SUPREME COURT OF FLORIDA

WASTE MANAGEMENT, INC.	*	
	*	
Appellants	*	**CASE NO.: SC05-2024**
	*	Fourth District Court of Appeal
v.	*	Case No: 4D04-2414
	*	
ROLANDO MORA & MAURA MORA,	*	
	*	
Appellee	*	
	*	

APPEAL FROM FINAL ORDER
OF THE FOURTH DISTRICT COURT OF APPEAL
IN CASE NO. 4D04-2414, JUDGE C.J. STEVENSON

APPELLANT'S INITIAL BRIEF

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STATEMENT OF CASE AND FACTS

This is an automobile negligence action which was tried before a jury for three days. The Honorable David Krathen presided over this trial. The issues of liability, proximate cause and damages were all hotly contested and extensive evidence was submitted in support of the defendant's contention that plaintiff's back condition was pre-existing and degenerative in nature. The jury returned a verdict on liability as follows: 26% negligence on the plaintiff, 50% negligence on plaintiff's employer ("*Fabre*" defendant) and 24 % negligence on the defendant, Waste Management, appellant herein.

The jury awarded $20,000 for past medical bills and lost wages, and $22,000 for future medical bills and lost wages. The jury awarded zero damages for past and future pain and suffering.

Plaintiffs' filed a Motion Seeking a New Trial on the issue of non-economic damages only. Plaintiffs made it clear to the trial court that they were satisfied with the liability verdict and with the verdict as to economic damages.

The trial court decided that the jury's verdict was inadequate based on a line of cases holding that a jury verdict awarding nothing for pain and suffering, but awarding damages for medical expenses is generally considered inadequate. Appellant does not dispute that conclusion.

The trial court then exercised its discretion pursuant to Section 768.043 to cure the aforementioned inadequacy by granting an additur. The additur consisted of an additional award of $5,000 for past non-economic damages and $5,000 for future non-economic damages. The trial court then extended the option of accepting or rejecting the additur to the party adversely affected by the additur, namely, the defendant, Waste Management, who would be required to pay additional monies to the plaintiffs as the result of the additur.

Counsel for the defendant, Waste Management, immediately accepted the additur, the court molded the additur pursuant to the liability percentages, and entered judgment accordingly.

Plaintiffs took an appeal of that decision to the Fourth District Court of Appeals. That court reversed the decision of the trial court as to the award of an additur and as to the decision to deny plaintiffs' Motion for a New Trial on damages. The Fourth District relied upon the case of Brant v. Dollar Rent A Car Systems, Inc., 869 So.2d 767 (Fla. 4th DCA 2004), but acknowledged that decision was in direct conflict with the case of Beyer v. Leonard, 711 So.2d 568 (Fla. 2d DCA 1997). The Fourth District certified the conflict with that decision.

SUMMARY OF ARGUMENT

The trial court correctly interpreted Section 768.043 Florida Statutes in that it

recognized that it was the responsibility of the court to review the amount of the damage award to determine if it was inadequate and, if so, to award an additur. Furthermore, the trial court followed the letter of the law as set forth in the last sentence of Section 768.043(1) Florida Statutes by giving the defendant, Waste Management, the option of accepting or rejecting the additur, since only Waste Management was the party adversely affected by the granting of an additur.

The Florida Legislature could have easily used the words "If either party . . . " or "If any party . . ." adversely affected does not agree with the additur, the court shall order a new trial on damages. The fact is that the legislature chose not to use those phrases, but rather used the words, "if **the** party adversely affected by such ... additur does not agree . . . " (*emphasis supplied*).

The language of the statute is clear and the courts should not attempt to re-write the statute to reach a conclusion contrary to its plain meaning.

I.
THE STANDARD OF REVIEW IS DE NOVO

The issue before this court is one of statutory construction and de novo review standard applies to such issues. Gordon v. Reiger, 877 So.2d 843 (Fla. 4th DCA 2004).

II.
THE DECISION OF THE TRIAL COURT TO ORDER AN ADDITUR TO CORRECT WHAT IT CONSIDERED TO BE AN INADEQUATE VERDICT WAS WITHIN ITS DISCRETION PURSUANT TO SECTION 768.043, AND HAVING PROPERLY GRANTED AN ADDITUR, THE TRIAL COURT PROPERLY CONCLUDED THAT THE DEFENDANT, WASTE MANAGEMENT, INC. WAS THE PARTY ADVERSELY AFFECT BY SAID ADDITUR AND GAVE THAT DEFENDANT ALONE, THE OPTION OF ACCEPTING THE ADDITUR, OR SEEKING A NEW TRIAL ON DAMAGES.

