IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,201

SELMA GROSS,

Petitioner,

vs.

REBECCA LYNN LYONS,

Respondent.

REPLY BRIEF OF PETITIONER

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CERTIFICATION OF FONT SIZE AND STYLE

Petitioner, SELMA GROSS, through her undersigned attorneys, hereby certifies that the size and style of type used in the Reply Brief of Petitioner is 14 points proportionately spaced Times New Roman.

SUMMARY OF THE ARGUMENT

It is undisputed that the two automobile accidents the Respondent was involved in are unrelated. These two collisions are sufficiently disconnected that in a legal sense Petitioner cannot be liable for the second impact. Causation principles prevent Petitioner from being held fully liable for damages caused by the subsequent accident. Therefore, the jury should have apportioned damages between the various accidents. By its verdict, the jury found that none of Respondent's injuries resulted from the first accident. Accordingly, the new trial order should be reversed and the case remanded for reinstatement of the jury's verdict.

Alternatively, even if Respondent's argument is correct that the injuries are indivisible, Petitioner cannot be responsible for all of Respondent's injuries and damages. This court should review the instructions which the majority decision found should be given to the jury and conclude that such instructions improperly preclude the jury from considering postaccident events and unfairly makes Petitioner responsible for all of Respondent's injuries even if they were not legally caused by Petitioner. If after reviewing all the evidence presented, this court concludes that it would be impossible for the jury to apportion, even roughly, this court should find that the jury should be instructed to divide the damages equally amount various causes.

ARGUMENT[1] [2]

I.
PETITIONER WAS NOT THE LEGAL CAUSE OF ALL OF RESPONDENT'S INJURIES SO THE CONCLUSION THAT THE FIRST TORTFEASOR IS RESPONSIBLE FOR ALL INJURIES IS NOT SUPPORTED BY THE RECORD, THE CASE LAW AND THE CONCEPT OF FAIRNESS IMPLICIT IN THE FAULT THEORY.

In evaluating whether a first tortfeasor can be liable for injuries in a second accident, courts should look to causation principles. See Braunstein v. McKenney, 73 So. 2d 852 (Fla. 1954). This is the only way to determine whether the first tortfeasor caused all the damages the plaintiff suffered and to make the defendant only responsible for the harm caused by her own negligence. Respondent disagrees. Instead, Respondent would make Gross, the tortfeasor in the first accident, liable not only for the damage she caused, but also for injuries subsequently suffered by Lyons in an unrelated accident. Respondent would disregard causation in favor of public policy. The result urged by

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[1]In responding to the arguments in the answer brief, Petitioner presents its arguments as set forth in the initial brief.

[2] "R1.", "R2.", and "R3." refer to the record on appeal in this case. Although not indicated in the Index to the Record, Petitioner has assumed that the record was prepared in accordance with Rule 9.200(d)(B) and separated into "consecutively numbered volumes not to exceed 200 pages each." "T1.", "T2.", "T3", "T4.", "T5.", "T6.", "T7.", and "T8." refer to the eight volumes of the trial transcript included in the record on appeal. "PX" and "DX" refer to the plaintiff's and defendant's trial exhibits. The parties will be referred to by their proper names or as they appeared below. Unless otherwise indicated, all emphasis is supplied.

Respondent would eliminate the requirement that the plaintiff establish that the damages she seeks were proximately caused by the negligence of the defendant. See C. F. Hamblen, Inc., 172 So. at 696 (tortfeasor liable only for subsequent injury that is caused by or the proximate result of the original injury); Ellingson v. Willis, 170 So. 2d 311, 313-15 (Fla. 1st DCA 1964) (held that evidence raised jury question as to whether defendant's negligence was one of proximate causes of second accident occurring when approaching automobile ran into plaintiff's and defendant's automobiles, which had collided two to four minutes before, and killed plaintiff's wife and child), disapproved, on other grounds, Devlin v. McMannis, 231 So. 2d 194 (Fla. 1970).

In this case, the second accident in this case was not a foreseeable intervening cause of the loss to the plaintiff. See id. The second accident was unrelated to and not a foreseeable natural consequence of the first accident. See id. There was no evidence in the record of this cause from which the jury could lawfully find that Gross's negligence was one of the proximate causes of the second collision and the injuries suffered by Lyons after the second accident. Id. at 315. However, the result urged by Respondent would disregard this fact.

The evidence presented during the trial establishes the following. The accident at issue in this case was a rear-end collision which occurred on July 2, 1992. (R1. 1-2; T2. 133; T5. 526). The July accident was described as a low speed accident with minor

property damage. (T5. 526-30; T7. 651-53, 702-711, 771). After leaving the first accident scene, Lyons was taken by her father-in-law to Good Samaritan Hospital's emergency room for treatment, complaining primarily of neck pain. (T2. 135-36). Prior to trial, Gross admitted liability for causing the first accident, but denied being the legal cause of all of Lyons' damages. (R1. 34-35, 183).

On September 15, 1992, three months after the first accident, Lyons was involved in a second automobile accident. (T3. 218; T4. 344). During this accident the front of both vehicles collided. (T7. 693). Lyons did not began physical therapy until September 18, 1992, three months after the first accident and three days after the second accident. (T3. 218).

During trial, Lyons sought to recover damages for a lower back injury allegedly caused by the first accident. (T3. 219). However, Lyons admitted during cross-examination that she had experienced back pain, as well as neck pain, prior to the first accident. (T2.140; T7. 784). Additionally, Lyons was impeached with the fact that she had been treated for back pain in February 1992, prior to the first accident. (T2. 103, 111; T7. 784; DX.31). Her own treating doctor stated that in reviewing Lyons' prior medical records, he did find notations of prior back care and treatment. (T4. 336). Additionally, Defendant presented the fact that, in October 1992, Lyons reported to a treating physician that her major back injuries occurred in the September 1992 accident. (T6. 621).

