IN THE SUPREME COURT OF FLORIDA

MARY ANN SHEFFIELD,

Petitioner,

v.

SUPERIOR INSURANCE COMPANY,

Respondent.
_____/

Case No. 96,857

DCA Case No. **98-1332**

PETITIONER'S JURISDICTIONAL BRIEF

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, will be referred to as "Petitioner" or "Mrs. Sheffield."

Superior Insurance Company, who was the defendant in the trial court and the appellee below, will be referred to as "Respondent" or "Superior Insurance."

References to the Appendix will be designated "App." followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Mrs. Sheffield sued Superior Insurance seeking uninsured motorist coverage for permanent injuries she sustained as the result of a motor vehicle accident. Superior Insurance denied coverage and alleged, inter alia, that Mrs. Sheffield had not sustained a permanent injury. Superior Insurance further alleged that, if it were held liable for coverage, it was entitled to a collateral source set-off.

Prior to trial, Mrs. Sheffield filed a motion in limine in which she sought an order precluding Superior Insurance from presenting any evidence regarding collateral source benefits. The court reserved its ruling on this issue, and the case proceeded to trial. After opening statements, but prior to the presentation of any evidence, a conference before the trial judge. Counsel for Mrs. Sheffield stated that because a court reporter had not been present during a motion hearing that took place immediately prior to trial,[1] he wanted to ensure that rulings made and stipulations entered into during that hearing were placed on the record. Counsel for Mrs. Sheffield proceeded to confirm that during the motion hearing the court had denied Mrs. Sheffield's motion in limine, and had thereby ruled that Superior Insurance would be

[1] Counsel for Superior Insurance acknowledged that he was responsible for the failure to have a court reporter present at the earlier hearing.

permitted to present argument and evidence on collateral source benefits. Counsel for Mrs. Sheffield then 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 nnt be waived by his being forced, by the court's ruling, to refer to or present evidence on these benefits himself. Counsel for Superior Insurance agreed that these rulings and stipulations had been made at the earlier hearing.

On appeal to the First District, Mrs. Sheffield asserted that the trial court's denial of her motion in limine was error that required a new trial pursuant to Gormley v. GTE Products Corp., 587 So. 2d 455 (Fla. 1991), and Wackenhut Corp. v. Lippert, 591 So. 2d 215 (Fla. 4th DCA 1991). Superior Insurance admitted in its Answer Brief that the denial of Mrs. Sheffield's motion in limine was error, but argued that such error did not affect the jury's verdict and was therefore harmless.

The First District recognized that the trial court's denial of Mrs. Sheffield's motion in limine was error (App.6-7). 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 (App 9). Judge Browning issued a stern dissent to the majority opinion in

which he asserted that Gormley and Wackenhut required reversal of the collateral source issue without exception (App. 13-14). 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 (App. 15). He pointed out that the majority decision conflicts with Porter v. Vista Building Maintenance, 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 (App. 15-16).

Mrs. Sheffield moved for a rehearing of the collateral source issue. The majority denied her motion, without comment, in an order issued September 28, 1999 (App. 20). Judge Browning dissented to the denial of the motion for rehearing, and again chastised the majority for refusing to 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 (App. 20-21). Judge Browning further stated that he would certify the case to this Court as being in express and direct conflict with

Gormley and Wackenhut (App. 21).

Mrs. Sheffield also appealed to the First District the trial court's denial of her motion for directed verdict on the threshold issue of permanency. During trial, testimony from three physicians was presented on the issue of the permanency of Mrs. Sheffield's injuries. All three physicians testified that she suffered a permanent injury as a result of the accident. Because the evidence that Mrs. Sheffield sustained a permanent injury was uncontroverted, she moved for a directed verdict on that issue. Superior Insurance objected to the motion, arguing that the jury could infer from a surveillance videotape it introduced into evidence that her injuries were not permanent. On that basis, the trial court denied Mrs. Sheffield's motion.

The First District, in its majority opinion, affirmed this issue, again on grounds not argued either at trial or on appeal (App. 2-3). The majority implicitly rejected Superior Insurance's argument that the surveillance videotape was sufficient to rebut the permanency evidence. However, it stated that Dr. Richards and Dr. Puente-Guzman had disagreed 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 (App. 10-13). 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.[2] 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) (App. 10-11). Mrs. Sheffield 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 (App. 20).

Mrs. Sheffield's notice to invoke the discretionary jurisdiction of this Court was timely filed on October 26, 1999.

