DA 1-5-93 047

8/18

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

PETITIONER'S INITIAL BRIEF ON MERITS

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TABLE OF CONTENTS

TABLE OF CASES

STATUTES

STATEMENT OF THE CASE

This court has agreed to exercise its discretionary jurisdiction to review the opinion of the District Court of Appeal, First District, that reversed the judgment of the trial court and ordered a new trial.

In this brief the parties will be referred to either by name or by their position in the trial court. The following symbols will be used:

R for record on appeal;

T for trial transcript.

The plaintiffs contended that Eloukse Rhodes sustained a permanent injury as a result of the negligence of Donna Easkold in the operation of an automobile. A special verdict was submitted to the jury, which found that the collision was caused by the negligence of Donna Easkold but that Elouise Rhodes did not sustain a permanent injury within reasonable medical probability. It awarded Elouise Rhodes damages for past and future medical expenses and lost wages, but it did not award any non-economic damages to either Elouise Rhodes or her husband, James Rhodes, Jr. (R 70).

Not being satisfied with the amount awarded, the plaintiffs filed a motion for new trial (R 74) that was denied (R 77). An appeal was taken to the District Court of Appeal, First District, which reversed for a new trial with Judge Wolfe

dissenting. This court has accepted jurisdiction on conflict grounds.

STATEMENT OF THE FACTS

The jury's answers to the questions on the special verdict form (R 70) were that there was negligence on the part of Donna Easkold that was a legal cause of injury to Elouise Rhodes; that the amount of damages for medical expenses and lost earning ability in the past were $16,000.00; that there would be future damages for medical expenses and lost earning ability of $21,000.00 over 14 years; that no damages for pain and suffering should be awarded to either Elouise Rhodes or James Rhodes for the past or the future; and that Elouise Rhodes did not sustain a permanent injury as a result of the negligence of Donna Easkold.

Elouise Rhodes was waiting to make a left turn into an office parking lot when her vehicle was struck on the left side by one driven by Rickey Goldsmith that had collided with an automobile driven by Donna Easkold (T 43-45).

The investigating officer testified that when he arrived at the scene the Rhodes vehicle was headed east with the Goldsmith vehicle against it and the Easkold vehicle into the side of the Goldsmith vehicle. All three vehicles were drivable (T 83-86).

Mrs. Rhodes drove her vehicle from the scene to University Hospital, where she was examined in the emergency room (T 57-58). She did not recall much about that examination (T 185), but the emergency room record was admitted into evidence as plaintiff's exhibit 13. According to the history portion of that record, Mrs. Rhodes stated that she struck her left thigh against the car door. The nurse's notes indicate that she was complaining of pain from the left side of her neck radiating down her back and left leg. She was told to apply heat to the thigh that night. She was given a prescription for two types of medication and referred to her private doctor far followup.

The emergency room visit on the day of the accident, July 11, 1988, was at 3:40 P. M. The following day, July 12, 1988, she reported to the emergency room of Sacred Heart Hospital at 7:43 P. M. That record was admitted into evidence as plaintiff's exhibit 14. The history shown on that record was that Mrs. Rhodes had done fine initially but while at home she began to have shaking spells and questionable loss of consciousness. She was brought in by ambulance on a backboard.

After examination and some X-rays and laboratory testing, she was given some prescriptions and discharged in stable condition.

The next time that Mrs. Rhodes had any medical attention was August 9, 1988, when she was seen by Dr. Flynn (T

190; R 8). In the meantime she had submitted a claim for personal injury protection benefits to her own automobile insurance carrier, Allstate, including a claim for lost earnings of $281.50 per week as a domestic servant (defendant's exhibits 2 and 3).

Mrs. Rhodes continued to be treated intermittently by Dr. Flynn. She had another automobile collision in August of 1989. Following that collision Allstate referred her to Dr. VerVoort for an examination that was conducted on November 13, 1989 (R 2E).

Neither Dr. VerVoort nor Dr. Flynn procured records of the treatment that Mrs. Rhodes had received over the years at the outpatient clinic at University Hospital, during an admission to Baptist Hospital or by Dr. Jankauskas at his office (R 40). Dr. VerVoort did obtain some records from another department of the Medical Center Clinic, with which he was associated (R 2E). Dr. VerVoort expressed the opinion that Mrs. Rhodes had sustained a permanent injury to her neck, her low back and her knee in the collision with Mrs. Easkold (R 2N-0).

