Dell w/app

IN THE SUPREME COURT

OF FLORIDA

CASE NO. 78,856

MICHAEL MANSFIELD and MARY GROSS MANSFIELD

Petitioners,

vs.

ROSA RIVERO and FREDERICO RIVERO

Respondents.

DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Case Nos. 89-1941; 89-1851

CROSS-PETITIONERS' JURISDICTIONAL AMENDED BRIEF AND APPENDIX

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TOPICAL INDEX

CITATION OF AUTHORITIES

OTHER AUTHORITIES:

STATEMENT OF THE CASE AND FACTS

This case involved a claim for personal injuries resulting from a rearend automobile accident. The injuries are classified as ligamentous and muscular in nature, commonly referred to as "soft tissue" injuries. Liability for the accident was conceded at trial and has never been an issue. The doctors treating the Plaintiff in this case, Dr. Moya and Dr. Bustillo, both testified that she had sustained a permanent injury as a result of the accident. The defense doctors, Dr. Turbin and Dr. Wilensky, both testified that the Plaintiff did not sustain a permanent injury as a result of the accident. At the conclusion of the case, the Plaintiff requested that a charge to the jury be given in accordance with the law in Johnson v. Phillips, 345 So.2d 1117 (Fla. 2d DCA 1977), which law had also at that time been adopted by the Appellate Court, Third District, in Jones v. Smith, 547 So.2d 201 (Fla. 3rd DCA 1989).

The requested charge of the Plaintiff was a charge to inform the jury that a person with subjective complaints, that is, complaints of pain coming from an initial organic injury, could also be a basis for finding that the Plaintiff was permanently injured and serve as a basis for the jury finding in favor of the Plaintiff. A copy of the charge is attached, as well as the notation of same by the Appellate Court.

The Trial Court refused to give the requested charge. The Third District, in their review of this case, receded from its

prior opinion in Jones v. Smith, supra, and held that the charge was correctly denied. (See Opinion attached).

The Opinion of the Third District Court of Appeal in the case, sub judice, is in direct conflict with the Opinion of the Second District Court of Appeal in Johnson v. Phillips, supra, a matter which this Honorable Court should take jurisdiction of and resolve this conflict which, as currently constituted, allows for different law to be given to jurors for their consideration in different areas of the State of Florida.

SUMMARY OF ARGUMENT

The Third District Court of Appeal in the case, sub judice, in receding from its Opinion in Jones v. Smith, 547 So.2d 201 (Fla. 3rd DCA 1989), (copy attached), is, respectfully, in error and the law of Florida should be that expressed on the same point in Johnson v. Phillips, 345 So.2d 1117 (Fla. 2d DCA 1977).

The law in Florida has long been that each side is entitled to jury charges which support the theory of their case. L.K. v. Water's Edge Assoc., 532 So.2d 1097 (Fla. 3rd DCA 1988); Sears, Roebuck & Co. v. McKenzie, 502 So.2d 940 (Fla. 3rd DCA 1987).

In the case, sub judice, as will be set forth in detail in the Argument section of this Brief, the defense doctors examining the Plaintiff on a one-time basis years after the accident on one specific day did not find any organic problem. Applying those findings or lack of findings to the American Medical Association Guide, hereinafter referred to as "the AMA," the defense doctors concluded that the Plaintiff had no permanent injury since there were no objective findings to support such.

Appellate decisions have recognized the basic unfairness of the use of AMA Guide as a basis for determining permanent injury in sprain type cases. In Patterson v. Wellcraft, 509 So.2d 1195 (Fla. 1st DCA 1987), and in Florida Sheriffs' Youth Fund v.Harrell, 438 So.2d 450 (Fla. 1st DCA 1983), the appellate tribunals

noted that the AMA Guidelines do not address themselves to this type of injury and therefore make it unfair to determine permanent injury based on the AMA Guide.

The Plaintiffs verily believe that in instructing the jury that permanent injury may be found based on organic injury which later only leaves subjective complaints of pain and no objective findings, the Plaintiffs are given a chance to prove their case. This instruction by no means guarantees that the jury, having heard all the evidence, will choose to believe the Plaintiff. The instruction only gives the jury a basis for finding in favor of the Plaintiff in contradiction to the AMA Guide, which Guide, by its terms and definitions, would deny recovery to the Plaintiff. Instead of having a "stacked deck" against the Plaintiff, the jury would have two possibilities in rendering their decision to determine that a basis exists in fact and law to find that the Plaintiff did suffer a permanent injury.