SUMMARY OF THE ARGUMENT

The First District's affirmance of the trial court's denial of Mrs. Sheffield's motion in limine, wherein she sought to preclude Superior Insurance's introduction of collateral source evidence, expressly and directly conflicts with this Court's decision in ducts , 587 So. 2d 455 (Fla. 1991), and the Fourth District's decision in Wackenhut Corp. V. Lippert, 591 So. 2d 215 (Fla. 4th DCA 1991). This Court and the Fourth District have

[2] Superior Insurance did not file a response to Mrs. Sheffield's motion for rehearing. Thus, Superior Insurance has never argued, even "armed"with the majority opinion of the First District, that there was any disagreement among the experts regarding the permanency of Mrs. Sheffield's injuries or that Mrs. Sheffield invited the collateral source error.

held that a party's introduction of collateral source benefits, over objection, is error that requires a new trial. Further, the First District's ruling that Mrs. Sheffield "invited the error," by being the first to introduce such evidence, when she obtained agreement from Superior Insurance that her introduction of such evidence would not constitute a waiver of the issue, expressly and directly conflicts with Porter v. Vista Building Maintenance, Inc., 630 So. 2d 205 (Fla. 3d DCA 1993).

The First District's affirmance of the trial court's denial of Mrs. Sheffield's motion for directed verdict on the issue of permanency expressly and directly conflicts with the Second District's decision in Holmes v. State Farm, 624 So. 2d 824 (Fla. 2d DCA 1993), and the Fourth District's decision in Jarrell v. Churm, 611 So. 2d 69 (Fla. 4th DCA 1992). Because Mrs. Sheffield presented uncontroverted expert testimony on the issue of permanency, and because Superior Insurance completely failed to satisfy its burden rebutting such evidence, the trial court was required, under the above case law, to direct a verdict on this issue in favor of Mrs. Sheffield.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the supreme court or another district court of appeal on the same point of law. Art. V

§ 3(b)(3) Fla. Const. (1980); Fla. R. App. R. 9.030(a)(2)(A)(iv).

ARGUMENT

I. THE FIRST DISTRICT'S DECISION ON THE COLLATERAL SOURCE ISSUE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN GORMLEY v. GTE PRODUCTS CORP., 587 So. 2d 455 (Fla. 1991), THE DECISION OF THE FOURTH DISTRICT IN WACKENHUT CORP. v. LIPPERT, 591 So. 2d 215 (Fla. 4th DCA 1991), AND THE DECISION OF THE THIRD DISTRICT IN PORTER v. VISTA BUILDING MAINTENANCE, INC., 630 So. 2d 205 (Fla. 3d DCA 1993).

The First District's decision affirming the trial court's admission of collateral source evidence expressly and directly conflicts with this Court's decision in Gormley v. GTE Products Corp., 587 So. 2d 455 (Fla. 1991), and the Fourth District's decision in Wackenhut Corp. v. Lippert, 591 So. 2d 215 (Fla. 4th DCA 1991). In Gormley, this Court unequivocally ruled that the admission of evidence of collateral source benefits, over objection, is reversible error and requires a new trial. In Wackenhut Corp. v. Lippert, 591 So. 2d 215 (Fla. 4th DCA 1991), the Fourth District stated 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. See also Parker v. Hoppock, 695 So. 2d 424 (Fla. 4th DCA 1997). Gormley and Wackenhut make clear that the admission of collateral source evidence, over objection, is error that requires a new trial. Despite that clear edict, however, the First District affirmed the trial court's denial of Mrs. Sheffield's motion in limine.

The First District's ruling on this issue also expressly and

directly conflicts with the Third District's decision in Porter v. Vista Bld. Maint. Services, Inc., 630 So. 2d 205 (Fla. 3d DCA 1993). In Porter, 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. Counsel for Mrs. Sheffield relied on this time-honored principle, and obtained agreement on the record and in the presence of the trial judge that her introduction of collateral source evidence, in an attempt to diffuse the impact of the presentation of such evidence by Superior Insurance, would not later prejudice Mrs. Sheffield in any way. Mrs. Sheffield respectfully submits that the First District, by discounting the importance and validity of that agreement and holding that Mrs. Sheffield invited the error, itself 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" (App 18).

11. THE FIRST DISTRICT'S DECISION ON THE PERMANENCY ISSUE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE SECOND DISTRICT'S DECISION IN HOLMES v. STATE FARM, 624 So. 2d 824 (Fla. 2d DCA 1993), AND THE FOURTH DISTRICT'S DECISION IN JARRELL v. CHURM, 611 So. 2d 69 (Fla. 4th DCA 1992).

The Second and Fourth Districts expressly held in the above-cited cases that 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 expert; or (3) present other evidence which creates a direct conflict with the proponent's evidence.

Unless the opponent of permanency satisfies this burden, the court must grant a motion for directed verdict. Holmes v. State Farm, 624 So. 2d at 824, 825; Jarrell v. Churm, 611 So. 2d at 69,70.

