

IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,154

3 DCA Case Nos. 92-167
91-2918

Fla. Bar No. 137172

ROLAND PIERRE ANGRAND, as
personal representative of the
estate of Carolyn Angrand,
Deceased,

Petitioner,

vs.

MICHAEL KEY, D.O.,

Respondent.

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BRIEF OF PETITIONER, ROLAND PIERRE ANGRAND,
AS PERSONAL REPRESENTATIVE OF THE ESTATE OF
CAROLYN ANGRAND, DECEASED
(On the Merits)

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I.

INTRODUCTION

The petitioner, Roland Pierre Angrand, as personal representative of the estate of Carolyn Angrand, deceased, for and on behalf of Roland Pierre Angrand, surviving spouse, and John Whyms, surviving son, was the appellee in the District Court of Appeal, Third District, and was the plaintiff in the trial court. The respondent, Michael Key, D.O., was the appellant/defendant. In this brief of petitioner on the merits the parties will be referred to as the plaintiff and the defendant and, where necessary for clarification or emphasis, by name. The symbols "R," "T" and "A" will refer to the record on appeal, the trial testimony (as renumbered by the lower court clerk all as found in Volumes IV-VIII) and the appendix accompanying this brief, respectively. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

STATEMENT OF THE CASE AND FACTS

A.

The plaintiff, decedent's husband and the personal representative of her estate, sued the defendant (and others) and sought wrongful death damages as a consequence of alleged medical negligence for failure to diagnose an ectopic pregnancy (R. 1-8). The jury trial against the defendant culminated with a verdict (and resultant judgment and amended judgment) in plaintiff's favor (R. 169, 170, 210, 263, 264). Defendant

appealed to the Third District which Court, in an opinion now reported, KEY v. ANGRAND, 630 So. 2d 646 (Fla. App. 3rd 1994), stated:

* * *

"The expert testimony, when added to the lay testimony, tended to make grief-related testimony a feature of the trial.

* * *

"Because of the prejudicial nature of the testimony and the heavy emphasis given this issue at trial, we reverse and remand for a new trial on liability and damages. We certify direct conflict with so much of Holiday Inns, Inc. v. Shelburne [576 So. 2d 322 (Fla. App. 4th 1991)] as allows the use of expert testimony to explain survivor grief to members of a jury." 630 So. 2d at page 651.

* * *

B.

At the trial of this case the plaintiff called as an expert (damage) witness Dr. Larry Platt. By way of preliminary introduction, Dr. Platt was the witness involved in HOLIDAY INNS, INC. v. SHELBURNE, 576 So. 2d 322 (Fla. App. 4th 1991). As a matter of fact the Third District has concurred with the Fourth District that Dr. Platt is an expert in the field:

* * *

"The expert in this case has a doctorate in sociology with extensive additional education in the area of bereavement and grief. He has written or co-authored five books on the subject, as well as numerous articles, and has presented papers to professional groups. He provides training to counselors, therapists, nurses, social workers and physicians.

"By qualifications, the witness met the definition of expert as set out in Section 90.702 and Florida Rule of Civil Procedure 1.390(a). . . We find no abuse of discretion in the trial court's determination that the witness was qualified to express an expert opinion." 630 So. 2d at page 650.

* * *

In this regard the record specifically reflects that Dr. Platt is probably the most eminent expert in the country today on death and dying, grief and bereavement. He has taught for 17 years at Georgia Southern College. He teaches under-graduate and graduate courses in death and dying and research methods. He has a bachelor's degree, a master's degree and a Ph.D degree in sociology, and is working on his post-doctorate at Harvard University in the field of grief and bereavement. Dr. Platt has been doing work in this field for over 15 years. (T. 304-315) Since 1970, Dr. Platt has attended seminars and/or workshops dealing with death and dying. He has studied directly under the two world authorities on the subject. His post doctorate studies are in the areas of grief and bereavement. The subject is a recognized area of study in schools around the United States. It has been carried out as a study for over sixty years in sociology, psychology, nursing, social work and medicine. The subject is taught at between 2,000-3,000 colleges and universities across the country (T. 304-310).

Dr. Platt has authored several books on death and dying, grief and bereavement, and how to respond to the loss. He has published a dozen or so articles in different journals on death and dying, and on grief and bereavement. He has presented a number of scientific papers on the subject across the country. He provides training for counselors, therapists, nurses, social workers and physicians who deal with patients who have experienced a loss (T. 304-314). Dr. Platt has been doing basic

research about how death effects people's lives for over 15 years and his studies utilize the interview format (T. 308, 309).

C.

In the instant cause Dr. Platt interviewed decedent's two survivors, Roland Pierre Angrand and John Whyms (T. 316). The record before this Court reflects:

* * *

"Q Was the interview that you conducted with respect to Roland and John any different from any of the other hundreds of interviews that you've conducted in your career?

