SUPREME COURT OF FLORIDA

BETH LINN and ANTHONY LINN,

Appellants,

v.

SC Case No. SC05-134
DCA Case No. 1D03-4152

BASIL D. FOSSUM, M.D.,

Appellee.

APPELLANTS' REPLY BRIEF

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CONFLICT WITH *SCHWARZ*

Dr. Fossum unsuccessfully tries to recast the central issue in Schwarz v. State, 695 So.2d 452 (Fla. 4th DCA 1997), in an attempt to convince this Court that the Fourth District's decision does not conflict with the First District's decision in this case. Dr. Fossum states that Schwarz "is not really a 'conduit for hearsay' case, but rather an improper bolstering case." (Ans. Brf., p. 13). However, the Fourth District made clear that it did ***not*** view the case in that manner:

> [t]he precise issue before us is ***not*** whether Dr. Burton could testify that other experts agreed with him, but rather whether he could testify that he had consulted other experts in his same field.

Schwarz, 695 So.2d at 455 (emphasis added). Instead, the court stated that:

> our holding rests on the ground that [the testimony's] relevance is outweighed by possible prejudice, in that it could be inferred that other nontestifying experts agreed with him.

Id. at 455-56.

The decision in Schwarz reflects a straightforward application of Section 90.403, Florida Statutes ("Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. . . ."). The court concluded that the unfair prejudice of the testimony ***outweighed*** the values served by Section 90.704, Florida Statutes, upon which Dr. Fossum so heavily relies. The court distinguished the typical situation involving Section 90.704,

e.g., a party "having his expert psychiatrist testify as to the results of a C.A.T. scan." Schwarz, 695 So.2d at 455, citing Bender v. State, 472 So.2d 1370 (Fla. 3d DCA 1985). The Schwarz court held that, unlike such a situation, "the expert in the present case consulted with other experts in his same specialty." Schwarz, 695 So.2d at 455. The rationale for the decision is that it would be unfairly prejudicial to permit the expert to mention even the fact of a consultation (let alone the substance) because "[t]here is too much of a possibility of an inference being drawn that these experts agreed with Dr. Burton." Id.

Perhaps recognizing that Schwarz is indistinguishable from this case, Dr. Fossum ultimately argues that Schwarz should be overruled as "contrary to the purpose and text of section 90.704 and to the cases interpreting that statute." (Ans. Brf., p. 25). The problem with this argument (and with the decision of the First District) is that it places entirely too much emphasis on Section 90.704. The Schwarz court correctly recognized that Section 90.704 is not the end of the analysis, but only the beginning.

One of the cases cited by Dr. Fossum, Kim v. Nazarian, 216 Ill.App.3d 818, 576 N.E.2d 427 (Ill. App. 1991), aptly addresses the tension between Federal Evidence Rules 403 and 703 (the counterparts to Sections 90.403 and 90.704). Kim was a medical malpractice case involving the alleged failure of the defendants to diagnose a patient's tuberculosis. At trial, the court permitted defendants' expert to testify that the opinions of

other, non-testifying physicians corroborated his opinions. Kim, 576 N.E.2d at 430-33. For example, the trial court permitted the following exchange between defense counsel and an expert witness:

> Q. In finalizing your opinion, did you consult with various other radiologists in your department?
>
> A. Yes, which is my usual case. I take the films to other members of my department. In this case, I took them to a bone radiologist and I took them to a pediatric radiologist, both of whom were instructing residents at the time, and I put the films up and asked them if they could see anything wrong with the films, and neither one was able to see anything wrong with the films, at which time I asked them if this turned out to be a case of tuberculosis, where do you think it would be, and they said we don't know, because we can't see anything wrong with the films.

Id. at 432.

This testimony is remarkably similar to what occurred in this case and in Schwarz. In Kim, as in this case, the jury returned a verdict in favor of the defendants. However, the appellate court reversed and remanded, finding that no principle exists that would permit "an expert's testimony to simply parrot the corroborative opinions solicited from non-testifying colleagues." Kim, 576 N.E.2d at 434.

