SUPREME COURT OF FLORIDA

FAITH CARR HIBBARD, ET AL,

Petitioners,

vs.

MICHAEL McGRAW, ET AL.,

Respondents.

CASE NO.: SC04-7
5th DCA Case No. 5D02-2154
L.T. No. CA–128

ON APPEAL FROM THE FLORIDA
FIFTH DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONERS

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PRELIMINARY STATEMENT

Petitioners, Faith Hibbard, individually, and as mother and guardian (i.e., power of attorney) over Amanda K. Carr, shall be referred to as “Amanda”. Respondents, Michael McGraw and Dual, Incorporated, shall be referred to as “McGraw”. The record on appeal shall be referred to as (R. Vol. 1, p.__); the trial transcript shall be referred to as (T.T., p._); and the appendix shall be referred to as (App., p.__). Excerpts from the depositions will be referred to as: (deposition, p. _____).

Respondents' Answer Brief shall be referred to as: ("Answer Brief, p. ____").

STATEMENT OF THE CASE AND OF THE FACTS

The Fifth District Court of Appeal found two (2) issues involving error: (1) the Proposal for Settlement was found to be ambiguous and unenforceable, and the calculation of set-offs prior to entry of Judgment were not proper. Hibbard vs. McGraw, 862 So. 2d 816 (Fla. 5th DCA 2003). This Court accepted jurisdiction notwithstanding this Court's decision in Norman v. Farrow, 880 So. 2d 557 (Fla. 2004). Respondents believe that this Court's decision in Norman resolved the conflict. (Answer Brief, p. 2). Petitioners believe that since this Court accepted jurisdiction, all of the issues addressed in Petitioners' Initial Brief are worthy of judicial review. Given the limited jurisdiction of the Supreme Court to review issues raised in the lower Courts, this Court should seize the opportunity to consider these other important appellate issues because of the tremendous impact it would have on lower court decisions involving: the seat belt defense; Fabre defense; and collateral set-offs. Trial lawyers, trial judges, and lower appellate courts are in need of additional guidance from this Court to help perfect the delivery of justice in our State.

The statement of the facts outlined in Petitioners' Amended

Initial Brief are reincorporated herein. (Initial Brief, pp. 1-17). There are several important factual distinctions that deserve further focus.

Brock and Amanda were traveling east on Fruit Cove Woods Drive behind McGraw as they approached the side road of Pitch Pine Avenue. (R. Vol. I, pp. 1-3). Brock went to pass McGraw who was traveling too slow. (R. Vol. I, pp. 1-3). As the two (2) vehicles were almost side by side McGraw, without any warning, turned his vehicle left directly into the pathway of Brock who was occupying the passing lane. (T.T., pp. 45; 93-96; 133-134). There was no evidence introduced to show whether the roads were county maintained or state maintained.[1] Brock and Amanda testified McGraw never turned on his left turn signal. (T.T., Vol. I, pp. 45; 93-96; 133-134). Likewise, McGraw and his passenger both testified they could not recall the left turn signal being turned on. (T.T., Vol. I, p. 134; Vol. IV, p. 413-414; Vol. VI, p. 530).

As Brock veered left, he applied his brakes causing 30 feet of skid marks, confirming a deceleration. (T.T., Vol. VI, p. 495). Brock left the shoulder and struck a pine tree located several feet off the shoulder. The pick-up truck partially

[1]This factual issue is important because it affected the jury instructions on speed.

flipped onto its side. In the course of that rollover, Brock landed on top of Amanda, probably striking her on her left hip causing the shattered pelvis. (T.T., Vol. I, pp. 68-70).

Contrary to the contention asserted by the Respondents, competent expert testimony regarding seat belts and body mechanics were not presented, which is the crux of the appellate issues herein. (Answer Brief, p. 5). Keifer should have never been allowed to testify because: (1) he did not inspect the Brock vehicle; (2) when his associate initially examined the seat belt, the mechanism would not operate (T.T., Vol. V, pp. 466-467); and (3) Keifer did not examine all the medical testimony regarding the nature of Amanda's injuries. (T.T., Vol. V, p. 478).

