O.A. 1-5-93 047

CASE NO. 79,138

IN THE SUPREME COURT OF FLORIDA

DONNA EASKOLD,

Petitioner,

v.

JAMES RHODES, JR. and ELOUISE MODES,

Respondents.

BRIEF OF FLORIDA DEFENSE LAWYERS ASSOCIATION, AMICUS CURIAE

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PRELIMINARY STATEMENT

In this brief, the parties will generally be referred to as they stood in the trial court, Petitioner having been defendant and Respondents having been plaintiffs. References to Elouise Rhodes individually will be to "plaintiff." All emphasis herein is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

For purposes of this brief, the relevant facts are set forth in the opinion of the District Court of Appeal, First District. This amicus curiae does not have ready access to the Record or the Trial Transcript, and hence takes no position as to any factual dispute between the parties.

This cause arose out of an automobile accident. Among the issues at trial was whether plaintiff had sustained a permanent injury as a result of the accident.[1] Three physicians testified at trial, all by deposition.

Dr. Flynn, an orthopedic surgeon, opined that, based on the history given him by plaintiff, plaintiff had sustained permanent injuries to her left knee, back, and neck as a result of the auto accident.

Dr. VerVoort testified that the medical history given him by plaintiff denied any history of neck or back pain prior to the

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[1]In the interest of brevity, we will occasionally refer to the separate issues of permanency and causal relationship simply as "permanency." The key issue in the trial of the instant case was whether plaintiff's injuries were caused by this accident or were pre-existing.

accident in question. He testified that she had sustained a permanent injury to her neck, low back, and left knee as a result of the accident, but admitted that he was relying on her statements to him as to her medical history.

Dr. Jankauskas had been plaintiff's regular physician since 1981. His review of the medical charts revealed that she had been examined both at his office and at the county clinic on several occasions between 1975 and 1986 for various conditions, including numbness in her left leg and toes, pain in her back, numbness and pain on the left side of her head and neck, left leg pain, and pain in the ears and back. Neither Dr. Flynn nor Dr. VerVoort had had access to these medical records at the time of their depositions.

During the cross-examination of plaintiff, it was elicited that in an April 1990 deposition, she stated that she never had any kind of trouble with her back or knees before this accident, and had had no other injuries before the accident that required treatment from a doctor. She also stated in that deposition that she had not complained to Dr. Jankauskas about pain in her neck, back, or knees before the accident. In a second deposition two months later, plaintiff admitted that she had left her job at a hospital after she had been hit in the leg, causing her to fall down, and admitted that she probably had a little backache or headache at times before the 1988 accident.

The jury found defendant negligent and awarded a total of $37,000 for past and future medical expenses and lost earning ability, but specifically found that plaintiff had not sustained

a permanent injury as a result of this accident and awarded no damages for pain and suffering or loss of consortium.

Plaintiff moved for a new trial, which was denied. On appeal, the District Court reversed. In so doing, the District Court held that when a plaintiff presents expert medical opinion testimony of permanent injury caused by an accident, and that testimony remains materially uncontradicted, a jury verdict of "no permanency" would be contrary to the manifest weight of the evidence, requiring the granting of a new trial. Continuing, the District Court held that even though the history given to the testifying physician may have been false or incomplete, unless questions were put to the physician specifically inquiring about the effect of the false or omitted information on the doctor's previously expressed opinion, the trier of fact would not be permitted to reject the physician's opinion. The District Court noted that neither Dr. Flynn nor Dr. VerVoort testified that the additional medical history would have changed their opinion (neither one was asked that question). Since the medical evidence of "permanency" was therefore uncontroverted, the District Court said, the jury's verdict of no causally-related permanent injury was contrary to the manifest weight of the evidence, and a new trial was required.

Judge Wolf dissented, noting that the weight and credibility to be given to an expert's testimony was a matter for the finder of fact, and that the trier of fact was justified in determining that the physicians' opinion testimony was flawed by the materially untruthful history given them by plaintiff. Noting that both

physicians admitted having relied on the history given them by the plaintiff in making their determination that there was a permanent injury, and that the defense presented evidence that the history given was materially inaccurate, Judge Wolf would have affirmed the trial court, finding it within the province of the trier of fact to determine whether, under the circumstances, the opinion testimony should be accepted or rejected.