"A No.

"Q Please tell us, Dr. Platt, what did you learn about the grief with respect to Roland Pierre Angrand and John Whyms and what they have gone through, and if you can take us through your interview or anyway you want to explain what you learned by conducting that and based on your expertise, of course.

"A It would probably be simple to go through those five categories and see the findings in each of those areas.

"First factor is prior loss, who else has died. When we come to a death with no experience at all beforehand, then it makes the learning process of how to deal with what death more difficult. It will take longer. If we have had some significant loss in our life, we know some of the things that go with the grief experience from that, and that may prepare us in some way for the death that we are coping with now. For John, he had had no other significant death in his life. This was the first person that really mattered in his life and so there was no preparation there. But for Roland, he had had his mother and father die. They had both died of long term chronic illness. While it told him something about what the death experience is like when you lose people really important to you, it did not prepare him. He feels for the death of his wife and particularly the way in which she died. So he understood something about death from natural causes but this other type of death

he found difficult. So there was preparation, but it was limited.

"Q Going on, can you tell us what else you learned.

"A The centrality of the relationship, the second category, how important was this person shows, of course, that there was a special bond between John and his mother beyond just being parent and child. They spent a great deal of time together. They moved into a relationship that was extremely close and they shared everything together. She was his confidant. It was her advice that he got and sought out, and he'd make decisions with her input.

"For Roland, this was the marriage that he had wanted. He was happy in the marriage he had with her. He felt like they were very compatible. They formed that very intimate bond that I talked about between husband and wife, and it's a special kind of relationship that we don't have with anybody else.

"For both of them, the loss of this very central and important figure in their life means their grief reaction is going to be far more intense and long lasting than is usually the case.

"When you look at the third category which is the mode of death, how she died, they both believe her death was unexpected. They know that they had no forewarning this was going to happen. They think the death was untimely. She had a life ahead of her, and they had their lives with he ahead. So it was not somebody who had died after 90 years of full life. They felt she was robbed of those years.

"They also felt it was a painful death, that she suffered, that she felt physical pain and that too complicates the response. They see it as a preventable death. This was not an illness. This was something that could have been avoided. If people would have behaved differently, she'd be alive today. All of those things amplify and intensify the already grief experience. It's one of the most intense producing forms of death that we know of. Sudden and unexpected death increase high levels of intensity thus it takes a lot longer to deal with.

"Q With respect to each one of them, Doctor, and perhaps we can do it individually, why don't we take John first. Can you tell us about John's reaction

with respect to the four tasks that you have told us about?

"A Yes. Do you want me to tell you where he is?

"Q Where he is and how he went through them based on your review and expertise and information you can offer to the jury in terms of their understanding of the grief process John Whyms went through as a result of his mother's death?

"A Yes, I think he has completed the four tasks that we talked about in the grieving process. He has adjusted as best as he can to his mother's death. There are a number of things that he did and is doing now that indicate that he is still having some element men of thinking that he will have to cope with.

"Q Can you please tell us what you're referring to?

"A That there are a number of objects of his mother's that he still maintains a strong linkage to. He likes this particular bible that has notes by her in it because people are drawn to the handwriting that brings back a sense of that person. There is a quote she made and he slept with all these years. There are those things.

"He also goes to the grave about once a month. There he feels very close to her. He feels the sense of her presence and carries on conversations with her, talks out loud to her as though she were alive. He's still very much trying to find a way to live with the permanent absence of his mother. He has strong anniversary reactions on particular days. His birthday is one in particular that he used to celebrate. They reawaken the grief. He knows that his mother is not coming back. He has accepted the reality of her death and with that he has experienced much of the kind of emotional responses that go with that permanent loss. He sees his future as happening without her and realizes now how much of that's going to be changed by her death.

"Other than his continued strong attachment to the grave, he has basically come to terms with those four tasks that he has to deal with. With the level you see of his active grief going through particular days and having still strong attachment to objects and places related to her, still finding those things very difficult to deal with, it's very much the permanent

state of grief. It's going to be in his life pretty much this way for the rest of his life.

"The accomplishment of the four tasks is not where you reach a state where you no longer grieve. It's where you reach a stage of adjustment and you become as good as you can get in coping with the death. Then you accept that as a permanent part of who you are, and that diminished person then goes on and accepts the reality of the loss."

"Q What about with respect to Roland, Dr. Platt?

"A I see Roland still very much struggling with task three, coping and adjusting to the changed environment. He has the house kept pretty much the same way as when she died. His bedroom, in particular, is very much the same way. There are still a number of her clothes there that still hold the smell of her. For the first year, he slept with her pillow because it had the smell and simply found it was so emotionally charged. He eventually had to put the pillow away. There are objects that he finds that have strong attachment. There was a tape that had the sound of her voice on it, and he played it over and over again until he finally wore it out still desiring to hear the sound of her voice as the years went by. He too has strong anniversary reactions but to far more days than John. Every date that's related to her triggers these emotional reminders.

