IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1508

Florida Bar No. 184170

ITT HARTFORD INSURANCE COMPANY OF THE SOUTHEAST,

Petitioner,

vs.

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

Respondents.

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

REPLY BRIEF OF PETITIONER ON THE MERITS

ITT HARTFORD INSURANCE COMPANY OF THE SOUTHEAST

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REPLY 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 choice of a new trial on damages. This has always been the Defendant's position and it is not being argued for the first time in this Court.

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. ITT Hartford Insurance Company of the Southeast v. Owens, 760 So. 2d 210 (Fla. 3d DCA 2000).

As the Opinion of the Third District concedes, both parties presented expert testimony that had contrasting and opposing figures for future medical damages and also conflicting economic calculations. It is clearly contrary to Florida law for the trial judge to surmise what the jury intended to do, and then take portions of various economic testimony, even if it comes from both sides, to come up with the court's own number, and not give an alternative of a new trial. The judge could have taken different parts of the damage evidence and she would have come up with a completely different number. If she had found the $72,000 was the number the jury had intended as future medical expenses and that it had miscalculated the total $1.8 million dollars number, this would have led to totally different number. The procedure used by the trial court and affirmed by the Third District exists nowhere in Florida law and must be reversed. The Owens ruling, affirming the Additur of $819,214, but not giving the Defendant the option of a new trial, conflicts with

all Florida law on point; and specifically with Jarvis v. Tenent Health Systems Hospital, Inc., 743 So. 2d 1218 (Fla. 4th DCA 1999); and Food Lion v. Jackson, 712 So. 2d 800 (Fla. 5th DCA 1998).

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.

Of the 76 cases cited by the Respondent, not a single one allows the trial judge to hold a separate, post-trial, evidentiary hearing, to determine the damages to be awarded. The Plaintiff continues to try and justify this unusual procedure with his single argument throughout, that the jury awarded $1.8 million in future medical expenses and, since the Defendant did not object to that number, somehow that makes the entire post-trial proceedings proper. To begin with, what the jury awarded was $72,000 for future medical expenses and, because that was clearly based on the evidence at trial, there was absolutely no reason for Hartford to object to that award, nor to how the jury calculated that award. Furthermore, the Plaintiff has not cited a single case that holds it is necessary to object to a portion of the jury's calculations, prior to the final award, in order to properly object and preserve a post-trial procedure and Order for appellate review.

The legal issue is whether the judge can hold a mini-trial, after a jury award is made, based on the evidence presented at trial. This issue is still totally ignored by the Plaintiff, because there is simply no case law in Florida that allows the procedure that the judge used in this case. The judge took expert testimony and calculations, which were not presented to the jury and, based on this

new evidence, granted an $819,214 Additur. The judge realized that there was a problem with the procedure used, but left it to the appellate court to fashion the correct remedy. The correct legal remedy was to reinstate the original $1.2 million dollar Jury Verdict for the Plaintiff, which was based on competent, substantial evidence; or grant a new trial on damages, which the Defendant was clearly entitled to, assuming arguendo this Court agrees that the $819,214 Additur was legally and factually proper.

The Plaintiff's Brief substantiates the fact that different numbers could have been used by the jury, other than the two discount rates suggested at trial; and, of course, the jury never heard the arguments, nor saw the calculations presented to the trial court. Where is the Plaintiff's case law that allows an evidentiary Affidavit to be filed post-trial, with new damages being argued, which did not go to the jury? There is no such law; just as there is no law that allows a trial court to circumvent the express, clear and unambiguous statutory language that mandates a new trial on damages, if the adversely affected party rejects the court's Additur. The jury could have accepted figures and testimony that showed returns on investments that involved some risks; but this is pure speculation, as the Plaintiff admits. Therefore, the Jury Verdict of $1.2 million for the Plaintiff has to be reinstated.

