IN THE SUPREME COURT OF FLORIDA

MARY ANN SHEFFIELD,

Petitioner,

vs.

SUPERIOR INSURANCE COMPANY,

Respondent.
_____/

CASE NO.: SC 96,857

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

PETITIONER'S INITIAL 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 in the trial court, the appellant below, and is the petitioner herein, will be referred to by her full name or as “Mrs. Sheffield.”

Superior Insurance Company, who was the defendant in the trial court, the appellee below, and is the respondent herein, will be referred to as “Superior Insurance.”

References to the record on appeal will be designated “R-” followed by the appropriate volume number and page number.

References to the transcript of the trial will be designated “T-” followed by the appropriate volume number and page number.

References to Mrs. Sheffield’s Initial Brief filed with the First District will be designated “I.B.” followed by the appropriate page number, references to her Reply Brief filed with the First District will be designated “R.B.” followed by the appropriate page number.

References to Superior Insurance’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

Mary Ann Sheffield initiated this action by filing a complaint against Superior Insurance Company (R-I 2-4). She alleged that Superior Insurance had issued to her an automobile liability insurance policy that provided, among other things, uninsured motorist coverage, and that the policy was in effect on December 10, 1994, when she was permanently injured as a result of an automobile accident caused by Linda Kowacz, an underinsured motorist (R-I 2-3). She further alleged that her damages exceeded the liability coverage of Ms. Kowacz's insurance policy, and that Superior Insurance was required by the policy to pay the excess damages but had failed and refused to do so (R-I 3-4).

Superior Insurance denied that Mrs. Sheffield's damages exceeded Ms. Kowacz's insurance policy limits, and alleged, as one of its affirmative defenses, that it was entitled to a collateral source set-off because Mrs. Sheffield had received, or in the future would receive, compensation for injuries and damages from collateral sources (R-I 46).

Prior to trial, Mrs. Sheffield filed a motion in limine in which she sought an order precluding Superior Insurance or its witnesses from presenting any evidence regarding collateral source benefits on the ground that such evidence would be

prejudicial, and would be irrelevant to the issues to be decided by the jury (R-II 91). The court entered a written order reserving its ruling on this issue (R-III 141).

The case proceeded to trial on October 13 and 14, 1997. After opening statements, but prior to the presentation of any evidence, a conference was held in the trial judge's chambers (T-I 6). Because a court reporter had not been present during a motion hearing that took place prior to trial,[1] counsel for Mrs. Sheffield wanted to ensure that rulings made and stipulations entered into during that hearing were placed on the record (T-I 6). Counsel for Mrs. Sheffield proceeded to confirm that the court had denied Mrs. Sheffield's motion in limine, and had thereby ruled that Superior Insurance would be permitted to present argument and evidence on collateral source benefits received by Mrs. Sheffield, either in the form of insurance or benefits provided by Mrs. Sheffield's employer (T-I 6). Counsel for Mrs. Sheffield confirmed that he had a standing objection to the presentation of argument and evidence of collateral source benefits, and confirmed that such standing objection had not been waived and would not be waived by his being forced, by the court's ruling, to refer to or present evidence on these benefits himself (T-I 7). Counsel for Superior Insurance agreed

[1] During this conference, counsel for Superior Insurance acknowledged that he was responsible for the failure to have a court reporter present at the earlier hearing (T-I 9).

that these rulings and stipulations had been made at the earlier hearing (T-I 6-7). After concluding this conference, counsel for Mrs. Sheffield began presenting her case.

Mrs. Sheffield testified that she was injured when the car in which she was a passenger was struck from behind by a truck (T-I 17). The back of Mrs. Sheffield's head struck the headrest and she was jerked back and forth (T-I 18). The car in which she was a passenger was totaled (T-I 19, 45).

During the days following the accident, she experienced a persistent headache and tightness in her neck and back (T-I 19). She obtained emergency room care and physical therapy during the three weeks immediately following the accident, but continued to experience headaches, back pain, neck pain, and muscle tightness (T-I 22). She then began experiencing numbness and tingling down her back and left arm that, at times, would awaken her from sleep (T-I 22).

She testified that at the time of the accident, she was employed as a medical assistant (T-I 24-25). She lost minimal time from work as a result of the accident, as her work did not require heavy lifting and was primarily performed from a sitting position (T-I 25). She stated that she did experience muscle spasms from time to time while working, and sometimes the doctor for whom she worked gave her an injection of lidocaine, which is a numbing medication (T-I 25, 32). This relieved her headaches

and numbed her muscles so she could continue working (T-I 25-26). She was also able to avail herself of the physical therapy facility located in her work facility from time to time during her work day (T-I 26).

Mrs. Sheffield testified that several different medications had been prescribed for her to ease the pain of the injuries sustained in the accident (T-I 35). She stated that she was able to obtain some of these medications free of charge, because her employer sometimes allowed her to use samples provided by drug representatives (T-I 38, 60). She had to purchase some of her medication, however, because samples were not always available (T-I 60). She received some of her physical therapy free of charge when the physical therapy staff at her place of employment was able to work her into their schedule (T-I 60). She stated that she also had group insurance that helped with the cost of her physical therapy and medication (T-I 38). She stressed that there were, however, no guarantees that these benefits, which were directly associated with her present employment, would continue to be provided to her (T-I 39).

Counsel for Mrs. Sheffield presented deposition testimony from three doctors on the issue of permanency: Dr. Ivan Lopez, a neurologist who was Mrs. Sheffield's initial treating physician; Dr. Rigoberto Puente-Guzman, a physical medicine and rehabilitation specialist who was Mrs. Sheffield's treating

physician at the time of trial; and Dr. Bruce Richards, a neurologist who was hired by Superior Insurance to perform an independent medical examination of Mrs. Sheffield.

Dr. Lopez testified that he treated Mrs. Sheffield from January 1995 until November 1996 (T-I 72, 80). He performed objective tests such as electromyography and nerve conduction studies, and these tests revealed deterioration in the left shoulder muscles, the muscles in the lower extremity, and the paraspinal muscles in the lower back, and abnormal nerve conduction velocity at the lower extremities (T-I 77). In addition, Dr. Lopez testified that he objectively confirmed that Mrs. Sheffield suffered from muscle spasms in the cervical, thoracic, and lumbar areas (T-I 79). He stated that Mrs. Sheffield made only limited improvement during his treatment of her, and that she was still experiencing muscle spasms at the time of the last visit (T-I 80, 82). His ultimate diagnosis was that Mrs. Sheffield suffered radiculopathy of the cervical and lumbar region as a result of the accident (T-I 77).

