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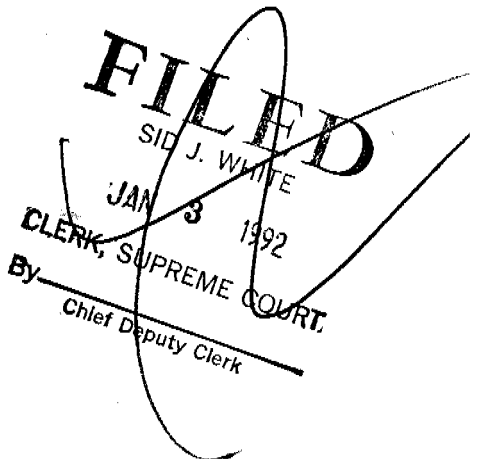

CASE NO. 79,138

IN THE SUPREME COURT OF FLORIDA

DONNA EASROLD,

Petitioner,

v.

JAMES RHODES, JR., and
ELOUISE RHODES,

Respondents.

PETITION TO INVOKE DISCRETIONARY JURISDICTION

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE

This is a petition to invoke the discretionary jurisdiction of this court on the ground that the opinion of the District Court of Appeal, First District, directly conflicts with an opinion of this court as well as two opinions from the District Court of Appeal, Fifth District.

The appeal was taken to the District Court of Appeal, First District" by the plaintiffs in the trial court who were not satisfied with the amount of damages awarded to them by the jury's verdict. Elouise Rhodes contended that she sustained a permanent injury in a motor vehicle collision with Donna Easkold. James Rhodes, Jr., sought damages based upon his wife's injuries. The jury found that Mrs. Rhodes did not sustain a permanent injury and therefore did not award any non-economic damages to either Elouise Rhodes or James Rhodes, Jr. It did award Elouise Rhodes damages for past and future medical expenses and lost wages. Mr. and Mrs. Rhodes took an appeal from the judgment in their favor contending that they should have been granted a new trial on damages. The District Court of Appeal, First District, agreed, reversing the judgment for a new trial with Judge Wolf dissenting.

STATEMENT OF THE FACTS

The facts necessary for consideration of the jurisdictional issues are found in the district court of appeal's decision (A-2 to A-4) as follows:

> The depositions of three physicians were presented at the trial. Dr. Flynn, an orthopedic surgeon, first saw Rhodes in August 1988, at which time she was complaining of pain in her neck, back, and left knee, stemming from the auto accident. A CT scan and arthrogram revealed a herniated disc, nerve impairment in the neck and lower back, arthritic changes in the kneecap, and both torn cartilage and a small chip inside the left knee joint. In February 1989, Flynn performed surgery on the kneecap and, during surgery, discovered a fracture. It was Flynn's opinion that the fracture was caused by trauma, "and from the history she [Rhodes] gave me, the only trauma that she knew of or at least she related to me was the auto accident." It was also Flynn's opinion that Rhodes had sustained permanent injuries to her left knee, back, and neck, in the auto accident. He admitted on cross-examination that he had no way of knowing what percentage of Rhodes' impairment had existed before the 1988 auto accident except "what she told me."
>
> Dr. VerVoort performed an IME on Rhodes in November 1989. It was his opinion, after examining her medical records and taking a history from Rhodes, that she had sustained a permanent injury to her neck, low back, and left knee as a result of the July 1988 auto accident. In giving her history to Dr. VerVoort, Rhodes had denied any history of neck or back pain prior to the July 1988 accident. Dr. VerVoort admitted that he was relying upon Rhodes' statements to him to determine that there was some aggravation of her knee from the accident.
>
> In addition, the record contained the deposition of Dr. Jankauskas, who had been Rhodes' regular physician since 1981.

Jankauskas' review of medical charts revealed that Rhodes had been examined both at his office and at the county clinic, on several occasions between 1975 and 1986, for various conditions, including numbness in her left leg and toes, pain in her back, numbness and pain on the left side of her head and neck, left leg pain, and pain in the ears and back. Neither Dr. Flynn nor Dr. VerVoort had had access to these medical records at the time of their depositions.

During cross-examination of plaintiff at trial, it was elicited that she had stated in an April 1990 deposition that she had never had any kind of trouble with her back or knees before the 1988 accident, had had no other injuries before the accident that required treatment from a doctor, and had not complained to Dr. Jankauskas about pain in her neck, back, or knees before the accident. In a second deposition in June of 1990, the plaintiff admitted that she had left her job in the maintenance department at Sacred Heart Hospital after she was hit in the leg with a buffer, causing her to fall down. She also admitted that she had "probably had a little backache or headache" at times before the 1988 accident.

After considering the evidence presented, the jury found Easkold to have been negligent, and awarded the Rhodeses a total of $37,000 for past and future medical expenses and loss of earning ability. No damages were awarded on the plaintiff's claims for pain and suffering or loss of consortium, however, and the jury specifically found that plaintiff had not sustained a permanent injury. Plaintiff's motion for new trial, in which she argued that the uncontradicted medical evidence indicated that she had sustained permanent injuries as a result of the auto accident, was denied.

STATEMENT OF THE ISSUES

(1) The decision of the district court of appeal directly conflicts with other appellate decisions in regard to the weight to be given expert testimony.

(2) The decision of the district court of appeal directly conflicts with another appellate decision in regard to the burden of proving permanent injury.

SUMMARY OF THE ARGUMENT

Issue 1 - Effect of Expert Testimony

The District Court of Appeal, First District, held that even though there is evidence from which the jury could conclude that factual assumptions made by an expert medical witness are not correct, the jury cannot choose to disregard that expert's opinion unless the expert testifies that the opinion would be different if the expert was aware of the actual facts. This holding directly conflicts with the rule expressed in decisions of this court and of other district courts of appeal to the effect that a jury has the right to reject opinion testimony when the factual basis for the opinion is proved to be unsound.

Issue 2 - Burden of Proof

The decision of the District Court of Appeal" First District, imposes upon the defendant in a motor vehicle personal injury case the burden of establishing that the plaintiff did not sustain a permanent injury. This is in conflict with the decision of the District Court of Appeal, Fifth District, that

the burden of proving a permanent injury by a preponderance of the evidence is upon the plaintiff.

ARGUMENT

Issue 1 - Effect of Expert Testimony

The holding of the First District is found in the last paragraph of its opinion (A-6) as follows:

> As in Morey, the plaintiff in the instant case presented expet medical testimony that she had sustained permanent injuries as a result of her 1988 auto accident, defendant presented no medical evidence to the contrary, and neither Dr. Flynn nor Dr. VerVoort testified that additional medical history would have changed their opinions. Further, as in Faucher, supra, the defendant in the instant case failed to specifically ask Drs. VerVoort and Flynn at their depositions whether their opinions would have been different had they known Mrs. Rhodes' complete medical history. Because the medical evidence of permanency was therefore uncontroverted, the jury's verdict of no permanent injury was contrary to the manifest weight of the evidence, and appellant's motion for new trial should have been granted.

The court has therefore held that even though there is evidence from which the jury could conclude that the medical expert's opinion as to whether the collision caused a permanent injury is based upon erroneous statements made by the patient, the jury is not permitted to arrive at a conclusion that there is no permanent injury. In other words, in the context of the no fault threshold of permanent injury, the District Court of Appeal, First District, has established a rule that a jury cannot disregard expert opinion even when it concludes that the factual

assumptions underlying the opinion are incorrect. This holding is in direct conflict with at least two appellate decisions, including one from this court.

