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IN THE SUPREME COURT OF FLORIDA

MILLIE WEYGANT

Petitioner,

vs.

FORT MYERS LINCOLN MERCURY, INC., d/b/a FORT MYERS AMC JEEP, RENAULT and CHESTER MEREDITH,

Respondents.

Case No. 81,008
District Court of Appeal
2nd District - No. 91-01902

APPEAL FROM THE SECOND
DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF

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ARGUMENT

1. JURY DISREGARD OF EXPERT TESTIMONY

It is respectfully submitted that this court's ruling on the issue of the jury's right to reject expert opinion testimony set forth in the case of Easkold v. Rhodes, 18 F.L.W. S134 (Fla. March 4, 1993), should be further elucidated.

In that decision, as here, the medical testimony and opinions presented by the plaintiff were the issue of review. The plaintiff there presented the expert testimony of a Dr. Flynn, who testified that a traumatically induced fracture of the plaintiff's knee was due to the auto accident suffered by the plaintiff. The plaintiff had not given the doctor an accurate history, as in fact she had suffered an injury to her knee when someone had run into her leg with a buffer. Quite clearly, the plaintiff willfully concealed a relevant prior injury from this doctor.

Likewise, the plaintiff there presented the testimony of a Dr. Vervoort relating to her claimed neck, low back, and left knee injury, and again denied having any history of prior pain or problems in these areas to the doctor. In fact, the plaintiff had previously suffered from and been medically treated for numbness in her left leg, toes, pain in her back, and numbness and pain on the left side of her neck and head.

This court noted that neither of the two doctors who testified at trial had access to the prior medical records of the plaintiff which would have revealed these prior symptoms.

Under those facts, this court ruled that it was error for the

district court of appeals to have granted the plaintiff a new trial after the jury found for the defense.

> "The district court found that Rhodes had presented expert medical testimony that she had sustained permanent medical injuries as a result of the auto accident and that this medical evidence was uncontroverted because Easkold presented no medical testimony to the contrary and neither Dr. Flynn not Dr. Vervoort testified that additional medical history would have changed his opinion. Consequently, the district court determined that the jury's verdict of no permanent injury was contrary to the manifest weight of the evidence and that Rhodes' motion for a new trial should have been granted." Id. at S134.

The district court of appeals determined that because neither doctor had opined that the additional medical history of prior injuries and symptoms would cause him to change his testimony, and because one doctor was not asked whether the history of prior injury would affect his opinion, the medical testimony was "essentially uncontradicted".

This court reversed the ruling of the lower appellate court based on the case of Shaw v. Puleo, 159 So.2d 641 (Fla. 1964), as formalized in the Florida Standard Jury Instruction (Civil) 2.2(b). The court went on to reaffirm the continuing authority of Shaw;

> "even though the facts testified to by [the medical expert] were not within the ordinary experience of the members of the jury, the jury was still free to determine their credibility and to decide the weight to be ascribed to them in the face of conflicting lay evidence. ... Based upon the rule announced in Shaw and incorporated into instruction 2.2(b), the jury in the instant case was 'justified in determining that the opinion testimony was flawed by reason of the materially untruthful history given [to the doctors] by the claimant'" Id. at S135, authorities omitted.

Under this portion of the court's opinion, it appears that there must be some contradictory lay evidence - such as evidence of an untruthful medical history - in order for a jury to disregard an expert's opinion, assuming the expert testimony in the case is not met by some contradictory expert testimony.

But earlier in the opinion, the language put forth by the court appears to set forth the proposition that a jury can freely reject expert opinion even if that opinion is not impeached by any other lay or expert testimony.

> "Instruction 2.2(b) provides that the jury 'may accept [expert witness] opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinion expressed, and all other evidence in the case.' Fla. Std. Jury Instr. (Civ.) 2.2(b) (emphasis added). As noted in the comment to the instruction, this instruction is based upon Shaw v. Puleo, wherein this Court recognized that 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.'" Id., (initial emphasis added).

