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 REPLY BRIEF ON THE MERITS

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

Teresa Byrd Morgan
Florida Bar No. 0698954
TERESA BYRD MORGAN, P.A.
302 East Duval Street
Lake City, Florida 32055
(904) 755-1977

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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 Superior Insurance's Answer Brief on the Merits will be designated "AB" followed by the appropriate page number.[1]

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.

[1] Superior Insurance mistakenly labeled its answer brief on the merits "Respondent's Initial Brief on the Merits."

SUMMARY OF ARGUMENT

In Gormley v. GTE Products Corporation, 587 So. 2d 455 (Fla. 1991), this Court held that the admission of collateral source evidence, over objection, is so inherently prejudicial that it requires the granting of a new trial unless the party that invited such error conclusively shows that no prejudice resulted from admission of the improper evidence. Superior Insurance completely failed to satisfy its burden of proving that the collateral source evidence presented in this case caused no prejudice and, therefore, was harmless. Accordingly, the final judgment entered in this case must be reversed, and the case must be remanded for a new trial.

This Court need not remand the issue of whether the injuries Mrs. Sheffield sustained as a result of the subject accident were permanent, however, because Mrs. Sheffield has already proven, by uncontroverted evidence, that such injuries were permanent. All three physicians who testified, including Superior Insurance Company's own IME doctor, testified that Mrs. Sheffield's injuries were permanent. Superior Insurance totally failed to present any evidence that refuted the evidence of permanency presented by Mrs. Sheffield. Accordingly, the trial court reversibly erred in denying Mrs. Sheffield's motion for a directed verdict on this issue. On remand, the trial court should be directed to enter a directed verdict for Mrs.

Sheffield on the issue of permanency.

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.

In its Answer Brief on the Merits, Superior Insurance implicitly acknowledges that the trial court committed clear error when it denied Mrs. Sheffield's motion in limine. Superior Insurance fails to acknowledge, however, that it was the party that invited this clear and now uncontroverted error by its objection to and argument against such motion. Despite the fact that Superior Insurance was the party that encouraged the trial court to make this erroneous ruling, it now faults Mrs. Sheffield for relying on such ruling and accuses her of "inviting error." What erroneous ruling did Mrs. Sheffield invite? The erroneous ruling made with regard to this issue was the trial court's denial of the motion in limine and that error, clearly and undisputedly, was invited by Superior Insurance, not Mrs. Sheffield.

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

Superior Insurance has now abandoned the position it

maintained throughout the trial court proceedings that evidence of collateral source benefits, over objection, is admissible. Clearly, such position is indefensible. This Court's holding in Gormley v. GTE Products Corp., 587 So. 2d 455 (Fla. 1991), was unequivocal: introduction of evidence of collateral source benefits in a liability trial, over objection, is reversible error.

Despite the fact that Superior Insurance invited this error by persuading the trial court to deny Mrs. Sheffield's motion in limine, Superior Insurance attempts to persuade this Court to disregard such error by characterizing it as "harmless." However, Superior Insurance has not even acknowledged, much less satisfied, its burden of showing such error was harmless. This Court made clear in Gormley v. GTE Products Corp., 587 So. 2d at 459 (Fla. 1991), that the party who invites the trial court to commit such an error must bear the burden of proving that the error was harmless. Only where such party demonstrates to the reviewing court that the improperly admitted collateral source evidence clearly was not prejudicial, will such party be found to have satisfied its burden. See Gormley, 587 So. 2d at 459; Parker v. Hoppock, 695 So. 2d at 429 (Fla. 4th DCA 1997). See also, State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986)("If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by

definition harmful.")

Superior Insurance suggests in its Answer Brief on the Merits that this error was harmless because the collateral source evidence presented to the jury was all evidence of past collateral source benefits, and the jury's award for past medical benefits was the amount Mrs. Sheffield requested (AB 7). This argument might be persuasive if it were factually correct. However, the record on appeal shows that the evidence of collateral source benefits was not limited to past benefits. To the contrary, Mrs. Sheffield testified at trial that she continued to obtain medications free of charge through her employer, continued to receive physical therapy free of charge through her employer, and continued to receive group insurance benefits (T-I 38, 60). In fact, Superior Insurance itself elicited testimony from Mrs. Sheffield that she continued to receive such benefits and, assuming she continued to work for the same employer, likely would continue to receive such benefits in the future(T-I 60-61). In that the collateral source evidence was not strictly limited to past benefits, Superior Insurance cannot show that no prejudice occurred simply by pointing out that the jury's award for past medical expenses was in line with Mrs. Sheffield's request.

With regard to future damages, Superior Insurance argues that Mrs. Sheffield "minimized" any prejudice by testifying that

there was no guarantee she would receive collateral source benefits in the future (AB 8-9). This argument does not even begin to rise to the level required of a party who has the burden of proving that no prejudice occurred as a result of the admission of improper evidence. Superior Insurance's burden is not satisfied by suggesting that the error committed might not have been prejudicial because Mrs. Sheffield made a statement that might have minimized its prejudicial effect. Only where the party seeking to show that reversible error was harmless conclusively shows that the jury's verdict was not improperly influenced by improper evidence may the reviewing court accept such error as "harmless." See Gormley 587 So. 2d at 459; Parker v. Hoppock, 695 So. 2d at 429 (Fla. 4th DCA 1997). See also, State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).

