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CASE NO. 79,138

IN THE SUPREME COURT OF FLORIDA

DONNA EASKOLD,

Petitioner,

v.

JAMES RHODES, JR., and
ELOUISE RHODES,

Respondents.

DISCRETIONARY REVIEW OF DECISION OF

DISTRICT COURT OF APPEAL, FIRST DISTRICT

BRIEF OF THE *AMICUS* CURIAE

STATE FARM MUTUAL AUTOMOBILE INSURANCE *COMPANY*

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ADOPTION OF STATEMENT OF THE CASE AND OF THE FACTS

The Amicus Curiae, State Farm Mutual Automobile Insurance Company (hereafter "State Farm"), hereby adopts and incorporates the Statement of the Case and of the Facts contained in the Initial Brief on the Merits of the Petitioner, Donna Easkold, as if set forth at length herein.

ISSUE PRESENTED

The opinion of a medical expert that a permanent injury resulted from an automobile accident can be rejected by a jury if its credibility and weight are controverted by any evidence, including lay testimony or cross examination of the expert, and need not be controverted by the opinion of other medical experts.

SUMMARY OF ARGUMENT

In automobile negligence cases, Florida Statute 6627.737(2)(b) (1991) limits a plaintiff's right to recover non-economic damages unless the plaintiff proves that he suffered a permanent injury within a reasonable degree of medical probability as a result of the accident. This statute places the burden of proof upon the plaintiff to meet the statutory requirements, absent which, he may not recover non-economic damages. Because the statute requires proof of permanent injury within a reasonable degree of medical probability, the plaintiff has the burden to present credible expert medical testimony, in order to persuade the trier of facts that he has suffered a permanent injury as a result of the automobile accident.

In the opinion under review in this case, the First District Court of Appeal addressed the issue of what evidence is sufficient to meet the plaintiff's burden on the permanency issue. The Court held that if the plaintiff presents a medical expert who gives an opinion that plaintiff suffered a permanent injury as a result of the accident, a jury verdict of no permanency is contrary to the manifest weight of the evidence requiring retrial, unless:

1. The defense presents contrary medical expert opinion; or

2. The defense elicits testimony from the plaintiff's expert that his opinion regarding a permanent injury resulting from the accident would be different, had the expert been aware of facts different from those facts upon which he relied in arriving at his opinion.

The holding of the First District Court of Appeal in this case is contrary to Florida Jurisprudence and to one of the most generally accepted rules in all jurisprudence, state and federal, that the questions of the credibility and weight of expert opinion testimony are for the trier of facts, and that such testimony is not conclusive even where it is uncontradicted by other expert opinion. Rather, the jury is free to accept or reject the expert's testimony, based on a number of factors, including evidence showing the incorrectness or inadequacy of the factual assumptions on which the opinion is based, the interest or bias of the expert, inconsistencies or contradictions in his testimony as to material

facts, and other factors which bear on the credibility and weight to be given to the expert's opinion.

The First District's requirement that the defense present contrary medical opinion testimony, or elicit a contrary opinion from the plaintiff's expert before the jury can reject the opinion of the plaintiff's expert, invades the province of the jury to reject opinion evidence which is based on an unsound factual basis, or is otherwise unworthy of belief, contrary to Florida law. Further, it has the effect of shifting the burden of proof on the permanency and causal relationship questions to the defense, by requiring the defense to disprove the opinion of the plaintiff's expert, no matter if that opinion is without adequate foundation and unworthy of belief, contrary to the requirements of Florida Statute §627.737(2)(b). The First District's decision also is inconsistent with Florida Standard Jury Instruction 2.2b on the believability of expert witnesses, and case law interpretation of Florida Evidence Code 490.702 on expert witness testimony.

In the case before this Court, sufficient evidence was presented by the defense upon which a reasonable jury could have determined that the opinion of the plaintiff's medical experts that plaintiff sustained a permanent injury as a result of the accident was not well-founded, and should be rejected. Since it is the plaintiff's burden to prove permanency and causal relationship under Florida Statute §627.737(2)(b), the burden was on the plaintiff to either rehabilitate her own experts or show that the evidence presented by the defense that served to controvert the

foundation for the opinion of the plaintiff's experts was itself unworthy of belief. As plaintiff failed to do so, the jury's verdict in this case was not contrary to the manifest weight of the evidence, and the judgment of the trial court should be affirmed.