Dr. Lopez opined that, within a reasonable degree of medical certainty, the injuries Mrs. Sheffield sustained to both the cervical and lumbar regions were permanent (T-I 82). He gave her a permanent impairment rating of 8% of the whole person, and testified that she was permanently restricted from heavy lifting, repeated bending, and stooping (T-I 82-83). He

testified that she would continue to need medical treatment for these injuries on a permanent basis (T-I 83-84).

Dr. Puente-Guzman testified that he first examined Mrs. Sheffield on February 25, 1997 (T-II 146). Her primary complaints at that time were left shoulder pain radiating down the upper extremity, and mid- and low-back pain (T-II 146). He performed several objective tests, such as electrodiagnostic studies and an MRI (T-II 146-151). His ultimate diagnosis was chronic cervical myofascial pain and minor lumbar myofascial pain, meaning that she had injury to the muscular soft tissue in the neck and low back areas (T-II 151). He testified that, within a reasonable degree of medical probability, these injuries were caused by the December 10, 1994, accident and were permanent (T-II 151-152, 177-178). He testified that Mrs. Sheffield was permanently restricted from lifting heavy objects and performing repetitive, strenuous activity (T-II 152). He stated that required future treatment would include medication, blood work to monitor the side effects of the medication, continued use of the TENS unit, doctors' visits once or twice a year, and physical therapy (T-II 152-157). Dr. Puente-Guzman stated that, because Mrs. Sheffield's injuries were permanent, this treatment regimen would be permanent also (T-II 153).

The final medical testimony Mrs. Sheffield presented on the issue of permanency came from the deposition of Dr. Richards,

who had been hired by Superior Insurance to perform an independent medical examination (IME). Dr. Richards testified that he performed the IME on June 9, 1995[2] (T-III. 236). The physical examination revealed mild cervical spasm and spasm in her shoulder girdle muscles (T-III 239). He stated that this did not limit her range of motion or mobility of the neck area (T-III 239). She also had some muscle spasm in the lumbosacral region (T-III 239). His diagnoses were that Mrs. Sheffield had suffered lumbar strain and cervical strain, and that these injuries were permanent (T-III 240).

Additional evidence Mrs. Sheffield presented during trial included testimony from her husband and mother regarding the impact the injuries had on her daily life (T-III 251-264; T-I 97-120); testimony from a pharmacist as to the type and cost of medication Mrs. Sheffield was required to take on a regular and ongoing basis (T-II 126-137); testimony from a medical laboratory manager as to the cost of tests Mrs. Sheffield was required to undergo on a periodic basis (T-II 137-143); and testimony from an economist regarding the present value of Mrs. Sheffield's medical expenses and loss of ability to perform household services (T-II 183-227). Mrs. Sheffield then rested her case.

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[2] Dr. Richards testified later during trial that the entire examination took 45 minutes to one hour (T-III 311).

Superior Insurance presented only two witnesses. First, it presented Eric Moore, a private investigator who testified that he had been retained by Superior Insurance to surveil Mrs. Sheffield (T-III 272). He stated that he videotaped her on three different days (T-III 272). The videotape shows Mrs. Sheffield driving, walking, and talking, in what appears to be a normal manner with normal ranges of motion (T-III 276, 301; R-V 184). Mr. Moore admitted, on cross-examination, that he did not know whether, on the days he videotaped Mrs. Sheffield, she had had a light workday or had received physical therapy (T-III 297-298).

Finally, Superior Insurance called Dr. Bruce Richards to testify in person (T-III 306). He stated Mrs. Sheffield confirmed to him during the examination that her "biggest" problem was the lumbar injury (T-III 322). Dr. Richards stated that while Mrs. Sheffield was still having some problems in the cervical area at the time of the examination, it was not her significant problem (T-III 322). Accordingly, his primary focus during the examination was the lumbar injury (T-III 322). Dr. Richards was asked whether he could <u>rate</u> Mrs. Sheffield with regard to permanency of the injuries to her cervical and lumbar areas (T-III 334). He stated that he would want to observe, during more than one examination, whether the muscle spasms he previously observed were still present (T-III 334-335). He

stated that if, over the course of several examinations, the muscle spasms were still present, he would rate the injuries as permanent (T-III 335). He agreed that, according to the AMA guide, muscle spasms that continue beyond six months are determined to be permanent (T-III 337). Dr. Richards again confirmed during this testimony that Mrs. Sheffield had relatively good range of motion on examination and that her gait was normal (T-III 313, 320). He further stated that he had reviewed the videotape filmed by Eric Moore, and that nothing on that videotape contradicted what he found on his examination (T-III 350).

At the close of Superior Insurance's case, counsel for Mrs. Sheffield moved for a directed verdict on the threshold issue of permanency on the ground that the undisputed evidence in the case, including uncontradicted medical evidence, showed that Mrs. Sheffield had sustained permanent injury as a result of the accident (T-IV 360-362). Superior Insurance objected to the motion on the ground that the surveillance videotape it presented in evidence showed Mrs. Sheffield during the normal course of a day, and stated that the jury was entitled to determine, on the basis of what it observed on the videotape and during the two days of watching her during trial, that she did not have a permanent injury (T-IV 363). The court denied the motion for directed verdict, ruling that there was enough

evidence to send the issue to the jury (T-IV 366).

The jury returned a verdict in favor of Mrs. Sheffield, but awarded her only $14,873.00 for past medical expenses, and $2,742.00 for loss of ability to perform household services in the past (R-III 149; T-IV 478). The jury arrived at a figure of $37,744.92 as damages for medical expenses and loss of ability to perform household services in the future, and stated that the number of years over which those future damages were intended to provide compensation was five (R-III 149). The jury reduced the figure of $37,744.92 over the five-year period to a present value of $6,554.61 (R-III 149). Finally, the jury found that Mrs. Sheffield did not sustain a permanent injury as a result of the accident (R-III 150).

