IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,178

Florida Bar No: 184170

GERALD S. KAUFMAN, D.P.M., and GERALD S. KAUFMAN, D.P.M., P.A.,

Petitioners,

vs.

PATRICIA MACDONALD,

Respondent.

ON PETITION FOR DISCRETIONARY JURISDICTION FROM THE FOURTH DISTRICT COURT OF APPEAI.

BRIEF OF PETITIONERS ON THE MERITS GERALD S. KAUFMAN, D.P.M., and GERALD S. KAUFMAN, D.P.M., P.A.

(With Appendix)

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TABLE OF CITATIONS

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POINTS ON APPEAL

I. THE TRIAL COURT ERRED IN AWARDING ATTORNEYS' FEES WHICH WERE MORE THAN DOUBLE THE AMOUNT PROVIDED FOR IN THE CONTINGENCY FEE ARRANGEMENT IN THIS MEDICAL MALPRACTICE CASE AND THE JUDGMENT MUST BE REVERSED; ROWE, INFRA.

II. THE TRIAL COURT ERRED IN GIVING A NON-STANDARD JURY INSTRUCTION ON NEGLIGENCE, WHICH CONTAINED THE PLAINTIFF'S ALLEGATIONS AGAINST THE DEFENDANT, WAS REPETITIVE AND WAS AN IMPROPER COMMENT ON THE EVIDENCE.

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INTRODUCTION

Two appeals were filed from the trial court action. The first appeal is from a verdict against a podiatrist (Case No. 87-2413) and the second appeal is from the attorneys' fees awarded to the Plaintiff, as a result of the malpractice suit against the podiatrist (Case No. 88-1363). The Fourth District sua sponte consolidated the appeals. Kaufman v. MacDonald, 14 F.L.W. 1301 (Fla. 4th DCA April 20, 1989). The appellate court affirmed the trial verdict and the fees awarded and certified the case as one involving a question of great public importance. The Brief of Petitioner addresses the legal issues in the consolidated appeals, beginning with the certified question on attorneys' fees.

The Petitioners Gerald S. Kaufman, D.M.P. and Gerald S. Kaufman, D.P.M., P.A. will be referred to in the singular as Dr. Kaufman or Defendant.

The Respondent Patricia MacDonald will be referred to as MacDonald or Plaintiff.

The Record on Appeal will be designated by the letter "R" and the trial transcript by the letter "T".

All emphasis in the Brief is that of the writer unless otherwise indicated.

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STATEMENT OF THE FACTS AND THE CASE

Overview

This is a medical malpractice case where the jury awarded the Plaintiff damages of $58,980 after the doctor performed successful surgery on the Plaintiff's feet. During the time the Plaintiff was recuperating she lost her job because of her inability to get around the office and she sued the doctor. At trial the Plaintiff was permitted to use a non-standard jury instruction, which contained five allegations from the Plaintiff's Complaint against the doctor. The jury instruction was clearly contrary to Florida law. (The total Verdict was $98,300 reduced by 40% comparative negligence to $58,980.)

The Plaintiff, Patricia MacDonald, sued the Defendant, Dr. Kaufman, and after a jury trial, Judgment was entered in the Plaintiff's favor for $58,980. Five months later the Plaintiff moved for attorneys' fees, and the trial court awarded $60,000 in attorneys' fees, which was almost triple the contingency fee arrangement between the Plaintiff and her attorney. This fee award is excessive as a matter of law and must be reversed.

Basically what happened in this case is that Mrs. MacDonald went to Dr. Kaufman for some elective foot surgery. After the surgery an infection developed in one of her feet. During her recuperative period the Plaintiff alleged that she was fired from her job at a stock brokerage firm because they did not like her non-professional appearance with her foot bandaged or in a cast. In addition, one of the operative procedures resulted in a non-union of bones in her left foot and Mrs. MacDonald had a subsequent surgery performed, which also resulted in a non-union

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of the bones. Mrs. MacDonald sued Dr. Kaufman for malpractice alleging that he carelessly performed the surgery on her feet, failed to render proper operative and post-operative treatment, and failed to properly treat the subsequent infection in her foot (R 936-941). As a result of the surgeries performed by Dr. Kaufman, Mrs. MacDonald asserted that she had residual pain in both feet, which prevented her from working at her former job as a sales assistant in a brokerage house. Mrs. MacDonald did not dispute that she had no restrictions on her ability to walk, had no limp and her feet were not deformed by the surgery. Her main complaint was that her feet hurt and therefore this restricted her from pursuing the same type of career she had prior to the surgery. In addition she could no longer hike and was not able to dance with the same agility as she had previously.

Specific Facts

Patricia MacDonald decided to have elective foot surgery and sought treatment from Dr. Kaufman, a licensed podiatrist. Mrs. MacDonald was no stranger to surgery having had four prior operations. She had previously gone to an orthopedic specialist, Dr. Cosara, to have a neuroma removed from her left foot. In addition she went to Dr. Gaster to have a bunion removed from her left foot (T 516). The same type of condition then developed on her right foot. She was aware of the fact that the neuromas would only get worse and her bunion was bothering her to the extent that she had to remove her shoes (T 515, 516). In addition she was experiencing pain on the left side of her left foot and was concerned because her second toe was longer than her

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first toe (T 518-519).

Therefore on December 7, 1983 she went to Dr. Kaufman to have the bunion and neuromas removed. Dr. Kaufman informed Mrs. MacDonald that he would remove the bunion and the neuromas and that he would fix the problem with the left side of her foot, including the shortening of longer second toe (T 519). Mrs. MacDonald asserted that Dr. Kaufman did not discuss any risks associated with the surgeries (T 520). Having had the surgery before she expected that it would proceed without incident (T 520). Mrs. MacDonald returned to Dr. Kaufman's office in February to have the surgical procedures performed.

At that time Dr. Kaufman gave her a consent form which she admitted that she did not read, with the exception of the five surgical procedures written in across the top of the form. Dr. Kaufman performed the surgery. When he was finished Mrs. MacDonald stated that she stepped down and her right foot started to hemorrhage (T 529). At that point Mrs. MacDonald asserted that Dr. Kaufman left the room and instructed a non-medical employee to re-bandage her foot (T 529).