Amanda had no injury to her chest, nor bruising on her abdomen. (T.T., Vol. VI, p. 468). Nor was there any evidence of injuries to Brock's chest or abdomen. (T.T., Vol. V, p. 495). Although both Amanda and Brock struck the windshield, Keifer testified that the starring effect on the windshield was evidence of only a ten (10) mph collision. (T.T., Vol. V, p. 495).

Most startling is Keifer's admission that the location of the starring on the windshield means she would have struck the windshield while she was over the dashboard. (T.T., Vol. V, p.

505).

Dr. DiPasquale testified that the anatomy of Amanda's injury was from "a lateral compression." (DiPasquale deposition, pp. 14-17; T.T., Vol. III, p. 227). The treating physician found the fracture to the pelvis was caused by a lateral impact. (T.T., Vol. II, p. 171; DiPasquale deposition, pp. 14-17; T.T., Vol. III, p. 227).

The statement made by Respondents on page 6 of their Brief that: "Mr. Keifer personally inspected the seat belt to determine that it was functional" (T.T., Vol. V, p.447) is simply taken out of context. (T.T., Vol. V, pp. 466-467).

Respondents have mischaracterized the trial testimony of Dr. Samuel G. Agnew, M.D. (Answer Brief, pp. 8-9). Once again, Respondents are attempting to use Amanda's broken front superior ramus bone in her pelvis in their attempt to persuade this Court, like the jury, there was a frontal impact. Again, the broken bone in the front of the pelvis does not equate to a frontal impact. Structurally, the front superior ramus bone is located in the lower pubic area of a woman's body which really cannot even come into contact with a dashboard, or anything else, if the body is tilted forward so the head can strike the windshield. Dr. Agnew, who bolted Amanda's pelvis together the night of her accident, confirmed (.T.T., Vol. II, p. 171)

that her injury pattern and fatigue pattern about her pelvis was consistent with that from a blow from the left side.

SUMMARY OF THE ARGUMENT

The Fifth District in the instant case incorrectly applied the collateral source set-off by following the method set forth in Assi vs. Florida Auto Auction of Orlando, 717 So. 2d 588 (Fla. 5th DCA 1998)rather than the method of calculation set forth by this Court in Norman vs. Farrow, 832 So. 2d 158 (Fla. 1st DCA 2002), approved, 880 So. 2d 557 (Fla. 2004). This case presents a further issue not present in Norman vs. Farrow: the impact on the collateral source set-offs of the presence of a Fabre entity. The set-off for settlement with the Fabre entity should be allocated between the economic and non-economic elements in accordance with the jury's allocation, and both the resulting amount and the amount of the PIP set-offs subtracted from the jury's award of economic damages in order to reach the economic damage liability of the Respondents. Alternatively, the Court should reduce the collateral source payments by the comparative fault percentage, plus the Fabre percentage, then subtract this amount from the jury's economic damage award, then apply the applicable percentage of fault to reach the amount of the economic damages to be included in the judgment.

The decision below erroneously applied the seat belt defense

by including the non-party driver's failure to use his own seat belt as part of the comparative fault to be attributed to him, and thus to further reduce Amanda's recovery - even though Respondents did not plead such a theory and specifically disavowed it during the trial. Because of the error in allowing the speculative testimony on failure to wear a seat belt, the jury in essence addressed the non-party driver's failure to wear his seat belt as a part of his Fabre comparative negligence. The lower court's error in allowing the jury to consider this unplead theory likely led to jury confusion and an improper result. There was also no competent evidence to establish any causal connection between the non-use of a seat belt and Amanda's injuries.

The lower tribunal erred in not granting the motion for new trial, since the overwhelming weight of the evidence demonstrated that the jury's allocation of only 5% of the fault to Defendants and 70% to the driver was not a decision that reasonable persons could make in this case.