In Shaw v. Puleo, 159 So.2d 641 (Fla. 1964), this court reversed a decision of the District Court of Appeal, First District, in a somewhat similar situation. That case arose from a rearend automobile collision. Expert medical testimony was presented that the minor plaintiff had sustained a permanent neck injury. The jury found liability in favor of the plaintiffs but awarded no damages. The trial court denied the plaintiffs' motion for new trial. The district court of appeal reversed for a new trial on damages" including in its opinion (159 So.2d at 642) the following:

> ...This proof was uncontradicted by any other medical testimony. It appears to be generally accepted that where injuries are of such a character as to require skilled professional persons to determine the nature, extent and duration thereof, and the proper procedures for treatment, the question is one of science and must be determined by skilled professional persons. . . . Testimony thuse adduced may not be arbitrarily disregarded by the finders of fact when not contradicted by proof of equal dignity, nor open to doubt from any reasonable point of view.

This court disagreed with those statements in the opinion of the District Court of Appeal, First District. This court said (159 So.2d at 643):

> While we agree that jurors and the courts ordinarily are not qualified to determine the "proper procedures for diagnosing and treating" a particular human ailment in a

> malpractice case, this does not mean that a jury is not free, in the ordinary negligence case, to accept or reject the testimony of a medical expert just as it may accept or reject that of any other expert. . . .
>
> A like situation exists when the opinion of the expert is based upon hypothetical questions. If the jury should find that the facts on which the hypothesis or theory is based are not proved, the answers of the experts would necessarily fall with the hypothesis. . . . So, too, where there are in fact conflicts which arise in testimony given during the trial, it is the function of the jury to resolve them and it is within their province to reject the expert testimony and rely on lay evidence. . . .
>
> For these reasons we must reiterate that even though the facts testified to by Dr. Albee are not within the ordinary experience of the members of the jury, the jury was still free to determine their credibility and to decide the weight to be ascribed to them in the face of conflicting lay evidence.

In short, this court held that a jury is entitled to disregard the opinion of a medical expert if it concludes that the underlying assumptions upon which the opinion is based are not factually correct. The District Court of Appeal, First District, in the instant case held that a jury cannot disregard such expert opinion unless the expert is confronted with the erroneous assumption and testifies that his opinion would be different if the true facts were known.

The decision sought to be reviewed is also in direct conflict with Burton v. Powell, 547 So.2d 330 (Fla. 5th DCA 1989). In that case the jury found that the plaintiff had not sustained a permanent injury in the motor vehicle collision. One

of the points that she raised on the appeal was that the trial court should have directed a verdict in her favor on the issue of permanency. On that issue, the Fifth District said (547 So.2d at 332):

> The appellant also contends the trial court should have directed a verdict on the issue of the permanency of her injury. We disagree. Without belaboring the point, we simply reiterate the established precept that a jury is free in the ordinary negligence case to accept or reject the testimony of a medical expert just as it may accept or reject that of any other expert.

In the instant case, the First District has held that a jury is not authorized to accept or reject the opinion of an expert. It has held that the expert's opinion must be accepted even if based upon erroneous assumptions unless the expert himself testifies that his opinion would be different if he were aware of the true facts.

In the context of expert medical testimony in a personal injury damage suit the opinion of the District Court of Appeal, First District, is in direct conflict with the decisions of this court and of the Fifth District. This court should exercise its discretion to accept jurisdiction to harmonize the law of the First District with that of the rest of the state.

Issue 2 - Burden of Proof

The holding of the First District also has the effect of shifting the burden of proof in regard to a permanent injury in a suit arising out of a motor vehicle collision. The decision

below imposes upon the defendant an obligation to establish by contrary medical testimony the absence of a permanent injury, thereby altering the rule that the burden of proving an essential element of a claim for damages is upon the plaintiff. This holding conflicts with Estate of Wallace v. Fisher, 567 So.2d 505 (Fla. 5th DCA 1990). One of the issues decided in that case was that the jury should have been instructed that the plaintiff was required to establish the existence of a permanent injury by the preponderance of the evidence.

In holding that the judgment should be reversed for a new trial, the District Court of Appeal, First District, extended its previous holding in Morey v. Harper, 541 So.2d 1285 (Fla. 1st DCA 1989) rev. den. 551 So.2d 461 (Fla. 1989). It had held in that case that when the plaintiff presents expert medical testimony that remains materially uncontradicted, a jury verdict of no permanent injury will be found to be contrary to the manifest weight of the evidence. It has now gone farther and has held that even when an expert medical witness admits that his opinion is based upon assumptions that the jury could find to be erroneous, the defendant must present additional evidence proving that the plaintiff does not have a permanent injury. The decision sought to be reviewed is therefore in conflict with the decision of the Fifth District also.

CONCLUSION

The decision of the District Court of Appeal, First District, in this case is in direct conflict with at least one decision of this court and of another district court of appeal on the issue of whether a jury is entitled to disregard the opinion of an expert witness if it finds that factual assumptions made by the expert are erroneous. The decision is also in conflict with that of another district court of appeal in shifting the burden of proof in regard to the permanency of an injury in a motor vehicle case from the plaintiff to the defendant. This court should exercise its discretion to take jurisdiction of this case to clarify the law of Florida on both of those issues.

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IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

JAMES RHODES, JR., and ELOUISE RHODES, Husband and Wife,	NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND DISPOSITION THEREOF IF FILED
Appellants,	CASE NO. 90-3840
vs.	
DONNA EASKOLD,	
Appellee.	

Opinion filed October 10, 1991.

An Appeal from the Circuit Court for Escambia County. Lacey Collier, Judge.

Thomas E. Wheeler, Jr., of Bell, Schuster & Wheeler, P.A., Pensacola, for Appellants.

Robert P. Gaines, of Beggs & Lane, Pensacola, for Appellee.

SHIVERS, Judge.

Appellants, plaintiffs below, appeal the trial court's denial of their motion for new trial. We reverse, and remand for a new trial.

The record indicates that appellants, James and Elouise Rhodes, were involved in an auto accident with appellee, Donna Easkold, in July 1988. The Rhodeses filed a negligence action

against Easkold, seeking damages connected with Elouise Rhodes' injuries. Easkold denied liability, and a jury trial was conducted in 1990.

The depositions of three physicians were presented at the trial. Dr. Flynn, an orthopedic surgeon, first saw Rhodes in August 1988, at which time she was complaining of pain in her neck, back, and left knee, stemming from the auto accident. A CT scan and arthrogram revealed a herniated disc, nerve impairment in the neck and lower back, arthritic changes in the kneecap, and both torn cartilage and a small chip inside the left knee joint. In February 1989, Flynn performed surgery on the kneecap and, during surgery, discovered a fracture. It was Flynn's opinion that the fracture was caused by trauma, "and from the history she [Rhodes] gave me, the only trauma that she knew of or at least she related to me was the auto accident." It was also Flynn's opinion that Rhodes had sustained permanent injuries to her left knee, back, and neck, in the auto accident. He admitted on cross-examination that he had no way of knowing what percentage of Rhodes' impairment had existed before the 1988 auto accident except "what she told me."

Dr. VerVoort performed an IME on Rhodes in November 1989. It was his opinion, after examining her medical records and taking a history from Rhodes, that she had sustained a permanent injury to her neck, low back, and left knee as a result of the July 1988 auto accident. In giving her history to Dr. VerVoort, Rhodes had denied any history of neck or back pain prior to the

July 1988 accident. Dr. VerVoort admitted that he was relying upon Rhodes' statements to him to determine that there was some aggravation of her knee from the accident.

In addition, the record contained the deposition of Dr. Jankauskas, who had been Rhodes' regular physician since 1981. Jankauskas' review of medical charts revealed that Rhodes had been examined both at his office and at the county clinic, on several occasions between 1975 and 1986, for various conditions, including numbness in her left leg and toes, pain in her back, numbness and pain on the left side of her head and neck, left leg pain, and pain in the ears and back. Neither Dr. Flynn nor Dr. VerVoort had had access to these medical records at the time of their depositions.

