ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO.

3rd DCA Case No.: 99-00679

Florida Bar No. 184170

ITT HARTFORD INSURANCE COMPANY OF THE SOUTHEAST,

Petitioner,

vs.

STILES JERRY OWENS and JEAN A. OWENS, his wife,

Respondents.

FILED
THOMAS D. HALL
JUL 24 2000
CLERK, SUPREME COURT
BY

ON PETITION FOR DISCRETIONARY REVIEW FROM THE THIRD DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON JURISDICTION
ITT HARTFORD INSURANCE COMPANY OF THE SOUTHEAST

(With Appendix)

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POINT ON APPEAL

THE DECISION IN THE PRESENT CASE, FINDING THE TRIAL JUDGE GRANTED AN ADDITUR BUT NOT ALLOWING AN OPTION OF A NEW TRIAL, CONFLICTS WITH ALL FLORIDA LAW ON POINT, AND PARTICULARLY WITH JARVIS V. TENENT HEALTH SYSTEMS HOSPITAL, INC., INFRA; FOOD LION V. JACKSON, INFRA; AND CITY OF JACKSONVILLE V. BAKER, INFRA.

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CERTIFICATION OF TYPE

It is hereby certified that the size and type used in this Brief is 12 point Courier, a font that is not proportionately spaced.

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STATEMENT OF THE FACTS AND CASE

The decision in this present case of granting an additur of $819,000 without giving the Defendant the alternative of a new trial on damages, is contrary to all Florida law on point.

What happened was that there was disputed medical and economic testimony as to the amount of the Plaintiff's future medical and, other economic damages, the number of years over which the Plaintiff would live and the present value of those economic damages. As in any case, the doctors and economists for both sides gave numerous alternative ways and numbers to calculate these damages, and eventually the jury entered a Verdict finding total future damages to be $1.8 million, the number of years he would live to be 25 years, and the present value to be $72,000 as follows:

> 2. What is the amount of any future damages for medical expenses to be sustained by Stiles Jerry Owens in future years?
>
> a. Total damages over future years? $1,800,000.00
>
> b. The number of years over which those future damages are intended to provide compensation? 25 years
>
> c. What is the present value of those future damages? $72,000.00
>
> (Hartford v. Owens Page 2).

It should be noted that $72,000 per year times 25 years yields $1.8 million dollars.

After trial, the Plaintiff moved for an additur contending that $1.8 million was the amount the jury had intended to be the correct one, and that the jury miscalculated the $72,000, whereas

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the Defendant contended that the $72,000 was the amount the jury intended, and that the jury miscalculated the $1.8 million. The Defendant further contended there was evidence to support the $72,000, but no evidence to support the $1.8 million.

In any event, after hearings on Post-trial Motions, the judge surmised that the jury intended to award the $1.8 million and not the $72,000, and then picked certain portions of the expert testimony to discern it should grant an additur of $819,214, and granted an additur for that amount, but refused to give the Defendant the option of a new trial.

On appeal, the court affirmed by two to one vote with the dissent saying that under Florida law a trial judge clearly has to give the option of a new trial if an additur is granted.

Motion for Rehearing and Motion for Rehearing En Banc were filed and the Motion for Rehearing En Banc was denied by a six to five vote. Therefore, this discretionary review was filed to the Honorable Florida Supreme Court.

SUMMARY OF ARGUMENT

The decision in the present case conflicts with all Florida law and the relevant Florida statutes which hold that when an additur is granted, that the Defendant must be given the alternative of a new trial on damages.

In the present case, the trial judge granted an additur of $819,214 without the alternative of a new trial on damages, and this is clearly in conflict with Florida law.

As the Opinion of the Third District concedes, both parties presented expert testimony that had contrasting and opposing

figures of future medical damages and also conflicting economic calculations and it is clearly contrary to Florida law for the trial judge to surmise what the jury had intended to do, and take bits and pieces of various economic testimony to come up with the court's own number, and not give an alternative of a new trial. If the court had taken different bits and pieces of economic testimony, it would have come up with a completely different number, and if it had found the $72,000 was the number the jury had intended and that it had miscalculated the $1.8 million dollars, that would have been a totally different number. This was clearly an additur, as the decision expressly held, and it is in conflict with all Florida law not to allow the alternative of a new trial.

ARGUMENT

THE DECISION IN THE PRESENT CASE, FINDING THE TRIAL JUDGE GRANTED AN ADDITUR BUT NOT ALLOWING AN OPTION OF A NEW TRIAL, CONFLICTS WITH ALL FLORIDA LAW ON POINT, AND PARTICULARLY WITH JARVIS V. TENENT HEALTH SYSTEMS HOSPITAL, INC., INFRA; FOOD LION V. JACKSON, INFRA; AND CITY OF JACKSONVILLE V. BAKER, INFRA.

The Court of Appeal expressly found that the trial court granted an additur, but nonetheless ruled that the Defendant was not entitled to the option of a new trial. This ruling in granting an additur of $819,214, but not giving the Defendant the option of a new trial, conflicts with all Florida law on point, and specifically conflicts with Jarvis v. Tenent Health Systems Hospital, Inc., 743 So. 2d 1218 (Fla. 4th DCA 1999); Food Lion v. Jackson, 712 So. 2d 800 (Fla. 5th DCA 1998).

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It should be noted that the dissent specifically cites these cases as being in conflict with the majority opinion case.

It should be noted that this was not a situation where the Third District held this was not an additur; the decision is expressly clear that it was an additur, and therefore, holding that the court did not have to give the option of a new trial creates express and direct conflict.

The Opinion is clear that the trial judge granted an additur:

> ITT Hartford Insurance Company of the Southeast appeals an order granting an <u>additur</u> in a personal injury case. Defendant-appellant Hartford contends that it is entitled to reject the <u>additur</u> and be given a new trial. <u>See</u> § 768.043, Fla. Stat. (1997). Because under the unusual circumstances of this case there was no disputed issue for retrial, the defendant's request for a new trial was properly denied and we affirm the <u>additur</u>.
>
> (Page 1-2).
>
> Therefore, the court was correct in determining that appellee was entitled to an <u>additur</u>.
>
> (Page 4)(emphasis added).

Furthermore, both § 768.043, Fla. Stat. (1997) and § 768.74, Fla. Stat. (1997) are clear that when an additur is granted, the alternative of a new trial "shall" be given. Section 768.043(1), Fla. Stat. (1997) provides:

> "...If the party adversely affected by such remittitur or additur does not agree, the court <u>shall</u> order a new trial in the cause on the issue of damages only." (emphasis added).

Section 768.74(4), Fla. Stat (1997) has the identical language:

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> "...If the party adversely affected by such remittitur or additur does not agree, the court _shall_ order a new trial in the cause on the issue of damages only." (emphasis added).

Clearly this decision creates express and direct conflict in Florida law, in allowing trial judges to pick and choose medical and expert testimony and grant an additur, but then not to give the party the alternative of a new trial on damages, in conflict with the express mandatory wording of the statutes, and in conflict with Florida case law.

The first case this is in conflict with is _Jarvis v. Tenent Health Systems Hospital, Inc._, _supra_. What occurred in _Jarvis_ was that after a large verdict, the trial judge granted a new trial on both liability and damages, and this was appealed to the Fourth District. The central issue was whether the new trial must be on damages only, or whether the trial judge could grant a new trial on liability and damages. The decision discussed the fact that the relevant statute, § 768.74(4) mandatorily provides that the party "shall" be given the alternative of a new trial:

> ...The statute further provides that "[i]f the party adversely affected by such remittitur or additur does not agree, the court shall order a new trial in the cause **on the issues of damages only.**"
>
> _Jarvis_, 1219.

The court held that "shall" was mandatory language and the new trial must be on damages only.

Therefore, the decision in the present case, which specifically holds that this is an additur, but that the trial judge can grant an additur without an alternative grant of a new

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trial, is in express and direct conflict with Jarvis, which holds that "shall" is mandatory language and that when an additur is granted, the defendant must have the alternative of a new trial on damages.

The decision, in the present case, is also in conflict with the case of Food Lion v. Jackson, supra, which was also cited by the dissent as being in conflict with the court's decision. The facts in Food Lion were that a customer slipped and fell on a wet floor, and the jury returned a verdict for the plaintiff. On post-trial motions, the trial judge granted an additur of $5,000 and gave the defendant the alternative of a new trial on damages only. On appeal, the issue was whether the § 768.74, Fla. Stat. (1997), which states that after an additur is granted the party must be given the alternative of a new trial on damages only, precludes the court from granting a new trial on both damages and liability where it was a compromise verdict. The opinion in Food Lion holds that a new trial can be on liability and damages, but the dissent in Food Lion urges that the mandatory language requires that the new trial be on damages alone. However, both the majority and dissent make clear that there must be the alternative of a new trial given, and therefore, this is in express and direct conflict with the opinion in the present case.

The facts in City of Jacksonville v. Baker, 456 So. 2d 1274 (Fla. 1st DCA 1984), rev. den., 464 So. 2d 554 (Fla. 1985) were that Baker was injured in an intersectional collision between an automobile, and a motorcycle on which he was riding as a passenger. After trial, the jury returned a verdict for $400,000

and the trial judge granted an additur and gave the defendant the alternative of a new trial on damages. The defendant appealed urging that the new trial should be on both liability and damages. The court discussed the mandatory language of § 768.74, and quoted the language that "the court shall order a new trial in the cause on the issue of damages only," and ruled that the alternative to the additur would be a new trial on damages only.

Once again, this holding that the Florida Statutes and case law require that there be an option of a new trial when an additur is granted, is in express and direct conflict with the present case, which holds that judge can enter an additur without the alternative grant of a new trial.

Further, the decision under review points out that there was conflicting medical testimony and expert testimony from both sides about future medical care and about the present value of future damages:

> At trial there was differing medical testimony regarding the amount of money needed for future medical treatment. Both sides also presented expert economists who testified about calculating the present value of future damages.
>
> (Hartford v. Owens, Page 2).

It certainly is contrary to Florida law for the trial judge to weigh conflicting medical testimony and conflicting expert testimony, and pick and choose different calculations to surmise what the jury truly intended, and change the Verdict by $819,000. Certainly, this is an additur, as the Third District specifically held, and a new trial should be awarded.

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In fact, the jury does not even have to be provided expert testimony in order to reduce damages to present value. Seaboard Coast Line Railroad Company v. Burdi, 427 So. 2d 1048 (Fla. 3d DCA 1983); so it is a conflict of law to hold that it was bound by portions of the medical and economic testimony presented, but not by other portions.

Also, as the court noted in the first paragraph on page three of the Opinion, the defense took the position that the reduction of $1.8 million to $72,000 was within the evidence, and therefore, it was error for the trial judge to disregard part of the evidence in creating her own present value, which was not a number the jury had arrived at, especially without giving the alternative of a new trial.

Further, the jury could have found that, having seen its money shrink due to inflation over the years, that interest rates and inflation would cancel out, and this would be a basis for the present verdict. Further, the jury could have found that $72,000 was the amount it wanted to award, and it miscalculated the total number. There are so many numbers and alternatives it is totally incredulous for a trial judge to try to surmise what the jury intended, and grant an additur without the alternative of a new trial, and discretionary review must be granted.

There was no case law cited by the Third District in its opinion, which allows a court to grant an almost million dollar additur, without giving the Defendant the option of a new trial on damages. The Court only cited cases where a retrial can be limited to a certain item of damages, but none of the cases

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involves the addition of almost a million dollars to the Verdict by the trial court. In Astigarraga v. Green, 712 So. 2d 1183 (Fla. 2d DCA 1998), the party was given the option of a new trial.

This case does not involve a simple addition error, but complex and conflicting medical and economic testimony. As this Court is well aware, the jury can arrive at a present value determination, based on its own common sense, or based on expert testimony. Experts testified at trial regarding present value determinations, discount rates, inflation, etc; which were explained to the jury; as well as investments in the stock market.