POINT ON DISCRETIONARY REVIEW

WHETHER THE DECISION OF THE COURT OF APPEAL, THIRD DISTRICT, IN THE CASE, SUB JUDICE, IS IN DIRECT CONFLICT WITH THE DECISION IN JOHNSON V. PHILLIPS, 345 SO.2D 1117 (FLA. 2ND DCA 1977).

ARGUMENT

In the case at bar, the defense called as a witness Dr. Turbin who had examined the Plaintiff and found no disability in accordance with the AMA Guide. (T.157,158,170,172). The defense then played for the jury the video deposition of Dr. Wilensky, a doctor whom they had the Plaintiff see, and he testified that in accordance with the AMA Guide, the Plaintiff had no permanent injury. The defense counsel then argued strongly in closing argument that based on the AMA Guide, there was no permanent injury in this case. (T.433). This case, being an auto accident case, was subject to the Florida "No-Fault" Law and in the absence of a finding of permanent injury, a defense verdict is appropriate.

As can be seen from the questions presented to the defense doctors and later strongly argued (T.157,158,170,172,206,207,432-434), the defense's position in this case was premised upon the standards set out in the AMA Guide, a Guide which does not consider a sprain to be capable of being a permanent injury.

In Patterson v. Wellcraft Marine, 509 So.2d 1995 (Fla. 1st DCA 1987), citing previous appellate decisions, the Court therein expressed the following in support of the above comment of the undersigned attorney:

> "Additionally, and perhaps most importantly, Dr. Kaufman's determination that claimant had suffered no permanent impairment was based exclusively upon the AMA Guides, which have no application to the type of injury suffered by claimant: lumbar back strain. In Florida Sheriffs' Youth Fund v. Harrell, 438 So.2d 450 (Fla. 1st DCA 1983), this court observed that a soft tissue injury is not covered by the Guides because they do not measure impairment of the back or pelvis in the absence of limitation of motion. Quoting with approval from the attending physician's testimony, we observed that as to soft tissue injuries, the Guides do not truly address such injuries because they refer either to disc lesions or fractures. The AMA Guides' failure to take into consideration the type of soft tissue injury described by Dr. Meriwether was also discussed by this court in Martin County School Board v. McDaniel, 465 So.2d 1235 (Fla. 1st DCA) (on Rehearing en banc) Appeal and Cross-Appeal dismissed, 478 So.2d 54 (Fla. 1985), in which we observed the basic similarities between the facts in Harrell and McDaniel, wherein both patients suffered soft tissue injuries and medication was prescribed for the specific purpose of preventing acute muscle spasm."

The Court concluded thereafter, as follows:

> "(3) Under circumstances where prescribed medical rating guides do not adequately address an impairment, we have recognized that a deputy can properly rely upon a physician's qualified expert opinion, which utilizes experience in treating a claimant, and that such an opinion will suffice without reliance on a medical manual or guide. United General Construction v. Cason, 479 So.2d 833 (Fla. 1st DCA 1985) At P. 1197."

While the aforenoted cases dealt with injuries to victims in the area of Workers' Compensation, two crucial points can be

gleaned from the Opinion:

1. The AMA Guide does not cover a soft tissue injury and therefore, applying the Guide should not be the sole determinative factor in determining impairment; and

2. That if legal officers need to go outside the Guide to do justice, then certainly lay people not skilled in the law need guidance as to what may constitute permanent injury or impairment.

