IN THE SUPREME COURT OF THE STATE OF FLORIDA
CASE NO. SC05-2024

WASTE MANAGEMENT, INC.,	*
	*
Petitioner,	*
vs.	*
	*
ROLANDO MORA & MAURA MORA,	*
	*
Respondents	*
	*

RESPONDENTS' ANSWER BRIEF

ARTHUR J. MORBURGER
Attorney for Respondents
Suite 404 19 West Flagler Street
Miami, FL 33130
Tel. No. (305) 374-3373
Fla. Bar No. 157287

MICHAEL P. WEISBERG
Attorney for Respondents
1925 Brickell Avenue Suite D301
Miami, FL 33129
Tel. No. (305) 854-0996
Fla. Bar No. 106375

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STATEMENT OF THE CASE AND OF THE FACTS

Rolando Mora and his wife Maura Mora, as Plaintiffs, sued Waste Management, Inc., as Defendant, for damages. The complaint alleged that Rolando Mora sustained personal injury as a proximate result of a truck accident and demanded trial by jury.

The case proceeded to trial and, on March 17, 2004, the jury returned a verdict, determining that Plaintiff Rolando Mora was 26% at fault, that Defendant Waste Management, the owner of the truck, was 24% at fault, that Rolando Mora's past medical expenses and loss of earnings was $20,000, that his future medical expenses and loss of earnings was $22,000, but that he sustained no damages with regard to pain and suffering, past or future. (R: 182-186)

On Monday, March 29, 2004, the Moras moved for a new trial (R: 187) and later supplemented that motion with a supporting memorandum of law (R: 205). In that motion, in that memorandum, and at the ensuing hearing of that motion, the Moras limited their request for a new trial just to the issue of pain and suffering, past and future (R: 187-189; R: 210; TR 18, lines 13-20). The Moras pointed out that the jury's award of damages just for past and future medicals and loss of earnings was contrary to the evidence and to the manifest weight of the evidence because it was unaccompanied by any award for past and future pain and suffering.

After hearing argument on that issue, the trial court announced an additur "of $5,000 in past pain and suffering and $5,000 in future pain and suffering.'" (TR 15, lines 12-15; TR 22, lines 21-22) The trial court then solicited argument as to whether a plaintiff has the "option" of accepting the additur in lieu of a new trial or rejecting the additur and instead opting for a new trial. (TR 15, lines 16-25) Plaintiffs' attorneys, Michael Weisberg and Anthony Brown, argued that a plaintiff is entitled to that option, citing *Brant v. Dollar Rent A Car Systems, Inc.*, 869 So.2d 767 (Fla. 4th DCA 2004). (TR 13, lines 17 to 14, line 2; TR 20, line 23 to TR 21, line 6) The following exchange ensued:

> " MR. BROWN: There was no motion for an additur by the plaintiff, only a motion for new trial by the plaintiff.
> THE COURT: But here you asked for an additur?
> MR. WEISBERG: Who has? We have not.
> THE COURT: You haven't?
> MR. WEISBERG: No, no.
> THE COURT: So you don't want an additur.
> MR. WEISBERG: We want a new trial."

(TR 21, line 24 to TR 22, line 8) Defense counsel cited §§ 768.043 and 768.74, Fla. Stat. and argued that only Defendant had such an option with regard to an additur. (TR 17, lines 4-5; TR 18, lines 21-22; TR 19, lines 17-22; TR 22, line 13; TR 20, lines 4-8)

The court embraced defense counsel's argument, granted the aforementioned

additur, subject only to Defendant's option to proceed instead with a new trial. (TR 22, lines 20-25) Defense counsel thereupon announced to the court that Defendant accepted the additur and asked to have a judgment entered that incorporated that additur – in the total amount of $12,480[1]. (TR 23, lines 7-20) On May 17, 2004, an order was entered that included a judgment for damages in the amount of $12,480 and a judgment for costs in the amount of $4,592.80. (R: 217) That order also recited that "plaintiffs' motion for new trial is denied." On May 20, 2004, Plaintiffs further memorialized their rejection of the additur in a "Notice of Refusal to Accept Additur" (R: 221) and moved for reconsideration in regard thereto (R: 219). That motion was denied. (R: 218) Plaintiffs' Notice of Appeal followed on June 11, 2004. (R: 223)

The District Court of Appeal, Fourth District, reversed, holding that, since Plaintiffs timely objected to the additur, they were entitled to a new trial on the issue of damages and the denial of that right was error. *Mora v. Waste Management, Inc.*, 911 So.2d 1251 (Fla. 4th DCA 2005). The Fourth District certified its decision as being in conflict with that of the Second District in *Beyer v. Leonard*, 711 So.2d 568 (Fla. 2nd DCA 1997).