Similarly, none of the cases cited by the majority below dealt with an issue where an additur was granted, but a new trial on damages was denied. Astigarraga v. Green, supra; Altilio v Gemperline, 637 So. 2d 299 (Fla. 1st DCA 1994); Dyes v. Spick, 606 So. 2d 700 (Fla. 1st DCA 1992). The very fact that not a single case in Florida exists that holds that an additur can be granted without the defendant being given an option of a new trial on damages, substantiates the fact that the decision in this case involves a question of great public importance; as well as being in direct and express conflict with Florida law.

The additur statute clearly does not permit the Court to say that an additur of almost $1 million can be granted; but say a new trial would be a waste of time, because the jury would reach the same evidentiary finding that the judge reached post-verdict. There is a 99% chance the jury would not reach that result, so

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the province of the jury was invaded.

The decision is also in conflict with the Supreme Court's decision in Pinillos v. Cedars of Lebanon Hospital Corporation, 403 So. 2d 365 (Fla. 1981) where at a post-trial hearing the trial judge took evidence on future damages, on the theory that the jury had improperly reduced the future damages to present money value based on an erroneous instruction given to the jury. The court held it was reversible error for the trial court to make reductions in present value. The Court of Appeal ruled the trial judge should have "granted a new trial on damages." Pinillos, 368.

Furthermore, the decision in this case is also in conflict with the Supreme Court's decision in Poole v. Veterans Auto Sales and Leasing Company, Inc., 668 So. 2d 189 (Fla. 1996). In that case, the Supreme Court held when an additur had been rejected, the only issue for the appellate court was the propriety of the court refusing to grant a new trial on damages, under the remittitur/additur statute. In other words, once the additur is rejected, the only issue is whether the trial court must reinstate the jury's verdict, or grant a new trial on damages only.

CONCLUSION

This case conflicts with Jarvis v. Tenent Health Systems Hospital, Inc., 743 So. 2d 1218 (Fla. 4th DCA 1999); Food Lion v. Jackson, 712 So. 2d 800 (Fla. 5th DCA 1998); and City of Jacksonville v. Baker, 456 So. 2d 1274 (Fla. 1st DCA 1984), rev. den., 464 So. 2d 554 (Fla. 1985).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 21st day of July, 2000 to:

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By: Richard A. Sherman

/dlo

Appendix

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 2000

ITT HARTFORD INSURANCE COMPANY OF THE SOUTHEAST,	**	
	**	
Appellant,	**	
vs.	**	CASE NO. 3D99-0679
STILES JERRY OWENS and JEAN A. OWENS, his wife,	**	LOWER TRIBUNAL NO. 95-20911
Appellees.	**	

Opinion filed April 19, 2000.

An appeal from the Circuit Court for Dade County, Fredricka G. Smith, Judge.

Richard A. Sherman and Rosemary B. Wilder, for appellant.

Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., and Joel Perwin, for appellees.

Before COPE, GERSTEN and SORONDO, JJ.

COPE, J.

ITT Hartford Insurance Company of the Southeast appeals an order granting an additur in a personal injury case. Defendant-appellant Hartford contends that it is entitled to reject the

additur and be given a new trial. See § 768.043, Fla. Stat. (1997). Because under the unusual circumstances of this case there was no disputed issue for retrial, the defendant's request for a new trial was properly denied and we affirm the additur.

Plaintiff Stiles Jerry Owens was seriously injured in an automobile accident, sustaining injuries to his right hand and arm. Plaintiffs brought suit against defendant Hartford, their uninsured motorist carrier.[1]

At trial there was differing medical testimony regarding the amount of money needed for future medical treatment. Both sides also presented expert economists who testified about calculating the present value of future damages.

The jury returned an interrogatory verdict which stated, in part:

> 2. What is the amount of any future damages for medical expenses to be sustained by Stiles Jerry Owens in future years?
>
> a. Total damages over future years? $1,800,000.00
>
> b. The number of years over which those future damages are intended to provide compensation? 25 years
>
> c. What is the present value of those future damages? $72,000.00

[1] Plaintiff Jean A. Owens brought a claim for loss of consortium.

The trial judge called counsel to sidebar and pointed out that there was apparently an error in the present value calculation. Defense counsel took the position that a reduction of $1.8 million to $72,000.00 was within the evidence. Plaintiffs' counsel said that such a calculation was not supportable under any view of the evidence. Plaintiffs requested that the present value calculation be resubmitted to the jury but the trial court declined to do so.

By post-trial motion, plaintiffs asserted that the jury had misunderstood the concept of present value. The defense economist had testified that in reducing an award to present value, the jury should use a 5.5% discount value, and the plaintiffs' expert had said that a 6.3% figure should be used. Under either calculation, the resulting figure would be **much** higher than the $72,000.00 figure contained as item 2c on the jury verdict form. It turns out, however, that $1.8 million (line 2a) divided by a twenty-five-year life expectancy (line 2b) equals $72,000.00 (line 2c).

The trial court ruled that the plaintiffs' point was well taken. The court concluded that the jury intended to award $1.8 million in future damages. The court ruled that the present value calculation performed by the jury was not supported by the evidence, and must be modified by applying a discount value which is supported by the evidence.

The discount figure testified to by defendant's expert was 5.5%. In order to avoid the necessity of another trial, plaintiffs

stated that they would accept the defense figure and abandon the higher figure (6.3%) which had been supported by plaintiffs' expert. The trial court used the defense figure and granted an additur of $819,214. The court ruled that, under the circumstances, defendant did not have the option of a new trial on this issue. Defendant has appealed, and we affirm.

We entirely agree with the trial court's conclusion that the jury intended to award $1.8 million for future medical expenses. The error was in the present value calculation which the jury did not understand. Therefore, the court was correct in determining that appellee was entitled to an additur.

Normally, defendant would have the option of refusing the additur and obtaining a new trial on the issue of damages. See § 768.043, Fla. Stat (1997).[2] But the only issue to be tried here if a new trial were granted would be the reduction of future medical expenses to present money value. Plaintiffs accepted defendant's discount rate for the reduction to present value. That concession by plaintiffs left no issue to be tried.

We respectfully disagree with the analysis of the dissent. The dissent relies on Jarvis v. Tenet Health Sys. Hosp., Inc., 743 So. 2d 1218 (Fla. 4th DCA 1999), and Food Lion V. Jackson, 712 So. 2d 800 (Fla. 5th DCA 1998), but those cases address a different issue than the one now before us. In Jarvis and Food Lion, the

[2] The case was tried during 1998.

question was whether, once an additur was rejected by the defendant, the trial court should have ordered a new trial on damages only, or on damages and liability. See Jarvis, 743 So. 2d at 1219; Food Lion, 712 So. 2d at 803. Both courts concluded that, under the circumstances, a new trial was required on damages but not liability.

The wording of the statute is: "If the party adversely affected by such remittitur or additur does not agree, the court shall order a new trial in the cause on **the issue of damages** only." § 768.043(1), Fla. Stat. (1997) (emphasis added). The question is how to interpret the phrase, "the issue of damages." Id. Reading the statute as a whole, the intent is that where the problem leading to the excessiveness or inadequacy is one which affected damages only, then there should be a new trial on damages, but not liability. Thus, in the case of a general verdict, there would be a new trial on all damages.

The purpose of an itemized verdict, see id. § 768.77, is to facilitate judicial review of the jury's award by the trial judge and the appellate court. Where, as here, there is an interrogatory verdict and the problem of excessiveness or inadequacy affects a single interrogatory verdict only, the term "the issue of damages" logically means the interrogatory affected by the excessiveness or inadequacy. There is no reason to disturb other items in the jury's verdict which are not implicated in the excessiveness or

inadequacy. On this point we follow the Second District's decision in Astigarraga v. Green, 712 So. 2d 1183 (Fla. 2d DCA 1998), which held that where there is an excess verdict on one item of damages, the new trial should be ordered on that item of damages, not all damages. See id. at 1184; see also Altilio v. Gemperline, 637 So. 2d 299, 302 (Fla. 1st DCA 1994) (new trial on future medical expenses and future damages); Dyes v. Spick, 606 So. 2d 700, 703-04 (Fla. 1st DCA 1992) (new trial on past non-economic damages).

In the present case, like Astigarraga, it is clear that the inadequacy affects only one item of damages, future medical expenses, and consequently the remittitur or additur analysis is performed with regard to this one issue of damages only. In the present case there is a facial error in the present value calculation for future medical expenses, but this problem logically has no effect on any of the other itemized damages.

As already stated, the statute calls for a new trial "on the issue of damages only." § 768.043(1), Fla. Stat. (1997). This necessarily contemplates that the "issue" between the parties is a disputed issue which must be resolved by the jury. But in this case the plaintiffs accepted defendant's present value calculation, leaving no issue to be tried.

The Florida Supreme Court has held that review of trial court orders regarding excessive or inadequate verdicts is governed by an abuse of discretion standard. See Brown v. Estate of Stuckey, 749

So. 2d 490, 498 (Fla. 1999). We see no abuse of discretion here.

Affirmed.[3]

SORONDO, J., concurs.

[3] As the present case illustrates, we doubt the wisdom of asking lay juries to unravel the mysteries of present value calculation.

GERSTEN, J. (dissenting)

I respectfully dissent. Though the majority's pragmatic approach has great cache', it violates both statute and caselaw. Section 768.043(1) details a clear and simple procedure in remittitur and additur actions arising out of the operation of motor vehicles stating: "If the party adversely affected by such remittitur or additur does not agree, the court shall order a new trial in the cause on the issue of damages only." §768.043(1), Fla. Stat. (1997)(emphasis added). A fortiori, once the trial court grants the plaintiff's motion for additur, and, as here, the adversely affected party does not agree, the trial court must order a new trial. See §768.043(1), Fla. Stat. (1997); Jarvis v. Tenet Health Systems Hosp., Inc., 743 So. 2d 1218 (Fla. 4th DCA 1999); Food Lion v. Jackson, 712 So. 2d 800 (Fla. 5th DCA 1998); City of Jacksonville v. Baker, 456 So. 2d 1274 (Fla. 1st DCA 1984), review denied, 464 So. 2d 554 (Fla. 1985).

My views in this regard, are summarized and far better expressed in the recent concurring opinion of Judge Hazouri in Jarvis v. Tenet Health Systems Hosp., Inc., 743 So. 2d at 1220 (Hazouri, J., concurring specially). Judge Hazouri noted that the language of Section 768.043(1) is virtually identical to Section 768.74, and that the operative word in both statutes is "shall."

Thus Judge Hazouri concluded that the statutes' mandatory language entitles the adversely affected party to a new trial upon request, once a trial court grants an additur or a remittitur. See Jarvis v. Tenet Health Systems Hosp., Inc., 743 So. 2d at 1221 (Hazouri, J., concurring specially). I agree with Judge Hazouri's definitive analysis. This case should be reversed and remanded with instructions to grant the defendant's motion for a new trial on damages pursuant to the clear additur statute and existing caselaw.

render the evidence relevant. In any event, even if it were deemed marginally probative, the danger of unfair prejudice certainly outweighed any probative value that could be derived from such evidence. *See* § 90.403, Fla. Stat. *Mutcherson v. State*, 696 So.2d 420 (Fla. 2d DCA 1997), is distinguishable as the proof of possession of coins in that case, even if marginally tied to the offense of theft of quarters from vending machines, would not in and of itself be prejudicial. Whereas here, possession of cocaine, if not connected to the crime charged, is evidence that the defendant committed a felony.

[2, 3] As we stated in *Williams v. State*, 692 So.2d 1014 (Fla. 4th DCA 1997), on the subject of improper admission of collateral crime evidence,

> When this kind of irrelevant evidence is admitted . . . there is a presumption that the error was harmful, because of "the danger that the jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged."

Id. at 1015 (quoting *Straight v. State*, 397 So.2d 903, 908 (Fla.1981)). Accordingly, we hold that the admission of Adams' guilty plea to cocaine possession was prejudicial error requiring reversal and a new trial. *See* § 924.051(3), Fla. Stat.

As to all other issues raised on appeal, we find no error or abuse of discretion. *See Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972); *Zile v. State*, 710 So.2d 729 (Fla. 4th DCA 1998), *rev. granted*, 729 So.2d 396 (Fla.), *rev. dismissed*, No. 93,289, —— So.2d ——, 1999 WL 977081 (Fla. Oct. 28, 1999).