Prior to entry of a final judgment, Mrs. Sheffield filed a motion for new trial in which she argued, inter alia, that (1) the trial court erred in refusing to grant her motion for directed verdict on the issue of permanency; and (2) the trial court erred in denying her motion in limine regarding the introduction of collateral source evidence (R-III 187-189). The trial court entered an order summarily denying all issues raised in the motion for new trial with the exception of the collateral source issue. As to that issue, the court found that, if there were any error in the court's ruling, it was harmless as only Mrs. Sheffield's attorney had made any reference to her having

group insurance and, even then, no amounts were stated (R-IV 11-12).

On March 9, 1998, the trial court entered a final judgment in this cause. The final judgment reflected a set-off of $10,000.00 for the liability coverage provided by Ms. Kowacz's insurance policy, and an additional $10,000.00 for Mrs. Sheffield's PIP coverage (R-IV 13). Accordingly, final judgment was entered for Mrs. Sheffield in the total amount of $4,170.22 (R-IV 13).

Mrs. Sheffield appealed the final judgment to the First District Court of Appeal (R-IV 14). On appeal, she asserted that the trial court's denial of her motion in limine was per se reversible error pursuant to this Court's opinion in Gormley v. GTE Products Corp., 587 So. 2d 455 (Fla. 1991), and the subsequent Fourth District decision in Wackenhut Corp. v. Lippert, 591 So. 2d 215 (Fla. 4th DCA 1991). (I.B. 20-27; R.B. 4-10). Superior Insurance admitted in its Answer Brief that the denial of Mrs. Sheffield's motion in limine was error (A.B. 5-7). Its sole argument in defense of Mrs. Sheffield's appeal of this issue was that such error was harmless (A.B. 5-7).

The First District, in its majority opinion, recognized that the trial court's denial of Mrs. Sheffield's motion in limine was error. However, in a majority opinion authored by Judge Benton in which Judge Miner concurred, the court affirmed the

collateral source issue because it found that Mrs. Sheffield had "invited the error" by being the first to introduce evidence of collateral source benefits.[3] Judge Browning issued a stern dissent to the majority opinion in which he asserted that this Court's opinion in Gormley required reversal of the collateral source issue without exception. He buttressed his position with his citation Wackenhut. Finally, he took the majority to task for asserting that Mrs. Sheffield had somehow waived her right to raise the collateral source issue, even though Superior Insurance had expressly stipulated on the record that she would not waive the issue by introducing such evidence herself. In support of his position on the waiver issue, he pointed out that the majority decision conflicts with Porter v. Vista Building Maint. Services, Inc., 630 So. 2d 205 (Fla. 3d DCA 1993), wherein the Third District held that a party does not waive its previous objection to the admission of evidence where such objection is denied and the party introduces the evidence itself in an attempt to diffuse the impact of the opposing party's being the first to introduce it.

Mrs. Sheffield moved for a rehearing of the collateral source issue. The majority denied her motion, without comment. Judge Browning, however, dissented to the denial of the motion for rehearing and again chastised the majority for refusing to

[3] Superior Insurance did not argue in its Answer Brief that Mrs. Sheffield had invited the collateral source error.

follow existing law and for denying Mrs. Sheffield relief based upon reasons "first enunciated by the majority, which were never thought of, much less argued, by [Superior Insurance] to the trial court" or to the First District. Judge Browning further stated that he would certify the case to this Court as being in express and direct conflict with Gormley and Wackenhut.

Also on appeal to the First District, Mrs. Sheffield argued that the trial court committed reversible error when it denied her motion for directed verdict on the threshold issue of permanency. The First District, in its majority opinion, also affirmed this issue, again on grounds not argued either at trial or on appeal. The majority stated that its reading of the record indicated disagreement between Dr. Richards and Dr. Puente-Guzman as to which of Mrs. Sheffield's injuries was permanent, and on that basis it affirmed the trial court's denial of the motion for directed verdict. Judge Browning issued a scathing dissent to the majority's opinion on this issue as well. Judge Browning pointed out that Superior Insurance had never advanced the argument that there was any disagreement among the physicians on the issue of permanency. Rather, Superior Insurance's sole argument at trial and on appeal was that the surveillance videotape provided a basis for submitting the permanency issue to the jury. Judge Browning further asserted that the evidence of permanency was, in fact, substantial and uncontroverted, and that the majority's holding

conflicted with the law set forth in Holmes v. State Farm, 624 So. 2d 824 (Fla. 2d DCA 1993). Mrs. Sheffield also raised this issue in her motion for rehearing. As it did with regard to the collateral source issue, the majority denied such motion without comment.

Mrs. Sheffield timely filed a Notice to Invoke the Discretionary Jurisdiction of this Court, and both parties subsequently filed jurisdictional briefs. Ultimately, this Court accepted jurisdiction to review this case.

SUMMARY OF ARGUMENT

Both Superior Insurance and the First District agree with Mrs. Sheffield that the trial court clearly erred when it denied her motion in limine, which sought to preclude argument and evidence of any collateral source benefits received by her either through group insurance or through her employment as a medical assistant. On Mrs. Sheffield's appeal of this issue, however, the First District appears to have rejected this Court's holding that the burden to prove that such error was harmless is on the party that urged the trial court to make the erroneous ruling. See Gormley v. GTE Products Corp., 587 So. 2d 455 (Fla. 1991). Instead, the court held that Mrs. Sheffield had failed to demonstrate any reason to disturb the trial court's finding in its order denying her motion for new trial that any error in its denial of her motion in limine was harmless.

Even more astonishingly, the First District went on to state that even if the error were not harmless, Mrs. Sheffield invited it because she was the first to introduce evidence of collateral source benefits at trial. The court acknowledged the fact that Mrs. Sheffield had an agreement with opposing counsel that was made on the record and in the presence of the trial judge that she would not be considered to have waived her numerous

objections to such evidence by being forced to present it herself in an attempt to diffuse the impact of Superior Insurance's being the first to introduce the evidence to the jury. However, the First District nevertheless held that Mrs. Sheffield had invited the error when she introduced this evidence at trial. The First District's decision on this issue does not comport with the basic fairness principles on which our trial rules are based, and should not be permitted to stand.