It is important to remember that the bulk of the Plaintiff's claim for future medical expenses was related to nerve blocks, which most of his doctors agreed should not be continued, due to their limited success; a major point, the Plaintiff argues is irrelevant. The jury was free to find any mix and match of treatment was

necessary in the future. Rejecting the repeated nerve block therapy significantly reduced the Plaintiff's future medical treatment from a seven figure amount to a five figure amount. To arrive at a total figure of $72,000 for future treatment was not only possible, based on the Record, but was logical and reasonable. Juries are certainly aware of inflation and have seen their own dollars shrink; and similarly, are aware of interest rates; and are free to hold that these would negate each other. The jury was given evidence on the history of the high rate of return in the stock market; an investment of $72,000 could easily result in $1.8 million over 25 years and this was a common sense conclusion, as well as being based on the evidence at trial.

The Plaintiff argues that the jury can only reject the expert evidence, if it was shown that it was based on false facts relying on Easkold v. Rhodes, 614 So. 2d 495 (Fla. 1993). That certainly was not the holding in Easkold and there is no such restriction appearing in Standard Jury Instructions 6.1, given to the jury below.

As this Honorable Court knows, generally when a jury returns a verdict, the present value is generally not a precise mathematical calculation of the future value, but courts do not grant a new trial, whenever this happens, because the assessment of damages is within the province of the jury. No one contests the fact that the $1.2 million dollar Verdict for the Plaintiff was supported by competent, substantial evidence. It must be reinstated, or a new trial granted on damages.

It is common knowledge that juries frequently determine the bottom line amount they wish to award first and then work backwards.

The jury awarded a total Verdict to the Plaintiffs of $1.158 million, and it is apparent this is the amount the jury wished to award. This total amount was supported by evidence at trial and should have been affirmed. Phillips v. Ostrer, 481 So. 2d 1241 (Fla. 3d DCA 1985); R.W. King Construction Company, Inc. v. City of Melbourne, 384 So. 2d 654 (Fla. 5th DCA 1980); Richard Swaebe, Inc. v. Sears World Trade, Inc., 639 So. 2d 1120 (Fla. 3d DCA 1994); Capital Bank v. MVB, Inc., 644 So. 2d 515 (Fla. 3d DCA 1994); Utvich v. Felizola, 742 So. 2d 847 (Fla. 3d DCA 1999).

The procedure in this case cannot be approved because the legal question is not a determination of whether the trial court was correct in denying a new trial, or that the Defendant waived entitlement to a new trial, which is basically what the Plaintiff argues throughout his Brief. The legal challenge is to the entire post-Verdict mini-trial; as well as the court's refusal to order a new trial, when she granted the $819,214 Additur. The massive amount of factual arguments made by the Plaintiff in his Brief to justify his dollar amounts and the huge Additur shows this was clearly a jury question and not one for the trial court to decide; which is the error raised on appeal and ignored by the Plaintiff. The Plaintiff argues that the expert testimony had to be accepted; but, no expert testified at trial to the dollar amounts used to recalculate the damage award, based on the assumption that the jury meant to use $1.8 million, but not $72,000.

The Plaintiff summarily dismisses the cases in direct conflict with Owens, claiming they are factually off point; because the Plaintiff "agreed" to accept the Defendant's expert testimony on the

discount rate. It is important to note that the Plaintiff did not "accept the defendant's measure of the damages" (Brief of Respondent, p. 34). The Defendant's measure of damages was the original Jury Verdict of $1.2 million, based on a present value of $72,000 for future medical expenses. For the judge to use the Defendant's discount rate, applied in a post-trial Affidavit to $1.8 million, to arrive at an $819,214 Additur, increasing the Jury's Verdict by 70% was not the Defendant's measure of damages. Furthermore, the Plaintiff has no case on point, or one that holds that if a plaintiff comes up with some post-trial calculation, which incorporates a single number used by the Defendant, that somehow this waives the Defendant's right to rely on Florida case law and the express terms of the Additur statutes. Reversal of the unorthodox procedure used below is mandatory. Jarvis; Food Lion; supra; City of Jacksonville v. Baker, 456 So. 2d 1274 (Fla. 1st DCA 1984); Pinillos v. Cedars of Lebanon Hospital Corporation, 403 So. 2d 365 (Fla. 1981).