WARNER, C.J. and COX, CYNTHIA, Associate Judge, concur.

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Raymond JARVIS and Theresa Mary Jarvis, Appellants/Cross-Appellees,

v.

TENET HEALTH SYSTEMS HOSPITAL, INC., d/b/a Delray Community Hospital, Appellee/Cross-Appellant.

No. 98-2312.

District Court of Appeal of Florida, Fourth District.

Nov. 17, 1999.

In medical malpractice action, the Circuit Court, Palm Beach County, Jack H. Cook, J., granted new trial. Plaintiffs and defendants appealed. The District Court of Appeal, Shahood, J., held that trial court should not have granted a new trial on both liability and damages once additur was rejected.

Affirmed in part, reversed in part, and remanded.

Hazouri, J., filed a specially concurring opinion.

1. New Trial ⚷**9**

Trial court should not have granted a new trial on both liability and damages once additur was rejected, as there was no finding that verdict was the result of a compromise. West's F.S.A. § 768.74(4).

2. Trial ⚷**18**

Trial court has broad discretionary authority in determining whether jury was unduly influenced by passion or prejudice.

Julie H. Littky-Rubin of Lytal, Reiter, Clark, Fountain & Williams, LLP, West Palm Beach, for appellants/cross-appellees.

James C. Sawran of McIntosh, Sawran, Peltz & Cartaya, P.A., Fort Lauderdale, for appellee/cross-appellant.

SHAHOOD, J.

Following a three-week trial in this medical malpractice action, the jury found in favor of the plaintiffs/appellants, Raymond Jarvis and Theresa Mary Jarvis. Based on a determination that the defendant/appellee, Tenet Health Systems Hospital, Inc., d/b/a/ Delray Community Hospital ("Delray") was 1% negligent and the *Fabre* [1] defendant, Bethesda Ambulance Service ("Bethesda") was 99% negligent, the jury awarded past medical expenses in the amount of $10,446.65, future medical expenses in the amount of $474,114, and damages for past and future pain and suffering in the amount of $10,000,000.00. The trial court granted an additur of $1,011,868.31 as to the past medical expenses and a remittitur of $5,000,000 as to the loss of consortium damages, and ruled that the failure to accept the additur or remittitur by either party would result in a new trial on both liability and damages.

[1] The central issue on appeal is whether the trial court erred in granting a new trial on both liability and damages once the additur was rejected. We conclude that the court did err in this regard, and reverse and remand for a new trial on damages only.

Section 768.74(4), Florida Statutes addresses the procedure to be followed for remittitur and additur, and states that "[i]f the court finds that the amount awarded is excessive or inadequate, it shall order an additur or remittitur, as the case may be." § 768.74(2), Fla. Stat. (1997). The statute further provides that "[i]f the party adversely affected by such remittitur or additur does not agree, the court shall order a new trial in the cause **on the issue of damages only.**" § 768.74(4), Fla. Stat. (1997) (emphasis added). In *Broward County School Board v. Dombrosky,* 579 So.2d 748 (Fla. 4th DCA 1991), this court carved a limited exception in these cases holding that where the issue of liability is hotly contested *and* there is some suggestion that the jury may have compromised on the verdict, a new trial on both damages and liability is appropriate.

In this case, the trial court denied appellants' motion to limit the new trial to only damages indicating that it was bound to follow the *Dombrosky* exception since liability was hotly contested. While there is no dispute that liability was hotly contested, there was no concurrent finding that the verdict was the result of a compromise, as *Dombrosky* requires. In fact, in denying Delray's motion for new trial, the trial court had previously found just the opposite, stating that this was a "well-thought-out verdict." Thus, absent a finding that the jury compromised on the verdict, the trial court was not bound to follow *Dombrosky.* In fact, in light of the court's earlier decision to deny Delray's motion for new trial, the subsequent grant of a new trial on both liability and damages following rejection of the additur was inconsistent. Instead, the trial court should have granted a new trial on damages only in accordance with the statute.

[2] Delray argues that the verdict was, indeed, a compromise because the award for past medical expenses appears to be approximately one percent of the damages proven, and is consistent with the jury's assessment of liability. We have not overlooked the fact that there was some confusion at trial concerning the jury instructions, but note that the trial court addressed this issue and concluded that the jury was not unduly influenced by passion or prejudice. The trial court has broad discretionary authority in this area; we find that there has been no abuse of discretion. *See generally Brown v. Estate of Stuckey,* 24 Fla. L. Weekly S397, — So.2d —, 1999 WL 669205 (Fla. Aug. 26, 1999) (in reviewing a trial judge's ruling on whether a verdict is inadequate, exces-

1. *Fabre v. Marin,* 623 So.2d 1182 (Fla.1993), *receded from by Wells v. Tallahassee Mem'l Reg'l Med. Ctr.,* 659 So.2d 249 (Fla.1995).

sive, or contrary to the manifest weight of the evidence, an appellate court must employ the reasonableness test to determine whether the trial judge abused his or her discretion).

Accordingly, we reverse the order granting a new trial on both liability and damages and remand for a new trial on damages only. We affirm as to all other issues raised.

FARMER, J., concurs.

HAZOURI, J., concurs specially with opinion.

HAZOURI, J., concurring specially

I concur in the result but write to express my disagreement with our court's decision in *Broward County School Board v. Dombrosky*, 579 So.2d 748 (Fla. 4th DCA 1991), for its failure to follow the mandatory requirement of section 768.74(2), Florida Statutes (1997). As the majority points out, the pertinent part of section 768.74(2) provides: "If the party adversely affected by such remittitur or additur does not agree, the court shall order a new trial in the cause **on the issue of damages only**." § 768.74(2), Fla. Stat. (1997) (emphasis added). The operative word here is **shall**, giving the trial court no discretion, when ordering a remittitur or additur, to grant a new trial on liability **and** damages. The court in *Dombrosky*, in determining that there should be a new trial on damages and liability, relied on *Watson v. Builders Square, Inc.*, 563 So.2d 721 (Fla. 4th DCA 1990), for the proposition that: "when a damage award is clearly inadequate and the issue of liability is hotly contested, such circumstances give rise to a suggestion that the jury may have compromised its verdict." However, in *Watson* there was no issue of an additur, and thus no need for the application of section 768.74.

Prior to the enactment of section 768.74, the legislature enacted section 768.043(1), Florida Statutes (1977),[2] It applies to actions for personal injury or wrongful death arising out of the operation of a motor vehicle, but is otherwise virtually identical to section 768.74. The First District Court of Appeal addressed the application of section 768.043 in *City of Jacksonville v. Baker*, 456 So.2d 1274 (Fla. 1st DCA 1984). In *Baker*, the jury returned a verdict for the plaintiff, Baker, in the amount of $400,000.00. The plaintiff moved for an additur or, alternatively, a new trial on damages and the motion for an additur was granted. The defendant, City of Jacksonville, rejected the additur which resulted in an order granting a new trial on the issues of **damages only**, and the City of Jacksonville appealed. One of the points raised on appeal was that the trial court erred in granting a new trial as to damages only and rejecting the City of Jacksonville's assertion that there should be a trial on liability and damages. According to the *Baker* court:

> There are many cases in which the interest of justice requires that an order granting a new trial because of inadequate damages provide for retrial of the issue of liability as well as the issue of damages. *See Gross v. Lee*, 453 So.2d 495 (Fla. 1st DCA 1984); *1661 Corp. v. Snyder*, 267 So.2d 362 (Fla. 1st DCA 1972); *Duquette v. Hindman*, 152 So.2d 789 (Fla. 1st DCA 1963). However, in this case this question is controlled by

2. In any action for the recovery of damages based on personal injury or wrongful death arising out of the operation of a motor vehicle, whether in tort or in contract, wherein the trier of fact determines that liability exists on the part of the defendant and a verdict is rendered which awards money damages to the plaintiff, it shall be the responsibility of the court, upon proper motion, to review the amount of such award to determine if such amount is clearly excessive or inadequate in light of the facts and circumstances which were presented to the trier of fact. If the court finds that the amount awarded is clearly excessive or inadequate, it shall order a remittitur or additur, as the case may be. If the party adversely affected by such remittitur or additur does not agree, the court shall order a new trial in the cause on the issue of damages only.

§ 768.043, Fla. Stat. The language in the statute is mandatory and requires "[i]f the party adversely affected by such remittitur or additur does not agree, the court *shall* order a new trial in the cause on the issue of damages *only*."

Id. at 1276.

Therefore, just as the first district held that 768.043 is mandatory, I would hold that 768.74 is mandatory and if a trial court grants an additur or a remittitur and the adversely affected party rejects the additur or remittitur, that party is entitled to a new trial on damages only.

Michael CONSIGLIO, Appellant,

v.

STATE of Florida, Appellee.

No. 98–3528.

District Court of Appeal of Florida, Fourth District.

Nov. 17, 1999.

Defendant was convicted in the Circuit Court, Broward County, Royce Agner, J., of carjacking and robbery, and he appealed. The District Court of Appeal, Warner, C.J., held that conviction for both carjacking and robbery did not violate principles of double jeopardy.

Affirmed.

1. Double Jeopardy ⚷145

Conviction for both carjacking and robbery did not violate principles of double jeopardy, as there were two separate acts and separate property involved; robbery involved an intent and act to steal money from victim, and carjacking involved an intent and act to steal victim's car.

2. Criminal Law ⚷29(1)

In determining whether single or multiple offenses occurred, what is dispositive is whether there have been successive and distinct forceful takings with a separate and independent intent for each transaction.

Richard L. Jorandby, Public Defender, and Paul E. Petillo, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and James J. Carney, Assistant Attorney General, West Palm Beach, for appellee.

WARNER, C.J.

[1] We affirm appellant's convictions for carjacking and robbery against his claim that conviction of both violates double jeopardy, as we conclude that the evidence supports two separate acts and separate property. While beating the victim, appellant first demanded the keys to the victim's car after his accomplice jumped in the vehicle and noticed the keys were not inside. The victim reached into her pocket and gave appellant the keys. During the beating, appellant demanded that the victim give him money. She complied. At that point the robbery was complete. Subsequently, the appellant drove off in the victim's car, completing the offense of carjacking.

[2] As the supreme court stated in *Brown v. State,* 430 So.2d 446, 447 (Fla. 1983), "[w]hat is dispositive is whether there have been successive and distinct forceful takings with a separate and independent intent for each transaction." While the temporal separation was very minimal in this case, there were two separate acts: (1) an intent and act to steal money from the victim; and (2) an intent and act to steal the victim's car. *See, e.g., Simboli v. State,* 728 So.2d 792, 793 (Fla.

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The trial court concluded the administrative penalty was a sufficient sanction to constitute "criminal" punishment and that it invoked the double jeopardy clause under the guidelines announced in *United States v. Halper,* 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989). The trial court declined to follow *Borrego v. Agency for Health Care Administration,* 675 So.2d 666 (Fla. 1st DCA 1996), perhaps because the issue in that case was whether an earlier criminal proceeding prevented a subsequent revocation of a physician's license.

[2] Recently, the United States Supreme Court revisited double jeopardy in *Hudson v. United States,* —— U.S. at ——, 118 S.Ct. at 488. The Court disavowed its methodology in *Halper* and reaffirmed the analysis contained in *United States v. Ward,* 448 U.S. 242, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980). *Ward* held that inquiry into whether a statutory penalty is civil or criminal proceeds on two levels. *Id.* at 248, 100 S.Ct. 2636. First, a court determines whether the legislature, in establishing the penalizing mechanism, indicated expressly or impliedly a preference for one label or another. *Id.* at 248, 100 S.Ct. 2636. Second, where the legislature has indicated an intention to establish a civil penalty, the court inquires into whether the statutory scheme on its face is so punitive in either purpose or effect as to negate that intention. *Id.* at 248–49, 100 S.Ct. 2636.