So it remains unclear under this court's opinion whether there must be some controverting lay testimony in order for a jury to reject expert testimony not contradicted by other expert opinion, or if the jury is free to reject any expert testimony at any time in the absence of any contradicting lay evidence whatsoever.

If there are no limits on the jury's ability to disregard uncontradicted expert testimony, such as the necessity for some substantial contradictory lay evidence, the law in the area of review of jury verdicts will be profoundly altered by the Easkold opinion.

If a jury can reject uncontradicted expert testimony without any contrary lay evidence, no jury verdict for the defense in the area of personal injury will ever be subject to reversal. In effect, the law that jury verdicts are subject to review if contrary to the manifest weight of the evidence, which goes back to the common law and in this court's rulings to the year 1853, will be reversed by this decision. Renvart Lumber Yards v. Levine, 49 So.2d 97 (Fla. 1951)

This court has always ruled that the jury may not be permitted to base its decisions on matters outside the evidence or on speculation. Yet this is the door which is opened if the Easkold opinion is not clarified in this respect. If a jury rules against a plaintiff because of prejudice or improper argument - such as by accusations that she is a drug abuser and a "double dipper", such as in the instant case - that verdict is not reviewable. The decision of the jury could have been that the expert opinion was unacceptable to the jury for no reason at all. They might not have liked the color of the expert's tie.

But an appeal on the grounds of jury misconduct - or, as here, on the grounds that the defense repeatedly hammered on the improper argument that collateral sources for recovery exist for this injury - would necessarily fail because that misconduct would be harmless error. How can any other basis of error for a defense verdict be asserted when the jury might have simply rejected the expert testimony without cause or reason?

The jury's right to make determinations of credibility and of

the weight to be given to the evidence comes with a concomitant responsibility to follow the law and to consider only the admissible evidence before it. This responsibility will be severely eroded if this court does not clarify whether there are any boundaries on a jury's right to reject expert medical testimony.

This court's decision in Easkold, if not clarified so as to require some evidentiary basis for the rejection of uncontradicted expert testimony, has removed any duty on the part of the jury to act responsibly. They have, in effect, been invited and allowed to exercise arbitrary and groundless decision-making power; to rule based on speculation and matters outside the evidence at trial.

And with such a green light to act without any limitations, the incentive for the defense in these cases will be to violate any rule of procedure or evidence they can get away with. The defense in this action claims that any restriction on a jury's right to make determinations will be at the expense of the truth. But if the Easkold decision is left unclarified, it is the tortfeasor who will be rewarded for spreading confusion, innuendo and improper argument, instead of sticking to direct consideration of the evidence at trial.

Yet the plaintiffs remain with the stringent standard of proof requiring they present expert medical testimony to make a prima facie case, under the statute. The shift in burden is substantial.

The rulings of the trial judge will be final, and the plaintiff's right to appeal will have been judicially terminated.

The effect of such a ruling will be to swing the burden far over onto the side of the tortfeasors in accident cases, and render review of defense verdicts impossible. What policy is promoted by requiring the victim and the state welfare agencies to absorb tortious damages, rather than putting responsibility for the damages on the tortfeasor?

The plaintiff here would go so far as to submit that by removing all restrictions on a jury's right to decide cases capriciously, the appellate courts would be abdicating their responsibility under the common law and the constitution to protect the public's right to appellate review. There must be some control over a jury's ability to arbitrarily reject all of the manifest weight of the evidence, unless this court has for policy reasons determined that such a pivotal and momentous change in this area of the law is necessary and desireable.

It is submitted that the distinction between whether there should be any evidentiary basis over a jury's right to reject expert opinion is critical to a proper resolution of the appeal in the instant case. If there must be some credible lay evidence to impeach the testimony of an expert in order to allow the jury to disregard the testimony, then this court should reverse the trial court's decision in the instant case and remand for a new trial on damages only.