The philosophy of the court in Patterson, supra, is clear. The AMA Guide should not control the determination of whether a soft tissue injury is determined to be permanent. To allow the AMA Guide to be the determining factor, where the Guide does not cover this, is not fair nor is it mandated by any law. In the case, sub judice, the jury is told by the defense doctors that unless this is an objective sign of injury, there can be no permanent injury. (T 157,158,170, video deposition of Dr. Wilensky, T 433). In fact, the jury was told by the defense attorney as follows in closing argument:

> "Now, what else did we hear? You heard from both Dr. Turdin and Dr. Wilensky. Both of these doctors are Board Certified orthopedic surgeons. They examined the Plaintiff and they found--each of them found nothing wrong with her neck and back. They took her through a normal range of motion and it was normal in the neck and normal in the back. Each of these doctors told you that they could find no objective sign of injury. They said, in their opinion you need to find something objective to have a permanent injury. They said they did not make that up. You need that criteria. That is what the AMA Guide tells you, that you need to find an objective sign to determine a permanent injury or permanent impairment, right out of the AMA from doctors. They are not defense lawyers that look like myself, who want to win cases. That is the American Medical Association,

the largest medical organization in the world."
(T.432-433). (Emphasis added)

Thus, the doctor's opinion is predicated on and sanctified by the weight of the AMA Guide so that a jury, unsophisticated in these matters, is put in a position where they truly do not have a basis for finding a permanent injury does in fact exist such as to render a verdict for a plaintiff. The only real hope that a plaintiff has to counter-balance the defense position is to have the court instruct the jury that subjective complaints following an initial injury with objective signs may be a permanent injury. See for example, Fuster v. Eastern Airlines, Inc., 545 So.2d 268, 271,272 (Fla. 1st DCA 1988).

In Johnson v. Phillips, supra, the medical condition before the court was a concussion. Therein, the testimony of the medical doctor was that he did not feel that the patient had permanent injury of an organic nature, but that the subjective complaints of pain would be permanent. In determining the issue therein, as to whether or not the plaintiff had a permanent injury, the appellate court stated:

> "We interpret the words 'permanent injury' in Florida Statute 627.737(2) to include subjective complaints of pain resulting from an organic injury." At p.1117.

The appellate court therein found for the plaintiff.

In their initial treatment of this issue in Jones v. Smith, supra, it is respectfully submitted that in ruling in accordance with Johnson, supra, the Third District Court of Appeal clearly understood the problem a plaintiff has in carrying the burden of proof in a soft tissue injury case when years after the accident

only subjective complaints complaints remain. In Phillips, supra, the decision noted that the court must conclude that the jurors were misled by the trial court's failure to give the requested instruction. The basis for this, the court noted, was that the record indicated that the jurors were not fully cognizant that the legal definition of "permanent injury" included subjective complaints.

If the Legislature was at all in disagreement with the Jones decision or the Johnson decision, supra, rendered twelve years ago, one would have expected an amendment to the applicable statute. No such amendment was ever passed.

In the case, sub-judice, the Third District Court initially noted that the charge sought was "the words 'permanent injury,' as used in the Florida "No-Fault" Law, included permanent subjective complaints of pain resulting from an initial organic injury." (Emphasis added, page 2 of Opinion). The Third District then, in receding from its Opinion in Jones, supra, noted its reason:

> "An instruction that permanent injury included permanent subjective complaints of pain incorrectly informs the jury that under the statute, permanent pain is always permanent injury." (Emphasis added, p.3 of Opinion)

The instruction, respectfully, does not do that. It gives the jury the option of balancing the entire weight of the testing against the AMA Guide which, in the absence of a counter-balance, has the effect of directing a verdict for the defense.
In fact, there is nothing in the instruction which requires a

jury to believe a plaintiff when they say they are having pain or in believing the plaintiff's doctors when they testify that a plaintiff will have permanent pain. These questions are to be answered by a jury based on the force and effect of the entire case.

There is a direct conflict between the decisions in Jones, supra, and the case at bar. It is an area that this Honorable Tribunal should take jurisdiction of and clarify so that the State has uniform law.

CONCLUSION

There is a direct conflict in the law between the decision in Johnson v. Phillips, 345 So.2d 1116 (Fla. 2d DCA 1977), and the case sub-judice. Since a party is entitled to a charge on their theory of the case, the law in the State of Florida should be uniform regarding what the plaintiff must prove to receive a verdict under Florida Statute 627.737. Your Petitioner herein respectfully submits that this Honorable Court take jurisdiction of this conflict and determine that it is appropriate for a plaintiff to receive a charge that informs the jury that in soft tissue cases the jury may find a permanent injury exists where, following an initial organic injury the plaintiff is left with subjective complaints of pain.

