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IN THE SUPREME COURT OF FLORIDA

ANAMARIA SANTIAGO,

Petitioner,

v.

MAUNA LOA INVESTMENTS, LLC

Respondent.

Case No.: SC13-2194

L.T. Case Nos. 3D12-1825
10-07498-CA-04

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

PETITIONER'S REPLY BRIEF

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ARGUMENT

Defendant's answer brief should not persuade this Court to affirm the Third District's decision in this case. Instead of addressing the Third District's numerous errors as set forth in Plaintiff's initial brief, Defendant chose to ignore those errors and to re-argue the various points it made in the Third District – arguments the Third District apparently rejected when it based its reversal on a legal ground Defendant had not raised either in the trial court or on appeal.[1] In addition, Defendant clings to the same erroneous notions the Third District did about the alleged merger between the defaulted complaint against Defendant with the Iberia complaint to argue that the judgment was void. By making no serious attempt to justify the Third District's errors as revealed on the face of the Third District's opinion, however, Defendant has conceded those errors in this Court. *Cf. Spencer v. BR Contracting, Inc.*, 935 So. 2d 1289, 1290 n.1 (Fla. 5th DCA 2006) (stating that appellee waived a timeliness argument by failing to raise it below or in the

[1] Although Defendant belatedly argued to the trial court that the complaint was not well pled because the basis for causation as pled (that Plaintiff tripped and fell on a walkway in disrepair) was different from the facts of causation as determined through discovery (that Plaintiff tripped while moving a large statue across the walkway in disrepair which statue fell on Plaintiff and nearly severed her foot as she fell) (A.42), Defendant never argued that Plaintiff's filing of the Iberia complaint caused the defaulted complaint against Defendant to wholly fail to state a cause of action. (A.8; A.9; A.11; A.12; A.18; A.27; A.28; A.29; A.109; A.110.) Thus, Defendant never argued to the trial court or even in the Third District the argument the Third District seized upon. (*See id.*; *See also* R.4:Tab.A. (Appellant's Initial Brief in the Third District)).

answer brief); *Franklin Acceptance Corp. v. Superior Elec. Indust., Inc.*, 167 So. 2d 116, 117 (Fla. 3d DCA 1964) (finding appellees seemed to concede the lower court's error, but argued the court's ruling should be sustained on other grounds).

In essence, Defendant is making a Tipsy-Coachman-like argument by implying that, even if the Third District reversed the final judgment for the wrong reason, the Third District's decision should still be affirmed because Defendant claims it demonstrated that the trial court should have set the default aside because Plaintiff sued the wrong party and the judgment is void to the extent it was based on an unpled theory of causation and allowed Plaintiff to recover certain elements of damages that were not specifically pled. *See* Answer Brief ("AB"), pp. 24-50.[2] These arguments were all fully briefed to the Third District and yet the Third District did not rely upon any of them to reverse the judgment or vacate the default. Rather, the Third District looked outside the four corners of the defaulted complaint and to exhibits *Defendant* attached to one of its many motions to vacate the default to conclude that the defaulted complaint wholly failed to state a cause of action against Defendant. (R.4:395-400.) Nevertheless, the record before this

[2] A large portion of the argument in Defendant's answer brief is contained in footnotes in the statement of facts and argument sections of the brief. Argument made solely in footnotes is not preserved for appellate review. *See St. Mary's Hosp., Inc. v. Sanchioni*, 511 So. 2d 617, 617 (Fla. 4th DCA 1987). Nevertheless, to the extent possible within the page limitation requirements, Plaintiff has responded to some of those improper arguments. Plaintiff's full responses to the Third District are contained in the record at Volume 4; Tab B, Amended Appellee's Answer Brief.