Under the first prong of *Ward,* we conclude, for several reasons, that the legislature intended to impose civil penalties in section 489.129(1)(k). First, although this statute contains no language explicitly categorizing the sanctions as "civil," it states the board can impose an "administrative" fine not to exceed $5,000. Second, the authority to revoke a registration or impose a fine is conferred upon the Construction Industry Licensing Board, an administrative agency. *See Hudson,* —— U.S. at ——, 118 S.Ct. at 495. Third, section 489.129 creates a "disciplinary proceeding" rather than a criminal proceeding. Finally, chapter 489 does contain statutory provisions establishing criminal penalties for some conduct, but not for the conduct charged in the administrative complaint. *See* § 489.127, Fla. Stat. (1993). Thus, the legislature has clearly implied a preference to label the penalties in section 489.129 as civil.

Under the second prong of *Ward,* the statutory penalties—revocation of Mr. Bowling's state registration and payment of a maximum fine of $5,000—are not so punitive that they overcome the legislative intent and render section 489.129 criminal. *See Ward,* 448 U.S. at 248–49, 100 S.Ct. 2636. It has long been recognized that the revocation of such a license is typically free of punitive criminal intent. *See Hudson,* —— U.S. at ——–——, 118 S.Ct. at 495–96. The purpose of such a revocation is to protect the public from risk of future harm by the license holder. Similarly, the $5,000 fine does not render section 489.129 criminal. The payment of money is a sanction that has been enforceable by civil proceedings since the original revenue law of 1789. *Id.*, 118 S.Ct. at 496. Thus, under the *Ward* test, Mr. Bowling's prior penalties were civil.

Reversed and remanded.

FULMER and CASANUEVA, JJ., concur.

FOOD LION, Appellant,

v.

Shirley JACKSON, Appellee.

No. 97–1572.

District Court of Appeal of Florida, Fifth District.

June 26, 1998.

Injured customer brought negligence action against store after she slipped and fell

We assume two orders were entered by the Sarasota County Board, and that the wrong order was filed in the record.

on wet floor. Following jury verdict for plaintiff, the Circuit Court, Brevard County, Frank R. Pound, Jr., J., ordered new trial on issue of damages if store did not agree with additur in additional amount of $5,000. Store appealed. The District Court of Appeal, Peterson, J., held that new trial was warranted on issues of both liability and damages in light of indications that jury compromised verdict.

Reversed and remanded.

Thompson, J., dissented and filed opinion.

1. Trial ⚩366

In personal injury action, plaintiff's failure to request an itemized verdict did not require reinstatement of the jury's verdict, which had been modified by trial court's grant of plaintiff's motion for additur, in view of the opportunities given to all of the parties to complain about the noncompliance with the verdict form requirements. West's F.S.A. § 768.77.

2. New Trial ⚩74

In personal injury action, new trial on issues of both liability and damages was warranted by strong indications that jury compromised on issue of liability by awarding plaintiff her medical expenses without considering noneconomic damages. West's F.S.A. § 768.74.

Kendall B. Rigdon of Boehm, Brown, Rigdon, Seacrest & Fischer, P.A., Cocoa, for Appellant.

Jack Perlmutter, P.A., Melbourne, for Appellee.

PETERSON, Judge.

Food Lion appeals an order granting Shirley Jackson's motion for additur or in the alternative, a new trial for damages only. We reverse and remand.

Food Lion attempted to restrict its customers from entering an area in the produce department of its grocery store, where the floor was noticeably wet, by barricading the area. The barricade consisted of a cone with "Wet Floor" and "Caution" printed on it, and a bucket with a mop in it. Ignoring the barricade, Jackson reached behind or walked around it to gain access to some produce and fell to the floor. Asked whether she was hurt immediately after the fall, Jackson said that she felt fine, but was embarrassed. The manager of Food Lion testified that he did not notice any impairment of Jackson's movements after she stood up.

Later, after leaving the store Jackson said that she began feeling discomfort in her neck, back and right leg. She also complained of headaches. She obtained treatment from a chiropractor 27 times but last visited him almost a year prior to the date of trial. The chiropractor predicted Jackson would continue to experience pain in the future as a result of her fall.

The verdict form submitted to the jury provided:

> We, the jury, return the following verdict:
>
> 1. Was there negligence on the part of the Defendant, FOOD LION, which was a legal cause of damage to Plaintiff, SHIRLEY JACKSON.
>
> YES X NO____
>
> If your answer to Questions [sic] 1 is no, your verdict is for the Defendant and you should not proceed further except to date and sign this Verdict and return it to the Courtroom. If your answer to Question 1 is YES, please continue.
>
> 2. Was there negligence on the part of the Plaintiff, SHIRLEY JACKSON, which was a legal cause of her damage?
>
> YES X NO____
>
> If your answer to question 2 is YES, please answer question 3. If your answer to question 2 is NO skip question 3 and answer question 4.
>
> 3. State the percentage of any negligence, which was a legal cause of damage to Plaintiff, SHIRLEY JACKSON, that you charge to:
>
> FOOD LION 90 %
>
> SHIRLEY JACKSON 10 %

TOTAL MUST BE 100%

Please answer question 4.

4. What is the total amount (100%) of any damages sustained by Plaintiff, SHIRLEY JACKSON, and caused by the incident in question?

Total damages of Plaintiff, SHIRLEY JACKSON

$ 2061.80

In determining the total amount of damages, do not make any reduction because of the negligence, if any, of the Plaintiff. If you have the Plaintiff negligent in any degree, the Court in entering Judement [sic] will reduce Plaintiff's total amount of damages (100%) by the percentage of negligence which you found is chargeable to the Plaintiff.

Please answer Question 5.

5. What is the present value of any damages sustained by Plaintiff, SHIRLEY JACKSON, and caused by the incident in question?

$ 2061.80

In using the above verdict form, the parties and trial court ignored the itemization requirements of section 768.77, Florida Statutes (1995); only one line was provided for a composite of all damages rather than setting forth separate amounts for past economic and non-economic losses, and future economic and non-economic losses. The jury found the damages to be $2,061.80, the exact amount placed in evidence as Jackson's past medical damages. During their deliberations, the jury asked two questions which could only be interpreted as evidence of the intent to award Jackson only her past medical expenses without damages for pain and suffering.[1] The questions were:

1) How can we give Shirley Jackson medical expenses only of $2,061.80? What should we put in number four and number five in order to do this?

2) If we award $2,061.80 to the plaintiff in both four and five, can we not answer number three? Or how do we answer number three in order for her to get that exact amount?

Both parties agreed with the court to answer the questions as follows:

1) You [the jury] may insert the medical expenses figure contained in your note in numbers four and five.

2) If you award $2,061.80 to the Plaintiff on numbers four and five, you may answer number three, "Food Lion—100%" for her to get that exact amount.

Post-trial, Jackson filed a motion for additur which the trial court granted in the amount of $5,000. The trial court, in the same order granting additur, ordered a new trial on the issue of damages if Food Lion did not agree with the additur. Food Lion appeals from this order and asks that the jury verdict be reinstated or in the alternative, that we remand for a new trial on the issue of both liability and damages.

[1] Food Lion first contends that Jackson's failure to request an itemized verdict requires reinstatement of the jury's verdict. We reject that argument in view of the opportunities given to all of the parties to complain about the noncompliance with the verdict form required by section 768.77.

[2] The instant case is very similar to *Broward County School Board v. Dombrosky*, 579 So.2d 748 (Fla. 4th DCA 1991), in which the fourth district remanded for a new trial on damages and liability while recognizing the provisions of section 768.74, Florida Statutes (1987), require that the adverse party be given the choice of accepting the amount of the additur or a new trial on damages only. The *Dombrosky* court concluded that a new trial on both liability and damages was warranted because there was some suggestion from the hotly contested evidence of liability that the jury may have compromised on the verdict in light of the small amount of damages awarded to the plaintiff. *See also, Bucci v. Auto Builders South Florida, Inc.*, 690 So.2d 1387 (Fla. 4th

1. Food Lion did not raise the issue of Jackson's failure to object to the apparent inadequacy of the verdict before the jury was discharged so as to give the jury the opportunity to correct any error. *See Bucci v. Auto Builders South Florida, Inc.*, 690 So.2d 1387 (Fla. 4th DCA 1997) and *Allstate Insurance Co. v. Manasse*, 681 So.2d 779 (Fla. 4th DCA 1996), *decision quashed on other grounds*, 707 So.2d 1110 (Fla.1998).

DCA 1997) (jury's award for past medical expenses only, viewed together with note that jury sent to court during deliberations, in which jury indicated that it wanted to award damages only for present medical damages to date, and in which jury asked how to assign percentages of negligence to arrive at final medical expense amount, strongly indicated that jury compromised verdict; thus, case was remanded for new trial on both liability and damages).

In the instant case, the questions from the jury and the verdict convey a strong indication of compromise on the issue of liability when it awarded Jackson her medical expenses without considering non-economic damages. We, accordingly, choose to follow *Dombrosky* in remanding for a new trial on both liability and damages. We also recognize that section 768.74 instructs that the adverse party be given the choice of accepting the amount of additur or a new trial on damages only, but we do not believe that the legislature intended to preclude a court from ordering a new trial on both damages and liability where the jury compromised the verdict.

The order requiring Food Lion to choose between additur or a new trial on damages only is reversed and we remand for a new trial on both issues of liability and damages.

REVERSED and REMANDED.

GOSHORN, J., concurs.

THOMPSON, J., dissents, with opinion.

THOMPSON, Judge, dissenting.

I respectfully dissent. I would relinquish jurisdiction to the trial court for compliance with section 768.74, Florida Statutes. Plaintiff Shirley Jackson should be given the opportunity to accept the additur, and, if Food Lion, the party adversely affected, does not agree to the additur, the trial court should order a new trial on damages alone, as required by the statute. § 768.74(4), Fla. Stat. That order would be an appealable order and would allow this court to apply "long-standing principles applicable to the granting of new trials on damages." *Poole v. Veterans Auto Sales and Leasing Co., Inc.*, 668 So.2d 189, 191 (Fla.1996) (*Poole I*); Fla. R. Civ. P. 1.530(f). Food Lion should not be given an opportunity for a second bite at the liability apple because it neither complied with the statute nor filed a motion for a new trial pursuant to rule 1.530(a), Florida Rules of Civil Procedure.

First, I think this case's appearance in this court is premature. After the verdict was returned by the jury, Jackson moved for additur or in the alternative a new trial on damages. The trial court granted the motion after a contested hearing, but neither entered an order granting a new trial on damages nor a final judgment for $7,061.80, representing the jury verdict plus the additur. The trial court's order stated: "[Jackson] is awarded an additional sum of $5,000. If [Food Lion] does not agree to the additur, then [Jackson's] Motion for New Trial on Damages is GRANTED." Food Lion did not accept or reject the additur, but simply appealed the order. I question the jurisdictional basis for this appeal. Although Rule 9.110(a)(4), Florida Rules of Appellate Procedure, authorizes review of an order granting a new trial, it does not authorize review of an order that conditionally grants a new trial.

In *Veterans Auto Sales and Leasing Co., Inc. v. Poole*, 649 So.2d 264 (Fla. 5th DCA 1995) (*Poole II*), the defendant rejected the additur and the trial court ordered a new trial. On appeal, this court considered whether the trial court exceeded its authority by granting the additur, and this court affirmed the additur in part and reversed it in part. *Id.* at 267. In *Poole I*, the supreme court discussed the impact of a defendant refusing an additur and then appealing the order granting a new trial. The supreme court wrote:

> At the outset, it appears that the district court of appeal overlooked the significance of the fact that Veterans refused the additur. Therefore, the only issue before the court below [the district court] was the propriety of the order granting a new trial. We know of no authority which would allow an appellate court to even address the propriety of an additur, much less approve

one part of it but disapprove another, when the additur had been refused.

Poole I, 668 So.2d at 191.

If an appellate court can only consider the motion for new trial and not the additur when it has been rejected, how then can an appellate court consider both? By entertaining this appeal and granting a new trial on liability and damages, we reward Food Lion's non-compliance and essentially gut the remedies of the remittitur and additur statute. The purpose of the remittitur and additur statute is to see "that awards of damages be subject to close scrutiny by the courts and that all such awards be adequate and not excessive." *See* § 768.74, Fla. Stat. (1997). We have no authority to deprive the trial court of the opportunity to scrutinize the verdict and order a new trial if appropriate. More significant, we should not allow the adversely affected party to appeal more than it could have if the additur had been declined.