Respectfully submitted,

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(305) 643-6200

By: _____
GARY E. GARBIS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 14th day of November, 1991, to STEVEN R. SIMON, ESQ., Rosner & Simon, P.A., 21 S.E. First Avenue, Miami, FL 33131; and JEANNE HEYWARD, ESQ., 300 Robert Building, 28 W. Flagler Street, Miami, FL 33130.

GARY E. GARBIS

A P P E N D I X

PLAINTIFF'S REQUESTED SPECIAL JURY INSTRUCTIONS 17

The words "permanent injury", as used in the Florida No-Fault Law, include permanent subjective complaints of pain resulting from an initial organic injury.

See Johnson v. Phillips, 345 So.2d 116 (2d DCA Fla. 1977).

Jane Smith

543 - 2nd 207
3rd DCA

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1991

SEPTEMBER 27, 1991

ROSA RIVERO, et al.,	**	CASE NO. 89-01941 89-01851
Appellant(s),	**	
vs.	**	
MICHAEL MANSFIELD, et al.,	**	LOWER TRIBUNAL NO. 86-17712
Appellee(s).	**	

Upon consideration, appellees' motion for rehearing, rehearing en banc and motion to certify is hereby denied. Appellants' motion for rehearing, reconsideration and/or certification to Supreme Court is denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of Appeal, Third District

By: _____
Deputy Clerk

cc: Gary Garbis
Jeanne Heyward
/NB

Steven R. Simon

A-2

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1991

ROSA RIVERO and FREDERICO RIVERO, **

Appellants, **

vs. ** CASE NOS. 89-1941
89-1851

MICHAEL MANSFIELD and MARY GROSS MANSFIELD, **

Appellees. **

Opinion filed April 23, 1991.

Appeals from the Circuit Court for Dade County, Thomas Carney, Judge.

Gary E. Garbis, for appellants.

Goodhart, Rosner, Simon, Greenberg & Humbert; Jeanne Heyward, for appellees.

Before SCHWARTZ, C.J., and BARKDULL, HUBBART, NESBITT, BASKIN, FERGUSON, JORGENSON, COPE, LEVY, GERSTEN, and GODERICH, JJ.

ON CONSIDERATION EN BANC

BASKIN, Judge.

Rosa Rivero and Frederico Rivero, her husband, appeal a final judgment and amended final judgment. We affirm the final judgment and reverse the amended final judgment.

The Riveros sued Mary and Michael Mansfield for damages for injuries Rosa sustained in an automobile accident. The Riveros alleged that as a result of her injuries Rosa was in constant pain that left her unable to work and caused her to become deeply depressed. At trial, the Mansfields admitted liability. The trial proceeded on the issues of damages and whether the Riveros crossed the permanent injury threshold requirement of section 627.737(2), Florida Statutes (1983). According to the Riveros' medical experts' testimony, Rosa's permanent pain constituted a permanent injury; however, the Mansfields' medical experts testified that she did not sustain a permanent injury.

At the close of trial, the Riveros, relying on Johnson v. Phillips, 345 So.2d 116 (Fla. 2d DCA 1977), requested the court to instruct the jury: "The words 'permanent injury,' as used in the Florida No-Fault Law, include permanent subjective complaints of pain resulting from an initial organic injury." The trial court rejected the Riveros' requested instruction. Instead, it instructed the jury: "In this case, the plaintiff does allege a permanent injury. Therefore, in order to recover in the case, the plaintiff must prove by the greater weight of the evidence that she has sustained a permanent injury within reasonable medical probability." The jury returned a verdict in the Riveros' favor, awarding them the uncontested amount of Rosa's unpaid medical bills, but finding that Rosa had not sustained a permanent injury. Consequently, the trial court entered a final judgment in accordance with the jury verdict. The Mansfields then requested the court to reduce the judgment by 80% pursuant

to section 627.737, Florida Statutes (1983). The trial court granted the motion and entered an amended final judgment for the reduced amount. The Riveros filed this appeal.