Court, which includes the Third District's full record, is sufficient to allow this Court to resolve these matters directly and without remanding them to the Third District for reconsideration. And, this Court clearly has discretionary jurisdiction to do so if it so chooses. *See Murray v. Regier*, 872 So. 2d 217, 223 n.5 (Fla. 2002). Because these matters were fully briefed and argued in the Third District and also to some degree here, and because a resolution at this stage would promote the interests of judicial economy and avoid delaying justice for the parties any further, this Court should consider Defendant's Tipsy-Coachman-like arguments here rather than remand them to the Third District. *Cf. Chiles v. Phelps*, 714 So. 2d 453, 457 (Fla. 1998) (considering issue for first time on original jurisdiction in the interest of judicial economy and efficient justice).

In seeking a reversal of the judgment here, Defendant attempts to make the following three points: 1) Plaintiff never produced actual evidence (as opposed to statements by counsel) to prove Defendant "owned" the premises on the relevant date (Respondent's Answer Brief ("AB."), p. 24); 2) Plaintiff allegedly conceded that the trial court based its decisions on the conclusion that Defendant's affidavits were legally insufficient and, therefore, that the standard of review is *de novo* (AB, pp. 24-31); and 3) Plaintiff's judgment is void for repugnant allegations, unpled theories of liability or legal conclusions, and unpled damages (AB, pp. 32-50). The underlying premises of Defendant's arguments are simply incorrect.

First, Plaintiff never had any obligation to adduce evidence as to whether Defendant owned, controlled, or maintained the property. Defendant admitted that it did through the validly noticed, entered, and sustained default. (A.3:2; A.6.) Despite Defendant's claims to the contrary, Plaintiff obtained a valid default after both notice and a hearing. (A.4; A.5; A.1:6; A.28:2.) Even Defendant's first attorney, Mr. Calejo, admitted that he received notice of the default and that a hearing was held, but claimed – too late – that he did not attend that hearing because his secretary did not properly calendar the necessary dates.[3] (A.28.) Thus, Defendant was not denied due process and Plaintiff had no burden to prove actual ownership, control, or maintenance to show liability. Under Florida law and procedure, those matters were established by default.

In addition, the Third District based its ruling solely on a lack of ownership and control; it did not address Defendant's duty to maintain the premises in a reasonably safe condition as alleged in the defaulted complaint. (A.3; R.4:395-400.) The duty of proper maintenance is an independent basis for establishing premises liability under Florida law. *See, e.g., De Cruz-Haymer v. Festival Food Market, Inc.*, 117 So. 3d 885, 888 (Fla. 4th DCA 2013). Thus, the judgment should have been affirmed on the basis of Defendant's duty of maintenance alone.

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[3] Defendant filed Mr. Calejo's affidavit approximately eighteen months after the trial court issued the default. (A.28; A.6.) Thus, his affidavit was not filed with due diligence. *See* IB, pp. 42-50.

Second, Plaintiff does not concede that the standard of review is *de novo*. Rather, orders denying motions to set aside a default are reviewed for an abuse of discretion. *See N. Shore Hosp., Inc. v. Barber*, 143 So. 2d 849, 852 (Fla. 1962); *Anish v. Topiwala*, 430 So. 2d 990, 991 (Fla. 3d DCA 1983) (citation omitted). In this case, the Third District did not conclude that no reasonable man would have adopted the view taken by the trial court on Defendant's various default-related motions. *See Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980). And this Court should not do so either. Rather, on the record before this Court, it is clear that Defendant never established by affidavit or sworn testimony the existence of all three requirements to set the default aside. Thus, the trial court did not abuse its discretion by refusing to vacate the default. *See Canakaris*, 382 So. 2d at 1203; IB, pp. 42-50. The Third District seemed to agree because it did not expressly find an abuse of discretion. (R.3:395-400.) Even if the Court does evaluate the affidavits and verified motions on a *de novo* basis, which it should not, it should nevertheless conclude that they were not sufficient to establish that the default should be vacated in this case. *See* R.4:Tab B, pp. 16-39; IB, pp. 42-49. Thus, Defendant's second point is without merit and does not justify the Third District's erroneous actions in this case.

