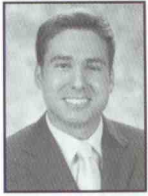


PERMANENCY: NO LONGER AN EPHEMERAL CONCEPT IN FLORIDA COURTS

By Michael J. Brevda, Esquire



If you see a late-1990s Florida Personal Injury Practice book with the line “determination of permanency is for the jury”, rip out the page. In the recent Supreme Court of Florida decision *Wald v. Grainger*, 2011 WL 1885710 (Fla. May 19, 2011), Florida’s highest court held that determinations about the permanency of an injury are generally made by juries, but can be taken out of the jury’s hands if rebuttal evidence is not properly presented *Id.*, See also *State Farm Mut. Auto. Ins. Co. v. Orr*, 660 So. 2d 1061 (Fla. 4th DCA 1995)

When litigating a personal injury plaintiff case, to maximize your client’s recovery, it is crucial to have the ability to recover non-economic damages (i.e. pain and suffering). To recover non-economic damages in an auto accident case involving a threshold question (such as a PIP case), a Plaintiff must prove a permanent injury that is causally related to the accident.

The *Wald* case involved a standard two-car motor vehicle accident where liability was clear cut and the parties went to trial solely on the amount and permanency of the Plaintiff’s damages. The Plaintiff’s treating physician testified that he suffered from

permanent injuries related to the accident in his neck, back, right arm, foot, and thigh. The Defendant’s expert then took the stand and refuted the permanency of all of *Wald*’s injuries except his thigh condition. Naturally, the Plaintiff moved for a directed verdict on the permanency issue, which was granted as to the thigh condition, as there was unrefuted expert testimony of a permanent thigh injury. The jury awarded *Wald* more than \$1 million.

On appeal, the First DCA reversed this judgment, finding error in the trial court’s directed verdict on the permanency of the thigh injury. The First DCA held that a jury is free to weigh the credibility of an expert’s testimony, as well as reject uncontradicted testimony regarding an injury’s permanency. The district court held that *Wald*’s directed verdict on the permanency issue deprived the jury of this determination and reversed accordingly.

However, when the case was appealed to the Supreme Court of Florida, Justice Quince’s opinion explains the permanency issue with clarity and logic. A Plaintiff is almost always going to present evidence which shows a prima facie case of permanency through expert testimony. The burden then shifts to the Defendant(s) to offer countervailing evidence, discrediting the permanency

of the Plaintiff’s injuries. “If the defendant succeeds in this endeavor, a jury question is presented; if not, a directed verdict on permanency is appropriate.” *Wald v. Grainger*, 2011 WL 1885710 (Fla. May 19, 2011), citing *Evans v. Montenegro*, 728 So.2d 270, 271 (Fla. 3d DCA 1999).

The recent Supreme Court decision affirms the concept that while carefully safeguarding the traditional province of the jury’s determination, we cannot let go of basic logic and send the jury an issue for which they have no counter evidence to examine. In other words, if there is uncontroverted expert testimony proving a permanent injury, why risk confusing a jury if the permanency question can only be answered one way?

A careful read of the recent Supreme Court decision can greatly benefit a Plaintiff’s permanency argument in a case involving a threshold question. In *Wald*, the Plaintiff’s treating physician presented evidence of the thigh permanency based on a reticular motor nerve injury starting at the spine and ending in the thigh. Defendant’s expert testified that the thigh pain stems from a seatbelt injury that resulted in a sensory impairment to the nerve in a totally different area of the thigh, not involving the

spine. In essence, the opposing experts did not testify in lockstep with each other. In fact, the Defendant’s expert completely disagreed with Plaintiff’s expert as to the type of thigh injury, but he did not refute its permanency. While traditionally, this would lead to a jury question as to permanency, the Supreme Court in *Wald* imposes the ruling that if the Plaintiff presents evidence of permanency, the Defense must present some form of dispute to the permanency of the injury, or else the jury cannot deliberate on the permanency issue and a directed verdict is proper. Accordingly, Plaintiff’s lawyers should constantly survey the Defense expert’s opinion, searching for any admissions that a Plaintiff’s injuries are permanent, even if the experts disagree as to the type or degree of the Plaintiff’s injury. Under *Wald*, if the Defense does not counter the Plaintiff’s expert testimony regarding permanency, a directed verdict will be granted on the issue of permanency, foregoing the confusing permanency jury instruction and allowing a jury to award non-economic damages.

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