IN THE SUPREME COURT OF FLORIDA

ORIGINAL

CASE NO: **SC01-2430**

CHESTER R. MORRISEY, JR. and LAURA MORRISEY, his wife,

Petitioners,

vs.

THOMAS M. OWEN,

Respondent.

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Application For Discretionary Review of A Decision Of
The District Court Of Appeal, Fourth District

Petitioners' Reply Brief On The Merits

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PREFACE

This is a proceeding for discretionary review of a decision of the Fourth District Court of Appeal based on conflict with a decision of this court and a decision of the Third District Court of Appeal.

The petitioners, Chester R. Morrisey, Jr. and Laura Mrrisey, his wife, were the plaintiffs before the trial court and the appellees before the Fourth District Court of Appeal. The respondent, Thomas M. Owen, was a defendant before the trial court and the appellant before the Fourth District Court of Appeal. In this brief the parties will be referred to by name or as plaintiffs and defendant.

The following symbol will be used in this brief:

(R.___ p.___) record on appeal;

(T.___) trial transcript.

QUESTIONS PRESENTED

(Raised by Petitioners)

I. Whether a finding of a permanent injury is required under *Auto-Owners Ins. Co. v. Tompkins,* 651 So. 2d 89 (Fla. 1995) and § 627.737(2), Fla. Stat. (1993), in order for a jury to award economic damages for lost wages for the balance of plaintiff's work life and to award future medical damages for plaintiff's life expectancy.

II. Whether the trial court erred in granting defendants a set-off from the verdict for past social security disability payments paid to plaintiff, but in denying an off-set from collateral source benefits of the amounts paid into the social security system by plaintiff's employers on his behalf.

(Raised by Respondent)
(Restated by Petitioners)

III. Whether the trial court abused its discretion in refusing to grant a mistrial based on the testimony of Dr. Charles Benedict, who did not express new opinions at trial and expressed opinions for which he had the necessary expertise.

IV. Whether the trial court abused its discretion in refusing to grant a mistrial based on the testimony of Dr. Linda Bland.

SUMMARY OF ARGUMENT

The decision of the Fourth District Court of Appeal in *Owen v. Morrisey,* 793 So. 2d 1018 (Fla. 4th DCA 2001), conflicts with this court's decision in *Auto-Owners Ins. Co. v. Tompkins,* 651 So. 2d 89 (Fla. 1995), and with the decision of the Third District Court of Appeal in *Hamilton v. Melbourne Sand Transport,*

Inc., 687 So. 2d 27 (Fla. 5th DCA 1997). Because of the conflict between these decisions, this court has jurisdiction to hear this cause on the merits.

This court should clarify that under its decision in *Auto-Owners Ins. Co. v. Tompkins,* it is not necessary for the jury to find that plaintiff sustained a permanent injury as a result of the accident where, as here, the accident aggravated a pre-existing condition and caused the future economic damages that will last for the balance of the plaintiff's life.

The evidence in this case established the plaintiff's future economic damages with reasonable certainty. The jury was properly instructed regarding aggravation of a pre-existing condition. The jury obviously could not apportion the damages. The jury was justified in awarding damages for the entire condition. The decision of the Fourth District Court of Appeal should be reversed and remanded with instructions to reinstate the jury verdict and judgment entered thereon.

This court should address the second issue regarding plaintiff's right to an offset from collateral source benefits of the amounts paid into the Social Security system by plaintiff's employers on his behalf. Alternatively, this issue should be remanded to the Fourth District Court of Appeal for consideration.

This court should decline to address issues III and IV raised by the defendant because he did not file a notice to invoke the discretionary jurisdiction

of this court.[1] In the event this court addresses this issue, it should affirm the decision of the Fourth District Court of Appeal on these points. There was no abuse of discretion by the trial court in permitting the testimony of Dr. Benedict and Dr. Bland.

[1] The plaintiffs have filed a motion to strike the defendant's argument on points III and IV. Because that motion is still pending, the plaintiffs have addressed these issues in this brief. This court should disregard those arguments in the event the court grants the motion to strike.