Subsequent to the surgery Mrs. MacDonald developed an infection in her right foot. She had previously informed Dr. Kaufman that she was allergic to penicillin, however the symptom that she relayed to Dr. Kaufman (vaginal itch) was not consistent with an allergy to penicillin (T 367-378; 706; 802). Dr. Kaufman treated Mrs. MacDonald with a penicillin type drug, to which she had no adverse reaction. In addition he gave her intramuscular injections of Gentamisin and the infection cleared up (T 551;

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555-556).

Dr. Kaufman performed an excision of the neuromas on Mrs. MacDonald's right foot; a bunionectomy on the right foot; a fifth metatarsal osteotomy for her metatarsal plantarflexion deformity; an arthroplasty of her second toe on her left foot; and capsulotomies and tenotomies to improve the appearance of her feet (T 139, 336, 770). The osteotomy resulted in a non-union of the bone in the left foot which she said caused her continued pain. Mrs. MacDonald then went to see two other orthopedic surgeons for a second opinion as to the condition of her feet. Dr. Silverstein did a repeat osteotomy on her foot, which once again resulted in a fibrous non-union of the bone. Dr. Silverstein also did a scar re-section allegedly for a painful scar on her right foot, however the pathology indicated that the skin that he removed was unremarkable and not even scar tissue (T 570, 812-813).

During the time that Mrs. MacDonald was being treated by Dr. Kaufman she was employed at Drexel Burnham, a stock brokerage firm, as a sales assistance (T 45). After the second surgery by Dr. Silverstein, Mrs. MacDonald was in a cast for 16-18 weeks, was taught how to use crutches and had to have her foot propped up (T 559, 562). At this time two of the stock brokers complained about Mrs. MacDonald's performance at work and one stated that she was a general eyesore (T 289, 563). Five months after the surgery was performed by Dr. Kaufman, Mrs. MacDonald was given a sales assistance test in which she scored a 12 (T 486). Because of her low score and the complaints regarding her work

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she was placed on probation in July of 1984 (T 487). She was given from July to August to improve and on August 29, 1984 she was fired (T 488). Her supervisor stated that she was terminated for making too many mistakes, because of the complaints about her work from the brokers, because she wasted a lot of time on personal conversations and wasted time in the office, etc. (T 489, 490). Mrs. MacDonald filed for unemployment compensation listing as the reason for termination that physical conditions affected her work performance (T 489). Mrs. MacDonald was making $7.50 an hour as a sales assistance and is now making $5.87 in the loan department of a bank (T 419, 421). Because Mrs. MacDonald's feet hurt her, the rehabilitation specialist stated that she could no longer work in the stock brokerage firm because it is not a sit down job, therefore she is underemployed (T 415, 416).

Mrs. MacDonald sued Dr. Kaufman alleging that the surgery that he performed caused her intense suffering and disability, that he failed to prevent or treat the infection in her foot and that she required subsequent surgery, all of which led to the fact that she was fired from her job (R 936-941).

The Plaintiffs presented the expert testimony of Dr. Brietstein, a podiatrist, who testified that the bunionectomy performed by Dr. Kaufman was done very well and Mrs. MacDonald had an excellent result and there were no complications (T 308, 358). Brietstein testified that Dr. Kaufman did not treat the infection properly and the operative report showing a 1.5 cm incision was too small to adequately do the surgery (T 313). Dr.

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Brietstein felt that Dr. Kaufman deviated from the standard of care for podiatrists by not suggesting to Mrs. MacDonald non-invasive procedures. Mrs. MacDonald testified however that she knew from prior surgeries that there were alternatives (T 608). Dr. Brietstein stated that it was a deviation from the standard of care that there was a bone displacement. In contrast the Defendant's expert, Dr. Spinner, testified that the displacement was perfect for the procedure that was done and was the exact position that was to be achieved in that particular procedure (T 325; 744). Dr. Brietstein stated that Dr. Kaufman should have taken serial x-rays of the patient, should have hospitalized her for the subsequent infection and that the tenotomies and caspsulotomies were unnecessary (T 325, 328, 330, 336). In addition he stated that Dr. Kaufman should have gotten Mrs. MacDonald's specific consent to the tenotomies and capsulotomies and that Dr. Kaufman used the wrong antibiotics to resolve her foot infection (T 337-338).

On cross examination the Plaintiff's expert testified that the 2.5 cm incision listed in the form operative notes was not a deviation from the standard of care; that Dr. Kaufman's procedures for doing the osteotomy did not deviate: that the failure to fixate the bones done during the osteotomy was not a deviation; that the non-union of the bone did not fall below the standard of care and that Dr. Silverstein's subsequent surgery on the osteotomy sight also resulted in a nonunion of the bone (T 360, 361-362, 381).

The Defendant's experts testified that Dr. Kaufman's

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procedures did not fall below the standard of care, in not fixating the osteotomy and not casting Mrs. MacDonald's foot, in not achieving a non-union of the bones and in not taking serial x-rays after surgery (T 709, 712; 796-797). In addition it was not improper to do the tenotomies and capsulotomies, it was not a deviation to not list these minor procedures on the consent form and it was proper to use form operative reports (T 717; 804-806). Both Dr. Spinner and Dr. Petti stated that there was good surgical intervention performed and that Mrs. MacDonald's scars were well healed (T 720, 795). In addition both of the Defendant's experts testified that Mrs. MacDonald had no deformity or disability of the feet and had no functional disability (T 721, 795). She required no medications nor the use of any special shoes and required no future surgery (T 795). Basically Mrs. MacDonald can do whatever she wants to, has absolutely no restrictions regarding her activities, her daily work or the type of job that she does (T 795).