ARGUMENT

In automobile negligence cases, there is a limitation on the plaintiff's right to recover non-economic damages created by Florida Statute §627.737(2)(b) (1991). The statute provides:

> 627.737 Tort Exemptions; Limitation on Right to Damages; Punitive Damages. -
>
> (2) In any action of tort brought against the owner, registrant, operator, or occupant of a motor vehicle with respect to which security has been provided as required by ss. 627.737-627.7405, or against any person or organization legally responsible for his acts or omissions, a plaintiff may recover damages in tort for pain, suffering, mental anguish, and inconvenience because of bodily injury, sickness, or disease arising out of the ownership, maintenance, operation, or use of such motor vehicle only in the event that the injury or disease consists in whole or in part of:
>
> (b) Permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement.

This Florida Statute places the burden upon the plaintiff in an automobile negligence case, to prove both that the injury of which he complains was caused by the accident, and that the injury complained of is permanent within a reasonable degree of medical probability, as a threshold to any claim for the non-economic damages referenced in the statute.

Because the statute requires proof of permanent injury within a reasonable degree of medical probability, the courts in Florida

have held that in order to sustain his burden of proof, the plaintiff must present expert medical testimony on the permanency question, because only a medical expert can state an opinion "within a reasonable degree of medical probability" Fay v. Mincey, 454 So.2d 587 (Fla. 2d DCA 1984); Refior v. Matuszcak, 358 So.2d 95 (Fla. 4th DCA 1978), cert. denied, Refior v. Matuszcak, 362 So.2d 1055 (Fla. 1978); Avis Rent-a-Car System. Inc. v, Stuart, 301 So.2d 29 (Fla. 2d DCA 1974).

As a result, under Florida law, the plaintiff has the burden to present credible expert testimony, on the issue of permanency, in order to persuade the trier of fact that he has suffered a permanent injury as a result of the automobile accident.

In its opinion in this case, Rhodes v. Easkold, 588 So.2d 267 (Fla. 1st DCA 1991), the First District Court of Appeal addressed the issue of what evidence is sufficient to meet the plaintiff's burden on the permanency issue. The Court, with Judge Wolf dissenting, held that if the plaintiff presents a medical expert who gives an opinion that the plaintiff suffered a permanent injury as a result of the accident, a jury verdict of no permanency is contrary to the manifest weight of the evidence and the case must be retried unless:

3. the defense presents contrary medical expert opinion: or

4. the defense cross examines the plaintiff's medical expert and elicits testimony from that expert that his opinion regarding a permanent injury resulting from the accident would

be different, had the expert been aware of facts different from those facts upon which he relied in arriving at his opinion. [1]

The holding of the First District Court of Appeal in this case is contrary to the jurisprudence of Florida on the province of the jury to accept or reject expert opinion testimony. The Florida courts consistently have held that expert witness testimony is not conclusive or binding on the jury, in that it is free to determine its credibility and to decide the weight to be ascribed to it, and to accept or reject all, or any part of, the testimony of any witness including expert witnesses. Byrd v. State, 297 So.2d 22 (Fla. 1974); Williams V. Brochu, 578 So.2d 491 (Fla. 5th DCA 1991); Burton v. Powell, 547 So.2d 330 (Fla. 5th DCA 1989); Trolinger V. State, 300 So.2d 310 (Fla. 2d DCA 1974), cert. denied, Trolinger v. State, 310 So.2d 740 (Fla. 1975); south Venice Corp. v. Caspersen; 229 So.2d 652 (Fla. 2d DCA 1969); Bailey v. Sympson, 148 So.2d 729 (Fla. 3rd DCA 1963).