A notice invoking the discretionary jurisdiction of this Court was timely filed, and this Court accepted jurisdiction.

SUMMARY OF ARGUMENT

The District Court erred by holding that a jury may not reject, on the basis that its factual assumptions are untrue, expert opinion testimony that a plaintiff has a permanent injury causally related to an auto accident. That holding ignores, and even contradicts, sound and settled rules concerning the jury's proper role in evaluatingthe evidence, and should be unequivocally rejected.

One of the jury's primary functions in our judicial system is to determine the credibility of the witnesses and the weight of the evidence. The weight and credibility to be given an expert's opinion testimony is a matter for the jury, which may, based on all the evidence in the case, accept it or reject it in whole or in part. Even uncontroverted expert opinion testimony is not conclusive on the jury.

The permanency of a plaintiff's injury, and its causal relationship to the accident in issue, must be proven by expert

medical opinion testimony. Simply because such testimony is introduced and not met with other, contrary, expert medical opinion testimony, however, does not require that the jury be bound by that opinion. The jury remains free to reject the expert's opinion if, for instance, the testimony is not credible or if it rests on factual assumptions which are unsupported or untrue.

Where the jury finds that the facts on which an expert's opinion rests are not proven (or are disproven), the expert's opinion is without foundation and has no evidentiary value. Thus, an expert medical opinion that, based on the history given the doctor, plaintiff suffered permanent injury caused by the auto accident, has no evidentiary value if the jury determines from the evidence that the medical history given to the doctor is materially incomplete or false. In that situation, the opinion testimony is unsupported and plaintiff has simply failed to prove an element of the case. Incredibly, the First District has instead held that, **even** if the jury finds that the opinion testimony is not believable and that it rests on false assumptions, the jury is nonetheless compelled to accept it.

That holding not only violently departs from sound precepts of our jurisprudence, but in addition requires the jury to accept as **true** the facts on which the opinion is based -- no matter how convincingly they have been proven untrue -- since the opinion testimony **has** no evidentiary value unless its factual assumptions are supported.

For these reasons, Florida courts (including the First District itself in other cases) have consistently rejected the proposition that "uncontroverted" expert opinion testimony is binding on the jury, and have properly permitted juries to fulfill their historic functions of weighing evidence and evaluating credibility in their search for truth. The First District's contrary ruling in the instant case is ill-advised, at odds with fundamental precepts of our judicial system, and would unnecessarily increase litigation costs and further increase the burden on already-overcrowded court dockets.

The District Court's decision in the instant case should be reversed and the cause remanded with instructions to reinstate the judgment entered on the jury's verdict.

ARGUMENT

THE DISTRICT COURT ERRED WHEN IT SIGNIFICANTLY DEPARTED FROM PRE-EXISTING FLORIDA LAW BY HOLDING THAT A JURY MAY NOT CHOSE TO REJECT THE OPINION OF A PHYSICIAN ON THE ISSUES OF PERMANENCY AND CAUSATION OF PLAINTIFF'S INJURIES IF THE JURY CONCLUDES FROM THE EVIDENCE THAT THE FACTUAL ASSUMPTIONS ON WHICH THAT OPINION IS BASED ARE ERRONEOUS.

In the instant case, the District Court held that a jury may not, in an ordinary negligence case, reject expert medical opinion testimony as to the permanency of plaintiff's injuries and the causal relationship between those injuries and the auto accident in question, even though the medical history on which they relied in reaching their opinions was materially false and incomplete. In so holding, the First District radically and unwisely departed

from well-settled and fundamental principles of our jurisprudence regarding the proper role of a jury in evaluating the evidence.

The weight and credibility to be given to testimony is a matter for the finder of fact. Chomont v. Ward, 103 So.2d 635 (Fla. 1958). It is the exclusive province of the jury to determine the credibility of a witness and the truth or falsity of the facts on which a determination depends. Byrd v. State, 297 So.2d 22 (Fla. 1974); Davis v. Tew Land & Construction Co., 340 So.2d 525 (Fla. 1st DCA 1976); Keith v. Amrep Corp., 312 So.2d 234 (Fla. 1st DCA 1975); Bailey v. Symoson, 148 So.2d 729 (Fla. 3d DCA 1963).

