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IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, 2004

PHILLIP MORRIS, INC., et al.,	**	
Appellants,	**	CASE NO. 3D03-311
vs.	**	
SUZETTE AHRENDT JANOFF,	**	LOWER TRIBUNAL NO. 00-3153
Appellee.	**	

Opinion filed October 27, 2004.

An Appeal from the Circuit Court for Miami-Dade County, Leslie B. Rothenberg, Judge.

Greenberg Traurig, David L. Ross, Elliot H. Scherker, Elliot B. Kula, for appellants.

Hunter, Williams & Lynch and Steven K. Hunter, for appellee.

Before GODERICH, GREEN and FLETCHER, JJ.

GODERICH, Judge.

The defendants, Phillip Morris, Inc., et al., appeal from an order granting a new trial. We affirm.

The plaintiff, Suzette Ahrendt Janoff, brought a products liability action against Phillip Morris, Inc., et al. She alleged that her chronic sinusitis and other respiratory ailments were caused by exposure to environmental tobacco smoke (ETS) when she worked as a flight attendant from 1983 to 1996. After considering the testimony of several experts, the jury returned a verdict in favor of the defendants. The plaintiff moved for a new trial alleging that the defendants had impermissibly bolstered the testimony of their expert on re-direct examination. The defense argued that the plaintiff had either invited error or "opened the door" during the cross-examination of the defense expert. The trial court found that neither occurred, that the defense had engaged in improper bolstering of its expert witness, and that a new trial was warranted "due to the highly prejudicial nature of the improperly admitted evidence." The defendants' appeal follows.

During trial, prior to the defense experts testifying, the plaintiff moved in limine, pursuant to section 90.706, Florida Statutes (2002), to preclude the defense from bolstering their expert witnesses by asking them whether there was anything in the medical literature that supported their opinions. Defense counsel agreed that he could not ask his expert witnesses whether there were any specific authoritative texts that supported their opinions, but that the expert witnesses could

testify that their opinions were based on a general review of medical literature. After hearing arguments of counsel, the trial court permitted this limited inquiry.

On direct examination, one of the defense experts, Dr. Michael Anderson, a board certified internist, allergist and immunologist, opined that the plaintiff had chronic sinusitis. He explained that he had familiarized himself with the plaintiff's medical history by examining her medical records, CAT scans, and allergy testing, and by reviewing the depositions of the plaintiff's treating physicians. The defense then asked whether the expert had reviewed anything else in addition to items that are specific to the plaintiff. He responded, "I've reviewed some medical literature that is available." The defense then asked, "And do all the things that you've reviewed support the opinions that you're about to offer for this jury?" The expert responded affirmatively. He opined that the plaintiff's chronic sinusitis was caused by allergies, not ETS. He stated that when the plaintiff's sinuses were inflamed, large amounts of secondhand smoke may have aggravated her condition.

Thereafter, the plaintiff attempted to cross-examine this defense expert with information regarding chronic sinusitis found on the hospital's website where he had staff privileges. The plaintiff, however, was unable to effectively cross-examine the expert because he refused to recognize the source of the

information as authoritative. The expert did, however, recognize the authoritativeness of the Florida Allergy, Asthma and Immunology Society, an organization of which he was a member. The plaintiff then cross-examined him based on information contained in the organization's website linking ETS and chronic sinusitis. The plaintiff asked whether the expert agreed with the organization's statements on its website. He stated that sometimes he disagrees. When asked specifically about cigarette smoke, he replied that he believed that the website was stating that cigarette smoke aggravated sinus conditions, and therefore, cigarette smoke should be avoided. The expert explained further, "I don't think they're saying that cigarette smoke causes sinusitis because it's never been shown in any medical literature."

The plaintiff then asked the expert whether everything he knew about the case was what was given to him by the tobacco companies' attorneys. The expert denied that assertion. When asked whether he had spoken with the plaintiff's treating physician, the expert indicated that he had read the treating physician's deposition. The defense expert confirmed that he learned from reading the treating physician's deposition that the treating physician had been treating the plaintiff for ten years and had examined her personally many times. The defense

expert disagreed with the treating physician's choice of treatment (surgery), but stated that it was not malpractice.