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[1] In respondents' amended brief on jurisdiction to this Court, respondents argue that this was not the holding of the Court in this case. Rather, respondents argue that the Court merely held that while a jury can always disregard expert opinion, there was insufficient evidence in this case upon which a reasonable jury could question the weight and credibility of the expert medical opinion on the permanency issue and therefore, the verdict was against the manifest weight of the evidence. As such, respondents argue that this case does not have the effect of changing Florida law on the province of the jury to accept or reject expert opinion testimony. However, because of the language used by the Court in its opinion, and the result reached, State Farm disagrees with the respondents' reading of the Court's holding in this case. Nevertheless, assuming respondents' reading is correct, State Farm urges clarification of the law of Florida on this point by this Court.

In Shaw v. Puleo, 159 So.2d 641 (Fla. 1964) and Chomont v. Ward, 103 So.2d 635 (Fla. 1958), this Court held that in the ordinary negligence case, a jury is free to accept or reject the testimony of a medical expert just as it may accept or reject that of any other expert. If the jury should find that the facts on which the opinion of the expert is based are not proved, the expert's opinions can be rejected. Similarly, where there are in fact conflicts which arise in testimony given during the trial, it is the function of the jury to resolve them and it is within their province to reject the expert testimony and rely on lay evidence. The rule laid down by this Court in those cases applies, even where the facts testified to by the medical expert are not within the ordinary experience of the members of the jury, but are peculiarly within the realm of medical expertise. Even in such a circumstance, the jury is free to determine the credibility of the expert opinion and to decide the weight to be ascribed to it in the face of conflicting lay evidence. As stated by this Court in Shaw v. Puleo,

> For these reasons we must reiterate that even though the facts testified to by Dr. Albee were not within the ordinary experience of the members of the jury, the jury was still free to determine their credibility and to decide the weight to be ascribed to them in the face of conflicting lay evidence.

Id. at page 644.

Hence, to the extent that the First District Court of Appeal in this case based its holding on the rationale that by statute the

permanency of an injury must be proven within a reasonable degree of medical probability, its holding conflicts with Florida law.

Moreover, there is no requirement under Florida law that the jury must accept expert opinion testimony, unless a contrary opinion is offered by another expert. The rule long fallowed in Florida is that the opinion of an expert witness, even though not contradicted by another expert, is not binding on the trier of fact, and can be rejected. ~~Estate of Wallace v. Fisher~~, 567 So.2d 505, 509 nt.11 (Fla. 5th DCA 1990); ~~Russo v. Heil Construction. Inc.~~, 549 So.2d 676, 677 (Fla. 5th DCA 1989); ~~Nettles v. State~~, 409 So.2d 85, 88 (Fla. 1st DCA 1982), ~~rev. denied~~, Nettles v. State, 418 So.2d 1280 (Fla. 1982); ~~Behm v. Division of Admin., State. Dept. of Transp.~~, 292 So.2d 437, 441 (Fla. 4th DCA 1974), ~~asaroved~~, Behm v. Division of Admin,, State, Dept. of Transp., 336 So.2d 579 (Fla. 1976); Robertson V. Robertson, 106 So.2d 590, 593 (Fla. 2d DCA 1958). The rationale for this rule is well stated by the Fourth District Court of Appeal in Behm v. Division of Admin., supra, as follows:

> 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. ...
>
> 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.

Id. at page 441.

The rule that expert opinion testimony is not conclusive even where it is uncontradicted, is not a rule limited to the jurisprudence of the state of Florida, as noted by the Court in Mims v. United States, 375 F.2d 135 (5th Cir. 1967). In that case, the sanity of a criminal defendant was in issue, and expert medical opinion was offered by the defendant. The government offered no expert witness to rebut this opinion evidence. It relied upon factual proof, nonexpert opinion testimony and weaknesses in the testimony of appellant's experts made evident by cross examination. In finding that the expert medical testimony offered by the defendant was not conclusive or binding, the Court noted the following:

> On the other hand, one of the most generally accepted rules in all jurisprudence, state and federal, civil and criminal, is that the questions of the credibility and weight of expert opinion testimony are for the trier of facts, and that such testimony is ordinarily not conclusive even where it is uncontradicted. The Supreme Court of the United States has said that the trier of the facts is not limited to a compromise in balancing of opinions of expert witnesses in reaching its decisions, and that there is no rule of law that requires the judgment of witness to be substituted for that of the jury. ...
>
> It has been recognized that expert opinion evidence may be rebutted by showing the incorrectness or inadequacy of the factual

