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 REPLY BRIEF

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SUMMARY OF ARGUMENT

In the first paragraph of Respondents' Summary of Argument, Respondents make the broad statement that the decision in 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 with other Florida cases that have uniformly answered the question of whether an additur can foreclose a plaintiff from opting instead for a new trial on an unliquidated damage claim. In support of that contention, Respondents cite this court to the following three cases: Sarvis v. Folsom, 114 So.2d 490 (Fla. 1st DCA 1959); Bennett v. Jacksonville Expressway Authority, 131 So.2d 740 (Fla. 1961); and, Reinhart v. Seaboard Coast Line R. Co., 472 So.2d 511 (Fla. 2nd DCA 1985), rev. denied, 480 So.2d 1295 (1985). These three cases provide an interesting historical perspective on the use of additur and remittitur under the common law. Sarvis, and Bennett, *supra* were decided before Section 768.043 Florida Statutes was enacted by the Legislature in 1977. Reinhart, *supra*, was decided in 1985, but did not involve a motor vehicle accident, and thus Section 768.043 Florida Statutes, was not cited in that case and did not apply.

In Sarvis, *supra*, the First District stated:

> ". . . we are without Florida precedent for the proposition that an additur may be imposed on the condition that unless the losing party consents thereto a new trial will be granted."

In Bennett, *supra*, the Court held:

> "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." (Citing to Sarvis, *supra*)

In Reinhart, *supra*, the Second District stated:

> "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.

Appellant takes the position that the cases of Sarvis, Bennett, and Reinhart, *supra*, should not be considered in this Court's decision as the Florida Legislature saw fit in 1977 to enact Section 768.043 Florida Statutes, and give the trial courts the authority to grant additurs, with a rejection option going only to the defendant.

The next argument advanced by Respondents is that Section 768.043 Florida Statutes is unconstitutional and specifically violates Article I, Section 22 of the Florida Constitution. That section of our Constitution states: (in pertinent part)

> "The right to a trial by jury shall be secured
> to all and remain inviolate."

Subsection (3) of Section 768.043 Florida Statutes discusses the legislature's intent in enacting this statute and states:

> "(3) 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 act, 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."

In the foregoing statute, the Legislature has recognized that a jury verdict should only be modified by a trial judge exercising caution and discretion. The same statute gave the trial court below the authority to review verdicts that it deems inadequate or excessive with an eye towards injecting an element of soundness and logic to our judicial system.

This Court is in the unique position of considering the decision of the trial court on post-trial motions, without having the benefit of the actual trial transcript. The learned trial judge below had the benefit of hearing extensive medical and factual evidence challenging the causation and legitimacy of plaintiff's injuries and calling into question whether any significant pain and suffering had any effect on the Plaintiff, or on his ability to work following this accident. After hearing all of this evidence, the jury decided to award zero damages for past and future pain and suffering. The trial court, bound by a line of cases holding that the jury's verdict was inadequate for reasons stated in our Initial Brief, granted an additur. That decision

was not made in a vacuum. The trial court heard the evidence, saw the demeanor

of

the witnesses, and made a well reasoned decision, well within the discretion extended to him by Section 768.043 Florida Statutes.

On Page 5 of his Reply Brief, Respondents cite the case of ITT Hartford Insurance Co. of the Southeast v. Owens, 816 So.2d 572 (Fla. 2002) as standing for the following proposition:

> "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, *supra*, has itself denominated that party as a complaining party." (Quoted from page 5 of Respondents' Answer Brief)

ITT Hartford, *supra*, involves a Plaintiff who was dissatisfied with the amount of a future medical expenses award by a jury. Plaintiff filed post trial motions contending that said award was inadequate. The trial court granted an additur pursuant to Section 768.043 Florida Statute. The defendant insurance company, in this uninsured motorists case, sought to reject the additur and opt for a new trial on damages. The trial court refused, and entered judgment including the additur amount against the defendant. The District Court of Appeals affirmed. The Supreme Court reversed holding that pursuant to Section 768.043 Florida Statues, a defendant presented with an additur by the trial court, must be given the option of a new trial on damages.

On Page 575 of the ITT Hartford, *supra*, decision, this court stated:

> ". . . we conclude that in light of the mandate contained in Section 768.043, Florida Statutes (1977) the trial court abused its discretion in denying ITT Hartford the alternative of a new trial on the disputed element of damages issued under these circumstances. Accordingly, the district court similarly erred in affirming that decision.
>
> Here the Third District's determination that Section768.043 does not require a defendant to be given the option of a new trial when an additur is granted is contrary to the express language of the statute and analogous precedent concerning remittiturs."