The experts also testified that even assuming that it was a deviation from a normal standard of care not to list the tenotomies and capsulotomies on the consent form, that this would result in absolutely no damages to Mrs. MacDonald (T 709, 718). Similarly Mrs. MacDonald was not damaged by the antibiotics chosen to treat her infection, as the infection cleared up and there was no need to call an infection control specialist (T 713-714; 708). The bottom line to the expert's testimony was that there was no deviation from the standard of care in the podiatric community with regard to any surgical procedure performed by

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Dr. Kaufman (T 713).

Jury Instruction

At the charge conference the Plaintiff submitted what she claimed was her standard jury instruction 3.5 on negligence (R 1826-1877; T 680). However, the jury instruction listed a number of allegations from the Plaintiff's Complaint as the issues for the jury to determine. The Defendant objected, as it was clearly not a standard jury instruction and that the negligence issue for determination was whether Dr. Kaufman deviated from the standard of care in the treatment of Mrs. MacDonald (T 680-681). The court stated that it was going to read the jury instruction as the Plaintiff had submitted and the Defendant again objected for the record (T 682). The jury instruction was given as follows:

> The issues for your determination on the negligence claim of the plaintiff, Patricia MacDonald, against the defendant, Gerald Kaufman, D.P.M., are:
>
> Whether Defendant, Gerald Kaufman was negligent in failing to exercise the degree of skill and care ordinarily exercised by podiatrists engaged in the practice of foot surgery;
>
> Carelessly performed foot/toe surgery on the Plaintiff's feet so as to cause plaintiff intense suffering and disability;
>
> Failing to timely order medical/ diagnostic tests, x-rays, and treatment consistent with the circumstances;
>
> Rendering improper intra-operative and post-operative treatment to Plaintiff thus aggravating Plaintiff's condition;

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Failing to institute timely and appropriate antibiotic therapy to prevent or treat Plaintiff's infection.

Whether or not Defendant, Gerald Kaufman negligently failed to obtain the informed consent of plaintiff, Patricia MacDonald to medical treatments or procedures claimed of.

(T 916-917).

At the close of the Plaintiff's case and at the end of the presentation of all of the evidence the Defendant's moved for directed verdict, which was denied (T 669, 683). The court instructed the jury with the non-standard negligence instruction 3.5, which contained the Plaintiff's allegations (T 916, 917). In addition the jury was given the standard jury instruction on professionals and the standard instruction on negligence (T 918-919). The jury returned a Verdict finding the Plaintiff 40% negligent and the Defendant 60% negligent (T 932-933).

The Defendant filed his Motion for New Trial, again raising that the trial court erred in allowing the non-standard jury instruction (R 1774-1776). The Motion for New Trial was denied and the Defendant appealed, as it was clear reversible error to use a non-standard repetitive jury instruction on negligence (R 1883).

Attorneys' Fees

Five and a half months after the jury verdict in this case, the Plaintiff's attorney scheduled a Motion to Tax Costs and Motion for Attorneys' fees on January 14, 1988 for a hearing on March 15, 1988 at 10:50 A.M. (R 1899-1900; 1901-1904).

Defendant's counsel became ill with the flu and was unable to attend the March 15th hearing (R 1932-1935). The Plaintiff

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re-noticed her Motion for Attorneys' Fees and to Tax Costs on March 18, 1988 scheduling the hearing for April 13, 1988 at 10:00 A.M. However in another medical malpractice case, Manning v. Temken, Case No. 86-29469 CH, the plaintiff's attorney had scheduled a video taped deposition of an expert in Los Angeles, California for the same date and time as the Attorney Fee Hearing (R 1932-1935).

The plaintiff's lawyer in Manning v. Temken had noticed the video tape of the expert prior to MacDonald's lawyer noticing the Motion to Tax Costs and Manning's attorney refused to cancel the Deposition, stating that his Deposition had priority (R 1932-1935). Therefore on April 12, 1988 at 1:30 P.M. in the afternoon Defendant's counsel left a message with MacDonald's lawyer to return a phone call. After no call was returned, defense counsel once again called at 4:30 P.M. only to reach the answering service (R 1932-1935). At that time defense counsel left a message stating that he was calling regarding the rehearing the next day and to please have Attorney Richards return his call as soon as possible (R 1932-1935).

Attorney Richards never returned the phone call and it was not until April 13, 1988 the following morning that defense counsel's secretary was able to reach her by phone at approximately 9:15 A.M. At that time Attorney Richards was advised that defense counsel was on his way to Los Angeles and was unable to attend the hearing. However Plaintiff's counsel refused to cancel the Hearing.

The matter was covered by Patricia Wright, an associate in

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defense counsel's firm, who was not familiar with fees and costs in malpractice cases. She merely appeared in the trial court as a courtesy to explain the circumstances surrounding defense counsel's unavailability for the hearing (R 1972). Attorney Wright explained that she did not handle medical malpractice cases and was not prepared to argue the Motion in the fifteen minutes left, after the arrival of Attorney Richards (R 1972). The trial judge stated that he was compelled to go forward with the Hearing (R 1974).

At that point Plaintiff's counsel called Attorney David Krathen to testify regarding the attorney fee issue (R 1976). Attorney Krathen testified that the Plaintiff's injuries were worthless, but that Attorney Richards should be awarded $128,750. This figure was based on an hourly fee of $250 for 206 hours of work on the case and a contingency risk factor of 2.5 (R 1976-1978). Mr. Krathen testified that he found all medical malpractice cases required a contingency risk factor of at least 2, even if it was an easy, open and shut case (R 1991).

Attorney Richards testified that she had a 40% contingency fee contract with the Plaintiff and she thought there was a 50/50 chance of winning malpractice cases (T 23).

Ms. Wright again objected to having to conduct the hearing unprepared; stating that the Defendant was severely prejudiced as as he was unable to have any expert refute the testimony of Attorney Krathen (R 1998-1999). At this point the Plaintiff's trial attorney put on Attorney Farmer, Plaintiff's appellate counsel, who argued that in the Fourth District it was proper to

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award attorney's fees higher than the contingency fee contract and higher than the Judgment in the case (R 1999-2000).