Second, assuming this court has jurisdiction to review this nonfinal order, I do not agree that liability should be retried because Food Lion, although it makes that contention here, did not preserve the issue for appeal by raising it below. The jury verdict was returned and filed in open court on 18 February 1997. Rule 1.530(a), Florida Rules of Civil Procedure, allows any party to file a motion for new trial on "all or a part of the issues" heard by a jury. Rule 1.530(b) requires that the motion for new trial be served within 10 days of the return of the jury verdict. Food Lion neither filed nor served a motion for new trial. Furthermore, since Jackson did not file her motion for additur until 27 February 1997, Food Lion could have followed her motion with its own. If Food Lion had filed a motion for new trial, the trial court could have ruled on the issue and Food Lion would have preserved the issue for appeal.

If the trial court had granted the motion for new trial on both issues of liability and damages, it would have been required to specify the grounds for granting the motion thus providing a basis for appellate review if Jackson chose to appeal the ruling. *See* Rule 1.530(f); *Hawk v. Seaboard System R.R., Inc.,* 547 So.2d 669 (Fla. 2d DCA 1989); *Wackenhut Corp. v. Canty,* 359 So.2d 430 (Fla.1978). Once the court granted the motion for additur, or in the alternative a new trial on damages only, Food Lion should have rejected the additur, allowed the trial court to enter an order and then appealed the order for new trial on damages only. Because Food Lion did not preserve the issue of liability by presenting it to the trial court, it should not be allowed to raise the issue on appeal. *See Dober v. Worrell,* 401 So.2d 1322 (Fla.1981).

Third, Food Lion argues that a new trial on liability and damages is appropriate because the case was "hotly contested" and that therefore the jury verdict finding it 90% negligent was a compromise verdict. It cites *Broward County School Bd. v. Dombrosky,* 579 So.2d 748 (Fla. 4th DCA 1991) to support its argument. *Dombrosky* can be distinguished. In *Dombrosky,* the jury returned a verdict in a personal injury case for less than the amount of his unrefuted medical expenses. The plaintiff filed a motion for new trial on damages only, or, in the alternative, for additur. The trial court granted the motion for additur, and awarded the plaintiff an additional $7,000. The defendant appealed the additur and the plaintiff cross-appealed the denial of his motion for new trial on damages only. The parties in *Dombrosky* complied with the additur statute and the appellate court was concerned that the verdict was not supported by the facts. The record in this case does not support the argument that the case remained hotly contested after jury deliberations began. In fact, Food Lion stipulated that it was 100% negligent which contradicts its appellate argument that the case was hotly contested.

This is a straightforward slip and fall case. After all of the testimony was presented, the lawyers for the litigants stipulated during jury deliberation that in order for the jury to return a verdict of $2,061.80, the jury should write that Food Lion was "100%" negligent. In order to answer a jury question, the trial court asked both attorneys for their responses to a jury question:

THE COURT: 'Got another question, gentlemen: "If we award $2061.80 to the

Plaintiff in both four and five, can we not answer number three? Or, how do we answer number three in order for her to get that exact amount?" Let me see your form again, please.

DEFENDANT: Number three is dividing—where they put the percentage of comparative negligence for each.

THE COURT: Anybody have a suggestion?

PLAINTIFF: Well, we'd be telling them what to do on negligence. They would have to put 100%.

DEFENDANT: Should we read the comparative negligence instruction to them?

PLAINTIFF: That's probably proper.

THE COURT: Well—

DEFENDANT: We can tell them to stop asking questions.

THE COURT: What does the Plaintiff propose?

PLAINTIFF: Well, the easiest thing to do is tell them 100%. We know what we're going to get. But I don't know if that's the proper thing to do.

THE COURT: Well, if you agree to it, that would be the simple solution. I think it's clear from the jury's notes their desire and what their verdict really is. If you agree to that, we could do it that way.

PLAINTIFF: That's up to Mr. Alexander with 100%.

DEFENDANT: I will agree to that, if—

THE COURT: If?

DEFENDANT: If they're going to put $2,061.80 in four and five, then I will agree to have them put 100% for Food Lion in number three under comparative negligence, mostly to avoid the possibility of a math error if we send them back to try to figure out what to do; however, I'm afraid of a math error coming back if something is different.

PLAINTIFF: I think probably you ought to—properly probably ought to read the comparative negligence instruction again.

THE COURT: Alright. The question again is, "If we award $2061.80 to the Plaintiff in both four and five, can we not answer number three? Or, how do we answer number three in order for her to get that exact amount?"

If you award $2061.80 to the Plaintiff on numbers four and five, you may answer number three, "Food Lion—100%" for her to get that exact amount.

PLAINTIFF: That's fine.

DEFENDANT: Could I hear it one more time?

THE COURT: If you award $2061.80 to the Plaintiff on numbers four and five, you may answer number three, "Food Lion—100%" for her to get that exact amount.

DEFENDANT: Yes, sir.

THE COURT: And please return that to the jury. And here's your verdict form again, Mr. Alexander.

It appears that Food Lion admitted that it was 100% negligent up to $2,061.80, yet feels it is not a contradiction to argue on appeal that it was not at all negligent and that the verdict was a result of compromise. It was known to all the parties that the jury wanted to return a verdict for a specific dollar amount. In order to reach that dollar amount, Food Lion stipulated to being negligent. It is disingenuous for Food Lion to argue that it is entitled to a jury trial on liability and damages when it has stipulated to being 100% negligent. This case may have started as hotly contested, but it certainly was not after the stipulation.

We should relinquish jurisdiction to the trial court to enter an appealable order—either a final judgment or an order granting a new trial on damages alone. Although this will require additional time, the matter could have been resolved sooner if the lawyers had provided the trial court with a correct verdict form, objected to the verdict at the time it was returned or waited until an order for a new trial on damages alone had been rendered, or stipulated to an additur. If returned for a jury trial, certainly it will take

as long as returning the case for the rendition of an appealable order.

Abdala ALHUSSAIN, Appellant,

v.

Matthew SYLVIA, Michael Sylvia, William J. Sylvia, Silco Investments, L.C., d/b/a Sunrise Watersports Rentals, Gerald E. Holmes, AMC Marine Construction of Florida, Seven Seven International, Inc., d/b/a USA Groceries, Inc., Ekus & Chess, Inc., d/b/a/ Mombasa Bay Lounge, Boston Whaler, Inc. and Teleflex, Inc., Appellees.

No. 97-1918.

District Court of Appeal of Florida, Fourth District.

July 1, 1998.

Plaintiff who was injured in boating accident sued homeowner, alleging that homeowner was responsible for placement of dolphin piling which caused accident. The Circuit Court, Broward County, W. Herbert Moriarty, J., denied homeowner's motion to quash. Homeowner appealed. The District Court of Appeal held that complaint alleging only that homeowner was a Florida resident at time of accident was insufficient to allow substituted service by Secretary of State.

Reversed and remanded.

1. Process ⇐73, 158

To support substituted service of process on a defendant, the complaint must allege the jurisdictional requirements prescribed by statute, and if it fails to do so, then a motion to quash process should be granted.

2. Process ⇐80

Plaintiff's complaint, which alleged that defendant was a Florida resident and homeowner at time of boating accident but failed to allege that defendant had become a nonresident or was concealing his whereabouts, was insufficient to allow substituted service by Secretary of State, as plaintiff failed to plead required statutory prerequisites or allege ultimate facts that invoked substitute service statute. West's F.S.A. § 48.181(1).

Eric G. Belsky and Steven J. Leiter of Hinshaw & Culbertson, Fort Lauderdale, for appellant.

No appearance for appellees.

PER CURIAM.

Appellant, Abdala Alhussain, appeals an order that in effect denied his motion to quash service of process as it ordered him to file an answer to the complaint. We reverse because the substituted service was ineffective since the complaint failed to allege any basis for such service.

Appellee, Matthew Sylvia, sued Alhussain in connection with a boating accident. Appellee alleged that Alhussain was, and is, a Broward County resident and the homeowner responsible for the placement of a dolphin piling which caused the accident. Upon having difficulty locating Alhussain, appellee successfully sought several orders permitting him to extend the time to serve Alhussain with the complaint. More than two years after filing suit, appellee substituted service on Florida's Secretary of State, pursuant to section 48.181(1), Florida Statutes (1995).

[1] As this court emphasized in *Farouki v. Attel et Cie*, 682 So.2d 1185 (Fla. 4th DCA 1996), in order to support substituted service of process on a defendant, the complaint must allege the jurisdictional requirements prescribed by statute. If it fails to do so, then a motion to quash process should be granted. *See also Wiggam v. Bamford*, 562 So.2d 389, 390 (Fla. 4th DCA 1990).

[2] Here, appellee substituted service under section 48.181(1), which provides that

an opportunity for a trial and an appeal of the trial court's judgment.

Here, as in *DeClaire*, the fraud perpetrated by appellant in connection with the filing of his financial affidavit, if indeed the affidavit was false, was intrinsic fraud and did not constitute fraud upon the court.

[3-6] Although our Supreme Court's action in quashing the Fourth District's opinion in *Yohanan*, and in disapproving in part the principles enunciated in *Brown*, require reversal of the case sub judice, we conclude that this case must be remanded to the trial court with instructions to dismiss the wife's complaint with leave to file an amended complaint should the wife feel that she can properly and in good faith allege misconduct by attorney Harden or collusion between Harden and her husband or her husband's attorney which prevented her from presenting her case in the divorce action. Conduct by an attorney which amounts to connivance at the defeat of his own client, or conduct by a party which prevents an opposing party from fairly presenting his or her claim or defenses does constitute fraud on the court. *DeClaire v. Yohanan; Fair v. Tampa Electric Co.*, 158 Fla. 15, 27 So.2d 514 (1946); *Wescott v. Wescott*, 444 So.2d 495 (Fla. 2d DCA 1984). The wife's complaint does not allege corruption, collusion, or connivance in her defeat on the part of her attorney but merely alleges that the wife "agreed to a request" that she discharge her former attorney and use some other attorney who would be selected for her by the husband's attorney. Although this allegation would appear to lay the groundwork for some further allegation of corruption or collusion, no such additional allegations appear. While the wife's affidavit in support of her motion for summary judgment does include an averment that she "was misled by Defendant, aided and abetted by Tommy Greene and Paul Hardin [sic] ...," this averment cannot take the place of specific allegations of facts tending to demonstrate misconduct on the part of attorney Harden or specific allegations of facts showing that Harden "connived in her defeat" or "corruptly sold out" her interest. See *U.S. v. Throckmorton*, 8 Otto 61, 98 U.S. 61, 25 L.Ed. 93 (1878); *DeClaire v. Yohanan.* It is axiomatic that the facts and circumstances constituting an alleged fraud must be pled with specificity and particularity, even in ordinary civil actions to recover damages. *In re Ruch's Estate*, 48 So.2d 289 (Fla.1950); *Florida Life Insurance Co. v. Dillon*, 63 Fla. 140, 58 So. 643 (Fla.1912); 27 Fla. Jur.2d *Fraud and Deceit* § 90, and authorities cited therein. We believe that in a case such as this, where a party seeks to vacate a final judgment which is regular on its face, has been affirmed on appeal, and is more than one year old, the requirement that fraud be pleaded with particularity is even more important than in ordinary civil actions. Because the wife failed to plead or prove that the conduct of the husband, the husband's attorney or the attorney selected for her by the husband's attorney amounted to fraud upon the court, this case must be, and hereby is, reversed and remanded for further proceedings not inconsistent herewith.

SHIVERS and ZEHMER, JJ., concur.

CITY OF JACKSONVILLE, Appellant,

v.

David G. BAKER, etc., et al., Appellees.

No. AX-116.

District Court of Appeal of Florida, First District.

Sept. 26, 1984.

Rehearing Denied Oct. 17, 1984.

