

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 RESPONDENTS' JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

The jurisdictional brief of RIVEROS violates two basic rules pertaining to discretionary review. First, RIVEROS' Brief makes reference to the transcript of testimony which is not set forth in the opinion. This is contrary to the well established rule that for the purpose of determining conflict jurisdiction, this Honorable Court has stated that it is limited to the facts which appear on the face of the opinion, Hardee v. State, 534 So.2d 706 (Fla. 1988); White Const. Co., Inc. v. Dupont, 455 So.2d 1027 (Fla. 1984).

The second violation of the rule allowing discretionary review consists of RIVEROS' argument on the merits and reference to the AMA guide and a discussion of Patterson v. Wellcraft Marine, 509 So.2d 1195 (Fla. 1st DCA 1987) which are immaterial to the issue of conflict jurisdiction.

Cross Respondents MANSFIELDS will set forth the basic facts which appear in the opinion¹ as follows:

The RIVEROS sued the MANSFIELDS for damages for injuries ROSA RIVERO sustained in an automobile accident. The RIVEROS alleged that ROSA was in constant pain that left her unable to work and caused 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 §627.737(2) Fla.Stat.

¹The decision of the District Court of Appeal is cited as Rivero v. Mansfield, 584 So.2d 1012 (Fla. 3d DCA 1991).

(1983). The medical experts' testimony was in conflict. RIVEROS' witnesses testified that ROSA'S permanent pain constituted a permanent injury. MANSFIELDS' medical experts testified that she did not sustain a permanent injury.

At the close of trial RIVEROS relying on Johnson v. Phillips, 345 So.2d 1116 (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 RIVEROS' requested instruction.

Instead, the trial court instructed the jury as follows:

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.

This instruction tracked the language of §627.737(2)(b). Its correctness and applicability is beyond question.

The jury weighed the credibility of ROSA RIVERO and the conflicting testimony of the medical witnesses and returned a verdict in favor of the RIVEROS, awarding them the uncontested amount of ROSA'S unpaid medical bills, but finding that ROSA had not sustained a permanent injury. The trial court entered the Final Judgment in accordance with the jury verdict.

Thereafter the MANSFIELDS requested the court to reduce the judgment by 80% pursuant to §627.737 Fla.Stat. (1983). The trial court granted this motion and entered an Amended Final Judgment for

the reduced amount.

On appeal, the District Court of Appeal, Third District, held that the trial court did not err in failing to give the requested instruction and in so doing receded from its own decision of Jones v. Smith, 547 So.2d 201 (Fla. 3d DCA 1989). RIVEROS allege conflict jurisdiction from this portion of the opinion.

In addition, the District Court held that the trial court erroneously reduced the amount of the judgment by 80%. The District Court also held that RIVEROS could recover the deductible amount from the MANSFIELDS even though ROSA RIVERO did not sustain a permanent injury and §627.739(1) and the decisions interpreting it forbid an injured party who has not crossed the threshold set forth in §627.737(2) from collecting his PIP deductible from the tortfeasor. This is the subject matter of a Petition for Discretionary Review filed by the MANSFIELDS.

SUMMARY OF ARGUMENT

The decision does not conflict with Johnson v. Phillips, supra. The present decision correctly holds that it is improper to instruct the jury that subjective complaints of pain alone constitute a permanent injury. An instruction to this effect would constitute a comment on the evidence and direct the jury to disregard any medical testimony to the contrary.

Johnson v. Phillips, supra merely held that permanent subjective complaints of pain resulting from an initial organic injury constitute "permanent injury" under §627.737(2). Johnson did not concern itself with jury instructions and did not hold that a jury must be instructed to that effect - rightfully so because this would constitute an improper comment on the evidence.

POINT ON CROSS DISCRETIONARY REVIEW

WHETHER THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IS IN DIRECT CONFLICT WITH JOHNSON v. PHILLIPS, 345 So.2d 1116 (FLA. 2D DCA 1977).

ARGUMENT

The decision of the District Court of Appeal which correctly receded from its prior decision of Jones v. Smith, supra does not conflict with Johnson v. Phillips, supra for the following reasons:

1. The jury was properly instructed in accordance with §627.737(2) that it was their duty to determine whether plaintiff had sustained a permanent injury within a reasonable degree of medical probability in light of all the testimony. This instruction tracked the language of the statute. Based upon this instruction the jury determined the credibility of the witnesses, weighed the evidence and determined that ROSA RIVERO had not sustained a permanent injury.

The instruction sought by RIVEROS based upon the majority opinion in Jones v. Smith, supra would have constituted an improper comment on the evidence. Assuming the medical witnesses were divided as to whether a permanent injury could be based upon subjective complaints alone and the court had instructed the jury that a permanent injury could be based upon subjective complaints alone, this instruction would have constituted a comment on the evidence. It would also have instructed the jury to disregard the

testimony of the medical witnesses who stated that in their opinion permanent injury could not be based solely upon subjective complaints.

As the District Court of Appeal said, "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." The District Court also said that the effect of such an instruction would direct the jury to disregard the testimony of defense medical witnesses and would be tantamount to the court directing a verdict for plaintiffs on the issue of permanent injury. Therefore, the District Court correctly receded from Jones v. Smith, supra.

2. The decision does not conflict with Johnson v. Phillips, supra. Johnson does not hold that a jury must be instructed that a permanent injury under Florida Statute §627.737(2) includes permanent subjective complaints of pain resulting from an initial organic injury or that permanent subjective complaints of pain alone constitute permanent injury. In fact, Johnson did not even mention jury instructions.

Rather, Johnson merely holds that permanent subjective complaints of pain resulting from an organic injury will satisfy the threshold requirements of §627.737(2). It is still for the medical experts to determine whether a party has received a permanent injury. The jury must then determine the credibility of the medical experts and the other evidence. An instruction that a permanent injury may be based on permanent subjective complaints

of pain is tantamount to instructing the jury to disregard any contrary testimony or any medical testimony that plaintiff's injury was not permanent. The jury should not be misled or erroneously instructed that subjective complaints alone constitute a permanent injury - this constitutes a comment on the evidence and in effect the court's approval of the testimony of one medical expert over the other.

Simply stated, there is no conflict between the present decision and Johnson. Both decisions in effect hold that the jury is to determine whether there is a permanent injury based upon the medical experts' testimony.

CONCLUSION

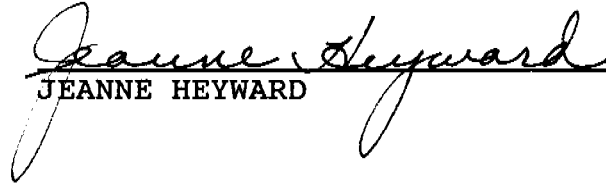
Based upon the reasons set forth above, it is respectfully submitted that Cross-Petitioners RIVEROS have not demonstrated an express and direct conflict - only Petitioners MANSFIELDS have established conflict jurisdiction.

Respectfully submitted,

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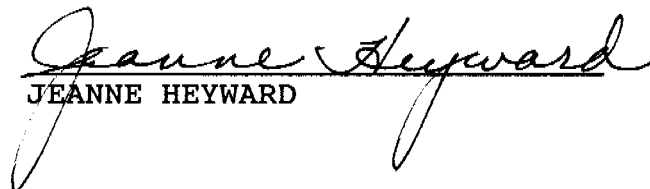
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to GARY E. GARBIS, P.A., 701 S.W. 27th Avenue, Suite 1000, Miami, Florida 33135 this 22nd day of November, 1991.


JEANNE HEYWARD