ARGUMENT

I. Whether a finding of a permanent injury is required under *Auto-Owners Ins. Co. v. Tompkins*, 651 So. 2d 89 (Fla. 1995) and § 627.737(2), Fla. Stat. (1993), in order for a jury to award economic damages for lost wages for the balance of plaintiff's work life and to award future medical damages for plaintiff's life expectancy.

Contrary to defendant's assertions, the evidence established with reasonable certainty Chester Morrisey's future medical expenses and lost earnings. The uncontradicted testimony of Sharon Griffin, a rehabilitation consultant and counselor, established that Chester Morrisey suffers from a failed back syndrome and is totally unemployable. (R.13 p.1133) According to Griffin, his post injury earning capacity is zero and is attributable to his pain, the failed back syndrome and all of the medication he takes. (R.13 p.1133) The pain medications interfere with Morrisey's ability to work. (R.13 p.1133) Moreover, the morphine pump has side effects and is a significant impediment to a person's ability to work. (R.13 p.1137) The defendants presented no evidence to contradict this testimony of Sharon Griffin.

In 1992, Mr. Morrisey earned $41,108. (R.13 p.1126) Dr. Bernard Pettingill, an economist, testified that the past lost income from December 28, 1993 to the time of trial was $167,801. (R.14 p.1254) According to Dr. Pettingill, future, unreduced lost earning capacity is $1,276,832.00 and the value of lost future fringe benefits are $191,958. (R.14 p.1257-1258) The present value of the

future lost earning capacity and fringe benefits are $870,564 and $191,958, respectively. (R.14 p.1258)

Sharon Griffin prepared a life care or medical needs care plan based on input from Chester Morrisey's treating physicians. (R.13 p.1159 *et seq.*) Based on that life care plan, the economist calculated that future medical needs would cost $1,558,825 and that the value of future loss of household services is $92,660. (R.14 p.1260) The present value of future medical needs is $487,133. (R.14 p.1260) Dr. Pettingill testified that the future economic losses, reduced to present value are $1,554,467. (R.14 jp.1261) The total sum for past and future economic losses, reduced to present value, is $1,912,964.00, according to Dr. Pettingill. (R.14 p.1261)

The jury awarded total economic damages of $1,806,048.11. (R.2 p.377-381) As demonstrated above, this damages award was established by the evidence with reasonable certainty. Thus, a finding of permanent injury is not necessary in order to uphold this award. The claimant did not require surgery prior to this accident. This accident caused the need for surgery. The failed back surgeries and morphine pump implant are the cause of the future damages.

II. Whether The Trial Court Erred In Granting Defendants A Set-Off From The Verdict For Past Social Security Disability Payments Paid To Plaintiff, But In Denying An Off-Set From Collateral Source Benefits Of The Amounts Paid Into The Social Security System By Plaintiff's Employers On His Behalf.

The trial court erred in denying an offset from the collateral source setoff for the amounts paid into social security on plaintiff's behalf by his employers. Section 768.76(1), Florida Statutes, specifies that the reduction of plaintiff's damages by collateral source payments shall be offset by any amount contributed or paid on behalf of the claimant to secure his right to the collateral source. This provision would certainly encompass payments made by an employer to secure health insurance for an employee which insurance pays for treatment of his injuries. The statute should be interpreted to require an offset for employer contributions to social security.

Section 3101(a) of the Internal Revenue Code imposes a tax on the income of every individual for old-age, survivors and disability insurance. Since 1990, the tax has been 6.2 percent. Section 3111 of the Internal Revenue Code imposes an excise tax for old age, survivors and disability insurance on every employer, with respect to individuals in his employ, equal to 6.2 percent of the wages paid by the employer to the employee.

The defendant admits at pages 37-38 of his merits brief that the premium for employer supplied health insurance would be an offset. There is no reason to

treat the contributions to the social security system made by an employer on behalf of his employee any differently than one would treat employer supplied health insurance.

III. Whether the trial court abused its discretion in refusing to grant a mistrial based on the testimony of Dr. Charles Benedict, who did not express new opinions at trial and expressed opinions for which he had the necessary expertise.