> assumptions on which the opinion is based, "the reasoning by which he progresses from his material to his conclusion," the interest or bias of the expert, inconsistencies or contradictions in his testimony as to material matters, material variations between the experts themselves, and defendant's lack of cooperation with the expert. Also, in cases involving opinions of medical experts, the probative force of that character of testimony is lessened when it is predicated on subjective symptoms, or where it is based on narrative statements to the expert as to past events not in evidence at the trial. In some cases, the cross examination of the expert may be such as to justify the trier of facts in not being convinced by him. One or more of these factors may, depending on the particular facts of each case, make a jury issue as to the credibility and weight to be given to the expert testimony; and in determining whether such issue is raised, due consideration must be given to the fact that the trier of facts has the opportunity to observe the witness if he testifies in person. (emphasis in original) (citations omitted)

Id. at page 140-144.

The observation of the Fifth Circuit Court of Appeals in Mims v. United States that under American Jurisprudence the rule is that expert opinion testimony can be disregarded even if not controverted by other expert testimony, is supported not only by the cases cited within that opinion, but by a number of other decisions of the federal and state courts of the United States. See, Gregg v. U.S. Industries, Inc., 887 F.2d 1462 (11th Cir. 1989); Woodling v. Garrett Corp., 813 F.2d 543 (2nd Cir. 1987); Jenkins v. General Motors Corp., 446 F.2d 377 (5th Cir. 1971), cert. denied, General Motors Corp. v. Jenkins, 405 U.S. 922 (1972); Mechanick v. Conradi, 527 N.Y.S.2d 586 (N.Y.App.Div. 1988); Harmston v. Asro-West, Inc., 727 P.2d 1242 (Idaho Ct.App. 1986); Sanchez v. Molycorp., Inc., 703 P.2d 925 (N.M.Ct.App. 1985); Amaru

v. Stratton, 506 A.2d 1225 (N.J.Super.Ct.App.Div. 1985); Stillwell v. Cincinnati Inc., 336 N.W.2d 618 (N.D. 1983); Fox v. Mason, 456 A.2d 1196 (Conn. 1983); Bronchak v. Rebmann, 397 A.2d 438 (Pa.Super.Ct. 1979); Indoor Recreation Enterprises, Inc. v. Douglas, 235 N.W.2d 398 (Neb. 1975); Equity National Life Insurance Co. v. Shelnutt, 198 S.E.2d 350 (Ga.Ct.App. 1973); Olson v. Katz, 201 N.W.2d 478 (Iowa 1972); Wisdom v. Armstrong, 196 A.2d 88 (D.C. 1963); Dimas v. Irvine, 334 P.2d 82 (Cal.Ct.App. 1959); Denman v. Colorado Interstate Gas Co., 294 P.2d 207 (Kan. 1956).

A federal bankruptcy court has noted that Federal Rule of Evidence 702 dealing with expert testimony does not make the testimony of an expert, even if uncontradicted by another expert, conclusive as to the issues testified to, with the trier of fact being free to make its own determination of the issues, regardless of the expert's testimony. In Re: Opelika Mfg. Corp., 66 B.R. 444 (Bkrtcy.N.D.Ill. 1986). The Florida Evidence Code on the same subject, Florida Statute $90.702 (1991), is identical to the federal rule on this issue and the same interpretation should be given to the Florida Code.