Similarly, the weight and credibility to be given to expert opinion testimony is a matter for the finder of fact. Fay v. Mincey, 454 So.2d 587 (Fla. 2d DCA 1984); Horowitz v. American Motorist Ins. Co., 343 So.2d 1305 (Fla. 2d DCA 1977); Robertson v. Robertson, 106 So.2d 590 (Fla. 2d DCA 1958). Although expert witness testimony may be persuasive, the trier of fact may apply its knowledge and experience, and the other evidence in the trial, when weighing that evidence. Russo v. Heil Construction, Inc., 549 So.2d 676 (Fla. 5th DCA 1989); Behm v. Division of Administration, 292 So.2d 437 (Fla. 4th DCA 1974), approved, 336 So.2d 579 (Fla. 1976).

As this Court pointed out in Behm v. Division of Administration, 336 So.2d 579 (Fla. 1976), in considering an expert's opinion testimony the jury must be guided by the greater weight of the evidence, and it remains the jury's province to

determine the weight and credibility to be given an expert's opinion testimony.

Legions of cases hold that expert testimony, although persuasive, is **not** conclusive or binding on the jury, and that the jury is free to determine credibility and decide the weight to be ascribed to that opinion testimony. See, for instance, Russo v. Heil Construction, Inc., supra; Nettles v. State, 409 So.2d 85 (Fla. 1st DCA 1982), rev. den., 418 So.2d 1280 (Fla. 1982); Trolinger v. State, 300 So.2d 310 (Fla. 2d DCA 1974, cert. den., 310 So.2d 740 (Fla. 1975); Behm v. Division of Administration, 292 So.2d 437 (Fla. 4th DCA 1974), approved, 336 So.2d 579 (Fla. 1976); South Venice Corp. v. Caspersen, 229 So.2d 652 (Fla. 2d DCA 1969); Ronlee, Inc. v. P. M. Walker Co., Inc., 129 So.2d 175 (Fla. 3d DCA 1961); Robertson v. Robertson, supra.

The trier of fact has the discretion to accept or reject the opinion of an expert, even if that opinion is uncontroverted. Nettles v. State, supra; Behm v. Division of Administration, 292 So.2d 437 (Fla. 4th DCA 1974), approved, 336 So.2d 579 (Fla. 1976); Robertson v. Robertson, supra. Indeed, Florida Standard Jury Instruction (Civil) 2.2b, dealing with the believability of expert witnesses, provides, in pertinent part:

> You may accept such opinion testimony, reject it, or give it the weight You think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinion expressed, and all the other evidence in the case.

Both this Court and the District Courts of Appeal have repeatedly held that a jury is free, in the ordinary negligence case, to accept or reject the opinion testimony of a medical expert, just as it may accept or reject the opinion testimony of any other expert. Shaw v. Puleo, **159 So.2d 641** (Fla. **1964);** Williams v. Brochu, 578 So.2d 491 **(Fla.** 5th DCA 1991); Burton v. Powell, **547** So.2d 330 (Fla. 5th DCA **1989);** Westbrook v. All Points, Inc., 384 So.2d **973** (Fla. **3d DCA** 1980); Insle v. Cachran, 151 So.2d 63 (Fla. 1st DCA **1963);** Bailey v. Symoson, susra.

Applying that principle, the Fourth District in Behm v. Division of Administration, 292 So.2d 437 (Fla 4th DCA **1974),** approved, **336 So.2d 579** (Fla. **1976),** has held that a jury is not required by law to accept as true the plaintiff's evidence as to the permanency of plaintiff's injuries, even if that evidence is not contradicted by other evidence. See also, to like effect, Estate of Wallace **v.** Fisher, **567** So.2d **505 (Fla.** 5th DCA 1990).