The trial court likewise clearly erred when it denied Mrs. Sheffield's motion for a directed verdict on the issue of permanency. The testimony of three doctors was introduced at trial, and all three agreed that Mrs. Sheffield suffered permanent injuries to both her cervical and lumbar areas as a result of the accident. On Mrs. Sheffield's appeal of this issue, Superior Insurance did not so much as suggest that any of the expert testimony regarding permanency was inconsistent, or that it had impeached such testimony, presented countervailing expert testimony, or presented other evidence that created a direct conflict with the testimony regarding permanency. To the contrary, Superior Insurance's sole argument on appeal was that a videotape it introduced into evidence that showed Mrs. Sheffield walking with an apparently normal gait and normal range of motion in her neck, was sufficient evidence to create a jury question on the issue of permanency. Similar to its

treatment of the collateral source issue, the First District agreed with Mrs. Sheffield that the videotape did not create a jury question on this issue. However, it again injected an issue into this appeal that was never even suggested by Superior Insurance, much less argued, and held that the testimony of the doctors was inconsistent as to which of Mrs. Sheffield's two injuries was permanent. The First District's opinion is not supported by the record. Furthermore, it conflicts with well-settled case law on the issue of permanency. Mrs. Sheffield respectfully submits that the First District's decision on this issue should not be permitted to stand.

ARGUMENT

ISSUE I: THE FIRST DISTRICT'S DECISION AFFIRMING THE TRIAL COURT'S DENIAL OF MRS. SHEFFIELD'S MOTION IN LIMINE IN WHICH SHE SOUGHT TO PRECLUDE SUPERIOR INSURANCE FROM PRESENTING ANY EVIDENCE REGARDING COLLATERAL SOURCE BENEFITS EXPRESSLY AND DIRECTLY CONFLICTS WITH SETTLED CASE LAW, UNDERMINES FUNDAMENTAL FAIRNESS PRINCIPLES THAT FORM THE BASIS OF OUR TRIAL RULES, AND SHOULD NOT BE UPHELD.

A. The trial court clearly erred in denying Mrs. Sheffield's motion in limine.

Whether the trial court erred in denying Mrs. Sheffield's motion in limine in which she sought to preclude Superior Insurance from presenting any evidence regarding collateral source benefits does not appear to be in question. Prior to entry of the final judgment in this case, Superior Insurance steadfastly adhered to the position that its introduction of evidence regarding collateral source benefits, over objection, was legally permissible. However, when faced with this issue on appeal, Superior Insurance capitulated and admitted that the trial court's denial of Mrs. Sheffield's motion in limine seeking to preclude such evidence was error. The First District also agreed with Mrs. Sheffield that the trial court erred when it denied her motion in limine.

The law could not be much clearer on this issue. In Gormley v. GTE Products Corp., 587 So. 2d 455 (Fla. 1991), this Court definitively ruled that introduction of collateral source

evidence in a liability trial, over objection, is reversible error. This Court explained that evidence of collateral source benefits is inadmissible because such evidence could lead the jury to believe that the plaintiff is attempting to obtain a double or triple recovery, or that the plaintiff has already received sufficient compensation for the injury. 587 So. 2d at 458. Accordingly, this Court held that a trial court's improper admission of collateral source evidence, over objection, requires a new trial. 587 So. 2d at 459.

While the cases that recognized the inadmissibility of collateral source evidence prior to Gormley are legion,[4] few courts have found it necessary to address this issue subsequent to this Court's thorough discussion in Gormley. In one of the few subsequent cases in which this issue was discussed, Wackenhut Corp. v. Lippert, 591 So. 2d 215 (Fla. 4th DCA 1991),

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[4] Kreitz v. Thomas, 422 So. 2d 1051 (Fla. 4th DCA 1982) (reversible error to admit collateral source evidence of workers' compensation benefits received by plaintiff); Clark v. Tampa Elec. Co., 416 So. 2d 475 (Fla. 2d DCA 1982) (reversible error to admit evidence of plaintiff's income before and after accident even where curative instruction was repeatedly given); Grossman v. Beard, 410 So. 2d 175 (Fla. 2d DCA 1982) (reversible error to admit evidence that plaintiff's hospital bill was paid by worker's compensation); Williams v. Pincombe, 309 So. 2d 10 (Fla. 4th DCA 1975) (reversible error to admit evidence of plaintiff's receipt of welfare benefits, even for the purpose of impeaching plaintiff's motive to work); Cook v. Eney, 277 So. 2d 848 (Fla. 3d DCA 1973) (admission of collateral source evidence reversible error on issue of liability, despite defendant's assertion that it could affect only issue of damages).

the Fourth District acknowledged that the trial court did not have the benefit of Gormley at the time of the first trial and noted that the issue of the admissibility of collateral source recovery was not properly preserved for review. Nevertheless, upon reversing the final judgment rendered in that case due to error committed on another issue, the Fourth District took the opportunity on remand to instruct the trial court that "any evidence of collateral source recovery by the plaintiff is inadmissible for her property loss claim and is per se prejudicial." 591 So. 2d at 219.

In this case, counsel for Mrs. Sheffield did everything humanly possible to prevent this error from occurring. He filed a motion in limine prior to trial seeking to preclude any reference to collateral source benefits (R-II 91). When the trial court orally denied that motion outside the presence of a court reporter, he later ensured that the record reflected the court's denial and the fact that he had a standing objection to all references to collateral source benefits, either in the form of insurance or benefits provided by her employer (T-I 6-7). Finally, he confirmed with both the court and opposing counsel that he had a standing objection to the presentation of such evidence that would not be deemed to have been waived by his being forced by the court's ruling to present evidence on these benefits himself (T-I 7). Counsel for Superior Insurance

expressly acknowledged, on the record, that these rulings and stipulations had been made at the earlier hearing (T-I 6-7).

The trial court's denial of Mrs. Sheffield's motion in limine, over her counsel's numerous and express objections, clearly and indisputedly was error.

B. The trial court's erroneous denial of Mrs. Sheffield's motion in limine cannot be upheld based upon a harmless error analysis.

