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.
_____/

REPLY BRIEF OF PETITIONER, ROLAND PIERRE ANGRAND, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CAROLYN ANGRAND, DECEASED.

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I.

INTRODUCTION

In this reply brief of petitioner, the parties will be referred to as the plaintiff and the defendant and, where necessary for clarification or emphasis, by name.

II.

STATEMENT OF THE CASE AND FACTS

In the opinion herein being reviewed, KEY v. ANGRAND, 630 So. 2d 646 (Fla. App. 3d 1994), the District Court certified:

> "...direct conflict with so much of Holiday Inns, Inc. v. Shelburne [576 So. 2d 322 (Fla. 4th DCA), review dismissed, 589 So. 2d 291 (Fla. 1991)] as allows the use of expert testimony to explain survivor's grief to members of a jury." 630 So. 2d at page 651.

In his brief the defendant addresses that issue, requests that this Court approve the Third District's decision and then, in an apparent abundance of caution presents an alternative ground for relief, to wit:

> THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF DR. SUSAN FOX AND DR. MORRY FOX AND IN FAILING TO INSTRUCT THE JURY ON COMPARATIVE NEGLIGENCE.

It is apparently through the raising of this issue that the defendant can justify inclusion into its brief of numerous facts otherwise totally irrelevant to the conflict certified. More to the point, the defendant's statement of the case and facts is slanted, argumentative and misleading. A jury found the defendant negligent. The facts were in conflict, almost! There exists nothing in the defendant's statement of the case and facts to inform this Court that the defendant presented no

medical testimony to establish that the plaintiff's alleged "comparative negligence" was a contributing legal cause of her death. It is the absence of this evidence that continues to doom the defendant's argument as to this point. Although the defendant's statement of the case and facts picks, probes, argues, disputes and faults, it does not fully or fairly inform. The "alternative argument" is a red herring!

A.

At page 1 of his brief the defendant suggests that plaintiff's expert was "reluctant" but that:

> "Dr. Key's medical expert countered that Mrs. Angrand's condition was so rare and her pregnancy had progressed so far, that 99.99 percent of the time, Dr. Key's reading of the second set of ultra-sound films would have been correct (citation omitted). His opinion was that the incorrect diagnosis was not a result of negligence (T. 605)." Brief of defendant, page 2.

Dr. Key's medical expert was Dr. Bezjiane:

1. Dr. Bezjiane is not a radiologist (T. 573);

2. Dr. Bezjiane rendered his opinion even though he had not reviewed Dr. Key's deposition testimony (T. 576);

3. Dr. Bezjiane was not aware that Dr. Key failed his Boards in radiology (T. 416);

4. Dr. Bezjiane agreed that Carolyn Angrand did not have a single intra-uterine fetus at the time the film was interpreted. In retrospect he admitted Dr. Key was in error (T. 595, 596); and

5. Dr. Bezjiane candidly admitted that he testifies for physicians and has not testified on behalf of a patient in this community since 1975 (T. 577). This, even if the physician was negligent, because it would (or could) effect his (Dr. Bezjiane's) income (T. 577-584).

The above is what the defendant suggests made the issue of liability "extremely close." While it is true the defendant produced "expert" testimony, the liability issue was clearly "not close!" Notably absent from the defendant's brief is any mention at all as to why what Dr. Key did was (allegedly) improper. The following is submitted.

First, according to Dr. Barnhart, Dade County Medical Examiner, Carolyn Angrand died from a ruptured ectopic pregnancy. There was no other cause of death. An ectopic pregnancy is one that occurs outside of the uterus (T. 395, 399-406).

Dr. Barnhart testified that no product of the conception, no evidence (at all) of pregnancy was in the uterine cavity (T. 402, 403). Dr. Barnhart further testified that this was not a complicated case to make a determination of the cause of death (T. 415).

In contrast, Dr. Key diagnosed Carolyn's pregnancy as intra-uterine. He was incorrect (T. 508, 546). Dr. Key stated that he interpreted the two ultra-sound films without requesting the patient's history. He testified it was his practice (T.

519). However, according to Board certified radiologist, Dr. Joel Schneider, it is very dangerous to interpret ultra-sound "film" by merely looking at it. If a history does not accompany a film, one calls and tries to get a history or other information to aid in the formulation of a correct diagnosis (excerpt of deposition of Schneider, pages 10 and 11). Dr. Schneider testified that within a reasonable degree of medical probability Dr. Key fell below the acceptable standard of care in his interpretation of the ultra-sound films taken of Carolyn Angrand on February 2, 1985, and May 18, 1985 (excerpt of deposition of Schneider at pages 18 and 19).