"He's distracted on a daily basis by people who look like, sound like or remind him in some way, family members of hers that he has a good time with, the house that he likes having those memories there is also a place he has to stay out of. He tries to go and be with friends and be busy and not spend time there because in the evening time is when he begins to feel very strongly the sense of her presence. He'll get out a couple of the objects, wedding picture, cap and scarf she made him, sit in the bedroom, feel her presence and talk out loud to her. He too goes to the grave and he goes about every other month and there at the grave he talks to her. So there is this continued sense of the presence of her.

"Q Doctor, based on your education, training and experience within thanatology, do you have an opinion as to whether Roland and John will suffer the grief and pain of the loss of their respective wife and mother for the rest of their lives?

"A Yes. That's the nature tour of the grief response.

"Q Doctor, there's a saying that time heals all wounds. Do you have an opinion if that's true with respect to death?

"A Time doesn't really change anything by itself. It takes the active effort of the person who's grieving. Time permits a window for that to happen. And slowly and gradually over time they will come to adjust to the death. It will simply take a great deal of time far longer than they ever imagined. And when they've gotten as good as they'll get, the portion of grief that is still a permanent part of them is going to be far greater than they first imagined.

"Q From your interviews and the information you have received, has Roland attempted to go on with his life and do the things that you've referred to in your task?

"A Yes, I think he's doing some of task four. He's still having problems dealing with world without her. He's made attempts to be with other people. He just finds those relationships, when he's out on a date, are not rewarding. He keeps making comparisons. He keeps seeing these people as not measuring up to the relationship that he had thus he finds there's no need to go on so those relationships have fizzled.

"Q With respect to John and Roland, do they suffer from any guilt feelings after the loss of a loved one?

"A The survivors following the death often time feel guilty that they themselves didn't die. They feel guilty for being the one living. When they do start to recover they feel guilty that how can I be having this pleasurable time and this loved one that I care about is dead."

* * *

Regarding the scope and extent of Dr. Platt's opinions, he explained:

1. There are dimensions to grief and because people do not speak about it and share it much with

other people nor society at large, we're not as aware of all the details.

2. One of his functions is to make people aware of the details; and

3. That his interview had a therapeutic effect upon the decedent's survivors in that it helped them understand the details of their loss. (A. 29-30)

D.

On appeal to the Third District, that Court reversed the final judgment and directed that a new trial be had as to both liability and damages. The Court stated:

* * *

"We conclude that the testimony of the grief expert should not have been admitted. Review of the trial transcript shows that the expert in this case did not testify as to anything that was outside of the common experience, or common sense, of the jury, most of whom had also experienced the death of a loved one in the past. It is self-evident that grief is a profound and difficult experience which takes a long time to overcome; that different people handle their grief in different ways and on different time tables; and that the closer the relationship, the deeper the sense of loss experienced by the survivors. The expert added nothing beyond what the survivors themselves, their minister and other family members testified to as to the close relationship Mrs. Angrand had with her husband and son and the loss felt by them after her death." 630 So. 2d at page 650.

* * *

The Court certified its conflict with SHELBURNE, supra, 576 So. 2d 322 [". . . as allows the use of expert testimony to explain survivor grief to members of a jury. . ."]. The Court in SHELBURNE held:

* * *

"In the present case, the witness' testimony clearly assisted the jury, and appellant's argument that his testimony should have been excluded because the subject matter of the testimony was within the normal, everyday comprehension of jurors is without merit. The expert witness' research over a period of 15 years and the research of others in the field indicate that there are patterns of responses to grief, stages of grief, and factors that exacerbate one's responses to grief. More specifically, he explained that people can now be categorized as falling into either normalized patterns of grief or complicated grief, and he explained those processes. Certain factors affect a person's grief, and the ability to recover from that grief.

"The expert interviewed Mr. and Mrs. Rice before trial. Thus, he was able to explain to the jury the Rices ordeal in working their way through the grief process, where they were in that grief process at the time of trial, what factors had adversely affected their response to their son's death and affected their ability or inability to recover from their grief, and the pattern their grief was likely to take in the future. Clearly, the subject of grief and bereavement is not an area within the normal everyday comprehension of jurors, and the expert testimony was properly admitted to aid the jury in its consideration of the effect of David's death on his parents." 576 So. 2d at page 336.

* * *

This proceeding followed.

The plaintiff reserves the right to argue the significance of the above facts and other relevant record facts in the argument portion of this brief.

III.