During cross-examination of plaintiff at trial, it was elicited that she had stated in an April 1990 deposition that she had never had any kind of trouble with her back or knees before the 1988 accident, had had no other injuries before the accident that required treatment from a doctor, and had not complained to Dr. Jankauskas about pain in her neck, back, or knees before the accident. In a second deposition in June of 1990, the plaintiff admitted that she had left her job in the maintenance department at Sacred Heart Hospital after she was hit in the leg with a buffer, causing her to fall down. She also admitted that she had "probably had a little backache or headache" at times before the 1988 accident.

After considering the evidence presented, the jury found Easkold to have been negligent, and awarded the Rhodeses a total of $37,000 for past and future medical expenses and loss of earning ability. No damages were awarded on the plaintiff's claims for pain and suffering or loss of consortium, however, and the jury specifically found that plaintiff had not sustained a permanent injury. Plaintiff's motion for new trial, in which she argued that the uncontradicted medical evidence indicated that she had sustained permanent injuries as a result of the auto accident, was denied.

We reverse the trial court's denial of the motion for new trial, on the basis of this court's holding in Morey v. Harper, 541 So.2d 1285 (Fla. 1st DCA), review denied 551 So.2d 461 (Fla. 1989). In Morey, this court held that a finding of permanent injury could only be satisfied by expert medical testimony, and stated:

> Because the plaintiff cannot satisfy this requirement without presenting expert medical testimony, when the plaintiff does present such testimony and it remains materially uncontradicted, a jury verdict of no permanent injury will be found to be contrary to the manifest weight of the evidence and require the granting of a new trial. . . . Even though appellee demonstrated that the medical history on which the doctors based their opinion was in part inaccurate, neither doctor opined that the additional medical history would cause him to change his opinion regarding the permanent nature of the injuries suffered by the plaintiff. Doctor Sharf was not even asked whether such history of prior injury would affect his opinion. Thus, their opinions that plaintiff sustained a permanent injury as a result of the

> accident were essentially uncontradicted despite some seeming inconsistencies in the testimony.

541 So.2d at 1288 (emphasis supplied). Because the medical testimony of permanency introduced at the trial in Morey was not based on an accurate factual predicate, the court found that the trial court had not erred in denying the plaintiff's motion for directed verdict. The court reversed and remanded for new trial, however, stating that "because the medical evidence, although based on an inaccurate predicate, was uncontroverted on this record, the jury's verdict finding no permanent injury was contrary to the manifest weight of the evidence under the authority of Scarfone V. Magaldi [522 So.2d 902 (Fla. 3d DCA), review denied by 531 So.2d 1353 (Fla. 1988)]" (finding that the jury's verdict of no permanent injury was against the manifest weight of the evidence, and reversing and remanding for new trial, where the plaintiff presented medical evidence of permanent injuries sustained as the result of the subject automobile accident, and the defendants offered no contrary medical evidence). 541 So.2d at 1288. Morey has been cited with approval in Faucher v. R.C.F. Developers, 569 So.2d 794 (Fla. 1st DCA 1990), a workers' compensation case in which this court held:

> It is now well settled that a doctor's medical opinion cannot be disregarded by the judge of compensation claims because the judge finds that the history given such doctor by the claimant was either false or incomplete, unless appropriate questions are put to the doctor specifically inquiring about the effect of the false or omitted information on the doctor's previously expressed opinion.

569 So.2d at 801 (e.s., citations omitted)

As in Morey, the plaintiff in the instant case presented expert medical testimony that she had sustained permanent injuries as a result of her 1988 auto accident, defendant presented no medical evidence to the contrary, and neither Dr. Flynn nor Dr. VerVoort testified that additional medical history would have changed their opinions. Further, as in Faucher, supra, the defendant in the instant case failed to specifically ask Drs. VerVoort and Flynn at their depositions whether their opinions would have been different had they known Mrs. Rhodes' complete medical history. Because the medical evidence of permanency was therefore uncontroverted, the jury's verdict of no permanent injury was contrary to the manifest weight of the evidence, and appellant's motion for new trial should have been granted.

REVERSED and REMANDED for new trial.

CAWTHON, S.J., CONCURS. WOLF, J., DISSENTS, WITH OPINION.

WOLF, J., dissenting.

I would affirm. The cases of Morey v. Harper, 541 So.2d 1285 (Fla. 1st DCA 1989), rev. denied, 551 So.2d 461 (Fla. 1989), and Faucher v. R.C.F. Developers, 569 So.2d 794 (Fla. 1st DCA 1990), should be revisited.

The weight and credibility to be given to an expert's testimony is a matter for the finder of fact. Horowitz v. American Motorist Ins. Co., 343 So.2d 1305 (Fla. 2nd DCA 1977). The trier of fact was justified in determining that the opinion testimony was flawed by reason of the materially untruthful history given them by the claimant. See Faucher, supra (Nimmons, J., dissenting).

Dr. Flynn and Dr. VerVoort both admitted that they relied on the history given to them by the plaintiff in making their determination concerning that Rhodes had sustained permanent injuries as a result of the auto accident. The defense presented evidence that the history given by the plaintiff was materially inaccurate. It was within the province of the trier of fact to determine whether, under the circumstances, the opinion testimony of the doctors should be accepted or rejected. I find no error in the jurors rejecting the opinion of the doctors on the evidence presented.

Elizabeth A. SHAW and John C. Shaw, Petitioners,

v.

John Anthony PULEO, a minor, by his next friend and father, John Joseph Puleo, and John Joseph Puleo, Respondents.

No. 32717.

Supreme Court of Florida.

Jan. 8, 1964.

Action by father for medical expenses and by minor son for personal injuries. The Circuit Court for Volusia County, Robert H. Wingfield, J., entered judgment denying plaintiffs' motion for new trial and the plaintiffs appealed. The District Court of Appeal, 149 So.2d 880, reversed and remanded with directions and the defendants petitioned for certiorari. The Supreme Court, Terrell, J., held that even though facts testified to by physician concerning alleged whiplash injury were not within ordinary experience of members of jury, jury was still free to determine their credibility in face of conflicting lay evidence but on new trial plaintiffs were required to prove damages and jury was not precluded from inquiring into reasonableness and necessity of medical expenses.

Decision of the Court of Appeal quashed and case remanded with directions.

1. Courts ⇐216

Alleged conflict between decisions of district court of appeal of same district would not give Supreme Court jurisdiction by certiorari under constitutional provision giving Supreme Court power to review by certiorari any decision of district court of appeal that is in direct conflict with the decision of another district court of appeal or the Supreme Court. F.S.A.Const. art. 5, § 4.

2. Evidence ⇐571(1)

Jury is free in ordinary negligence case to accept or reject testimony of medical expert just as it may accept or reject that of any other expert, especially when facts sought to be proved by expert testimony are within ordinary experience of members of jury.

3. Evidence ⇐570

If jury should find that facts forming basis of hypothetical questions asked of expert are not proved, answers of experts necessarily fall.

4. Evidence ⇐570

Trial ⇐143

Where facts are in conflict, it is function of jury to resolve them, and it is within their province to reject expert testimony and rely on lay evidence.

5. Evidence ⇐571(10)

Even though facts testified to by physician concerning alleged whiplash injury were not within ordinary experience of members of jury, jury was still free to determine their credibility and to decide weight to be ascribed to them in face of conflicting lay evidence.

6. Appeal and Error ⇐1004(1)

Verdicts for allegedly inadequate damages will not be set aside merely because they are less than Supreme Court thinks they should be, and it must be shown that verdict was induced by prejudice or passion, some misconception of law or evidence, or must be shown that jury did not consider all elements of damage involved, missed a consideration of issues submitted, or failed to discharge their duty as given by court's charge.