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[1] That $12,480 total was = [$42,000 (*per* verdict) + $10,000 (additur)] x 24%

SUMMARY OF ARGUMENT

The single case that the Fourth District certified as conflict, *Beyer v. Leonard,* 711 So.2d 568 (Fla. 2nd DCA 1997), conflicts not only with *Mora v. Waste Management, Inc.*, 911 So.2d 1251 (Fla. 4th DCA 2005) but also with the other Florida cases that have addressed the question of whether an additur can foreclose a plaintiff from opting instead for a new trial on his or her unliquidated damage claim. Those cases have uniformly answered that question in the negative, holding that an additur cannot be invoked to preempt an objecting plaintiff's right, under Art. I, § 22, Fla. Const., to jury trial. *Sarvis v. Folsom*, 114 So.2d 490, 492-493 (Fla. 1st DCA 1959); *Bennett v. Jacksonville Expressway Authority*, 131 So.2d 740, 744 (Fla. 1961) (citing *Sarvis*); *Reinhart v. Seaboard Coast Line R. Co.*, 472 So.2d 511 (Fla. 2nd DCA 1970), *rev. denied*, 480 So.2d 1295 (Fla. 1985).

In construing the additur provision included in § 768.043, Fla. Stat., Art. I, § 22, and the aforementioned case precedents militate against any such preemption.

The first rule of statutory construction to be considered is that an unconstitutional construction of a statute is to be avoided. As applied to § 768.043, a construction that would treat an additur as preempting an objecting plaintiff's entitlement to a jury determination should, in light of the aforementioned Florida case precedent, be avoided.

Any such a "preemptive" construction would also run afoul of the second rule of statutory construction, that, in enacting new laws, the Legislature is presumed to be aware of prior Florida case law, that in this case includes the Florida case precedent treating any such preemption as unconstitutional.

Those rules of construction are readily reconciled with § 768.043's reference to "the party adversely affected by the additur," as being entitled to reject that additur and proceed with a new trial. A plaintiff who is dissatisfied with the amount of an additur and wishes instead a new trial on damages is just such a party adversely affected by the additur. *ITT Hartford Insurance Co. of the Southeast v. Owens*, 816 So.2d 572 (Fla. 2002) has itself denominated that party as "a complaining party." Defendant Waste Management is not at all complaining about the additur. To the contrary, it has agreed to it. The only parties who are complaining are the Moras and they are the parties adversely affected by the additur.

The Fourth District therefore correctly reversed the trial court's disallowance of the Moras' rejection of the additur.

ARGUMENT

I. CONFLICTING WITH *BEYER* IS THE BODY OF FLORIDA CASE LAW UNIFORMLY HOLDING THAT A PLAINTIFF'S CONSTITUTIONAL RIGHT TO TRIAL BY JURY WOULD BE VIOLATED BY AN UNLIQUIDATED DAMAGE ADDITUR THAT FORECLOSES PLAIN-TIFF FROM OPTING INSTEAD TO PROCEED WITH A NEW TRIAL

Petitioner's Initial Brief, at p. 8, makes only token reference to the constitutional-right-to-jury-trial issue, that *Mora v. Waste Management, Inc.*, 911 So.2d 1251 (Fla. 4th DCA 2005) assigned as one of its two "rationales." Petitioner Waste Management acknowledges the references to that issue in *Brant v. Dollar Rent A Car Systems, Inc.*, 869 So.2d 767, 768 (Fla. 4th DCA 2004) and in *ITT Hartford Insurance Co. of the Southeast v. Owens*, 816 So.2d 572 (Fla. 2002), but then summarily dismisses the issue simply by stating that "constitutionality is not an issue in this case." To the contrary, to construe § 768.043(1), Fla. Stat., as authorizing a trial judge to impose an additur in regard to a non-consenting plaintiffs' unliquidated damage claim would bring that statute into conflict with that plaintiffs' right under Art. I, § 22, Fla. Const.[2] to have his or her damages determined by

