IN THE SUPREME COURT OF FLORIDA

MARY ANN SHEFFIELD,

Respondent

vs.

SUPERIOR INSURANCE COMPANY,

Petitioner
_____/

CASE NO.: SC 96,857

L.T. CASE NO.: 1D98-01332

RESPONDENT'S INTIAL BRIEF ON THE MERITS

On review from the District Court of Appeal, First District
State of Florida

_____

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PRELIMINARY STATEMENT

Mary Ann Sheffield, who was the plaintiff below and is the appellant herein, will be referred to as "Appellant" or "Ms. Sheffield". Superior Insurance Company, who was the defendant below and is the appellee herein, will be referred to as "Appellee" or "Superior".

References to the record on appeal will be designated "R __," followed by the page number. References to the transcript of the trial will be designated "T __," followed by the page number. References to the initial brief will be designated "I.B" followed by the page number. References to Sheffield's Reply Brief filed with the First District will be designated "R.B.", followed by the appropriate page number.

References to Superior's Answer Brief filed with the First District will be designated "A.B.", followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Appellant, Mary Ann Sheffield, filed a complaint against Appellee, Superior Insurance Company, alleging that Appellee had failed to provide benefits under a policy of insurance for uninsured/underinsured motorist coverage (R 2-4). Appellee answered the complaint and affirmatively alleged, inter alia, that Appellant had not suffered a permanent injury and that Appellee was entitled to a set-off for any payment received or to be received by Appellant from collateral sources (R 44-48). The case proceeded to jury trial in the Circuit Court, Third Judicial Circuit, before the Honorable John W. Peach, Circuit Judge, beginning October 13, 1997.

Appellant's trial counsel filed a Motion in Limine seeking to preclude the introduction of evidence regarding benefits from collateral sources (R 91). The trial court denied this ruling, but permitted Appellant's trial counsel to maintain a standing objection to such evidence (R 141-142; T 6-7). Appellant's trial counsel first introduced evidence of such benefits at trial during the direct examination of Appellant (T-25).

At trial, Appellant stated that she had received the following benefits at work: injections for pain (T 25-26, 32-34, 61), physical therapy (T 26, 60), and medication samples (T 38, 60-61). Appellant also agreed that she had "group insurance ... to help with some of the costs of [the] physical therapy and medications," but that this group insurance could not be guaranteed in the future (T 38-39). Finally, she stated that the group insurance had paid for the benefits she received through her employment (T 61).

Appellant also testified that she had continuous pain from the time of the accident on December 10, 1994, through the date of the trial (T 40) and has difficulty working and performing household chores (T 25, 29-31). Appellant's treating physicians, Ivan Lopez, M.D., and Rigoberto Puente-Guzman, M.D., testified that she had suffered a permanent injury (T 82, 152). Bruce Richards, M.D., a neurologist who performed an independent medical examination, also testified that Appellant's injury was permanent, based on the fact that her lumbar symptoms had persisted more than six months (T 240). However, Appellee presented to the jury a surveillance videotape showing Appellant over a period of three days from September 15, 1997, to September 17, 1997 (T 275). This

videotape showed Appellant leaving work at a regular time, talking to co-workers, and driving her car (T 285-287). The private investigator who conducted the surveillance also testified to his personal observations of Appellant's activities during that time, and stated that she did not have any difficulty moving her neck and back, or driving her car (T 277-278, 289).

William M. Wright, an economist, testified as to the value of medical and household expenses that Appellant would incur in the future, as well as methods for reducing those amounts to their present value. Mr. Wright stated that the method for reducing the amount to present value is the exact reverse of the manner in which interest compounds (T 186), and that additional factors to be considered in the reduction to present value include inflation, which affects medical expenses more significantly than household expenses (T 188-189).

In closing argument, trial counsel for appellant requested that the jury award Appellant the following amounts in damages:

$14,873.61 for past medical expenses (T 410); $2,742.00 for loss of household services in the past (T 411); and $1,258,164.00 in future medical expenses and loss of household services in the future, for a period of

51.4 years, reduced to a present value of $218,487.00 (T 417).