There is nothing in the Record indicating that the jury ignored the evidence at trial. Rather, this evidence indicated that his problem could be unaffected, or exacerbated, by the very expensive nerve block therapy and surgeries; which represented the bulk of the requested $1.2 million in future medical expenses. The jury heard the testimony of half a dozen doctors about what future treatment was necessary, suggested, not recommended at all, or just in part, for the Plaintiff and how much the various mixes and matches of these treatments would cost. The jury could have taken three of the Plaintiff's suggested present values, added them together, and rounded them off to arrive at a present value of $72,000 for future

medicals. Again, this is something completely ignored by the Plaintiff in his Brief, as irrelevant.

The Plaintiff argued in one breath that it was impossible for the trial court to conform the Verdict to the jury's intention on the issue of present value because that intention cannot be determined; but then in the next breath, claimed it was okay for the court hold a post-trial evidentiary hearing and recalculate the damages, based on the fact that it was clear that the jury's intent was to award $1.8 million in future medical expenses. Having admitted that it was impossible to know the true intent of the jury regarding the issue of present money value then, at the very least, the judge should have granted a new trial on the issue of damages and no additur.

A new trial is also mandated by the remittitur/additur statute, § 768.043. This statute is absolutely clear that if the party adversely affected by an additur does not agree, the court shall order a new trial on the issue of damages only. The Plaintiff makes the incredible argument that, since the Plaintiff accepted the Defendant's post-trial evidentiary showing, the Defendant is no longer entitled to a new trial. Again, what the Plaintiff conveniently ignores is the fact that the Defendant objected, throughout, to having any post-trial evidentiary hearing; and to the presentation of any new evidence by experts from either side to the court; and to the court deciding what this amount of damages should be; and to an Additur in the absence of the Defendant having the option of a new trial. The trial judge thought that the jury was confused on the issue of future medical expenses; and in that case the remedy would be a new trial on damages, even without an Additur.

The simple fact is that a new trial has to be held on damages, as mandated by § 768.043(1), but this is again completely ignored by the Plaintiff. Instead, he argues that a judge could order a new trial on a discreet element of damages, if that is the only element challenged. The Plaintiff cites Astigarraga v. Green, 712 So. 2d 1183 (Fla. 2d DCA 1998). The Astigarraga case addresses a situation where the trial judge ordered a new trial on all damages, after finding that the verdict was not supported by the evidence, only on the award for future medical expenses. Astigarraga, 1184. The appellate court found this procedure erroneous and said that the judge should have first ordered a remittitur, as to that element of damages, and then if the plaintiff did not agree with the remittitur, then a trial should be held on the award of future medical expenses. Astigarraga, 1184.

This case does not hold that a new trial should be held only on the issue of present money value. The Second District did not discuss the express language in the remittitur/additur statute; "the court shall order a new trial in the cause on the issue of damages only." Therefore, where the trial court has granted an $819,214 Additur; which was done without the required fact finding to support such an Additur; and even the Plaintiff's case holds that the new trial has to be offered to the Defendant, who disagrees with the additur, a new trial must be granted; at the very least, on future medical expenses and not just present money value. Astigarraga, supra.

The unilateral, gratuitous stipulation by the Plaintiff, to accept the lowest measure of present value money calculated post-

trial, using the Defendant's discount rate, does not cure the error in this case. The Plaintiff acknowledged that it was impossible to ascertain the jury's true intent and, therefore, the trial court could not be "correcting" the Jury's Verdict. Regardless of what the trial court did, the bottom line is that the Defendant is entitled to the option of a new trial on damages; even if the trial court was correct that the jury misunderstood the evidence and did not follow the jury instructions. That is not to say that the Verdict in this case should not be reinstated, where the ultimate amount awarded by the jury was based on competent substantial evidence, as was the $72,000 awarded as future medical expenses. Department of Transportation v. Brooks, 517 So. 2d 82 (Fla. 1st DCA 1987); Vernon v. Beni, 599 So. 2d 1052 (Fla. 4th DCA 1992); Griefer v. DiPietro, 625 So. 2d 1226 (Fla. 4th DCA 1993).