Dr. VerVoort admitted that X-rays taken soon after the accident showed that Mrs. Rhodes had significant degenerative arthritis in her neck and back. He said that he could not tell whether she had symptoms before the accident but that she claimed that she had not. His examination of the left knee of Mrs.

Rhodes was done after surgery had been performed on it by Dr. Flynn. Dr. VerVoort agreed that the extensive injury indicated by the records of Dr. Flynn would probably not be caused by a minor movement of an automobile (R 2U-Y).

Dr. VerVoort admitted that he was relying upon the statements of Mrs. Rhodes that she did not have pain in her neck, back or knee before the accident in concluding that there was a permanent injury from the accident (R 2V, 2X).

Dr. Flynn testified that he did not recall having procured the emergency room records or any other prior records of the treatment of Mrs. Rhodes. A fracture in the left knee was first seen on X-rays taken September 21, 1988, with another type of internal fracture being first noticed at surgery. He said that there was no way that he could tell from the X-rays or surgery when the injury to the knee occurred (R 34-35).

Dr. Flynn also said that there was no way that he could tell from his examinations, the X-rays or other tests when Mrs. Rhodes began having difficulty with any of the portions of her body about which she complained to him. He based his conclusions on what she told him (R 41).

In a discovery deposition Mrs. Rhodes testified that she had no trouble with her back or knees, any other injury that required treatment from a doctor, or had ever complained to Dr.

Jankauskas about pain in her back, neck or knees before the accident (T 244).

In a second discovery deposition Mrs. Rhodes admitted that she had left her job in the housekeeping department at Sacred Heart Hospital because she had been hit in the leg with a buffer and knocked down (T 245).

She testified at trial on cross-examination that she had not been seen by Dr. Knefely for seizures as early as 1976. She admitted at trial that she had been knocked backwards by the incident while she was working at Sacred Heart Hospital, but she denied having reported any fainting or falling out spells after that (T 192-193).

She admitted at trial having been referred to doctors at Lakeview Center following the injury at Sacred Heart Hospital, but she denied knowing that the doctors were talking about seizures, fainting spells or falling out. She said that she did not remember making an application to the state for disability benefits in 1978 because of arthritis and seizures (T 193-194).

Included in the records of the Medical Center Clinic, plaintiffs' exhibit 19, are documents prepared in 1978 in connection with an application for disability benefits submitted by Elouise Rhodes. They include a letter from the Florida Department of Health & Rehabilitative Services dated October 31, 1978, to Dr. James Brown that stated that Mrs. Rhodes was

alleging disability due to arthritis and seizures. The report of his examination by Dr. Brown dated November 16, 1978, gave the description of Mrs. Rhodes of those "fits" as being a period of confusion and apparent loss of consciousness. Dr. Brown reported that his exmaination was essentially negative.

Those records also contained additional documents prepared in 1976 including a consultation report that was a part of a Baptist Hospital record made by Dr. Thornton at the request of Dr. Knefely. Dr. Thornton expressed serious doubt that there was a seizure disorder.

Dr. Jankauskas testified by deposition that when he saw Mrs. Rhodes in his office on September 11, 1981, she was complaining of low back pain. His examination revealed tenderness and spasm in that area. Mrs. Rhodes was walking with a limp favoring her left leg (R 51-52).

While the deposition of Dr. Jankauskas was being taken, he also had available a copy of the outpatient clinic records from University Hospital. Referring to those records, he testified that Mrs. Rhodes had been seen on July 7, 1980, with complaints of pain in her back and side for three weeks. On November 15, 1976, she had been complaining of numbness and pain on the left side of her head and neck all the way down to her hip. On December 5, 1977, she was complaining of pain in her

back, shoulders, hips and right foot radiating up to the knee (R 54-56).

On April 9, 1984, she was complaining of pain in the left leg. She was also complaining of left leg pain on October 24, 1984, and again on October 29, 1985. In August of 1986 she was complaining of back pain, among other things (R 58-59).

June Merritt, the daughter of Kathleen Browder who was claimed by Mrs. Rhodes to have been paying her $52.50 per day for five days per week, testified that Mrs. Browder died April 26, 1990. Mrs. Merritt had lived about two or three blocks from Mrs. Browder's home for 10 years. Mrs. Merritt had met Elouise Rhodes at her mother's home. She was unable to say when Mrs. Rhodes began working for her mother.