7. Appeal and Error ⇐1004(3)

In reviewing jury verdict after trial court has denied a motion for new trial alleging inadequacy of damages, test to determine adequacy of verdict is not what appellate court would have decided had it tried case, but whether it can be said that jurors as reasonable men could not have found verdict they did.

8. Damages ⇐3

Mere happening of accident or even fact that negligence is shown will not in and of itself produce a right to recover damages.

9. Appeal and Error ⇐1213, 1214

On remand of action by father for medical expenses and by minor child for personal injuries for new trial on issue of damages only after jury had returned verdict for plaintiffs but denied damages, father had to prove damages and jury had to inquire into reasonableness of medical expenses on new trial.

John L. Graham, of Hull, Landis, Graham & French, DeLand, for petitioners.

Maurice Wagner, Holly Hill, and Richard D. Bertone, Daytona Beach, for respondents.

TERRELL, Justice.

This cause is here on petition for certiorari filed by Elizabeth A. and John C. Shaw seeking review of the decision of the First District Court of Appeal in the case of Puleo v. Shaw, 149 So.2d 880.

The case grew out of a rear end collision wherein petitioners' automobile struck an automobile owned by respondent John Joseph Puleo causing injuries to one of its passengers, John Anthony Puleo, a minor. By their complaint respondent minor sought damages for personal injuries sustained as a result of the accident and his father sought damages for the medical expenses necessarily incurred as incident to his son's injuries and for loss of his son's services. At the trial respondents introduced evidence which established the liability of petitioners. With respect to the issue of damages the evidence showed that respondent minor, a boy 13 years old, led an active life and enjoyed good health prior to the accident.

The jury returned a verdict in favor of the respondents as to liability but stripped it of damages. The trial court denied plaintiffs' motion for new trial. On appeal the district court reversed the cause and remanded it with directions that a new trial be granted on the issue of damages only. In doing so, the district court said in part:

"* * * It was the doctor's medical opinion that the minor boy had suffered what is commonly known as a whiplash injury, which is of a type not readily detectible from casual observation and which, as in this case, is not totally disabling. *This proof was uncontradicted by any other medical testimony.* It appears to be generally accepted that where injuries are of such a character as to require skilled professional persons to determine the *nature, extent and duration thereof, and the proper procedures for treatment, the question is one of science and must be determined by skilled professional persons.* [Crovella v. Cochrane, (Fla.App.1958) 102 So.2d 307.] Testimony thus adduced may not be arbitrarily disregarded by the finders of fact *when not contradicted by proof of equal dignity*, nor open to doubt from any reasonable point of view. [Chomont v. Ward, (Fla.1958), 103 So.2d 635]

* * *

"The jury was not, however, justified on the evidence before it in finding that plaintiffs were not entitled to recover *at least the amount of medical expenses* incurred as a result of the injury suffered by the minor son.

"For the foregoing reasons it is our view that the verdict is contrary to the manifest weight of evidence as related to the issue of damages." (E. S.)

Petitioners contend that the instant decision is in direct conflict with at least six prior decisions of the appellate courts of this state.

[1] Before proceeding further, it is appropriate to correct a misconception on

the part of the petitioners relating to this court's direct conflict jurisdiction. Art. V, Sec. 4, Florida Constitution, F.S.A., provides that "The supreme court may review by certiorari any decision of a district court of appeal * * * that is in direct conflict with a decision of *another* district court of appeal or of the supreme court on the same point of law, * * *." (E.S.) In their effort to show such "direct conflict," petitioners rely on the cases of Ingle v. Cochrane, (Fla. DCA 1st, 1963) 151 So.2d 63, and Crovella v. Cochrane, (Fla. DCA 1st, 1958) 102 So.2d 307, as being in direct conflict with the present decision of the District Court of Appeal, *First District*. Even if, for the sake of argument, we conceded that the above cases were in fact inconsistent with each other and would under our jurisdictional precedents normally generate direct conflict, it is clear that such inconsistency or conflict would not support this court's exercise of jurisdiction by certiorari. Our conflict jurisdiction is constitutionally limited to cases wherein the decision of the district court sought to be reviewed conflicts with a decision of "another" district court or the Supreme Court. Conflicts between two or more decisions of the same district court of appeal cannot activate this phase of our constitutional power of review by certiorari.

As to the remaining cases cited by the petitioners as being in direct conflict with the instant decision of the district court, we must conclude that such conflict is not shown and therefore, under normal circumstances we would not have jurisdiction. However, during the consideration of this cause, a petition for writ of certiorari was filed in the case of Schmidt v. Tracey, (Fla. DCA 2nd, 1963) 150 So.2d 275. Said petition alleged that the Schmidt case was in direct conflict with the First District Court of Appeal decision in the instant case. With this contention we agree. The Schmidt case involved an automobile negligence action wherein the district court held that although the damages awarded were less than the amount claimed as medical expenses by the plaintiff, they were not so inadequate as to be unreasonable in view of the question as to what portion of the medical expenses was necessarily incurred as a result of the injury and the reasonableness of said expenses. Such a holding by the Second District Court of Appeal in a case involving substantially the same controlling facts is in direct conflict with the First District Court's decision in the instant case wherein the said court reversed, admonishing that upon remand the jury should award "at least the amount of medical expense" incurred as a result of the injury suffered by respondent's minor son.

Jurisdiction being clear, we now turn to a consideration of the district court's decision in the instant case. Of most immediate concern is the district court's application of the rule of evidence described in the medical malpractice case of Crovella v. Cochrane, (Fla. DCA 1st, 1958) 102 So.2d 307, to the instant personal injury case. In the Crovella case the plaintiff sought damages for personal injuries allegedly resulting from defendant obstetrician's negligence in failing to correctly diagnose and treat plaintiff for an alleged pregnancy. In affirming a summary judgment granted in favor of the defendant, the District Court of Appeal, First District, stated in part:

> "As to the first ground of assault on the affidavit, the overwhelming weight of authority supports the view that except to the extent that the physical condition of a person is open to ordinary observation by persons of common experience, the testimony of one who is qualified in the field of medical knowledge must be adduced to inform the jurors of the *proper procedures for diagnosing and treating* the particular case. Millar v. Tropical Gables Corp., Fla. [App.], 99 So.2d 589; Howell v. Jackson, 65 Ga.App. 422, 16 S.E.2d 45. * * *" (E.S.)

[2] While we agree that jurors and the courts ordinarily are not qualified to determine the "proper procedures for *diagnosing*

and treating" a particular human ailment in a malpractice case, this does not mean that a jury is not free, in the ordinary negligence case, to accept or reject the testimony of a medical expert just as it may accept or reject that of any other expert. See Bailey v. Sympson, (Fla. DCA 3rd, 1963) 148 So.2d 729; Ingle v. Cochran, (Fla. DCA 1st, 1963) 151 So.2d 63, and Goldstein v. Walters, (Fla. DCA 2nd, 1961) 126 So.2d 759. This is especially true when the facts sought to be proved by expert testimony are within the ordinary experience of the members of the jury. In such cases the conclusions to be drawn from such facts will be left to the jury. Mills v. Redwing Carriers, Inc., (Fla. DCA 2nd, 1961) 127 So.2d 453.

[3, 4] A like situation exists when the opinion of the expert is based upon hypothetical questions. If the jury should find that the facts on which the hypothesis or theory is based are not proved, the answers of the experts would necessarily fall with the hypothesis. Millar v. Tropical Gables Corp., (Fla. DCA 3rd, 1958) 99 So.2d 589; Chomont v. Ward, Fla.1958, 103 So.2d 635. So, too, where there are in fact conflicts which arise in testimony given during the trial, it is the function of the jury to resolve them and it is within their province to reject the expert testimony and rely on lay evidence. Gulf Life Insurance Co. v. Shelton, 155 Fla. 586, 21 So.2d 39.