The facts here are very different that those in Easkold, the arguments of the defense notwithstanding. It is submitted that there was no evidence on the record, lay or otherwise, or impeach

the experts here.

In the instant case, at least two of the medical experts who testified on behalf of the plaintiff not only were fully aware of the condition and medical history of the plaintiff before her auto accident, but were actually her treating physicians both before and after the accident. There was absolutely no evidence in the record to indicate that these two doctors, Dr. Husey and Dr. Bercaw, were basing their opinions on misleading or incomplete medical histories given by the plaintiff or any other person.

Indeed, they both knew of all other incidents listed by the defendants as providing other possible causes for the plaintiff's injuries, such as falls, lifting baskets, and so forth. They factored their knowledge of those incidents into their opinions.

The defense in its answer brief glosses over all of the evidence in the record which indicates the doctors had full knowledge of the plaintiff's medical condition. The claim that the plaintiff changed her story about which side she felt pain on at various times is simply not true: a look at the actual testimony of Dr. Husey and Dr. Bercaw in their entirety answers that claim.

The defense is simply trying here, as it did at trial, to sow confusion, generating "discrepancies" by taking the expert's testimony out of context and overgeneralizing the testimony and the stated grounds for the testimony.

This confusion was aided by the trial court's erroneous refusal to grant a concurrent cause instruction in this aggravation case, which alone was grounds for reversal. Marinelli v. Coultas,

604 So.2d 1274 (Fla. 4th DCA 1992); Standard Jury Instruction 5.1(b); Maser v. Fioretti, 498 So.2d 568 (Fla. 5th DCA 1986)

A third doctor, Dr. Lusk, additionally had the benefit of direct observation of the plaintiff's spine during surgery in rendering his opinion. These were not, as in Easkold, doctors who were limited to third party descriptions in reaching their opinions. They had the benefit of direct observation and treatment.

Here there were objective signs of the injury, including MRI results showing a bulging disc, myelograms, thermograms, and muscular spasms. The evidence of aggravation of plaintiff's psychological disability was corroborated by 26 hospital admissions for pain and stress after the accident, compared with one such admission in all the years before the accident.

Furthermore, all three of these doctors in the instant case were actually questioned on cross examination as to whether any of the "phantom causes" would cause him to change his expert testimony, and all emphatically indicated that they would not. All three conceded the existence of a pre-existing injury and condition, but unequivocally testified to the existence of an identifiable aggravation and new injury caused by the auto accident.

All three of these treating doctors were questioned on any alleged discrepancies and were actually given a chance to change their opinions. This is not a case like Easkold, in which the district court of appeals ruled that there was no impeachment

because no one happened to ask one of the doctors about the discrepancies.

One of the arguments submitted by the insurance industry in its amicus brief in the Easkold case was that to require the defense to hire an expert where the plaintiff's expert would not change his or her decision would be onerous and expensive. But in the instant case, unlike Easkold, the defense did in fact hire a medical expert, and had the opportunity to present that expert with all of the hypothetical discrepancies they brought up before the jury.

Despite hiring this expert and having access to all of the alleged impeaching material, the defense's own expert could not render an opinion to contradict the experts of the plaintiff. Even the defense expert in this case deferred to the plaintiff's treating physicians based on their superior knowledge and opportunity to have direct observation of the plaintiff over many years. This policy argument of reducing expense has no application here.

Other jurisdictions have wrestled with the problem of how and when an expert opinion may be disregarded. For instance, the law in New York was set forth in the case of Barker v. Rice, App. Div., 449 NYS 2d 369 (1982). In that state, the court noted that ordinarily the trier of fact, as here, need not credit an expert's testimony.

However, the opinion should be given great weight where it is neither contradicted by direct evidence, opposed by the

probabilities, nor in its nature is surprising or suspicious. A jury verdict in that state which disregards such an unimpeached expert opinion is contrary to the weight of the evidence and requires reversal and a new trial. Additionally, it is deemed a crucial fact if the defense produces no expert testimony although their own doctor examined the plaintiff. Id.