Specifically, and according to Dr. Schneider, the defendant fell below the acceptable standard of care in issuing a report that said a single intra-uterine fetus was noted. Dr. Schneider stated:

> "I believe that he (Dr. Key) fell below that standard in making a definitive statement on information that just was not there on the film..."

Dr. Schneider opined that under the circumstances which faced the defendant, a radiologist should pick up the telephone and have the patient come back, repeat the test and provide a history. Dr. Schneider testified that the worst risk in misdiagnosing an ectopic pregnancy is that there will be a:

> "...rupture of the pregnancy with tremendous loss of blood and, if not treated, death."

Carolyn Angrand died from a ruptured ectopic pregnancy which was not diagnosed by Dr. Key (and consequently not timely treated by anyone).

B.

COMPARATIVE NEGLIGENCE

At all times pertinent hereto, the defendant's theory was that the condition of Carolyn Angrand was so rare that it could not have been observed. Yet we have the following situation:

1. Carolyn Angrand was instructed to obtain two ultra-sound procedures. She did this.

2. Dr. Key (the defendant) read the films and reported a normal (intra-uterine) pregnancy.

3. Dr. Fox properly relied on Dr. Key's (erroneous) reports.

A valid, proper and lawful inference arising from the facts and circumstances of this case established that if Dr. Fox properly relied upon what he received from Dr. Key, so did the plaintiff's decedent! Further, the defendant does not point to any testimony to establish that the alleged comparative negligence was a contributing legal cause of Carolyn Angrand's death. The reason why there is no reference in the defendant's brief to this is because the defendant neither presented any such testimony nor proffered any such testimony, as well he could not. To do so would be to present "evidence" in complete contradiction of what purportedly was the primary defense in this case, to wit: that the condition of Carolyn Angrand was so rare that it could not have been observed. The defendant's argument has, at all times pertinent, been premised upon circular reasoning.

C.

THE EXPERT WITNESS

At pages 3, 4, and 5 of his brief the defendant discusses the background and qualifications of Dr. Platt. Dr. Key does so in a most inaccurate way. Whether one agrees or disagrees with the need for testimony of the type supplied by Dr. Platt, it is undisputed that the trial judge in SHELBURNE, supra, the District Court judges in SHELBURNE, the trial judge in this case and the District Court judges in this case all concluded that the witness was qualified. In the subject opinion it was specifically stated:

> "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.

It is, therefore, both unfair and inaccurate to suggest as the defendant does, as if the argument was herein being made to a jury that:

> "Dr. Platt is neither a psychiatrist nor a psychologist. Instead, he merely has a Ph.D. in sociology and receives 75 percent of his income as a litigation consultant (T. 140, 306)." See: brief of defendant at page 3.

Dr. Platt is a well qualified expert witness and the record supports this fact. Indeed, there is no conflict over this fact. There is merely disagreement by the defendant.

Likewise, the defendant's statement at page 4 of his brief quoting Dr. Platt's statement to the extent that lay people do understand grief (the defendant concludes therefrom that the

expert opinion was unnecessary) is also misleading. This is so because as Dr. Platt 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).

As a matter of fact--defendant's jury arguments as to why one should not <u>believe</u> Dr. Platt aside--it must be concluded that Dr. Platt is a qualified and well respected expert possessed of knowledge, skill, experience, training and education whose specialized knowledge assisted the trier of fact in <u>understanding</u> the evidence.

III.

<u>REPLY ARGUMENT</u>

A.

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

At the outset it should be noted that the defendant has questioned the conflict certified to this Court suggesting that the instant cause and HOLIDAY INNS, INC. v. SHELBURNE, 576 So. 2d 322 (Fla. App. 4th 1991):

"...are factually distinguishable..." See: footnote 2, brief of defendant at page 7.

Likewise, at page 9, footnote 3 of his brief, the defendant states:

> "Dr. Key respectfully submits that there is no direct conflict between this case and the Shelburne case. Dr. Key agrees that the two opinions do conflict insofar as the Fourth District found that grief is not within a jury's ordinary understanding and the Third District found that grief is within a jury's ordinary understanding. However, simply because the opinions may differ in part, does not mean that the decisions conflict..."