Mrs. Browder had maid service for years. The maid would be at work for two mornings or two afternoons per week. The same thing would have been true of Elouise Rhodes. The normal rate of pay for that type of maid service was $5.00 per hour. Mrs. Merritt said that her mother would have paid the going rate or less (far less than Mrs. Rhodes claimed) for that type of service. There were no records of the amounts paid (T 255-258). Mrs. Rhodes admitted that she had never filed an income tax return (T 184).

ISSUE PRESENTED

The issue presented to this court by the opinion of the district court of appeal is whether a jury may choose not to accept the opinion of a physician if the jury concludes that the plaintiff's statements upon which the opinion is based are erroneous.

SUMMARY OF THE ARGUMENT

The plaintiffs' motion for new trial (R 74) was in essence based upon a contention that the verdict was contrary to the manifest weight of the evidence. In holding that the motion should have been granted, the District Court of Appeal, First District, adopted a special rule in regard to expert medical testimony in motor vehicle cases. It has reasoned that the special rule arises from the special requirement for the award of non-economic damages contained in Section 627.737, Florida Statutes (1991). Under that provision, non-economic damages can be awarded only if there is a particular type of injury. The type involved in this and other similar cases is described in §627.737(2)(b) as a "permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement." Expert medical testimony is needed to meet the statutory requirement. The district court concluded that unless the physician rendering such an opinion agrees to retract it if the

statements from the plaintiff upon which the physician relies in arriving at his opinion are erroneous, a jury may not reject the opinion.

Expert opinions in automobile injury cases should not be put into a special category. It is a well-established principle of Florida law that a jury may decide to reject an expert opinion, including a medical opinion, if it concludes that the factual assumptions upon which the opinion is based are erroneous. Chomont v. Ward, 103 So.2d 635 (Fla. 1958); Shaw v. Puleo, 159 So.2d 641 (Fla. 1964).

There is no reason to establish a special rule on medical opinions when applying the Florida Automobile Reparations Reform Act. The jury should be just as free in that type of case to reject an expert opinion as it is in any other type of case. The decision of the District Court of Appeal, First District, ordering a new trial should be reversed.

ARGUMENT

The district court of appeal purported to rely upon its earlier decision in Morey v. Harser, 541 So.2d 1285 (Fla. 1st DCA 1989), rev. den. 551 So.2d 461 (Fla. 1989). It quoted the essence of its holding in Morey in its opinion in this case, Rhodes v. Easkold, 588 So.2d 267, 268 (Fla. 1st DCA 1991) as follows:

> Because the plaintiff cannot satisfy this requirement without presenting expert medical testimony, when the plaintiff does present such testimony and it remains materially uncontradicted, a jury verdict of no permanent injury will be found to be contrary to the manifest weight of the evidence and require the granting of a new trial... Even though appellee demonstrated that the medical history on which the doctors based their opinion was in part inaccurate, neither doctor opined that the additioanl medical history would cause him to change his opinion regarding the permanent nature of the injuries suffered by the plaintiff. Doctor Sharf was not even asked whether such history of prior injury would affect his opinion. Thus, their opinions that plaintiff sustained a permanent injury as a result of the accident were essentially uncontradicted despite some seeming inconsistencies in the testimony.

The emphasis was added by the district court of appeal in **Rhodes**.

The district court also relied upon its interpretation of Scarfone v. Magaldi, 522 So.2d 902 (Fla. 3d DCA 1988), rev. den. 531 So.2d 1353 (Fla. 1988). In that case the Third District ordered a new trial, holding the jury finding of no permanent injury against the manifest weight of the evidence. However, in that case the court described the medical evidence as follows:

> Suffice it to say, however, that, among other things, 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, three-eighth-inch wide surgical scar on his forearm as a result of this surgery; the defendants, on the other hand, offered no contrary medical evidence.

That case certainly does not stand for the proposition that a jury is prohibited from choosing not to accept a medical opinion based upon erroneous statements made by the plaintiff.

It is necessary to review the evidence that was in the record before the district court of appeal in this case. Mrs. Rhodes complained to Dr. Flynn and Dr. VerVoort about three separate portions of her body--her neck, her back and her left leg. The main treating physician, Dr. Flynn, testified that X-rays and visual observation at surgery showed two fractures in the left knee of Mrs. Rhodes. One of them was a chip fracture and the other was in the area where the kneecap and thigh bone are. Dr. Flynn said that those injuries were "very focal, which means as if it had had something hit it directly." He went on to say that the cause of the fracture would have to be trauma, "and from the history she gave me the only trauma that she knew of or at least she related to me was the automobile accident" (R 21).