Despite the fact that both Superior Insurance and the trial court placed Mrs. Sheffield's counsel in the untenable position of having to present evidence of the collateral source benefits himself or risk the prejudicial impact of Superior Insurance's first bringing the fact of such benefits to the attention of the jury, the trial court nevertheless ruled in its Order Denying Motion for New Trial that any error in denying the motion in limine was harmless because, according to the trial court, Mrs. Sheffield's attorney made the only reference to her group insurance and even then no amounts were stated. (R-IV 11-12). This statement shows that the trial court completely failed to comprehend the scope of the collateral source evidence presented at trial.

In an effort to diffuse the explosive impact of Superior Insurance being the first to question Mrs. Sheffield on the issue of medical benefits received by virtue of her employment as a medical assistant, and relying on the stipulation made with

opposing counsel and acknowledged by the trial judge prior to trial that his introduction of such evidence could not and would not be construed as waiving his objections to such evidence, Mrs. Sheffield's counsel elicited testimony from her regarding the drug samples and physical therapy she was provided from time to time, free of charge, by her employer (T-I 38-39). In its cross-examination of Mrs. Sheffield, Superior Insurance compounded the prejudice that had already occurred when her counsel was forced to inject collateral source information into the trial:

> Q [Counsel for Superior Insurance] And if the work schedule permits it and if you go to that facility, you personally, Mary Ann Sheffield, don't have to pay anything for it, correct?
>
> A That's correct.
>
> Q All right. Now, these prescription samples, again, the same question, if you continue to be an employee there and if they're available, you can get them and there is no charge, correct?
>
> A If they're there. Sometimes it may be six months before a drug rep brings that particular sample back and it's available. It depends on our patient needs for that medication. Now, there are some samples that I had gotten when I first started there that have not come back yet and I've had to go out and buy. It really depends on our patients because our patients come first.
>
> Q And as to the injections that you received in that office, again, were those injections that were given by the doctors there at your facility given to you without charge?
>
> A Yes. That's one of our benefits.

(T-I 60-61). Superior Insurance proceeded to elicit more prejudicial testimony on collateral source benefits received by Mrs. Sheffield in its cross-examination of Carl Allison, the pharmacist who testified regarding the cost of the different medications Mrs. Sheffield was taking:

> Q [Counsel for Superior Insurance] Yes. This last question may appear silly, so I apologize. You put figures behind these pharmaceuticals that are on the short list. If someone was getting those for free, then the cost of those pharmaceuticals would be free?
>
> A [Mr. Allison] Right.

(T-II 136) (emphasis added).

Clearly, the very prejudice the collateral source rule seeks to prevent occurred in this case. The jury was left with the impression that it need not include in its economic damage award any amount for prescription medication or physical therapy because Mrs. Sheffield was receiving these benefits free of charge. Nevertheless, when Superior Insurance was faced, on appeal to the First District, with having to defend the trial court's clearly erroneous denial of Mrs. Sheffield's motion in limine, a ruling that it had not only encouraged but had actively sought, it latched on to the trial court's finding that any error was "harmless" and centered its entire defense around that argument (A.B. 5-7). It did not, however, sustain its burden on appeal of conclusively showing that such error was harmless nor did it even attempt to justify the trial court's

rationale for finding the error harmless.

As this Court stated in Gormley,

> Equity and logic demand that the burden of proving such an error harmless must be placed upon the party who improperly introduced the evidence. Putting the burden of proof on the party against whom the evidence is used . . . would simply encourage the introduction of improper evidence.

587 So. 2d at 459. As reflected in Gormley, it would be fundamentally unfair to permit Superior Insurance, who improperly sought to introduce this collateral source evidence, to invite Mrs. Sheffield's introduction of such evidence in reliance on the trial court's ruling, and then defend the reversible error the trial court committed by shoving the burden of conclusively showing the resulting prejudice onto Mrs. Sheffield. See also Mattek v. White, 695 So. 2d 942 (Fla. 4th DCA 1997)("[W]hen a trial lawyer leads a judge into an obvious error like this one, cries of harmless error on appeal are likely to fall on deaf ears.")

In defending Mrs. Sheffield's appeal of this issue, Superior Insurance had the burden of showing that no prejudice occurred as a result of the improper admission of collateral source benefit evidence. Gormley v. GTE Products Corp., 587 So. 2d at 459. It completely failed to satisfy that burden. The First District needed to look no further than the minimal award for future medical expenses to see the prejudice that likely was

caused by the improper admission of collateral source benefit evidence. Nevertheless, despite the fact that this Court has held that the burden of proving the error harmless is on the party opposing the motion seeking to preclude admission of the improper collateral source evidence, the First District placed that burden on Mrs. Sheffield when it ruled that she had "demonstrated no reason to disturb" the trial court's finding of harmless error. Sheffield v. Superior Ins. Co., 741 So. 2d 533, 538 (Fla. 1st DCA 1999). As this Court stated in Gormley, placing the burden of disproving harmless error on Mrs. Sheffield defies both equity and logic.

C. The trial court's erroneous denial of Mrs. Sheffield's motion in limine cannot be upheld based on an "invited error" analysis.

While the First District stated that Mrs. Sheffield had not demonstrated any reason to disturb the trial court's finding that any error in admitting the collateral source evidence was harmless, this was not the primary reason the court offered for its affirmance of this issue. Rather, its primary rationale for affirming the issue was its finding that Mrs. Sheffield had invited the error by being the first to introduce evidence of collateral source benefits.

Mrs. Sheffield cannot reasonably be found to have invited the error that the trial court clearly committed. The record shows that she repeatedly objected to Superior Insurance's

introduction of evidence of collateral source benefits, and that she secured a confirmation from opposing counsel in the presence and with the apparent blessing of the trial court that her own presentation of such evidence, in an attempt to diffuse the impact of Superior Insurance being the first to introduce it, would not be held against her (T-I 6-7). The portion of the record reflecting this confirmation reads as follows:

> MR. SMITH (Mrs. Sheffield's attorney): Judge, just to put on the record some of what's gone on in the case prior to this time and some stuff that we had stipulated to earlier this morning before a court reporter was available.
>
> We had very early in the case, months ago, filed a motion in limine regarding keeping out any evidence of future collateral source benefits, either insurance or benefits provided by the employer. It's my understanding that the court was going to deny that motion, was going to allow argument and evidence on that and then was itself, at the end of the case, going to make a deduction for any insurance. Even though the jury is going to hear all about all of that, the court is going to make a deduction at the end. Is that correct?
>
> THE COURT: And that's your understanding, Mr. Winter?
>
> MR. WINTER (Superior Insurance's attorney): That's my understanding.
>
> MR. SMITH: Okay. Then we agreed that I wouldn't have to contemporaneously or spontaneously object during the trial and that we'd have a standing objection for the record. <u>And because of the court's ruling, which we knew before the trial started, we've, you know, brought that out in our voir dire and in our opening and we certainly didn't mean to waive any arguments that we had</u>.
>
> MR. WINTER: <u>Yeah, that's fine, because we agreed</u>

earlier before trial.