From Dr. Key's standpoint it is certainly understandable why his counsel would be seeking to have certiorari discharged. However, even the Third District Court of Appeal in the opinion herein being reviewed stated that SHELBURNE was:

> "...a case not only directly on point but also involving the same expert..." 630 So. 2d at page 651.

The plaintiff sees not even a modicum of merit to the defendant's contention given the fact that the subject matter surrounding the particular issue has as its object the same witness, to wit: Dr. Platt. The issue is one of law for this Court, to wit: given the existence of a properly qualified expert, should such testimony be excluded because the subject matter of the testimony is/is not within the normal, everyday comprehension of jurors. SHELBURNE held that the testimony should be presented to a jury. The Third District Court of Appeal has held otherwise:

> "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 has also experienced

> the death of a loved one in the past..." 630 So. 2d at page 650.

The conflict is real and it must be resolved.

The plaintiff would also note that the defendant obtains no comfort in attempting to argue that reversal obtained in the case because of "cumulative evidence of grief." The "thorny problem" herein involved lies squarely with the allowance of expert testimony on the subject matter. As the District Court of Appeal, Third District, noted:

> "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..." See: 630 So. 2d at page 650.

It was the admission into evidence of the testimony of the expert witness which prompted the District Court to reverse. Obviously, if the testimony was properly admitted (as the plaintiff suggests and as the Fourth District in SHELBURNE, supra, has so found), there exists no independent basis upon which to premise a reversal. It is obvious from the subject record that the trial court did not believe that the matter of grief became a feature of the trial as the trial court denied the defendant's post-trial motion as to this issue (R. 214-216). The trial court's ruling on this matter is entitled to considerable discretion. See: CLOUD v. FALLIS, 110 So. 2d 669 (Fla. 1959).

The defendant's argument that the evidence of grief otherwise properly presented to the jury is governed by the line of cases finding reversible error in a trial counsel's repeated

and selectively placed improper comments to a jury needs no detailed comment. The "machine gun" error argument referred to in the cases cited by the defendant and advanced by the defendant itself fires blanks and obviously misses its mark. The issue is precise:

> SHOULD THE INSTANT JURY HAVE HEARD DR. PLATT'S TESTIMONY?

But for the Third District's holding that the subject matter of the testimony presented was not a proper subject for jury consideration, there would not exist any claim of error at all.

The inherent flaw in the defendant's argument is quickly identified. The defendant states at page 8 of his brief:

> "First of all, this testimony was not helpful to the jury. By Dr. Platt's own admission, juries can understand grief--he simply makes them aware of some of the 'details.'... The 'details' he described are nothing more than common sense factors which affect how the survivors grieve..."

The defendant ignores the significance of Section 90.702, Florida Statutes (1993). As pertinent that section provides:

> "...Testimony by expert: If...specialized knowledge will assist the trier of fact in understanding the evidence...a witness qualified as an expert by knowledge, skill, experience, training or education may testify about it in the form of an opinion..."

This is precisely what Dr. Platt is eminently qualified to do and did. His specialized knowledge assisted the trier of fact in understanding the evidence. The defendant's attempt to lessen the impact of his testimony by suggesting that his explanation is nothing more than "common sense" begs the issue. It also tracks the reasoning of the District Court of Appeal,

Third District, in the opinion under review. As a consequence it is subject to the same flaw. That something is (or is not) "common sense" is a conclusion, pure and simple. In this case 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. While one may decide to conclude that this presents matters of "common sense," it cannot change the fact that Dr. Platt's testimony assisted the trier of fact in understanding the evidence. In truth this is the only place where the District Court of Appeal, Third District, differed from SHELBURNE. The remaining portions of the Third District's opinion regarding the instant subject matter deals not with the admissibility of the testimony of the expert witness, but, rather, what result should have obtained as a consequence of the admission into evidence of the allegedly improper testimony.

In the opinion herein being reviewed the Third District had occasion to state:

> "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 has also experienced the death of a loved one in the past..." 630 So. 2d at page 650.