Likewise, Defendant's third point does not support the Third District's decision and, therefore, this Court should remand to the Third District with

instructions for that court to reinstate the judgment in Plaintiff's favor. As argued in the initial brief, although the Iberia complaint and the defaulted complaint were consolidated, the two cases did not become merged such that the allegations of one are deemed the allegations of the other. IB, pp. 31-33. Therefore, Plaintiff's dismissal of the Iberia action pursuant to rule 1.420(a)(1) of the Florida Rules of Civil Procedure was not an improper attempt to dismiss less than all the causes of action contained in the suit. Because the two cases maintained their separate identities, Plaintiff properly dismissed the entire Iberia complaint either pursuant to rule 1.420(a)(1) or to rule 1.250(b) of the Florida Rules of Civil Procedure. *See* Fla. R. Civ. P. 1.420(a)(1), 1.250(b); *Freeman v. Mintz*, 523 So. 2d 606, 610 (Fla. 3d DCA 1988) (treating dismissal under 1.420(a)(1) as dropping party pursuant to rule 1.250(b)), *cause dism'd*, 528 So. 2d 1182 (Fla. 1988); *see also Siboni v. Allen*, 52 So. 3d 779, 780 (Fla. 5th DCA 2010); *Nat'l Bank of Commerce v. Jupiter Mtg. Corp.*, 7890 So. 2d 553, 555 (Fla. 2d DCA 2005). (*See also* R.4:Tab B, pp. 35-39.) Either way, however, Iberia was properly dropped from the case – either as a result of rule 1.420(a)(1) or rule 1.250(b), which is effectuated through rule 1.420(a)(1) in any event. Consequently, Defendant's argument that Iberia is the real defendant is simply incorrect. (*Id.*)

Similarly, Defendant's assertion that it argued to the trial court that Iberia was an indispensable party is not supported by the record. (AB, pp. 37-39.)

Although Defendant argued in the trial court that it was not the owner of the property and that Iberia was, Defendant never raised Iberia's status as an indispensable party in its Answer (A.9), in a motion for judgment on the pleadings, or at trial (A.111-116). *See* Fla. R. Civ. P. 1.140(h)(2) (listing when indispensable-party defense may be raised).[4] Defendant's contention that it did not own the property in the face of its admission by default that it did, along with its contention that Iberia was the true owner, was not sufficiently specific to notify the trial court that Defendant contended Iberia was an indispensable party. *See generally Aills v. Boemi*, 29 So. 3d 1105, 1108-09 (Fla. 2010) (describing specific contemporaneous objection rule (citation omitted)). Because Defendant never argued that Iberia was an indispensable party, the Third District could not properly consider that argument for the first time on appeal. *See Cowart v. City of West Palm Beach*, 255 So. 2d 673, 673-74 (Fla. 1971); *Riverwood Condo. Ass'n, Inc. v. Litecrete, Inc.*, 69 So. 3d 983, 985-86 (Fla. 3d DCA 2011). And, this Court should not do so either. As a result, the judgment should be affirmed as to liability.

Defendant's reliance on *GAC Corporation v. Beach*, 308 So. 2d 550 (Fla. 2d DCA 1975), and *Days Inn Acquisition Corporation v. Hutchinson*, 707 So. 2d 747 (Fla. 4th DCA 1997), to argue to the contrary is misplaced. In *Beach*, the plaintiff

[4] A search of the entire .pdf version of the Appendix Defendant filed in the Third District revealed that the word "indispensable" does not appear anywhere in the Appendix materials.

failed to allege any claim against the defaulted corporation. *Id.* at 551. Here, Plaintiff specifically alleged a cause of action against Defendant, the party against which the trial court issued the default. (*See* R.4:Tab B, pp. 28-35). Similarly, in *Days Inn*, the court found that the default was premature because the complaint alleged that Days Inn's liability was dependent upon a non-defaulting defendant's liability, which had yet to be determined. *Id.* at 748. In this case, the default was not premature, because Defendant's negligence, as alleged in the complaint, was not dependent upon any other person or entity's liability. Rather, the complaint alleged that Defendant was negligent for not maintaining the premises it owned, controlled or maintained in a safe condition. (A.3.) Therefore, neither *Beach* nor *Days Inn* supports the Third District's action in this case. Thus, the judgment on liability should have been affirmed below.