Owen complains that Dr. Benedict was allowed to use diagrams depicting his analysis of the accident and pictures. These diagrams were merely demonstrative aids and were not admitted in evidence. The diagrams are not a part of the record on appeal. Thus, this court cannot even determine if this was harmful error. There was no requirement that these non-evidentiary, demonstrative aids be listed on the pretrial statement. The defendant had the photographs that Dr. Benedict used. (R.8 p.420) Moreover, the Standard Jury Instructions contemplate that a witness can use demonstrative aids at trial. Instruction 1.7(a) provides:

> This witness will be using (identify demonstrative or visual aid(s)) to assist in explaining or illustrating [his][her] testimony. The testimony of the witness is evidence; however, [this][these] (identify demonstrative or visual aid(s)) [is][are] not to be considered as evidence in the case unless received in evidence, and should not be used as a substitute for evidence. Only items received in evidence will be available to you for consideration during your deliberations.

This jury instruction, although not in effect at the time of this trial, is consistent with cases holding that a witness may draw a diagram to illustrate or explain his testimony. *Landrum v. State,* 79 Fla, 189, 84 So. 535 (Fla. 1920); *Blackwell v. State,* 69 Fla. 453, 68 So. 479 (Fla. 1915).

Owen contends that Dr. Charles Benedict developed new opinions that were contrary to his deposition testimony after the time of his deposition and that the trial court erroneously permitted him to testify at trial regarding the purportedly contradictory opinions. There is no merit to this contention. During trial, the court gave extensive consideration to this issue, reviewed Dr. Benedict's deposition testimony and determined that the testimony was not a change in testimony. (R.8 p.414-422) The trial court did not abuse its discretion in admitting the evidence.

The cases that Owen cites as authority on this issue are all either factually and/or legally distinguishable, or are simply inapplicable. For instance, *Belmont v. North Broward Hospital District,* 727 So. 2d 992 (Fla. 4th DCA 1999), is factually distinguishable. There, one of the defendant doctors in a medical malpractice case testified during the plaintiff's case in chief that when he operated on the decedent, he found that her aorta had been perforated and that there was a needle stick in the mesentery that was in direct line with the needle stick in the aorta. He testified during the plaintiff's case that he sewed up both of those perforations in the aorta. He also stated that these perforations resulted from a diagnostic procedure that was performed on the decedent to detect internal bleeding.

In a pretrial deposition another defendant testified that he, in reviewing the autopsy report, recalled that the medical examiner found a perforation in the decedent's aorta. This defendant also acknowledged in that deposition that the perforation could have occurred during the diagnostic procedure that he had performed. This deposition testimony was read to the jury during the plaintiff's case in chief.

During the defense case, both physicians were called as witnesses and changed their testimony about the existence of perforations in the aorta "180 degrees." They testified in the defendants' case that the decedent's aorta had never been perforated. They changed their testimony because, during trial, the defense attorney had them examine the decedent's aorta which had been preserved at the medical examiner's office. They decided, after the mid-trial examination of the aorta, that the aorta did not contain any punctures. That simply is not what happened in this case and thus Owen's reliance on *Belmontt* is misplaced.

Similarly, Owen's reliance on *Grau v. Branham,* 626 So. 2d 1059 (Fla. 4DCA 1993), is also misplaced. In that case, plaintiff's counsel had two expert witness physicians examine the plaintiff after the trial had commenced and the experts then gave opinions which were contrary to their deposition testimony. In that case, the Fourth District held that once trial begins, except under extraordinary circumstances, the lawyers have a right to expect that discovery and examinations must cease. That is not what occurred in this case.

Likewise, *Office Depot, Inc. v. Miller,* 584 So. 2d 587 (Fla. 4DCA 1991), involved an expert medical witness who examined the plaintiff at the request of defense counsel and reached an opinion. He submitted a detailed medical report and testified in a pretrial deposition that the accident caused the plaintiff's disc herniation. However, before trial, defense counsel contacted the expert witness and asked him to again review plaintiff's medical history. As a result of that review the expert reversed his opinion and decided that plaintiff was suffering from progressive degeneration of the cervical disc which was wholly unrelated to the accident. Plaintiff's counsel objected to this testimony on the grounds that he had not been advised of the expert's reversal of opinion. Defense counsel admitted that he had not advised plaintiff's counsel of that reversal of opinion because no one had asked for it. These facts are substantially distinguishable from this case. This case does not involve a flat-out reversal of prior deposition testimony about causation.