QUESTION PRESENTED

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING EXPERT TESTIMONY ON THE ISSUE OF GRIEF AND BEREAVEMENT.

IV.

SUMMARY OF ARGUMENT

The plaintiff would respectfully suggest to this Court that the trial court was eminently correct in allowing expert testimony on the issue of grief and bereavement. As a result, the opinion of the Third District should be quashed, the final judgment (and amended final judgment) entered in favor of the plaintiff should be re-instated and the opinion of the Fourth District in SHELBURNE should be approved as the controlling authority for this state.

It appears to be established in this state that there are four considerations in determining the admissibility of expert testimony: (1) that the opinion evidence be helpful to the trier of fact; (2) that the witness be qualified as an expert; (3) that the opinion evidence can be applied to evidence offered at trial; and (4) that evidence, although technically relevant, must not present a substantial danger of unfair prejudice that outweighs its probative value.

In SHELBURNE, in analyzing the subject issue, the Fourth District discussed in detail the qualifications of the (subject) witness and concluded the witness was undoubtedly qualified as an expert in the field of grief and bereavement. More importantly, however, the Court emphasized that the witness teaches psychologists and counselors so that they can understand grief and bereavement and provide more help to their patients. In point of fact, the Third District did not quarrel with the

qualifications of Dr. Platt and agreed with the Fourth District that the trial court committed no abuse of discretion in determining that the witness was qualified to express an expert opinion.

The plaintiff does not, in the abstract, disagree with that part of the Third District's opinion which recognizes that expert testimony should not be admitted if there is a substantial danger of unfair prejudice outweighing its probative value. The plaintiff does disagree with the Third District's conclusion that the expert in this case did not testify as to anything that was outside of the common experience, or common sense, of the jury. This is a conclusion on the part of the Third District and it is simply wrong.

In SHELBURNE, in discussing the same expert, the Court stated:

"In the present case, the witness' testimony clearly assisted the jury and appellant's argument that his testimony should have been excluded because the subject matter of the testimony was within the normal, everyday comprehension of jurors is without merit. The expert witness' research over a period of 15 years, and the research of others in the field indicate that there are patterns of responses to grief, stages of grief, and factors that exacerbate one's response to grief. More specifically, he explained that people can now be categorized as falling into either normalized patterns of grief or complicated grief, and he explained those processes. Certain factors effect a person's grief, and the ability to recover from that grief." 576 So. 2d at page 336.

The present record reflects the testimony as noted in SHELBURNE, supra. That testimony suggests that what the Third District took as "self-evident" is simply not so and that testimony

provides as fact the reason why the need for expert testimony in the first place. The Third District stated:

" . . . Grief is a profound and difficult experience which takes a long time to overcome; that different people handle their grief in different ways and on different time tables; and that the closer the relationship, the deeper the sense of loss experienced by the survivors. . ." 630 So. 2d page 650.

However, the opinion of Dr. Platt reflects that there are stages to grief and, as pertinent to this aspect of the discussion:

" . . . Sudden and unexpected death increase high levels of intensity, thus it takes a lot longer to deal with. . ." (T. 304-314)

The Third District's "self-evident" conclusion conflicts with the facts of this case. Indeed, it can be stated that at one point in time it was "self-evident" that the world was flat, that the sun revolved around the earth, and that there existed no need at all for "expert" witnesses. To justify the existence of a conclusion on the basis of a matter being "self-evident" begs the issue, it does not resolve it. Simply stated, on the record presented, the Third District's opinion is wrong!

There can be little doubt, if any at all, that there exists a threshold flaw in the Third District's opinion. That Court stated:

" . . . Review of the trial transcript shows that the expert in this case did not testify as to anything that was outside of the common experience, or common sense, of the jury. . ." 630 So. 2d at page 650

The above is a conclusion, pure and simple, found to be a "self-evident" truth by three educated and knowledgeable jurists whose own collective past experiences may have led them to conclude as

they did, but whose own past experiences should not serve as the basis for the conclusion reached especially where, as here, a wealth of information gleaned from a person deemed to be an expert by both District Courts established as fact matters outside of the common sense, experience and knowledge of the jury. That the jury or the reviewing court was possessed of "some" knowledge on the subject cannot be deemed dispositive here. In most, if not all cases, the jury will be composed of a cross-section of the community, one member of which may be possessed of "some" knowledge of an issue being explored at the trial.

Given Dr. Platt's qualifications, his research over a period of 15 years and the research of others in the field which indicate without contradiction that there are patterns of responses to grief, stages of grief, and factors that exacerbate one's responses to grief as well as the fact that people can now be categorized as falling into either normalized patterns of grief or complicated grief, it must be concluded that the significance of, and the reactions of a human being to, these factors might reasonably be held to involve a knowledge that was within the sphere of the witness' expertise and beyond the scope of the common knowledge of the jurors.