The trial court entered an Order based on 150 hours, at $200 per hour, finding that a reasonable fee was $30,000 (R 1956-1957). The court went on to state that the Plaintiff had entered into a contingency fee arrangement for a fee of up to 50% of any recovery, or a greater fee as the court might award under Fla. Stat., Section 768.56. The judge determined that based on a contingency risk factor of 2, a reasonable attorneys' fee in the case was $60,000 and he awarded $750 for the expert testimony of Attorney Krathen (R 1956-1957). The trial court later entered an Order on the Motion to Tax Costs awarding $12,532.96 (R 1959). (It should be recalled that this was on a jury verdict of $58,980.)

The trial court denied the Defendant's Motion for Rehearing and the Defendant, appealed, as the $60,000 attorney fee award, on a $58,000 Verdict, was excessive as a matter of law and must be reversed. Rowe; Tamayo, infra (R 1956;1961).

The Fourth District affirmed the verdict finding no prejudice in the court's use of the bizarre non-standard jury instruction. Kaufman, 1031. The appellate court also affirmed the attorneys' fee award which was higher than the Plaintiff's contingency fee arrangement and certified the following question as one of great public importance:

> Does the holding in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) preclude an attorneys' fee in a medical malpractice action above the percentage amount set out in the contingency fee agreement between claimant and her

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> counsel, where the agreement provides that the fee upon recovery shall be the higher of the percentage amount or an amount awarded by the court?
>
> Kaufman, 1031.

Jurisdiction was accepted in the consolidated appeals. The Judgments in both appeals are contrary to established Florida law and must be reversed and the certified question answered in the affirmative, limiting attorneys' fees in malpractice cases to the amount in the contingency fee agreement.

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SUMMARY OF ARGUMENT

The jury awarded the Plaintiff $58,980, and the court awarded her attorney attorneys' fees of $60,000; which was more than the Plaintiff received. Additionally the appellate court awarded fees, so the attorneys will recover for more than the Plaintiff recovers for her injuries, unless this Honorable Court reverses this. The Fourth District also certified this question to the Supreme Court, to determine if fees greater than the contingency percentage mandate by the Florida Supreme Court can be awarded.

This Court has twice held in medical malpractice actions the trial court may not award attorneys' fees greater than the contingency fee arrangement reached between the attorney and the client. Rowe; Miami Children's Hospital, infra. In the present case the Plaintiff had a 40% contingency fee arrangement with her attorney, which in this case would amount to a reasonable fee of $23,592. The $60,000 fee awarded by the trial court is two and a half times greater than the amount agreed on by the Plaintiff and her attorney, is excessive as a matter of law and must be reversed.

In this malpractice case the jury awarded the Plaintiff damages of $58,980, after the doctor performed successful surgery on the Plaintiff's feet. During the Plaintiff's recuperation she lost her job allegedly because of her inability to get around the office and she sued the doctor. At trial the Plaintiff was permitted to have a non-standard jury instruction given to the jury, which instruction incorporated five factual allegations of

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the Plaintiff's Complaint. The jury instruction is contrary to Florida law and requires reversal of the verdict, which verdict is contrary to the manifest weight of the evidence.

The trial court below refused the Defendant's request to use Standard Jury Instruction 3.5 on negligence. Instead the court gave a non-standard jury instruction which contained five sets of factual allegations. The jury returned a verdict for total damages of almost $100,000 for the Plaintiff's complaint that her feet hurt, even though the undisputed expert's testimony was that Dr. Kaufman's surgical procedures did not deviate from the standard of care in the community. It was clearly harmful prejudicial error for the trial court to refuse to give the standard jury instruction and the modified instruction was unnecessarily repetitive, argumentative and was an improper comment on the evidence. The instruction was also highly prejudicial and inflammatory as it contained statements such as, the Defendant could be found negligent for having "carelessly performed foot/toe surgery on the Plaintiff's feet so as to cause Plaintiff intense suffering and disability".

The trial court is required to use Florida Standard Jury Instructions unless the court finds that the instruction is erroneous or inadequate. If the court makes such a legal determination it must state on the record or in a separate order the reason why the standard instruction is wrong and the legal basis for its finding. However the trial court below made no such statement. He simply refused the requested standard

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instruction and instead gave the Plaintiff's instruction, which incorporated her factual allegations against the Defendant. In other words after first describing the negligence issue as a possible deviation from skill and care ordinarily exercised by podiatrists; the issue was then repeated five more times in the jury instruction, using highly inflammatory and prejudicial language, resulting in unnecessary and prejudicial repetition. Furthermore the instruction as given restated the Plaintiff's allegations against the Defendants as facts proven as a matter of law. The repetitive jury instruction could only mislead the jury and prejudicially emphasize this aspect of the case and was an improper comment on the evidence. The harmful prejudicial error resulting from this improper and illegal jury instruction requires reversal of the verdict and the granting of a new trial.

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I. THE CERTIFED QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE; THE TRIAL COURT ERRED IN AWARDING ATTORNEYS' FEES WHICH WERE MORE THAN DOUBLE THE AMOUNT PROVIDED FOR IN THE CONTINGENCY FEE ARRANGEMENT IN THIS MEDICAL MALPRACTICE CASE AND THE JUDGMENT MUST BE REVERSED; ROWE, INFRA.

In the medical malpractice action below the jury awarded Plaintiff MacDonald $58,980, and the court awarded her attorneys $60,000. The appellate court also awarded attorneys' fees to be assessed by the trial court, so the attorneys will recover for more than the Plaintiff herself. However the Fourth District also certified this to the Supreme Court, as to whether the court can award fees greater than the contingency percentage amount set by the Florida Supreme Court, and even more than the Plaintiff received. The Plaintiff had a contingency fee arrangement with her lawyer for 40% of the recovery or a greater amount awarded by the court pursuant to Fla. Stat. Section 768.56 (repealed) (R 1992). The trial court awarded $60,000 in fees; which is two and a half times the 40% contingency amount of $23,592. Based on clear law out of this Court, this award is excessive as a matter of law, as no attorney fee award can be in excess of the contingency fee agreement and it must be reversed.

This Court in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145, 1151 (Fla. 1985) expressly stated that:

> Further, in no case should the court-awarded fee exceed the fee arrangement reached by the attorney and his client.