The jury asked the following question during its deliberations:

> [W]e are going to reduce number 3 by a certain percentage, will we reduce 3(b) by the same percentage … how do we reduce 3(a)[?] (T 470-471)

The trial judge answered the jury's question by stating the following, without objection from counsel for Appellant:

> [I]f you're going to reduce the future damages, medical expenses, loss of ability to perform household serve, you say you're going to reduce that, reduce that by a certain percentage, then, of course, if you set the present value of those future damages, it should be reduced by the same percentage. You don't have to reduce (a) at all. You can if you like, but (a) is just a figure of the number of years which the future damages are intended to provide compensation. You can put a number in there. You don't have to reduce it by any particular number.
>
> But the end result is something you should know. 3, 3 and 3(a), they're there for good purpose, but they're also somewhat of a worksheet for you. The end result is going to be (b), what is the present value of those future damages. (T 471-472)

Counsel for Appellant agreed with this statement by the trial judge (T 474, 475).

When the jury returned with its verdict, the jury awarded to the plaintiff the following amounts: $14,873.61 for past medical expenses; $2,742.00 for loss of household services in the past; and $37,744.92 in future medical expenses and loss of household services in the future, for a period of 5 years, reduced to a present value of $6,554.61 (T 478-479). After polling the jury, the judge discharged the jury (T 479-481) and adjourned (T 482). Counsel for Appellant did not object to the verdict after it was returned, before the jury was polled or discharged, or at any other time before the proceedings were adjourned.

Ms. Sheffield appealed the final judgment to the First District Court of Appeal. (R-IV 14). The First District, issued a majority opinion, finding that the trial court's denial of Ms. Sheffield's motion in limine was error but affirming the collateral source issued because if found that Ms. Sheffield had 'invited the error' by being the first to introduce evidence of collateral source benefits, which was supported by the record. Judge Browning authored a dissent, relying primarily on Gormley.

Ms. Sheffield moved for a rehearing of the collateral source issue. The majority denied her motion without comment; Judge Browning again authored a dissent.

Ms. Sheffield then filed a timely Notice To Invoke The Discretionary Jurisdiction of This Court, and this Court accepted jurisdiction to review this case.

SUMMARY OF ARGUMENT

The jury awarded the full amount of past medical damages requested by Appellant at trial, and therefore any effect of collateral sources on future damages was extinguished or minimized by Appellant herself. Therefore, because the jury's verdict was not affected by the admission of evidence of collateral sources, any error in such admission is harmless. Additionally, by being the first party to affirmatively incorporate and introduce collateral source evidence at trial, Appellant invited error and should not therefore be entitled to benefit from that litigation tactic.

Furthermore, the trial court properly denied Appellant's motion for directed verdict on the issue of permanency, as there was sufficient lay evidence in the form of a surveillance videotape for the jury to reject the expert testimony as to permanency.

ARGUMENT

I. THE FIRST DISTRICT'S DECISION AFFIRMING THE TRIAL COURT'S DENIAL OF MS. SHEFFIELD'S MOTION FOR NEW TRIAL WAS CORRECT AND SHOULD BE AFFIRMED ON APPEAL AS ADMISSION OF EVIDENCE OF COLLATERAL SOURCES BY MS. SHEFFIELD RESULTED IN HARMLESS ERROR.

A trial court's decisions are presumed to be correct in the absence of reversible error demonstrated by an appellant. Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1979). In the case at bar, any error in the admission of testimony regarding collateral sources is harmless error.

For instance, in Stecher v. Pomeroy, 253 So. 2d 421 (Fla. 1971), the court criticized the trial court for permitting the introduction into evidence of the liability limits of the defendant's policy of insurance. Even after hearing that the policy limits were $100,000, the jury returned a verdict of $19,000. The court ruled that the introduction of the policy limits was harmless error, because the jury's verdict was not adversely affected.

Similarly, in the case at bar, the jury heard the evidence regarding the treatment Appellant had received in the *past*, such as the injections and physical therapy. In addition, the record clearly shows that the group

insurance had *previously* reimbursed the medical office where the plaintiff was employed for those benefits plaintiff had received in the past. When making its award for past medical bills, however, the jury awarded the full amount requested by the plaintiffs. Therefore, it is clear that the jury did not consider these at-work "collateral sources" in its award of past damages.