A corollary to the rule that a jury may reject expert opinion testimony, even if not controverted by other expert opinion, is that a jury has the right to reject opinion testimony when its factual basis is proven unsound. Shaw V. Puleo, supra; Chomont v. Ward, supra; Frve v. Suttles, 568 So.2d 983 (Fla. 1st DCA 1990); R.P. Hewitt & Assoc. of Florida, Inc. V. McKimie, 416 So.2d 1230 (Fla. 1st DCA 1982); Monsalvatge & Co. of Miami, Inc. v. Ryder

Leasing, Inc., 151 So.2d 453 (Fla. 3rd DCA 1963); Behm v. Division of Admin., supra. The rationale for this rule is stated by the First District Court of Appeal in its decision in R.P. Hewitt & Assoc. of Florida, Inc. v. McKimie, supra, which was a workers compensation case which involved the issue of whether the claimant's injuries resulted from an employment related accident. At footnote 1 of its decision, the First District Court of Appeal stated the following:

> An expert opinion based on facts not supported by the record cannot constitute proof of the facts necessary to support the opinion, and is not competent substantial evidence. A deputy may consider lay testimony and his view of the claimant, and his conclusions may be based on testimony of the claimant to the exclusion of that of a medical expert. Lay testimony is of probative value to establish the necessary causal relationship between the accident and the injury where the conditions and symptoms are within the actual knowledge and sensory experience of the claimant. Here, the claimant's condition and symptoms were within her actual knowledge and sensory experience, and the rejected medical opinions were based on a view of the claimant's symptoms which was not supported by the record. (citations omitted)

Id. at page 1232.

so, too, where lay testimony and lay knowledge bring into question the accuracy of expert testimony, a jury may properly refuse to give credence to the medical expert testimony. Westbrook v. All Points Incorporated, 384 So.2d 973 (Fla. 3rd DCA 1980). In this case, the medical experts agreed that the plaintiff had suffered a back injury, and that pain is a concomitant of the injury diagnosed. However, the defense presented film of the plaintiff as rebuttal evidence showing him climbing a 12 foot chain

link fence, stooping, bending and lifting as he went. In holding that the jury was within its province in refusing to give credence to the medical expert testimony in the case, the court noted that the difficulty of accurate diagnosis in cases of purported back injury is common knowledge, and the jury quite properly may have taken that factor into consideration, along with the fact of the plaintiff's refusal to undergo certain medical tests which might have been dispositive, and along with the film of the plaintiff in rejecting the expert's testimony.

In the case before this Court, while no expert medical testimony was presented by the defense on the question of whether Mrs. Rhodes had suffered a permanent injury as a result of the automobile accident, there was substantial evidence presented to the jury that the medical experts presented by Mrs. Rhodes based their conclusions of a permanent injury caused by the accident on an inaccurate history given to them by Mrs. Rhodes. As outlined in the Petitioner's Statement of the Case and Facts in her initial brief on the merits before this Court, this evidence brought into question the causal relationship between the accident and any permanent medical condition suffered by Mrs. Rhodes. The evidence showed that she had complained of the same or similar medical problems for years before the accident, but that she had not related this history to her expert witnesses. As noted in R.P. Hewitt & Assoc. of Florida, Inc. v. McKimie, supra, lay testimony is of probative value to establish the necessary causal relationship between the accident and the injury where the

conditions and symptoms are within the actual knowledge and sensory experience of the plaintiff. Where, as here, evidence shows that the plaintiff related to physicians conditions and symptoms similar to those claimed to have been caused by the accident years prior to the accident, such evidence has probative value on the issue of causal relationship and can controvert expert medical testimony on the issue.

Rather than permitting the jury to discredit and reject the medical expert opinion on this basis, the First District Court of Appeal concluded that the jury could not do so because the defense had not put on contrary medical expert opinion and had failed to elicit a contrary opinion from the plaintiff's experts, based on the more accurate history. This requirement invades the province of the jury to reject opinion evidence which is based on an unsound factual basis, or is otherwise unworthy of belief, as permitted by the Florida decisions cited above.