Therefore there is absolutely no question that when this Court adopted the federal lodestar procedure for determining reasonable attorneys' fees, the court awarded fee can and should not exceed the contingency fee arrangement between the plaintiff and his or

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her attorney.

In this case Plaintiff's counsel testified that she had a 40% contingency fee arrangement with the Plaintiff, which in this case would amount to a reasonable fee of $23,592. The $60,000 fee awarded by the trial court is two and a half times greater than the'amount agreed on by the Plaintiff and her counsel and is excessive as a matter of law and must be reversed.

Numerous cases have addressed the decision in Rowe finding that where there is a contingency fee agreement, the court award may not exceed that amount in determining reasonable attorneys' fees. Multitech Corporation v. St. Johns Bluff Investment Corporation, 518 So.2d 427 (Fla. 1st DCA 1988)(the Supreme Court in Rowe concluded that "in no case should the court awarded fee exceed the fee arrangement reached by the client and his client"; Winterbotham v. Winterbotham, 500 So.2d 723 (Fla. 2d DCA 1987)(the Rowe decision is applicable to domestic relations cases and the court awarded fee should not exceed the fee reached between the attorney and his client).

This Court once again held that even if the contingency fee agreement was entered into prior to the decision in Rowe, the principles of ~~Rowe must~~ be applied to limit the court's award of attorneys fees to an amount ~~not~~ in excess of the fee set by the contingency agreement. Miami Children's Hospital v. Tamayo, 529 So.2d 667 (Fla. 1988).

The Third District originally held in the Tamayo case, that Rowe was not to apply retroactively and therefore the trial court could award an amount greater than the contingency fee contract.

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Tamayo v. Miami Children's Hospital, 511 So.2d 1091 (Fla. 3d DCA 1987). The plaintiffs in Tamayo prevailed in a medical malpractice action and had a 40% contingency fee contract with their attorney. The trial court, pursuant to Rowe, limited the attorney fee award to the 40% fee payable under the contract. The Third District reversed holding that Rowe did not apply, since the fee arrangement had been entered into prior to the effective date of Rowe. Tamayo, supra.

This Court quashed the Third District's opinion and reinstated the trial court's award, as limited by the principles in Rowe. This Court once again listed the factors to be considered in making the fee determination when the case involves a contingency fee, again emphasizing the principle that:

> [I]n no case should the court awarded fee exceed the fee arrangement reached by the attorney and his client. (Emphasis in original)
>
> Miami Children's Hospital, 668.

At the fee hearing below it was argued that the Fourth District's decision in Alston v. Sun Deck Products Inc., 498 So.2d 493 (Fla. 4th DCA 1986) stood for the proposition that the trial court is not limited by the fee arrangement between the client and his attorney. However the Alston decision involved a breach of contract action, in which the court expressly noted that Rowe stood for the proposition that in no case should the court awarded fee exceed a contingency fee arrangement. The panel in Alston went on to point out that the statement to that effect, contained in Rowe, was limited to the opinion's discussion of contingency fees, such as those arrangements in

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medical malpractice cases, of which this is one. Alston, 494.

Therefore there is absolutely no precedent in the Fourth District or any other court that allows a trial judge to award fees in excess of the contingency fee arrangement between the Plaintiff and her attorney in a medical malpractice action. Therefore the $60,000 fee awarded below is excessive as a matter of law and must be reversed.

The Respondent argued below that Tamayo, and Rowe, did not apply, simply because the Plaintiff's agreement provided for a disjunctive award of fees either based on: (1) a 40% contingency fee amount or (2) "such greater fee as the court might award under Section 768.56".

The Respondent failed to acknowledge that every case construing the attorneys' fees statute has held that the trial court may not award an amount greater than the contingency fee arrangement between the plaintiff and the attorney. In Tamayo the appellate court reversed and remanded the attorneys' fee proceeding based on the rule in that District that Rowe did not apply retroactively, so as to restrict an attorney fee award to no more than the fee set by the contingency fee agreement between the parties and their counsel. Tamayo, 1092. The Third District in Tamayo expressly stated that the attorney fee order was reversed and remanded to the trial court with directions to enter an attorney fee award based on the standards established by Rowe, except that the court awarded fee may exceed the fee set by the contingency fee agreement between the plaintiff and his counsel.

This Court quashed the Third District's opinion and remanded

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with directions to affirm the order of the trial court, which had limited the attorneys fees awarded to the amount of the contingency fee payable under the contract between the plaintiffs and their counsel; based on the authority of Rowe ("Further, in no case should the court/awarded fee exceed the fee arrangement reached by the attorney and his client"). Miami Children's Hospital, supra, 668; Tamayo, supra, 1092.

This Court stated in its opinion that the plaintiff and the attorney in Tamayo had entered into a 40% contingency fee contract. The trial court, in awarding fees pursuant to Section 768.56, utilized the principles of Rowe and limited the award to the 40% contingency fee payable under the contract. In other words this Court in Miami Children's Hospital expressly reinstated the trial court's award limited to the contingency fee amount payable under the contract.

The disjunctive clause contained in the Plaintiff's contract with her attorney in the present case expressly stated that a contingency fee amount will be paid or such greater fee as the court might award under Section 768.56. However under Section 768.56 the trial court may not award a greater fee than the contingency fee amount contained in the contract. Miami Children's Hospital; Rowe, supra.

This is further substantiated by the fact that in Miami Children's Hospital this Court stated that whatever rights a prevailing party has to collect attorneys' fees exist solely because of Section 768.56. In construing that Statute this Court has expressly stated that the trial judge may not award a

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fee exceeding the contingency fee agreement reached by the attorney and his client. The mere addition of the word "greater" to the Plaintiff's fee contract cannot override the express holding of this Court regarding the statutorily awarded attorneys' fees in this case. Since the trial court may not, by statute and caselaw, award an amount greater than the contingency fee agreement, the word "greater" in the Plaintiff's contract has absolutely no legal force or effect.