However, Mrs. Rhodes did not report any injury to her knee to the emergency room attendants at either University Hospital, to which she went on the afternoon of the accident, or Sacred Heart Hospital, to which she went the following night. Furthermore, almost one month elapsed between the date of the accident and her first visit to the office of Dr. Flynn. The chip fracture was first revealed by an X-ray taken almost one month after that, and Dr. Flynn could not tell either from the X-

ray or his observation at surgery anything about how old the fractures were (R 34-35).

As far as the neck and back complaints were concerned, Dr. Flynn said that it was obvious from the X-rays that she had pre-existing arthritis in both of those areas. In assuming that there was some aggravation of those conditions, he had accepted the statement of Mrs. Rhodes that she had not had any difficulty with those areas before the accident. Dr. Flynn gave the following answers to questions on cross-examination (R 33):

> Q Isn't it quite likely that her arthritis was progressing over the years as she carried out those activities?
>
> A In her lower back I think there's a good chance that that may be true, as well as in her knee. Her neck, it may not be a factor.
>
> Q All right. You didn't have an opportunity to check the ranges of motion or any x-rays or do any other tests on Mrs. Rhodes before August 9th, 1988, did you, Doctor?
>
> A No, sir.
>
> Q So you don't have any way of knowing what her percentage of impairment was before the automobile accident, do you?
>
> A Only what she told me.
>
> Q And that's what you're basing your conclusion on that there was some aggravation of her preexisting conditions, what she told you?
>
> A What she told me.

In the trial court the plaintiffs based their argument on Morey v. Harper, 541 So.2d 1285 (Fla. 1st DCA 1989). Two arguments were made in that case--that a verdict should have been directed for the plaintiff on the issue of permanent injury or alternatively that the evidence entitled the plaintiff to a new trial on that issue. The district court agreed with the second argument and rejected the first.

The plaintiff admitted to a prior fracture of his right wrist and two prior injuries to his back. Testimony of three orthopedic surgeons was presented. One of them concluded that there were conditions in the plaintiff's neck that were permanent but pre-existed the accident. He was not sure whether there had been an aggravation of one of the pre-existing conditions. He also said that the accident had caused fractures of two bones in the plaintiff's right wrist.

The second orthopedist testified that based upon the history he had concluded that there was a permanent injury to the neck and back from the accident. He also concluded that there was no permanent injury to the wrist from the accident.

The third orthopedic surgeon found problems in both wrists that he related to the accident as well as aggravation of the pre-existing back problems.

The second orthopedic surgeon was asked whether his opinion would change if he were told that the plaintiff had neck,

back and wrist problems before the accident, to which he responded that he would not be able to give an opinion as to what percentage of impairment came from what source but that a different history would not change his opinion with regard to the permanency. The third orthopedic surgeon was not asked whether a history of prior injury to the wrist would change his opinion regarding the permanency of the injury caused by the accident.

The jury found that there was not a permanent injury as a result of the accident. The plaintiff's motion for new trial was denied.

The holding of the First District was that since the statute requires proof of permanent injury within a reasonable degree of medical probability, that requirement cannot be satisfied without presenting expert medical testimony. The court also said that if the medical testimony remains "materially uncontradicted" a finding of no permanent injury will be contrary to the manifest weight of the evidence and will require a new trial.

There may have been justification for the court's ordering a new trial in Morey based upon its summary of the evidence found at page 1288 as follows:

> Turning to this case, both Drs. Flinchbaugh and Sharf testified that appellant sustained a permanent injury related to the accident. Although Dr. Flinchbaugh opined that the permanent injuries related to the neck and back, and Dr. Sharf felt the injury to the wrist was permanent, Dr. Flinchbaugh's and Dx. Sharf's testimony was

> not inconsistent for the reasons stated above. *(See* fn. 1) Even though appellee demonstrated that the medical history on which the doctors based their opinion was in part inaccurate, neither doctor opined that the additional medical history would cause him to change his opinion regarding the permanent nature of the injuries suffered by the plaintiff. Dr. Sharf was not even asked whether such history of prior injury would affect his opinion. Thus, their opinions that plaintiff sustained a permanent injury as a result of the accident were essentially uncontradicted despite some seeming inconsistencies in the testimony. Because the medical testimony of permanency was not based upon an accurate factual predicate, we find the holding in Martin v. Young inapplicable to the facts of this case and conclude that the court did not err in refusing to direct a verdict for appellant on this issue. We do hold, however, that because the medical evidence, although based on an inaccurate predicate, was uncontroverted on this record, the jury's verdict finding no permanent injury was contrary to the manifest weight of the evidence under the authority of Scarfone v. Magaldi.