Because the determination of what constitutes a permanent injury causally related to an auto accident is a medical question, the requirement of proof for no-fault threshold purposes can only be satisfied by expert medical opinion testimony of causation and permanency. Morev V. Harper, 541 So.2d 1285 (Fla. 1st DCA **1989),** rev. den., **551 So.2d** 461 **(Fla. 1989). See** also, to like effect, Horowitz v. American Motorist Ins. Co., supra. From this correct premise, however, the First District in the instant case reached a false conclusion. The First District concluded that, since expert medical opinion testimony is required to prove causation and

permanency, the existence of any medical opinion (no matter how factually unsupported) tending to show that causation and permanency exist, if coupled with an absence of controverting medical opinion testimony, requires a determination that permanency and causation have been conclusively established.

In so holding, the First District wholly overlooked the jury's recognized power to reject testimony which it finds not to be credible and to reject opinion testimony which it finds to be based on factual assumptions which are not supported by the evidence. Instead, the First District has elevated expert opinion testimony to such an exalted station as to make it conclusive and binding on the jury, even though the jury might legitimately find it to be not credible or not supported by evidence of the existence of its factual assumptions. In taking this position, the First District in this and other cases[2] has significantly departed from fundamental and appropriate principles of our jurisprudence.

In the instant case, the physicians who testified that plaintiff had sustained a permanent injury which was causally related to the auto accident in question both further testified that, in reaching this opinion, they had relied on the medical history given them by plaintiff. As the District Court noted, evidence was adduced that the history given these physicians by

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[2]The First District has similarly held that medical expert testimony cannot be rejected if not contradicted by other medical testimony, unless the testifying physician admitted on the witness stand that an alternative factual basis would change his opinion, in **Faucher** v. R.C.F. Developers, *569* So.2d **794** (Fla. 1st DCA 1990) and in Morey v. Harper, supra.

plaintiff was both false and incomplete. If a jury finds that the facts on which an expert's opinion is based are not **proven,** the answers of the expert must necessarily fall as well. Shaw v. Puleo, supra; R. P. Hewitt & Associates of Florida **v.** McKimie, 416 So.2d 1230 (Fla. 1st **DCA** 1982); Behm V. Division of Administration, 292 So.2d 437 (Fla. 4th **DCA** 1974), approved, **336** So.2d 579 (Fla. **1976).**

As this Court observed in Chomont V. Ward, 103 So.2d 635, 637-638 (Fla. 1958):

> While several doctors testified as to some of the alleged physical injuries it was shown in each instance that the doctors rendered a clinical opinion grounded upon the factual history related by the appellant. This being so, if the jury disbelieved the appellant's story, then his entire claim for damages for physical injuries collapsed.

In Arkin Construction **Co.** V. Simpkins, **99** So.2d ***557*** (Fla. 1957), this Court addressed the point in the context of a workers' compensation proceeding. In that case, the widow and minor son of the deceased employee were awarded death benefits, and the Industrial Relations Commission affirmed that award. In the course of quashing that order, this Court noted (at **560)** that the only question it was required to answer was whether there was competent substantial evidence in the record to support the Deputy's finding that an on-the-job **fall** had caused the claimant**'s** heart failure. **A** specialist produced by claimants had testified that in **his** opinion the fall and resulting pain and tension precipitated or triggered the fatal heart attack. Noting that the burden was on the claimant to establish a causal connection between the injury

and the employment, the Court determined that the testimony of claimant's heart specialist did not constitute competent substantial evidence of a causal relationship. The Court pointed out (at 561) that the claimant's expert witness had assumed, as a basis of his opinion, that the deceased suffered pain, nervous tension and anxiety, but that the record was devoid of any evidence to support that assumption -- and, in fact, indicated that the deceased did not suffer from pain, nervousness or anxiety. This Court reiterated that the conclusion or opinion of an expert witness based on facts not supported by the evidence in a case has no evidentiary value. Accordingly, since the expert's opinion testimony had no evidentiary value, the record lacked any competent evidence of a causal relationship, and this Court quashed the contrary decision of the Industrial Relations Commission.