This statement of the District Court sets dangerous precedent. It allows for the exclusion of otherwise proper expert testimony

if some jurors have personally experienced the event which forms the basis for the expert's testimony. What of the jurors who were fortunate enough to not have experienced the death of a loved one in the past. In the case of WINNER v. SHARP, 43 So. 2d 634 (Fla. 1949), this Court stated:

> "Those who have not brought a child into the world and loved it and planned for it, and then have it suddenly snatched away from them and killed can hardly have an adequate idea of the mental pain and anguish that one undergoes from such a tragedy. No other affliction so tortures and wears down the physical and nervous system."

Although the language quoted above was uttered in the context of a discussion of a parent's grieving for the loss of a child, the same analysis should apply here. In WINNER v. SHARP, supra, this Court noted that an individual who had not been fortunate enough to have a child and then unfortunate enough to have lost that child could "hardly have an adequate idea of the mental pain and anguish that one undergoes from such a tragedy." The essence of this Court's observations there applies with equal force here. Under Florida law the test for the admissibility of expert testimony is simply whether expert testimony will "assist" the jurors in understanding the evidence. A juror who has not suffered the sudden and unanticipated loss of a loved one cannot understand nor fully appreciate the levels of grief or the survivor's ordeal in working his way through the grief process. To a large extent common sense must be based on experience. If specialized knowledge can assist the trier of fact in understanding the evidence, then, under Florida law, the

expert testimony is admissible. Such is the instant cause. The opinion herein being reviewed should be quashed and the opinion of the Fourth District Court of Appeal in SHELBURNE, supra, should be approved as the controlling law for the State of Florida.

B.

THE ISSUE OF WHETHER THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF DR. SUSAN FOX AND DR. MORRY FOX AND IN FAILING TO INSTRUCT THE JURY ON COMPARATIVE NEGLIGENCE HAS NOT BEEN PROPERLY PRESERVED FOR APPELLATE REVIEW.

At page 20 of his brief the defendant states:

> "Regardless of this Court's decision regarding Argument I, if this Court accepts jurisdiction, it should at the very least reverse for a new trial on damages because of the trial court's erroneous exclusion of the testimony of Drs. Susan and Morry Fox."

As to this issue, the District Court of Appeal, Third District, stated:

> "The trial court erred by granting the motion in limine and ordering the exclusion of the Foxes' oral communications with decedent." 630 So. 2d at page 648.

Dr. Key prevailed on this point. Why Dr. Key is now (still) complaining is that the District Court stated:

> "We do not reverse on this point, however, because there was no offer of proof of the substance of the Foxes' testimony, nor was the substance of the proposed testimony otherwise apparent." 630 So. 2d at page 648.

The District Court of Appeal, Third District, disposed of Dr. Key's argument regarding the need for, but lack of, a proffer by stating:

> "In the present case, we hold that the evidence code provision is controlling. Section 90.104 required a proffer of the excluded testimony. Since that was not done, the point is not preserved for appellate review." 630 So. 2d at page 649.

The District Court's analysis on this issue is correct.

Further, the District Court reached the right conclusion because the trial court ruled that the evidence was insufficient to support a jury instruction on the issue of comparative negligence. See: BORENSTEIN v. RASKIN, 401 So. 2d 884 (Fla. App. 3d 1981); NORMAN v. MANDARIN EMERGENCY CARE CENTER, INC., 490 So. 2d 76 (Fla. App. 1st 1986), wherein the court stated:

> "A party who is injured by the negligence of another owes himself a duty of ordinary care and diligence, including the duty to obtain needed medical attention and to use ordinary care in following his physician's advice. However, PUBLIC POLICY DICTATES THAT A PATIENT DOES NOT HAVE AN OBLIGATION OR DUTY TO DETERMINE WHETHER AN INJURY IS BEING PROPERLY TREATED." 490 So. 2d at page 478.

The issue of whether or not the court should have allowed either one of the two Drs. Fox to testify is a moot point. The determinative question asks: Was there competent, substantial medical testimony presented by the defendant to establish that Carolyn Angrand missing the scheduled doctor visits and failing to obtain medical treatment for a two-month period contributed to her own demise? The answer to this question must be, "no." The defendant presented no such medical opinions.

Lastly, it must be again reminded that the defendant's defense of this case was that Carolyn's condition was so rare that it could not have been detected. For the defendant to have presented expert testimony that the condition would have been

discovered with follow-up care would have been inconsistent with that main defense which the jury rejected in any event.

The defendant's alternative argument is without merit.

IV.

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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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Petitioner was mailed to the following counsel of record this 29th day of June, 1994.

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