IN THE SUPREME COURT OF FLORIDA

Faith Carr Hibbard, o/b/o
Amanda K. Carr,
Petitioners,

v.

Docket No. SC04-7
Fifth District Docket No. 5D02-2154

Michael McGraw and
Dual Incorporated,

Respondents.
_____/

JURISDICTIONAL BRIEF OF PETITIONERS

On Discretionary Review of the District Court of Appeal,
Fifth District, State of Florida

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STATEMENT OF THE CASE AND FACTS

Being ever so mindful of this Court's guidance in Reaves v. State, 485 So. 2d 829 (Fla. 1986) to restrict the Jurisdictional Brief to only those facts relevant to the jurisdictional issues and those facts contained within the four corners of the conflicting decisions, Petitioners herein limit their recitation to the following facts.

Petitioner, Amanda K. Carr (as a minor), by and through her natural mother and guardian, Faith Carr Hibbard, initially filed suit in January of 2000 against the Respondents, Dual Incorporated, as the vicarious employer and its employee, Michael McGraw, alleging negligence arising out of an automobile accident that occurred on August 28, 1997 (R. Vol. I, p. 1). On August 27, 1997, then sixteen year old Carr was a passenger in a pickup truck driven by her friend, Mark Brock. Carr and Brock were driving behind McGraw on a two-lane road in Jacksonville. McGraw proceeded slowly, so Brock drove into the left lane to pass him. Unfortunately, McGraw was in the process of making a left turn. To avoid hitting McGraw, Brock swerved and his truck went off the road, overturned and hit a tree. Carr, who was not wearing a seatbelt or shoulder harness, fractured her pelvis.

The Respondents raised two Affirmative Defenses which were among the subjects of the appeal (R. Vol. I, p. 4; 12). In the Third Affirmative Defense, the Respondents raised the "Seat Belt Defense" contending in part that Amanda Carr's

failure to use an operational seat belt caused, in whole or in part, her pelvic injuries (R. Vol. I, pp. 5; 13). In addition, the Respondents raised the Fabre Affirmative Defense contending that the proximate cause of the accident was the negligence of Mark Brock in the operation of his vehicle (R. Vol. I, pp. 5; 13).

At the November 13, 2001 trial, Brock and Carr, as well as McGraw and his passenger, testified to their recollections of the accident. Numerous experts testified for both sides.[1]

The jury's verdict findings were (R. Vol. VII, p. 1054):

A) Negligence

(1)	Michael McGraw, Dual Inc. (Defendant)	5%
(2)	Mark Brock (Fabre Defendant)[2]	70%
(3)	Amanda Carr (Plaintiff)	25%

B) Damages

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[1]Petitioner asserted on appeal that the trial court erred in permitting the testimony, on behalf of Respondent, of a doctor who testified that even though he knew nothing about the interior of the pick-up truck regarding location, configuration and distance between Amanda Carr and the dashboard, it didn't matter to him "who shot Cock Robin", and her failure to wear a seatbelt caused her injuries. Petitioner also asserted that the trial court erred when it gave a separate jury instruction on the seatbelt statute that was improper. (T.T. Vol. I, pp. 159-162); (T.T. Vol. VII, p. 639). Petitioner recognizes that the District Court rulings on these points are not a basis for conflict jurisdiction, however, and will reserve those points for briefs on the merits.

[2] Petitioner also objected and argued below that the reason the Fabre percentage was so high (70%) was due to the confusion created by testimony that Mark Brock was negligent in not wearing his seatbelt resulting in the secondary collision striking Amanda Carr inside the vehicle as opposed to his negligence in the operation of his vehicle.

	Economic		
(1)	Past	$104,766	
	Future	100,000	
			$204,766.00
(2)	Non-economic		
	(1) Amanda Carr past pain & suffering		100,000
	(2) Amanda Carr future pain & suffering		50,000
	(3) Faith Hibbard consortium		10,000
			$160,000.00
Total Damages			$365,766.00

Following the jury verdict, Amanda Carr/Faith Hibbard filed a Motion for New Trial and/or in the Alternative Motion for Directed Verdict and/or Motion for Judgment Notwithstanding the Verdict (R. Vol. VII, p. 1072).