The judgment on liability should also have been affirmed because there were no unpled theories of liability presented at trial. In its motion for summary judgment, which was filed only after the trial court ordered Defendant not to file any additional motions attacking the default (A.37), Defendant argued for the very first time that the defaulted complaint was not well pled because the theory of causation pled in the complaint (that Plaintiff tripped and fell on a walkway in disrepair) was different than the facts of causation as established by discovery (that Plaintiff was moving a large statue when she tripped and fell on the walkway in

disrepair which caused the statue to fall on her and nearly sever her ankle) (A.42). The trial court denied that motion the same day it was filed and, therefore, Plaintiff did not respond to it. (A.43.) Nevertheless, Defendant subsequently argued that the motion should not have been denied in its entirety because of this newly-raised argument about causation. (A110:10-11.) Defendant had admitted, however, that it had not previously raised this argument and that the only argument it had presented in the preceding many months was a lack of duty based on lack of ownership or control. (A.110:12-13.) The trial court rejected Defendant's argument that the causation pled was different from the causation found through discovery because the court understood that Plaintiff was moving a statue when she tripped and fell and the statue fell on her at that time. (A.110:28-30, 31-32.) The trial court properly concluded that these facts were consistent with the trip-and-fall allegations in the defaulted complaint against Defendant. (A.110:33.) The court did not abuse its discretion in this regard.

The trial court also did not abuse its discretion by not allowing Defendant to introduce evidence at trial related to either Plaintiff's or her son's potential comparative negligence. *See Muhammad v. State*, 132 So. 3d 176, 192 (Fla. 2013) (stating that admissibility of evidence is in the sound discretion of the trial judge and that discretion will not be reversed absent an abuse). Comparative negligence is an affirmative defense that must be pled and proven. *Drew v. Tenet St. Mary's,*

Inc., 46 So. 3d 1165, 1170 (Fla. 4th DCA 2010); *see also* Fla. R. Civ. P. 1.110(d) (listing contributory negligence as an affirmative defense); *cf. Erickson v. Irving*, 16 So. 3d 868, 870 (Fla. 3d DCA 2009) (noting that defendants pled comparative negligence as an affirmative defense). A party waives all defenses and objections that the party does not present either by motion, or if the party has made no motion, in a responsive pleading, except as provided in rule 1.140(h)(2).[5] Fla. R. Civ. P. 1.140(h)(1). Even if liability had not been decided by default, it would have been reversible error for the trial court to allow Defendant to introduce evidence of Plaintiff's or a third party's negligence where Defendant had not pled Plaintiff's or a third party's negligence as an affirmative defense. *See Valente v. Resort Enters., Inc.*, 700 So. 2d 732, 733 (Fla. 2d DCA 1997; *see also Nash v. Wells Fargo Guard Servs., Inc.*, 678 So. 2d 1262, 1264 (Fla. 1996) (concluding that to include a non-party on the verdict form for apportionment of fault, the party must plead the non-party's negligence and specifically identify the non-party to which fault should be apportioned); *Metro. Dade County v. Coats*, 559 So. 2d 71, 73 (Fla. 3d DCA 1990) (failure to raise affirmative defense in pleadings is waiver (citations omitted)). Defendant admitted that it did not raise this issue in its Answer or in a proper motion to dismiss. (A110:12-13; *see also* A.9.) Therefore, Defendant waived any

[5] Rule 1.140(h)(2) states that the defense of failure to state a cause of action may be raised by motion for judgment on the pleadings or at the trial on the merits in addition to either being raised in a motion to dismiss or in the answer or reply. Fla. R. Civ. P. 1.140(h)(2).

defense that Plaintiff or a third party caused or contributed to her injuries, not only by default, but also subsequently through the Answer (A.9), which did not allege that Plaintiff or any identified third party caused her trip and fall. *See* Fla. Civ. P. 1.140(h)(1). Consequently, the trial court did not abuse its discretion by excluding testimony intended to show that either Plaintiff or her son was negligent while moving the statue at the time of the accident. (*See* A.140.)