Further, it has the effect of shifting the burden of proof on the permanency and causal relationship questions to the defense, by requiring the defense to disprove the opinion of the plaintiff's expert, no matter if that opinion is without adequate foundation and unworthy of belief, contrary to the requirements of Florida Statute §627.737(2)(b). As argued above, it is the plaintiff's burden under this statute to prove both permanency and the causal relationship of the injury to the accident. In order to meet this burden, it is up to the plaintiff to present credible expert testimony, absent which, the plaintiff fails to meet her burden of

proof. If the plaintiff gives an inaccurate history to her medical expert and the medical expert reaches an opinion based upon this inaccurate history, plaintiff takes the risk that the inadequate history will be revealed at trial, and give grounds to the jury to reject her expert's opinion. The rule that would be more in keeping with the requirement that plaintiff sustain her burden of proof in a situation such as this, is to require the plaintiff to rehabilitate her own expert, by eliciting testimony fromthe expert that the more accurate history would not have changed the expert's opinion or by proving through other evidence that the plaintiff did give an accurate history to the expert and that the defense has mischaracterized or not proven that the history given was inaccurate. Placing the burden on the plaintiff to provide an accurate history to her physician serves the beneficial purpose of encouraging plaintiffs to be candid with their physicians regarding their prior medical history, thus permitting medical experts to reach more accurate opinions on the issues of permanency and causal relationship of the injury to the accident.

As noted by Judge Wolf in his dissenting opinion in this case, the weight and credibility to be given to an expert's testimony is a matter for the finder of fact. Horowitz v. American Motorist Insurance Co., 343 So.2d 1305 (Fla. 2d DCA 1977). Where evidence is presented and believed by the jury that a materially untruthful history was given to a medical expert, who based his opinion upon that history, the trier of fact is justified in rejecting the opinion and concluding that the plaintiff has failed to meet her

burden of proof on the issue. This is consistent with Florida Standard Jury Instruction 2.2b on the believability of expert witnesses. That jury instruction provides as follows:

> [You have heard opinion testimony [on certain technical subjects] from [a person] [persons] referred to as [an] expert witness[es].] [Some of the testimony before you was in the form of opinions about certain technical subjects.]
>
> 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.

To the extent that the First District's opinion in this case was based upon its prior cases of Morey v. Harper, 541 So.2d 1285 (Fla. 1st DCA 1989), rev, denied, Harper v. Morey, 551 So.2d 461 (Fla. 1989); and Faucher v. R.C.F. Developers, 569 So.2d 794 (Fla. 1st DCA 1990), State Farm agrees with the view of Judge Wolf in his dissent that those cases also should be revisited.

State Farm disagrees with the argument made by the Respondents in their amended brief on jurisdiction in this case, that the cases of Scarfone v. Magaldi, 522 So.2d 902 (Fla. 3rd DCA 1988), rev. denied, Government Employees Ins. Co. v. Scarfone, 531 So.2d 1353 (Fla. 1988); Short v. Ehrler, 510 So.2d 1110 (Fla. 4th DCA 1987); and Martin v. Young, 443 So.2d 293 (Fla. 3rd DCA 1983), support the decision of the First District in this case. In each of those cases, the plaintiff presented expert medical testimony that plaintiff had sustained a permanent injury within a reasonable degree of medical probability resulting from the accident and no contrary medical evidence was offered by the defense. However, the

decisions in those cases were not based upon merely the lack of contrary medical evidence on the permanency question, but resulted from a finding that there was no other evidence by lay witnesses, or otherwise, controverting the plaintiff's medical evidence on permanency. In Scarfone V. Magaldi, the evidence demonstrated that the plaintiff suffered permanently broken teeth, a fractured forearm requiring surgery which left three permanent stainless steel screws in his bone, and a four inch long surgical scar on his forearm. In Short v. Ehrler, even the defense conceded that some aggravation to a prior injury had occurred from the automobile accident in question and in closing argument, the defense conceded that damages in a range of *$20,000.00* to $25,000.00 would more than adequately compensate the plaintiff, thus causing the court to conclude that the jury could not reasonably have returned a zero verdict. In Martin v. Younq, the court held that a directed verdict for the plaintiffs was proper because there was no conflict in the medical evidence and no other reasonable inferences to be drawn from that evidence. Consequently, in these cases, each of the courts followed the existing law of Florida because the medical evidence on permanency was not controverted by any evidence. These courts did not hold, as the First District did in this case, that the medical evidence must be controverted by either other medical evidence, or the eliciting of a contrary opinion from the plaintiff's medical expert on cross examination.