[2] Art. I, § 22, Fla. Const. provides that "the right of trial by jury shall be secured to all and remain inviolate forever."

a jury, not by a trial judge.[3] In that same regard, *Mora v. Waste Management, Inc.*, 911 So.2d 1251 (Fla. 4th DCA 2005), takes note of *Brant*'s "rationale" that any such statutory construction would be "constitutionally dubious." *Brant*, 869 So.2d at769, quoted *Sarvis v. Folsom*, 114 So.2d 490, 492-493 (Fla. 1st DCA 1959), that in turn held:

> Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess--in that sense that it has been found by the jury--and that the remittitur has the effect of merely lopping off an excrescence. But, where the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict.... To so hold is obviously to compel the plaintiff to forego his constitutional right to the verdict of a jury and accept 'an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess.'
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> * * *
>
> There is no stronger precept in the Florida Constitution than that which provides that 'the right of trial by jury shall be secured to all and remain inviolate forever.' Dec. of Rights, Sec. 3, F.S.A. A similar provision is found in the Constitution of the United States and that of most states, including California, from which jurisdiction we have cited authority in support of our conclusions. We hold, in line with what we consider to be the better rule and the weight of authority, that in actions at law involving controverted and unliquidated damages courts are without power to require a party to consent to an additur as a condition to refusal to grant a new trial. The attempted exercise of such power is not to be confused with the power

[3] That issue is an issue of law and as such is subject to *de novo* review.

> of the trial court to correct obvious mathematical errors of the jury when recognized as such by all parties to the litigation, e. g., where in a condemnation proceeding the jury verdict is for a stated amount per acre for a specified acreage and the total award reflects incorrect multiplication.

Sarvis cited *inter alia* like holdings in *Dimick v. Schiedt*, 293 U.S. 474, 482 (1935) and *Dorsey v. Barba*, 226 P.2d 677, 688 (Cal. App. Ct. 1951). Just as in *Sarvis*, *Brant*, *Dorsey* and *Dimick*, so in *Shanahan v. Boston*, 193 Mass. 412, 79 N. E. 751 (1907) and *Kuebler v. Roberts*, 138 Pa.Super. 208, 10 A.2d 862 (1940), the preemption of an objecting plaintiff's right to a new trial by an additur to an unliquidated-damage jury award was held to violate the plaintiff's constitutional right to a trial by jury.

Sarvis has been cited with approval by the Florida Supreme Court in *Bennett v. Jacksonville Expressway Authority*, 131 So.2d 740, 744 (Fla. 1961), as follows:

> "Although we have referred to the additur ordered by the trial judge as indicating the extent to which he considered the verdict unjust, we do not recognize his authority to effectuate an increase in the verdict of the jury. See *Sarvis v. Folsom*, Fla.App., 114 So.2d 490 ..."

And *Sarvis* and *Bennett* have been cited with approval and adhered to in *Reinhart v. Seaboard Coast Line R. Co.*, 472 So.2d 511 (Fla. 2nd DCA 1970), *rev. denied*, 480 So.2d 1295 (Fla. 1985), as follows:

> Although we agree that the jury's verdict was grossly inadequate, we find the trial court had no authority to order an additur in lieu of a new

> trial. *Bennett v. Jacksonville Expressway Authority*, 131 So.2d 740 (Fla.1961); *Meana v. St. Petersburg Kennel Club, Inc.*, 279 So.2d 329 (Fla. 2d DCA 1973); *Sarvis v. Folsom*, 114 So.2d 490 (Fla. 1st DCA 1959). [FN1] We, therefore, reverse the judgment and remand for yet another new trial, this time on the issue of damages only.
> FN1. Despite appellees' argument to the contrary, the party for whose "benefit" the additur was ordered may appeal that order. See, e.g., *Meana* and *Sarvis*. Further, although appellant failed to object to the trial court's additur, the effect of the order of additur, rather than a new trial, would be to deny appellant her right to a jury trial, which is fundamental error. See, e.g., *Sarvis*, 114 So.2d at 492. As such, her failure to object did not waive her right to appeal this error. See *Sanford v. Rubin*, 237 So.2d 134.