The Kim court acknowledged that Federal Evidence Rule 703 allows an expert to testify as to the opinion of a non-testifying expert where that opinion "would serve simply as a premise supporting the testifying expert's opinion on a broader

issue." Kim, 576 N.E.2d at 434. It cited as an example the situation in which a psychiatric expert may rely on the reports of a patient's psychiatric history in arriving at his diagnosis. Id., citing People v. Anderson, 113 Ill.2d 1, 495 N.E.2d 485 (Ill. 1986). However, where the opinion of the non-testifying expert does not serve as "a narrow premise" upon which the testifying expert's opinion is based, but rather is offered to corroborate the ***same issue*** as that addressed by the testifying expert, such testimony is inadmissible. Kim, 576 N.E.2d at 434. Again, Kim is a case cited by ***Dr. Fossum***, yet it stands for the exact proposition that the Linns urge this Court to accept.

The situation at issue in this case, and in Schwarz and in Kim, is wholly different from the typical situation that Section 90.704 is designed to address. Typically, an expert reviews a variety of information and then applies his or her education, training and experience to form ***his or her*** opinion. The common sense rationale of Section 90.704 is that a practicing physician does not require formal authentication of a radiologist's x-ray report (or other similar data) before relying on it to make a diagnosis, and thus courts should not require formal admission of every such report into evidence before permitting the expert to refer to it. Nobody disagrees with that proposition. The statute is more properly viewed as an administrative attempt to streamline the trial ***process*** rather than as a ***substantive*** limitation of the hearsay doctrine.

Equally unpersuasive is Dr. Fossum's argument that because consultation with other physicians is natural and even

advisable, experts should be permitted to relay their hearsay conversations. (See, e.g. Ans. Brf., p. 27 ("There is no question that urologists rely on consultations with other urologists in the normal course of their practice.")). Admission of Dr. Weaver-Osterholtz's testimony does not follow, *ipso facto*, from the fact that doctors regularly consult with one another. After all, if the pertinent consideration is what happens in the real world, then an expert should be permitted to testify that a learned treatise supports his or her opinions. However, it is well settled in Florida that such testimony is inadmissible. See, e.g., Tallahassee Memorial v. Mitchell, 407 So.2d 601 (Fla. 1st DCA 1981). Other considerations are obviously at play.

The Schwarz and Kim decisions recognize that all data "reasonably relied upon by experts" is not automatically admissible in evidence. Section 90.403 acts as a counterbalance when the nature of the data makes it unfair to admit the testimony without the benefit of cross-examination. Courts across the country follow the same approach. They do so based upon concerns underlying the hearsay rule -- in particular the unfairness of permitting a jury to reach a verdict based upon purported opinions of experts who do not state their opinions in court, under oath, and are not subject to cross-examination. ***There is a line***. In this case, the circuit court and the district court erred not only in failing to recognize that Dr. Weaver-Osterholtz's testimony clearly falls on the inadmissible

side of the line, but also by failing to acknowledge the existence of the line in the first place.

The cases cited by Dr. Fossum from other jurisdictions almost universally recognize these principles and, as in Florida, do not permit an expert to serve as a mere conduit for another non-testifying expert opinion. See, e.g. State v. Lundstrom, 161 Ariz. 141, 776 P.2d 1067 (Ariz. 1989) ("We caution also that if the testifying expert merely acts as a conduit for another non-testifying expert's opinion, the 'expert opinion' is hearsay and is inadmissible."); Patey v. Lainhart, 366 Utah Adv. Rep. 21, 977 P.2d 1193 (Utah 1999) ("Rule 703 cannot be used to introduce evidence through an expert for purposes other than the expert's conclusions and thus circumvent other rules of evidence."). These are cases cited by ***Dr. Fossum***.