Finally, the lower tribunal erred in instructing the jury that the violation of several Florida Statutes could be considered by them as evidence of negligence, since the evidence adduced at trial clearly demonstrated that none of the statutes had, in fact, been violated.

ARGUMENT

I. Entry of the Final Judgment Was Not Correct.

A. **Standard of Review**: The standard of review for a question of law is de novo. Richey vs. Hurst, 798 So. 2d 841 (Fla. 5th DCA 2001). Respondents contend that the Appellate Court held and the Petitioners have conceded that no set-off for the Brock settlement was applicable is not entirely accurate. Rather, Petitioners contend that the Respondents are not entitled to any set-off for the Brock settlement as to the entire verdict, rather, the set-off should only be applied against the economic damage award amount. The Fifth District erred because it deducted the full amount of the Brock settlement as a collateral source set-off from the economic damage liability of the Respondents, resulting in an award of only $8,000 in non-economic damages.

Once again, in Norman vs. Farrow, supra, this Court set forth the correct method of approaching the set-off issue where no Fabre parties are involved. Applying that methodology to the instant case, the total economic damages of $204,766 are to be reduced by the offset amount of $72,966.09, resulting in a figure of $131,799.91. Adding the non-economic damages of $160,000 yields a total amount of $291,799.91. Multiplying that figure by the Defendants' 5% liability percentage yields a

judgment amount of $14,590.

Unlike the present case, Norman vs. Farrow did not involve a Fabre defendant. In Norman, the defendant was found 10% at fault and plaintiff 90% at fault. Here, in contrast, Plaintiff was found 25% at fault, Defendants 5% at fault, and the non-party (Brock) 70% at fault.

In accordance with Wells vs. Tallahassee Memorial Regional Medical Center, Inc., 659 So. 2d 249 (Fla. 1995), the Court has discussed some of the issues of set-offs, Fabre defenses, and comparative negligence in assessing both economic and non-economic damages set forth by a jury. The fairest solution is an allocation of settlement amounts based on the jury verdict. Settlement proceeds should be divided between economic and non-economic damages in the same proportion as the jury award. Collateral sources (PIP/collateral insurance) should also be considered as an additional set-off, but only as to economic damages as set forth in Fabre vs. Marin, 623 So. 2d 1182 (Fla. 1993). With regard to the percentage of fault against the defendants, that percentage should be allocated only against the non-economic damages. Applying Wells and Fabre, the jury verdict in this case should have been reduced to a Final Judgment in the amount of $83,663.91 as explained in the Initial Brief.

Since the Supreme Court created the Fabre defense, there are many legal questions that remain unanswered, which does cause confusion in the trial courts. (See Fabre vs. Marin, 623 So. 2d 1182 (Fla. 1993)). Further, not all of these issues were addressed by this Court in Norman, supra.

This case is further convoluted because the trial court erred in not granting the Motion in Limine concerning the seat belt issue and did not give proper jury instructions on Brock's negligence. At first blush, it would appear that possibly something is wrong with the legal maze of Fabre, offsets, collateral sources, and joint and several liability that results in a plaintiff being awarded by the jury damages of $365,766 yet receiving only $18,238.32, i.e., .042%.

Consequently, this case does present the opportunity for this Court to address and resolve the proper application and the interaction of set-offs, collateral sources, and Fabre defendants for the purpose of providing further guidance to the bench and bar in the state of Florida.

II. The Seat Belt Issue Should Not Have Been Submitted.

A. **Standard of Review:** The decision to give or withhold a

particular jury instruction is "abuse of discretion". See Barbour vs. Brinker Florida, Inc., 801 So. 2d 953 (Fla. 5th DCA

2001). In considering the Motion for Directed Verdict, the Court is required to evaluate the evidence in the light most favorable to the non-moving party and indulge every reasonable inference in the non-movant's favor. Tenny vs. Allen, 858 So. 2d 1192 (Fla. 5th DCA 2003).