The jury in this matter returned a verdict that included an award for past medical bills and lost wages, an award for future medical bills and lost wages, and no award for past or future non-economic damages.

This type of verdict is generally considered to be inadequate. Deklyen v. Truckers World, Inc., 867 So.2d 1264 (Fla. 5th DCA 2004); Stevens v. Mount Vernon Fire Ins. Co., 395 So.2d 1206 (Fla. 3rd DCA 1981). The trial court heard extensive evidence introduced by the defense which called into question the causation of plaintiff's injuries, and the pre-existing nature of those injuries. Plaintiff filed a timely Motion for New Trial on damages, limited solely to the issue of non-economic damages.

The trial court agreed with plaintiff's contention that the verdict was inadequate. The trial court then exercised the discretion conferred upon it by Section 768.043 Florida Statutes, and elected to grant an additur of $5,000 for past non-

economic damages, and $5,000 for future non-economic damages. The trial court then offered the Defendant a period of time to decide whether to accept the additur, or reject it and elect to proceed to a new trial on damages. That decision, which tracks the last sentence of Section 768.043(1) in an exact manner, is the key issue before this court.

The Fourth District Court of Appeals found itself bound by the decision in Brant v. Dollar Rent A Car Systems, Inc., 869 So.2d 767 (Fla. 4th DCA 2004). In Brant, *supra*, the trial court denied the Motion for New Trial, but deferred ruling on the question of additur. The factual issue in Brant was similar to that in the instant case in that the jury awarded damages for past and future medical expenses, but no damages for past or future pain and suffering. The Brant court considered Section 768.043(1) Florida Statutes and the Florida Supreme Court decision in ITT Hartford Insurance Co. of the Southeast v. Owens, 816 So.2d 572 (Fla. 2002) to be controlling on the outcome of the case. In ITT Hartford, *supra*, the Third District had concluded that Section 768.043 Florida Statutes did not require a defendant to be given the option of a new trial when an additur was granted by the trial court. The Supreme Court reversed, holding that Section 768.043 expressly required that the defendant be given an option to reject an additur and have a new trial on damages. The Supreme Court did not hold that the plaintiff should also be given the same option if

they thought the additur was inadequate.

Appellant herein is somewhat confused by the Brant court's reliance on ITT Hartford, given the conclusion that the Brant court reached. The holding in ITT Hartford, *supra*, is completely consistent with appellant's position herein. In the instant matter, the trial court granted an additur to remedy an inadequate verdict and gave the party adversely affected, the defendant, the option of a new trial on damages.

In ITT Hartford, the Supreme Court cited a number of other examples of cases that dealt with the "party adversely affected" clause in Section 768.043(1) and in Section 768.74 which contains the same language. In Born v. Goldstein, 450 So.2d 262, 264 (Fla. 5th DCA 1984) the court held that a trial court may not reduce a jury verdict by ordering a remittitur without permitting the plaintiff to have the option of new trial. In Ellis v. Golconda Corp., 352 So.2d 1221, 1227 (Fla. 1st DCA 1977) the court held that a trial court is not permitted to reduce the verdict of a jury by ordering a remittitur without permitting the plaintiffs to have the option of a new trial.

In Stuart v. Cather Industries, Inc., 327 So.2d 99, 100 (Fla. 4th DCA 1975) the court set aside an order of remittitur which failed to award the plaintiff the alternative of a new trial. In Dura Corp. v. Wallace, 297 So.2d 619 (Fla. 3rd DCA 1974) the court held that a trial judge is not permitted to reduce the verdict of a

jury by ordering a remittitur without permitting the plaintiff to have the option of a new trial.

Finally, the Supreme Court in ITT Hartford, *supra*, cited the case of Doughty v. Insurance Company of North America, 701 So.2d 1225, 1227 (Fla. 4th DCA 1997) which held that in determining the standard applicable to its review of a trial court order granting an additur, that this court's precedent regarding the standard applicable to appellate review of an order granting a remittitur was instructive, there being no difference, so far as we can see, between a remittitur and an additur.

In all of the aforementioned cases cited in ITT Hartford, the trial court granted a remittitur and the appellate court held that the plaintiff must be given the option of a new trial. Appellant has been unable to locate any precedent for the position that a defendant also has the option of rejecting a remittitur. No case has held that a defendant is also a "party adversely affected" by a remittitur.