Regarding the Plaintiff's claim that only the Defendant waived any inconsistencies in the Verdict by not properly objecting at trial, the following is exactly what was said; and, clearly, the judge did not understand that the Plaintiff was objecting and asking to send the jury back to re-evaluate the damages because, in fact, what the Plaintiff's counsel asked for, was to have the jury polled:

> THE COURT:
> The question I have is, of course, they couldn't have a present value of million, eight, down to seventy-two thousand. I think they must have meant seven hundred twenty thousand.
>
> MR. RICE:
>
> That's a present, fair present value, Judge, with all due respect.
>
> MR. FREIDIN:

It couldn't be that under your most optimistic result from your expert. It couldn't be seventy thousand dollars for the present value.

THE COURT:
I don't think we can do anything. They can make this reduction. There is no way I think I could send it back to them.

MR. FREIDIN:
For the record, we request that, and it's denied, I guess. I appreciate if you would say it was denied instead of me.

THE COURT:
What is it you are requesting? What would you be requesting? I mean, well, this, of course, will be a matter of record. Set fourth[sic] all the other figures with the appropriate --

MR. FREIDIN:
That's only ones that they reduced to present value. I don't think anyone could realistically argue one million, eight hundred thousand dollars could be seventy thousand dollars in present money value.

THE COURT:
What if they bought the argument that they should invest in the stock market? That was argued.

MR. FREIDIN:
I feel like it's a blatant error. I am beginning to think what the right thing to do is -- I understand it's not that simple to just -- for my opinion, I would like to ask them, ask the foreman if seventy -- I would like to ask the foreman if they felt that that accurately reflects their reduction to present value of seventy thousand dollars.

THE COURT:
I am not going to do that; but if you want the jury polled, I would ask them what the verdict -- I just mentioned was the verdict, they each agreed.

MR. FREIDIN:
Well, they are going to be polled, so --

THE COURT:
That's what I'll do.

MR. FREIDIN:
Since --

THE COURT:
I am not going to ask them about that specific figure.

MR. FREIDIN:
Okay.

(T 635-636).

Even if this Court accepts the argument that the Plaintiff has not waived any inconsistencies in the Verdict, again, that would mean that the Verdict was clear and patent on its face. At trial the judge observed, as she did at the post-trial hearing, that the jury could have bought the argument that investing in the stock market would return a higher rate for the investment than the 5% and 6% discount rates argued by the experts. The Plaintiff tries to get around the lack of objection and the inconsistency in the Verdict, by arguing that the issue is not whether the Verdict was inconsistent but, rather, the issue is whether there was evidence to support the jury's determination on future medical expenses. The jury could have taken the present money values suggested by the Plaintiff's experts, rounded it off, and still arrive at an amount of $72,000. Therefore, the Verdict was supported the manifest weight of the evidence and it should have been reinstated.

Regardless of whether the jury was misled by the force and weight of the evidence, or if the court believed it was completely confused and ignored the evidence and instructions,

the remedy is a new trial on damages. If the jury acted properly and the Defendant is correct, that the Verdict is based on the evidence, then the original Verdict must be reinstated. None of the options, however, include what the judge did in this case; which was hold her own separate, evidentiary hearing, or mini-trial.