Motorcycle passenger brought negligence action against city to recover damages for injuries sustained in accident at intersection at which stop sign which city

had erected was not in place on date of the accident. The Circuit Court, Duval County, Virginia Q. Beverly, J., following verdict for motorcycle passenger and city's rejection of additur, ordered new trial on damages only, and city appealed. The District Court of Appeal, Thompson, J., held that: (1) evidence on issue of proximate cause presented jury question; (2) trial court did not abuse its discretion in determining that award of $400,000 for the motorcycle passenger was inadequate; and (3) trial court was required to order new trial on issue of damages only where city rejected additur.

Affirmed.

1. Automobiles ⟹308(10)

In motorcycle passenger's negligence action against city to recover damages for injuries sustained in collision with automobile at intersection at which stop sign, which city had previously erected, was not in place on the date of the accident, evidence on issue of proximate cause presented jury question.

2. Damages ⟹132(15)

Trial court did not abuse its discretion in determining that award of $400,000 was inadequate for 20-year-old motorcycle passenger who would be confined to wheelchair for rest of his life and who would be incapable of performing even most basic tasks for himself due to brain damage. West's F.S.A. § 768.043.

3. New Trial ⟹161(1)

Trial court was required to order new trial on issue of damages only where party adversely affected rejected additur.

Dawson A. McQuaig, Gen. Counsel and William Lee Allen, Asst. Counsel, Jacksonville, for appellant.

David Wiesenfeld of Dawson, Galant, Sulik, Ellis & Wiesenfeld, Jacksonville, for appellees.

THOMPSON, Judge.

The City of Jacksonville (City) appeals a jury verdict in favor of the plaintiff Baker in a negligence action and from the trial court's order granting new trial as to damages only. The City asserts: 1) that the City's motion for directed verdict should have been granted, 2) that the City's motion for a new trial should have been granted, and 3) that the trial court erred in granting new trial as to damages only. We affirm.

Baker was severely and permanently injured in an intersectional collision between an automobile and the motorcycle upon which he was riding as a passenger. Baker alleged in his complaint that his injuries were the result of the City's negligence in failing to replace a stop sign which it had previously erected at the intersection, but which was not in place on the date of the accident. There was evidence that the stop sign had been missing from the intersection for a month or more, that the City knew or should have known that the sign was missing, and that it's absence created a dangerous condition at the intersection.

[1] The City's defense was that the intervening negligence of the operator of the motorcycle was the sole proximate cause of the accident. Under the circumstances of this case the issue of proximate cause was properly left for the jury to resolve and the court did not err in refusing to direct a verdict for the City. Nor did the court err in refusing to grant the City's motion for new trial.

Baker, who was only 20 years old at the time of trial, will be confined to a wheelchair for the rest of his life and the severe brain damage he sustained in the accident has left him incapable of performing even the most basic tasks for himself. His expert economist testified that his damages for lost wages alone will exceed $500,000. Baker obviously experienced great pain and suffering during the 11 months he spent in various hospitals and it is clear that he sustained an almost total loss of capacity for enjoyment of life.

Digest

The jurors deliberated for over five hours, during which time they requested and received a re-reading of the jury instructions. They then returned a verdict for appellee in the amount of $400,000. Baker moved for an additur or, alternatively, new trial on damages, and the motion was granted. The City's rejection of the additur resulted in the issuance of the order granting new trial on the issue of damages only.

[2] In the order granting a new trial as to damages, the trial judge expressly considered each of the criteria set out in § 768.043, Fla.Stat., for determining excessiveness or inadequacy of a verdict. Her determination that the damage award in this case was inadequate was well supported by the facts and circumstances referred to in her order and her determination that the jury's award was inadequate cannot be said to have been an abuse of discretion. Section 768.043, Fla.Stat. authorizes trial courts to order a remittitur or additur in automobile accident cases and provides, in pertinent part:

> (1) In any action for the recovery of damages based on personal injury ... arising out of the operation of a motor vehicle ..., wherein the trier of fact determines that liability exists on the part of the defendant and a verdict is rendered which awards money damages to the plaintiff, it shall be the responsibility of the court, upon proper motion, to review the amount of such award to determine if such amount is clearly excessive or inadequate in light of the facts and circumstances which were presented to the trier of fact. If the court finds that the amount awarded is clearly excessive or inadequate, it shall order a remittitur or additur.... If the party adversely affected by such remittitur or additur does not agree, the court shall order a new trial in the cause on the issue of damages only.

[3] There are many cases in which the interest of justice requires that an order granting a new trial because of inadequate damages provide for retrial of the issue of liability as well as the issue of damages. *See Gross v. Lee,* 453 So.2d 495 (Fla. 1st DCA 1984); *1661 Corporation v. Snyder,* 267 So.2d 362 (Fla. 1st DCA 1972); *Duquette v. Hindman,* 152 So.2d 789 (Fla. 1st DCA 1963). However, in this case this question is controlled by § 768.043, Fla. Stat. The language in the statute is mandatory and requires "[i]f the party adversely affected by such remittitur or additur does not agree, the court *shall* order a new trial in the cause on the issue of damages *only.*" (emphasis supplied).

AFFIRMED.

SHIVERS and ZEHMER, JJ., concur.

Aaron WOODWARD, Appellant,

v.

STATE of Florida, Appellee.

No. AY-69.

District Court of Appeal of Florida,
First District.

Sept. 26, 1984.

Petitioner appealed from the Circuit Court, Leon County, Charles E. Miner, Jr., J., which denied his motion to vacate sentence. The District Court of Appeal, Zehmer, J., held that since 1976 motion to vacate sentence attacked propriety of sentence imposed, while present motion sought relief on grounds that petitioner was deprived of effective assistance of counsel, trial court was required to hear second motion which asserted new grounds for relief.

Reversed and remanded.

FLORIDA DECISIONS WITHOUT PUBLISHED OPINIONS

SUPREME COURT

Title	Docket Number	* Date	Disposition	** Appeal from and Citation
A. Duda & Sons, Inc. v. Department of Agriculture and Consumer Services	66448	1/23/85	Pet. den.	
Bean v. State	66093	1/24/85	Cause dism.	
Carroll v. State	66235	2/20/85	Pet. for rev. den.	5th DCA 459 So.2d 368
City of Jacksonville v. Baker	66148	2/21/85	Pet. for rev. den.	1st DCA 456 So.2d 1274
City of Miami v. Warner	66326	2/27/85	Pet. for rev. den.	3d DCA 458 So.2d 338
Cohen v. Amerifirst Federal Sav. and Loan Ass'n	66042	2/21/85	Pet. for rev. den.	3d DCA 454 So.2d 626
Colina v. Metropolitan Dade County	66229	3/8/85	Pet. for rev. den.	3d DCA 456 So.2d 1233
Cone Bros. Contracting Co. v. Ashland-Warren, Inc.	66261	2/27/85	Pet. for rev. den.	2d DCA 458 So.2d 851
Cooley v. Cooley	66646	3/5/85	Pet. for rev. dism.	4th DCA 461 So.2d 1026
Cooper v. State	65929	3/5/85	Pet. for rev. den.	1st DCA 455 So.2d 588
Counts v. State	66142	2/27/85	Pet. for rev. den.	5th DCA 457 So.2d 568
Daugharty v. Daugharty	66149	2/21/85	Pet. for rev. den.	1st DCA 456 So.2d 1271
Devitto v. Wainwright	66361	1/22/85	Hab. Corp. den.	
Ferenc v. State	66464	2/18/85	App. dism.	5th DCA 462 So.2d 28
Florida Farm Bureau Ins. Co. v. Tropicana Products, Inc.	66095	3/5/85	Pet. for rev. den.	3d DCA 456 So.2d 549
Florida Machinery Corp. v. General Acc. Fire & Life Assur. Corp.	66228	1/24/85	Pet. for rev. dism.	3d DCA 456 So.2d 948
Fountaine v. State	66407	3/5/85	Pet. for rev. den.	2d DCA 460 So.2d 553
Fox v. Loefler	66558	2/18/85	Pet. for rev. dism.	4th DCA 461 So.2d 953
Garnett v. State	66219	2/21/85	Pet. for rev. den.	3d DCA 457 So.2d 1144
Gomez v. Espinosa	66687	3/12/85	Pet. for rev. dism.	3d DCA 460 So.2d 1031
Grady v. School Bd. of Broward County	66557	2/18/85	Pet. for rev. dism.	4th DCA

* Date of decision or date rehearing denied (if requested).
** Court or agency rendering decision appealed and citation (if reported).

for alleged failure to return rental car was action based on misconduct in a commercial transaction involving willful, wanton, or gross misconduct, for purposes of statute providing that punitive damages in such an action shall not exceed three times the amount of compensatory damages. Alamo Rent-A-Car, Inc. v. Mancusi, 632 So.2d 1352 (1994).

4. **Punitive damages**

In calculating punitive damages, which statute limits to no more than three times the amount of compensatory damages awarded to each person, court may not exclude one of the elements of the compensatory damages package; there is nothing in punitive damages statute authorizing judges to separate various elements composing bundle of compensatory damages and discard from punitive damages formula those elements that judge personally deems unwise. Christenson & Associates v. Palumbo-Tucker, App. 4 Dist., 656 So.2d 266 (1995).

Punitive damages are appropriate when defendant engages in conduct which is fraudulent, malicious, deliberately violent or oppressive, or committed with such gross negligence as to indicate a wanton disregard for rights of others. W.R. Grace & Company--Conn. v. Waters, 638 So.2d 502 (1994).

Prior punitive damages assessed against defendant do not preclude subsequent awards against same defendant for injuries arising from same conduct; while acknowledging potential for abuse when defendant may be subject to repeated punitive damage awards arising out of same conduct, uniform solution to problem could only be effected by federal legislation. W.R. Grace & Company--Conn. v. Waters, 638 So.2d 502 (1994).

5. **Collection of damages**

General revenue fund of state, as specifically designated recipient of 60% of punitive damages awarded in landlords' eviction action, was entitled to recover from landlords a sum equal to its 60% interest in punitive damages award, where landlords, without state's knowledge or consent, had entered into postjudgment settlement with judgment debtor that effectively dispossessed state of its portion of trial court's award. Sontag v. State, Dept. of Banking and Finance, App. 3 Dist., 669 So.2d 283 (1996), rehearing denied, prohibition denied 676 So.2d 414.

Pursuant to § 768.73(5), Florida Statutes, the Department of Banking and Finance is charged with collecting all payments due the state in any civil action in which punitive damages were awarded between July 1, 1986, and June 30, 1995. Op.Atty.Gen. 96-15, Feb. 28, 1996.

6. **Arbitration awards**

Arbitrators could award punitive damages in dispute arising from transfer of franchise rights, although buyer did not claim punitive damages in arbitration complaint, where buyer alleged misrepresentations that could be viewed as tortious. Kintzele v. J.B. & Sons, Inc., App. 1 Dist., 658 So.2d 130 (1995), rehearing denied.

Judicially created pleading requirements on subject of punitive damages do not apply to arbitration awards. Kintzele v. J.B. & Sons, Inc., App. 1 Dist., 658 So.2d 130 (1995), rehearing denied.

Statute providing that 40% of punitive damages awarded in any "action" shall be payable to state did not apply to arbitration awards. Miele v. Prudential-Bache Securities, Inc., 656 So.2d 470 (1995), answer to certified question conformed to 62 F.3d 1315.

7. **Parties**

Trial judge properly exercised her discretion, even after judgment in false imprisonment action in which plaintiff was awarded punitive damages, to permit state to intervene as a plainly interested party plaintiff seeking a percentage of the punitive damages award. Gordon v. State, App. 3 Dist., 585 So.2d 1033 (1991), approved 608 So.2d 800, certiorari denied 113 S.Ct. 1647, 507 U.S. 1005, 123 L.Ed.2d 268.

8. **Sufficiency of evidence**

Evidence which was sufficient to support compensatory damages for fraud was, under Florida law, sufficient to support punitive damages award. Scheidt v. Klein, C.A.10 (Okla.)1992, 956 F.2d 963.