The instant case is also similar to Snider v. Bancroft Investment Co., 61 So. 2d 184 (Fla. 1952) in which the court could not find "that the jury was influenced by considerations outside the evidence" because no prejudice was specified by the Appellant. In the instant case, the Appellant in the Initial Brief refers numerous times to an alleged prejudicial effect of the collateral source evidence, but the only "prejudice" referred to is the "minimal damages awarded in the jury's verdict" (IB 27). However, the damages awarded for past medical expenses are exactly those which Appellant's trial requested in closing argument. Therefore, because Appellant has not pointed out any specific prejudice as a result of the admission of evidence of collateral sources, any error in the trial court's denial of the Motion in Limine is harmless error.

Finally, any prejudice as to the award of future benefits was minimized by Appellant's own testimony at trial. She stated that there was no guarantee that she would receive any group insurance in the future (T 38-39), and Appellant's trial counsel stated in closing argument that she was not seeking any damages for the costs of future injections (T 460). Therefore, because Appellant's own testimony minimized any potential unfair prejudice from this evidence, any error in its admission is harmless. See, e.g., Mapps v. Wolff, 561 So. 2d 397 (Fla 4th DCA 1990) (redirect testimony neutralized any danger of unfair prejudice, therefore rendering error harmless).

Therefore, because the admission of evidence of collateral sources did not affect the jury's verdict, Appellant was not prejudiced as a result of the admission of such evidence. Thus the error is harmless, and the decision of the lower court should stand.

Superior is mindful that the First District has ruled that the trial court did err when it denied Ms. Sheffield's Motion in Limine that would have secured an order excluding evidence concerning medical expenses that were being paid by group or other insurance companies, and that the amount she was paying for doctor's visits

and prescription expenses was below the market rate due to her insurance coverage.

It is a record fact that Ms. Sheffield worked in the medical field, in a medical clinic, in Lake City, Florida. Part of the videotape surveillance showed Ms. Sheffield in 'scrubs' that she regularly wore as part of her job. This employment status was well known to the plaintiff, and to her counsel prior to trial, and it was their duty therefore to construct their case presentation so as to insulate Ms. Sheffield from prejudice from those facts.

If Ms. Sheffield chose to include the benefits she received from her employment status as part of her case in chief, she did so at her peril. Ms. Sheffield could have chosen to remove those issues from her case in chief, but she chose to open the door. Counsel for Superior therefore had a duty to respond to those segments of Ms. Sheffield's case that were addressed by her motion in limine.

The trial court's failure to grant Ms. Sheffield's motion in limine confers on her no right to build error into a trial, so as to guarantee two bites at the apple. See Perez v. State, 717 So.2d 605 (Fla. 3d DCA 1998).

When confronted with a denial by the trial court of her motion in limine, Ms. Sheffield could have accepted the verdict of the jury, or could have appealed the verdict, having preserved the issue on appeal. Certainly, if Superior had first introduced the collateral source evidence, Ms. Sheffield would have preserved her right to appeal. However, because Ms. Sheffield ignored the court's ruling, and chose to nevertheless introduce the body of evidence that was the subject of the motion in limine, together with the evidence of Ms. Sheffield getting free medical care and treatment at her employer's clinic, she did so at her peril.

Ms. Sheffield's tactic of eliciting testimony on direct examination, even in light of the trial court's ruling on the motion in limine, precludes reversal for questions within the scope of direct examination. Superior's cross-examination, otherwise improper, was not improper in this case, based on Ms. Sheffield's trial decisions. See United States v. Gignac, 119 F.3d 67, 69-70 (1st Cir.), cert denied, 118 U.S. 431 (1997); United States v. Johnson, 720 F.2d 519, 522 (8th Cir. 1983); see also United States v. Ohler, 169 F.3d 1200, 1202-04 (9th Cir. 1999); Gill v. Thomas, 83 F.3d 537, 541 (1st Cir.