Another case cited by Dr. Fossum aptly articulates the line between permissible reliance on colleagues to support a testifying expert's conclusions, and impermissible relaying of hearsay. In Primavera v. Celotex Corp., 415 Pa. Super. 41, 608 A.2d 515 (Pa. Super. Ct. 1992), the court held that:

> [a]n "expert" should not be permitted simply to repeat another's opinion or data without bringing to bear on it his own expertise and judgment. Obviously in such a situation, the non-testifying expert is not on the witness stand and truly is unavailable for cross-examination. [Footnote omitted]. The applicability of the rule permitting experts to express opinions relying on extrajudicial data depends on the circumstances of the particular case and demands the exercise,

> like the admission of all expert testimony, of the sound discretion of the trial court. Where, as here, the expert uses several sources to arrive at his or her opinion, and has noted the reasonable and ordinary reliance on similar sources by experts in the field, and has coupled this reliance with personal observation, knowledge and experience, we conclude that the expert's testimony should be permitted.

Id. at 52-53.

The facts in Primavera demonstrate the type of circumstances contemplated by Section 90.704. That case involved a claim for injuries resulting from workplace exposure to asbestos. Several doctors testified on behalf of the plaintiff. Each had either personally examined the plaintiff or had personally examined the slides of the biopsied tissue, or both. Id. at 46. However, they also relied upon the findings and observations of three doctors who did not testify at trial: (1) a radiologist who reviewed x-rays and submitted a radiology report describing his findings; (2) a surgeon who reported his surgical findings; and (3) a pulmonologist who prepared a summary of the hospital records and a description of plaintiff's medical history. Id. at 46-47.

The Primavera court concluded that the testifying experts' reliance on the out-of-court information did not violate the hearsay rule. In doing so, the court emphasized that "the core testimony from [plaintiff's] testifying experts was based on personal observation and first-hand analysis of the medical evidence." Id. at 47. The court further noted that "[t]he references made to the reports of other doctors were slight and

formed only a minor portion of the data relied on by the testifying experts to form their in-court conclusions." Id.

The situation in this case is certainly different from Primavera. Dr. Weaver-Osterholtz did not examine or treat Beth Linn. Though she reviewed the medical records and depositions, this review led her to conclude that she would have taken a more proactive approach than Dr. Fossum (the same conclusion as the Linns' experts). The purported "curbside consult" with the non-testifying physicians is not simply a "narrow premise" supporting Dr. Weaver-Osterholtz's conclusions -- it was the ***sole*** basis for her testimony that Dr. Fossum complied with the standard of care. Dr. Weaver-Osterholtz was permitted to simply repeat to the jury the opinions of other doctors who did not testify under oath and who (purportedly) took a more lenient view of Dr. Fossum's performance. It is, at best, unclear whether any of these doctors actually reviewed any medical records. The reason the record is unclear is because the other doctors were not subject to cross-examination. If there was ever a case in which the hearsay should be excluded, this is it.

THE LINNS PROPERLY PRESERVED THE ERROR

For the first time in this Court, Dr. Fossum makes the remarkable argument that the Linns failed to preserve their argument regarding the impermissible hearsay on appeal. This is a strange argument in light of the fact that the Linns specifically cited Schwarz in their motion in limine (R. III/397/401-02) and handed a copy to the judge at the hearing on the first day of trial (A. 21).

In addition to their pretrial objections, the Linns renewed their objection ***during*** trial:

> MR. SIPPLE: Just for the record, I would like to renew my objection that I made in the outset of the case to any hearsay and use of this witness as a conduit for hearsay from other physicians. (A. 136).
>
> ...
>
> MR. SIPPLE: Same objection, Your Honor, ***to the extent that the basis for the standard is whatever communication she had with these other doctors***. It's just the same objection was made against me. It is necessarily based on hearsay and, therefore, is objectionable. (A. 137) (emphasis added).

Nevertheless, Dr. Fossum suggests that the Linns failed to preserve error because their counsel did not say the words "improper bolstering" at trial. (Ans. Brf., p. 10).[1] The pretrial and trial objections noted above clearly preserved the issue for review. There is no requirement that counsel utter certain magic words in order to preserve such an issue for review. See, e.g., Neely v. State, 883 So.2d 861, 864 (Fla. 1st DCA 2004) ("When a party makes a hearsay objection, a trial court must consider all possible hearsay violations, exceptions and exclusions."). Dr. Fossum cites no contrary authority and his waiver argument should be summarily rejected.