[5] For these reasons we must reiterate that even though the facts testified to by Dr. Albee were not within the ordinary experience of the members of the jury, the jury was still free to determine their credibility and to decide the weight to be ascribed to them in the face of conflicting lay evidence.

[6] The second issue for our consideration revolves around the district court's holding that "The jury was not, however, justified on the evidence before it in finding that plaintiffs were not entitled to recover *at least* the amount of medical expenses * * *." (E.S.) The question of adequacy or inadequacy of damages is governed by this court's decision in Radiant Oil Co. v. Herring, 146 Fla. 154, 200 So. 376, wherein we said:

"It has been held that under the old common law rule, a motion for new trial for inadequacy of damages should not be granted but the general rule now seems to be that a verdict for grossly inadequate damages stands on the same ground as a verdict for excessive or extravagant damages and that a new trial may as readily be granted in the one case as the other. Such verdicts will not be set aside for the mere reason that they are less than the Court thinks they should be. It must be shown that the verdict was induced by prejudice or passion, some misconception of the law or the evidence or it must be shown that the jury did not consider all the elements of damage involved, missed a consideration of the issues submitted or failed to discharge their duty as given them by the Court's charge. 20 R.C.L. 283."

To same effect see Allen v. Powell, 152 Fla. 443, 12 So.2d 378.

[7, 8] In reviewing a jury verdict in a case wherein the trial court has denied a motion for new trial alleging inadequacy of damages, an appellate court is bound to remember that the test of inadequacy of a verdict is not what the reviewing court would have decided had it tried the case, but whether it can be said that the jurors as reasonable men could not have found the verdict they did. Utley v. Southern Metal Products Co., (Fla. DCA 2nd, 1959) 116 So.2d 28. Thus, it should be kept in mind that the mere happening of an accident or even the fact that negligence is shown will not in and of itself produce a right to recover damages. Chomont v. Ward, supra. Among the items which the party seeking to recover must prove, even when liability is clear, is the necessity and reasonableness of the charges for medical attendance and treatment. Schmidt v. Tracey, supra.

[9] Since the rules governing adequacy of damages are clear, we are confident that the learned appellate judge by his comments did not intend upon reversal to relieve the respondents from the burden of proving their damages or to preclude the jury from inquiring into the reasonableness and necessity of respondents' medical expenses.

For the reasons above stated, the decision of the court of appeal in the instant case must be quashed and the case remanded to it for further proceedings consistent with the opinions expressed herein.

It is so ordered.

ROBERTS, Acting Chief Justice, O'CONNELL, CALDWELL and SEBRING (Retired), JJ., concur.

Gertrude S. SCHMIDT, Petitioner,

v.

Raymond R. TRACEY, Respondent.

No. 32714.

Supreme Court of Florida.

Jan. 8, 1964.

Writ of Certiorari to the District Court of Appeal, Second District, 150 So.2d 275.

Farish & Farish and J. D. Farish, Jr., West Palm Beach, for petitioner.

Earnest, Pruitt & Schulle and Wallis E. Schulle, West Palm Beach, for respondent.

PER CURIAM.

This cause is here on Petition for Writ of Certiorari alleging conflict with Puleo v. Shaw.[1] Although conflict exists we find that, inasmuch as the Puleo decision, supra, is reversed by the decision of this Court,[2] the petition herein is denied.

DREW, C. J., and TERRELL, O'CONNELL, CALDWELL and SEBRING (Retired), JJ., concur.

Henry G. SIMMONITE, Petitioner,

v.

Ryan Von Alvorden KITTEL, Respondent.

No. 32790.

Supreme Court of Florida.

Jan. 17, 1964.

Writ of Certiorari to the District Court of Appeal, Third District.

Dismissing certiorari Fla.App., 152 So.2d 817.

Carr & Warren, Miami, for petitioner.

Joseph J. Gersten, Miami, for respondent.

PER CURIAM.

The petition for writ of certiorari reflected apparent jurisdiction in this Court. We issued the writ and have heard argument of the parties. After hearing argument and upon further consideration of the matter, we have determined that the writ was improvidently issued and that the petition is without merit. Therefore, the writ must be and is hereby discharged and the petition for writ of certiorari is dismissed.

It is so ordered.

DREW, C. J., O'CONNELL, CALDWELL and HOBSON (Ret.), JJ., and HEWITT, Circuit Judge, concur.

1. 149 So.2d 880 (Fla.App.1st 1963).

2. Shaw v. Puleo, Fla., 159 So.2d 641.

at the commitment hearing it should be noted that such issue has not been raised on appeal and therefore should not be considered. *See Spankie,* 505 So.2d at 1358 n. 1. In addition, in *Fredrick,* under similar circumstances, this court has held that admission of hearsay evidence was harmless error.

While the evidence of abandonment here may not be clear, the evidence of abuse and neglect, both past and prospective, is clear and convincing. *See Spankie.* Accordingly, the judgment is affirmed.

AFFIRMED.

ORFINGER, J., concurs.

COWART, J., dissents with opinion.

COWART, Judge, dissenting.

This is another appeal by a mother whose parental rights to her child have been terminated by final judgment of the trial court. As in all of these cases, there are a lot of details and the mother has many problems and inadequacies and is not a perfect mother; but basically, the mother's parental rights to one of her children were terminated in this case because (1) the child was previously adjudicated to be dependent, (2) when the child's father ran the mother from the home, the mother left the child in the custody of the child's father, who turned the child over to H.R.S. and when the mother returned and wanted custody, the father told the mother that the child was "dead and buried," (3) the mother failed to comply with a performance agreement, and (4) "prospective abuse or neglect"; in other words, H.R.S. and the trial court were satisfied that because of the mother's past lifestyle, emotional problems, and history, the child's future was "at risk."

This case should be reversed because the trial court erred (1) by admitting into evidence the permanent termination hearing hearsay evidence involved in a prior dependency adjudication proceeding, *see In the Interest of S.J.T.,* 475 So.2d 951 (Fla. 1st DCA 1985) and the dissent in *Frederick v. H.R.S.,* 523 So.2d 1164 (Fla. 5th DCA 1988), *rev. denied,* 531 So.2d 1353 (Fla. 1988) and the separate opinion in *White v. H.R.S.,* 483 So.2d 861 (Fla. 5th DCA 1986); (2) the failure of the mother to comply with an H.R.S. performance agreement which is itself arbitrary, coerced, and based on a facially unconstitutional statute and is not a proper legal basis for permanently terminating parental rights, *see In the Interest of R.W.,* 481 So.2d 548 (Fla. 5th DCA 1986), *affirmed,* 495 So.2d 133 (Fla.1986), and (3) there is no statutory basis for terminating parental rights on the basis of speculation or inferences as to a parent's probable future or prospective abuse or neglect—the law requires clear and convincing evidence of actual, substantial, and real neglect or abuse of the child by the parent whose rights are being considered, and at a time when the parent had actual custody and control of the child and while *able* to provide necessary care, the parent intentionally or neglectfully failed to do so. *See In the Interest of B.W.,* 498 So.2d 946 (Fla. 1986); and the dissents in *Gunter v. H.R.S.,* 531 So.2d 345 (Fla. 5th DCA 1988) and *Frederick v. H.R.S.,* 523 So.2d 1164 (Fla. 5th DCA 1988).

Linda G. BURTON, Appellant,

v.

Barry Dean POWELL and National Pulpwood Corporation, Appellees.

No. 89-92.

