IN THE SUPREME COURT OF FLORIDA

MARY ANN SHEFFIELD,

Petitioner,

v.

SUPERIOR INSURANCE COMPANY,

Respondent.
_____/

Case No.: 96,857

DCA Case No.: 98-1332

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

At the trial of this matter, the Plaintiff wanted to increase her damages profile, by testifying that she received medical care and treatment at the facility where she worked, during lunch. But for the fact that she received that medical care and treatment free of charge, she wanted to allege that it nevertheless had a financial value. The Plaintiff acknowledged at trial that she did not pay for this treatment.

Because of Mrs. Sheffield's interest in presenting the damages profile described above, and 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 was held before the trial judge. Counsel for Mrs. Sheffield confirmed *that* the Plaintiff's case would include evidence of receipt of medical care and treatment at the Plaintiff's employer's facility for which she was not charged or billed. The Plaintiff confirmed that they would incorporate this evidence into the trial, even though those issues would require fair and thorough cross examination by an appropriately zealous advocate for Superior Insurance.

After an appropriate time for consideration and reflection, the Plaintiff put on their case, and affirmatively and intentionally included the testimony concerning the alleged treatment of the Plaintiff in her employer's facility, for which she was not charged **OF** billed. The Plaintiff then called an expert economist and incorporated the Plaintiff's theory of the total theoretical cost of care and treatment into a damages profile opinion. The Plaintiff's counsel then incorporated into his closing argument, asking the jury to return a verdict that included the value of that care and treatment,

for which the Plaintiff was never charged or billed. The Plaintiff therefore not only invited the error but continued to maintain the error throughout every aspect of the trial.

During the trial, the Plaintiff also tried to convince the jury that she has sustained a permanent injury. The jury received in total, testimony from two physicians, from medical records and reports, from bills, from videotape surveillance, and from personal observations of the Plaintiff in the courtroom for three days. Following the presentation of the evidence, the Court declined to grant the Plaintiff's motion for directed verdict on the issue of permanency, and the jury confirmed the Court's correct ruling by finding that the Plaintiff had not sustained a permanent injury.

SUMMARY OF THE ARGUMENT

The First District recognized that it was the Petitioner's insistent inclusion of the collateral source issue into here initial presentation that infused the problem into this trial.

The First District's ruling that Mrs. Sheffield "invited the error", by being the first to introduce such evidence, after the Plaintiff had time to reflect on the

content of her case, does not conflict with any decision of this Court or any district court of Florida.

The First District's affirming of the trial court's denial of Mrs. Sheffield's motion for a directed verdict on the issue *of* permanency was correct and is supported by Florida case law. The Plaintiff's testimony, together with expert, videotape and lay witness testimony, was rebutted by the Defendant to the satisfaction of the trial judge, the jury, and the First District.

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 the decision of the Supreme Court or another district court of appeal on the same point of law. Art. V, sec. 3(b)(3), Fla. Const. (1980); Fla.R.App.P. 9.030(a)(2)(A)(iv). The converse is true. The Florida Supreme Court has the discretion to reject review of a decision of a district court of appeal that does not present as an express or direct conflict with a decision of the Supreme Court *or* another district court of **appeal**, which is the case at bar.

ARGUMENT

I. The First District's decision on the collateral source issue is consistent with prior rulings of this Court and with the decisions of the District Courts of Florida, because it is not solely decided on the issue of admissibility of collateral sources,

The First District's decision affirming the trial court's admission of collateral source evidence, following the plaintiff's affirmative decision to include error evidence into the Plaintiff's own case in chief was correct, and does not conflict with any decision *of* this Court, or any district court of Florida.

Petitioner has cited **several** cases to support their allegation that the issue of collateral sources presents a conflict in this case. A closer analysis of those cited cases demonstrates that there is no conflict, because these cases do not involve the insistence of the plaintiff to infuse error into the plaintiff's own case.

In Gormley, the defendant put into evidence collateral source evidence against plaintiff's objections. Gormley v GTE Prods. Corp., 587 So.2d 455, 458-59 (Fla. 1991). In Parker the defendant first elicited that the Plaintiff had received a form of collateral source. Parker v Hoppock, 695 So.2d 424 (Fla. 695 DCA 1997). Wackenhut is also

cited, but that case simply follows the dictate of Gormley. Wackenhut v Lippert, 591 So.2d 215 (Fla. 4th DCA 1991). In Kreitz, the court erred by allowing the defendant to introduce evidence of statements of payments received from Worker's Compensation sources. Kreitz v Thomas, 422 So.2d 1051 (Fla. 2d DCA 1982). Finally, in Clark, defendant's counsel asked an expert whether it would make any difference in his opinion if the expert knew the plaintiff was receiving disability payments. Clark v Tampa Electric, 416 So.2d 475 (Fla. 2d DCA 1982). In all of these cases it was the defendant who introduced error over objection, after the plaintiff had taken steps to modify the plaintiff's presentation of evidence so that collateral source evidence was not submitted by the plaintiffs to the jury.

