DF7 OA. 1-543

CASE NO. 79,138

IN THE SUPREME COURT OF FLORIDA

DONNA EASKOLD,

Petitioner,

vs.

JAMES RHODES, JR., and ELOUISE RHODES,

Respondents.

RESPONDENT'S BRIEF ON MERITS

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STATEMENT OF THE CASE

The Respondent would add that an amicus curiae brief was served on the Respondent by mail on August 3, 1992, by State Farm Mutual Automobile Insurance Company and the further amicus curiae brief filed by the Florida Defense Lawyers Association was served on the Respondents by mail on August 10, 1992. If any necessary discussion of these two briefs is made, it will be referred to as the "State Farm" position and the "FDLA" position, respectively.

STATEMENT OF THE FACTS

On July 11, 1988, James Rhodes, Jr., and his wife, Elouise, were involved in a three motor vehicle accident initiated by Donna Easkold. Mrs. Rhodes sustained permanent injuries as a result of this accident and brought a claim against Mrs. Easkold. Mr. Rhodes also brought a claim based upon his loss of consortium on account of his wife's injuries (R-1).

Mrs. Easkold denied liability and the case proceeded to trial on that issue and on the issue of whether Mrs. Rhodes met the no-fault threshold of proving permanent injury within reasonable medical probability and, if so, the amount of damages.

This accident involved Mrs. Easkold striking a third vehicle, owned and driven by Rickie Goldsmith, as she left the parking lot of a doctor's office. The collision then caused

Mr. Goldsmith ta ram the vehicle driven by Mrs. Rhodes, who was stopped with her turn signal on, waiting to make a turn into the doctor's office parking area (TR-44). Mr. Goldsmith indicated that he had been going 15 to 20 miles an hour at the time he was impacted. He indicated that he left no skid marks (TR-49). He indicated that Mrs. Easkold had not stopped at the road he was driving on (Fontaine Street) as she was leaving the parking area (TR-44). Finally, he indicated that the impact of his vehicle was at the driver's door of Mrs. Rhodes' vehicle (TR-47). He indicated that Mrs. Easkold had failed to yield the right-of-way to him (TR-44).

Mr. Goldsmith's testimony was consistent with Mrs. Rhodes on this point. Mrs. Rhodes indicated that she saw Mrs. Easkold leaving the parking lot full speed and that she did not stop as she approached Fontaine Street (TR-173).

The above testimony is also consistent with Mrs. Rhodes' testimony on this point. He was a passenger in the front seat and observed Mrs. Easkold leaving the parking lot without attempting to stop and yield the right-of-way (TR-52).

Mrs. Easkold stated that she had been at the doctor's office for 1-1/2 hours for x-rays prior to the accident. She then claimed, contrary to all the other witnesses, that she stopped at the edge of the parking lot at Fontaine Street, that she had looked to her left and somehow had not observed Mr. Goldsmith proceeding down the road (TR-65). She further claims that she had stopped far one minute at Fontaine Street.

Her only explanation for her oversight of observing Mr. Goldsmith's approach was to suggest that Mr. Goldsmith had been speeding, although she admitted that she had not seen his vehicle approaching (TR-68).

Subsequent to the accident Mrs. Rhodes went to University Hospital for treatment (TR-173). She was then referred by someone at either University or Sacred Heart Hospital to a bone specialist (TR-175).

Mrs. Rhodes complained of neck, left leg and back pain. She indicated that what she meant when she talked about her leg was primarily her left knee (TR-176). Mrs. Rhodes testified that she had had some previous problems with her neck, back and left leg, but she had no continuing problems with any of these areas (TR-175-176).

Dr. J. K. Jankauskas testified that he had treated Mrs. Rhodes on and off since September, 1981. In reviewing her medical records, he indicated that she had occasional complaints of back pain (D-9). He indicated that prior to the accident, she did have some arthritis in her ankle (D-9). She also had occasional complaints of pain in her left leg (D-10, 11).

At no time did Dr. Jankauskas testify to any permanent pre-existing conditions in the neck, lower back or left knee. Further, his testimony showed that the treatment for the above referenced symptoms were typical for regular muscle problems that one might expect every one in a while (D-16). He further

indicated that if Mrs. Rhodes had had any involved orthopaedic problem with the lower back, that she would have typically been referred to an orthopaedics, which was not done prior to the accident (D-18).