An argument could be made that a defendant who was unhappy with the amount of a remittitur should also have the option of rejecting the remittitur and have the option of requesting a new trial. Suppose the amount of the reduction is not enough in the mind of the defendant. The court in Doughty, *supra*, held that there is no difference for appellate review of an additur as opposed to a remittitur.

The meaning of the phrase "party adversely affected" was interpreted as being the plaintiff in a remittitur situation, and the defendant in an additur situation, until the Brant decision was rendered. Although the Brant court

considered ITT Hartford

as controlling precedent, there is nothing in that decision that supports their conclusion that a plaintiff is a party adversely affected by an additur. The Brant court also concluded that allowing a trial judge to grant an additur to fix unliquidated damages would introduce constitutional doubts into the statute. Interestingly, the ITT Hartford decision concluded that defendants attack on the constitutionality of Section 768.043 is without merit. Appellant submits that constitutionality is not an issue in this case.

A close look at Section 768.043 Florida Statutes is in order. Sub-Section (3) of that statute states:

> "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."

There can be no question that the Legislature chose to convey discretionary authority to a trial court to review and modify an inadequate verdict. In our case, the jury chose to award zero dollars for past and future pain and suffering. The trial court recognized that award as inadequate, and modified each award to $5,000 via the use

of an additur. The statute specifically conveys the authority to do just that.

Section 768.043(1) states in pertinent part:

> "In any action for the recovery of damages based on personal injury ... arising out of the operation of a motor vehicle ... where the trier of fact determines that liability exists on the part of the defendant and 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 ... 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 ... inadequate, it shall order ... an 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. (*Emphasis supplied*)

In Beyer v. Leonard, 711 So.2d 568 (Fla. 2d DCA 1997) a jury awarded the plaintiff awards for past and future economic damages, and an award for past non-economic damages, but awarded zero damages for future non-economic damages. The Beyer court concluded that zero award for future pain and suffering was inadequate and awarded an additur of $5,000 to the plaintiff. The defendant was given the option of accepting the award or taking a new trial on damages alone. The defendant accepted the additur.

The plaintiff complained that the additur was inadequate and sought a new trial on damages. The Second District analyzed Section 768.043 Florida Statutes and concluded that the party adversely affected by an additur, is the defendant, and that only the defendant had the option of rejecting the additur.

The following quote from the *Beyer* decision parallels the argument appellant advances on this appeal:

> "Where there has been an additur, however, and the liable party is required to pay additional damages, it is that liable party who would be "adversely affected." The Legislature, in its wisdom, did not provide, 'If either party affected by such remittitur or additur does not agree, the court shall order a new trial on the issue of damages only.' **To construe Section 768.043(1) as urged by appellee would be to alter the clear words of that legislative enactment. We are not allowed that liberty.**" (*Emphasis supplied*)

Appellant adopts that precise argument on this appeal. Appellant acknowledges the First District's decision in *Bamford v. Williams* 896 So.2d 779 (Fla. 1st DCA 2004) chose to follow the holding in *Brant* while acknowledging a conflict with the holding in *Beyer*. Appellant respectfully suggests that the courts in *Brant* and *Bamford* have chosen to ignore the clear language of Section 768.043 and that the Court's decision in *Beyer* is the one that best complies with the legislature's intent.

CONCLUSION

Based upon the foregoing legal argument, appellant contends that (a) the trial court properly exercised its discretion to grant an additur to correct what it deemed to be an inadequate verdict; (b) that the trial court correctly interpreted Section

768.043(1) Florida Statutes by identifying defendant as the party adversely affected by an additur, and giving defendant only the option of a new trial; and (c) that the plaintiff did not have the option of rejecting the additur.

As such, appellant asks this Honorable Court to reverse the decision of the Fourth District Court of Appeals and to affirm the decision of the trial court with direction that the previously entered judgment, shall be entered against the defendant, Waste Management, Inc. Furthermore, Appellant requests that the decisions in Grant and Bamford be overruled.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Brief on Jurisdiction was mailed this 2nd day of December, 2005 to: MICHAEL P. WEISBERG, Esquire, Michael P. Weisberg, P.A., Attorneys for Appellee/ Plaintiff, 1925 Brickell Avenue, Suite D-301, Miami, FL 33129; and ARTHUR J. MORBURGER, Esquire, Attorney for Appellee/Plaintiff, 19 West Flagler Street, Suite 404, Miami, Florida 33130.

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.

Respectfully Submitted,

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