DA 1-5-93 047

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 REPLY BRIEF ON MERITS

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TABLE OF CONTENTS

TABLE OF CASES

ARGUMENT

Apparently Mrs. Rhodes is resting her case for a permanent injury on the fractures in her left knee. There are several reasons why the jury was well justified in rejecting the opinion of Dr. Flynn as to whether a permanent injury to the left knee occurred in the collision in question, In the first place, the emergency room record (plaintiff's exhibit 13) records the history given by Mrs. Rhodes as striking her left thigh against the car door. Nothing was recorded about striking her knee. The record also indicates that she was complaining of pain radiating down her back and left leg. There is no indication of a complaint of pain in the knee. The instructions she was given were to apply heat to the thigh, There is no indication of any home treatment to be given to the knee.

The day after the accident she was seen at another hospital emergency room, the record of which is plaintiff's exhibit 14. There is no reference to any difficulty with the knee in that record.

The next treatment rendered was by Dr. Flynn. He testified that he first saw Mrs. Rhodes on August 9, almost a month after the accident. At that time she was complaining of pain in the knee. Dr. Flynn's examination showed some evidence of abnormality in the ligaments and possibly an internal derangement of the left knee (R 10). As Mrs. Rhodes states in her brief, her knee got worse under the treatment of Dr. Flynn. He

saw a chip fracture on X-rays made September 21, 1988, but did not detect the internal fracture until surgery in February of 1989 (R 34; 20).

As to the cause of the fracture, Dr. Flynn said (R 21):

> It 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.

Mrs. Rhodes did not tell Dr. Flynn about the injury that she sustained some years before while working at Sacred Heart Hospital when she had been hit in the leg with a buffer and knocked down (T 245). Nor did she tell him about the complaints that she made to another doctor several years earlier about pain in her left leg (R 58-59).

Dr. Flynn was asked whether there was any way he could tell from the X-rays or what he was able to visualize at surgery when the fractures occurred. He said that he was not able to date them from the X-rays or visualization (R 34-35).

The strong reliance that Dr. Flynn placed upon what he was told by Mrs. Rhodes is demonstrated by these questions and answers (R 41):

> Q And there's no way that you can tell from any of your examinations of her or the x-rays or any of your other tests as to when she began having difficulty with any of these portions of her body that she's now complaining about, is there?
>
> A Not by the tests. Only by the history of the patient.

Q That's by what the patient tells you?

A Yes, sir.

As far as the testimony of Dr. VerVoort is concerned, he conducted one examination on November 13, 1989, after Mrs. Rhodes was in another automobile accident in August of 1989 (R 2E, G). By that time Dr. Flynn's surgery had been performed. Although even without questioning it would have been obvious to the jury that Dr. VerVoort's evaluation of the physical condition of Mrs. Rhodes prior to both of the automobile accidents must have been based upon either the records that he reviewed or what he was told by Mrs. Rhodes, that point was made clear by Dr. VerVoort's answers to questions about the basis for his opinion as to the condition of Mrs. Rhodes before he saw her (R 2W-X). In the course of that questioning it was also learned that Dr. VerVoort was relying on a description of the accident that involved a great deal more physical force than was indicated by the testimony of the participants and the investigating officer about the collision itself.

Mrs. Rhodes argues that another district court of appeal has arrived at the same rule as the First District, citing Scarfone v. Magaldi, 522 So.2d 902 (Fla. 3d DCA 1988), rev. den. 531 So.2d 1353 (Fla. 1988). As we pointed out on page 11 of our initial brief, there was ample evidence of permanent injury that did not need support from medical testimony, including some

broken teeth, an arm fracture that resulted in three stainless steel screws being left in the bone and a visible surgical scar on the forearm.

The rule adopted by the District Court of Appeal, First District, appears to be unique. It has once again applied the rule to a workers' compensation case, Finney v. Agrico Chemical Co., 599 So.2d 1359 (Fla. 1st DCA 1992). It apparently will continue to apply its own unique rule to medical opinion testimony unless this court reverses its decision in this case.

CONCLUSION

There is no need for a special rule in suits brought under the automobile reparations reform act or in workers' compensation claims that prohibits impeachment of a medical opinion by demonstrating that it was based upon erroneous assumptions of fact. The decision of the jury in this case should be reinstated.

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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 copies mailed to Ada A. Hammond, Esquire, and Jack W. Shaw, Jr., Esquire, on August 26, 1992.

Robert P. Jaeger

Of counsel for petitioner