In Frve v. Suttles, 568 So.2d 983 (Fla. 1st DCA 1990), the First District itself applied this same rule in a motor vehicle accident case. In that case, an economist had valued plaintiff's lost earnings and lost earning capacity in reliance on assumptions that plaintiff had not worked at all since the accident and that, but for the accident, he would have continued in his position with certain increases in pay through retirement. However, the evidence showed that the plaintiff had worked one-fourth of the time between the accident and the trial, that he did not have a history of continuous employment, and that he had consistently earned the minimum wage when he had worked, having begun his last employment only several weeks before the accident. That evidence, the First

District said in Frye, was sufficiently inconsistent with the economist's assumptions to permit the jury to wholly or partially reject the economist's opinions.

In Frye, the First District specifically noted (at 985) that a jury has a right to reject expert opinion testimony when the factual basis of the expert's opinion is proven unsound. In the instant case, in contrast, the First District has held to the contrary, refusing to permit a jury to reject opinion testimony when its factual basis is proven unsound. Exalting form over substance, the First District has held that defendant must either "ask the magic question" of plaintiff's expert (even if the answer is abundantly obvious) or present expert medical opinion testimony of its own (thereby increasing litigation costs and further lengthening trials). In the First District, unsupported opinion testimony of an economist may be rejected by the jury, but unsupported opinion testimony of a doctor as to the permanency of an injury and its causal relationship to an accident may not be. No reason exists to justify such an absurd dichotomy.

As this Court pointed out in Behm v. Division of Administration, 336 So.2d 579 (Fla. 1976), the opinion of an expert is worth no more than the reasons on which it is based. Where the record is devoid of evidence supporting the factual statements in a hypothetical given to an expert, the opinion testimony given in response to that hypothetical question is incompetent and without evidentiary foundation. Victoria Hospital v. Perez, 395 So.2d 1165 (Fla. 1st DCA 1981); Monsalvatse and Co. of Miami V. Ryder Leasing,

Inc., 151 So.2d 453 (Fla. 3d DCA 1963). Likewise, where the jury finds from the evidence that the "facts" on which the expert bases his opinion are untrue, the opinion testimony is without foundation and has no evidentiary value: otherwise, the jury would be compelled to either accept an opinion based on false premises or reject facts the jury found to be true simply because they were inconsistent with the facts assumed by the expert in reaching his opinion.

As this Court stated in Arkin Construction Co. v. Simpkins, supra, at 561:

> It is elementary that the conclusion or opinion of an expert witness based on facts or inferences not supported by the evidence in a cause has no evidential value.

The rule espoused by the District Court in the instant case, however, is to the contrary. Under the holding of the District Court in the instant case, the opinion testimony of an expert medical witness on issues of permanency and causation occupies an exalted status, and the opinion testimony of such a witness must be believed by the jury, even if the evidence shows that the opinion is based on factual assumptions which the jury finds, based on all the evidence, are factually unsupported or incorrect.

As discussed above, and as the District Court correctly noted, a plaintiff in an auto accident case seeking to show permanent injuries causally related to the auto accident (in order to meet the no-fault threshold) must provide competent medical opinion testimony as to permanency and causation. Under the cases cited

above, if the factual foundation assumptions of that required medical opinion on causation and permanency are removed, the opinion testimony is of no probative value, and plaintiff has thus failed to prove the existence of any permanent injury causally related to the accident.

In the instant case, incredibly, the First District not only failed to recognize that the jury had the right to reject the physician's opinion testimony, and to find that the factual assumptions on which it was based were unsupported (thereby depriving it of any evidentiary value), but further held that such factually-unsupported opinions were conclusive and binding on the jury.

That holding is greatly at variance with well-settled Florida case law. Under settled Florida law, the trial court correctly held that the jury's rejection of the medical opinions as to causation and permanency was within the jury's authority, since the jury could have found from the evidence that the factual assumptions on which those opinions were based were false, thus depriving the opinions of any evidentiary value. In reversing, the First District incorrectly held that the opinion testimony was conclusive and binding simply because the physicians were not asked whether, if they assumed a different medical history than that given them by the plaintiff, their opinions would differ. What the District Court failed to recognize was that, on the evidence adduced, the jury was entitled to determine that the history given these physicians by plaintiff was both false and inaccurate, and

hence that their opinion testimony, which relied on that history as a factual assumption, simply had no probative value.