On re-direct examination, defense counsel tried to rehabilitate his expert by using the two websites that were used during cross-examination to emphasize that nowhere do they state that exposure to cigarette smoke causes chronic sinusitis. Thereafter, the defense addressed the plaintiff's assertion that everything the defense expert had reviewed about the case was what had been given to him by the tobacco companies' attorneys. The defense asked, "Were there things that you reviewed that you got on your own?" The expert answered affirmatively explaining that he had also conducted a Medline search, a search of the medical libraries. Over the plaintiff's objection to bolstering, the expert explained the details of the search. Thereafter, over plaintiff's repeated objections to bolstering, defense counsel identified several authoritative textbooks and journals by name and asked the expert whether any of them concluded that exposure to ETS causes chronic sinusitis. The expert addressed each source individually stating that there was an absence of any such writing in any of those authoritative sources that came to that conclusion.

The defendants contend that the trial court erred by granting a new trial. We disagree.

Section 90.706, Florida Statutes (2002), titled, "Authoritativeness of literature for use in cross-examination," provides:

> Statements of facts or opinions on a subject of science, art, or specialized knowledge contained in a published treatise, periodical, book, dissertation, pamphlet, or other writing may be used in cross-examination of an expert witness if the expert witness recognizes the author or the treatise, periodical, book, dissertation, pamphlet, or other writing to be authoritative, or, notwithstanding nonrecognition by the expert witness, if the trial court finds the author or the treatise, periodical, book, dissertation, pamphlet, or other writing to be authoritative and relevant to the subject matter.

"Under section 90.706, authoritative publications can only be used during the cross-examination of an expert and cannot be used to bolster the credibility of an expert or to supplement an opinion of the expert that has already been formed." Erwin v. Todd, 699 So. 2d 275, 278 (Fla. 5th DCA 1997). In the instant case, on re-direct examination, defense counsel impermissibly bolstered Dr. Anderson's testimony by identifying specific authoritative publications and asking whether they lacked articles stating that exposure to ETS causes chronic sinusitis.

The defense argues that the plaintiff invited this purported error by eliciting the same testimony on cross-examination of the defense expert that she asserts as error. Specifically, the question that the defense urges invited error was whether the defense expert agreed with the information

contained in his organization's website regarding cigarette smoke and chronic sinusitis. The expert stated that he interpreted the information differently and explained that he did so because "it's never been shown in any medical literature." This answer referred to medical literature generally and did not identify any publication specifically. Therefore, it could not have invited the type of bolstering that occurred on re-direct examination where defense counsel listed by name authoritative publications that lacked articles relating ETS and chronic sinusitis.

Alternatively, the defense argues that the plaintiff "opened the door" by asking the defense expert on cross-examination whether everything the expert knew about the case had been given to him by the tobacco companies' attorneys. Again, we disagree.

Examining the context of this question reveals that after the expert denied that everything he knew about the case was what had been given to him by the tobacco companies' attorneys, the plaintiff followed with a series of questions that elicited that the expert had read the treating physician's deposition and learned that the treating physician had been treating the plaintiff for ten years and had examined her on many occasions. By asking this series of questions, the plaintiff was trying to discredit the defense expert's opinion by showing that the

treating physician had firsthand knowledge of the plaintiff's condition from her repeated examinations; whereas, any evaluation of the plaintiff's condition by the defense expert was suspect because he had never examined her personally, and his opinion was based solely on a "cold record." This line of inquiry did not open the door for the defense to identify by name a list of authoritative publications that agreed with his expert's opinion.

Further, this error was fundamental to a trial that the trial court characterized as a "battle of expert witnesses." A review of the record shows that the experts agreed that the plaintiff suffered from chronic sinusitis and only disagreed as to its cause. The purpose of listing the litany of authoritative sources that lacked articles linking chronic sinusitis to ETS was solely to bolster the defense expert's opinion by showing that his opinion must be correct because it was supported by the lack of articles stating otherwise.

The remaining points raised on appeal lack merit.

For these reasons, we affirm the order granting a new trial.

FLETCHER, J., concurs.

GREEN, J. (dissenting).

Respectfully, under the facts and circumstances of this case, I find that an order for new trial was not warranted because the error was unpreserved and/or cumulative. Accordingly, I dissent.