In the instant case, all three of the physicians, including Superior Insurance's own expert, testified that Mrs. Sheffield suffered a permanent injury. Superior Insurance admittedly failed to present countervailing expert testimony, severely impeach the testimony of any of the physicians, or present other evidence that created a direct conflict with the uncontroverted evidence of permanency. Rather, in arguing against the motion for directed verdict, it argued only that the jury could infer from a surveillance videotape that her injuries were not permanent.

The majority did not accept Superior Insurance's argument.[3] Instead, it affirmed based upon its unprecedented inference from this record that two of the three doctors had "disagreed" as to which of Mrs. Sheffield's two injuries were permanent (App. 2-3). Assuming, arguendo, the record reflected such disagreement, which it does not, this still would not support the First District's affirmance on this issue because all three physicians testified, without contradiction, that Mrs. Sheffield suffered a aermanent injury. Thus, absent Superior Insurance satisfying its burden of

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[3]Jarrell v. Churm, **611 *So.* 2d** 69 (Fla. 4th **DCA** 1992), **makes** clear that this argument was without merit.

rebuttal, a directed verdict was required. In affirming the trial court's denial of Mrs. Sheffield's motion for directed verdict on the issue of permanency, the First District has issued on opinion that expressly and directly conflicts **with** the **holdings of** Holmes, **and** Jarrell **.**

CONCLUSION

This Court has discretionary jurisdiction to review **the** decision **below,** and **should** exercise that jurisdiction to consider the merits of Mrs. Sheffield's argument.

Respectfully submitted,
TERESA BYRD MORGAN, P.A.

By _____
Teresa Byrd Morgan
Florida Bar No. 0698954

CERTIFICATE OF SERVICE

I HEREBY **CERTIFY** that a **copy** of the foregoing Petitioner's Jurisdictional Brief has been furnished by regular U.S. Mail this 5th day of November, 1999, to W. ALAN WINTER, ESQUIRE, and SONYA H. HOENER, **ESQUIRE,** Attorneys for Respondent, 1301 Riverplace Boulevard, Suite 2210, Jacksonville, Florida 32207.

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IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

MARY ANN SHEFFIELD,

Appellant,

v.

SUPERIOR INSURANCE COMPANY,

Appellee.

_____/

CASE NO. 98-1332

Opinion filed June 30, 1999.

An appeal from the Circuit Court for Columbia County. John W. Peach, Judge.

Teresa Byrd Morgan of Teresa Byrd Morgan, P.A., Lake City, for **Appellant.**

A. Alan Winter and Sonya Harrell Hoener of the Winter Law Firm, Jacksonville, for **Appellee.**

BENTON, J.

Mary Ann Sheffield sustained soft tissue injuries as a passenger in an automobile hit from the rear while waiting for a traffic light to change. After settling with the driver of the other car for policy limits, she sued her own uninsured motorist insurance carrier, Superior Insurance Company (Superior). Dissatisfied with the size of the verdict against Superior, she now seeks a new trial on damages. We reject the contention that she was entitled to a directed verdict deeming her injuries permanent. while the trial court did err in denying her motion to exclude

evidence of collateral sources, her own introduction of such evidence precludes reversal for a new trial on that ground. We therefore affirm.

1.

Maintaining that the jury must have been misled on the point by videotapes depicting her in apparent good health, Ms. Sheffield argues that the medical evidence left the trial judge no choice but to direct a verdict finding that she had suffered permanent injury. Granting a motion for directed verdict would, however, have been "proper only if there was no evidence upon which a jury could find," Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So. 2d 911, 914 (Fla. 1995), that her injuries were not permanent. 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)).

Although several physicians testified that Ms. Sheffield suffered permanent injury, they did not all agree that any one injury was permanent. Dr. Ivan Lopez testified that Ms. Sheffield had permanent injuries, both cervical and lumbar. But Dr. Bruce Richards, who examined Ms. Sheffield approximately six months after she started treatment with Dr. Lopez,[1] testified that the cervical

[1]Dr. Richards' opinion that Ms. Sheffield's injury was permanent was based primarily on the fact that symptoms persisted for more than six months. By the time of trial, however, Dr. Richards had not examined Ms. Sheffield for over two years.

injury had largely gone away and "might resolve in the future," and Dr. Rigoberto Puente-Guzman, who treated her after she left Dr. Lopez's care, testified that the lumbar injury was not permanent. Especially when taken together with Dr. Puente-Guzman's testimony,[2] Dr. Richards' testimony implied that the cervical injury was in the process of healing.