The basic legal fallacy of the Respondent's position is her misinterpretation of the caselaw regarding the determination of reasonableness of attorneys' fees. Prior to the adoption of the federal lodestar formula by this Court in Rowe, courts were required to utilize the criteria set forth in Disciplinary Rule 2-106(b) of the Florida Bar Code of Professional Responsibility. In adopting the federal lodestar process, this Court stated that its intent was to articulate specific guidelines to aid trial judges in the setting of attorneys fees. Rowe, 1150. One of the criteria taken into consideration is whether the fee was fixed or contingent.

Some trial judges, however, were entering fee awards based solely on the amount of the contract; whether it was a contingency fee percentage or a fixed amount. In other words some trial courts were simply entering a fee of 40% or 50% of the recovery or a fee based solely on the agreed to fixed hourly rate. This Court in Rowe set forth the requirements to be used by trial court judges in determining a reasonable fee. In other words, trial judges could not simply use the contingency fee

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percentage or the fixed fee arrangement in making its fee award. Since this Court's decision in Rowe various appellate decisions, like the one in Alston, found that where no contingency fee agreement was involved, a trial court may award a fee higher than that agreed on between the plaintiff and its counsel.

However, not a single case in Florida, since the Supreme Court's decision in Rowe, has allowed a trial judge under Section 768.56 to award attorneys' fees in excess of the contingent fee percentage agreed on between the plaintiff and its counsel.* Rather the exact opposite has occurred. In Tamayo the trial court expressly limited the attorney fee award in the medical malpractice action to an amount not greater than the contingency fee percentage. The Third District reversed the trial court and this Court in Miami Children's quashed the Third District opinion, which had reversed the trial court's limitation of the fee award. In Miami Children's this Court reinstated the attorney fee award limited to the amount of the contingency fee payable under the contract between the plaintiff and their counsel.

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* The Fourth District's decision in Florida Patient's Compensation Fund v. Moxley, 14 F.L.W. 1145 (Fla. 4th DCA May 10, 1989) was a companion case to Kaufman and was originally scheduled for oral argument at the same time as Kaufman. Both cases involve the same appellate counsel for the plaintiff and plaintiff's counsel in Moxley was the plaintiff's expert in Kaufman. The fee contracts were different but in both malpractice cases plaintiff's counsel was awarded a fee greater than the contingency fee arrangement. Moxley simply affirms the award with no mention of the Fourth District's decision in Kaufman or the question, it certified just one week before.

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The decision in Miami Children's Hospital is a correct application of the Rowe decision under the medical malpractice statute. Based on the decisions in Rowe and Miami Children's, it is respectfully submitted that the certified question be answered in the affirmative; precluding attorneys' fee awards in medical malpractice above the percentage amount set out in the contingency fee agreement between the claimant and her counsel. The $60,000 fee awarded below by the trial court; which is two and a half times greater that the amount agreed on by the Plaintiff and her attorney, and more than the Plaintiff herself received; is excessive as a matter of law and must be reversed.

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11. THE TRIAL COURT ERRED IN GIVING A NON-STANDARD JURY INSTRUCTION ON NEGLIGENCE, WHICH CONTAINED THE PLAINTIFF'S ALLEGATIONS AGAINST THE DEFENDANT, WAS REPETITIVE AND WAS AN IMPROPER COMMENT ON THE EVIDENCE.

The trial court below refused the Defendant's request to give the standard jury instruction 3.5 on negligence. Instead the court accepted the non-standard jury instruction as proposed by the Plaintiff, which contained five allegations from the Plaintiff's Complaint. Where the jury returned a verdict for almost a $100,000 for the Plaintiff's complaint that her feet hurt, after the undisputed expert testimony was that Dr. Kaufman's surgical procedures did not deviate from the standard of care in the community; it was clearly harmful prejudicial error for the trial court to refuse to give the standard jury instruction. The modified instruction also was unnecessarily repetitive and was in fact argumentative and an improper comment on the evidence. The instruction was also highly prejudicial and inflammatory as it contained statements such as, the Defendant could be found negligent for having "carelessly performed foot/toe surgery on the Plaintiff's feet so as to cause Plaintiff intense suffering and disability". Finally the instruction was also erroneous in that it assumed the five factual allegations as proven and the jury was instructed as a matter of law regarding those facts, which were supposed to be resolved by the jury during deliberations. There is absolutely no question that the refusal to give the standard jury charge on negligence and the giving of the modified charge was harmful error requiring reversal of the verdict and the granting of a new trial.

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Even the trial court noted that in the requested instruction it appeared as if the Plaintiff's allegations were established facts, even before the jury retired to decide the issue.

> The Court: ...The problem I have with yours (the instruction) is its not the eliciting punitive (sic), what YOU elicit is was he negligent and then you have got -- It's like he already did these things.
>
> (T 681).

On appeal MacDonald argued that it was proper for the judge to tell the jury what the case is all about in the jury instructions. There is no authority to support this position because this is clearly contrary to Florida law and the purpose of jury instructions. The purpose of jury instructions is to advise the jury on proper legal standards to be applied in determining issues of fact as to the case before them. Pittman v. State, 134 Fla. 626, 184 So. 646 (1938); Hattaway v. Florida Power & Light, 133 So.2d 101 (Fla. 2d DCA 1961).

Closing argument is the appropriate time to discuss the issues and the disputed questions of fact, after which the court instructs the jury on the law. 55 Fla. Jur.2d Trial Section 124. At this point the trial judge is required to instruct the jury on the questions of law pertinent to the issues of fact submitted to them. The Respondent failed to cite a single case that holds that in instructing the jury on the plaintiff's theory of the case, the court is permitted to add disputed factual issues to the legal theory of recovery.

Instructions to the jury must be on the law applicable to the facts proved. Byrd v. Felder, 197 So.2d 554 (Fla. 3d DCA

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1967)(Instruction to the jury must be predicated on the facts developed at the trial); Bradley v. Guy, 438 So.2d 854 (Fla. 5th DCA 1983)(where a person is injured by another and no statutory exceptions apply, standard of care is governed and defined by standard jury instruction on negligence).