The Riveros argue that the trial court erred in failing to give the requested instruction. We disagree, and in so doing, recede from our decision in Jones v. Smith, 547 So.2d 201 (Fla. 3d DCA 1989).[1] Section 627.737 permits a plaintiff to recover damages for pain, suffering, mental anguish, and inconvenience "only in the event that the injury consists in whole or in part of: . . . (2) Permanent injury within a reasonable degree of medical probability." § 627.737(2), Fla. Stat. (1983). The statute does not define permanent injury, but requires that permanent injury be established within reasonable medical probability. Rosa testified that she suffers permanent pain. Although she introduced expert medical testimony that such pain constitutes permanent injury, defendants' medical experts testified that Rosa does not have a permanent injury. Consequently, the jury's obligation was to decide the weight to be given the evidence, a matter within the jury's province. An instruction that permanent injury includes permanent subjective complaints of pain incorrectly informs the jury that under the statute permanent pain is always permanent injury. In effect,

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[1] In Jones v. Smith, 547 So.2d 201 (Fla. 3d DCA 1989), we held that the trial court had committed reversible error in refusing plaintiff's request to instruct the jury that in section 627.737(2) "the words permanent injury include subjective complaints obtained resulting from an initial organic injury." Jones, 547 So.2d at 201. Although in some cases, permanent pain may constitute permanent injury, the factfinder must base its decision as to permanence on all the testimony and evidence.

such an instruction directs the jury to disregard the testimony of defense medical experts and is tantamount to the court directing a verdict for plaintiffs on the issue of permanent injury. See Gencorp, Inc. v. Wolfe, 481 So.2d 109 (Fla. 1st DCA 1985). The court's instruction tracking the language of the statute was appropriate because it properly informed the jury that its obligation was to determine whether the plaintiff had sustained a permanent injury within a reasonable degree of medical probability, in light of all the testimony. We therefore affirm the final judgment.

For the following reasons, however, we reverse the amended final judgment in which the court reduced the jury's award. The Mansfields maintain that the court properly reduced the judgment because the Riveros have the option of suing their insurance carrier to require it to provide coverage. That argument is not persuasive. Nothing in the law "prevents injured persons from waiving their rights to receive insurance benefits and suing the tortfeasor for the full amount of their damages." Purdy v. Gulf Breeze Ent., Inc., 403 So.2d 1325, 1329 (Fla. 1981); Blue Cross & Blue Shield of Fla. v. Matthews, 498 So.2d 421, 422 (Fla. 1986). The record establishes that the Riveros' insurance carrier has refused to provide them any benefits; no rule requires them to recover from the carrier.

Finally, we are not convinced by appellees' assertion that section 627.739(1), Florida Statutes (1983), requires the subtraction of the amount of the Riveros' deductible from the jury award. Section 627.739(1), contains no mandate that a

tortfeasor's obligation to pay damages be reduced by the amount of the victim's deductible. "[T]he overriding purpose of the statute is to assure complete insurance coverage for injuries." Kwechin v. Industrial Fire & Cas. Co., 409 So.2d 28, 30 (Fla. 3d DCA 1981), approved, 447 So.2d 1337 (Fla. 1983);[2] see generally International Bankers Ins. Co. v. Arnone, 552 So.2d 908 (Fla. 1989). Appellees have not provided any authority to support their unorthodox proposition; we therefore decline their invitation to so construe the statute. For these reasons, the amended final judgment is reversed, and the cause remanded to the trial court to reinstate the final judgment.

The remaining points on appeal lack merit.

Affirmed in part; reversed in part; remanded.

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[2] Subsequent amendments to section 627.739 have not altered the legislative purpose of the statute. Fortune Ins. Co. v. McGhee, 571 So.2d 546 (Fla. 2d DCA 1990).

Robert JONES and Eolyn Jones, Appellants,

v.

Cornelian J. SMITH, Appellee.

No. 87-2425.

District Court of Appeal of Florida, Third District.

June 27, 1989.

Rehearing Denied Aug. 29, 1989.

Husband and wife brought action to recover damages for injuries sustained by husband in automobile accident. The Circuit Court, Dade County, Philip Bloom, J., entered judgment, pursuant to jury verdict, for defendant, and husband and wife appealed. The District Court of Appeal, Baskin, J., held that trial court's refusal to instruct jury that term "permanent injury" included subjective complaints was reversible error.

Reversed and remanded.

Nesbitt, J., filed dissenting opinion.