Other jurisdictions besides New York have come up with reasoned guidelines as to what constitutes competent impeachment evidence. The Supreme Court of Arizona addressed the issue of relevant versus irrelevant impeachment evidence in Fry's Food Stores v. Industrial Commission of Arizona, 776 P.2d 797 (Ariz. 1989). Under the issue heading of "The Incorrect Factual Assumption", the court noted as follows:

> "An expert opinion based on an incorrect factual assumption may be rejected if the factual assumption was material, but not every error in fact renders the opinion fatally flawed. ... Obviously, an opinion based on incorrect but irrelevant factual assumptions is admissible. For example, an accident reconstruction expert's estimate of speed from skid marks would be admissible even though the expert believed the car was blue when it was actually red." Id. at 800, quoting footnote.

Likewise in our case, the hypothetical given in the initial brief sets forth a situation where the expert's opinion is, in a technical sense, contradicted, yet in a manner which is irrelevant and which upon challenge does not affect the substance of the expert's testimony. In Florida after Easkold, it is unclear whether there need be no evidence to allow a jury to disregard the expert, some scintilla of evidence, whether relevant or not, or

some showing of competent, substantial evidence. This court had in earlier years given some indication of what showing was necessary: these opinions appear to have been reversed without consideration by Easkold.

In State Department of Transportation v. Myers, 237 So.2d 257 (Fla. 19), the court noted that:

> "Where, however, an issue must be resolved upon the basis of technical evidence on which only experts are qualified to speak, and such evidence is not in dispute, the court is not justified in rejecting it unless it is so palpably incredible, illogical, and unreasonable as to be unworthy of belief or otherwise open to doubt from some reasonable point of view. As said by the Supreme Court in Chomont v. Ward:
>
> ' ...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....'
>
> The foregoing does not exclude the corollary rule that when facts sought to be proved by expert testimony are within the ordinary experience of the members of the jury, or disputed by lay testimony, the conclusions to be drawn from such expert testimony will be left to the jury." Id. at 261.

The Supreme Court of Nebraska has indicated its reasoned approach in Mann v. City of Omaha, 319 N.W.2d 454, 459 (Neb.1982), as follows:

> "[W]here the medical testimony is uncontroverted, unimpeached, and is given in matters of medical diagnosis which are peculiarly within the range of the knowledge of the expert, the compensation court is not free to substitute its own diagnosis. It is not true that in every case the uncontested opinion of an expert is binding on the trier of fact, but where, as here, the testimony is based on first-hand knowledge, is credible, and has no demonstrable weaknesses or failure of foundation, such testimony cannot be ignored." Id.

Clearly, a determination of fact as to what constitutes a permanent injury under the statute is a matter which must be resolved upon the basis of technical evidence on which only experts are qualified to speak. The determination of what constitutes a permanent injury in automobile accident cases under Florida Statute 627.737(2) is a matter left solely for determination by reference to expert testimony. Indeed, there is no jury instruction which defines the condition of permanent injury.

It appears clear from Easkold that this court feels direct contradicting expert testimony is not necessary, but what lesser standard of proof of impeachment will do? It is clear from all of the case law generated on this issue by the district courts of appeal that further guidance is not only helpful but necessary in this active area of the law. It is submitted that this most recent declaration of the law in this area serves to make less certain, rather than more explicit, the law in this area.

It is submitted that some sort of guidance should be given the lower courts as to under what circumstances an expert opinion may properly be deemed impeached, such as is given in the Barker case or in Myers. Simply leaving this matter open does nothing to clarify, from a policy standpoint, how this court looks at the kind of evidence deemed competent to impeach an expert.

This court should accept jurisdiction of this cause and clarify what standard of impeachment of expert evidence is necessary to overturn a jury verdict; what evidence must be in the record to constitute adequate support for a jury to disregard

unimpeached expert testimony? Or has the law changed now so that such verdicts are no longer reviewable?