Failure to give a requested instruction that is proper under the situation of the case is error. Aragon v. Florida Equipment Co. of Miami, Inc., 368 So.2d 90 (Fla. 3d DCA 1979)(reversible error for trial court to fail to read plaintiff's requested standard instruction on concurring negligence and to correct the oversight even though plaintiff objected). This Court has stated that the trial court may adopt requested instructions and it has the right to phrase the instruction in language of its own, if that language is full, fair and applicable to the facts. Luster v. Moore, 78 So.2d 87 (Fla. 1955). By giving a non-standard jury instruction on negligence, which contained five of the Plaintiff's allegations against the Defendant, which included language that the Defendant could be found negligent for "carelessly operating on the Plaintiff to cause intense suffering and disability", was not full and fair language and was reversible error.

Trial Court Required to Use Standard Jury Instruction

The Defendant presented the court with Florida Standard Jury Instruction 3.5 on negligence (T 679). The court refused to give that instruction and instead gave the Plaintiff's nonstandard instruction on negligence (T 682). This Court has said that if

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the standard jury instruction is not given, the trial judge shall state on the record or in a separate order the manner in which he finds the standard jury instruction erroneous or inadequate and the legal basis for this finding. In Re: Florida Rules of Civil Procedure, 211 So.2d 174, 195 (Fla. 1968).

While this Court has said that the trial court may use Florida Standard Jury Instructions, it is clear that the instructions must be used unless the judge determines that the requested standard instruction is erroneous or inadequate. State v. Bryan, 90 So.2d 482 (Fla. 1974) (court should use standard instructions where they are appropriate); Rigot v. Bucci, 245 So.2d 51 (Fla. 1971). In other words it is only when the requested standard instruction is inappropriate or inadequate that the trial court may refuse to give the instruction. However at that point the court must state on the record or in a separate order the reason why the standard instruction is wrong and the legal basis for this finding. In Re: Florida Rules of Civil Procedure, supra; Lynch v. McGovern, 270 So.2d 770 (Fla. 4th DCA 1972), cert. dismissed, 277 So.2d 786 (Fla. 1972).

Florida Standard Jury Instruction 3.5 states:

> Whether (defendant) was negligent in (describe negligence) and, if so, whether such negligence was a legal cause of [loss] [injury] [or] [damage] [sustained by] (claimant).

At trial the Defendant correctly noted that in describing the negligence in this jury instruction, a proper description was: Whether or not Dr. Kaufman deviated from the standard of care in the treatment of Mrs. MacDonald (T 681). The trial court refused to give the standard instruction as requested and instead

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gave the following instruction which incorporated the Plaintiff's allegations against the Defendant:

> The issues for your determination on the negligence claim of the plaintiff, Patricia MacDonald, against the defendant, Gerald Kaufman, D.P.M., are:
>
> Whether defendant, Gerald Kaufman was negligent in failing to exercise the degree of skill and care ordinarily exercised by podiatrists engaged in the practice of foot surgery;
>
> Carelessly performed foot/toe surgery on the plaintiff's feet so as to cause plaintiff intense suffering and disability;
>
> Failing to timely order medical/ diagnostic tests, x-rays, and treatment consistent with the circumstances;
>
> Rendering improper intra-operative and post-operative treatment to plaintiff thus aggravating plaintiff's condition;
>
> Failing to institute timely and appropriate antibiotic therapy to prevent or treat plaintiff's infection.
>
> Whether or not Defendant, Gerald Kaufman negligently failed to obtain the informed consent of plaintiff, Patricia MacDonald to medical treatments or procedures claimed of.

(T 916-917).

The trial court gave no reason for denying the requested standard jury instruction and gave no reason or legal basis for finding that the standard negligence instruction was erroneous or inapplicable in this case (T 682). The trial court erred as a matter of law in refusing to give Florida Standard Jury Instruction 3.5 on negligence and the verdict must be reversed.

Repetitious Instruction Reversible Error

Repetition in jury instructions is not required, as

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repetition serves only to give undue emphasis. Florida Power and Light Company v. Robinson, 68 So.2d 406 (Fla. 1954). It is reversible error to give jury instructions which involve a frequent repetition of the defendant's duty to the plaintiff in instructions to the jury. Lithgow Funeral Centers v. Loftin, 60 So.2d 745 (Fla. 1952); Shaw v. Congress Building, Inc., 113 So.2d 245 (Fla. 3d DCA 1952)(giving repetitive charges on the issue of contributory negligence was undue emphasis, requiring reversal, noting that the Supreme Court has put aside such undue emphasis in a number of cases); Dowling v. Loftin, 72 So.2d 283 (Fla. 1954)(where the Supreme Court stated that it was quite true that in many cases charges contained repetitions in them and at times such repetitions may unnecessarily emphasize a particular rule of law advantageous to one of the parties; it is frequently true that the record and that particularly the charges requested by one party or the other, discloses an "over-trial" of a case, where such conditions resulted in a miscarriage of justice, the judgment should be reversed and set aside).

Instead of being instructed that the negligence issue for the jury's determination was whether or not Dr. Kaufman deviated from the podiatric standard of care in his treatment of Mrs. MacDonald; the jury was instructed that the issues for their determination was whether or not he deviated from the standard of care ordinarily exercised by podiatrists engaged in the practice of foot surgery and also in carelessly performing surgery causing the Plaintiff intense suffering and disability and in failing to timely order tests, x-rays, etc. and in rendering improper

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intra-operative and post-operative treatment therefore aggravating the Plaintiff's condition and in failing to institute timely and appropriate antibiotic therapy and in failing to obtain informed consent of the Plaintiff.