(T-I 6-7).

This interchange clearly shows that counsel for Mrs. Sheffield, counsel for Superior Insurance, and the trial court, all agreed that Mrs. Sheffield's introduction of collateral source evidence would not later prejudice Mrs. Sheffield in any way.

The law is well settled that a party does not waive its previous objection to the admission of evidence where such objection is denied and the party introduces the evidence itself in an effort to diffuse the impact of the opposing party's being the first to introduce it. The Third District succinctly explained this principle in Porter v. Vista Bldg. Maint. Services, Inc., 630 So. 2d 205 (Fla. 3d DCA 1993). In Porter, the plaintiff in a slip-and-fall case filed a pretrial motion in limine seeking to prohibit the defendant from making reference to, or introducing any evidence of, the plaintiff's previous abuse of alcohol. Because the trial court erroneously denied the motion, the plaintiff's attorney mentioned his client's previous alcoholism in his opening statement in an effort to diffuse its impact. In addressing the issue of whether the plaintiff's counsel had waived his objection or rendered any error harmless by introducing the alcoholism himself, the Third District held:

> [P]laintiff's counsel's attempt to diminish the prejudicial impact of the damaging evidence did not, contrary to appellee's contentions, waive the error, or render the error harmless. A party cannot be penalized for his good-faith reliance on a trial court's incorrect ruling. See John Hancock Mut. Life Ins. Co. v. Zalay, 522 So. 2d 944 (Fla. 2d DCA 1988) (where evidentiary ruling is subsequently found to be erroneous, litigant must be granted an opportunity to present his case under correct ruling).

630 So. 2d at 205 (emphasis added).[5]

The Third District recently had occasion to reaffirm this principle in Smith v. Hooligan's Pub, 753 So. 2d 596 (Fla. 3d DCA 2000). In that case, the Smiths, the parents of 22-year-old David who was shot and killed outside Hooligan's Pub & Oyster Bar (Hooligan's), filed a wrongful death action against Hooligan's and its owner alleging that David's death as caused by their negligent failure to provide adequate security. Before trial, the Smiths moved in limine to exclude as irrelevant and immaterial all evidence regarding David's character and proposed opinion testimony of Hooligan's security expert regarding David's propensity for violence. The trial court denied both motions in limine. On appeal, the Smiths argued that the trial

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[5] As the Eleventh Circuit held in United States v. Velez, 693 F.2d 1081, 1084 n. 5 (11th Cir. 1982), "The importance of honoring a party's good faith reliance upon a judicial officer[']s ruling] is hardly a novel proposition." See also, Estate of Mills v. Fla. Ins. Guaranty Ass'n, 378 So. 2d 301 (Fla. 3d DCA 1980)(Plaintiff had right to rely on judge's ruling that action need not progress until final determination of a prior cause; thus, dismissal of complaint for failure to prosecute was improper.)

court improperly admitted evidence concerning David's bad character because the use of bad character evidence to prove how a person acted on a particular occasion is impermissible in civil proceedings. Hooligan's countered that the character evidence was fair and appropriate rebuttal to the Smiths' evidence of David's good nature. The Third District agreed that the trial court had reversibly erred in denying the Smiths' motions in limine, and expressly rejected Hooligan's argument:

> The record reflects that the Smiths did not submit their evidence about David's good nature until after the trial court denied the Smiths' pretrial motion in limine to exclude as irrelevant all evidence Hooligan's proposed to use regarding David's bad character; until after Hooligan's counsel had portrayed David during opening statements as a violent person who had numerous run-ins with the law; and until after the Smiths' counsel made clear that in presenting testimony concerning David's good character, he would be relying solely on the trial court's ruling permitting the admission of character evidence, and that he did not want to be accused of opening the door to the introduction of such evidence. Thus, the Smiths' counsel presented good character testimony in anticipation of Hooligan's bad character evidence and simply attempted to minimize the latter's prejudicial impact.

753 So. 2d at 599-600 (emphasis added).

This same basic principle of fairness espoused in the above-referenced cases forms the foundation of a variety of rules that apply during trial. For instance, this Court long ago made clear that an objection is not waived when counsel, whose timely objection has been overruled, cross-examines a witness with regard to the objectionable subject matter. See Louette v.

State, 12 So. 2d 168, 174 (Fla. 1943). Similarly, this Court has held that the evidentiary rule against impeaching one's own witness does not forbid the use of "anticipatory rehabilitation" to mitigate the impact of inconsistent statements likely to be introduced. See Bell v. State, 491 So. 2d 537, 538 (Fla. 1986). Rather, this Court has stated that this is a permissible manner in which to "'take the wind out of the sails' of an attack on credibility, or to 'soften the blow' of anticipated inquiries or revelations expected to be damaging to the credibility of a witness." Lawhorne v. State, 500 So. 2d 519 (Fla. 1986).

Counsel for Mrs. Sheffield relied on these time-honored fairness principles enunciated in the law and obtained agreement on the record and in the presence of the trial judge that her introduction of collateral source evidence would not later prejudice Mrs. Sheffield in any way. Yet, despite the agreement on the record, the First District held that Mrs. Sheffield had "invited the error." The First District's opinion expressly and directly conflicts with the Third District's opinions in Porter and Smith, and inherently conflicts with this Court's decisions in Louette, Bell, and Lawhorne.

Notably, prior to issuance of the First District's opinion, Superior Insurance never even intimated that Mrs. Sheffield had invited the collateral source error. Superior Insurance made no such suggestion to the trial court when arguing against Mrs.