As noted above, where the record is devoid of evidence supporting the factual statements in a hypothetical question to an expert, the expert's opinion given in response to the hypothetical is incompetent as being without evidentiary foundation. Similarly, where the record permits a jury to find that the facts on which an opinion is based are not accurate, the opinion testimony can be rejected by the jury as being without a factual foundation. The rule employed by the District Court in the instant case, however, would not only make the opinion testimony conclusive and binding, but would require the jury to disbelieve any evidence (no matter how compelling) at variance with the factual foundation assumptions made by the expert.[3]

Since an expert's opinion testimony has probative value only if its foundation assumptions are true, the effect of the District

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[3]To use an admittedly extreme example, assume that plaintiff told the doctor that his right arm was traumatically amputated in the auto accident and that, based on that medical history, the doctor testified that, in his opinion, plaintiff sustained a permanent injury as a result of the accident. Assume further that plaintiff in fact had lost his right arm in an industrial accident two years prior to the auto accident, and that this fact was proven to the jury beyond any conceivable doubt. Under the rule espoused by the District Court in the instant case, unless defendant presented the contrary expert testimony of another physician (plainly an unnecessary extravagance in this situation) or asked plaintiff's expert if his opinion would be different on this set of facts (a question to which the answer of any remotely honest witness is obvious), the jury would be required to find that plaintiff lost his arm in the auto accident (because the uncontroverted expert opinion is that he did) and thus the jury would be required to disbelieve evidence which is, in fact, true beyond any reasonable dispute.

Court's making that opinion conclusive and binding is to require the jury to also accept as true the foundation factual assumptions on which the expert's opinion relies. Where, as here, the expert has relied on a history given him by plaintiff, and other evidence is adduced to demonstrate that that medical history is both incomplete and false, the effect of the District Court's ruling is to require that the jury believe the history as given by plaintiff, notwithstanding any proof as to the lack of accuracy or completeness of what plaintiff told the doctor, since otherwise the expert's opinion is, under settled law, without factual foundation and hence without probative value.

Moreover, under the District Court's holding, such medical expert opinion testimony would be binding on the jury no matter how badly the expert's credibility may have been impeached or the factual foundations of his opinion shown to be either unreliable or completely false. Even if the expert had been convicted of perjury, had admitted numerous inconsistent statements in his deposition, was a close personal friend of plaintiff and a bitter and long-term personal enemy of defendant, and exhibited a demeanor revealing an utter lack of trustworthiness, and even if each and every one of his factual assumptions were convincingly contradicted by other evidence in the case, under the District Court's ruling, the jury would nonetheless be required to accept his opinion testimony at full value. Such cannot be the law.

Expert opinion testimony on contested issues simply cannot be binding and conclusive on the jury, whose proper role includes

determining the credibility of the witnesses and weighing the probative value of the evidence. In Behm v. Division of Administration, 292 So.2d 437, 441 (Fla. 4th DCA 1974), approved, 336 So.2d 579 (Fla. 1976), in the course of rejecting a contention that expert witness testimony was binding and conclusive, the Fourth District pointed out:

> The adoption of a rule contra to the views herein expressed would work basic injustices and unduly restrict and bind the fact finding function. As experienced triers know, there are experts with differing degrees of qualifications and subjects who lend themselves in varying degrees to the employment of opinion testimony. Some experts, although able to recite at least enough background and experience to mount the witness stand and give voice to their hypothesis and end opinion, are unworthy of belief, their opinions being against every understanding of common sense and everyday experience. It would be unthinkable to tell a trial court that, faced with this circumstance, it would have no alternative but to adopt as an established fact the opinion of such a witness when the other side failed to counter it with another expert.
>
> Supposing, further, that the subject is borderline as concerns the proper use of expert testimony. One side produces an expert, the other doesn't, just as a matter of choice. The contra rule would mean that one side would necessarily default the issue to the expert's opinion when indeed, such opinion contributed little, if anything to the ultimate proofs.
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> And so we conclude that the proper rule, and the rule followed by the trial court, is that the opinion of an expert witness, even though not contradicted by another expert, is not necessarily binding.