Approximately four weeks after the accident, Mrs. Rhodes began seeing a board certified orthopaedist, Dr. Leo Flynn (D-5). At that time, she presented with complaints to the neck, lower back and down into her left leg (D-5). He indicated there was injury to her neck, back and knee (D-5). He found on physical exam muscle spasms in the lower back, a reduced range of motion and positive straight leg raise on the left side (D-6). She also had muscle spasm at the base of the neck and a reduced range of motion.

As to her knee, it showed evidence of ligament sensitivity, she had stretching of the ligaments from side to side and had a pop or click involving the left knee, suggestive of internal derangement, either a cartilage or defect in her left knee and underneath her knee cap. At the conclusion of the initial examination, Dr. Flynn told Mrs. Rhodes that he thought she had soft tissue injury to her neck and back, and that she appeared to have a soft tissue injury to her shoulder (D-7).

Dr. Flynn also reviewed x-rays in which he found some pre-existing arthritic problems in her neck, and some degenerative disc changes in her lower back (D-10).

Originally Dr. Flynn attempted conservative treatment by putting a collar on Mrs. Rhodes' neck, a brace for her lower back, and a brace for her knee, and further put her on physical therapy and medication (D-12).

When Mrs. Rhodes continued to have pain, additional testing was done. Thermograms (D-12) and CT scans (D-13) were ordered by Dr. Flynn. He found that the CT scan was consistent with the thermogram and that it showed that the disc at L5-S1 level was herniated 3-4 millimeters and that consequently there was narrowing where the nerve came out at that level. Additionally, he noted that there were arthritic changes in the back. He also noted that the CT scan showed problems in the neck at the C5-C6 level (D14-15).

Dr. Flynn then performed an arthrogram on the knee. This test showed that there was arthritic changes under the kneecap but it also showed that there was a tear in the washer on the inside of the knee joint and that there was also a cyst (D-15).

During the course of Dr. Flynn's treatment, Mrs. Rhodes' knee became more symptomatic. Additionally, she continue to have problems in her neck and back, in spite of the therapy. Her knee continued to become more symptomatic with locking and catching (D-16). Because of the latter problem, surgery was subsequently done on her knee (D-17).

In the course of the knee surgery, Dr. Flynn discovered that there had been a fracture where the portion of her knee

cap and her thigh bone had been injured. He indicated that this fracture was "very focal, which means as if it had had something hit it directly" (D-18). Dr. Flynn specifically testified that this fracture would have been caused by trauma, which he related to the automobile accident. He specifically noted that this was an impaction injury which had been caused by direct trauma and was not the kind of injury that you see from a patient that just has arthritis **(D-18).**

Dr. Flynn specifically testified that his opinion, within reasonable medical probability, was that **Mrs.** Rhodes sustained a permanent injury in the automobile accident of July 11, **1988.** He found that these permanent injuries resulted in an impairment rating to her neck at 10-153, her lower back at 10-15%, and her knee at 30-35% **(D-22).** When those three injuries are combined, they show an impairment of the whole body at 29%-38% **(D-22).** Finally, he noted that during the course of treatment with Mrs. Rhodes, her complaints of pain had been continuous (D-24).

On November **13,** 1989, **Mrs.** Rhodes' PIP carries requested an independent medical examination by Dr. Shane VerVoort (D-5). He clearly identified either permanent injury or permanent aggravation of a pre-existing condition to the neck, lower back and left knee (D-15, 16). Dr. VerVoort found that Mrs. Rhodes had suffered a 36% permanent partial impairment rating of the whole body far injuries to her **neck,** low back

and left knee. He based this on a loss of range of motion, surgical changes and injury to her left knee (D-20).