District Court of Appeal of Florida, Fifth District.

Aug. 10, 1989.

Driver of automobile which was struck from behind by truck brought negligence suit against driver of truck and his employer. The Circuit Court, Marion County, Carven D. Angel, J., entered judgment awarding plaintiff $2,350, and plaintiff appealed.

The District Court of Appeal, Cobb, J., held that: (1) it was error for trial court to deny plaintiff's motion for directed verdict on issue of liability; (2) issue of permanency of plaintiff's injury was for jury; and (3) inconsistency in jury verdict did not warrant granting plaintiff a new trial.

Affirmed in part; reversed in part and remanded.

1. Automobiles ⇐242(7)

Driver of truck which struck automobile from behind when both vehicles were attempting to enter lane in heavy traffic failed to rebut or dissipate presumption that his negligence was sole proximate cause of collision; automobile's alleged start and stop occurred at time and place where it was reasonably to be expected.

2. Negligence ⇐136(31)

Under comparative fault principles, a directed verdict may still lie as against a defendant whose negligent acts are less than the sole proximate cause of an injury; such verdict is merely a finding that defendant was negligent to some extent; moreover, such would be the case even where there is reasonable evidence from which a jury might find plaintiff to be contributorily negligent.

3. Negligence ⇐136(26)

A plaintiff is at liberty to move for directed verdict on issue of comparative negligence in addition to issue of defendant's liability.

4. Evidence ⇐570

Jury is free in an ordinary negligence case to accept or reject testimony of a medical expert just as it may accept or reject that of any other expert.

5. Appeal and Error ⇐1033(7)

Plaintiff was not entitled to new trial in negligence suit because jury verdict demonstrated an inherent inconsistency, where plaintiff received more than she would have had the jury properly understood and applied trial court's instructions in regard to issue of permanency of injury.

Ralph J. McMurphy of Green and Simmons, P.A., Ocala, for appellant.

Bryce W. Ackerman of Savage, Krim, Simons, Fuller & Ackerman, P.A., Ocala, for appellees.

COBB, Judge.

The appellant Linda Burton, plaintiff below, was the victim of a collision wherein her automobile was struck from behind by a truck owned by National Plywood Corporation and driven by Barry Dean Powell. Burton and Powell were stopped in tandem in a median strip between the north and southbound lanes of Highway 441, each attempting to enter the southbound lane in heavy traffic.

According to Powell, Burton drove forward as if to enter the highway, at which point he eased forward while looking to his right for oncoming traffic. When he turned back, Burton had stopped, and Powell ran into the rear of her car.

[1–3] Powell's version of the collision fails to rebut or dissipate the presumption that his negligence was the sole proximate cause of the collision. *Baughman v. Vann*, 390 So.2d 750 (Fla. 5th DCA 1980). This is so because Burton's alleged start and stop obviously occurred at a time and place where it was reasonably to be expected. *See Cowart v. Barnes*, 370 So.2d 103 (Fla. 1st DCA), *cert. denied*, 379 So.2d 202 (Fla.1979). It was error for the trial court to deny the plaintiff's motion for directed verdict on the issue of liability. Without any reasonable evidence pointing to Burton's contributory negligence, the liability of the appellees would of necessity have to be assessed at 100%.[1] As it turned out, the

1. Under comparative fault principles, a directed verdict may still lie as against a defendant whose negligent acts are less than the sole proximate cause of an injury. This is merely a finding that the defendant was negligent to *some* extent. Additionally, this would be the case even where there is reasonable evidence from which a jury might find a plaintiff to be contributorily negligent. *Stresscon International, Inc. v. Helms*, 390 So.2d 139, 142 (Fla. 3d DCA 1980); *Santiesteban v. McGrath*, 320 So.2d 476 (Fla. 3d DCA 1975) (issue of comparative fault, or negli-

jury allocated 40% of the negligence to the plaintiff, Burton.

[4] The appellant also contends the trial court should have directed a verdict on the issue of the permanency of her injury. We disagree. Without belaboring the point, we simply reiterate the established precept that a jury is free in the ordinary negligence case to accept or reject the testimony of a medical expert just as it may accept or reject that of any other expert. *Shaw v. Puleo,* 159 So.2d 641 (Fla.1964); *LaBerge v. Vancleave,* 534 So.2d 1176 (Fla. 5th DCA 1988).

[5] Additionally, the appellant urges that she is entitled to a new trial because the jury verdict demonstrated an inherent inconsistency. This argument is based upon the fact that the damages found by the jury in the aggregate amount of $2,350.00 were necessarily predicated on an implied finding by the jury, consistent with the trial court's instructions, that the plaintiff had sustained a permanent injury per the threshold requirement of section 627.-737(2), Florida Statutes (1987). On the other hand, when asked how many years it intended to provide Burton with compensation for future medical expenses and compensation, the jury answered one year.

The attorneys below both agreed to the submission of these interrogatories concerning the period of time to be covered in regard to compensation for future losses because of the provisions of the Tort Reform Act of 1986, section 768.77. *See In Re Standard Jury Instructions,* 541 So.2d 90 (Fla.1989). That section provides:

> (1) In any action to which this part applies in which the trier of fact determines that liability exists on the part of the defendant, the trier of fact shall, as part of the verdict, itemize the amounts to be awarded to the claimant into the following categories of damages:
>
> (a) Amounts intended to compensate the claimant for economic losses;
>
> (b) Amounts intended to compensate the claimant for noneconomic losses; and
>
> (c) Amounts awarded to the claimant for punitive damages, if applicable.
>
> (2) Each category of damages, other than punitive damages, shall be further itemized into amounts intended to compensate for losses which have been incurred prior to the verdict and into amounts intended to compensate for losses to be incurred in the future. Future damages itemized under paragraph (1)(a) shall be computed before and after reduction to present value. Damages itemized under paragraph (1)(b) or (c) shall not be reduced to present value. In itemizing amounts intended to compensate for future losses, the trier of fact shall set forth the period of years over which such amounts are intended to provide compensation.

The Florida Supreme Court Committee on Standard Jury Instructions (Civil) has attempted to interpret section 768.77 and formulate a verdict form to effectuate it. The Florida Supreme Court considered this itemized verdict form in its 1989 opinion, cited above, and characterized the Committee's recommendations "as a good faith effort to accommodate the legislature and the courts ..." It also commented, however, that its publication of the verdict form "does not imply any view of the constitutionality of section 768.77 under Art. II, sec. 3, Fla. Const." *See In Re Standard Jury Instructions* at 91.

We note the Florida Supreme Court's intimation that section 768.77 represents an unconstitutional invasion by the Florida Legislature of the province of the judiciary, and that said section may be constitutionally invalid on its face and as applied. We need not reach that determination in this case, however, and elect not to do so since

gence of the plaintiff, was properly permitted to go to the jury even though the question of the negligence of the defendant had been taken from the jury by way of a directed verdict on the issue of liability). A plaintiff is also at liberty to move for a directed verdict on the issue of comparative negligence in addition to the issue of the defendant's liability. *Valdes v. Faby Enterprises, Inc.,* 483 So.2d 65 (Fla. 3d DCA), *review dismissed,* 491 So.2d 278 (Fla. 1986).

it has not been raised by the parties, nor briefed.[2]

Based upon the record in the instant case, it is readily apparent that the jury felt that the plaintiff did not suffer a permanent injury; indeed, this is conceded in the appellant's brief on appeal. Nevertheless, the jury decided to award her something even so. Both attorneys agreed to the verdict form utilized below, which occasioned the confusion, and the appellant should not be awarded a new trial simply because she received *more* than she would have had the jury properly understood and applied the trial court's instructions in regard to the issue of permanency. We note that the appellee has filed no cross-appeal in this regard.

