

UNCONTRADICTED EVIDENCE OF EXPERTS

By Ted Babbitt

The case of Wald v. Grainger, 35 Fla. L. Weekly S211 (Fla. 2011), was a fairly standard personal injury automobile accident in which the defendant admitted liability. Therefore, the sole questions for the jury to determine were causation, the permanency of the plaintiff's injuries and damages. There were three injuries at issue. The plaintiff sought damages for his neck and back injuries but not for his thigh injury because he claimed that he had no ongoing chronic pain in that area. The defendant's expert provided contrary testimony with respect to plaintiff's alleged neck and back injury but agreed that the plaintiff's thigh numbness was permanent and was related to the accident.

At the conclusion of all of the evidence, the plaintiff moved for a directed verdict on the issue of permanency and the trial court granted it as to the plaintiff's thigh injury only. After a \$1 million damage award, the defendant appealed and the First District reversed in Grainger v. Wald, 982 So. 2d 42 (Fla. 1st DCA 2008) finding that the trial court had erred in granting a directed verdict as to permanency as that was a jury question. The First District bottomed its opinion on the precept that the jury was free to weigh the credibility of the expert witnesses and reject any testimony regarding permanency including uncontradicted testimony.

The Supreme court reversed holding that a jury is not free to reject uncontradicted evidence on permanency and that under those circumstances, a directed verdict on permanency is appropriate. At S212 the Court concluded:

Nonetheless, where the evidence of injury and causation is such that no reasonable inference could support a jury verdict for the defendant, it is not improper to direct a verdict on the permanency issue for the plaintiff. Id. at 1063. A plaintiff can establish a prima facie case of permanency by presenting expert testimony of permanency. Once this is done, the burden shifts to the defendant to present countervailing expert testimony, severely impeach the plaintiff's expert, or present other evidence which creates a direct conflict with the plaintiff's evidence. See Evans v. Montenegro, 728 So. 2d 270, 271 (Fla. 3d DCA 1999) (holding that a directed verdict for the plaintiff on permanency was proper where the defendant did not impeach the plaintiff's expert and did not present conflicting evidence on permanency.) If the defendant succeeds in this endeavor, a jury question is presented; if not, a directed verdict on permanency is appropriate.

The First District's statement that the jury was free to weigh the testimony of the expert witnesses and accept or reject it in whole or in part even if it was uncontradicted is something that all of us have always assumed. The Florida Standard Jury Instruction (Civ) 2.2(b) states that a jury is free to "accept (the expert witness') 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 other evidence in the case." Nevertheless at Page S213, the Court held:

. . . . the jury's ability to reject the testimony

must be based on some reasonable basis in the evidence. This can include conflicting medical evidence, evidence that impeaches the expert's testimony or calls it into question, such as the failure of the plaintiff to give the medical expert an accurate or complete medical history, conflicting lay testimony or evidence that disputes the injury claim, or the plaintiff's conflicting testimony or self-contradictory statements regarding the injury.

What makes this opinion unexpected is the fact that the plaintiff was not claiming any severe pain from the thigh injury that the trial court determined required a directed verdict on permanency. In fact, the plaintiff was not making any claim at all for his thigh injury. The First District concluded that without any claim of pain from the thigh injury, there could be no sustainable damages awarded under Fla. Stat. 627.737(2) (2007) which requires a permanent noneconomic loss before damages can be awarded. The Supreme Court points out, however, that a permanent injury may or may not include pain in order to be compensable as a noneconomic loss. At Page S213, the Court holds:

Section 627.737(2)(b) provides that a plaintiff may recover damages in tort for pain, suffering, mental anguish, and inconvenience (noneconomic damages) because of a bodily injury arising out of the use of a motor vehicle only in the event that the injury "consists in whole or *in part* of . . . [p]ermanent injury within a reasonable degree of medical probability." (Emphasis added). Thus, as long as part of the bodily injury arising out of the motor vehicle accident involves a permanent injury "within a reasonable degree of medical probability," the plaintiff can recover noneconomic damages related to his pain, suffering, mental anguish, and inconvenience

for all of the injuries related to the accident.

Thus the Court concludes that since there was no dispute but that plaintiff suffered a permanent thigh injury, and he was entitled to a noneconomic award for all of his injuries which the jury found to be compensable, a directed verdict in permanency was appropriate.

This case hold, contrary to popular belief, there where there is uncontradicted evidence of a plaintiff's permanent injury, a directed verdict on that subject is appropriate and that a jury is not free to reject uncontroverted evidence of experts.

NOTE: BECAUSE A NUMBER OF PEOPLE HAVE REQUESTED COPIES OF PAST ARTICLES, A COMPILATION OF THESE ARTICLES IS NOW AVAILABLE TO MEMBERS OF THE PALM BEACH COUNTY BAR ASSOCIATION, FREE OF CHARGE, BY CALLING (561) 684-2500.