[1] It is perhaps reflective of the seriousness with which Dr. Fossum asserts this argument that it appears in the "Summary of Argument" section of Dr. Fossum's brief, but is never revisited in the "Argument" section. Nor did Dr. Fossum make this argument in the First District.

THE CORRECT REMEDY IS REMAND FOR TRIAL ON DAMAGES

Dr. Fossum devotes only three pages of his brief to the appropriate remedy. His discussion attempts to distinguish ***one*** of the cases cited by the Linns (Schindler Elevator Corp. v. Carvalho, 895 So.2d 1103 (Fla. 4th DCA 2005)), but ignores the other four cases cited: O'Grady v. Wickman, 213 So.2d 321, 324 (Fla. 4th DCA 1968); Brooks v. Serrando, 209 So.2d 279 (Fla. 4th DCA 1968); Williams v. McNeil, 442 So.2d 269, 270-71 (Fla. 1st DCA 1983); and Pierce v. Smith, 301 So.2d 805, 806 (Fla. 2d DCA 1974). These cases stand for the proposition that expert testimony is required to show that a physician complied with the standard of care.

Dr. Fossum argues that "Linn has cited no case for the proposition that a directed verdict must be entered against a defendant who fails to offer expert testimony to rebut the plaintiff's case." (Ans. Brf., p. 38). Dr. Fossum argues that, even assuming the inadmissibility of Dr. Weaver-Osterholtz's testimony, the jury could nevertheless find in favor of Dr. Fossum based upon "[t]he cross-examination of Dr. Santa-Cruz" or "[o]ther evidence in the case." (Ans. Brf., p. 39). These assertions are both legally and factually incorrect.

Florida courts have addressed precisely the same issue in the context of expert medical opinions as to the permanency of injury. In Florida, "the status of permanency is a medical diagnosis." Jarrell v. Churm, 611 So.2d 69, 70 (Fla. 4th DCA 1992). Thus, "[i]ts existence, vel non, must initially be established by expert medical testimony in order to present a

prima facie case." Id. See also McElroy v. Perry, 753 So.2d 121, 124 (Fla. 2d DCA 2000) ("[a] plaintiff establishes a prima facie case of permanency by presenting expert testimony of permanency."). Once the plaintiff establishes a prima facie case, "***[t]he burden then shifts to the defendant to defeat the directed verdict*** by presenting countervailing expert testimony, severely impeaching the plaintiff's expert, or presenting other evidence which creates a direct conflict with the plaintiff's evidence." McElroy, 753 So.2d at 124 (emphasis added), citing Evans v. Montenegro, 728 So.2d 270, 271 (Fla. 3d DCA 1999), Holmes v. State Farm Mut. Auto. Ins. Co., 624 So.2d 824 (Fla. 2d DCA 1993), and Jarrell, 611 So.2d 69.

The situation in Jarrell is similar to the situation in this case. There, an expert testified that the plaintiff suffered from permanent neck and back injuries. Jarrell, 611 So.2d at 70. The defense offered no expert testimony. Instead, its evidence "consisted of the plaintiff's previous medical history and a surveillance tape showing her ability to turn her head and to carry items of household furniture." Id.

Based upon this record, the Fourth District held that the plaintiff was entitled to a ***directed verdict*** on the issue of permanency. Id. The court held that "[i]t was incumbent upon the defense either to present its own expert testimony that the video tape 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. . . ." Id. at 71. The court concluded:

> 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. . . ***We therefore reverse and remand with directions to enter a directed verdict for plaintiff on the issue of permanency and for a trial on damages***.

Id. at 71 (emphasis added).