For these reasons, among others, both this Court and the District Courts of Appeal have rejected the position taken by the First District in the instant case. Thus, in Byrd v. State, supra, this Court rejected a contention that a criminal defendant's conviction must be reversed where the defense presented two

psychiatrists (who testified that defendant was insane at the time of the offense) and the State presented no medical testimony whatsoever. In that case, the State presented two lay witnesses to rebut the factual basis of the psychiatrists' opinion testimony of insanity, but declined to present any medical opinion testimony as to his sanity. Rejecting the defendant's position that, given the "uncontroverted" psychiatric testimony that he was insane, his conviction must be reversed, the Court noted that the evidence of insanity had simply been insufficient to create the requisite reasonable doubt in the mind of the jury. The Court re-emphasized that a jury does not necessarily have to accept expert testimony over non-expert testimony, but may instead disbelieve the expert and believe the non-expert if that is their inclination. This Court re-emphasized that it is the exclusive province of the jury to determine the credibility of a witness and the truth or falsity of the facts on which a determination depends, and affirmed the conviction.

In Williams v. Brochu, susra, the Fifth District similarly rejected the position taken by the First District in the instant case. In that case, as in this one, the jury found that no permanent injury had been caused by an auto accident. The Fifth District noted that it was the jury's province to weigh the evidence and that the jury had the right to accept or reject all or any part of the testimony of any witness, including expert witnesses.

Again in Westbrook v. All Points, Inc., supra, the Third District reached the same conclusion in another auto accident case in which the jury awarded medical expenses, but declined to award any damages for pain and suffering. In affirming the judgment entered on that award, the Third District noted that the medical experts uniformly agreed that plaintiff had suffered a back injury, and that pain is a concomitant of the injury diagnosed. However, the court continued, the difficulty of accurate diagnosis in such cases of purported back injury is common knowledge, and the jury may quite properly havetakenthat factor into consideration, along with the fact of plaintiff's refusal to undergo certain medical tests which might have been dispositive. Where lay testimony and lay knowledge brought into question the accuracy of the expert testimony, the court concluded, a jury may properly **refuse** to give credence to the medical expert testimony.

The First District's contrary opinion in the instant case is at odds with well-settled and fundamentally sound Florida law in all of the above areas. Moreover, adoption of the rule employed by the District Court in this case would increase the cost of litigation by requiring defendants to retain, and present opinion testimony by, medical experts in cases in which that expense[4] is otherwise entirely unjustified. Requiring the defense to retain and present opinion testimony by such medical experts would also

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[4]In addition to the expert's own **fees,** the additional time expended by defense counsel in connection with the expert would mean additional attorney's fees being charged to defendant.

increase the length of trials (as well as requiring additional depositions), with a concomitant increase in the burdens on both the jury and the judiciary due to the increased length of trial. In these times of crowded trial dockets and widespread concern about the costs of litigation, the Court should think long and hard before adopting a rule which would unnecessarily but inevitably increase the costs and burdens of litigation. That is all the more true where, as here, such a rule would be fundamentally contrary to sound and well-settled principles of our jurisprudence concerning the proper role of the jury.

CONCLUSION

For the reasons set forth above, this Court should reaffirm the jury's well-settled role in accepting or rejecting expert testimony, and reaffirm that the burden of proving the existence of permanent injury causally related to an accident is on the plaintiff. This Court should reject the rule espoused by the District Court of Appeal in the instant cause and quash that decision, remanding the cause to the District Court of Appeal with instructions to affirm the judgment entered on this jury's verdict.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished to: Thomas E. Wheeler, Jr., Esquire, Bell, Schuster & Wheeler, P.A., 119 West Garden Street, Pensacola, FL 32501; Robert P. Gaines, Esquire, Beggs & Lane, Post Office Box 12950, Pensacola, FL 32576; and to Ada A. Hammond, Esquire, Taylor, Day & Rio, 10 South Newnan Street, Jacksonville, FL 32202, by mail, this 10th day of August, 1992.

Attorney