1996); Wactor v. Spartan Transp. Co., 27 F.3d 347, 350 (8th Cir. 1994); United States v. Williams, 939 F.2d 721, 724-5 (9th Cir. 1991); United States v. Cobb, 588 F.2d 607, 613 (8th Cir. 1978).

Ms. Sheffield, with complete knowledge of the trial court's rulings, proceeded with introducing evidence that she now contends was prejudicial. Ms. Sheffield invited the error that she now invokes as a reason for a new trial. A party may not invite error and then be heard to complain of that error on appeal. Pope v. State, 441 So.2d 1073, 1076 (Fla. 1983); Lentz v. State, 679 So.2d 866 (Fla. 3d DCA 1996); Buggs v. State, 640 So.2d 90 (Fla. 1st DCA 1994).

Ms. Sheffield cites Gormley as unequivocally ruling that introduction of evidence of collateral source benefits in a liability trial, over objection, is reversible error. Gormley v. GTE Products Corp., 587 So.2d 455 (Fla. 1991). But Gormley does not include the issue of the party seeking the redress being the same party who violated the original rule of evidence. In the case at bar, Gormley can only be used as a starting point, but Gormley does not address the central dispositive issue in this case, which is the conduct of Ms. Sheffield in fashioning her case in chief.

It is significant to note that "invited error" can take many forms. Fuller v. Palm Auto Plaza, Inc., 683 So.2d 654 (Fla. 4th DCA 1996); and Guyton v. Village Key & Saw Shop, 656 So.2d 475 (Fla. 1995)(citing Held v. Held, 617 So.2d 358 (Fla. 4th DCA 1993). Stipulations have been identified as the source of invited error. Hunter v. Employers Mutual Liability Ins. Co. of Wis., 427 So.2d 199 (Fla. 2d DCA 1982). The submission of improper case law has been held to be the basis of invited error. Risk Management Services, Inc. v. McCraney, 420 So.2d 374 (Fla. 1st DCA 1982). Certainly the submission of issues and bodies of evidence to a jury, where that submission may not produce the result intended by the litigant, can be the subject of invited error. Fuller, pp. 654-5.

It should also be noted that Gormley recognized that "…admission of evidence of a collateral source to reduce damages is reversible error precisely because it prejudices the jury's determination of liability…" Gormley, p. 456. In the case at bar, liability was not an issue, and therefore, Gormley is distinguishable.

Ms. Sheffield, in Petitioner's Initial Brief on the Merits, also relies on Porter, which was cited by Judge Browning in his dissent of the majority opinion of the First District. Porter v. Vista Building Maintenance

Services, Inc. 630 So.2d 205 (Fla. 3d DCA 1993). Here again, we have an issue concerning liability and not damages. It should be noted that Porter involved the trial tactic, as recognized by the Third District, of 'diffusing' the issue. Porter, p. 205. The result in Porter indicates that that attempt was completely without success. Plaintiff's counsel in Porter could have crafted his case to omit any mention of collateral source, insurance benefits, or free services.

In the case at bar, which only concerned damages, Ms. Sheffield's counsel had every opportunity to fashion his case in chief to avoid introducing or inviting error on the issue of collateral sources, and he failed to so do. In reasons that can only be known to Ms. Sheffield and her counsel, Ms. Sheffield's case was presented in a manner and in hopes of a return beyond that which prudence would dictate. There was absolutely no requirement for a party to submit evidence to a jury, when that party recognizes inherent problems with the inclusion of that evidence.

The trial judge, in his Order denying Ms. Sheffield's motion for new trial found that the admission of the evidence of collateral sources had proven harmless, even if it's original admission was error. The

First District affirmed the trial court's finding on that issue, recognizing that that finding should not be disturbed on appeal. Superior asks that this Court affirm both the trial court's and the First District's ruling on that issue.

Ms. Sheffield has asked this Court to accept jurisdiction of this appeal based on a perceived conflict based on Gormley and similar cases, but the real issue on appeal is whether Ms. Sheffield invited or built error into this case, and is now asking for a new trial based on her conduct and trial strategy. To grant Ms. Sheffield her requested relief would be contrary to Florida law and grossly unfair. Perez, p. 607.

