

SUPREME COURT OF LOUISIANA

No. 99-C-3577

MARY B. TOUCHARD

Versus

SLEMCO ELECTRIC FOUNDATION ET AL.

LEMMON, J., Subscribing to the Opinion and Assigning Additional Reasons

On original hearing, this court granted the defendant's application for certiorari and peremptorily reversed, without briefing or oral argument,¹ the judgment of the court of appeal. 99-3577 (La. 2/18/00), 754 So. 2d 953 (Calogero, C.J., and Lemmon, J., voting to grant and docket for argument). The peremptory reversal was based on the reasons assigned by the dissenting judge on the intermediate court who, citing Moresi v. State, through Dep't of Wildlife and Fisheries, 567 So. 2d 1081 (La. 1990), opined that an award of damages for mental injury, in the absence of physical injury, should only be made when there are special circumstances.

On rehearing, I write separately to point out that the Moresi case entailed a claim for mental anguish caused by conduct of the defendants that did not involve physical impact. In the present case, there was undisputed physical contact (although the intensity of the contact was disputed), and any rule against awarding damages for mental injury in the absence of physical injury should not be applied automatically. In

¹Peremptory reversals should be used very sparingly by this court, and this court's overuse frequently comes back to haunt us, as in this case. A certiorari court should not merely be concerned with error correction (which is the function for which intermediate courts are established in a three-tier system), but should primarily be concerned with addressing the most important legal issues of the time and providing guidance to lower court judges, lawyers and law professors by thorough and concise analysis and resolution of those issues.

a case that involves physical impact, it is up to the trier of fact to decide, under a preponderance of the evidence standard, whether the impact caused any physical or mental consequences.

I agree that there is sufficient evidence to support the decision of the trier of fact in this case, and that the judgment of the court of appeal should be reversed.