The testimony of Dr. Platt must be considered less emotional, less prejudicial and more clinical than the alternatives, to wit: enumerable friends, relatives, teachers, etc. testifying about the decedent and the effect of the death

on the survivors. Dr. Platt provided a clinical, not an emotional, analysis of the survivors' grief process. Indeed, the Third District stated that, "Different people handle their grief in different ways and on different time tables." See: 630 So. 2d page 650. Given the truth of this assertion, an expert should be allowed to indicate to a jury exactly how the affected survivor is grieving, if at all, and how such grief relates to society in general. If all people grieve differently and on different time tables, how can a jury know the extent of a loss absent being advised by an expert of the circumstances? Stated another way, given the varying patterns of grief, an expert should be allowed to explain to a jury the survivor's ordeal in working his way through the grief process, where he is in that grief process at the time of trial, what factors have adversely affected his response to his loved one's death, his ability or inability to recover from the grief and the pattern his grief is likely to take in the future. Given these factual considerations as well as the fact that it is reversible error in a wrongful death case to ask a jury to value a human life, evidence in the form of expert testimony should be presented to a jury to aid the jury in fulfilling its obligations to award damages to the survivors.

Lastly, the Third District's opinion relates almost entirely to the weight of Dr. Platt's testimony and not to its admissibility. There exists nothing "unfairly prejudicial" about Dr. Platt's testimony especially so where, as here, it was

properly admitted in the first place. The testimony assisted the jury in resolving the matters before it. The evidence presented assisted the jury as to matters not within its everyday experiences. The trial court did not abuse its discretion in allowing the testimony into evidence. The Third District's opinion should be quashed and the opinion in SHELBURNE, supra, should be approved.

V.

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING EXPERT TESTIMONY ON THE ISSUE OF GRIEF AND BEREAVEMENT.

The plaintiff would respectfully suggest to this Court that the trial court was eminently correct in allowing expert testimony on the issue of grief and bereavement. As a result, the opinion of the Third District should be quashed, the final judgment (and amended final judgment) entered in favor of the plaintiff should be re-instated, and the opinion of the Fourth District in SHELBURNE, supra, 576 So. 2d 322 (Fla. App. 4th 1991) should be approved as the controlling authority for this state.

A.

In Florida, it appears to be established, if not well settled, that there are four considerations (requirements so to speak) in determining the admissibility of expert testimony. See: GULLEY v. PIERCE, 625 So. 2d 45 (Fla. App. 1st 1993) and SHELBURNE, supra, 576 So. 2d at page 335, wherein the Court,

citing to its prior opinion in KRUSE v. STATE, 483 So. 2d 1383 (Fla. App. 4th 1986), determined:

". . . That there are four requirements for determining the admissibility of expert testimony: (1) that the opinion evidence be helpful to the trier of fact; (2) that the witness be qualified as an expert; (3) that the opinion evidence can be applied to evidence offered at trial; and (4) that evidence, although technically relevant, must not present a substantial danger of unfair prejudice that outweighs its probative value." 576 So. 2d at page 335.

The "considerations" arise from the concurrence of three sections of the Florida Statutes, to wit: Sections 90.702, 90.704, and 90.403, Florida Statutes (1993), which provide:

* * *

"90.702 Testimony by experts.--If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

* * *

"90.704 Basis of opinion testimony by experts.--The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, him at or before the trial . If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence.

* * *

"90.403 Exclusion on grounds of prejudice or confusion.--Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. This section shall not be construed to mean that evidence of the existence of available third-party benefits is inadmissible."

* * *

B.

In SHELBURNE, the Fourth District, in analyzing the subject issue, turned to the qualifications of the (subject) witness and stated:

* * *

". . . The witness was undoubtedly qualified as an expert in the field of grief and bereavement. Having already obtained a bachelor's degree, a master's degree, and a Ph.D. in sociology, he was working on his post-doctorate at Harvard University in the field of grief and bereavement. The witness has been researching and studying grief for 15 years, and has received research grants from the federal and state governments and foundations in order to do so. As the author of several books and publications on death and dying, and grief and bereavement, he has taught at seminars and has provided training as a consultant to different groups including hospital staffs, nurses, physicians, social workers and people who work in facilities for the terminally ill on this subject. Further, he teaches psychologists and counselors so that they can understand grief and bereavement and provide more help to their patients. This is only a partial listing of the witness' qualifications. Thus, it cannot be said that the Court erred in designating him an expert in the field of grief and bereavement." 576 So. 2d at page 336.

* * *

The subject record, involving as it does the same witness, is possessed of the same information (T. 304-314). Indeed, the Third District did not quarrel with the qualifications of Dr. Platt:

". . . By qualifications, the witness met the definition of expert. . . We find no abuse of discretion in the trial court's determination that the witness was qualified to express an expert opinion . . ." 630 So. 2d at page 650.