It was for the jury to resolve conflicting evidence on the issue of permanency. See Easkold v. Rhodes, 614 So. 2d 495, 497 (Fla. 1993); Hicks v. Yellow Freight Sys., 694 So. 2d 869, 870 (Fla. 1st DCA 1997); cf. Ullman v. City of Tampa Parks Dep't, 625 So. 2d 868, 873-74 (Fla. 1st DCA 1993). But see Allstate Insurance Co. v. Thomas, 637 So. 2d 1008 (Fla. 4th DCA 1994). As the finder of fact, the jury was free to "accept such [expert] opinion testimony, reject it, or give it the weight [the jury thought] it deserve[d], considering the knowledge, skill, experience, training,

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[2]In finding that Ms. Sheffield had not suffered a permanent injury, the jury may have relied on testimony Dr. Rigoberto Puente-Guzman gave:

> I cannot say with medical certainty there's a limit on how far an injury will last. Usually when I see someone with an injury to soft tissue and I recommend treatment, the majority of the people in the first few months will get better. About twenty percent--eight percent of the people can have chronic symptoms for years after their initial injury and it can be indefinite. It can wax and wane. Some people get better in two years and say, look, I got better just doing activity and all that. Some people will have the symptoms on and off. How long will that be? I can't tell you.

This testimony does not, of course, establish that Ms. Sheffield suffered a "[p]ermanent injury within a reasonable degree of medical probability." § 627.737(2)(b), Fla. Stat. (1995).

or education of the witness, the reasons given by the witness for the opinion expressed, and all other evidence in the case." Fla. Std. Jury. Instr. (Civ.) 2.2(b); see Gaskold, 614 So. 2d at 497-98; Shaw v. Puleo, 159 So. 2d 641, 643-44 (Fla. 1964), overruled in part on other grounds, Griffis v. Hill, 230 So. 2d 143 (Fla. 1969); Florida Dep't of Highway Safety and Motor Vehicles v. Schnurer, 627 so. 2d 611, 612 (Fla. 1st DCA 1993); Wynn v. Muffs, 617 So. 2d 794 (Fla. 1st DCA 1993); cf. Consleton v. Sansom, 664 So. 2d 276, 283 (Fla. 1st DCA 1995), review denied, 675 So. 2d 119 (Fla. 1996). The trial court did not err in denying the motion for directed verdict.[3]

The dissent takes us to task for "affirming on issues not presented to the trial judge, or briefed by the parties," going so far as to suggest a "practical denial of due process." But the burden is on Mrs. Sheffield to show that the trial court erred in denying the motion for directed verdict, not on appellees to show

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[3]The jury awarded damages for future (as well as past) medical care and loss of ability to perform household services over a prospective period of five years (rather than of more than 50 years as plaintiff advocated) but answered "No" to the question

> Did Mary Ann Sheffield, as a result of the December 10, 1994 collision, suffer a permanent injury within a reasonable degree of medical probability?

Ms. Sheffield does not argue on appeal that the verdict is internally inconsistent, nor could she. See Odom v. Carney, 625 So. 2d 850, 851 n.1 (Fla. 4th DCA 1993) (finding argument that verdict was inconsistent in not finding permanent injury waived by "failure to object before jury was discharged"). See generally Perry v. Allen, 720 So. 2d 614 (Fla. 1st DCA 1998).

See also Hamilton v. Melbourne Sand Transp., 687 So. 2d 27 (Fla. 5th DCA 1997) (holding that an award of damages for a 43-year period was not inconsistent with a finding that the injury was not permanent).

that the ruling was correct. See Applegate v. Barnett Bank, 377 So. 2d 1150, 1152 (Fla. 1979); Canto v. J.B. Ivey and Co., 595 So. 2d 1025, 1028 (Fla. 1st DCA 1992). Persuaded, as we are, that the trial court's decision was correct based on the evidence adduced, we must affirm. See Dade County Sch. Bd. v. Radio Station WQBA, 24 Fla. L. Weekly S71 (Fla. Feb. 4, 1999); Applegate, 377 So. 2d at 1152; Cohen v. Mohawk, Inc., 137 So. 2d 222, 225 (Fla. 1962); Nuta v. Genders, 617 So. 2d 329, 331 (Fla. 3d DCA 1993). Mrs. Sheffield has had adequate opportunity to show error but has failed to do so.

"In appellate proceedings the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error." Applegate, 377 So. 2d at 1152. An appellee's failure to file an answer brief altogether does not alter the rule that an appellate court should affirm, where the evidence supports the trial court's decision. See Florida Auto. Dealers Indus. Benefit Trust v. Small, 592 So. 2d 1179, 1180 (Fla. 1st DCA 1992). "Where a trial court reaches the correct decision even if for the wrong reason, the decision will be affirmed." Cardelle v. Cardelle, 645 So. 2d 22, 23 (Fla. 3d DCA 1994). See Firestone v. Firestone, 263 So. 2d 223 (Fla. 1972); In re Estate of Yohn, 238 So. 2d 290 (Fla. 1970); Walton v. Walton, 290 So. 2d 110 (Fla. 3d DCA 1974); Goodman v. Goodman, 204 So. 2d 21, 21 (Fla. 4th DCA 1967). Here parts of the physicians' testimony support the jury's implicit finding that the cervical injuries were not

permanent and other parts support their implicit finding that the lumbar injuries were not permanent.