Finally, Superior Insurance argues that the harmless error rule should be applied to this case because Mrs. Sheffield did not show the specific prejudice caused by the improper introduction of this evidence. First, as stated above, Mrs. Sheffield does not bear the burden of showing that the prejudice was not harmless. Rather, Superior Insurance bears the burden of showing that the error was harmless. Second, this Court need look no further than the ridiculously minimal award for future medical expenses to see the prejudice that was likely caused by the improper admission of collateral source benefit evidence.

As Judge Browning stated in his dissenting opinion to the majority decision,

> In the instant case, if the error is harmless, why did Superior oppose Sheffield's motion in limine? The answer is evident: because admission of evidence of collateral-source benefits was expected to have a 'dynamite" impact on the jury favorable to Superior.

Sheffield v. Superior Ins. Co., 741 So. 2d at 541. Apparently, the collateral source evidence did have a "dynamite" impact on the jury in this case, because it awarded a woman with a life expectancy of 51.4 years (T-II 190, 197) and annual medical costs of $1,957.00 (T-II 194; R-V 5) a total of only $6,554.61 for future medical expenses and future loss of ability to perform household services (R-III 149). Again quoting Judge Browning, Superior Insurance's "cries of harmless error now made should be disallowed on this record." Sheffield, 741 So. 2d at 540-541.

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

Superior Insurance's response to Mrs. Sheffield's argument on this issue completely fails to address or even acknowledge the fact that, at trial, Mrs. Sheffield made a standing objection to the admissibility of collateral source evidence and made an agreement with Superior Insurance that her own introduction of such evidence would not constitute a waiver of her motion or standing objection. Rather, Superior Insurance

simply ignores these facts, which are of such paramount importance to the review of this issue that Mrs. Sheffield devoted eight pages of her Initial Brief on the Merits to discussing them.

Instead of fairly and directly addressing the facts as they exist in this case, Superior Insurance ignores the facts and relies on Perez v. State, 717 So. 2d 605 (Fla. 3d DCA 1998), for its proposition that by being the first to elicit evidence of collateral source benefits, Mrs. Sheffield waived her right to argue on appeal that the denial of her motion in limine was reversible error.

Perez v. State is easily distinguishable from this case, in part, because of the precise facts referred to above and ignored by Superior. In Perez, while the defendant properly filed a motion in limine seeking to preclude Williams rule evidence, he failed to object to the introduction of such evidence at trial thus waiving his right to appellate review of the issue pursuant to applicable Florida law. Furthermore, while he was the first to introduce Williams rule evidence, he made no agreement with the State that his introduction of such evidence would not constitute a waiver of his motion in limine or standing objection. Here, Mrs. Sheffield made a standing objection, on the record, to the admission of collateral source evidence and made an agreement with Superior Insurance, again on the record,

that being the first to introduce such evidence would not constitute a waiver of her motion in limine and standing objection to the admissibility of such evidence. Clearly, the holding in Perez does not control the resolution of the issue presented in this case.

The record on appeal shows that Mrs. Sheffield did all she could to ensure that her objections to collateral source evidence would not be waived, and further did all she could to ensure that her own introduction of such evidence would not later prejudice her. She was entitled to rely on the assurances made by opposing counsel and confirmed by the trial court, and she was entitled to rely on settled case law as espoused in Porter v. Vista Bldg. Maint. Services, Inc., 630 So. 2d 205 (Fla. 3d DCA 1993). This Court should encourage professionalism among attorneys by requiring that they honor their agreements, not punish Mrs. Sheffield for relying on such an agreement and settled case law.

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.

In its Answer Brief on the Merits, Superior Insurance did not challenge Mrs. Sheffield's contention that the law reflected in 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), is directly applicable to this issue. As stated in Mrs. Sheffield's Initial Brief on the Merits, those courts held 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 experts; or (3) present other evidence that creates a direct conflict with the evidence of permanency. 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.

Moreover, although Superior Insurance's position on this issue is primarily based upon its contention that the jury was free to reject the uncontroverted expert testimony on the issue of permanency because of the surveillance tape it introduced into evidence, it made no effort to distinguish this case from Jarrell v. Churm, 611 So. 2d 69, a case that is remarkably analagous to the case at bar. In Jarrell, the plaintiff's treating physician testified that she suffered permanent injuries to her neck and lower back as a result of an automobile accident. 611 So. 2d at 70. The physician testified that one of the bases for his diagnosis was his objective findings of

muscle spasms in the back of the plaintiff's neck. 611 So. 2d at 70. The defendant offered no countervailing expert testimony, but presented a surveillance videotape showing the plaintiff turning her head to look at her automobile and carrying furniture from the house to the garage. 611 So. 2d at 70. The issue before the Fourth District was whether the plaintiff was entitled to a directed verdict on the issue of permanency. 611 So. 2d at 70. In rejecting the defendant's contention that the surveillance videotape created a jury issue as to permanency, the Fourth District stated:

> [I]t is entirely possible that the activities performed by plaintiff as demonstrated by the videotape were consistent with the expert's diagnosis. It was incumbent upon the defense either to present its own expert testimony that the videotape illustrated a malingering plaintiff, or, at the very least, to inquire of plaintiff's expert whether the activities engaged in by plaintiff had any substantial impact on his professional opinion that plaintiff had suffered a permanent injury. For example, if the medical expert's opinion of permanency of the neck injury had been based upon evidence that the plaintiff could not rotate her neck more than ninety degrees to the right, then the videotape showing casual movement and rotation considerably in excess of ninety degrees might be enough to take the issue to the jury.
>
> The foregoing implies, and therefore we explicitly recite, that, based solely upon consideration of evidence which does not clearly and directly contradict an expert opinion or the facts upon which that opinion is predicated, a jury of lay persons cannot be credited with having the technical expertise to totally disregard an expert medical opinion. There were no such direct conflicts in the record of these proceedings.
>
> The defense could have presented its own expert

> testimony, or it could have cross-examined plaintiff's expert to demonstrate to the jury that the activities engaged in by plaintiff were inconsistent with a diagnosis of permanent injury. The defense having failed to do so, the jury was not free to make its own diagnosis. We therefore reverse and remand with directions to enter the directed verdict on the issue of permanency and for a trial on damages.

611 So. 2d at 70.

In the instant case, Superior Insurance never asked any of the doctors who testified whether the videotape of Mrs. Sheffield would change their opinions that her injuries were permanent. In fact, during Superior Insurance's direct examination of Dr. Richards, it failed to elicit from Dr. Richards the facts that Superior Insurance had requested him to view the videotape, he had viewed it, and it had not changed his opinion that her injuries were permanent. Rather, Mrs. Sheffield's counsel elicited these facts in his cross-examination of Dr. Richards (T-III 349-350).

The videotape on which Superior Insurance relies for its position shows Mrs. Sheffield for a total of 54 seconds walking across a parking lot with an apparently normal gait and normal range of motion in her neck. Superior Insurance did not even suggest in its Answer Brief on the Merits how this tape was relevant to the issue of permanency, much less demonstrate how the tape could support a finding by the jury that Mrs. Sheffield's injuries were not permanent. The lack of relevancy of this videotape to the issue of permanency is reflected in the

testimony of Superior Insurance's own expert witness, Dr. Richards.[1]

Clearly, the videotape Superior Insurance introduced in evidence in no way rebutted the consistent testimony of all three expert witnesses that Mrs. Sheffield's suffered a permanent injury. This lack of rebuttal evidence is reflected in Superior Insurance's vague and inadequate response to the case law and argument Mrs. Sheffield presented in the Initial Brief on the Merits.

Superior Insurance next argues that this Court's opinions in Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So. 2d 911 (Fla. 1995), and Weygant v. Fort Myers Lincoln Mercury, Inc., 640 So. 2d 1092 (Fla. 1994), support its position that the jury was free to reject the uncontroverted medical testimony on the issue of permanency. However, this Court's opinion in Leisure Resorts is not even marginally relevant to the issue presented here. That case dealt with a contractor's statutory warranty of fitness, not a permanent injury issue. While Weygant is at least relevant to the issue presented, in that

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[1] Dr. Richards testified that his examination of Mrs. Sheffield showed that her gait was normal and she had good range of motion in her neck (T-III, 239, 313, 320). These findings had no effect, however, on his opinion that she sustained a permanent injury. (T-III 240). Furthermore, he testified that he viewed the videotape prior to trial and it did not change his opinion of permanency (T-III 349-350).

case this Court merely pointed out that a jury may reject expert testimony on the issue of permanency "when there exists relevant conflicting lay testimony." 640 So. 2d 1094. Jarrell recognized that principle and found that the defendant did not satisfy its burden merely by presenting videotape evidence in which it appeared that the plaintiff had normal range of motion in her neck. Similarly, in this case, Superior Insurance did not satisfy its burden merely by presenting videotape evidence showing Mrs. Sheffield with an apparently normal gait and normal range of motion in her neck.

Finally, although Superior Insurance made no such argument at either the trial court level or to the First District, it now latches onto Judge Benton's reading of the medical evidence and argues that "[t]he medical testimony on permanency was mixed at best." (AB 16). Interestingly, however, it makes no attempt to cite to any portions of the record showing that such evidence was "mixed." Superior Insurance's complete failure to make such an argument at the trial court and First District level, and to demonstrate the basis for such an argument at this level, shows that this argument is meritless.

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,
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 Reply Brief on the Merits has been furnished by regular U.S. Mail this _____ day of October, 2000, to W. ALAN WINTER, ESQUIRE, Attorneys for Respondent, The Winter Law Firm, 1301 Riverplace Boulevard, Suite 2210, Jacksonville, Florida 32207.

TERESA BYRD MORGAN, P.A.

By_____
Teresa Byrd Morgan
Florida Bar No. 0698954
302 East Duval Street
Lake City, Florida 32055
904/755-1977 (office)
904/755-8781 (facsimile)
Attorneys for Petitioner