IN THE SUPREME COURT OF FLORIDA

HOWARD B. WALD, JR.,

Petitioner,

v .

Case No. SC08-1143

ATHENA F. GRAINGER,
aspersonal representative of the
Estate of SAM GUS FELOS,

Respondent.
___________________________/

RESPONDENT'S JURISDICTIONAL BRIEF

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

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PRELIMINARY STATEMENT

Respondent adopts Petitioner's Preliminary Statement. In addition, references to the opinion of the First District Court of Appeal in this case will be referred to as "O" and the page number, i.e., [O: 2]. Petitioner's Initial Brief requesting jurisdiction will be referred to as "IB" and the page number, i.e., [IB: 2].

JURISDICTIONAL STATEMENT

As this Court has repeatedly acknowledged, its jurisdiction "extends only to the narrow class of cases enumerated in Article V, Section 3(b) of the Florida Constitution." Gandy v. State, 846 So.2d 1141, 1143 (Fla. 2003). See also Fla.R.App.P. 9.030(a). Moreover, as was explained in Reaves v. State, 485 So.2d 829 (Fla. 1986), conflict jurisdiction must be established based on what is set forth in the opinions of the District Courts of Appeal, and not in the record proper. The Reaves Court elaborated:

> The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict. As we explain in the text above, we are not permitted to base our conflict jurisdiction on a review of the record or on facts recited only in dissenting opinions. Thus, it is pointless and misleading to include a comprehensive recitation of facts not appearing in the decision below, with citations to the record, as petitioner provided here.

Id., at 830, n. 3.

STATEMENT OF THE CASE AND FACTS

This cause arises out of a decision by the First District Court of Appeal in an appeal by Respondent Felos, Appellant-Defendant below, from a final judgment in favor of Petitioner Wald, Appellee-Plaintiff below, in the trial court for injuries suffered in an auto accident. [O: 1-2] Wald sought damages for injuries to his neck and back. [O: 2] He did not seek damages for a thigh condition which caused no "ongoing daily chronic pain." [O: 2] Felos admitted fault for the accident, and the only issues for the jury were causation, permanency, and damages. [O: 2] The trial court grant Wald a directed verdict as to permanency, but only as to the thigh injury, and instructed Respondent's counsel that he could argue the issue of permanency of the other injuries to the jury. [O: 2] However, the question whether Wald had suffered a permanent injury as a result of the accident was not on the jury form. [O: 3]

On appeal, Respondent asserted that the trial court erred in granting a directed verdict as to permanency. [O: 2] The appellate court held that there was conflicting testimony as to the permanency of Wald's neck and back injury, and that the evidence of a permanent thigh injury was ambiguous. [O: 3] The

appellate court held that the issue of the permanency of Wald's injuries was a jury question, and reversed the final judgment and remanded the case for a new trial. [O: 4]

SUMMARY OF THE ARGUMENT

The decision of the First District Court of Appeal in this case is wholly consistent with Florida law, as expressed by this Court, other district courts, and as formulated in Florida Standard Jury Instruction (Civil) 2.2(b).

Petitioner's assertion that the appellate court ruled that "juries are free to disregard even uncontradicted and unanimous expert medical opinions of both parties on the issue of permanency" [IB: 3] is not supported by a reading of the opinion itself. In this case, the appellate court decision expressly recites that the evidence as to permanency was "conflicting" and "ambivalent" [O: 3], and that Wald himself was not claiming damages for the thigh injury which caused no "ongoing daily chronic pain." [O: 3] On these facts, the appellate court's reversal the trial court's directed verdict as to permanent injury is not in conflict with any of the reported decisions on which Petitioner relies. Aravena v. Miami-Dade County, 928 So.2d 1163, 1166 (Fla. 2006) (one test for conflict jurisdiction is whether the holding of a case is irreconcilable with holdings of other cases on the same or similar facts).

Therefore, Respondent respectfully requests that this Court find that there is no express and direct conflict and that it does not have jurisdiction under Rule 9.030(a)(2)(A)(iv).

ISSUE

Respondent respectfully suggests that the issue as framed by Petitioner relates to dicta in the opinion correctly reciting black-letter Florida law, but does not reach the actual ruling of the district court. Respondent would restate the issue as follows:

> DOES THE OPINION BELOW, WHICH HOLDS THAT PERMANENCY IS A JURY QUESTION WHEN THERE IS CONFLICTING OR AMBIVALENT TESTIMONY AS TO PERMANENCY, EXPRESSLY AND DIRECTLY CONFLICT WITH OPINIONS OF OTHER DISTRICT COURTS OF APPEAL AND THIS HONORABLE COURT, WHICH HOLD THAT JURIES ARE NOT FREE TO REJECT UNCONTRADICTED EXPERT TESTIMONY ABSENT SOME CONFLICTING LAY TESTIMONY OR EVIDENCE?

ARGUMENT

Petitioner's sole basis for claiming conflict jurisdiction in this case is that "the evidence concerning the permanency of this [thigh] injury was completely undisputed." [IB: 4] This is the argument Wald made on appeal, which was rejected by the appellate court. The opinion in this case does not hold that a directed verdict as to permanency is error when the evidence is completely undisputed. The opinion expressly holds to the contrary. Petitioner actually is asking this Court to review and reverse the appellate court's decision that there was conflicting and ambivalent evidence as to permanency. However, the purpose of conflict jurisdiction is not to review the facts stated in the decision or to reverse the appellate court's characterization of those facts. As this Court noted in Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980), quoting Gibson v. Maloney, 231 So.2d 823, 824 (Fla. 1970) "It is conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari."