Appeal and Error ⇐1067
Damages ⇐216(6)

In trial for injuries sustained in automobile accident, trial court's refusal to instruct jury that term "permanent injury," for purposes of no-fault statute's threshhold for tort recovery, included subjective complaints of pain resulting from initial organic injury, was reversible error; record indicated that jurors were not fully cognizant that legal definition of "permanent injury" included subjective complaints. West's F.S.A. § 627.737(2).

See publication Words and Phrases for other judicial constructions and definitions.

Horton, Perse & Ginsberg and Edward Perse, Miami, Herman M. Klemick, for appellants.

Rosen & Switkes and Paul D. Novack, for appellee.

Before HUBBART, NESBITT and BASKIN, JJ.

BASKIN, Judge.

Robert Jones and Eolyn Jones, his wife, appeal the trial court's entry of an adverse final judgment in accordance with a jury verdict. We reverse.

The Joneses filed an action against Cornelian Smith to recover damages for injuries Robert sustained in an automobile accident. At the charge conference, the Joneses requested the court to instruct the jury on the meaning of the term "permanent injury" contained in section 627.737(2), Florida Statutes (1983), to reflect that "the words permanent injury include subjective complaints obtained resulting from an initial organic injury." The requested instruction followed the decision in *Johnson v. Phillips*, 345 So.2d 1116 (Fla. 2d DCA 1977). The trial court denied the request; it did not give an instruction defining "permanent injury." The jury returned a verdict against the Joneses, and the trial court entered final judgment pursuant to the verdict. On appeal, the Joneses assert that the trial court committed reversible error when it refused to give their requested instruction. We agree and reverse.

In *L.K. v. Water's Edge Assoc.*, 532 So.2d 1097 (Fla. 3d DCA 1988), we stated:

> 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 the theory. The failure to give a requested instruction constitutes reversible error only when the requested instruction "contain[s] an accurate statement of the law, ... the facts in the case support[ed] a giving of the instructions, and ... the instructions [are] necessary for the jury to properly resolve the issues in the case." *Sears, Roebuck & Co. v. McKenzie*, 502 So.2d 940, 942 (Fla. 3d DCA), *review denied*,

511 So.2d 299 (Fla.1987). The appellate court will not set aside a verdict merely because an instruction which might have been proper was not given; the court must conclude that the jurors were misled by the trial court's failure to give the requested instruction.

L.K., 532 So.2d at 1098 (citations omitted).

Although Smith admitted liability, it was incumbent upon Jones to prove that his injury was permanent within a reasonable degree of medical probability in order to meet the statutory threshold requirement. § 627.737(2), Fla.Stat. (1983). At trial, however, a defense expert witness rejected the use of legal terminology in favor of medical terminology, preferring to use the term "impairment" instead of "injury." Jones introduced expert evidence that he sustained a permanent, partial disability as a result of the accident. To add to the confusion, the record indicates that the jurors were not fully cognizant that the legal definition of "permanent injury" included subjective complaints. Thus, the court's refusal to instruct the jury on the correct law as well as on plaintiffs' theory of the case may well have obfuscated the jury's understanding of plaintiffs' burden of proof. Under these circumstances, reversal is required.

We find no error in the trial court's denial of plaintiffs' motion for directed verdict in view of the deductible provision on the PIP coverage. *See* § 627.739(1), Fla.Stat. (1983).

Reversed and remanded for a new trial on damages.

HUBBART, J., concurs.

NESBITT, Judge (dissenting):

I respectfully dissent. The instruction given to the jury was neither misleading nor prejudicial. Section 627.737(2), Florida Statutes (1983) makes no specific mention of the subjective elements of an injury. In point of fact, section 627.737(2) states that the plaintiff must prove "permanent injury within a reasonable degree of medical probability." The instruction here tracked that language; mention of subjective complaint was not required. *See Eley v. Moris*, 478 So.2d 1100 (Fla. 3d DCA 1985); *Thompson v. Funny*, 440 So.2d 687 (Fla. 1st DCA 1983); *Garcia v. Antunez*, 362 So.2d 72 (Fla. 3d DCA 1978).