Court's have uniformly held that when a litigant invites error, then that party should not benefit from that conduct. Pope v. State, 441 So.2d 1073 (Fla. 1983); Lentz v State, 679 So.2d 866 (Fla. 3d DCA 1996); Buggs v State, 640 So.2d 90 (Fla. 1st DCA 1994); Pierre v State, 730 So.2d 841 (Fla. 3d DCA 1999) where the Court held that the Defendant was estopped from citing as error on appeal the trial court's failures, after the defendant exploited the alleged error by making continuous and extensive references

to prior arrests throughout trial; and Shingledecker v. State, 734 So.2d 483 (Fla. 4th DCA 1999). See also: Perez v. State, 717 So.2d 605, 607 (Fla. 3d DCA 1998).

Appellant has attempted to impose 'fault' on counsel for Appellee, by imposing a duty that is not recognized or supported by Florida law. [See Appellant's FN#1, p. 8, Appellant's Jurisdiction Brief.] Appellant is trying to say that Appellee had a duty to hire a court reporter for Appellant's use, at the trial level. Apparently, by failing to do this, Appellant *is* stating that Appellee is responsible for Mrs. Sheffield's errors at trial. Appellee is not aware of any Florida statute, Rule of Procedure, or *case* law that supports such an absurd proposition.

In fact, Appellant's proposition is parallel to their theory in this case, since they are saying that it is Appellee's fault that Appellant infused error into the Plaintiff's trial presentation. It was the Plaintiff who crafted her presentation, and in doing so, insisted on inviting error into the trial. Plaintiff did so at her own peril, and therefore, she must suffer her own self-imposed consequences. This invitation of error clearly distinguishes this case from the cases identified as conflicting in the Appellant's Jurisdictional Brief.

11. The First District's decision on the permanency issue was correct, as it is supported by Florida case law that requires the Court to consider all the evidence, including expert, lay witness, and videotape evidence, in a light most favorable to the non-moving party.

During the trial, the jury was able to make a competent decision on the issue of permanency from three sources. First, the jury was shown a videotape of surveillance of the Plaintiff in apparent good health. Second, the Defendant brought Dr. Bruce Richards to testify, and he rendered the medical opinion that the cervical injury had largely gone away and "might resolve in the future", while the Plaintiff's own physician testified that there was no permanent injury in the lumbar region of her back. When combining Dr. Richards' testimony with that of the Plaintiff's own doctor, Dr. Rigoberto Puente-Guzman, the jury had ample expert testimony to find that the Plaintiff's injuries were not permanent. *[See* FN#3 of the opinion of the First District.] Finally, the jury was able to observe the Plaintiff at close range, for three days, as the trial was conducted in the Columbia County Courthouse. When coupled with the medical opinions, the videotape surveillance, and the jury's personal observations, the

Court was correct in declining to direct a verdict on the issue of permanency.

Permanent means "permanent." Clearly, the jury's verdict, where they limited the Plaintiff's future medical care and treatment to five (5) years, sent a signal that they did not believe that the Plaintiff's injuries were permanent in nature.

The cases cited by Petitioner/Appellant only concern themselves with a complete failure of any basis for the determination that the Plaintiff sustained a permanent injury, which is not the case at bar. In our case, the jury had several evidentiary sources to draw from in reaching their conclusion that the Plaintiff did not sustain a permanent injury.

Clearly, when confronted by a motion for a direct verdict, a trial judge is bound by the rule that the granting of a directed verdict is "...properonly if there is no evidence upon which a jury could find..." that the Plaintiff's injuries were not permanent. Leisure Resorts, Inc. v. Frank J. Rooney, Inc. 654 So.2d 911, 914 (Fla. 1995). Therefore, the trial court's ruling, and the First District's affirmation of this issue, does not rise to the level of a conflict, and jurisdiction should therefore be denied on this issue.

CONCLUSION

This Court has discretionary jurisdiction to review appropriate district court decisions. This Court should find that the case at bar does not conflict with either its own decisions, or with the decisions of any district court of Florida, and should deny the Petitioner's request for relief and review.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Jurisdictional Brief has been furnished by U.S. mail, this 9th day of December, 1999, to **Teresa Byrd Morgan, Esquire**, Attorney for Petitioner, 302 East Duval Street, Lake City, Florida, 32055.