Moreover, the trial court expressly ruled that Defendant was permitted to introduce evidence as to how the accident occurred, but for purposes of damages only. (A.51.) Once Plaintiff and her son testified that she tripped and fell and the statue fell on top of her as a result (A114:17, 172, 184), Defendant never attempted to introduce any evidence at trial that the falling statue did not nearly sever Plaintiff's ankle or any credible evidence that her injuries were not as bad as she claimed. The trial court expressly stated that it would allow that type of evidence, and did, in fact, do so. (A51; A111:8-10, 20-23.) Indeed, the jury heard some testimony that Plaintiff did not complain about pain, had a miraculous recovery, and was attempting to make her injuries appear worse than they were (A115:87-91, 108-10, 125-29; A142; A143), but the jury apparently rejected that evidence. This Court should not re-weigh that evidence to reach an opposite conclusion. *See K.S.H. v. State*, 56 So. 3d 122, 126 (Fla. 3d DCA 2011). Therefore, the judgment on liability is not void and it should have been affirmed.

Similarly, the judgment on damages is not void and it should be affirmed because Defendant invited any error in submitting Plaintiff's claim for pain and suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience, or physical defect or loss of capacity for the enjoyment of life (collectively, "Pain Damages") to the jury. Defendant's proposed verdict form and requested jury instructions specifically asked the trial court to submit the Pain Damages to the jury. (A.83:2, 7-8.) Because Defendant asked the court to instruct the jury on these damages and even requested a verdict form that included them, Defendant invited any error associated with the jury's consideration of those damages. *See Bould v. Touchette*, 349 So. 2d 1181, 1186 (Fla. 1977). And, even if Defendant did not invite the error, it waived any objection to the submission of Pain Damages to the jury by not objecting to Santiago's evidence, jury instructions, or verdict form on the ground that those damages had not been pled. Thus, Defendant may not raise that objection for the first time on appeal. *Cowart*, 255 So. 2d at 673-74. As a result, the judgment for Pain Damages should have been affirmed by the Third District as it should be here.

Likewise, the judgment for Lost Wages should be affirmed because Defendant waived its objection to the submission of Lost Wages to the jury because it failed to object to the admission of the evidence of Lost Wages at trial. *See Stockman v. Duke*, 578 So. 2d 831, 832 (Fla. 2d DCA 1991); *see also* Fla. R.

Civ. P. 1.190(b) ("When issues not raised by pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."). Once this evidence was admitted without objection, it was proper for the trial court to instruct the jury on Lost Wages. *Cf. L.K. v. Water's Edge Ass'n*, 532 So. 2d 1097, 1098 (Fla. 3d DCA 1988) ("A party is entitled to have the trial court instruct the jury on his or her theory of the case when the evidence, even though controverted, supports that theory." (citations omitted)). As a result, the judgment for Lost Wages should be affirmed.

In sum, the damages in this case were supported by the evidence and are not excessive. Plaintiff testified that the gross receipts for her business in 2003 were $96,755 and in 2004 were $120,842. (A.114:153-54.) She testified that her income from the business was her only income and that it was sufficient to pay her mortgage, all of her living expenses, and her children's private school expenses. (A.114:83, 163-64, 178-79.) Thus, the evidence was sufficient to support her claim for Lost Wages. Also, at the time of the accident, Plaintiff was 43 years old, very active, and in good health. (A.127:6; A115:50; A.95.) After the accident, Plaintiff had a permanent injury that, within a reasonable degree of medical certainty, is going to require future surgery, is causing arthritis (A113:137-38), and will cause her pain and limit her activities for the rest of her life (A113:81, 137-38, 142; A114:60, 61-62). Given her age and life expectancy, she is going to experience

that pain and limitation for approximately thirty-five more years. (A127:6; A.115:50; A.95.) In addition, one expert testified, without any objection by Defendant, that the cost of the future surgery will be about $45,000. (A.113:48.) The jury awarded Plaintiff $30,000 for future medical expenses. (A.86.) Thus, those expenses were supported by the evidence.