II.

The trial court did err, however, in denying the motion in limine Ms. Sheffield filed in her effort to secure an order excluding any evidence regarding

> 1. The fact that some or all of [her] medical expenses are being paid by group or other insurance companies;
> 2. That the amount (she) is presently paying for doctor's visits and prescriptions expenses is below the market rate due to [her] insurance coverages.

After Ms. Sheffield restated her motion ~~ore tenus~~ to exclude evidence regarding "either insurance or benefits' provided by the employer," the trial court denied the motion.

Denial of the motion cannot be squared with controlling precedent that bars introduction of evidence of collateral sources when timely objection is made. See, e.g., ~~Gormley v. GTE Prods.~~ Corp., 587 So. 2d 455, 458-59 (Fla. 1991). We explained in ~~Rease~~ v. Anheuser-Busch, Inc., 644 So. 2d 1383, 1386-87 n.3 (Fla. 1st DCA 1994):

> As a rule of evidence, [the collateral source rule] "prohibits the introduction of any

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[4]The trial court ruled that the motion in limine only covered evidence of collateral benefits available under automobile insurance policies and the group insurance policy Ms. Sheffield obtained through her employment. We need not decide whether Ms. Sheffield ever adequately stated an objection to evidence regarding free samples of medicine she received by virtue of her employment in a physician's office. Apart from the motion in limine, she did not object to admission of evidence regarding pharmaceutical samples she received from her employer.

> evidence of payments from **collateral** sources, upon proper objection." [Gormley, 587 So. 2d] at 457. This is so because the introduction of collateral source evidence "misleads **the** jury **on** the issue of liability and, thus, subverts the jury process." Id. at 458.

See also Parker v. Hoppock, 695 So. 2d 424, 427 (Fla. 4th DCA 1997), review denied, 707 So. 2d 1126 (Fla. 1998); ~~Williams v.~~ Pincombe, 309 *So.* 2d 10, 11 (Fla. 4th DCA 1975); ~~Cook v. Enev~~, 277 *So.* 2d 848, 849 (Fla. 3d DCA 1973). We are not concerned here with a situation like the one that obtained in ~~State Farm Mutual~~ Insurance Company v. Gordog, 712 So. 2d 1138 (Fla. 3d DCA 1998). The trial court committed clear error in denying the motion in limine.

But it was Ms. Sheffield, during her case-in-chief, who first introduced evidence of "free" medicine' and group insurance benefits she received in connection with her employment as a medical assistant. Denial of the motion in limine notwithstanding,[6] Ms. Sheffield's eliciting testimony on direct

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[5]Ms. Sheffield also testified that her employer did not charge her for the portion of physical therapy her health insurance did not cover. The jury awarded Ms. Sheffield her past medical bills in full. She was not seeking additional physical therapy as part of her future medical expenses.

[6]Superior stipulated that Ms. Sheffield had a standing objection to evidence of collateral sources. On the record but after the fact, Superior also agreed that Ms. Sheffield had not waived her objection by raising the matter during voir dire and her opening statement. Superior is bound by this agreement **and** we do not hold otherwise.

Perhaps it made tactical sense for Ms. Sheffield to take the calculated risk of acclimating the jury in this way, given the trial court's erroneous ruling. See Porter v. Vista Bldg. **Maintenance Servs., 630 So.** 2d **205**, 206 **(Fla. 3d DCA 1993) (holding** opening statement did not waive objection); ~~United States v.~~ Garcia, 988 F.2d 965, 967-68 (9th Cir. 1993). But statements of

examination precludes reversal for questions within the scope of direct examination--and not otherwise improper--that Superior asked on cross-examination. 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, 724-25 (9th Cir. 1991); United States v. Cobb, 588 F.2d 607, 613 (8th Cir. 1978) (holding "Cobb effectively cut off both the prosecutor's privilege to withhold the possibly prejudicial evidence and the court's opportunity to reconsider its preliminary ruling by voluntarily broaching the subject of the 1949 conviction on direct examination . . . [and so] failed to preserve his objection to the admission of evidence of the 1949 conviction."); cf. Luce v. United States, 469 U.S. 38, 41-42 (1984); State v. Raydo, 713 So. 2d 996, 998 (Fla. 1998). But see United States v. Fisher, 106 F.3d 622, 629 (5th Cir. 1997); Judd v. Rodman, 105 F.3d 1339, 1342 (11th Cir. 1997); Reyes v. Missouri Pac. R.R. Co., 589 F.2d 791, 793 (5th Cir. 1979).