Reinhart was decided by the same Second District that later reached a contrary result in *Beyer v. Leonard*, 711 So.2d 568 (Fla. 2nd DCA 1997) – that, in turn, conflicts with *Mora v. Waste Management, Inc.*, 911 So.2d 1251 (Fla. 4th DCA 2005).[4]

Sirvas, Bennett, and *Reinhart* are entirely consistent with the statement in *ITT Hartford Insurance Co. of the Southeast v. Owens*, 816 So.2d at 576-577, that § 768.043(1), Fla. Stat. is constitutional, in light of *ITT*'s additional statement that the statute does not preclude either party, as a "complaining party," from rejecting a remittur or additur in favor of a new trial. Indeed, the concurring portion of Chief Justice Wells' separate opinion in *ITT* makes specific reference to *Sirvas, Bennett*,

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[4] *Beyer* did not cite back to either *Reinhart* or *Sarvis* and did not discuss the

Reinhart, and *Dimick.*

II. THE RULE OF STATUTORY CONSTRUCTION, THAT AN UNCONSTITUTIONAL CONSTRUCTION OF A STATUTE SHOULD BE AVOIDED, MILITATES AGAINST A CONSTRUCTION OF § 768.043 THAT WOULD TREAT AN ADDITUR AS PREEMPTING A PLAINTIFF'S ENTITLEMENT TO A JURY DETERMINATION

Brant cited the rule of construction that, whenever possible, an unconstitutional construction of a statute should be avoided.[5] That rule was adhered to in *State v. Giorgetti*, 868 So.2d 512, 518 (Fla. 2004), as follows:

> We are also obligated to construe statutes in a manner that avoids a holding that a statute may be unconstitutional. In *Gray v. Central Florida Lumber Co.*, 104 Fla. 446, 140 So. 320 (1932), this Court listed several canons of construction to be followed in interpreting statutory acts:
>
> (1) On its face every act of the Legislature is presumed to be constitutional; (2) every doubt as to its constitutionality must be resolved in its favor; (3) if the act admits of two interpretations, one of which would lead to its constitutionality and the other to its unconstitutionality, the former rather than the latter must be adopted....

An application of that rule was more recently approved in *Tyne v. Time Warner Entertainment Co., L.P.*, 901 So.2d 802, 805 (Fla. 2005). A corollary to that rule is the rule that "[t]he Legislature will be presumed to have intended a constitutional

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applicable constitutional issues.

[5] The construction to be accorded to § 768.043 is an issue of law subject to

result." *Sandlin v. Criminal Justice Standard & Training Commission*, 531 So.2d 1344, 1346 (Fla. 1988).

III. A SECOND RULE OF STATUTORY CONSTRUCTION, THAT, IN ENACTING NEW LAWS, THE LEGISLATURE IS PRESUMED TO BE AWARE OF PRIOR FLORIDA CASE LAW, FURTHER MILITATES AGAINST ANY CONSTRUCTION OF THE STATUTE THAT WOULD IMPAIR A PLAINTIFF'S RIGHT, ALREADY ESTABLISHED BY PRIOR FLORIDA CASE LAW, TO REJECT AN ADDITUR AND INSTEAD OPT FOR A NEW TRIAL BY JURY

That rule of statutory construction is here augmented by a second rule of statutory construction – that, in enacting new legislation, the Legislature is presumed to have knowledge of prior District Court of Appeal and Florida Supreme Court decisions. *Crescent Miami Center, LLC v. Florida Dept. of Revenue,* 903 So.2d 913, 918 (Fla. 2005). *Crescent* held:

> Florida's well-settled rule of statutory construction [is] that the legislature is presumed to know the existing law when a statute is enacted, including 'judicial decisions on the subject concerning which it subsequently enacts a statute.' " *Wood v. Fraser*, 677 So.2d 15, 18 (Fla. 2d DCA 1996) (quoting *Collins Inv. Co. v. Metro. Dade County*, 164 So.2d 806, 809 (Fla.1964)).