During the plaintiff's case in chief two experts testified that ETS causes respiratory tract diseases, but neither expert specifically found that ETS causes chronic sinusitis. Dr. Stroschein, one of the plaintiff's treating physicians, admitted on the stand that no scientific literature supported the conclusion that a causal link exists between ETS and chronic sinusitis.

Despite her own expert's admission, plaintiff moved to prohibit the defendants from asking their expert, Dr. Anderson, whether the scientific literature supports the position that ETS does not cause chronic sinusitis. Defense counsel assured the court that it was only going to delve into matters typically asked of experts, i.e., was there any scientific literature "out there" that conflicted with the expert's opinions, and whether there was any scientific literature that was inconsistent with the expert's opinion. Following a hearing, extensive legal

argument, and a recess to review the case law, the court found that:

> If the fact that he hadn't read anything out there that conflicts with his opinion is . . . the basis of his opinion, or in part, he may say so.
>
> But he cannot bolster his opinion by saying: And I've never read anything out there that conflicts with it.
>
> There's a difference. It's a fine line but a very distinctive one.

Plaintiff's lawyers did not object to this ruling. Dr. Anderson, in response to the question of what he did to prepare for his opinion in this case, stated:

> I've reviewed all of her medical records. I've read the depositions of her treating doctors. I've reviewed her CAT scans. I've reviewed her allergy testing.
>
> * * *
>
> I've reviewed some medical literature that's available.

Counsel then asked "[a]nd do all the things that you've reviewed support the opinions that you're about to offer to this jury?" Dr. Anderson replied, "Yes." Plaintiff's counsel did not object or seek a curative instruction for Dr. Anderson's testimony. During the course of Dr. Anderson's direct examination, he opined that exposure to ETS may have worsened the plaintiff's condition, but he did not believe that her exposure caused her medical problems.

On cross-examination, in an attempt to clarify his understanding of a paper published by the Florida Allergy and Immunology Society regarding ETS and chronic sinusitis, Dr. Anderson stated:

> I think what they're saying is [ETS] can aggravate a sinus condition, and the effect of that, what they want is for people to try and avoid it. I don't think they're saying that cigarette smoke causes sinusitis because its never been shown in any medical literature.

Plaintiffs counsel again did not object, move to strike, or seek other relief from the court with regards to this statement. Instead, counsel attempted to discredit the doctor by asserting, "everything you know about the case is what was given to you by the tobacco attorneys." The doctor responded, "No".

On redirect, defense counsel elicited from Dr. Anderson the items, including the leading texts in the field, that he used in reaching his opinion. The medical literature was not read to the jury or admitted into evidence. Instead, the doctor merely reiterated that he had found no articles in the medical texts to support the proposition that exposure to ETS causes chronic sinusitis.

Defendants' ear, nose, and throat expert, Dr. Kronberg, testified that he had reviewed the plaintiff's medical records, depositions, and spent several hours reviewing the medical literature in the preparation of his opinion. He diagnosed the

plaintiff as suffering from chronic sinusitis caused by allergies, re-occurring upper respiratory infections, anatomic abnormalities and scarring from surgery.

On cross-examination, in response to a question posed by plaintiff's counsel, Dr. Kronberg testified that: "[n]one of the [medical] literature I had up until that point had indicated that [ETS] was something that caused sinusitis, and nothing that I've read since then, with everything that I've been searching for, I can't find it." Again, no objections were made and no other relief was sought by plaintiff's counsel.

At the close of all the evidence, the jury returned a verdict in favor of the defendants. The plaintiff filed a motion for new trial arguing, in part, that:

> Counsel for the Defendants misled the Court concerning Florida law on the use of authoritative texts during direct-examination. Defense counsel led the Court astray by arguing that since Plaintiff's counsel had cross-examined upon authoritative texts, the door was opened for redirect examination for defense counsel to bolster the witness' testimony by referring to various authoritative texts and more prejudicially, to bolster the testimony of the defense expert witness by suggesting that there was no authoritative literature which was contrary to the defense expert's position. The Court was originally mislead by this improper argument and allowed Dr. Anderson (on re-direct) to testify as indicated . . . . The legal argument presented to the Court by counsel for the Defendant was contrary to the clear and established evidentiary law of the State of Florida.