The jury heard nothing of the moneys Ms. Sheffield received from the settlement with the other driver or of the personal injury protection benefits Superior paid. But for her putting on evidence about free medical samples and her group insurance, Superior might well have decided to forgo asking questions on these subjects, as

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counsel are not evidence.

well, in order to avoid the risk of reversal for doing so. Superior put on no evidence concerning collateral sources other than sources Ms. Sheffield first testified to.

The trial court should have granted the motion in limine. But its failure to do so conferred no right on Ms. Sheffield to build error into the trial so as to guarantee two bites at the apple. See Perez v. State, 717 So. 2d 605, 607 (Fla. 3d DCA 1998) ("We do not know and do not speculate as to . . . what strategic considerations may have led him to introduce some of this evidence himself. We are convinced, however, that it would be contrary to Florida law and grossly unfair to grant him relief for errors which . . . he, himself, invited.").

Plainly, as the first to introduce evidence she now contends was prejudicial, Ms. Sheffield invited the error now invoked as a reason for a new trial. See Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983) ("A party may not invite error and then be heard to complain of that error on appeal."); Lentz v. State, 679 So. 2d 866 (Fla. 3d DCA 1996); Buggs v. State, 640 So. 2d 90 (Fla. 1st DCA 1994). In denying the motion for new trial, moreover, the trial judge expressly found that admission of evidence of collateral sources had proven harmless, even if error. On appeal, Ms. Sheffield has demonstrated no reason to disturb this finding.

Affirmed.

MINER, J., CONCURS; BROWNING, J., DISSENTS WITH OPINION.

BROWNING, J., dissenting.

I respectfully dissent.

I.

There was substantial and uncontroverted evidence presented in this case that the appellant, Mary Ann Sheffield (Sheffield), sustained a permanent injury **as** a result of the accident. Three (3) physicians, Dr. Lopez, Dr. Rigoberto Puente-Guzman,[2] and Dr. Bruce Richards, testified that Sheffield sustained a permanent injury, **and** no expert testified in opposition. Of particular significance is that the physician retained by Superior Insurance (Superior), Dr. Bruce Richards, to perform an independent medical evaluation of

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[2] The majority publishes as footnote 2 of the opinion a portion of Dr. Rigoberto Puente-Guzman's general testimony on permanency, but omitted, however, the specific testimony he gave on permanency relating to Sheffield's injuries **as** follows:

> Q. In your opinion, based on reasonable medical certainty, has Ms. Sheffield suffered a permanent injury as a result of that automobile accident?
>
> A. *Yes.*
>
> * * *
>
> Q. Treatment regimen that *you* ***just*** described for us, since her injuries are permanent, will that treatment or similar treatment be on a permanent basis as well?
>
> A. **Yes.**

This testimony does establish that Sheffield suffered a "[p]ermanent injury within a reasonable degree of medical probability." §627.737(2)(b), Fla. Stat. (1995).

Sheffield, testified that Sheffield suffered injuries that meet the criteria for permanency.

The law in Florida is well recognized that after a party supports **its assertions of** permanency with expert testimony, the opponent of permanency, to avoid a directed verdict on the issue and have the jury **decide** the **issue, must:**

> (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.

Holmes v. State Farm, **624 So.** 2d 824 (Fla. 2d DCA 1993). Unless the opponent of permanency satisfies its burden, the opponent's motion for directed verdict must be granted. Superior failed to do so **in** the instant appeal, **and to** the contrary, through its independent medical examiner, Dr. Bruce Richards, actually **supported** Sheffield's position. Accordingly, the trial judge should have directed **a** verdict as requested by Sheffield on this issue.

The majority finds that **the** trial judge should **be** affirmed because of the experts' disagreement as to which of Sheffield's bodily functions was permanently injured. I do not find this to be compelling or persuasive, and apparently neither does Superior. At page 5 of Superior's answer brief the sole basis advanced for affirmance of the trial judge on this point is the following:

> 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.

(Emphasis added). Moreover, when arguing in the trial court in opposition to Sheffield's motion for a directed verdict on this issue, Superior advanced as its sole argument the basis stated above. In view of Superior's position, the majority, by affirming on issues not presented to the trial judge, or briefed by the parties, does violence to the traditional concept of our adversary system, which results in a practical denial of due process of law to Sheffield. She has not been apprised of the basis for the majority opinion previous to receipt of this opinion, nor has she been afforded the right to respond directly to such issue in the trial court or in this court. Simply put, the majority disregards the view of Superior's counsel on this issue, and injects its view of appropriate trial tactics for Superior, with all of the attendant adverse results that necessarily flow.

The surveillance videotape of Sheffield does not support the trial judge's denial of her motion for directed verdict on permanency as advanced by Superior. Such evidence does not provide a basis for submitting the issue of permanency to a jury. Jarrell v. Churm, 611 So. 2d 69 (Fla. 4th DCA 1992). Moreover, the facts in the instant case are more compelling than those in Jarrell. Dr. Richards, Superior's independent medical examiner, after testifying that Sheffield had suffered a permanent injury from the accident, testified that nothing on the videotape contradicted what he found

on his examination of Sheffield. Thus, the only basis argued by Superior on this issue is not supported by competent substantial evidence and is directly contradicted by its retained independent medical examiner. The trial judge erred by failing to grant a directed verdict on this point.