Finally, Mrs. Rhodes' employer, Viola Jean Parker, testified that she had employed Mrs. Rhodes in her home as a housekeeper eight or nine years prior to the trial. She had worked continuously for her up until the time of the accident, but did not return after the accident (TR-93). Mrs. Parker never observed any limitations in Mrs. Rhodes' activities despite the strenuous nature of the various physical activities (TR-94, 95)"

The jury returned a verdict finding that Mrs. Easkold was negligent in operating her vehicle and that such negligence was the legal cause of injury to Mrs. Rhodes. It further awarded $16,000 for medical expenses and lost earning ability in the past and further awarded $21,000 for future medical and lost earning ability. It noted that these damages were intended to provide compensation for 14 years. At the time of the trial, Mrs. Rhodes was 51 years of age. However, Mrs. Rhades was awarded no pain and suffering and other intangible damages, either in the past or future, and Mrs. Rhodes was denied any loss of consortium, either past or future (R-70, 71). A Motion for New Trial was filed an October 29, 1990, (R-74), and an Order denying such Motion was entered on December 3, 1990, (R-77). A Final Judgment was entered December 21, 1990, and a Notice of Appeal was filed at the

same time (R-78, 79). The Appellee filed a Notice of Cross Appeal on January 10, 1991 (R-86).

RESPONDENT'S STATEMENT OF THE ISSUE

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.

PETITIONER'S ISSUE PRESENTED (RESTATED)

The issue presented to this Court by the opinion of the First District Court of Appeal is whether a Motion far New Trial on damages should be granted by the trial court where the jury fails to accept the opinion of a physician which has not been materiallv contradicted.

SUMMARY OF THE ARGUMENT

The Plaintiff's 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 be granted, the District Court of Appeal, First District, applied its rule for the granting of new trials in this particular area of the law which had previously been adopted by it and its sister court. Both of these cases this Court had previously denied review. Morey v. Harper, 541 So.2d 1285 (Fla. 1st DCA 1989), rev. den. 551 So.2d 461 (Fla. 1989); Scarfoni v. Magaldi, 522 So.2d 901 (Fla. 3rd DCA), ~~rev. den.~~ 531 So.2d 1351 (Fla. 1988).

The First District has taken the traditional approach, which is consistent with the prior law in the area of granting new trials, in requiring that the necessary medical testimony in an automobile case be specifically and materially contradicted. The First District rightfully acknowledges that the only appropriate person to acknowledge a material contradiction would be a person qualified to give a medical opinion. The nature of the contradicting evidence, the Court has left wide open. The Court indicated that the material contradiction can be through the Plaintiffs' expert, or through its own expert. Thus in the parade of horribles, particular those contained in the amicus curiae brief, the solution to each of their hypotheticals would be to make simple inquiry of the

treating physician of those facts and almost any reputable physician would agree with their hypothetical.

This **case** is particularly frustrating because of the overwhelming facts to support a finding of permanent injury. Mrs. Rhodes' **own** insurance company, who afforded her PIP coverage and uninsured motorist coverage, requested and received pre-suit an independent medical exam by Dr. **Shane** VerVoort. Mrs. Easkold's counsel, therefore, knows that no reputable medical physician is going to make a finding of no permanent injury as the result of this accident. Instead, he chooses to play games with Mrs. Rhodes, who has an IQ in the range of **58-65** (TR-112). Yet nowhere does the Petitioner/ Defendant inquire of the treating physician, the IME, or any other medical personnel if **her** interpretation of certain statements by the Plaintiff/Respondent or her medical records is in any way relevant to the issue.

Further, this **case** is not a soft tissue injury **case** alone. There is a specific finding of a fracture in the area of the knee, which the treating physician discovered during surgery on the knee following this accident. Yet the Defendant in no way makes claim or presents any proof of any other type of trauma other than this automobile accident as even a possible, much less probable, cause of this objective injury.

Thus the First District's opinion, which has also adopted the rationale in the workers' comp area in Faucher v. R.C.F. Developers, 569 So.2d **794** (Fla. 1st DCA 1990) is simply

consistent with the prior law in the area on the granting of new trials.

Judge Wolfe's dissent, respectfully, again misses the point. His rationale states, **588** So.2d at **269:**

> The trier of fact was justified in determining that the opinion testimony was flawed by reason of the materially untruthful history given them by the claimant.

Nowhere in the record is there any medical evidence that anything that Mrs. Rhodes told any of her treating physicians or the insurance company's IME was "materially untruthful". The First District's simple solution, by requiring a demonstration of relevance to such matters is entirely consistent with previous Florida law.

ARGUMENT

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 1285, (Fla. 1st DCA), rev. den. 551 So.2d 461 (Fla. 1989). This Court reviewed the exact same arguments presented in this Petition as to an appellate court's analysis of 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 Morey 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. Masaldi, **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 by the Petitioner, 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 Morey 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 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.