In response, the defendants' claimed that they

did not improperly bolster their expert's opinion by the use of authoritative materials because:

> § 90.706 only prohibits introduction of "statements of facts or opinions contained in "a treatise and that did not occur; an expert can testify regarding the source of facts and data relied upon informing his opinion; and a party may re-examine a witness about matters raised during cross-examination. In addition, the allegedly improper testimony was cumulative to testimony which was properly introduced during the cross-examination of both parties' experts and, thus, any error was harmless.

The trial court found that Dr. Anderson's testimony was "clear bolstering," and that the plaintiff's attempted impeachment of Dr. Anderson did not "open the door" to such evidence. It also found that the testimony was not cumulative. Finally, the court granted a new trial finding that:

> This Court, in granting the Plaintiff a new trial does so due to the highly prejudicial nature of the improperly admitted evidence requiring a retrial and as a warning to lawyers who argue positions to the Court that they knew or should have known was contrary to the law. While the Defendants convincingly argued and persuaded this Court who announced its unfamiliarly [sic] with this area of the law, they did so without any authority to support their argument. It was also brought to this Court's attention in the Plaintiff's Motion for New Trial, that these [sic] same lawyer had made similar arguments to an experienced civil judge, . . . prior to the trial before this Court and were not permitted to do that which they argued to this Court was permissible. Lawyers should be cautioned that when they invite error, they do so at their own peril.

The Defendants appeal, arguing that the trial court erred in ordering a new trial based on a post-verdict reversal of a correct evidentiary ruling; and/or in ordering a new trial based upon unpreserved error. Essentially, the Defendants argue that the trial court's ruling regarding Dr. Anderson's testimony was proper, and even if it wasn't, the plaintiff failed to renew her objection to this testimony and therefore the "error" was unpreserved and waived. I agree, and accordingly, would reverse the order granting a new trial.

At trial, the court, after lengthy argument, ruled that Dr. Anderson could testify on direct examination that he hadn't read anything in the medical literature that conflicted with his opinion. Dr. Anderson did exactly that. Plaintiff's counsel did not object to Dr. Anderson's testimony on direct nor did counsel seek a new trial on the basis of this testimony. Thus, any error in the admission of Dr. Anderson's direct testimony was waived by the plaintiff and cannot provide the basis for an order for new trial. See Martinez v. Poly-Ply Corp., 29 Fla. L. Weekly D1947 (Fla. 3d DCA August 25, 2004) (holding that order for new trial based on unpreserved error cannot stand). See also Celatano v. Banker, 728 So. 2d 244, 245 (Fla. 4th DCA 1998) (finding trial court lacked jurisdiction to grant a new trial on grounds not preserved for review or fundamental error).

Moreover, Dr. Anderson's response to counsel's questions on cross-examination were also not objected to and a mistrial or curative instruction was not sought. This elicited cross-examination testimony[1] is, in essence, the same testimony as the testimony given on re-direct about which plaintiff bases her motion for new trial. Therefore, for this additional reason, I think the order for new trial was improper. See Allah v. State, 471 So. 2d 121, 122 (Fla. 3d DCA 1985) (party that elicits testimony on cross-examination cannot complain when adverse party elicits same testimony or explores the subject of the testimony); City of Miami Beach v. Klein, 414 So. 2d 620 (Fla. 3d DCA 1982); La Rocca v. State, 401 So. 2d 866, 868 (Fla. 3d DCA 1981).

Finally, Dr. Anderson's testimony was not the only evidence about the absence of medical literature finding a causal connection between ETS and chronic sinusitis. Such evidence was also presented through plaintiff's own expert, and Dr. Kronberg. Thus, I also believe that Dr. Anderson's comments were

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[1] Dr. Anderson's response to plaintiff's counsel's question regarding the paper published by the Florida Allergy and Immunology Society was:

> I think what they're saying is [ETS] can aggravate a sinus condition, . . . I don't think they're saying that cigarette smoke causes sinusitis because it's never been shown in any medical literature.

cumulative, and therefore, insufficient grounds for the granting of a new trial. See Quinn v. Millard, 358 So. 2d 1378, 1383 (Fla. 3d DCA 1978) ("The rule is well-established that even if error exists in the admission of expert testimony, the harmless error rule will be applied if such evidence is simply cumulative to other evidence admitted without objection.").

Thus, for all of the foregoing, I respectfully would reverse.