II.

I also believe that the trial judge reversibly erred by overruling Sheffield's motion in limine requesting exclusion of all evidence of collateral-source benefits received by her, and by failing to grant Sheffield's motion for a new trial on the basis of harmless error.

In Gormley v. GTE Products Corp., 587 So. 2d 455 (Fla. 1991), the Florida Supreme Court unequivocally ruled that introduction of evidence of collateral-source benefits in a liability trial, over objection, is reversible error. The court recognized and pointed out that evidence of collateral-source benefits is inadmissible because such evidence could lead the jury to believe that a plaintiff is attempting to obtain a double or triple recovery, or that the plaintiff has already received sufficient compensation for the injury. Id. at 458. Accordingly, the *court* held that a trial court's improper admission of collateral-source evidence, over objection, requires a new trial. Gormley has been followed by other districts, so that when evidence of collateral-source benefits has been admitted, over objection, error has been determined **and**

reversal adjudged, without exception. Parker v. Hoppock, 695 So. 2d 424 (Fla. 4th DCA 1997); Wackenhut Corp. v. Lippert, 591 So. 2d 215 (Fla. 4th DCA 1991). Even before Gormley, many districts followed the rule promulgated by that opinion. Kreitz v. Thomas, 422 So. 2d 1051 (Fla. 4th DCA 1982); Clark v. Tampa Elec. Co., 416 So. 2d 475 (Fla. 2d DCA 1982), review denied, 426 So. 2d 29 (Fla. 1983); Williams v. Pincombe, 309 So. 2d 10 (Fla. 4th DCA 1975).

In the instant case, Sheffield's attorney properly and timely objected to the presentation of any evidence of collateral-source benefits. Notwithstanding that Gormley is a well-known precedent, decided some eight years ago, the trial judge was convinced, apparently by Superior, to admit collateral-source evidence incorrectly. This was error that impels reversal and a new trial for Sheffield.

The majority affirms on this issue because Sheffield is described as having "invited error" and, thus, failed to preserve this point properly for appeal. But this issue was not presented by Superior to the trial court when the motion for new trial was argued and, most significantly, is not argued to this court by Superior. Superior's sole argument is that the trial judge should be affirmed on the basis of harmless error. Superior's position is stated at page 5 of its answer brief as follows:

> The jury awarded the full amount of past medical damages requested by Appellant at trial, and any effect of collateral sources on future damages was 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.

(Emphasis added). The **parties** stipulated that this issue **would** not be waived after the trial judge incorrectly denied Sheffield's motion in limine. If Superior had thought the issue unpreserved for appeal, surely some mention would have been made by it in its brief. **The** stipulation should **be** enforced as the parties understand it, and the impact of the error on the trial should be addressed ***by*** this court.

When faced with the trial judge's incorrect ruling, Sheffield had every right to attempt to defuse the issue and initially present collateral-source evidence, as sanctioned by the parties' stipulation, to the jury. **The Third** District recognized **and** explained this principle in Porter v. **Vista** Building Maintenance Services, Inc., 630 ***So.*** 2d 205 (Fla. 3d DCA 1993). In Porter, the plaintiff in a slip-and-fall case filed a pre-trial motion in limine seeking to prohibit the defendant from making reference to, or introducing any evidence of, the plaintiff's previous abuse of alcohol. The trial court erroneously denied **the** motion, and the plaintiff's attorney mentioned his client's previous alcoholism in his opening statement in an attempt to defuse anticipated prejudice before the evidence **was** introduced by the defendant. On appeal, the defendant argued that plaintiff's counsel had waived the objection, or else rendered any resulting error harmless by introducing the

alcoholism himself. The court pointed out the rule in such circumstances:

> [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).

Id. at 206.

Significantly, the error in Porter did not involve a principle and precedents as well-defined and recognized as in the instant case. In Porter, rules of elementary evidence were erroneously applied. Here, a landmark decision and numerous other appellate decisions of long standing were ignored, and now such error is affirmed based upon Sheffield's failure to preserve. It is doubtful that any speaker at a legal seminar held in the past twenty years relating to the subject of an offset or collateral-source benefits under Florida law has failed to include copious references to Gormley and its progeny, or to earlier, similar appellate precedents. Thus, no excuse exists for trying a case on a misapplication of such a universally known and accepted principle of law,

If the admitted error of the trial judge *is* considered on its impact on the trial rather than on the basis of nonpreservation, the

burden of proving that the error was "harmless" is borne by Superior, which induced the trial court to commit reversible error. **Gormley**, *587* So. 2d at 453. Only if Superior demonstrates to this court that the improperly admitted collateral-source evidence clearly was not prejudicial has its burden been met. Beyond doubt, the Florida Supreme Court in Gormley came very close to saying that the admission of collateral-source evidence, over objection, is per se prejudicial. However, the Fourth District, in a case decided after Gormley and in compliance with it, concluded that such error is "per se prejudicial." Wackenhut Corn., 591 So. 2d at 215.