Petitioner contends that the appellate court erred when it cited a principle of law in direct conflict with other courts and this Court by stating that "juries are free to disregard even uncontradicted expert testimony." [IB: 4] However, it is a correct statement of Florida law that "A jury is free to weigh the credibility of expert witnesses as it does any other witness, and reject even uncontradicted

testimony." [0:3]

This opinion is distinguishable on its reported factual basis from the cases cited by Petitioner as conflicting. In Williamson v. Superior Ins. Co., 746 So.2d 483, 486 (Fla. 2d DCA 1999), the opinion states that "[t]here is no evidence to refute Mr. Williamson's claim of a permanent injury." In Campbell v. Griffith, 971 So.2d 232, 236 (Fla. 2d DCA 2008), the opinion states that, when "the medical evidence on permanence . . . is undisputed, unimpeached, or not otherwise subject to question," a jury cannot arbitrarily reject it. In Evans v. Montenegro, 728 So.2d 270, 271 (Fla. 3d DCA 1999), the opinion states that, "where the evidence of injury and causation is such that no reasonable inference could support a jury verdict for the defendant," a directed verdict may not be improper. In State Farm Mutual Automobile Ins. Co.v. Orr, 660 So.2d 1061, 1063 (Fla. 4th DCA 1995), the opinion states that a directed verdict is not erroneous where the evidence is such that "no reasonable inference to be drawn from it would support a jury verdict for the defendant." In this case, unlike Williamson, Campbell, Evans, or Orr, the opinion states that there was evidence to refute Wald's claim of a permanent thigh injury, both through the ambivalence of the medical testimony and Wald's own testimony that he was not seeking damages for the thigh injury.

For the same reason, the opinion in this case correctly follows, and does not

conflict with, the decisions of this Court. This Court consistently has held that a jury may weigh the credibility of expert witnesses and reject even uncontradicted expert medical testimony. Easkold v. Rhodes, 614 So.2d 495, 497 (Fla. 1993):

> Florida Standard Jury Instruction (Civil) 2.2(b), relating to the believability of expert witnesses . . . provides that the jury "may accept [expert witness] opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, *the reasons given by the witness for the opinion expressed,* and all the other evidence in the case." Fla.Std. Jury Instr. (Civ.) 2.2(b) (emphasis added)

Similarly, the opinion in this case does not conflict with the holding in Weygant v. Fort Myers Lincoln Mercury, Inc., 640 So.2d 1092 (Fla. 1994). In Weygant, this Court held that a jury may base its verdict on lay testimony, even when the medical evidence to the contrary is uncontradicted. Weygant reaffirmed that testimony of a medical or other expert witness should not be given greater weight or deference than any other evidence, but may be considered and accepted or rejected by a jury as any other evidence. In Chomont v. Ward, 103 So.2d 635 (Fla. 1958), this Court held that the jury was entitled to disbelieve the testimony of plaintiff as to his alleged injuries, due to conflicts between his deposition and trial testimony. In the instant case, the testimony concerning Wald's thigh injury was ambivalent; therefore, there is no conflict with the law as stated in Weygant, Easkold, or Chomont.

The appellate court decision does not hold that "the issue of permanency should always be submitted to the jury even absent any conflicting evidence." [IB: 9] Rather, the decision holds that the trial court erred in not allowing the jury to render a verdict as to permanency, in light of conflicting and ambivalent medical testimony. [O: 3] Petitioner's attempt to create a conflict between this decision and the other cited decisions impermissibly asks this Court to look outside the opinion itself, and overturn the express factual premise on which the decision is based. As this Court stated in Reaves, *supra*, at 830:

> Petitioner is asking that we find conflict with *Nowlin*. In order to do so, it would be necessary for us either to accept the dissenter's view of the evidence and his conclusion that the statements were involuntary, or to review the record itself in order to resolve the disagreement in favor of the dissenter. Neither course of action is available under the jurisdiction granted by article V, section 3(b)(3) of the Florida Constitution. Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision.

Accordingly, there is no express and direct conflict jurisdiction under Article V, section 3(b)(3) of the Florida Constitution or Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure, and Petitioner's request should be denied.

The opinion in this case does not confuse the standard for a directed verdict, as Petitioner asserts. [IB: 9] Generally, the issue of permanency in auto accident cases is a jury question, particularly when the only injuries claimed are soft-tissue

injuries, as in this case. State Farm Mutual Auto Ins. Co. v. Orr, *supra*, at 1063. Where there is conflicting or ambivalent evidence as to permanency, as in this case, it is a jury question, and directing a verdict is erroneous.

Nor does the First District's opinion in this case render directed verdicts obsolete. This decision does not provide legal authority which would support denial of a directed verdict as to permanency when there is "no reasonable inference" from which a jury might decide for defendant, because this case is easily distinguishable on its facts from that scenario. In this case, the evidence of permanent injury was conflicting and ambivalent, and contradicted by Wald's own stipulation that he was not seeking damages for the only complaint on which the motion for directed verdict was granted.

CONCLUSION

Respondent respectfully requests that this Court deny Petitioner's request, because there is no express and direct conflict between the decision of the First District Court of Appeal in this case and the decisions of this Court or other appellate courts.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing has been furnished to on this 10th day of July, 2008, to Eric S. Block, Esquire, 3127 Atlantic Blvd, Suite 3, Jacksonville, Florida 32207; Reginald Estell, Esquire, 505 N. Liberty Street, Jacksonville, Florida 32202; and Don Detky, Esquire, Debra Carter Taylor, Esquire, Tyson & Associates, 1200 Riverplace Boulevard, Suite 640, Jacksonville, Florida 32207; S. Perry Penland, Jr., Esquire, 233 East Bay Street, Suite 310, Jacksonville, Florida 32202.

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CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that this brief complies with the font requirements of 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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Stephen J. O'Hara, Jr.