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Combating Permanency Without a Defense Medical Expert

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This brief, practical article presents strategies for challenging claims of permanent injury without relying on a defense expert.

In Florida, a motor vehicle personal injury plaintiff cannot recover damages for pain and suffering unless the plaintiff first satisfies the Motor Vehicle No Fault Threshold.[1] One way for a plaintiff to meet the threshold is to show a permanent injury.[2] Often, the plaintiff seeks to make this showing by presenting the testimony of a treating doctor.

A defendant has at least two ways of rebutting this testimony without calling its own medical expert. First, a defendant can rebut the testimony by showing the plaintiff failed to disclose prior similar injuries to the doctor. Second, a defendant can rebut the testimony through lay testimony.

I. Failure to disclose prior similar injuries to the doctor.

In *Easkold v. Rhodes*,[3] a plaintiff presented testimony from two of her treating doctors. The first doctor performed surgery on the plaintiff's left knee, and in so doing discovered a fracture in the kneecap. Because the only trauma the plaintiff had disclosed to the doctor was the motor vehicle accident at issue in the case, the doctor opined the accident caused the fracture. He also opined that the accident resulted in permanent injuries to the plaintiff's neck, back and left knee. The plaintiff told the second doctor she had no prior neck or back pain. The second doctor went on to opine that the accident caused permanent injuries to the plaintiff's neck, back and left knee. However, deposition testimony of the plaintiff's regular physician, although not commenting on permanency, showed that before the accident the plaintiff received treatment for pain in her neck, back and left leg. Neither of the plaintiff's first two doctors had access to the medical records corresponding to these pre-accident complaints. The plaintiff's own testimony showed that the plaintiff at first denied prior problems with her neck, back and knees, but later admitted she left her job after being hit in the leg at work, and that she "probably had a little backache or headache" prior to the motor vehicle accident.[4]

The jury awarded the plaintiff past and future medical expenses, as well as damages for loss of earning ability. The jury concluded the plaintiff did not sustain a permanent injury, and therefore awarded no damages for pain and suffering. The trial court denied a motion for new trial in which the plaintiff argued "that the uncontradicted medical evidence indicated that she had sustained permanent injuries as a result of the auto accident."[5] An appellate court reversed and remanded for a new trial, finding the plaintiff's expert testimony on permanency was uncontroverted because the defendant presented no medical testimony to the contrary, and because the plaintiff's first two doctors did not testify that the information regarding the plaintiff's undisclosed, prior pain complaints and treatment would have affected their opinions about permanent injury.[6]

The Florida Supreme Court quashed the appellate court opinion and remanded with instructions to reinstate the jury verdict, rejecting the idea that "a doctor's medical opinion cannot be disregarded even if the medical history given to the doctor by the plaintiff is false or incomplete, unless appropriate questions are put to the doctor specifically

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inquiring about the effect of the false or omitted information on the doctor's previously expressed opinion."[7] The court ruled that the plaintiff's failure to disclose her prior injuries to the treating physicians, in addition to her inconsistent deposition testimony, would have been a reasonable basis for the jury to find no permanent injuries.[8]

Other courts have reached similar conclusions. In *Wald v. Grainger*,[9] the Florida Supreme Court noted a jury could reasonably reject a plaintiff's medical expert opinion on permanency due to "failure of the plaintiff to give the medical expert an accurate or complete medical history."[10] In *21st Century Centennial Insurance Co. v. Thynge*[11] the Fifth District reversed a plaintiff's directed verdict on permanency in part because the plaintiff's doctor was not provided information on prior accidents and injuries. In *Reid v. Medical & Professional Management Consultants, Inc.*,[12] the First District affirmed the lower court's denial of a plaintiff's motion for directed verdict on permanency in part because of the plaintiff's inaccurate statements to her doctor regarding pre-accident medical complaints.[13] In *Travieso v. Golden*,[14] the Fourth District found no merit in the plaintiff's "claim that the jury was not free to reject the testimony of the doctors with respect to the issue of permanency . . . where there is evidence that [the plaintiff] may not have accurately reported her medical history or present condition" to the doctors.[15]

II. Lay testimony.

Florida Standard Jury Instruction 601.2(b) provides that a jury can reject expert testimony where other evidence so warrants. The Florida Supreme Court has noted that lay testimony alone can rebut the testimony of an expert:

> A jury is free to weigh the opinion testimony of expert witnesses, and either accept, reject or give that testimony such weight as it deserves considering the witnesses' qualifications, the reasons given by the witness for the opinions expressed, and all the other evidence in the case, *including lay testimony*.[16]

Therefore, "[a] defendant in a personal injury action is not required to present expert testimony to contradict the claimant's expert testimony of permanent injuries."[17]

In *Weygant v. Fort Myers Lincoln Mercury, Inc.*,[18] a personal injury plaintiff presented testimony of two neurologists, two psychiatrists and a neurosurgeon. All of these medical experts testified the plaintiff's injuries were a result of the motor vehicle accident at issue in the case and were permanent. The defendant did not present any expert testimony. However, the defendant did present the plaintiff's testimony from a prior workers' compensation matter, in which the plaintiff testified the injuries from the car accident were not incapacitating and that her pain was due to her workplace injury. In addition, the defendant showed the plaintiff had given confusing medical histories to her experts, creating the possibility that the experts' opinions were based on inaccurate predicates.