The First District has now extended the rule that it adopted in Morey to carve out an exception to the rule on the handling of medical opinion testimony in "no fault" cases. The difference between the evidence found by the court in Morey v. Harper and the evidence presented to the jury in this case is obvious. Both Dr. Flynn and Dr. VerVoort testified that their opinions as to a permanent injury from this accident were based upon the history given to them by Mrs. Rhodes that she had not had any difficulty with those areas of her body before the accident and that the symptoms had begun after the accident.

Ample evidence was presented to the jury that the statements made by Mrs. Rhodes were not correct. She had complained to physicians at the outpatient clinic at University Hospital and to Dr. Jankauskas in his office before the accident about problems with her neck, back and left leg. She had gone so far as to apply for disability benefits some years before the accident because of those complaints.

Neither Dr. VerVoort nor Dr. Flynn had seen Mrs. Rhodes before the accident. The jury was amply justified in concluding that their essential assumption that there had been no symptoms before the accident was not correct. Obviously a medical opinion that is not based upon direct observation and relies upon a factual assumption is no better then the accuracy of the underlying assumption.

The rule that credibility of a witness is a matter for the jury to determine has been applied in Florida to expert witnesses at least since Chomont v. Ward, 103 So.2d 635 (Fla. 1958). In that case the jury had returned a verdict for the defendant even though it was rather clear that the defendant had been negligent in the operation of his automobile. However, it was not so clear that the plaintiff had sustained any injury. In affirming the judgment for the defendant, this court pointed to the rule that the credibility of witnesses is for jury determination. It said at page 637:

> 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.

The case that is cited most often for this proposition is Shaw v. Puleo, 159 So.2d 641 (Fla. 1964). This court granted conflict certiorari in that case to review the action of the First District in ordering a new trial on damages. The jury awarded no damages. The First District in that case had arrived at the conclusion that the testimony of a treating physician as to the existence of an injury could not be disregarded by the jury. This court held that the First District had confused the rule that requires expert medical testimony in malpractice cases with the situation in an ordinary negligence case. This court specifically held that in an ordinary negligence case the 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. This court pointed out that whether the opinion was expressed in response to a hypothetical question or not, if the jury concluded that the expert medical witness was giving opinions based upon erroneous assumptions, the jury was free to disregard that testimony.

There have been a number of appellate decisions since Shaw v. Puleo that merely cite and follow it without giving any other facts. There have been others in which it can be deter-

mined from the opinion that the court is following the rule that a jury may disregard expert medical testimony. Burton v. Powell, 547 So.2d 330 (Fla. 5th DCA 1989); Westbrook v. All Points, Incorporated, 384 So.2d 973 (Fla. 3d DCA 1980).

In pointing out that the court below should have given a jury instruction on the no fault threshold, the Fifth District in Estate of Wallace v. Fisher, 567 So.2d 505 (Fla. 5th DCA 1990) stated in a footnote at page 509:

> The jury is not bound by law to accept as true and correct the plaintiff's evidence as to the permanency of her injuries, whether or not that evidence is contradicted by other evidence.

The rule exemplified in Shaw v. Puleo has been made a part of the Florida Standard Jury Instructions by the inclusion of a specific reference to the credibility of expert witnesses. In re Standard Jury Instructions Civil Cases, 503 So.2d 319 (Fla. 1987). It is senseless to set aside a verdict because the jury followed that instruction.

CONCLUSION

There is no reason to create a special rule on the credibility of expert medical witnesses for motor vehicle cases. The same rule should be applied in such cases as has been consistently applied in negligence cases other than medical malpractice cases. If there are conflicts from which the jury could

determine that factual assumptions made by the medical expert in arriving at an opinion are erroneous, the jury may choose to disregard that opinion. The decision of the District Court of Appeal, First District, under review should be quashed with directions to affirm the judgment of the trial court.

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CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing was delivered to Thomas E. Wheeler, Jr., Esquire, and a copy mailed to Ada A. Hammond, Esquire, on July 24, 1992.

Of counsel for petitioner