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 the case at bar. 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. Shaw noted that the jury was given medical opinions based upon erroneous assumptions. That is totally contrary to the case at bar where the Defendant only cryptically elicited from the medical experts that their opinions were based, in part, on the history received from the Plaintiff.

Finally, the most telling analysis is the careful review of this Court's case of Chomont v. Ward, 103 So.2d 635 (Fla. 1958). At page 637 of that opinion, this Court flatly states:

> The rule is well established that the matter of the credibility of witnesses is peculiarly one for jury determination. ... This does not mean that a jury is at liberty to disregard completely testimony which is not open to doubt from any reasonable point of view. 58 Am.Jur, Witnesses, section 864, page 492.

That statement of the law is entirely consistent with the rationale of Rhodes v. Easkold, Morey v. Harper, and Scarfone v. Magaldi, supra.

But the analysis becomes even more compelling when we read further as to the factual basis for this observation when the Court, at the bottom on page 637, states as follows:

> 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 addition, the appellee offered the testimony of two police officers to the effect that immediately after the occurrence, the appellant made no complaint whatever as to the presence of physical injuries.

This is totally to the contrary of the situation before this Court. Mrs. Rhodes sought immediate medical care after this accident, and has sought and obtained medical care consistently since the accident. In this case, where there is a trauma induced fracture and other associated injuries, there is absolutely no conflict with the factual history related by Mrs. Rhodes.

Therefore, it is obvious that this jury took the liberty to completely disregard testimony which is not open to doubt from any reasonable point of view. This is exactly what this Court stated a jury could not do in the above quote from Chomont.

The other cases cited by the Petitioner, Burton v. Powell, 547 So.2d 330 (Fla. 5th DCA 1989); Westbrook v. All Points, Incorporated, 384 So.2d 974 (Fla. 3rd DCA 1980); and Estate of Wallace v. Fisher, 567 So.2d 505 (Fla. 5th DCA 1990), do not announce any principal of law which was controlling in that case which is different than Rhodes v. Easkold and Morey v. Harper, or it is obiter dictum.

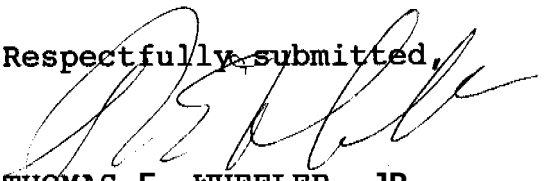
CONCLUSION

There is no reason not to require Petitioner to show a material contradiction of the Plaintiff's expert medical testimony in any case. But if there is no material contradiction shown on the record, the rule of law laid down in this Court in Chomont v. Ward that a jury is not at liberty to completely disregard testimony which is not open to doubt from any reasonable point of view should prevail.

The First District's holding in this case can be done by showing particular facts or assumptions relied upon by the medical expert (wha has shown such testimony's relevance) were inaccurate which can justify the rejection of that medical expert. Neither Chomont, Rhodes v. Easkold or Morey v. Harper suggest that the defendant has to present specific medical testimony. That is only one of the ways to show a material contradiction.

Therefore, the opinion and judgment of the First District Court of Appeal in this case should be affirmed. This is particularly true when the verdict of the jury found that Mrs. Rhodes would suffer future medical and economic damages for at least fourteen years. At the time of the trial, Mrs. Rhodes was 51 years old, and this would put her at retirement age of 65. Surely, isn't someone who has suffered an injury for two years prior to trial, and then will suffer injury and loss for fourteen years in the future, a victim of a permanent injury?

Respectfully submitted,



THOMAS E. WHEELER, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnishedto ROBERT P. GAINES, Seventh Floor, Blount Building, 3 West Garden, Pensacola, FL 32501, by hand delivery and Ada A. Hammond, Esquire, Taylor, Day & Rio, 10 South Newnan Street, Jacksonville, FL 32202, and Jack W. Shaw, Jr., Esquire, Osborne, McNatt, Shaw, O'Hara, Brown & Obringer, Suite 1400, 225 Water Street, Jacksonville, FL 32202-5147 by U.S. Mail, this 4th day of AUGUST, 1992.

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