That Dr. Platt is an expert in the field cannot be disputed. However, as Florida law teaches, and as the Third District noted, that the witness is qualified to testify as an expert

does not end the inquiry. See CRUMP v. STATE, 622 So. 2d 963 (Fla. 1993) and SHELBURNE, supra.

C.

The plaintiff does not, in the abstract, disagree with that part of the Third District's opinion which recognizes that expert testimony should not be admitted if there is a:

". . . substantial danger of unfair prejudice outweighing its probative value. . ." 630 So. 2d at page 650.

The plaintiff does disagree with the Third District's conclusion that:

"Review of the trial transcript shows that the expert in this case did not testify as to anything that was outside of the common experience, or common sense, of the jury, most of whom had also experienced the death of a loved one in the past. It is self-evident that grief is a profound and difficult experience which takes a long time to overcome; that different people handle their grief in different ways and on different time tables; and that the closer the relationship, the deeper the sense of loss experienced by the survivors. . ." 630 So. 2d at page 650.

First, and foremost, the Court in SHELBURNE, in discussing the same expert, stated:

"In the present case, the witness' testimony clearly assisted the jury, and appellant's argument that his testimony should have been excluded because the subject matter of the testimony was within the normal, everyday comprehension of jurors is without merit. The expert witness' research over a period of 15 years, and the research of others in the field indicate that there are patterns of responses to grief, stages of grief, and factors that exacerbate one's response to grief. More specifically, he explained that people can now be categorized as falling into either normalized patterns of grief or complicated grief, and he explained those processes. Certain factors effect a person's grief, and the ability to recover from that grief." 576 So. 2d at page 336.

The present record reflects the testimony as noted in SHELBURNE, supra. More importantly, that testimony suggests that what the Third District took as "self-evident" is simply not so and provides as fact why the need for expert testimony in the first place. The Third District stated:

" . . . Grief is a profound and difficult experience which takes a long time to overcome; that different people handle their grief in different ways and on different time tables; and that the closer the relationship, the deeper the sense of loss experienced by the survivors. . ." 630 So. 2d at 650.

However, the opinion of Dr. Platt reflects that there are stages to grief and, as pertinent to this aspect of the discussion:

" . . . Sudden and unexpected death increase high levels of intensity, thus it takes a lot longer to deal with. . ." (T. 304-314)

The Third District's "self-evident" conclusion conflicts with the facts of this case. Indeed, it can be stated that at one point in time it was "self-evident" that the world was flat, that the sun revolved around the earth, and that there existed no need at all for "expert" witnesses. To justify the existence of a conclusion on the basis of a matter being "self-evident" begs the issue, it does not resolve it. Simply stated, on the record presented, the Third District's opinion is wrong!

In SHELBURNE the Court stated:

"The expert interviewed Mr. and Mrs. Rice before trial. Thus, he was able to explain to the jury the Rices' ordeal in working their way through the grief process, where they were in that grief process at the time of trial, what factors had adversely affected their response to their son's death and had affected their ability or inability to recover from their grief, and the pattern their grief was likely to take in the future. Clearly, the subject of grief and

bereavement is not an area within the normal, everyday comprehension of jurors, and the expert testimony was properly admitted to aid the jury in its consideration of the effect of David's death on his parents." 576 So. 2d at page 336.

The same circumstances are presented here. In this case the expert interviewed the decedent's husband and her son. The testimony elicited has been set out in full in this plaintiff's statement of the case and facts (see: pages 4-9). As in SHELBURNE the interviews established the different stages of grief and the factors that exacerbated the survivors' responses to grief. Dr. Platt explained to the jury the survivors' ordeal in working their way through the grief process, where they were in that grief process at the time of trial, what factors had adversely affected their response to the death and had affected their ability or inability to recover from their grief and the pattern their grief was likely to take in the future. Once again, it must be noted that the Third District's "self-evident" conclusion conflicts with the facts of the case.

D.

There can be little doubt, if any at all, that there exists a threshold flaw in the Third District's opinion. That Court stated:

". . . Review of the trial transcript shows that the expert in this case did not testify as to anything that was outside of the common experience, or common sense, of the jury. . ." 630 So. 2d at page 650.

