5-8

IN THE SUPREME COURT OF FLORIDA

CITY OF TAMPA,

Petitioner,

vs. Case No. 80,804

J.D. LONG and HELEN LONG,

Respondents.

ON DISCRETIONARY REVIEW OF THE DECISION
OF THE SECOND DISTRICT COURT OF APPEAL

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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THE CASE AND FACTS

In addition to the matters set forth in petitioner's brief, the Court should note the following:

The jury found that J.D. Long had not suffered a permanent injury, but that Helen Long had. *R.565* Separate judgments were entered on the Longs' claims. *R.569, 570*

In its opinion, the District Court affirmed the judgment in favor of J.D. Long "without discussion." Further:

> As to the final judgment entered in favor of Helen Long, we approve the jury instructions for the reasons explained in Philon v. Reid, 602 So.2d 648 (Fla. 2d DCA 1992). But see Rivers v. Mansfield [*sic*], 584 So.2d 1012 (Fla. 3d DCA 1991), jurisdiction accepted, 592 So.2d 1091 (Fla. 1992).

The jury instruction at issue in this case was that a permanent injury "may include" permanent subjective complaints of pain resulting from an initial organic injury *R.479, 556* Mrs. Long's treating physician had testified that she was suffering from chronic pain as a result of the injuries she suffered in the accident, and that she would have the pain for the rest of her life. *R.15-16* Another doctor testified that he could relate Mrs. Long's subjective complaints of pain to objective findings, such as observable muscle spasms, and so forth. *R.119, 121, 122, 136*

The defendant's examining physician testified that he could find no objective evidence that Mrs. Long had suffered a permanent injury. When asked whether objective evidence would be necessary to a finding of permanent injury, the doctor said that each case had to be evaluated on its own merits. *R.402, 415, 421-22* As for Mrs. Long, the doctor recounted that during his

examination, her complaints of pain had been inconsistent; she would complain of pain during one test but not during another. *R.415*

SUMMARY OF ARGUMENT

A. The Rivero *decision is materially distinguishable from this case.*

In Rivero the Third District opined that an instruction telling the jury that the words "permanent injury" includes subjective complaints of pain advises them that pain ***always*** constitutes permanent injury. In the instant case, the judge told the jurors nothing of the sort. Rather, he instructed them that a permanent injury ***may include*** permanent subjective complaints of pain.

The Rivero court also reasoned that in that case such an instruction essentially would have directed the jurors to disregard the testimony of the defense medical expert.

Here, the experts were in agreement that subjective pain can constitute a permanent injury. They differed, however, on whether Mrs. Long's complaints of pain were sincere. The instruction at issue did not touch this simple credibility question.

B. The Rivero *decision is poorly reasoned.*

The reasoning by which the Rivero court reached its decision on the instant issue was fallacious in two respects. First, the court declared that the instruction "incorrectly

informs the jury that under the statute permanent pain is always permanent injury." But such an instruction is *not* incorrect. Both medically and legally, permanent pain resulting from an initial organic injury is considered a permanent injury.

Second, the Rivero court posited that the instruction directed the jury to disregard the testimony of defense medical experts. That is simply not so. The instruction merely informs the jurors of the law; they are separately instructed about their duties to weigh the evidence and assess credibility of the witnesses.

ARGUMENT

THE DISTRICT COURT CORRECTLY AFFIRMED MRS. LONG'S JUDGMENT.[1]

When reviewing Mrs. Long's judgment the District Court correctly declined to apply the decision in Rivero v. Mansfield, 584 So.2d 1012 (Fla. 3d DCA 1991), for the following reasons:

A.

The Rivero *decision is materially distinguishable from this case.*

In Rivero the plaintiff's medical experts testified that her permanent pain constituted a permanent injury. The defendants' experts opined that the plaintiff had not sustained a permanent injury. The trial judge, who of course had observed all the evidence, refused the plaintiff's request for a jury instruction that "The words 'permanent injury,' as used in the Florida No-Fault Law, include permanent subjective complaints of pain resulting from an initial organic injury." Rivero 584 So.2d @ 1013.