The trial testimony demonstrates that the first accident did not aggravate the Plaintiff's preexisting Pars defect. It is undisputed that Plaintiff had this preexisting condition. (T4. 332, 388-89; T5. 467-68; T7. 731). However, even Dr. G. Clay Baynham, plaintiff's treating doctor and expert, agreed that spondylolisthesis preexisted the first accident and never even shifted as a result of the first accident. (T4. 366, 383, 388-389, 399, 405). Dr. Pevsner, one of Defendant's experts, confirmed that after reviewing x-rays and scans taken in February 1992, before the first accident, and later x-rays and scans, the Pars defect was not changed as a result of the first accident. (T5. 478-83). Thus, the record reveals that the harm resulting from the second accident for which Plaintiff sought treatment and required surgery were not caused by, or the result of, the first accident. Id.; see also Braunstein, 73 So. 2d at 852.

In complete disregard of this evidence, the majority decision found that Defendant could be responsible for all of Plaintiff's damages. The majority opinion, thus, set forth a new legal theory "that in a two accident scenario where the damages cannot be apportioned, a plaintiff may recover his/her damages against either the first tortfeasor or the second tortfeasor." Gross v. Lyons, 23 Fla. L. Weekly D1163, D1166 (Fla. 4th DCA May 13, 1998) (Warner, J. dissenting).

Based upon the conflicting medical testimony and the Plaintiff's own testimony, the jury could have viewed these injuries as distinct impacts which injured a separate area

of Plaintiff's body and thus caused distinct harm or even as sufficiently disconnected accidents which would preclude the first tortfeasor from bearing liability for the second impact. See Bruckman v. Pena, 487 P. 2d 566, 568 (Colo.Ct. App.1971) (holding that defendants could not be held liable for plaintiff's subsequent injury whether or not such damage could be apportioned between the two injuries).

Respondent argues in her brief, that Petitioner has not presented any argument in response to the instructions given to the jury. Petitioner would like to clarify its argument by pointing out that integrated in this first argument is the argument that the instruction concerning the second accident was correct and was necessary to instruct the jury on a viable defense. The trial judge properly found that the aggravation instruction pertains only to an aggravation of prior injuries and that a separate instruction on a subsequent accident was appropriate in view of the evidence presented. (T8. 838-43). The judge stated, "I want to make sure the jury is instructed on everyone's theory of law." (T8. 843). Thus, the instruction given did not result in a miscarriage of justice and did not confuse or mislead the jury. See Goldschmidt v. Holman, 571 So. 2d 422 (Fla.1990).

Thus, in this appeal, Petitioner asks this court to once and for all resolve the issue of the appropriate instruction to be given to a jury when the Plaintiff has been involved in two or more successive accidents but has only sued the tortfeasor who caused the first

accident and the injuries may be indivisible. Since there is no Florida case addressing the precise issue raised in this case, Petitioner urges this court to adopt the equitable principles of rough apportionment or equal division among tortfeasors set forth in Loui v. Oakley, 438 P. 2d 393 (Haw. 1968), and explained in Montalvo v. Lapez, 884 P. 2d 345 (Haw. 1994).

II.

A NEW TRIAL IS NOT WARRANTED IN THIS CASE WHERE THE VERDICT WAS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

In light of the prior arguments, that no error below warranted a new trial, Petitioner presents the argument that the jury's verdict was supported by competent, substantial evidence. The record in this case demonstrates that the verdict in favor of Defendant is supported by the evidence presented during the trial.

In light of the ruling on the directed verdict issue, Lyons had the burden of proving the amount of damages caused by the accident. Based on the evidence, the jury could have concluded that the July 2, 1992 accident caused only a temporary soft tissue injury requiring, at most, the trip to the emergency room and a few visits with Dr. Baynham. All of the subsequent treatment, including the surgery, could have been related to other causes, such as the second accident, a preexisting condition or normal life activities.

The verdict indicates that the jury did not believe Plaintiff's case. It is well-settled

that a jury is free to "accept or reject the testimony of a medical expert just as it may accept or reject that of any other expert." Easkold v. Rhodes, 614 So. 2d 495 (Fla. 1993). The jury is also free to disbelieve and reject a plaintiff's testimony and medical evidence as to the extent, effect and cause of his injuries. See Weygant v. Ft. Myers Lincoln Mercury, Inc., 640 So. 2d 1092, 1093-94 (Fla. 1994); Shaw v. Puleo, 159 So. 2d 641, 644 (Fla. 1964); Chomont v. Ward, 103 So. 2d 635 (Fla. 1958); Travieso v. Golden, 643 So. 2d 1134, 1135 (Fla. 4th DCA 1994); Daigneault v. Gache, 624 So. 2d 818, 819 (Fla. 4th DCA), rev. denied, 631 So. 2d 623 (Fla. 1993); State Farm Mut. Auto. Ins. Co. v. Garcia, 621 So. 2d 475 (Fla. 4th DCA 1993). For the foregoing reasons, the jury's zero verdict was adequate and was supported by the evidence.

III.

THE DIRECTED VERDICT ON CAUSATION WAS IMPROPER.

The Fourth District Court of Appeal's decision on this issue was proper. Thus, Petitioner is not seeking further review by this court on this issue.

CONCLUSION

It is respectfully submitted that the new trial order should be reversed and the case remanded for reinstatement of the jury's verdict; alternatively, this court should review the instructions the majority decision found should be given to the jury and conclude that such instructions improperly preclude the jury from considering postaccident events and unfairly makes Petitioner responsible for all of Respondent's injuries even if they were not legally caused by Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this ___ day of April 1999 to all counsel on the service list below.

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