Sheffield's motion for new trial, nor to the appellate court when defending Mrs. Sheffield's appeal of the collateral source ruling. In fact, although "armed" with the First District's majority opinion on this issue, Superior Insurance did not even file a response to Mrs. Sheffield's motion requesting that the First District conduct a rehearing of this issue. The first time Superior Insurance made this argument was in its jurisdictional brief filed with this Court. Superior Insurance's shift in position is clear evidence that the First District's ruling, if permitted to stand, will cause the erosion of professionalism among attorneys.

Mrs. Sheffield had every right and every reason to trust that Superior Insurance would honor the parties' agreement. The parties made the agreement on the record, with the acknowledgment of the trial judge, and based upon a time-honored legal principle. Thus, all entities having any standing or any authority at trial agreed that Mrs. Sheffield would not be held to have waived her objection to the collateral source evidence by presenting such evidence herself. The First District, however, despite the parties' agreement, the law that supported it, and the fact that Superior Insurance had never even suggested that such agreement not be honored, changed the rules. Were this Court to adhere to the First District's opinion in this case, such adherence would result in a major setback to the

time-honored rules of encouraging, and in a multitude of instances requiring professional conduct among attorneys. By discounting the importance and validity of the parties' agreement and holding that Mrs. Sheffield invited the error by her own introduction of such evidence, the First District invites the erosion of professionalism among attorneys and violates the fundamental principle that all litigants are entitled to due process and a fair trial. As Judge Browning stated in his dissenting opinion, "Such advocacy should not be sanctioned by this court and certainly should not be encouraged, which will be the inescapable effect of the majority's decision." Sheffield v. Superior Ins. Co., 741 So. 2d at 541.

The fundamental importance of parties being able to trust agreements made with opposing counsel, particularly when such agreements are confirmed by the trial court, cannot be stressed enough. The very foundation of our legal system depends upon opposing counsels' fidelity to their agreements and the court's upholding of such agreements. Our judicial system, fortunately, does not support or reward "trial by ambush" tactics. To the contrary, every aspect of the law, whether case law, statutes, rules of procedure, administrative regulations, or any other area, is replete with rules that are designed to ensure that parties are afforded due process and receive a fair trial. Indeed, the Creed of Professionalism adopted by The

Florida Bar enjoins all members of the Bar to "at all times be guided by a fundamental sense of honor, integrity, and fair play." The Florida Bar Journal, p. 713 (Sept. 1999). Furthermore, the Florida Bar Guidelines for Professional Conduct provide:

> D. Communication with Adversaries.
>
> ***
>
> 5. A lawyer should adhere strictly to all express promises to and agreements with opposing counsel, whether oral or in writing, and should adhere in good faith to all agreements implied by the circumstances or by local custom.

The Florida Bar Journal, p. 715 (Sept. 1999). The First District's decision does not comport with these basic ethical principles and this Court cannot permit such decision to stand.

ISSUE II: THE FIRST DISTRICT'S AFFIRMANCE OF THE TRIAL COURT'S RULING DENYING MRS. SHEFFIELD'S MOTION FOR DIRECTED VERDICT ON THE ISSUE OF PERMANENCY IS NOT SUPPORTED BY THE RECORD, EXPRESSLY AND DIRECTLY CONFLICTS WITH THE SETTLED CASE LAW ON SUCH ISSUE, AND SHOULD NOT BE UPHELD.

The evidence that Mrs. Sheffield sustained a permanent injury was substantial and uncontroverted. Not only did Dr. Lopez and Dr. Puente-Guzman, the physicians who treated Mrs. Sheffield, testify that she sustained permanent injuries to both her cervical and lumbar areas (T-I 82; T-II 151-153, 177-178), but Dr. Richards, the doctor Superior Insurance hired to conduct

an independent medical examination of Mrs. Sheffield, likewise testified that Mrs. Sheffield's injuries were permanent (T-III 240-241). Accordingly, at the close of all of the evidence, Mrs. Sheffield moved for a directed verdict on the issue of permanency.

The case law applicable to Mrs. Sheffield's motion is clear and well-settled: when a party supports its assertion of permanency with expert testimony, the opponent of permanency, in order to carry the issue to the jury, must either (1) present countervailing expert testimony; (2) severely impeach the proponent's experts; or (3) present other evidence that creates a direct conflict with the evidence of permanency. Holmes v. State Farm, 624 So. 2d 824 (Fla. 2d DCA 1993); Allstate v. Thomas, 637 So. 2d 1008 (Fla. 4th DCA 1994); Jarrell v. Churm, 611 So. 2d 69 (Fla. 4th DCA 1992). If the opponent of permanency fails to present such evidence, a directed verdict is required. Holmes, 624 So. 2d at 825, 826; Allstate, 637 So. 2d at 1009-1010; Jarrell, 611 So. 2d at 71.

Superior Insurance did not satisfy any of these three requirements at trial. Its sole argument in opposing Mrs. Sheffield's motion for directed verdict was that the jury was free to reject the uncontroverted expert testimony on the issue of permanency because it introduced into evidence a surveillance tape that showed her for a total of 54 seconds walking across a

parking lot with an apparently normal gait and normal range of motion in her neck. Moreover, this is the only argument it made on appeal in defense of the trial court's ruling denying Mrs. Sheffield's motion for directed verdict issue.

As the Fourth District made clear in Jarrell v. Churm, 611 So. 2d 69 (Fla. 4th DCA 1992), a defendant cannot defeat a motion for directed verdict on the issue of permanency simply by introducing a surveillance tape showing some of the plaintiff's activities. Where a defendant attempts to rely on a videotape to rebut the evidence of permanency, the defendant must augment such evidence by either presenting its own expert testimony that the activities reflected on the videotape are inconsistent with a finding of permanency, or by eliciting such testimony from the plaintiff's expert. 611 So. 2d at 70. Not only did Superior Insurance fail to carry this burden, its own IME doctor, Dr. Richards, testified that he viewed the videotape prior to trial and it did not change his opinion of permanency (T-III 349-350).