The Pain Damages were also well within the limits of the jury's discretion. As even the Third District has stated, the burden is on the appellant (technically the Defendant here) to demonstrate that the jury rendered an excessive verdict because of "passion and sympathy." *Seaboard Coast Line R. Co. v. McKelvey*, 259 So. 2d 777, 781 (Fla. 3d DCA 1972) (citations omitted). Trial and appellate judges do not sit as a seventh jury with veto power. *Laskey v. Smith*, 239 So. 2d 13, 14 (Fla. 1970). Rather, where an appellant has not shown that either a jury considered an inappropriate item of damages or rendered a verdict because of "passion or sympathy," the verdict should be left within the discretion of the jury as to compensation for future Pain Damages. *McKelvey*, 259 So. 2d at 781-82; *see also Lassiter v. Int'l Union of Operating Eng'rs*, 349 So. 2d 622, 626-27 (Fla. 1976). In this case, Defendant has made no such showing.

An isolated reference in the record to the Plaintiff's having shed a few tears at trial (A.114:58) is insufficient to establish bias or sympathy. *Cf. Williams v. State*, 544 So. 2d 1114, 1115 (Fla. 3d DCA 1989) ("While state's single reference

during closing argument to the tears of the victim's parents was an improper appeal to the sympathy of the jury, the isolated comment does not rise to the level of reversible error." (citations omitted)). This is particularly true where Defendant made no other record of Plaintiff crying or being upset during the trial. *See Williams v. State*, 689 So. 2d 393, 398 (Fla. 3d DCA 1997). Thus, the record does not support a finding of bias or sympathy in this case.

Indeed, a large damage award by itself does not indicate excessiveness. *Citrus County v. McQuillin*, 840 So. 2d 343, 347 (Fla. 5th DCA 2003); *Zambrano v. Devanesan*, 484 So. 2d 603, 607 (Fla. 4th DCA 1986); *see also Bould*, 349 So. 2d at 1185. That is why comparing the verdict in this case to summaries of settlements or verdicts is not the panacea Defendant thinks they are. *See* AB, pp. 3-4 n.6. Rather, the verdict should be viewed in light of the evidence in the case at hand. *See McQuillin*, 840 So. 2d at 347. Because the evidence in this case supported the jury's verdict and the judgment as entered, the judgment should be affirmed as to damages.

CONCLUSION

For the foregoing reasons and for the reasons set forth in Plaintiff's initial brief, this Court should reverse the Third District's decision and remand with instructions for the Third District to affirm the judgment on appeal.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing was sent by email to Aubrey Rudd (ruddlawgroup@gmail.com), Rudd Law Group, Inc., 2100 Coral Way, Suite 602, Miami, Florida 33145; Austin Carr (austin@austincarrlaw.com), Austin Carr Law Office, 371 N. Royal Poinciana Blvd., Miami Springs, Florida 33166; and Dorothy F. Easley (administration@EasleyAppellate.com), 1200 Brickell Ave., Suite 1950, Miami, Florida 33131 this 6th day of November 2014.

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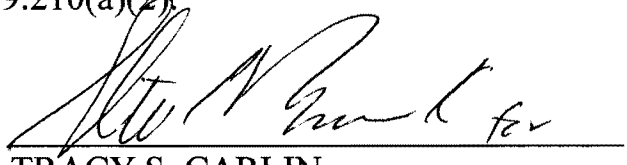
CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rules of Appellate Procedure 9.210(a)(2).



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