095

CASE NO. 79,138

IN THE SUPREME COURT OF FLORIDA

DONNA EASKOLD,

Petitioner,

vs.

JAMES MODES, JR., and ELOUISE RHODES,

Respondents.

AMENDED RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF ISSUES

(1) The decision of the district court of appeal does not conflict with other appellate decisions in regard to the weight to be given expert testimony.

(2) The decision of the district court of appeal does not conflict with other appellate decisions in regard to the burden of proving permanent injury.

SUMMARY OF THE ARGUMENT

ISSUE I - EFFECT OF EXPERT TESTIMONY

Contrary to the Petitioner's statement of this issue in her summary of the argument, the opinion below does not hold that where there is evidence from which a jury could conclude that factual assumptions made by an expert medical witness are not correct, the jury cannot choose to disregard that expert's opinion. The whole underlying issue is that there must be, on the record, a material contradiction of any relevant facts. There is no record basis of any material facts on the record below upon which the expert opinion could be rejected. The whole holding of the opinion below is the issue of materiality. This is a basic rule of evidence and is consistent with all other appellate decisions in Florida.

ISSUE II - BURDEN OF PROOF

Contrary to any assertions of the Petitioner, the First District Court of Appeals has clearly placed the burden of

establishing a permanent injury upon the Plaintiff and in fact has gone to far as to require expert medical testimony by the Plaintiff. This is in fact consistent with **opinions** from other District Courts of Appeal.

ARGUMENT

ISSUE I - EFFECT OF EXPERT TESTIMONY

with all due respect, there is no direct and express conflict in the decision below with any decision of this Court or any other District Courts of Appeal. The judgment below was reversed upon the now established authority of Morev v. Harper, 541 So.2d 1295, (Fla. 1st DCA), review denied 551 So.2d 461 (Fla. 1989). This Court reviewed the exact same arguments presented in this Petition as to an appellate court's analysis af when a **jury's** verdict of no permanency, pursuant to Chapter 627.737(2)(b), is against the manifest weight of the evidence, and rejected a review of such arguments at that time. There has been no authority which directly or expressly conflicts with the holding in Morev since that time.

Further, the issue of when a jury verdict of no permanency is against the manifest weight of the evidence in Morev was based on Scarfone v. Maqaldi, 522 So.2d 901 (Fla. 3rd DCA), review denied 531 So.2d 1351 (Fla. 1988), where again this Court also refused review.

The Defendant is simply seeking a review of the factual basis for the discretionary exercise by the Court below in setting aside a portion of the jury verdict below, not any conflict of decision.

The case below deals with the application of the manifest weight of evidence rule as applied to Chapter 627.737(2)(b). This Court's decision of Shaw v. Puleo, 159 So.2d 641 (Fla. 1964) does not deal with that statute at all. The other case cited be the Petitioner under issue one, Burton v. Powell, 547 So.2d 330 (Fla. 5th DCA 1989), does not deal with the manifest weight rule for granting a new trial but rather dealt with the "request for a directed verdict". It is not even the same subject matter. Further, it only tangentially mentions the general rule recited in Shaw v. Puleo. Neither of these cases establishes conflict of any sort with the decision below.

The general rule of law laid down in the case below and in Morev is that a jury may reject the expert testimony if it is properly materially impeached. The teaching of Morev and the case below is simply that the impeachment or contradiction must be established as being material to the issue of a permanent injury under Chapter 627. What the Defendant/Petitioner in this cause apparently is attempting to propose is that a jury has an absolute right to reject good and sufficient evidence presented by a plaintiff and that under no circumstances can that jury verdict be set aside by the Florida judiciary. This Court has long held that verdicts which are

contrary to the manifest weight of the evidence must be set aside. See Cloud v. Fallis, 110 So.2d 669, 673 (Fla. 1959); Scarfone, supra. See also Short v. Ehrler, 510 So.2d 1110 (Fla. 4th DCA 1987) and Martin v. Young, 443 So.2d 293 (Fla. 3rd DCA 1983).

Additionally, this Court has held that as to its conflict jurisdiction, where the cases are claimed to be in conflict are distinguishable on their facts, review on the ground of conflict will not lie. Florida Power and Light Co. v. Bell, 113 So.2d 697 (Fla. 1959). This is exactly the case in point. In both Morey and the case below, there was a specific fracture and trauma injury recited in the facts by the First District Court of Appeal. The cases cited by Petitioner in her brief either have no recitation of the nature of the injuries or the injury described was what is commonly called soft tissue injury or whiplash. Thus, the rules are based on different factual settings in the first place.

Finally, the rule cited for review by the Petitioner is in fact consistent (not conflicting) as between the case below and those cited by the Petitioner. For instance, in Shaw v. Puleo, supra, this Court certainly laid down no rule that a jury is free to disregard the evidence presented at trial. In that soft tissue case, this Court found that there was specific "conflicting lay evidence" (although not identified in the opinion) to impeach a hypothetical soft tissue injury. There was no objective fracture as in this case. In that

materiality is a predicate for the presentation of any piece of evidence, it can only be assumed that such "conflicting lay evidence" was in fact material.

Contrary to the Petitioner's assertion at page 5 of her brief, there is, in fact, no evidence in which a jury could conclude that the two medical experts' opinions in this case were in any way based upon supposedly erroneous statements made by the patient. The only person asserting that any such statements are erroneous in the first place is the Petitioner.