Likewise, *Auto Owners Ins. Co. v. Clark,* 676 So. 2d 3 (Fla. 4DCA 1996), is factually distinguishable. That case involved testimony by a neurosurgeon regarding a treatment session which occurred after the discovery deadline had expired. This case does not.

Department of Health and Rehabilitative Services v. Spivak, 675 So. 2d 241 (Fla. 4DCA 1996), is also distinguishable. In that case the plaintiff's economist was deposed one month prior to trial. On deposition, he was specifically asked whether he was instructed to do anything about life care plans or asked to form

opinions as to the cost of the plaintiff's future medical care. He responded that he had not been asked to do that. Prior to trial, the defendant moved in limine to preclude any testimony by the economist and by the rehabilitation expert as to the cost of a future life care plan. At that pre-trial hearing, the court directed that if the information regarding these matters was not disclosed as of 5:00 on the day of the hearing, the court would not permit the testimony.

Twelve days later, at 4:50 pm the afternoon before trial was to begin, plaintiff delivered correspondence that disclosed for the first time that the economist would testify as to his newly formed opinion that a life care plan for plaintiff would cost approximately $22 million. The trial judge directed the economist to submit to an updated deposition during the evening following the first day of trial. During that deposition, the expert was asked whether he had any other opinions as to the cost of the child's care and treatment, to which he responded "no." At trial, over objection, the court permitted the economist to testify not only about the life care plan, but also about additional costs for the care and treatment of the child that had not been previously disclosed. Those expenses totaled $6 million. The Fourth District reversed, noting that presentation of a changed opinion is tantamount to permitting an undisclosed adverse witness to testify. That is not the situation in this case.

Garcia v. Emerson Electric Co., 677 So. 2d 20 (Fla. 3dDCA 1996), is also distinguishable. In that case, prior to trial the court ruled that video tapes of tests that were completed at the time of an expert's deposition would be admissible and

that video tapes of tests that were completed after that time would be excluded. However, during trial, the court reversed its pretrial ruling and admitted the previously excluded tests. In addition, the court denied plaintiff's expert permission to sit in the court room during examination of the manufacturer's expert; thus plaintiff's expert never knew what the manufacturer's experts opinions were about these additional tests until he took the stand himself. Those, again, are not the facts in this case.

The defendant also contends that Dr. Benedict's opinion testimony was inadmissible because he has no medical training. The defendant relies on *Mattek v. White,* 695 So. 2d 942 (Fla. 4th DCA 1997), as authority for the proposition that this testimony was inadmissible. That case is factually distinguishable. In *Mattek,* a physicist gave opinion testimony regarding whether the plaintiff suffered a permanent injury. Dr. Benedict did not testify regarding whether plaintiff sustained a permanent injury. He testified about kinematics—the field of his expertise—and the effect that the forces exerted would have had on plaintiff's body. He was imminently qualified to render such opinion testimony.

In *Houghton v. Bond,* 680 So. 2d 514 (Fla. 1st DCA 1996), the First District determined that testimony by Dr. Benedict that was similar to his testimony in this case was admissible. In *Houghton*, Dr. Benedict testified that 90% of the plaintiff's injuries were caused by his hitting the dashboard due to his failure to wear a seatbelt. The court concluded this testimony was not "medical opinion." The court found that Dr. Benedict's testimony dealt with occupant

kinematics, and not medical causation, and was admissible. The same is true in this case.