Superior's counsel knew, or should have known, of the principle prohibiting admission of evidence of collateral-source benefits. As a result, the cries of harmless error now made should be disallowed on this record. However, the majority finds fault, not with Superior---which created the dispute over evidence of collateral-sources resulting in a misapplication of law by convincing the trial judge to admit clearly inadmissible evidence of collateral-source benefits---but with Sheffield, attempting "two bites at the apple." No adverse legal consequence is suffered by or allocated to Superior, which required Sheffield to accept an incorrect ruling or attempt to defuse an unfair threat to her case not of her own making. There would have been no necessity to "invite error" by Sheffield had she not been faced with what is now clearly recognized by all parties, the trial judge, and this court,

to be error based upon a violation of the Gormley principle. Superior should bear the responsibility for this error, as the precursor of it. Sheffield attempted to bar the inadmissible evidence by timely filing a motion in limine that correctly stated the law. Why should Sheffield bear the onus of an unfair trial of her case for attempting to make the best of a bad situation not of her own making, and for merely defending against inadmissible prejudicial evidence? The obvious answer is that she should not be so required.

While the majority's concern for not allowing Sheffield to manipulate the legal system to allow "two bites at the apple" is commendable as a general rule, in the context of the instant appeal the "mark is missed." The majority's decision will encourage litigants to seek clever misapplications of law to gain an advantage, and then after so doing, if confronted by appeal, admit to error and claim it to be harmless, or claim that the opponent waived the error while struggling within the confines of a patently unfair proceeding. In the instant case, if the error is harmless, why did Superior oppose Sheffield's motion in limine? The answer is evident: because the admission of evidence of collateral-source benefits was expected to have a "dynamite" impact on the jury favorable to Superior. 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.

Last, but not least, it is interesting to note that the majority cites as authority for its position the following three criminal cases that are not even remotely analogous to the instant case, and overlooks the well-reasoned opinion in Porter, 630 So. 2d at 205. Pose v. State, 441 So. 2d 1073, 1076 (Fla. 1983); Lentz v. State, 679 So. 2d 866 (Fla. 3d DCA 1996); Budds v. State, 640 So. 2d 90 (Fla. 1st DCA 1994). Not one of these criminal cases involves a factual situation, as here, where a correct ruling was sought but denied, and Sheffield attempted to deal with the incorrect ruling as best she could.

In summary, Sheffield was denied a fair trial because the principle enunciated by Gormley was not followed, for some unfathomable reason. Sheffield should not be punished for trying to make the best of a situation, not of her own making, that clearly prejudiced her case.

I would reverse and remand for a retrial on damages and instruct the trial judge to grant Sheffield's motion for directed verdict on permanency.

DISTRICT COURT OF APPEAL,, **FIRST DISTRICT**

Tallahassee, Florida 32399-1850

Telephone (850) 488-6151

DATE: September 28, 1999

CASE NO.: 98-1332

MARY ANN SHEFFIELD vs. SUPERIOR INSURANCE COMPANY

Appellant. Appellee.

BY ORDER OF THE COURT:

ON MOTION FOR REHEARING

Appellant's Motion For Rehearing is denied.

MINER and BENTON, JJ., CONCUR; BROWNING, J., DISSENTS WITH OPINION.

BROWNING, J., dissenting.

I dissent to the majority's failure to grant appellant's motion for rehearing.

Appellant filed the instant case expecting to, and entitled to have, her case decided under existing law. Through no fault on her part, appellant was forced to have her legal rights adjudicated under an erroneous principle of law espoused as correct by appellee in the trial court. Then appellant appeals the error to this court and is denied relief because she failed to accept error in the trial court in a "proper manner" based upon reasons first enunciated by the majority, which were never thought of, much less

argued, by appellee to the trial court and to this court. Appellant deserves better.

Also, I would certify this case to the Florida Supreme Court as being expressly and directly in conflict with Gormley v. GTE Products Corp., 587 So. 2d 455 (Fla. 1991); and Wackenhut Corp. v. Lippert, 591 So. 2d 215 (Fla. 4th DCA 1991).

I would grant appellant's motion for rehearing for the reasons stated herein.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

JON S. WHEELER, CLERK

By: Karen Roberts
Deputy Clerk

Copies:

Teresa B. Morgan
W. Alan Winter
Sonya H. Hoener