect." Id. at 608. Thus, contrary to Petitioner's argument, this was not a case where the district court simply relied upon the fact that there was evidence to support the verdict. Rather, the Third District properly concluded that the trial court's finding of "no evidence" to support the verdict was wrong.[1] As such, no reasonable person could have agreed with the trial court's order.

Turning to the seat belt defense, based on its review of the transcript and record, the district court found:

> Plaintiff's medical expert, Dr. Goodgold, testified that plaintiff's spinal injury was the result of a hyperextension of her neck from either hitting against the roof of the vehicle with her head back or ejection from the vehicle. Tomlinson testified that had plaintiff been belted, she would not have hit her head on the roof and would not have been ejected.[2] Plaintiff's expert, Nunn, testified that the vehicle was fitted with a seat belt with a comfort feature that would not automatically retract. Nunn opined that even if she had worn her seat belt it may not have prevented her from hitting her head on the roof in the rollover, as it was designed to

[1] Petitioner continues to confuse the issue of the cause of the tire blowout with the cause of the accident and injury. Thus, Plaintiff argues that everyone agreed the tire blowout was caused by a defect, and thus, there could be no comparative negligence. While there may have been agreement on the cause of the tire blowout, the cause of the accident and injury was very much in dispute.

[2] One of Plaintiff's primary challenges to this testimony in the district court was the witness' lack of qualifications. In fact, however, Plaintiff never objected to the introduction of this testimony at trial and thus, this asserted error had been waived.

> lock upon frontal impacts. Tomlinson testified that braking would have locked the shoulder harness of plaintiff's seat belt.

Trujillo, 711 So. 2d at 607-08. In light of these findings, no reasonable person could agree with the trial court's conclusion that "there was no testimony that Trujillo would have sustained no injuries if she had been wearing a seat belt." (R. 818)

Finally, as to damages, once again, Petitioner has made no showing that an improper standard was applied. Having reviewed the transcript and record, the court was aware that: (1) Plaintiff's injury was essentially a broken bone, with no neurological damage, (2) the jury had the opportunity to see Mrs. Trujillo during trial and to evaluate for themselves the permanency of her injury, (3) Plaintiff sought damages at trial for injuries which were not reported until years after the accident, and (4) Plaintiff demonstrated no loss of income. Given this record evidence, the district court properly concluded that it was an abuse of discretion to grant a new trial on damages since it was not clear, obvious, and indisputable that the jury was wrong. See Becker v. Williams, 652 So. 2d 1182 (Fla. 4th DCA 1995). Such a finding is not inconsistent with respect to the proper standard of review.

B. There is no Express and Direct Conflict as to the Standard of Review for the Remaining Issues.

Apart from its decision concerning the manifest weight of the evidence, the trial court found the verdict form was improper and that the jury's finding as to defect was inconsistent with its finding that Plaintiff was 100% responsible for his injuries.

Petitioner complains that the district court failed to apply the reasonableness test to this finding and that the failure to address these issues in its opinion conflicts with Baptist Mem. Hosp. Inc. v. Bell, 384 So. 2d 145, 146 (Fla. 1980). Petitioner's position cannot be sustained for several reasons.

First, Baptist does not hold that the district court must address each and every ground set forth in the new trial order. More importantly, the reasonableness test did not even come into play with respect to these issues because these errors were not preserved for review.

As set forth in Sears Roebuck & Co., Inc. v. Jackson, 433 So. 2d 1319 (Fla. 3d DCA 1989) where a court grants a motion for new trial on unpreserved error, he is not operating within the area of his discretion. See also Wasden v. Seaboard Coast Line R.R., 474 So. 2d 825 (Fla. 2d DCA 1985) (where new trial is granted based on unpreserved error, it is not a matter of discretion and the ruling will be upheld only if the error is, as a matter of law, fundamental).

Here, the district court indicated that it had thoroughly reviewed the trial transcript and record in this case. That record reveals that the errors cited by the trial court regarding the verdict form and the inconsistency in the verdict were not preserved below.

As to the verdict form, Plaintiff did not object to the language regarding comparative fault or the seat belt defense nor did Plaintiff bring her proposed form to the attention of the trial court or opposing counsel so the court could address these

issues. Accordingly, the issue was not preserved for review. Middelveen & Sibson Realty, Inc., 417 So. 2d 275, 276-77 (Fla. 5th DCA), rev. denied, 424 So. 2d 762 (Fla. 1982); DuPuis v. 79th Street Hotel, Inc., 231 So. 2d 532 (Fla. 3d DCA), cert. denied, 238 So. 2d 105 (Fla. 1970); McDonough Power Equip., Inc. v. Brown, 486 So. 2d 609, 610 (Fla. 4th DCA 1986); Concept, L.C. v. Gesten, 662 So. 2d 970, 972, n.1 (Fla. 4th DCA 1995); Luthi v. Owens-Corning Fiberglas Corp., 672 So. 2d 650 (Fla. 4th DCA 1996); Thus, it was error as a matter of law to grant a new trial based on this unpreserved error. Sears; Cushman & Wakefield of Florida, Inc. v. Comreal Miami Inc., 683 So. 2d 208 (Fla. 3d DCA 1996) (preservation of objection applies to new trial order as well as appeal).

Similarly, Plaintiff failed to preserve her objection to any alleged inconsistency in the jury verdict. Plaintiff acknowledged the appropriate relief in the event of an inconsistent verdict would be to resubmit the case to the jury. However, when the jury returned its verdict and the parties were specifically asked whether they sought any relief before the jury was discharged, Plaintiff responded that she was not asking the trial court for anything at that time. It is clear that Plaintiff affirmatively chose not to have the case resubmitted and thus, she waived her ability to object to the allegedly inconsistent verdict rendered in this case. Delva v. Value Rent-A-Car, 693 So. 2d 574 (Fla. 3d DCA 1997); Keller Indus., Inc. v. Morgart, 412 So. 2d 950, 951 (Fla. 5th DCA 1982); Brown v. North Broward Hosp. Dist., 521 So. 2d 143 (Fla. 4th DCA 1988); Holland America Cruise, Inc. v.

Underwood, 470 So. 2d 19, 21 (Fla. 2d DCA 1985); Gould v. National Bank of FL, 421 So. 2d 798, 802 (Fla. 3d DCA 1982).

In light of the foregoing, the court's ruling on this issue was entirely consistent with abundant case law reversing new trial orders where the cited error was not preserved in the trial court. See Anderson v. Watson, 559 So. 2d 654 (Fla. 2d DCA 1990); Gregory v. Seaboard Sys. R.R., Inc., 484 So. 2d 35, 38 (Fla. 2d DCA), rev. denied, 492 So. 2d 1334 (Fla. 1986); Nelson v. Reliance Ins. Co., 368 So. 2d 361 (Fla. 4th DCA 1978); Nissan Motor Corp. v. Padilla, 545 So. 2d 274 (Fla. 3d DCA 1989); Saxon v. Chacon, 539 So. 2d 11 (Fla. 3d DCA 1989); Williams v. Moran Towing & Transp. Co., 504 So. 2d 27, 28 (Fla. 4th DCA 1987). Accordingly, there can be no merit to Plaintiff's claim that the Third District's ruling is in conflict with other decisions concerning the use of the reasonableness test.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that the petition for review be denied.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 8th day of September, 1998 to Luis Stabinski, Esq., Attorney for Plaintiff, Stabinski & Funt, 757 N.W. 27th Avenue, Third Floor, Miami, FL 33125-3093 and Bambi Blum, Esq., Bambi Blum, P.A., 46 SW First St., Miami, FL 33130-1610.

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