In other words after first describing the negligence issue as the possible deviation from the degree of skill and care ordinarily exercised by podiatrists, the issue was then repeated five more times in the instruction, using highly inflammatory and prejudicial language resulting in unnecessary and prejudicial repetition. Furthermore the instruction as given restated the Plaintiff's allegations against the Defendant as facts proven as a matter of law. Bessett v. Hackett, 66 So.2d 694 (Fla. 1953) (instructions to the jury must not assume the truth of facts which are controverted). The rule that a trial judge must instruct the jury only on the law of the case, is a positive prohibition, in charging the jury against stating facts in evidence as proved or influencing in any other manner the jury's decision on the facts. Byrd v. Felder, supra; Bradley v. Guy, supra; Ferguson v. Porter, 3 Fla. 27 (1850). A charge to the jury as to the facts of a case at bar or deducting facts from other facts in evidence is improper. Southern Pipe Co. v. Powell, 48 Fla. 154, 37 So. 570 (1904); Edwards v. Fitchner, 104 Fla. 52, 139 So. 585 (1932).

The repetitive jury instruction could only mislead the jury and prejudicially emphasize this aspect of the case. Marks v. Mandel, 477 So.2d 1036 (Fla. 3d DCA 1985)(where the court instructed the jury on the standard of reasonable ordinary care,

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the trial court committed reversible error by then giving additional instructions on ordinary care which were confusing and misleading). ~~See also~~, Southwestern Insurance Company v. Stanton, 390 So.2d 417 (Fla. 3d DCA 1980) (instruction which tends to confuse rather than enlighten the jury is cause for reversal); Metropolitan Dade County v. Brill, 414 So.2d 626 (Fla. 3d DCA 1982) (where a jury in a simple action is given an incorrect instruction or one not applicable to the facts together with the correct instructions, reversal is mandated when a miscarriage of justice occurs where instructions may reasonably have confused or misled the jury).

In this case the jury's award of almost $100,000 to the Plaintiff, whose main complaint was that her feet hurt after surgery and therefore she could not work in a stock brokerage firm, substantiates the fact that the jury was confused or misled by the erroneous repetition of the Plaintiff's allegations against the Defendant in the jury instruction.

In charging the jury the trial court should try as far as possible to avoid singling out and unduly emphasizing one or more matters by giving more prominence to them or by commenting upon them to the exclusion or subordination of equally important matters. 55 Fla. Jur.2d Trial, Section 150. The court should not in its charge give undue prominence to any one phase of the case. Collins Fruit Company v. Giglio, 184 So.2d 447 (Fla. 2d DCA 1966). The requested jury instruction should be denied where it is designed to direct the jury's attention to a particular set of facts separating them from all the other material facts sought

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to be established by the testimony in the case, and giving prominence or importance to those facts for the purpose of strengthening the testimony. 55 Fla. Jur.2d Trial Section 150.

The trial court below picked out five of the fifteen factual allegations the Plaintiff requested to be read to the jury as Florida Standard Jury Instruction 3.5 (T 682). The choosing of five factual allegations to be added to the jury instruction clearly directed the jury's attention to those particular facts and gave undue emphasis and importance to them. Hall v. State, 78 Fla. 420, 83 So. 513 (1919). Botte v. Pomeroy, 497 So.2d 1275 (Fla. 4th DCA 1986) rev. denied, 508 So.2d 15 (Fla. 1987) (verdict form which made good samaritan defense first issue for determination gave undue prominence to that issue).

Plaintiff's Instruction Improper Comment on the Evidence

By adding factual allegations to the standard jury instruction the court made an improper comment on the evidence. Florida East Coast Railroad Co. v. Carter, 67 Fla. 335, 65 So. 254 (1914)(a court is not permitted to comment by expressing an opinion on the evidence when instructing the jury); Tanner v. State, 197 So.2d 842 (Fla. 1st DCA 1967)(comments on the evidence by trial judges in cases tried to a jury are usually grounds for reversal of the judgment rendered in the case). The trial judge should be cautious in his language and remarks before the jury. He must be fair to both sides and nothing should be said or done by him which will prejudice the rights of the parties. Where a comment expresses or tends to express the judge's view as to the

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weight of the evidence, the credibility of the witness, etc., it destroys the impartiality of the trial. Carr v. State, 136 So.2d 28 (Fla. 3d DCA 1962).

The dominant position occupied by a judge at trial before a jury is such that his remarks or comments overshadow those of the litigants, witnesses and other court officers. Hamilton v. State, 109 So.2d 422 (Fla. 3d DCA 1959). Almost a hundred years ago this Court stated that the court has no right to charge a jury with respect to matters of fact. Hanover Fire Ins. Co. v. Lewis, 28 Fla. 209, 10 So. 297 (1891); Williams v. Dickinson, 28 Fla. 90, 9 So. 847 (1891) (instructions which pointedly call the attention to the jury to various material facts in the evidence are fatally erroneous as trenching on the exclusive providence of the jury in determining the credibility of the witnesses and the weight of their evidence); Escambia County Electric Light & Power Co. v. Sutherland, 61 Fla. 167, 55 So. 83 (1911) (argumentative charge should not be given to the jury); 55 Fla. Jur.2d Trial Section 147 (jury charge which suggests to the jury the probable or possible effect of the conduct of one person to another is objectionable).

There is no question that the trial court erred in failing to give the standard jury instruction and in giving the non-standard instruction which contained the factual allegations of the Plaintiff's Complaint. The jury instruction as given was unnecessarily repetitive, unduly emphasized these particular aspects of the case and was an improper comment on the evidence, which was confusing and misled the jury. The harmful prejudicial

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error resulting from this improper and illegal jury instruction requires reversal of the verdict and the granting of a new trial.

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CONCLUSION

It is respectfully submitted that the certified question be answered in the affirmative and the trial court award of $60,000 in attorneys' fees, which is two and a half time greater than the amount due under the Plaintiff's contingency agreement and more than the Plaintiff herself received, be held excessive as a matter of law and reversed.

The trial court committed prejudicial reversible error in refusing to use the Standard Jury Instruction on negligence and in using a non-standard jury instruction, which was repetitive and an improper comment on the evidence. The Defendants are entitled to a new trial with proper standard jury instructions.

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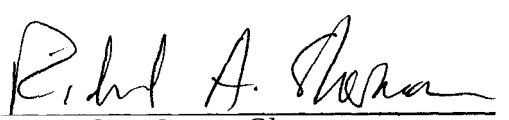
By : 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 16th day of June, 1989 to:

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