2. REFERENCES TO COLLATERAL SOURCES OF BENEFITS

Relating to the issue of collateral sources and the multiple references made to double dipping and possible receipt of worker's compensation benefits by the defense throughout the trial and during closing argument, this court does have jurisdiction to consider reversal of that error. White Construction Inc. v. Dupont, 455 So.2d 1026 (Fla. 1984)

The defense argues that the auto accident constituted a separate injury from the initial injury suffered in 1980 on the job. Since worker's compensation provides for liability for subsequent aggravations, and since all of the experts testified that the plaintiff suffered an aggravation of her previous injury, there is no way to isolate the pre-existing injury from the aggravation, as the defense argues. Maser, supra.

And the law is clear that if there can be no apportionment of injury between the aggravation and the initial injury, the second, aggravating tortfeasor is properly charged with responsibility for all of the damages. Washewich v. LeFave, 248 So.2d 670 (Fla. 4th DCA 1971) You take your victims as you find them.

In fact, the aggravation did form part of the basis for later settlement of the worker's compensation claim; there was no way to show this at trial because settlement had not been reached at that point. All the jury was told - again and again and again - was that the plaintiff had suffered a worker's compensation injury

the same area as injured by the auto wreck and that she was attempting to obtain benefits for that work related injury.

None of the cases cited by the defense on this issue deal with an aggravation situation, and none are on point. The cases previously cited in the initial brief all hold that the repeated references to worker's compensation during the course of the trial mandate reversal for prejudice. The trial court's refusal to grant a new trial due to violation of the collateral source doctrine requires reversal.

Two additional cases the plaintiff would call to the court's attention are Johnson v. Canteen Corp., 528 So.2d 1364 (Fla. DCA 1988), which notes that references to the term "benefits" in a trial is even more significant of prejudice and error, and John Deere Co. v. Thomas, 522 So.2d 926 (Fla. 2d DCA 1988), which also notes that there is never any call for reference to the term "benefits" in referring to collateral injuries for impeachment purposes.

The Second DCA also noted in Thomas that the closer a reference to collateral sources is made to the time the jury begins its deliberations, the more likely the prejudice caused by the reference. Here the defense referred to worker's compensation "benefits" in its closing argument at R2: 40, to worker's compensation claims or litigation at R: 93, 95, 108. 109, 115, 117, 118, 121, 127, 220, 225, 421, 423, 428, 538, 632, and at least 8 times during closing argument alone (R2: 40, 41, 48, 50).

"When she's in her worker's comp case trying to get that

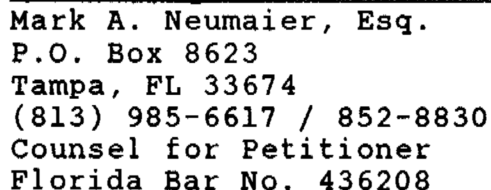
> type of benefit, specifically on May 21, 1990, long after the 1986 accident, ... this is her sworn answers." ...
>
> "Why is she saying that? First place, I think it's probably true, but even if it weren't there, she's trying to prove it's a right-sided problem, because here in this worker's comp she's trying to get benefits for left-sided." (R2: 48, closing argument by counsel for appellee)

The defense did not just make reference to worker's compensation claims, it beat the jury to death with it.

For the reasons set forth above, the court should take jurisdiction of this action for the purposes of clarifying its standard of proof under the Easkold decision, and should reverse the instant decision for lack of adequate impeachment and due to violation of the collateral source doctrine by the defense.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by U. S. Mail on May 11, 1993 to Floyd Price, Esq., P.O. Box 1519, Bradenton, FL 34206, Mark Yeslow, Esq., P.O. Box 9226, Ft. Myers, FL 33902, and to Patricia D. Prouty, Esq., P.O. Box 1519, Bradenton, FL 34206.



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