The above is a conclusion, pure and simple, found to be a "self-evident" truth by three educated and knowledgeable jurists [but, nevertheless, non-experts themselves in the subject field] whose

own collective past experiences may have led them to conclude as they did, but whose own past experiences should not serve as the basis for the conclusion reached. In point of fact what can be said is that the Third District panel was possessed of some (personal) knowledge "on the subject." This alone cannot suffice. As stated by the Court in ALLEN v. STATE, 365 So. 2d 456 (Fla. App. 1st 1978):

"In order to qualify as an expert witness one needs only to have acquired such special knowledge of the subject matter of his testimony either by study or by practical experience that he can GIVE THE JURY ASSISTANCE AND GUIDANCE IN SOLVING A PROBLEM TO WHICH THEIR EQUIPMENT OF GOOD JUDGMENT AND AVERAGE KNOWLEDGE IS INADEQUATE. . ." 365 So. 2d at page 458.

That the jury or the reviewing court be possessed of "some" knowledge on the subject is not dispositive. In most, if not all cases, the jury will be composed of a cross-section of the community one member of which may be possessed of some knowledge of an issue being explored at the trial. "Some" knowledge cannot save the Third District's faulty analysis especially where, as here, that "knowledge" has been shown to conflict with what the expert opined.

In SEABOARD COAST LINE RAILROAD COMPANY v. HILL, 250 So. 2d 311 (Fla. App. 4th 1971), the District Court, on facts admittedly totally distinguishable from those found in this case had to decide whether or not the subject matter of the expert testimony therein involved was appropriate:

"It is generally held that the subject matter of an opinion by an expert witness must be so related to some science, profession, business, or occupation as

to be beyond the understanding of the average layman.
. ." 250 So. 2d at page 315.

Although the facts of that case are not germane to the subject matter herein involved, the Court's analysis as to why the expert's testimony was/was not proper for jury evaluation is germane. The Court stated:

"The apparent subject matter of the witness' opinion was the visibility to an average driver of the defendant's train standing on the crossing on the night of the accident. At first glance it would appear that this would be a matter to be determined by the jury through the exercise of its common sense based upon the evidentiary facts. However, to fairly evaluate the subject matter of the opinion, we must examine the explanation given by the witness in support of the opinion. After having answered the question put to him in the manner indicated above, the witness explained that the reason he answered as he did was his understanding of the human reactions that would normally be engendered by the environment at the time of the accident as described in the hypothetical question. The witness testified that the darkness, the fog, the absence of flares, and the absence of sound would produce perceptual problems for a driver. The witness also testified that lights that were visible north of the crossing against the field of vision partially blocked by the boxcar would cause problems in depth perception. On the basis of these factors, the witness concluded that the information that could have been gathered as to the obstruction on the tracks was so poor that an average driver would not have been able to react to it properly. Hence, it appears to us that the subject matter of the opinion was not just the visibility of the train on the crossing, but also the deceptive quality of various factors that were present in the environment according to the hypothetical situation posed by the question, and the manner in which a person would react to these factors. The significance of and the reaction of a human being to these factors might reasonably be held to involve a knowledge that was within the sphere of the witness' expertise and beyond the scope of the common knowledge of the jurors. We, therefore, are of the view that the subject matter of the opinion was proper for the expression of an expert opinion." 250 So. 2d at page 315.

Such is the instant cause! Given Dr. Platt's qualifications, his research over a period of 15 years and the research of others in the field which indicate without contradiction that there are patterns of responses to grief, stages of grief, and factors that exacerbate one's responses to grief as well as the fact that people can now be categorized as falling into either normalized patterns of grief or complicated grief, it must be concluded here, as was concluded in HILL, supra:

"The significance of and the reaction of a human being to these factors might reasonably be held to involve a knowledge that was within the sphere of the witness' expertise and beyond the scope of the common knowledge of the jurors." 250 So. 2d at page 315.

E.

In truth the testimony of Dr. Platt must be considered less emotional, less prejudicial and more clinical than the alternatives, to wit: innumerable friends, relatives, teachers, etc. testifying about the decedent and the effect of the death on the survivors. Dr. Platt provided a clinical, not an emotional, analysis of the survivors' grief process. The testimony presented is in harmony with what this Court deemed to be pertinent in MARTIN v. UNITED SECURITY SERVICES, INC., 314 So. 2d 765 (Fla. 1975), when this Court upheld the constitutionality of the (then newly enacted) wrongful death statute:

* * *

"The claim for pain and suffering of the decedent from the date of injury to the date of death was eliminated. Substituted therefor was a claim for pain and suffering of close relatives, the clear purpose

being that any recovery should be for the living and not for the dead."

* * *

". . . We believe that the new right of surviving close relatives to recover for their own pain and suffering brought about by the wrongful death of a decedent is a reasonable alternative to dividing among the survivors the amount formerly recoverable. . . for the decedent's pain and suffering, if any. The new item of damage is much more susceptible of proof, since the party claiming damage for the pain and suffering is available to testify. . ." 314 So. 2d at pages 769 and 771.