Reversal will not be granted where the subject of the proposed instruction is covered in other charges given by the court, or where failure to give the instruction is not shown to be prejudicial. *Giordano v. Ramirez*, 503 So.2d 947 (Fla. 3d DCA 1987); *Sears, Roebuck & Co. v. McKenzie*, 502 So.2d 940, 942 (Fla. 3d DCA), *review denied*, 511 So.2d 299 (Fla.1987); *Schreidell v. Shoter*, 500 So.2d 228, 231 (Fla. 3d DCA 1986), *review denied*, 511 So.2d 299 (Fla. 1987); *LaTorre v. First Baptist Church of Ojus, Inc.*, 498 So.2d 455, 456 (Fla. 3d DCA 1986), *review denied*, 503 So.2d 326 (Fla. 1987); *Llompart v. Lavecchia*, 374 So.2d 77, 80 (Fla. 3d DCA 1979), *cert. denied*, 385 So.2d 758 (Fla.1980). What is ultimately dispositive is whether the record reveals that failure to give the requested instruction misled the jury. *Giordano*, 503 So.2d at 949; *Sears*, 502 So.2d at 942; *Schreidell*, 500 So.2d at 231; *LaTorre*, 498 So.2d at 456; *Gallagher v. Federal Ins. Co.*, 346 So.2d 95, 97 (Fla. 3d DCA), *cert. denied*, 354 So.2d 980 (Fla.1977).

In the instant case, the fact that the defendant's expert witness interspersed the words impairment and injury in his testimony does not indicate the jury was misled. The expert clearly stated his conclusion:

> I'm not saying he may not need treatment later on for his arthritis that's not related, or for a cold, but as far as the accident, no need for medical treatment, no evidence of permanent impairment—meaning permanent injury as a result of injuries sustained at the time of this accident.

Neither is there evidence that the jurors were not "fully cognizant" of what constituted a permanent injury. While appellants contend voir dire questioning demonstrated jurors' varying explanations of the term permanent injury, no statements made by the jurors indicate their interpretations of that term precluded subjective complaints of pain. Here, as in *Westbrook*

v. All Points, Inc., 384 So.2d 973 (Fla. 3d DCA 1980), the jury simply disbelieved the plaintiff's claim of ongoing permanent injury.

We find no error and affirm. *See and compare Dobbs v. State*, 473 So.2d 28 (Fla. 5th DCA 1985).

Affirmed.

Jack D. HOLT, Appellant,

v.

The STATE of Florida, Appellee.

No. 88–1236.

District Court of Appeal of Florida, Third District.

June 27, 1989.

Rehearing Denied Sept. 5, 1989.

An Appeal from the Circuit Court for Dade County, Martin D. Kahn, Judge.

Jack D. Holt, in pro. per.

Robert A. Butterworth, Atty. Gen., and Ralph Barreira, Asst. Atty. Gen., for appellee.

Before BARKDULL, BASKIN and FERGUSON, JJ.

PER CURIAM.

Following this court's opinion found and reported in *Holt v. State*, 512 So.2d 268 (Fla. 3d DCA 1987), the matter recurred in the trial court, whereupon the court determined that its duty on remand was to amend the judgment and sentence nunc pro tunc to reflect the correct degree of felony, and further to determine that the sentence as thus amended was below the statutory maximum for that degree of felony. The trial court made the appropriate correction, and determined that the 50 year sentence was proper from the outset, and the sentence was amended nunc pro tunc.

Kenneth V. HEMMERLE, Appellant,

v.

BRAMALEA, INC., f/k/a Bramalea Development U.S., Ltd., a Delaware corp., Appellee.

No. 88–1844.

District Court of Appeal of Florida, Fourth District.

June 28, 1989.

Rehearing Denied Aug. 31, 1989.

Costs and attorney fees were assessed by the Circuit Court, Palm Beach County, Karen L. Martin, J., for unreasonable rejection of offer of settlement, pursuant to statute, and party against whom costs and fees were assessed appealed. The District Court of Appeal, Hersey, C.J., held that: (1) the statute was substantive and could not be given retrospective application; (2) event triggering remedy provided by statute was making of settlement offer, not accrual of cause of action or commencement of litigation, so statute could be applied where settlement offer in case was made after the statute's effective date; and (3) costs and fees incurred or earned after final judgment had been rendered could not be considered for purposes of imposing sanction pursuant to the statute.

Affirmed in part; reversed in part.

1. Costs ⇐4, 194.22

Statute authorizing assessment of costs and attorney fees for unreasonable rejection of settlement offer is substantive