The First District correctly rejected Superior Insurance's argument that the videotape was sufficient to rebut the evidence of permanency. However, again injecting into this appeal a basis for affirmance that was never suggested by either the parties or the trial court, the First District affirmed based upon its unprecedented inference from this record that two of the three doctors whose testimony was presented at trial

"disagreed" as to which of Mrs. Sheffield's two injuries were permanent. Mrs. Sheffield respectfully suggests that the First District misapprehended the testimony of the three physicians who testified regarding the permanency of her injuries.

Dr. Lopez, who examined Mrs. Sheffield on several occasions between January 5, 1995, and November 8, 1996, testified that Mrs. Sheffield suffered radiculopathy of the cervical and lumbar regions as a result of the accident (T-I 78). He stated, unequivocally, that the injuries to both of these regions were permanent (T-I 82).

Dr. Richards testified that, at the request of Superior Insurance, he performed an independent medical examination of Mrs. Sheffield on June 9, 1995, and that the entire examination took 45 minutes to one hour (T-III 236, 311). He stated that prior to the examination, he reviewed Dr. Lopez's records and that those records indicated that her primary problem was the lumbar injury (T-III 237). He stated Mrs. Sheffield confirmed to him during the examination that her "biggest" problem was the lumbar injury (T-III 322). Dr. Richards stated that while Mrs. Richards was still having some problems in the cervical area at the time of the examination, it was not her significant problem (T-III 322). Accordingly, his primary focus during the examination was the lumbar injury (T-III 322).

At no point did Dr. Richards testify that Mrs. Sheffield was

not still suffering at the time of the examination from the cervical injury, nor did he testify that such injury was not permanent. To the contrary, he testified that his examination revealed muscle spasms in the cervical area, as well as the lumbar area (T-III 239-240, 321, 347). He acknowledged that she was still suffering, at the time of the examination, from cervical strain, as well as the lumbar strain, and stated that "on the basis of the duration of these complaints, which was in excess of six months, it does meet the criteria for permanency" (T-III 240). He then reiterated that these "problems" were going to be "permanent" (T-III 241). He stated that he was not prepared to rate Mrs. Sheffield for the injuries she sustained because he would need more than one examination with positive findings to do that (T-III 334-335). He reiterated, however, that if he examined her again and the muscle spasms were still present in the cervical area, then he would rate that injury (T-III 335-336).

Finally, Dr. Puente-Guzman testified that he examined Mrs. Sheffield on four occasions between the dates of February 25, 1997, and August 28, 1997 (T-II 146, 158-159). He stated that Mrs. Sheffield suffered myofascial injuries to the cervical and lumbar areas (T-II 151), and that such injuries were permanent (T-II 152-153, 177-178). He stated that when he first examined Mrs. Sheffield on February 25, 1997, she complained of pain in

her cervical and lumbar areas, and that she continued to have "chronic, persistent problems in the same areas" through the time of his testimony (T-II 146, 150). He did state that the injury to the lumbosacral area had not been his main concern in treating Mrs. Sheffield, and that he had not seen objective permanent restrictions or injuries in that area (T-II 180). However, at no time did he retract his earlier opinion that Mrs. Sheffield suffered myofascial injuries to both the cervical and lumbar areas and that both injuries were permanent. Rather, he simply made clear in his testimony that his focus during his treatment of Mrs. Sheffield had always been on the cervical injury (T-II 179-180). The First District's misapprehension of Dr. Puente-Guzman's testimony appears to have been based upon his testimony, quoted in footnote 2 of the majority opinion, wherein he described the usual "waxing and waning" of the chronic symptoms of soft tissue injuries. Such testimony was in direct response to Superior Insurance's hypothetical question as to whether Dr. Puente-Guzman could predict in what year an injury occurred by later viewing a patient's symptoms (T-II 162-163). This testimony was not given in response to a question regarding the permanency of any injuries, much less Mrs. Sheffield's injuries. Thus, contrary to the majority's statement in footnote 2 of the First District's opinion, such testimony would not support a factual finding that Mrs.

Sheffield did not suffer a permanent injury.

The testimony of all three doctors who testified in this case, when reviewed completely and in its entirety, reflects no inconsistency on the issue of permanency of both the cervical and the lumbar injuries. All three doctors testified that Mrs. Sheffield suffered injuries to both her cervical and lumbar areas, and all three doctors testified that such injuries met the criteria for permanency. At the very least, even if the jury could reasonably have inferred from Dr. Puente-Guzman's testimony that the injury to the lumbosacral area was not permanent, the record nevertheless contains no evidence controverting the permanency of the injury to the cervical area. Thus, in light of the undisputed fact that Mrs. Sheffield supported her assertion of permanency with uncontroverted expert testimony, the burden shifted to Superior Insurance to either:

> (1) present countervailing expert testimony; (2) severely impeach the proponent's expert; or (3) present other evidence which creates a direct conflict with the proponent's evidence,

in order to carry the issue to the jury. Holmes v. State Farm, 624 So. 2d 824 (Fla. 2d DCA 1993); Allstate v. Thomas, 637 So. 2d 1008 (Fla. 4th DCA 1994).

Because Mrs. Sheffield presented uncontroverted evidence that she sustained a permanent injury, and because Superior Insurance failed to satisfy its burden to rebut such evidence, the trial court reversibly erred in refusing to direct a verdict

for Mrs. Sheffield on the issue of permanency. In affirming the trial court's denial of such motion, the First District has issued an opinion that expressly and directly conflicts with Holmes v. State Farm, 624 So. 2d 824 (Fla. 2d DCA 1993); Allstate v. Thomas, 637 So. 2d 1008 (Fla. 4th DCA 1994); and Jarrell v. Churm, 611 So. 2d 69 (Fla. 4th DCA 1992). Mrs. Sheffield respectfully submits that the trial court ruling denying her motion for directed verdict should be reversed.

CONCLUSION

This Court should disapprove of the First District's decision on the collateral source and permanency issues, reverse the trial court's rulings on such issues, and remand the case to the trial court with directions to direct a verdict for Mrs. Sheffield on the issue of permanency and to hold a new trial, free from collateral source evidence, on the issues of damages.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Initial Brief on the Merits has been furnished by regular U.S. Mail this _____ day of August, 2000, to W. ALAN WINTER, ESQUIRE, The Winter Law Firm, Attorneys for Respondent, 1301 Riverplace Boulevard, Suite 2210, Jacksonville, Florida 32207.

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