9. **Attorney's fees**

Attorney's contingent fee, under contract entered into after effective date of statute requiring personal injury plaintiff to pay 60% of punitive damage award to state, could not include percentage of punitive damages paid to state. Gordon v. State, 608 So.2d 800 (1992), certiorari denied 113 S.Ct. 1647, 507 U.S. 1005, 123 L.Ed.2d 268.

768.74. Remittitur and additur

(1) In any action to which this part applies wherein the trier of fact determines that liability exists on the part of the defendant and a verdict is rendered which awards money damages to the plaintiff, it shall be the responsibility of

the court, upon proper motion, to review the amount of such award to determine if such amount is excessive or inadequate in light of the facts and circumstances which were presented to the trier of fact.

(2) If the court finds that the amount awarded is excessive or inadequate, it shall order a remittitur or additur, as the case may be.

(3) It is the intention of the Legislature that awards of damages be subject to close scrutiny by the courts and that all such awards be adequate and not excessive.

(4) If the party adversely affected by such remittitur or additur does not agree, the court shall order a new trial in the cause on the issue of damages only.

(5) In determining whether an award is excessive or inadequate in light of the facts and circumstances presented to the trier of fact and in determining the amount, if any, that such award exceeds a reasonable range of damages or is inadequate, the court shall consider the following criteria:

(a) Whether the amount awarded is indicative of prejudice, passion, or corruption on the part of the trier of fact;

(b) Whether it appears that the trier of fact ignored the evidence in reaching a verdict or misconceived the merits of the case relating to the amounts of damages recoverable;

(c) Whether the trier of fact took improper elements of damages into account or arrived at the amount of damages by speculation and conjecture;

(d) Whether the amount awarded bears a reasonable relation to the amount of damages proved and the injury suffered; and

(e) Whether the amount awarded is supported by the evidence and is such that it could be adduced in a logical manner by reasonable persons.

(6) It is the intent of the Legislature to vest the trial courts of this state with the discretionary authority to review the amounts of damages awarded by a trier of fact in light of a standard of excessiveness or inadequacy. The Legislature recognizes that the reasonable actions of a jury are a fundamental precept of American jurisprudence and that such actions should be disturbed or modified with caution and discretion. However, it is further recognized that a review by the courts in accordance with the standards set forth in this section provides an additional element of soundness and logic to our judicial system and is in the best interests of the citizens of this state.

Historical and Statutory Notes

Derivation:

Laws 1986, c. 86-160, § 53.

Prior Laws:

Fla.St. 1985, § 768.49.
Laws 1985, c. 85-175, § 18.
Laws 1977, c. 77-174, § 1.
Laws 1977, c. 77-64, § 11.
Laws 1976, c. 76-260, § 15.

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide following the Preface.

Notes of Decisions

Additur 4
Construction and application 1
Judicial discretion 2
New trial 6
Remittitur 3
Review 7
Setoffs 5

1. Construction and application

Statute which provides that trial judge shall grant remittitur or additur when jury award is excessive or inadequate and lists several criteria for judge to consider in making determination of whether award is excessive or inadequate does not alter longstanding principles applicable to granting of new trials on damages. Poole v. Veterans Auto Sales and Leasing Co., Inc., 668 So.2d 189 (1996).

2. Judicial discretion

Tort Reform Act section providing for remittitur and additur in any case in which trier of fact finds that liability exists on part of defendant and verdict is rendered awarding money damages to plaintiff gives trial court more discretion than court has under statute providing for remittitur and additur in actions arising out of operation of motor vehicles. Veterans Auto Sales and Leasing Co., Inc. v. Poole, App. 5 Dist., 649 So.2d 264 (1994), rehearing denied, review granted 660 So.2d 714, quashed 668 So.2d 189.

3. Remittitur

Jury's award of $35,000 in non-economic damages to restaurant patron who was served water contaminated with chlorine cleaning solution was not against great weight of evidence so as to justify remittitur, notwithstanding alleged lack of evidence of permanent harm. Waddell v. Shoney's, Inc., App. 5 Dist., 664 So.2d 1134 (1995).

In determining whether to order remittitur, trial judge's discretion is exercised in context of determining whether jury's verdict is against manifest weight of evidence or was influenced by consideration of matters outside the record. Waddell v. Shoney's, Inc., App. 5 Dist., 664 So.2d 1134 (1995).

Impropriety involving assignment of percentage of liability by jury and not merely excessiveness of verdict amount was not correctable by remittitur. Rowlands v. Signal Const. Co., 549 So.2d 1380 (1989).

A jury verdict of $22,500,000 in defamation action based on a letter accusing a restaurant owner of making anti-Semitic slurs was so grossly excessive and contrary to manifest weight of evidence as to shock conscience of the court, and thus remittitur was warranted; $10,000,000 in compensatory damages was simply not proven at trial and $12,500,000 in punitive damages bore no reasonable relationship to malice, outrage or wantonness of defamation as portrayed by evidence. Rety v. Green, App. 3 Dist., 546 So.2d 410 (1989), review denied 553 So.2d 1165, review denied 553 So.2d 1166.

There was no clear abuse of discretion in trial court in libel action based on a letter accusing a restaurant owner of making anti-Semitic slurs in ordering remittitur of jury verdict of $10,000,000 in compensatory damages to $2,500,000; trial court could have reasoned that highest amount of compensatory damages which jury could have awarded was $2,500,000 against both defendants. Rety v. Green, App. 3 Dist., 546 So.2d 410 (1989), review denied 553 So.2d 1165, review denied 553 So.2d 1166.

Trial judge's decision to reduce $10,000,000 in punitive damages assessed against libel defendant to mere $50,000 was clear abuse of trial court's limited discretion to interfere with punitive damages award and award would be remitted to $2,500,000; defendant, whom jury found was unworthy of belief, testified concerning his indebtedness and that his corporation was bankrupt but proffered no CPA audit, no income tax returns, nor any other records or documentary proof to corroborate that testimony, and no reasonable person could have concluded that award amounted to "economic castigation" under circumstances of case. Rety v. Green, App. 3 Dist., 546 So.2d 410 (1989), review denied 553 So.2d 1165, review denied 553 So.2d 1166.

There was no clear abuse of discretion in trial court's ordering remittitur of $2,500,000 in punitive damages against corporate defendant to $500,000; $500,000 represented highest amount of punitive damages jury could reasonably have awarded given lesser culpability of corporation as opposed to corporate president himself in libel action based on a letter accusing a restaurant owner of making anti-Semitic slurs. Rety v. Green, App. 3 Dist., 546 So.2d 410 (1989), review denied 553 So.2d 1165, review denied 553 So.2d 1166.

Court entering remittitur on damages awarded by jury must provide option of accepting remittitur or having new trial limited to issue of damages. Shalhub v. Andrews Roofing & Imp. Co., Inc., App. 3 Dist., 530 So.2d 1052 (1988).

Although punitive damages award of $667,000 awarded in action alleging breach of contract, fraud, and violations of misleading advertising law [§ 817.41] and free gift advertising law [§ 817.415] may have been considered

large, reasonable men could differ as to whether amount was so large that it would shock judicial conscience to the extent that new trial or remittitur was required. Bill Branch Chevrolet, Inc. v. Burkert, App. 2 Dist., 521 So.2d 153 (1988), review denied 531 So.2d 167.

Compensatory damages award of 12.47 million dollars in medical malpractice case was neither excessive nor unreasonable inasmuch as plaintiff, who suffered irreversible brain damage after her air supply was interrupted due to a malfunctioning respirator, was condemned to a 40-year life expectancy as a half-blind, hopelessly bedridden, pain-racked incompetent who required nearly $200,000 worth of medical care each year. Florida Medical Center, Inc. v. Von Stetina By and Through Von Stetina, App. 4 Dist., 436 So.2d 1022 (1983), reversed 474 So.2d 783.

Award of damages in amount of $135,000 was not excessive or inappropriate for injuries sustained by patient who fell and fractured her hip while undergoing physical therapy for previous cerebral stroke. South Miami Hospital v. Sanchez, App. 3 Dist., 386 So.2d 39 (1980).

Verdict of $300,000 for pain and suffering, disfigurement, mental anguish and loss of capacity for the enjoyment of life sustained by patient whose left leg was amputated below the knee allegedly as a result of the failure of the defendant physicians to render prompt and adequate treatment upon patient's admission to the hospital was not so inordinately large as to be outside the reasonable range within which the jury could properly operate. Daniels v. Weiss, App. 3 Dist., 385 So.2d 661 (1980).

4. Additur

Appellate court may not address propriety of additur, much less approve one part of it but disapprove another, when additur has been refused. Poole v. Veterans Auto Sales and Leasing Co., Inc., 668 So.2d 189 (1996).

Evidence supported jury's award of $80,000 to children for pain and suffering of motorcycle passenger who was killed in collision with automobile and, thus, additur was abuse of discretion, even though award was low; children lived with their fathers, not with victim, jury did not ignore evidence of children's pain and suffering, and award did not appear to be product of corruption or passion. Veterans Auto Sales and Leasing Co., Inc. v. Poole, App. 5 Dist., 649 So.2d 264 (1994), rehearing denied, review granted 660 So.2d 714, quashed 668 So.2d 189.

Evidence did not warrant additur after jury returned verdict awarding $200,000 for jewelry stolen while plaintiff was on defendant's premises; sole evidence as to value of lost jewelry was not clear, obvious, and indisputable, and record did not show that jury misconceived merits of case relating to amount of damages, that award did not bear reasonable relation to amount of damages proved and injury suffered, or that amount was unsupported by evidence. *Hertz Corp. v. David Klein Mfg., Inc.*, App. 3 Dist., 636 So.2d 189 (1994).

Trial court erred when it granted additur in absence of motion for such relief. Fitzmaurice v. Smith, App. 4 Dist., 593 So.2d 1197 (1992).

5. Setoffs

Setoff against damages awarded in medical malpractice case of amount recovered from original tortfeasor who caused patient's injury would be permitted if jury were to determine that damages could not be apportioned and would award a judgment to patient and against physician for all injuries sustained by the original accident and by the malpractice; conversely, if damages would be apportioned so that physician would be responsible only for damages caused by his malpractice, he would not be entitled to a setoff because that award would compensate for damages only for initial injury before any treatment. Mack v. Garcia, App. 4 Dist., 433 So.2d 17 (1983), petition for review denied 440 So.2d 352.

6. New trial

Trial court erred in medical malpractice wrongful death action against hospital in making reductions predicated upon a formula established posttrial, and should have granted a new trial on damages, where plaintiffs, though expressly requesting that jury make appropriate reductions and agreeing to trial court's checking of jury's arithmetic, did not agree to use of a formula to which jury was given no access and did not agree to trial court's reduction of gross verdict amounts contrary to this section and defendants failed to produce any evidence at trial on method of reducing future damages to present value. Pinillos v. Cedars of Lebanon Hospital Corp., 403 So.2d 365 (1981).

Although, in medical malpractice action, the evidence on future damages may have sustained an award for a continuing injury, plaintiff failed to carry his burden of showing permanency and, therefore, mortality tables were erroneously admitted into evidence over defense objection; and since there was no way to ascertain the extent to which the future damages awards may have been increased by the jury's consideration of plaintiff's life expectancy, a new trial on damages rather than a remittitur was indicated; furthermore, the pleadings and evidence raised issues so interrelating liability and damages that justice would best be served by a new trial as to both. Swan v. Wisdom, App. 5 Dist., 386 So.2d 574 (1980).

In medical malpractice action, before a new trial may be ordered as an alternative to a

remittitur, either the record must affirmatively show the impropriety of the verdict or there must be an independent determination that the jury was influenced by considerations outside the record. Daniels v. Weiss, App. 3 Dist., 385 So.2d 661 (1980).

7. **Review**

Defendant's acceptance of order requiring him to accept additur or suffer new trial on issue of damages amounted to waiver of appellate review on additur order, notwithstanding fact that defendant accepted additur "subject to all rights of appeal"; defendant's means of preserving issue for appeal was to submit to retrial of damages issue and then appeal new trial order along with other issues. Hattaway v. McMillian, C.A.11 (Fla.)1990, 903 F.2d 1440.

768.75. Optional settlement conference in certain tort actions

(1) In any action to which this part applies, the court may require a settlement conference to be held at least 3 weeks before the date set for trial.