The exact same rationale applies in this case and the Linns seek the exact same remedy. Just as in the case of permanency determinations, the plaintiff in a medical malpractice case is required to present expert testimony in order to establish a prima facie case of deviation from the standard of care. O'Grady v. Wickman, 213 So.2d 321, 324 (Fla. 4th DCA 1968), citing Brooks v. Serrando, 209 So.2d 279 (Fla. 4th DCA 1968) (expert testimony is required to show that a physician complied with the pertinent standard of care). There is no question (and Dr. Fossum tacitly concedes) that the Linns (through the testimony of Dr. Santa-Cruz) established a prima facie case of violation of the standard of care.

Once the plaintiff establishes a prima facie case of medical malpractice, the ***burden shifts*** to the defendant to prove compliance with the standard of care. The permanency cases cited above (Mcelroy, Evans, and Holmes) imply, and the Jarrell court explicitly states, that the defense normally must discharge its burden through expert testimony. While possible

to do so via cross-examination of the plaintiff's expert or other evidence in the case, such non-expert evidence must be particularly forceful. The reason is that "a jury of lay persons cannot be credited with having the technical expertise to totally disregard an expert medical opinion." Jarrell, 611 So.2d at 71.

Disregarding Dr. Weaver-Osterholtz's tainted testimony, there is nothing in the record approaching the level of proof necessary for Dr. Fossum to rebut the Linns' prima facie case. Dr. Fossum points to his counsel's cross-examination of Dr. Santa-Cruz. The Linns encourage the Court to review the entirety of this cross-examination, which comprises a mere 14 pages of the record. (A. 100-114). There is nothing approaching the type of "severe" impeachment necessary to avoid a directed verdict. See McElroy, 753 So.2d at 124.

One line of questioning pursued by Dr. Fossum on cross-examination involved the positive radiology reports upon which Dr. Santa-Cruz relied in concluding that Dr. Fossum should have pursued a more proactive approach. Dr. Fossum's attempt to parse the words of the radiologist report is representative of the entire examination:

> Q. Under the impression, where the radiologist says large amount of fluid present, superior to the urinary bladder, ascites or post inflammatory changes cannot be excluded?
>
> A. Yes.

Q. It's your testimony, sir, that those are very positive findings by the radiologist?
A. Those are positive findings, yes.

Q. I think your term -- your words were very positive findings?

A. I may have used the word "very."

Q. And you see the word "might" there; do you not?

. . .

A. Might be – yes, yes, sir.

Q. Is that a very positive word to you?

A. I think you're missing the point.

(A. 102-03).

Dr. Fossum does not even attempt to identify any "[o]ther evidence" in the case that "may also have cast doubt upon Dr. Santa-Cruz's opinions." (Ans. Brf., p. 39). Rather, Dr. Fossum retreats to the shopworn argument that the Linns failed to properly provide a record. (Ans. Brf., p. 39, citing Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150, 1152 (Fla. 1970)). This argument is unavailing. In addition to the Clerk's record, transcripts of the entire testimony of both Dr. Santa-Cruz and Dr. Weaver-Osterholtz, including cross-examination of both, were before the First District and discussed extensively in its decision. (See A. 73-226). Dr. Fossum was free to supplement the record with any other portions of the trial transcript he deemed pertinent. See Rule 9.220(a), Fla. R. App. P.

Dr. Fossum chose not to seek supplementation of the record before the First District and now argues that the cross-examination of Dr. Santa-Cruz is sufficient to avoid a directed verdict on the issue of liability. Dr. Fossum took a calculated risk that this Court would disagree with that assertion, much as he took a calculated risk at trial that Dr. Weaver-Osterholtz's testimony would be deemed inadmissible and he would be left without an expert. In short, to the extent either party has violated the Applegate doctrine, it is Dr. Fossum. There is clearly no basis in the record to rebut Dr. Santa-Cruz' testimony and thus the Linns are entitled to entry of judgment in their favor as a matter of law on the issue of liability.

CONCLUSION

Plaintiffs/Appellants respectfully request the Court to quash the decision of the First District Court of Appeal and remand with instructions that the First District remand to the circuit court for entry of a judgment in favor of Appellants and against Dr. Fossum on the issue of liability, and for a new trial solely on the issue of damages.

Respectfully submitted,

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CERTIFICATE OF TYPE SIZE AND STYLE

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