The Third District affirmed, reasoning that

> An instruction that permanent injury includes permanent subjective complaints of pain incorrectly informs the jury that under the statute permanent pain is always permanent injury. In effect, such an instruction directs the jury to disregard the testimony of defense medical experts and is tantamount to the court directing a verdict for plaintiffs on the issue of permanent injury. *See Gencorp, Inc. v. Wolfe*, 481 So.2d 109 (Fla. 1st DCA 1985).

Rivero, 584 So.2d @ 1014.

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[1]Petitioner has not challenged the affirmance of J.D. Long's judgment.

Here, on the other hand, the judge did not instruct the jury that permanent pain is *always* permanent injury, or anything close to that. Rather, he instructed that for purposes of the No-Fault threshold statute the term permanent injury ***"may include*** permanent subjective complaints of pain resulting from an initial organic injury." *(Emphasis added.)*

Neither did the instruction direct the jury to disregard the testimony of the defense medical expert. To the contrary, it was fully consistent with his testimony that objective signs of injury were not always necessary to a finding that a patient had suffered a permanent injury, and that such determinations had to be made on a case-by-case basis.

Thus, the question presented by the evidence was not whether subjective pain could constitute a permanent injury--all medical experts agreed that it could. Instead, the question presented was whether Mrs. Long was actually suffering pain. Her expert medical witnesses opined that she was suffering pain; they claimed to have observed corroboration in the form of muscle spasms, etc. The defense expert came to the contrary conclusion because, he said, during his tests Mrs. Long's complaints were inconsistent.

When reaching its verdict, the jury weighed all the evidence and concluded that Mrs. Long's complaints of pain were credible. The challenged instruction did not touch on this simple credibility issue, and could not have affected its resolution by the jury.

Whether to give a particular jury instruction is a matter within the discretion of the trial judge, and his decision should not be disturbed on appeal absent prejudicial error. Goldschmidt v. Holman, 571 So.2d 422, 425 (Fla. 1990). Prejudicial error requiring a reversal or new trial occurs only when the error complained of has caused a "miscarriage of justice", *i.e.*, when the instruction is reasonably calculated to confuse or mislead the jury. Section 59.041, Florida Statutes; Florida Power & Light Co. v. McCollum, 140 So.2d 569 (Fla. 1962). On the other hand, "[w]hen it appears from the whole record that an alleged misleading charge could not reasonably have influenced the verdict to the injury of the complaining party, a new trial on that ground should not be granted." Atlantic Greyhound Lines v. Lovett, 184 So. 133, 136 (Fla. 1938). *Compare*, Shaw v. York, 187 So.2d 397 (Fla. 1st DCA 1966).

In the instant case, the plaintiffs' and defendants' medical experts were in agreement that subjective complaints of pain could constitute permanent injury. Their only material disagreement was whether Mrs. Long's complaints were credible. The instruction at issue addressed the former question only, and could not reasonably have influenced the jury's resolution of the latter. That being so, Rivero has no bearing on this case, and the District Court was correct to affirm the judgment in Mrs. Long's favor.

B.

The Rivero *decision is poorly reasoned.*

Though this Court recently approved the portion of the Rivero decision at issue here, the Court did so without discussing or adopting the Third District's reasoning. Mansfield v. Rivero, 18 F.L.W. S99, S101 (Fla. Feb. 4, 1993). As will be seen, there are good reasons why this Court should reject that reasoning.

Recall that the Third District's objection to the plaintiff's proposed instruction in that case was two-fold. First, the court said, "An instruction that permanent injury includes permanent subjective complaints of pain incorrectly informs the jury that under the statute permanent pain is always permanent injury."

But, in fact, such an instruction is ***not*** incorrect. To the contrary, it is accurate, both medically and legally. The American Medical Association has determined that a person who suffers a documented initial organic injury followed by six months of medically documented pain has suffered a permanent impairment. *See,* Engleburg, M.D., Guides to the Evaluation of Permanent Impairment, p.73, Table 49, Subsection 2B (3d Ed. 1988).