Respondents contend that the pick-up truck struck a tree and that Amanda struck her head on the windshield. However, these facts alone should not create a basis upon which the jury was to consider Amanda's failure to wear a seat belt may have caused injuries to her pelvis. The trial court was faced with pure speculative testimony regarding a causal relationship between Amanda's lack of a seat belt and her injuries. The facts are: Brock began passing McGraw and McGraw turned left into the occupied passing lane causing Brock to turn further left to avoid the collision. Brock applied his brakes resulting in thirty (30) feet of skid marks, confirming a deceleration until his vehicle struck a pine tree. A starring effect on the windshield revealed the speed of the vehicle at the time of impact was ten (10) mph. Amanda had no injuries to her chest, nor bruising on her abdomen. No evidence of injuries to Brock's chest or abdomen. Keifer suggested that in order for Amanda's head to hit the windshield she would have been over the dashboard.

The medical testimony confirmed there was no frontal impact of Amanda's pelvis to the dashboard. Dr. DiPasquale testified Amanda's injuries were from a "lateral compression". The treating physician found the fracture to the pelvis was caused by a lateral impact. Respondents are incorrect regarding their interpretation of Dr. Agnew's opinions, he stated that the injury pattern and fatigue pattern about her pelvis was consistent with that from a blow from the left side.

Once again, Respondents have attempted to confuse this Court, as well as the jury, that there was a frontal impact to her pelvis. There is a bone in the front of her pelvis that was broken, but that was not from a frontal impact. The bone breaks in the front because of compression from the side and that was adequately explained by Dr. DiPasquale and Dr. Agnew. It is only Campbell, Respondents' IME doctor, who examined Amanda for less than fifteen (15) minutes, reviewed only a few of her medical records, none of which included x-rays, none of which included MRI findings, none of which included any EMGs, who then testified that he did not know the dimensions of the dashboard, nor the distance between the dashboard and the seat Amanda was sitting in, nor the exact location of the seat which she was positioned in, nor the rotation of her pelvis at the time of the collision. Yet it was Campbell who said, "I would suspect she

probably hit the dashboard", and then later on in his same testimony stated, "However, she could have struck the side door..."..."I mean, the issue of who shot cock robin doesn't seem to be, you know, important...". Keifer never read the doctor's deposition regarding Amanda's injuries, did not know what part of her body was injured, never inspected the pick-up truck, and admitted that Amanda could very well have been over the dashboard (i.e., not hitting the dashboard).

Again, this testimony was purely speculative, based on conjecture, and the Amanda seat belt defense should have never been submitted to the jury. See State Farm Mutual Automobile Insurance Co. vs. Smith, 565 So. 2d 751 (Fla. 5th DCA 1990); Houghton vs. Bond, 680 So. 2d 514, 523 (Fla. 1st DCA 1996), review denied, 682 So. 2d 1099 (Fla. 1996); and Zurline vs. Levesque, 642 So. 2d 1169 (Fla. 4th DCA 1994). See State Farm Mutual Automobile Insurance Company vs. Penland, 668 So. 2d 200 (Fla. 4th DCA 1995).

The greater weight of the evidence clearly showed that Brock's fall against Amanda caused her pelvis to shatter. As the vehicle hit the pine tree turning on its side, Brock fell from the driver's side of the truck crashing down onto the side of Amanda. Again, it was not Amanda's failure to wear her seat belt that caused her injuries, rather, it was Brock's failure to

wear his seat belt resulting in the "second collision". Brock's failure to wear his seat belt was not part of the Fabre defense, and as a result of this confusion, these issues should have either never been presented to the jury or only presented to the jury with proper instructions.