The trial court concluded the defendants were not jointly and severally liable since McGraw was found to be less than 10% at fault and less at fault than Carr. The court found the defendants' liability amounted to $18,238.32 (5% of the total award of $364,766.44) and they were entitled to a set-off for $72,966.09 from collateral sources, which far exceeded their liability. Thus the trial court entered judgment in favor of the defendants.

The Fifth District then re-calculated the damages based upon the following analysis: Since McGraw's percentage of fault (5%) was less than Carr's percentage of fault (25%) and the total amount of damages exceeded $25,000, the doctrine of joint

and several liability does *not* apply. Metropolitan Dade County vs. Frederic, 698 So. 2d 291 (Fla. 3d DCA), *rev. denied,* 705 So. 2d 9 (Fla. 1997). Thus McGraw was liable only for 5% of the economic damages of $204,766.44 or $10,238.32 and 5% of the non-economic damages of $160,000 or $8,000.

Prior to trial, Carr settled with Brock for $100,000 but this does not benefit McGraw. The provisions for setting off settlement proceeds do not apply to non-economic damages for which the defendants are only severally liable. Furthermore, these set-offs are only applicable to economic damages where the parties are subject to joint and several liability. Gouty v. Schnepel, 795 So. 2d 959 (Fla. 2001); Wells v. Tallahassee Memorial Regional Medical Center, Inc., 659 So. 2d 249 (Fla. 1995); Metropolitan Dade County; Cohen v. Richter, 667 So. 2d 899 (Fla. 4th DCA 1996).

Nevertheless, Carr received collateral source payments which do reduce economic damages. Wells; Assi v. Florida Auto Auction of Orlando, Inc., 717 So. 2d 588 (Fla. 5th DCA 1998); Readon v. Lim, 697 So. 2d 178 (Fla. 3d DCA 1997); Olson v. N. Cole Const., Inc., 681 So. 2d 799 (Fla. 2d DCA 1996). The collateral source payments of $72,966.09 far exceed McGraw's liability for $10,238.32 in economic damages. Thus the net recovery should have been limited, under the Fifth District's analysis, to McGraw's liability for his percentage of the non-economic damages – $8,000.

SUMMARY OF THE ARGUMENT

In the instant case, the Fifth District held that collateral source set-offs should be applied in their entirety against the defendant's economic damage liability after reduction for the fault of others, resulting in no award for Carr relative to economic damages and only a judgment for $8,000 representing non-economic damages. The First District in Norman v. Farrow, 832 So. 2d 158 (Fla. 1st DCA 2002), and the Fourth District in Aetna Casualty and Surety Company v. Langel, 587 So. 2d 1370 (Fla. 4th DCA 1991), in contrast, have held that, under the facts of this case, the PIP set-off calculation would have been reduced first by Carr's comparative negligence, and then that amount used to reduce the economic damages found by the jury, and then multiplied by McGraw's comparative negligence, resulting in an economic damages award in favor of Carr in the amount of $7,502.09. The economic damages of $7,502.09, plus the non-economic damages of $8,000, would then result in a final judgment of $15,502.09 in favor of Carr. Thus, there is a direct and express conflict of decisions between the District Courts of Appeal, and this Court has jurisdiction to resolve that conflict.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a District Court which expressly and directly conflicts with a decision of another District Court on the same point of law. Art. V, Section 3(b)(3) Fla. Const. (1980); Fla.R.App.P. 9.030(a)(2)(A)(iv). A District Court need not explicitly identify a conflicting Supreme Court decision in its opinion in order to create an express conflict under Section 3(b)(3). See Ford Motor Company v. Kikis, 401 So. 2d 1341 (Fla. 1981).

The Fifth District Court of Appeal's decision in this Hibbard case is in express and direct conflict with the First District Court of Appeal's decision in Norman v. Farrow, 832 So. 2d 158 (Fla. 1st DCA 2002) which followed the Fourth District Court of Appeal's decision in Aetna Casualty and Surety Company v. Langel, 587 So. 2d 1370 (Fla. 4th DCA 1991), but rejected the conclusions reached by the Fifth District Court of Appeal in Assi v. Florida Auto Auction of Orlando, Inc., 717 So. 2d 588 (Fla. 5th DCA 1998).

This Court has accepted jurisdiction in Norman v. Farrow, 847 So. 2d 978 (Fla. 2003), thereby recognizing the conflict between the various District Courts of Appeal on the issue of applying collateral source payments to reduce jury verdicts in calculating final judgments when there are issues of comparative negligence and Fabre

defendant percentages.