In a special verdict, the jury concluded that the motor vehicle accident was not the cause of the plaintiff's injuries. The plaintiff appealed, arguing she was entitled to a new trial because the jury's conclusion was contrary to the uncontroverted medical testimony.[19] The appellate court affirmed, ruling that the verdict was not against the manifest weight of the evidence in light of the plaintiff's conflicting testimony and the potentially inaccurate predicates of the experts' opinions.[20] The plaintiff appealed to the Florida Supreme Court, which also affirmed, stating:

> even though the facts testified to by the medical expert are not within the ordinary experience of the members of the jury, the jury is still free to determine their credibility and to decide the weight to be ascribed to them in the face of conflicting lay testimony. Under *Easkold, when jurors are faced with lay testimony which is in conflict with expert medical testimony, it is within their province to reject the expert testimony and base their verdict solely on the lay testimony.*[21]

III. Surgery does not mean permanency.

To circumvent these defense strategies, a plaintiff who has undergone surgery may argue that the surgery itself mandates a finding of permanency. Note that Florida law does not support such an argument. In *Easkold*, the supreme court affirmed a finding of no permanency despite the plaintiff having undergone knee surgery.[22] Similarly, in *Emanuele v. Perdue*,[23] the Fourth District reversed an order granting new trial where a jury found no permanency despite the plaintiff having undergone TMJ surgery.

Conclusion

Strategies for responding to claims of permanent injury without calling a defense expert should be part of defense counsel's toolkit. In the appropriate case, the plaintiff's failure to be candid with treating physicians, or lay testimony from another witness, will be an effective response.

1 § 627.737, Fla. Stat. (2017).
2 *Id.* at § 627.737(2)(b).
3 614 So. 2d 495 (Fla. 1993).
4 *Id.* at 496.
5 *Id.*
6 *Id.* at 496-97.
7 *Id.* at 497.
8 *Id.* at 498.
9 64 So. 3d 1201 (Fla. 2011).
10 *Id.* at 1206.
11 ---So. 3d---, 2017 WL 6541770 at *2 (Fla. 5th DCA Dec. 22, 2017).
12 744 So. 2d 1116 (Fla. 1st DCA 1999) (per curiam).

[13] *Id.* at 1118-19.
[14] 643 So. 2d 1134 (Fla. 4th DCA 1994).
[15] *Id.* at 1135. For additional examples, see *Weygant v. Fort Myers Lincoln Mercury, Inc.*, 640 So. 1092, 1094 (Fla. 1994) (noting jury is free to reject uncontroverted expert medical testimony on causation where opinion is based on inaccurate predicate); *Thynge*, 2017 WL 6541770, at *2 ("Because Dr. Paine was not given complete information regarding Mrs. Thynge's prior medical history, his opinions regarding causation and permanency were called into question, and the jury could properly reject them."); *Boyles v. A&G Concrete Pools, Inc.*, 149 So. 3d 39, 48-49 (Fla. 4th DCA 2014) (noting jury would be reasonable in rejecting plaintiff's medical expert testimony based upon "the lack of candor of the plaintiff in disclosing prior accidents, prior medical treatment, and prior or subsequent similar injuries"); *Brown v. Lunskis*, 128 So. 3d 77, 81 (Fla. 2d DCA 2013) ("It suffices to say that Dr. Creighton was not given a complete medical record regarding Mr. Lunskis, allowing the jury to reject Dr. Creighton's testimony."); *Fell v. Carlin*, 6 So. 3d 119, 121 (Fla. 2d DCA 2009) ("if the jury had a reasonable basis to conclude Fell was not candid with his doctors, it also had a basis to reject their opinions regarding whether he was injured as a result of the accident.").
[16] *Wald*, 64 So. 3d at 2015. (emphasis added); *see also Fell*, 6 So. 3d at 120 ("a jury may reject even uncontroverted expert medical testimony provided it has a reasonable basis to do so, such as where there is conflicting lay testimony."); *Hazerlrig v. Beuning*, 629 So. 2d 271, 272 (Fla. 2d DCA 1993) (reversing summary judgment on causation and permanency despite plaintiff presenting unrebutted expert medical evidence because "a jury may reject expert medical testimony in the face of conflicting lay evidence").
[17] *McCown v. Seidell*, 831 So. 2d 218, 219 (5th DCA 2002).
[18] 640 So. 2d 1092 (Fla. 1994).
[19] *Id.* at 1093.
[20] *Id*.
[21] *Id*. at 1094. (emphasis added).
[22] 614 So. 2d at 497.
[23] 693 So. 2d 1071 (Fla. 4th DCA 1997).