The Plaintiff apparently has finally given up arguing no Additur was granted; but still does not justify the lack of a new trial, with any case law on point. The judge substituted her determination on damages for that of the jury. She granted the Additur; but failed to follow § 768.043. Even if it was alright for her to grant the $819,214 Additur; without the appropriate statutory fact finding; she still had to allow the Defendant the option of a new trial on damages. The trial court recognized that this was a "difficult situation" and one that was a "little tricky;" but she left it to the appellate courts to decide what the appropriate procedure should have been, after the Plaintiff's Motion for Additur. The solution was easy. The trial court should have simply followed the additur statute; made the appropriate fact finding, applied the criteria in the additur statute; and then if she thought an additur was required, than she had to give the Defendant the option of a new trial on damages. Even the Plaintiff's case law supports this statutory procedure. Astigarraga, supra.

None of the cases cited by the majority below and the Plaintiff dealt with an issue where an Additur was granted, but a new trial on damages was denied. Astigarraga, 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 which holds that an additur, or remittitur, can be granted without the adversely affected party 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.

Numerous analogous cases stand for the same principle advocated by Hartford, that when a remittitur (additur) has been granted under the statute, the alternative of a new trial on damages must be given. Gould v. National Bank of Florida, 421 So. 2d 798 (Fla. 3d DCA 1982); St. Pierre v. Public Gas Company, 423 So. 2d 949 (Fla. 3d DCA 1982); Ellis v. Golconda Corporation, 352 So. 2d 1221 (Fla. 1st DCA 1977)(a trial court is not permitted to reduce the jury by ordering a remittitur, without permitting the adversely effected party to have the option of a new trial); Dura Corporation v. Wallace, 297 So. 2d 619 (Fla. 3d DCA 1974)(a trial court erred in entering an order of remittitur of original verdict, where the order was silent as to the grounds upon which it was based and where the trial judge failed to permit the plaintiff the alternative of electing a new trial); Lewis v. Evans, 406 So. 2d 489 (Fla. 2d DCA 1981)(the granting of a remittitur is error unless it is accompanied by the alternative grant of a new trial).

The unambiguous additur statute did not permit the Third District to find that an Additur of more than $800,000 can be

given; and also find that a new trial would be a waste of time, because the jury would have made the same evidentiary determination that the judge did post-Verdict. There is a 99% chance the jury would not have reached that result, so the province of the jury was invaded by the trial judge, who impermissibly vetoed the Verdict. Adams v. Wright, 403 So. 2d 391 (Fla. 1981); Wackenhut Corporation v. Canty, 359 So. 2d 430 (Fla. 1978); Laskey v. Smith, 239 So. 2d 13 (Fla. 1970).

There is no question that the Defendant was entitled to the alternative grant of a new trial, being the party adversely affected by the Additur. It was clear legal error for the judge to grant the Additur; but additionally, there was no legal basis for a new trial solely on the issue of the reduction of future medical expenses to present value. It would be, at least, on all elements of future medical expenses. However, the statutory language contained in the Additur statute is clear and unambiguous and it is mandatory that if a new trial is granted it must be on all damages; not just a reduction to present value.

The damage issues as to the various elements of the medical care and the mix and match of what medical treatment might be needed in the future were so interwoven with the Plaintiff's other claims for damages, if the jury is to rehear any of the damage issues, it really must rehear all of them. Therefore, if this Court should affirm the granting of the Additur, there is no question under the mandatory language of § 768.043, the Defendant must be given the alternative choice of a new trial on all elements of damages. However, based on existing law, the

Decision below must be quashed, to resolve the conflict; and the $1.2 million dollar Verdict for the Plaintiff reinstated.

CONCLUSION

The Third District Opinion must be quashed, as the trial court erred, as a matter of law, in granting an $819,214 Additur. The Verdict for the Plaintiff was substantiated by competent evidence and the original Jury Verdict must be reinstated; or in the alternative a new trial granted on all elements of damages, as mandated by the additur statute. Owens is in direct and express conflict with existing Florida law and must be quashed to resolve the conflict and the unambiguous additur statute must be applied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 14th day of June, 2001 to:

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/dlo

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.