Occupant kinematics is the study of the motions of an occupant's movements inside a vehicle. (R.9 p.437-438) Dr. Benedict's advanced degree in mechanical engineering was in the field of kinematic dynamics and the study of forces and of motion on different bodies. (R.9 p.438) Dr. Benedict has testified as an expert over 200 times in Florida courts in the field of occupant kinematics. (R.9 p.438)

Biomechanical engineering is the use of engineering in terms of linkages and how mechanical systems fit together as it relates to the human body, bone structure, muscles and ligaments. (R.9 p.439) Dr. Benedict is not a medical doctor. (R.9 p.441) One does not need a medical degree to form and give opinions in the field of biomechanical engineering. (R.9 p.441) As a biomechanical engineer, Dr. Benedict can tell what will happen to the system mechanically, and what forces will do with the system. Bone is a material that will break under certain loading, or a joint can be torn apart or crushed because of the loading. (R.9 p.442)

Dr. Benedict formed opinions in this case in the field of occupant kinematics and biomechanical engineering. (R.9 p.442) Occupant kinematics deals with the position, direction, and configuration of a person while forces act upon him. (R.9 p.443) According to Dr. Benedict, once one understands what the body

is doing mechanically, then one can determine where the loading occurs and what happens loading-wise to different parts of the body like the vertebrae. (R.9 p.444)

According to Dr. Benedict, when the plaintiff jammed on the brakes and pushed in the clutch—his buttocks came off the seat. (R.9 p.453) Because Morrisey was holding on to the steering wheel, and staying in that position, there was a downward force through his shoulders into his spine from the neck down and from the shoulders down (R.9 p.453) The discs distribute the force and the pressure over all the discs. (R.9 p.454) Bodies are designed so that there is an equal distribution of loads on the discs. That is not what happened in this accident. (R.9 p.455)

According to Dr. Benedict, from a kinemattic viewpoint, Morrisey's spine was twisted and he rotated counter-clockwise, pushing up with his legs, pulling down with his shoulders and twisting. (R.9 p.456) As Morrisey twisted the steering wheel, his shoulder went to the right. In order for Morrisey to get the leverage to do that, he had to turn the wheel. His body went to the right. (R.9 p.456) His vertebral column compressed and rotated so that it bent over to the right. (R.9 p.457) Morrisey's vertebrae were then out of alignment so that he was rotated and twisted and compressing on the edge of the right side. The disc had to twist and he unloaded the left side and compressed the right side. (R.9 p.457)

Dr. Benedict's testimony dealt with kinematics. It did not deal with medical causation. As the court concluded in *Houghton v. Bond, supra,* Dr. Benedict is

qualified to render opinion testimony in the field of kinematics. The trial court did not abuse its discretion in permitting him to render such testimony in this case.

IV. Whether the trial court abused its discretion in refusing to grant a mistrial based on the testimony of Dr. Linda Bland.

Defendants never deposed Dr. Bland prior to trial. (R.11 p.773) Thus, her testimony was not a "midtrial" change in testimony or a "surprise." Moreover, the main objection to Dr. Bland's testimony at trial was that it was cumulative. (R.11 p.772; 778) The trial court did not abuse its discretion in admitting her testimony.

The defendant also asserts that because Dr. Bland was not listed as an "expert," she should not have been permitted to give opinion testimony regarding permanency and causation. She was a treating physician and was certainly entitled to give opinion testimony regarding causation and permanency of the conditions that she treated. The records of the original emergency room report that Dr. Bland reviewed were in evidence without objection by defendant. Defendant simply cannot be heard to complain about the testimony of a witness whom he chose not to depose.

CONCLUSION

The decision of the Fourth District should be quashed and remanded with instructions to reinstate the verdict and judgment thereon. The case should also be remanded with instructions to award plaintiffs an off-set for contributions to social security made on plaintiff's behalf by his employers. Alternatively, this second issue should be remanded to the Fourth District Court of Appeal to consider and address the issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this **28th** day of **June, 2002** to: **Lorenzo Williams,** Gary Williams et al., Post Office Box 3390, Ft. Pierce, FL 34948-3390 (counsel for plaintiffs); **Douglas deAlmeida,** Neale & deAlmeida, 221 W. Oakland Park Boulevard, Third Floor, Fort Lauderdale, FL 33311 (counsel for defendant Owen); and **Nancy Little Hoffmann,** 440 East Sample Road, Suite 200, Pompano Beach, FL 33064 (appellate counsel for defendant Owen).

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is written in 14 point "Times New Roman" font.

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