Accordingly, we affirm the trial court's denial of a directed verdict in regard to the permanency of the injury and we reverse the trial court's judgment in regard to the allocation of fault, and remand for entry of judgment for the plaintiff in the full amount of the jury's verdict, which was $2,350.00.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

COWART and GOSHORN, JJ., concur.

2. We observe, however, that a trial jury duly constituted is an adjunct of the "judicial department" within the terms of this constitutional prohibition of the exercise by the legislative department of powers appertaining to the judicial department. *Nelson v. McMillan*, 151 Fla. 847, 10 So.2d 565 (1942). The pernicious nature of legislative aggrandizement was first, and most formidably, articulated by Chief Justice John Marshall in 1803:

> The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.
>
> Between these alternatives there is no middle ground. The constitution is within a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

Marbury v. Madison, 1 Cranch 137, 5 U.S. 137, 2 L.Ed. 60 (1803).

Bobby Eugene ADAMS, Appellant,

v.

STATE of Florida, Appellee.

No. 88–1204.

District Court of Appeal of Florida, Fifth District.

Aug. 10, 1989.

Defendant was convicted of burglary of conveyance accompanied by battery upon a person and aggravated battery and judgment was entered in the Circuit Court, Orange County, Gary L. Formet, Sr., J. Defendant appealed. The District Court of Appeal, Cobb, J., held that defendant could not be convicted of both offenses when same act of battery was involved in both.

Affirmed in part, reversed in part, and remanded.

Criminal Law ⇐984(6)

Defendant could not be sentenced for burglary of a conveyance accompanied by battery upon person, and aggravated battery, where same underlying act of battery was used for both offenses; lesser charge of aggravated battery was required to be vacated.

James B. Gibson, Public Defender, and Daniel J. Schafer, Asst. Public Defender, Daytona Beach, for appellant.

ESTATE OF Patricia WALLACE, et al., Appellants,

v.

Linda FISHER, et al., Appellees.

No. 90-352.

District Court of Appeal of Florida, Fifth District.

Sept. 20, 1990.

Insurer brought subrogation action against motorist. The Circuit Court, Brevard County, Martin Budnick, J., rendered judgment for insurer, and defendants appealed. The District Court of Appeal, Cowart, J., held that: (1) trial court improperly admitted testimony of police officer that he issued traffic citation to motorist and did not issue one to plaintiff to show who did and did not violate traffic ordinances; (2) defendants were entitled to jury instruction that threshold issue existed whether victim sustained permanent injuries within reasonable degree of medical probability other than scarring or disfigurement; and (3) defendants were entitled to comparative negligence instruction regarding possible violation by victim of speeding and careless driving laws.

Reversed and remanded.

1. Judgment ⇐648

Judgment of conviction in criminal prosecution is not admissible in civil action as evidence of facts upon which it is based.

2. Automobiles ⇐147, 243(3), 246(14)

When traffic ordinances prohibit specific conduct likely to cause harm to others, and same conduct is alleged in civil action to be negligent conduct causing injury or damage, traffic ordinance becomes in law somewhat of a legislative minimum standard of due care as to specific conduct, and evidence of traffic ordinance and of alleged conduct violating it is admissible in evidence under instruction to jury that if they find evidence shows party violated traffic ordinance, that finding is some evidence of negligence.

3. Judgment ⇐644

Where traffic violation is civil infraction, evidence of guilt of violation of traffic ordinance is inadmissible as evidence in civil action as proof of conduct itself.

4. Evidence ⇐207(4)

Evidence of voluntary and knowing plea of guilty to traffic ordinance, whether it is considered criminal or noncriminal infraction, is admissible in civil action as an admission, by implication, of conduct prohibited by ordinance.

5. Evidence ⇐207(4)

Admission by person, in noncriminal traffic infraction, in form of payment of fine for such infraction by mail may no be used in any other proceeding. West's F.S.A. § 318.14(4).

6. Automobiles ⇐351

Traffic citation constitutes only formal charging document or assertion against accused.

7. Automobiles ⇐243(3)

Evidence that officer either issued or did not issue traffic citation is not admissible to show that defendant did or did not violate particular traffic ordinance or evidence that defendant either did or did not do any particular act.

8. Appeal and Error ⇐1050.1(4)
Automobiles ⇐243(3)

Admission of testimony of police officer in negligence action arising from automobile accident that officer had issued driver traffic citation for improper backing and that he had not issued other driver any traffic citation to show that drivers did or did not violate traffic ordinance was prejudicial and reversible error.

9. Insurance ⇐467.61(7)

Under no-fault law person cannot recover damages for personal injuries sustained in automobile accident caused by negligent operation of motor vehicle unless person first establishes that he suffered permanent injury within reasonable degree of medical probability, other than scarring

or disfigurement. West's F.S.A. § 627.737(2)(b).

10. Automobiles ⇐251.18

Defendant in personal injury action alleging negligent operation of motor vehicle was entitled to instruction that threshold issue was whether plaintiff sustained permanent injuries within reasonable degree of medical probability other than scarring or disfigurement, and if that fact was not established by preponderance of evidence, plaintiff was not entitled to recover damages for permanent injuries. West's F.S.A. § 627.737(2)(b).

11. Insurance ⇐629(1)

In action seeking damages for injuries sustained in automobile accident, allegation in plaintiff's complaint that losses were either permanent or continuing in nature was an insufficient allegation of threshold requirement under no-fault law that person suffer permanent injury within reasonable degree of medical probability other than scarring or disfigurement where complaint used word "losses" instead of "injuries," and joined essential allegation in disjunctive, "permanent," with insufficient alternative allegation, "continuing in nature"; allegation should have tracked statutory language. West's F.S.A. § 627.737(2)(b).

12. Appeal and Error ⇐1067
Automobiles ⇐251.18

Refusal to give properly requested instruction on no-fault threshold issues is reversible error. West's F.S.A. § 627.737(2)(b).

13. Evidence ⇐594

Jury was not bound by law to accept as true and correct plaintiff's evidence as to permanency of her injuries, even though that evidence may not have been contradicted by other evidence.

14. Trial ⇐205

Parties are entitled to have court instruct jury as to issues in case and as to burden of proof and persuasion as to those issues.

15. Automobiles ⇐251.18

Defendant was entitled to instruction that permanent injury was condition precedent to recovery for personal injuries resulting from motor vehicle accident, even though defendant offered no authority to instruct on issue, and there was no standard jury instruction on issue; statute establishing permanency as condition precedent created issue necessitating instruction, and was only authority needed to issue instruction.

16. Trial ⇐268

Refusal to give requested instruction on basis that there is no evidentiary support for instruction constitutes directed verdict against party requesting instruction and factual finding that there is no evidence from which jury could lawfully find fact in issue.

17. Automobiles ⇐246(14, 20)
Negligence ⇐141(12)

Defendant in personal injury action arising from automobile accident was entitled to instruction that if jury found that plaintiff violated unlawful speed or careless driving laws, jury was permitted to consider that fact in determining if plaintiff was guilty of negligence which contributed to causing accident and which should be compared with any negligence of defendant in assessing amount of reasonable damages, where evidence indicated that plaintiff may have been speeding and may have been driving carelessly.

18. Trial ⇐140(1), 142

Jury is entitled to determine questions of credibility and to draw inferences from facts they believe.

Kenneth A. Studstill of Kenneth A. Studstill, P.A., Titusville, for appellants.

Raymond R. Gates of Zimmerman, Shuffield, Kiser & Sutcliffe, P.A., Orlando, for appellees.

COWART, Judge.