Having recognized the apparent conflict then by accepting jurisdiction for this case, the Florida Supreme Court will have before it the competing legal analyses between the Fifth District, the First District and Fourth District for clarification and guidance to determine the proper application of the collateral source statute, (F.S. 672.736(3)), as well as the set-off statutes in those types of cases involving comparative negligence and Fabre defendants. The Court should exercise its jurisdiction to resolve these conflicts and harmonize Florida law on these issues.

ARGUMENT

Since the Supreme Court has allowed the interjection of a non-party's negligence into a pending civil matter between a plaintiff and defendant thereby reducing a jury verdict award, many legal questions remain unanswered, causing much confusion in the trial courts. Fabre vs. Marin, 623 So. 2d 1182 (Fla. 1993).

Some of those questions revolve around the application of the set-off statutes, sections 45.015(2), 768.041(2) and 768.31(5), Florida Statutes (1991); the joint and several liability statute, section 768.81, Florida Statutes (1999); and, the collateral source statute, section 672.736(3), Florida Statutes (1999). Although there have been many decisions attempting to clarify and explain the Fabre application in conjunction with the set-off statutes, Wells vs. Tallahassee Memorial Regional Medical Center, 695

So. 2d 249 (Fla. 1995), and Gouty vs. Schnepel, 795 So. 2d 959 (Fla. 2001), there is the need for guidance from the Court regarding the correct application of the collateral source statute, section 672.736(3), Florida Statutes (1999) as it applies to comparative negligence cases and Fabre defendant calculations.

The Fifth District in this case followed its prior decision in Assi, supra, and applied the entire $72,966.09 PIP collateral source payments as a set-off against the percentage of the McGraw liability calculated against the economic damages (McGraw's 5% of economic damages multiplied against the jury verdict of $204,766.44, resulting in $10,238.32 against McGraw); the Fifth District then found no economic damages awarded to Carr. In essence the Fifth District took the entire collateral source payments and used it as a set-off against the mathematical comparative negligence calculations without any reduction, resulting in a zero award for economic damages.

In direct contrast, the First District in Norman, supra, and Fourth District in Langel, supra, would first reduce the set-off amount by Carr's comparative negligence, and then that amount would be used to reduce the economic damages, which would then be multiplied by McGraw's comparative negligence, resulting in an economic damages award in favor of Carr in the amount of $7,502.09. The economic damages of $7,502.09, plus the non-economic damages of $8,000, would then result in a final

judgment of $15,502.09 in favor of Carr.

However, this case involves a huge Fabre defendant reduction of 70%, which should also be part of the equation for reducing the collateral source...just like the percentage of comparative negligence. Therefore, if the Court were to reduce the collateral source payments by the comparative fault percentage of 25%, plus the Fabre percentage of 70%, then McGraw's liability would be: collateral source ($72,966.09) multiplied by 95% (Carr and Brock), resulting in $69,317.78, which then would equate to a net collateral source of $3,648.30 minus the economic damages of $204,766.04, resulting in a reduced jury verdict for economic damages of $201,117.74. The reduced jury verdict of $201,117.74 would then be multiplied by McGraw's 5% comparative fault resulting in an award of $10,055.88 to Carr for economic damages.

The economic damages of $10,055.88 would then be added to $8,000 non-economic damages, resulting in a judgment of $18,055.88.

CONCLUSION

This court has discretionary jurisdiction to review the decision below, and the Court should exercise that jurisdiction to consider the merits of the Petitioners' argument. The decision of the Fifth District Court of Appeal in the instant cause is in express and direct conflict with the decision of the First District Court of Appeal in Norman vs. Farrow, 832 So. 2d 158 (Fla. 1st DCA 2002), to which this Court has already granted jurisdiction in Norman vs. Farrow, 847 So. 2d 978 (Fla. 2003). This Court should exercise that jurisdiction here and harmonize the law of Florida on these issues.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via regular U.S. Mail to: Francis J. Milon, Obringer, DeCandio, & Oosting, P.A.,12 East Bay Street, Jacksonville, Florida 32202, this _____day of January, 2004.

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I HEREBY CERTIFY that this document complies with the font standards required by Florida Rule of Appellate Procedure 9.210 for computer-generated documents this _____ day of January, 2004.

_____

Stephen C. Bullock