Legally, case law holds that the words "permanent injury" in section 627.737(2), Florida Statutes, "include permanent subjective complaints of pain resulting from an initial organic injury." Johnson v. Phillips, 345 So.2d 1116, 1117 (Fla. 2d DCA

1977), *cert. denied* 358 So.2d 131 (Fla.1978).

Clearly then, if it were undisputed that a plaintiff suffered permanent subjective complaints of pain resulting from an initial organic injury caused by the accident at issue, she would be entitled to a directed verdict on the permanency threshold issue.

To be sure, where the evidence is disputed either as to whether the plaintiff's complaints of pain are sincere or as to whether they are permanent, jury issues are presented. And certainly, as the Rivero court noted, a jury "must base its decision as to ***permanence*** [and credibility as well] on all the testimony and evidence." Rivero, 584 So.2d @ 1014, note 1 *(emphasis added)*. But an instruction that permanent pain may constitute a permanent injury does not touch on either of those issues. Rather, it simply--and accurately--informs the jury of the law.

It is for that reason that the Rivero court's other rationale, that "such an instruction directs the jury to disregard the testimony of defense medical experts and is tantamount to the court directing a verdict for plaintiffs on the issue of permanent injury", is similarly flawed.

On the one hand, if the experts were to opine that permanent pain could never constitute a permanent injury, their testimony would have to be disregarded because it would be legally insufficient to support a verdict for the defendant. *See,* E.R. Squib & Sons, Inc. v. Stickney, 274 So.2d 898, 907

(Fla. 1st DCA 1973)("It has been uniformly held that the testimony of an expert witness which is premised solely upon a demonstrably false assumption of fact or patent misconception of law is not a sufficiently competent foundation to sustain a jury verdict.").[2]

If, on the other hand, the experts were to dispute the plaintiff's claim to suffer pain, or opine that her pain is not permanent, the jury would be free to accept that opinion without running afoul of the instruction.

That is because the instruction does not deal with the weight of the evidence or the assessment of credibility. The jury receives other instructions that do address those matters:

> In determining the believability of any witness and the weight to be given the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.

Florida Standard Jury Instruction (Civil) 2.2(a)

> You have heard opinion testimony on certain technical subjects from persons referred to as expert witnesses.
>
> 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 wit-

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[2]*Compare, Hall v. State*, 568 So.2d 882, 885 (Fla. 1990)("Expert testimony that a defendant suffered from a mental infirmity, disease, or defect without concluding that, as a result, the defendant could not distinguish right from wrong is irrelevant.")

ness, the reasons given by the witness for the opinion expressed, and all the other evidence in the case.

Florida Standard Jury Instruction (Civil) 2.2(b)

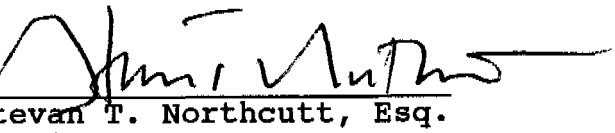
Generally, a jury is presumed to follow the court's instructions. *See, e.g.*, National Car Rental System, Inc. v. Holland, 269 So.2d 407, 411-412 (Fla. 4th DCA 1972). Neither the instruction regarding permanent pain at issue in Rivero nor the one at issue here offers any reason to believe the jurors would not abide by the instructions just quoted.

CONCLUSION

For the reasons described, the Court should approve the decision under review.

Respectfully submitted,

LEVINE, HIRSCH, SEGALL
& NORTHCUTT, P.A.

By 

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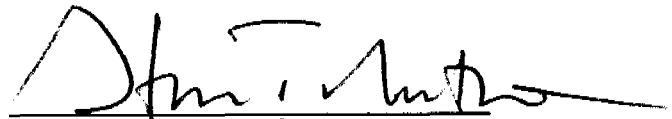
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished by U.S. Mail to Jack M. Larkin, Esq., 806 Jackson Street, Tampa, Florida 33602 on April 13, 1993.



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