As noted above, the Shaw v. Puleo holding in no way dealt with the specific requirements under Chapter 627.737(2)(b). As the First District explained in Morey, this particular requirement that a plaintiff must meet, i.e., "permanent injury", must be met by specific expert medical testimony. For instance, at page 1288, the Morey court noted:

> Subsection (b), the threshold requirement appellant contends he satisfied, requires "permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement". The statute does not, however, define what is meant by "permanent injury" and the jury was not instructed an any standard or criteria for determining whether a particular injury is or is not permanent. Therefore, even though the phrase "permanent injury" is not a word of art in the medical profession, nevertheless the determination of what constitutes a permanent injury must, as a practical matter, be left to physicians trained in that profession.

Hence, the language requiring proof of a permanent injury based on a reasonable degree of medical probability requires

proof that can only be satisfied by expert medical testimony. See Fay v. Mincey, 454 So.2d 587 (Fla. 2nd DCA 1984); Avis Rent-A-Car Svstem, Inc., v. Stuart, 301 So.2d 29 (Fla. 2nd DCA 1974). Thus, only such medical expert can identify what type of evidence (lay testimony, medical records, previous statements or whatever) would alter this opinion.

The second case cited by the Petitioner is Burton v. Powell, supra. The relevant issue on appeal in that case was whether or not a directed verdict in regard to the permanency of the injury should be affirmed. It had nothing to do with the granting of a new trial as being against the manifest weight of the evidence as is the case below. Additionally, there is absolutely no discussion of the type injuries suffered in this case. At page 332 of the opinion, the Court, citing this Court in Shaw v. Puleo, supra, stated that in fact the testimony of a medical expert may be accepted or rejected like that of any other expert. However, again that opinion in no way disagrees with the holding of the case below and certainly is not a direct and express conflict. The statement of law clearly signifies that a jury is not to be given unfettered discretion in this area. That certainly doesn't establish a "direct and express" conflict with the decision below. The case is further distinguishable in that it apparently dealt with what the Fifth District noted to be "an implied finding by the jury, consistent with the trial court's instruction, that the plaintiff had sustained a

permanent injury per the threshold requirements of Chapter 627.737(2), Florida Statutes". The case simply is not dealing with any issue involved in the case below and thus cannot be in conflict.

ISSUE II - BURDEN OF PROOF

The Petitioner cites only the case of Estate of Wallace v. Fisher, 567 So.2d 505 (Fla. 5th DCA 1990) on this point. At page 9 of her brief, the Petitioner erroneously misconstrues the opinion before when it states that in this case "an expert medical witness admits that his opinion is based upon assumptions that the jury could find to be erroneous". Again, there is absolutely no such statement from either of the expert medical witnesses contained in the opinion below or in the trial transcript.

The medical physicians in the case at bar found that among the several injuries, there was in fact a specific fracture caused by trauma. No where in any of the medical records, statements of the Plaintiff, any lay witness, or from any other source does the Defendant even suggest another trauma that could have caused this specific injury other than the accident sued upon. Instead, Petitioner says to this Court that this uncontra-dicted evidence of trauma may be disregarded by the jury without consequences of having a new trial granted. Presumably, the only (and very brief) discussion of the issues addressed in the petition contained

in the Estate of Wallace is found in two sentences in footnote 11 at page 509. Again, this is pure dicta and has nothing to do with the case, which was whether or not the defendant was entitled to a jury instruction on no-fault. Such passing dicta cannot be a basis to establish a direct and express conflict necessary to invoke this Court's jurisdiction. Furthermore, it is of interest to note that the statement of the law attributed to Burton v. Powell, supra, is in fact not the statement found in Burton.

However, the essential issue raised by Issue II of the Petition that there is some sort of shifting of a burden of proof by the case below is absolutely inaccurate. On page 9 of her brief, Petitioner states that the decision below

> imposes upon the Defendant an obligation to establish by contrary medical evidence the absence of a permanent injury, thereby altering the rule that the burden of proving an essential element far the claim for damages is upon the Plaintiff. This holding conflicts with Estate of Wallace v. Fisher, 567 So.2d 505 (Fla. 5th DCA 1990).

As noted above, the Estate of Wallace case only had to deal with the issue of whether or not the defendant got a proper jury instruction. It had nothing to do with the burden of proof. Irregardless, the rule laid out in the Court below says absolutely nothing about the Defendant having to produce "contrary medical testimony". (As in any case that type of presentation is at the option of the defendant if she could

produce said evidence which she so obviously could not in this case). The rule as laid out by this Court in Shaw v. Puleo is still in full force and effect. The expert testimony of the plaintiff, which is mandated by Court decision (see Fav v. Mincev, supra), can still be impeached by lay testimony and other "relevant and material" impeachment.

More importantly, noted above (at page 5) in the quote (from page 1288 of the opinion), the Morey court clearly showed that the burden of proof is on the Plaintiff to establish "permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement". That opinion reiterates the law of the State of Florida that that specific expert medical testimony must be shown by the plaintiff, not by the defendant, or his case will fail. See Fav v. Mincev, supra, and Avis Rent-A-Car System, Inc. v. Stuart, supra. Thus to possibly suggest that there has been any type of shifting of a burden of proof is totally unwarranted. There is no conflict.

CONCLUSION

This Court should refuse to exercise its discretion to take jurisdiction of this case as there is no "express and direct" conflict with any of this Court's decisions or any other District Court of Appeals. The issues raised in this matter are the same raised by Morey v. Harper, 541 So.2d 1285 (Fla. 1st DCA), review denied 551 So.2d 461 (Fla. 1989), and the Court saw fit to deny review in that case and it should be done in this case also.

CERTIFICATE OF SERVICE

1 HEREBY CERTIFY that a copy of the foregoing was furnished to ROBERT P. GAINES, Esq., P. O. Box 12950, Pensacola, FL 32576, by U.S. Mail, this 24th day of JANUARY, 1992.

THOMAS E. WHEELER, JR.
Attorney for Appellees