II. THE FIRST DISTRICT'S DECISION AFFIRMING THE TRIAL COURT'S DENIAL OF MS. SHEFFIELD'S MOTION FOR DIRECTED VERDICT WAS CORRECT AND THE ISSUE OF PERMANENCY WAS PROPERLY SUBMITTED TO THE JURY.

It is well settled that whether a plaintiff has suffered a permanent injury is an issue for the trier of fact. Easkold v. Rhodes, 614 So. 2d 495 (Fla. 1993); Darby v. Sheffer, 458 So. 2d 862 (Fla. 4th DCA 1984); Rice v. Everett, 630 So. 2d 1184 (Fla. 5th DCA 1994). Even though medical evidence may not be within the ordinary experience of jurors, they may still reject expert

medical testimony and rely on lay witnesses in their role as trier of fact. Weygant v. Fort Myers Lincoln Mercury, Inc., 640 So. 2d 1092 (Fla. 1994); Shaw v. Puleo, 159 So. 2d 641 (Fla. 1964).

In the case at bar, the jury was free to rely on the surveillance videotape of Appellant and reject the expert testimony that Appellant suffered a permanent injury. Therefore, the trial court properly submitted the issue of permanency to the jury.

It is Ms. Sheffield's apparent position that the jury must have been misled by the videotape that was played as part of Superior's case in chief, that depicted Ms. Sheffield in apparent good health. It was Ms. Sheffield's argument that the medical evidence left the trial judge with no choice but to direct a verdict finding that she had suffered permanent injury as a matter of fact and law. Granting a motion for directed verdict would have been proper only if there was no evidence upon which a jury could find that Ms. Sheffield's injuries were not permanent. Leisure Resorts, Inc. v. Frank J. Rooney, Inc. 654 So.2d 911, 914 (Fla. 1995). A motion for directed verdict concedes the facts in evidence and in addition, admits every reasonable and proper conclusion based thereon which is

favorable to the adverse party. Hartnett v. Fowler, 94 So.2d 724, 725 (Fla. 1957) (citing Dempsey-Vanderbilt Hotel v. Huisman, 15 So.2d 903 (Fla. 1943)). Superior made the issue of whether Ms. Sheffield suffered a permanent injury a material part of the trial in this matter, and provided the jury with a sufficient basis to reach their proper conclusion.

The medical testimony on permanency was mixed at best. Dr. Bruce Richards' testimony provided the jury with additional competent evidence upon which they could rely to find that the issue of a permanent injury was in question.

It was the Columbia County jury's task to resolve conflicting evidence on the issue of permanency, and they completed that task based on the evidence presented. Easkold v. Rhodes, 614 So.2d 495, 497 (Fla. 1993); Hicks v. Yellow Freight Systems., 694 So.2d 869, 870 (Fla. 1st DCA 1997).

As argued by counsel for Superior at closing, the jury was free to accept the experts' opinion testimony, reject it, or give it the weight that the jury thought it deserved, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinions expressed, and all other

evidence in the case. Fla. Std. Jury Instr. (Civ.) 2.2(b).

Finally, because the jury's finding of no permanent injury was consistent with the surveillance videotape, the jury's verdict should be affirmed. Anheuser-Busch, Inc., v. Campbell, 306 So. 2d 198 (Fla. 1st DCA 1975)(jury verdict entitled to all reasonable inferences to be drawn from evidence, and is presumed correct).

CONCLUSION

Because the Appellant has not demonstrated reversible error in either the admission of evidence of collateral source benefits or the jury's determination of permanency, this Court should affirm the decisions of the lower court.

Superior request this Court to find that this case does not involve a conflict between the districts but in fact involves the invitation of error by Appellant, for which she should receive no relief.

Respectfully submitted,

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certificate of service

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **Teresa Byrd Morgan, Esquire,** 302 East Duval Street, Lake City, Florida 32055, Attorney for Appellant, by U.S. Mail this 7th day of September, 2000.

Attorney