That second rule is here applicable because § 768.043 was enacted in 1977, long after *Sarvis*, *Bennett*, and *Reinhart* were decided.

In light of that prior case law, the Legislature's enactment of § 768.043 is

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de novo review.

presumed to have been with knowledge that Florida Courts had held that an additur could not be employed to defeat a plaintiff's right under Art. I, § 22, Fla. Const. to trial by jury of an unliquidated damage claim. Therefore, the Legislature should not be presumed to have drafted that statute so as to conflict with that case precedent and with that view of the Florida Constitution.

IV. THE STATUTE'S REFERENCE TO "THE PARTY ADVERSELY AFFECTED BY THE ADDITUR" DENOMINATES THE PARTY WHO OBJECTS TO THE AMOUNT THEREOF

Nothing in that statute suggests that the Legislature intended to depart from that case precedent. In that regard, *Mora v. Waste Management, Inc.*, 911 So.2d 1251 (Fla. 4th DCA 2005) expressly reaffirmed *Brant*'s second "rationale" that the statute as worded is entirely consistent with that case precedent. Petitioner Waste Management wrongly argues that the phrase, "the party adversely affected by the ... additur," can refer only to the defendant, who would have to pay the amount of the additur. That argument overlooks the fact that a determination of which party is adversely affected by the additur depends on whether the additur was too much (and thereby adversely affects defendant) or too little (and thereby adversely affects plaintiff) and whether plaintiff's entitlement to a new trial would thereby be

"adversely affected." The phrase, "party adversely affected," is in fact treated by the Florida Supreme Court as synonymous with "the complaining party" in *ITT Hartford Insurance Co. of the Southeast v. Owens*, 816 So.2d at 576-577:

> Defendants next contend that the statute substantially abridges the right to a jury trial. We disagree. The statute clearly provides for a new trial in the event the party adversely affected by the remittitur or additur does not agree with the remittitur or additur. *In other words, the* ***complaining party*** *need not accept the decision of the judge with respect to remittitur or additur. The party may have the matter of damages submitted to another jury*. Defendants' attack on the constitutionality of the statute is without merit. (Italics supplied)

ITT's reasoning is equally applicable to either party who happens to be the "complaining party." In the case at bar, since Waste Management agreed to the additur, the only "complaining parties" were the Moras, who complained that the damage issue should instead be submitted to a jury for determination at a new trial.

These same comments apply with equal force to *Adams v. Wright*, 403 So.2d 391 (Fla. 1981). *Brant*, at 768, likewise cited *Adams* in support of its right-to-jury-trial analysis and, in that regard, cited *Adams* as holding:

> "[S]tatute granting power to order additur did not violate constitutional right to trial by jury because statute expressly required new trial if adverse party did not consent to additur."

Beyer stands alone, at odds with the jurisprudence of Florida. *Beyer*'s

contrary holding may be due to the appellant's failure to raise the constitutional issues or the rules of construction surveyed *ante* as points on appeal in *Beyer*. Neither did *Beyer* allude to any of those issues nor did *Beyer* even refer back to the Second District's contrary *Reinhart* decision, that should have served as precedent for the panel that decided *Beyer*. And *Beyer* predated, and did not have the benefit of, the Supreme Court's analysis in *ITT*.

CONCLUSION

The Fourth District decision here under review should be approved and that of the Second District in *Beyer* should be overruled.

Respectfully submitted,

ARTHUR J. MORBURGER
Attorney for Respondents
Suite 404 19 West Flagler Street
Miami, FL 33130
Tel. No. (305) 374-3373
Fla. Bar No. 157287

MICHAEL P. WEISBERG
Attorney for Respondents
1925 Brickell Avenue Suite D301
Miami, FL 33129
Tel. No. (305) 854-0996
Fla. Bar No. 106375

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished by mail this _____ day of December, 2005, to: Kevin T. Smith 540 N.E. 4th Street Ft. Lauderdale, FL 33301.

_____

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief comports with the font and spacing requirements of Florida Rule of Appellate Procedure 9.210.

_____