* * *

In SHELBURNE, it was noted:

". . . That appellants argue that the statements made by the expert witness should be excluded as their probative value was substantially outweighed by the danger of unfair prejudice under Section 90.403, Florida Statutes (1989). Undoubtedly, there is a danger that the trier of fact may place undue emphasis on evidence offered by an expert, simply because of the witness' status as an expert. Also, the jury may infer that the expert, simply by virtue of his appearance for one party, is vouching for the credibility of that party. As already decided by this Court in Kruse, however, these dangers are not themselves sufficient reasons to exclude opinion testimony.

* * *

". . . In the present case, the expert was cross-examined about his reliance on what (the survivors) had told him, and that he was taking their statements at face value. The jury was free to reject his testimony, but they obviously chose not to. Further, appellant's objections to his testimony should be addressed to the weight of the testimony rather than to its admissibility. . ." 576 So. 2d at pages 336 and 337.

The plaintiff believes SHELBURNE, supra, is well reasoned and in harmony with current thinking on the subject matter. It should be adopted as the law in this state. As to this issue the Third District stated:

"In our view the testimony was unfairly prejudicial because of the possibility that the jury

would give such testimony, coming as it did from an expert, undue weight." 630 So. 2d at page 650.

However, it must again be reminded that the Third District's conclusion was/is premised upon the erroneous belief that:

". . . The expert in this case did not testify as to anything that was outside of the common experience, or common sense, of the jury. . ." 630 So. 2d at page 650.

One need only turn to the subject record to disprove the Third District's factual conclusions. In reaching the conclusions as cited above, the District Court stated:

". . . Different people handle their grief in different ways and on different time tables. . ." 630 So. 2d at page 650.

Given the truth of the above, an expert should be allowed to indicate to a jury exactly how the affected survivor is grieving, if at all, and how it relates to society in general. If all people grieve differently and on different time tables, how can the jury know the extent of a loss. Stated another way, given the varying patterns of grief, an expert should be allowed to explain to a jury the survivor's ordeal in working his way through the grief process, where he is in that grief process at the time of trial, what factors have adversely effected his response to his loved one's death, his ability or inability to recover from the grief and the pattern his grief is likely to take in the future.

Given the above factual considerations, it should be emphasized, as well settled in this state, that it is reversible error in a wrongful death case to ask a jury to value a human

life. See, for example: PUBLIC HEALTH TRUST OF DADE COUNTY v. GETER, 613 So. 2d 126 (Fla. App. 3rd 1993) and RUSSELL, INC. v. TRENTO, 445 So. 2d 390 (Fla. App. 3rd 1984). This is so because it is not the value of the life but the loss to the survivors that is the heart of the matter. Where, as here, evidence in the form of expert testimony can be presented to a jury to aid the jury in fulfilling its obligations to award damages to the survivors, it makes no logical or legal sense to conclude (in the same equation) as the Third District did:

1. Although the witness was qualified to express an expert opinion on the subject--

2. The opinion expressed on the subject was not the subject of expertise even though the subject matter opined was within the expert's expertise.

Since the evidence presented assisted the jury as to matters not within its everyday experiences, the opinion of the Third District should be quashed, see: SHELBURNE, supra, 576 So. 2d at page 336:

"Undoubtedly, there is a danger that the trier of fact may place undue emphasis on evidence offered by an expert, simply because of the witness' status as an expert. Also, the jury may infer that the expert, simply by virtue of his appearance for one party, is vouching for the credibility of that party. As already decided by this Court in Kruse, however, these dangers are not themselves sufficient reasons to exclude opinion testimony." 576 So. 2d at page 336.

The Third District's opinion relates almost entirely to the weight of Dr. Platt's testimony and not to its admissibility. There exists nothing "unfairly prejudicial" about Dr. Platt's

testimony especially so where, as here, it was properly admitted in the first place. The testimony assisted the jury in resolving the matters before it. The trial court did not abuse its discretion in allowing the testimony into evidence. The Third District's opinion should be quashed and the opinion in SHELBURNE, supra, should be approved.

VI.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the opinion of the Third District should be quashed, the final judgment (and amended final judgment) entered in favor of the plaintiff should be reinstated and the opinion of the Fourth District in SHELBURNE, supra, 576 So. 2d 322 (Fla. App. 4th 1991) should be approved as the controlling authority for this state.

Respectfully submitted,

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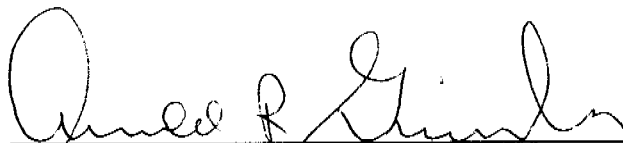
By: 

Arnold R. Ginsberg

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Brief of Petitioner on the Merits was mailed to the following counsel of record this 13th day of April, 1994.

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