III. The Trial Court Erred in Not Granting a New Trial.

A. **Standard of Review:** Whether the trial court abused its discretion in denying the motion for new trial; if reasonable persons could differ as to the propriety of the trial court's action, there is no abuse of discretion. See Reid vs. Medical and Professional Management Consultants, 744 So. 2d 1116 (Fla. 1st DCA 1999). Petitioners contend that reasonable persons could not differ on these issues and the overwhelming evidence in this record shows that McGraw violated F. S. 316.155 by failing to signal prior to entering the occupied lane of travel by Brock. It is not just a case of reasonable people having a differing view, rather, it was the overwhelming evidence in the case. Brock and Amanda both testified they saw no left turn signal by McGraw. McGraw's passenger testified he had no recollection of McGraw turning on his left signal. McGraw testified he did not recall turning on the left turn signal. Therefore, a jury of reasonable persons could only conclude from this type of overwhelming evidence that McGraw negligently turned left in

violation of F. S. § 316.155 causing this accident.

Respondents have ignored the argument that the greater weight of the evidence clearly showed that McGraw began his left-hand turn into a passing lane that had already been occupied by Brock. Florida law is clear that once a passing lane is occupied, then that person has the right-of-way. F. S. § 316.083. Undisputed, McGraw turned into a lane that had been occupied. A directed verdict should have been entered against McGraw for violating Florida Statute § 316.083.

Respondents argue that assuming arguendo McGraw was negligent, there was evidence that Brock was proceeding at an excessive speed. This argument needs analysis. What possibly could the phrase "excessive speed" mean from this record? Even if one assumes Brock was traveling at 40 mph, the evidence revealed there were no posted speed signs between State Road 13 and the site of the accident. State Road 13's posted speed sign was 45 mph. If anything, the speed limit would have continued to be 45 mph until reduced and there is absolutely no evidence in the record anywhere that Brock was exceeding 45 mph at the time of the accident. More importantly, the overwhelming evidence is that given thirty (30) feet of skid marks with a 10 mph impact against the tree, mathematical calculations illustrate that Brock could not have been driving in excess of 30 mph. Consequently, the jury could not conclude from this

record there was “excessive speed” on the part of Brock and reasonable people would not differ on this issue. A directed verdict should have been granted.

IV. Certain Jury Instructions Were Improper.

A. **Standard of review:** To give or withhold a particular jury

instruction is that of abuse of discretion. See Barbour vs. Brinker Florida, Inc., 801 So. 2d 953 (Fla. 5th DCA 2001).

Petitioners are complaining that not only should the four (4) traffic violation statutes not been submitted to the jury, but it was Respondents’ use of all four (4) traffic statutes that overwhelmed the jury into believing Brock “must have” been negligent. In other words, it was the cumulative effect from the trial judge in reading all the statutes that improperly influenced the jury.

Once again, F. S. § 316.614(5) is the seat belt law and it should not have been read to the jury.

The trial court should not have instructed the jury regarding F. S. § 316.185 on “special hazards” since there was none in this case. Further, the unlawful speed instruction, F. S. § 316.183, should also not have been given. Respondents continue to use the adjective “excessive speed”, when there was no excessive speed since under any scenario Brock’s vehicle would have been less than the posted 45 mph. Respondents’ boot

strap argument that once evidence is presented that the vehicle was driven at an “excessive speed”, then the instruction on unlawful speed was proper. Again, there was no evidence anywhere that driving either 30 mph 40 mph was “excessive”. Given the overwhelming evidence in this case, these multiple jury instructions should not have been given.

CONCLUSION

Petitioners sought review based on a conflict among the District Courts regarding the proper method for deducting collateral source benefits and the ultimate calculation of damages. Norman did not answer the Fabre issues. In resolving that issue, the Court should also resolve the seat belt issue providing the bench and bar with further guidance

For all the reasons set forth above and those contained in the Initial Brief, the Final Judgment in this case should be reversed and the case remanded for new trial or remand for the entry of a new Final Judgment correctly calculating the collateral source offset.

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, Esquire and Harris Brown, Esquire, Brown, Obringer, DeCandio & Oosting, P.A., 12 East Bay Street, Jacksonville, FL 32202, this _____ day of December, 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.

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