The ITT Hartford, *supra*, decision does not contain the proposition advanced by Respondents in their Answer Brief. To the contrary, the holding in ITT Hartford, *supra*, supports the contention of the Appellant that a defendant can reject an additur, and a plaintiff can reject a remittitur, and opt for a new trial. ITT Hartford, *supra*, does not hold that a Plaintiff should have the option of rejecting an additur. Nor do any of the remittitur cases cited on Page 575 of ITT Hartford, *supra* and contained in Appellant's Initial Brief, stand for such a proposition.

Respondents then cite this Court to cases relied upon the Sarvis court in rendering its decision. Those cases are Dimick v. Schiedt, 293 U.S. 474 (1935)*;* Dorsey v. Barba, 226 P. 2d 677 (Cal. App. Ct. 1951); Stranahan v. Boston, 193 Mass 412, 79 N.E. 751 (1907); and Kobler v. Roberts, 138 Pa. Super 208, 10 A. 2d 862 (1940). These cases are all decisions relying upon the common law, or the laws of

other jurisdictions. Appellant takes the position that these cases are of no consequence as the interpretation of Section 768.043 Florida Statutes is the only issue before this Court.

Respondents also contend that following the Beyer court's interpretation of Section 768.043 Florida Statute would be in conflict with Article I, Section 22 of the Florida Constitution. The constitutionality of the Statute has been considered by this Court in ITT Hartford, *supra*, at Page 576 as follows:

> "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. Defendant's attack on the constitutionality of the statute is without merit."

Not only did this Court uphold the constitutionality of 768.043, *supra*, it spoke of the party adversely affected as a singular entity. This court did not say in ITT Hartford, that either party may reject an additur, rather it said defendant has that right.

Furthermore, Respondents, at page 9 of their Answer Brief, refer to Chief Justice Wells' separate opinion in ITT Hartford and point out to this court that his dissent makes reference to the Sarvis, Bennett, Reinhart, and Dimick cases cited herein. A close review of Chief Justice Wells' opinion demonstrates that he used

those cases as a historical reference to the state of Florida law before the enactment of Section 768.043 Florida Statues. His dissent stood for the proposition that statute should be strictly construed, and that a party opting for a new trial on damages must have a new trial as to all elements of damages, not just those elements objected to. Chief Justice Wells' partial dissent does not support Respondents' contentions in any way.

Section III of Respondents' Answer Brief cites this Court to the cases of Crescent Miami Center LLC v. Florida Dept. of Revenue, 903 So.2d 913 (Fla. 2005) as holding that the legislature is presumed to know the existing law when a statute is enacted, including judicial decisions on the subject.

There is no reason to believe that the Legislature was not aware of the decisions in Sarvis, and Bennett, *supra* when they enacted Section 768.043 Florida Statutes. The fact that the Legislature chose to confer authority to trial judges to review jury awards for inadequacy or excessiveness is clearly an indication that the Legislature intended to change the existing body of case law on the subject. No other conclusion is possible. This is the type of "clear expression to the contrary" mentioned in Wood v. Fraser, 677 So.2d 15 (Fla. 2nd DCA 1996); and in Deltona Corp. v. Kipnis, 194 So.2d 295 (Fla. 2nd DCA 1966).

Respondents' argument in Section IV of their Answer Brief basically follows the reasoning in Brant v. Dollar Rent-A-Car Systems, Inc., 869 So.2d 767 (Fla. 4th DCA 2004). That argument is in direct conflict with the decision in Beyer v. Leonard, 711 So.2d 568 (Fla. 2nd DCA 1997).

Respondents' interpretation of the phrase "complaining party" as quoted from ITT Hartford at Page 576 is in line with the Brant decision. Appellant's interpretation of that clause is that the complaining party is the party adversely affected by the additur, namely the defendant that is required to pay more.

The Legislature could have easily used the phrase "either party may reject an additur or remittitur and opt for a new trial on damages." They chose not to do so.

CONCLUSION

The Fourth District decision here under review should be reversed; the trial court's ruling on the post-trial motions and judgment for plaintiff affirmed, the decision in Brant and Bamford overruled and the decision in Beyer adopted as the correct interpretation of Section 768.043 Florida Statutes.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Brief on Jurisdiction was mailed this 29th 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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