(2) Attorneys who will conduct the trial, parties, and persons with authority to settle shall attend the settlement conference held before the court unless excused by the court for good cause.

Historical and Statutory Notes

Derivation:

Laws 1986, c. 86–160, § 54.

Notes of Decisions

Validity 1

1. **Validity**

This section did not violate constitutional separation of powers provision where legislature made conferences entirely optional with courts. Smith v. Department of Ins., 507 So.2d 1080 (1987).

768.76. Collateral sources of indemnity

(1) In any action to which this part applies in which liability is admitted or is determined by the trier of fact and in which damages are awarded to compensate the claimant for losses sustained, the court shall reduce the amount of such award by the total of all amounts which have been paid for the benefit of the claimant, or which are otherwise available to him, from all collateral sources; however, there shall be no reduction for collateral sources for which a subrogation or reimbursement right exists. Such reduction shall be offset to the extent of any amount which has been paid, contributed, or forfeited by, or on behalf of, the claimant or members of his immediate family to secure his right to any collateral source benefit which he is receiving as a result of his injury.

(2) For purposes of this section:

(a) "Collateral sources" means any payments made to the claimant, or made on his behalf, by or pursuant to:

1. The United States Social Security Act,[1] except Title XVIII and Title XIX;[2] any federal, state, or local income disability act; or any other public programs providing medical expenses, disability payments, or other similar benefits, except those prohibited by federal law and those expressly excluded by law as collateral sources.

Laws 1988, c. 88–156, § 23, provided that notwithstanding the provisions of the Regulatory Sunset Act or any other provision of law providing for review and repeal in accordance with § 11.61, this section would not stand repealed on Oct. 1, 1988, but would continue in full force and effect as amended.

Laws 1988, c. 88–156, § 22, renumbered this section from § 489.5331 and made conforming modifications without change in substance.

768.043. Remittitur and additur actions arising out of operation of motor vehicles

(1) In any action for the recovery of damages based on personal injury or wrongful death arising out of the operation of a motor vehicle, whether in tort or in contract, wherein the trier of fact determines that liability exists on the part of the defendant and a verdict is rendered which awards money damages to the plaintiff, it shall be the responsibility of the court, upon proper motion, to review the amount of such award to determine if such amount is clearly excessive or inadequate in light of the facts and circumstances which were presented to the trier of fact. If the court finds that the amount awarded is clearly excessive or inadequate, it shall order a remittitur or additur, as the case may be. If the party adversely affected by such remittitur or additur does not agree, the court shall order a new trial in the cause on the issue of damages only.

(2) In determining whether an award is clearly excessive or inadequate in light of the facts and circumstances presented to the trier of fact and in determining the amount, if any, that such award exceeds a reasonable range of damages or is inadequate, the court shall consider the following criteria:

(a) Whether the amount awarded is indicative of prejudice, passion, or corruption on the part of the trier of fact.

(b) Whether it clearly appears that the trier of fact ignored the evidence in reaching the verdict or misconceived the merits of the case relating to the amounts of damages recoverable.

(c) Whether the trier of fact took improper elements of damages into account or arrived at the amount of damages by speculation or conjecture.

(d) Whether the amount awarded bears a reasonable relation to the amount of damages proved and the injury suffered.

(e) Whether the amount awarded is supported by the evidence and is such that it could be adduced in a logical manner by reasonable persons.

(3) It is the intent of the Legislature to vest the trial courts of this state with the discretionary authority to review the amounts of damages awarded by a trier of fact, in light of a standard of excessiveness or inadequacy. The Legislature recognizes that the reasonable actions of a jury are a fundamental precept of American jurisprudence and that such actions should be disturbed or modified only with caution and discretion. However, it is further recognized that a review by the courts in accordance with the standards set forth in this section provides an additional element of soundness and logic to our judicial system and is in the best interests of the citizens of Florida.

Historical and Statutory Notes

Derivation:

Laws 1979, c. 79–400, § 283.
Laws 1977, c. 77–468, § 41.

Laws 1979, c. 79–400, a reviser's bill, conformed the sections of Fla.St.1977 to additions, substitutions, and deletions editorially supplied therein in order to remove inconsistencies, redundancies, unnecessary repetition and otherwise clarify the statutes and facilitate their correct interpretation.

Library References

Damages ⚷226, 228.
WESTLAW Topic No. 115.
C.J.S. Damages §§ 194, 201.

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide following the Preface.

Notes of Decisions

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Construction and application 2
New trial 5
Remittitur 3
Validity 1

1. Validity

This section which concerns remittitur and additur in actions arising out of operation of motor vehicle, which clearly provided for new trial in event party adversely affected by remittitur or additur did not agree with remittitur or additur, did not unconstitutionally abridge right to jury trial. Adams v. Wright, 403 So.2d 391 (1981).

This section concerning remittitur and additur in actions arising out of operation of motor vehicles is a remedial statute designed to protect substantive rights of litigants in motor vehicle related suits and does not conflict with Civil Procedure Rule 1.530 delineating procedures for granting a new trial, and thus does not infringe on the rule-making power of the judiciary. Adams v. Wright, 403 So.2d 391 (1981).

2. Construction and application

Tort Reform Act section providing for remittitur and additur in any case in which trier of fact finds that liability exists on part of defendant and verdict is rendered awarding money damages to plaintiff gives trial court more discretion than court has under statute providing for remittitur and additur in actions arising out of operation of motor vehicles. Veterans Auto Sales and Leasing Co., Inc. v. Poole, App. 5 Dist., 649 So.2d 264 (1994), rehearing denied, review granted 660 So.2d 714, quashed 668 So.2d 189.

3. Remittitur

Trial judge was required to order remittitur prior to ordering new trial on ground that damages in an automobile accident case were excessive. Philon v. Reid, App. 2 Dist., 602 So.2d 648 (1992), jurisdiction accepted 614 So.2d 503, cause dismissed 620 So.2d 762.

Remittitur was required after trial court informed jury in automobile personal injury case that pain and suffering and loss of consortium damages were not available given jury's finding that permanent injury had not been sustained, and jury responded by adding amount previously awarded to damages for loss of wages and medical expenses. Schulz v. Remy, App. 4 Dist., 573 So.2d 1076 (1991).

Award of $850,000 to each child of driver killed in automobile accident was unreasonable and excessive, absent evidence of physical or mental abnormality or physical or emotional impairment which children suffered due to death of their father. Salazar v. Santos (Harry) & Co., Inc., App. 3 Dist., 537 So.2d 1048 (1989), review dismissed 544 So.2d 200, review denied 545 So.2d 1367.

Trial judge in personal injury action was not authorized to conduct informal interview of jurors after their dismissal and to then use results of poll as factual basis for his decision on defendants' motion for remittitur. Kirkland v. Robbins, App. 5 Dist., 385 So.2d 694 (1980), review denied 397 So.2d 779.

Proper procedure for trial judge in personal injury action, rather than permitting counsel to interview jury based in part on alleged consideration of improper evidence of injuries, was to poll jury and then order new trial or remittitur if appropriate. Kirkland v. Robbins, App. 5 Dist., 385 So.2d 694 (1980), review denied 397 So.2d 779.

4. Additur

Evidence supported jury's award of $80,000 to children for pain and suffering of motorcycle passenger who was killed in collision with auto-

mobile and, thus, additur was abuse of discretion, even though award was low; children lived with their fathers, not with victim, jury did not ignore evidence of children's pain and suffering, and award did not appear to be product of corruption or passion. Veterans Auto Sales and Leasing Co., Inc. v. Poole, App. 5 Dist., 649 So.2d 264 (1994), rehearing denied, review granted 660 So.2d 714, quashed 668 So.2d 189.

Denial of additur motion in negligence suit by injured pedestrian was appropriate where trial court considered statutory criteria and properly refused to sit as juror with veto power. Griefer v. DiPietro, App. 4 Dist., 625 So.2d 1226 (1993), modified on denial of rehearing.

Additur of $2,000 for husband for loss of consortium claim instead of new trial was proper. DeLong v. Wickes Co., App. 2 Dist., 545 So.2d 362 (1989).

Granting of additur in amount greater than lost wages instead of new trial was proper in action for injuries passenger sustained in vehicular collision. DeLong v. Wickes Co., App. 2 Dist., 545 So.2d 362 (1989).

Competent substantial evidence supported jury's award of $1,500 to motorist injured when Department of Transportation bridgetender began raising drawbridge while motorist was crossing bridge in her automobile, so that trial court should not have granted motion for additur in amount of $2,000; jury was instructed to consider reasonable value of medical care treatment necessary or reasonably obtained by motorist in past or to be obtained in future as result of accident and injuries and jury could reasonably have believed that a good portion of motorist's claim to medical expenses was result of preexisting conditions not caused by accident and injury. Department of Transp. v. Brooks, App. 1 Dist., 517 So.2d 82 (1987).

Evidence supported trial court's granting new trial or additur of $75,000 in wrongful death action, in which jury verdict of $25,000 was originally returned, arising out of automobile accident. Davis v. O'Dell, App. 4 Dist., 506 So.2d 1107 (1987).

Use of additur to reapportion responsibility rather than to increase damages was improper, in action arising out of motor vehicle accident. John Sessa Bulldozing, Inc. v. Papadopoulos, App. 4 Dist., 485 So.2d 1383 (1986).

5. New trial

Trial court was required to order new trial on issue of damages only where party adversely affected rejected additur. City of Jacksonville v. Baker, App. 1 Dist., 456 So.2d 1274 (1984), petition for review denied 464 So.2d 554.

Trial court did not abuse its discretion in determining that award of $400,000 was inadequate for 20-year-old motorcycle passenger who would be confined to wheelchair for rest of his life and who would be incapable of performing even most basic tasks for himself due to brain damage. City of Jacksonville v. Baker, App. 1 Dist., 456 So.2d 1274 (1984), petition for review denied 464 So.2d 554.

Order for new trial was deficient where it did not contain reference to record in support of conclusion that additur of jury award was necessary to cure inadequacy of verdict, which was basis of requiring new trial. Adams v. Wright, 403 So.2d 391 (1981).

768.045. Repealed by Laws 1983, c. 83–214, § 14

Historical and Statutory Notes

The repealed section, which related to the nonjoinder of liability insurers, was derived from Laws 1977, c. 77–468, § 39.

768.05, 768.06. Repealed by Laws 1979, c. 79–163, § 6

Historical and Statutory Notes

Repealed § 768.05, which provided for railroad company liability for tort damages, was derived from:

Comp.Gen.Laws 1927, § 7051.
Rev.Gen.St.1920, § 4964.
Gen.St.1906, § 3148.
Laws 1891, c. 4071, § 1.
Laws 1887, c. 3744, §§ 1, 2.

Repealed § 768.06, which provided for comparative negligence defense in actions involving railroad companies, was derived from:

Comp.Gen.Laws 1927, § 7052.
Rev.Gen.St.1920, § 4965.
Gen.St.1906, § 3149.
Laws 1891, c. 4071, § 2.
Laws 1887, c. 3744, §§ 1, 2.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 2000
JUNE 21, 2000

ITT HARTFORD INSURANCE COMPANY, ETC.,
Appellant(s)/Petitioner(s),

CASE NO.: 3D99-679

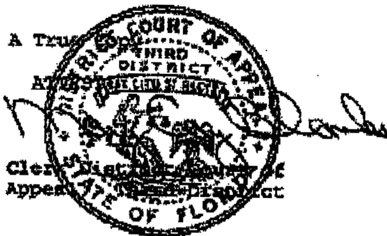
vs.

STILES JERRY OWENS, ET AL.,
Appellee(s)/Respondent(s).

LOWER TRIBUNAL NO. 95-20911
95-20911

Upon consideration, appellant's motion for rehearing is denied. COPE and SORONDO, JJ., concur. GERSTEN, J., dissents.

Appellant's motion for rehearing en banc is denied. SCHWARTZ, C.J., and JORGENSON, COPE, FLETCHER, SHEVIN and SORONDO, JJ., concur. LEVY, GERSTEN, GODERICH, GREEN and RAMIREZ, JJ., dissent.



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