This case involves (a) admissibility of evidence that officer issued, or did not issue, citation as evidence that traffic ordinance

was violated; (b) whether a defendant is entitled to a jury instruction on no-fault threshold of a permanent injury and (c) the sufficiency of evidence entitling defendant to a comparative negligence instruction as to traffic ordinance possibly violated by plaintiff.

Lisa Wallace backed a motor vehicle owned by her mother, Patricia Wallace, out of the driveway to her house onto Williams Avenue preparatory to driving south on that street when her vehicle was struck in the rear by a vehicle driven by Linda Fisher Sexton, owned by Beau Chrysler Plymouth and insured by Security Insurance Company of Hartford. Lisa was issued a citation for improper backing; Linda was not issued a traffic citation. The insurer paid Linda for personal injuries and Beau Chrysler Plymouth for damages to its vehicle and brought this subrogation action for negligence against Lisa and her mother as defendants. The jury returned a verdict finding Lisa 100% negligent; the trial judge denied a new trial and the defendants, Lisa and her mother's estate, appeal.

TRAFFIC CITATION AS EVIDENCE OF NEGLIGENCE:

During the trial, over the defendants' objection, the trial court admitted into evidence a police officer's testimony that he issued the defendant Lisa a traffic citation for improper backing and that he did not issue the nominal plaintiff Linda any traffic citation. This was prejudicial and reversible error.

[1-5] Traffic ordinances often prohibit specific conduct that is legislatively deemed likely to cause harm to others. When this is so and the same conduct that is prohibited by a traffic ordinance is alleged in a civil action to be negligent conduct causing injury or damage the traffic ordinance becomes in law somewhat of a legislative minimum standard of due care as to that specific conduct and evidence of the traffic ordinance and of the alleged conduct violating it is admissible in evidence under an instruction [1] to the jury that if they find the evidence shows a party violated the traffic ordinance, then that finding is some evidence of negligence. Probative evidence of the conduct prohibited by the ordinance (and therefore of negligence) is admissible on the issue. When the conduct prohibited by ordinance is the same conduct alleged to be negligent, the question sometimes naturally arises as to whether evidence that a party violated the ordinance (as distinguished from direct evidence of the conduct itself) is admissible as implicative evidence of the conduct. Although not the rule in Florida,[2] other authorities have held that when a violation of an ordinance is considered criminal, in the sense that proof of guilt must be established beyond a reasonable doubt, then evidence of a proper conviction of the criminal conduct is admissible in a civil action in which the criminal defendant's same conduct is in issue because of the lesser standard of proof (greater weight or preponderance) in the civil case.[3] However, traffic ordinance violations are now commonly civil infractions [4] and when so evidence of guilt of the civil infraction is inadmissible as evidence in a civil action as

1. *See* Standard Jury Instruction 4.11.

2. Florida courts have consistently held that a judgment of conviction in a criminal prosecution is not admissible in a civil action as evidence of the facts upon which it is based. *Boshnock v. Worldwide Rent-A-Car, Inc.*, 195 So.2d 216 (Fla.1967); *Moseley v. Ewing*, 79 So.2d 776 (Fla.1955); *Stevens v. Duke*, 42 So.2d 361 (Fla. 1949); *Wirt v. Fraser*, 30 So.2d 174 (Fla.1947); *State v. DuBose*, 152 Fla. 304, 11 So.2d 477 (1943). *See also Nell v. International Union of Operating Engineers*, 427 So.2d 798 (Fla. 4th DCA 1983) and *see* Annot., *Conviction or Acquittal as Evidence of the Facts on Which it was Based in Civil Action*, 18 A.L.R.2d 1287 (1951).

3. Federal courts allow prior criminal convictions to work as an estoppel in subsequent civil proceedings where issues to be estopped were "distinctly put in issue and directly determined" in the criminal prosecution. *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 71 S.Ct. 408, 95 L.Ed. 534 (1951). *See also Wolfson v. Baker*, 623 F.2d 1074 (5th Cir.1980), *cert. denied*, 450 U.S. 966, 101 S.Ct. 1483, 67 L.Ed.2d 615 (1981); *United States v. Frank*, 494 F.2d 145 (2d Cir.), *cert. denied*, 419 U.S. 828, 95 S.Ct. 48, 42 L.Ed.2d 52 (1974); and *Cardillo v. Zyla*, 486 F.2d 473 (1st Cir.1973).

4. Section 318.14, Florida Statutes.

proof of the conduct itself.[5] Evidence of a voluntary and knowing plea of guilty to a traffic ordinance, whether it is considered a criminal or a non-criminal infraction, is admissible in a civil action as an admission, by implication, of the conduct prohibited by the ordinance.[6] However, section 318.14(4), Florida Statutes, prohibits the use as evidence in any other proceedings an admission by a person, in a non-criminal traffic infraction, in the form of payment of the fine for such infraction by mail.

[6–8] A traffic citation constitutes only a formal charging document or assertion against the accused. A police officer may be a witness as to the conduct in question, or of an admission made by a party and when so he may be a competent witness to testify as to what he observed or heard.[7] However, when an officer issues, or decides not to issue, a traffic citation in a particular instance, he is but acting on his own interpretation of any relevant ordinance and his own belief and opinion as to the facts relating to the defendant's conduct. The police officer's interpretation of the ordinance and his beliefs and opinions as to the evidentiary facts are inadmissible in a civil action in which the judge interprets the ordinance or law and the jury (as judge) finds the facts based on their beliefs and opinions, the evidence and the jury instructions. Evidence that an officer either issued, or did not issue, a traffic citation is not admissible to show that the defendant did or did not violate a particular traffic ordinance or evidence that the defendant either did, or did not do any particular act.[8] *Eggers v. Phillips Hardware Co.*, 88 So.2d 507 (Fla.1956); *see also Moseley v. Ewing*, 79 So.2d 776 (Fla.1955). Therefore improperly admitted evidence of the issuance or non-issuance of a traffic citation in a particular instance is prejudicial and reversible.[9]

JURY INSTRUCTION ON NO-FAULT THRESHOLD REQUIREMENT OF A PERMANENT INJURY

[9–14] Under Florida's no fault law neither Linda, nor her subrogated insurer, is entitled to recover damages for personal injuries to the nominal plaintiff Linda caused by the negligent operation of the Wallace motor vehicle by the defendant Lisa unless the plaintiff first establishes, as required by section 627.737(2)(b), Florida Statutes, that Linda suffered a "permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement." This is a condition precedent or threshold requirement to the plaintiff's right to recover damages for Linda's personal injuries in this case. The plaintiff should allege this condition precedent to recovery in the plaintiff's complaint[10] and in addition to the other issues in the case (negligence, injuries, legal cause, comparative negligence, etc.), the defendant was entitled to have the jury instructed that a threshold issue was whether the plaintiff sustained "permanent injuries within a reasonable degree of medical probability other

5. *See* Ehrhardt, *Florida Evidence*, § 803.18a, p. 520 note 7 (2d Ed.1989).

6. *See Boshnack v. Worldwide Rent-A-Car, Inc.*, 195 So.2d 216 (Fla.1967); *Stevens v. Duke*, 42 So.2d 361 (Fla.1949).

7. Section 316.066(4), Florida Statutes, constitutes a limitation on reports and statements made to law enforcement officers for the purpose of completing accident reports.

8. Our holding is consistent with the following cases: *Brackin v. Boles*, 452 So.2d 540 (Fla. 1984); *deJesus v. Seaboard Coast Line Railroad*, 281 So.2d 198 (Fla.1973).

9. *MacNeil v. Singer*, 389 So.2d 232 (Fla 5th DCA 1980) (mother paying civil penalty in non-criminal traffic infraction for child not admissible as admission against interest by child); *Moore v. Taylor Concrete & Supply Co.*, 553 So.2d 787 (Fla. 1st DCA 1989), *Royal Indemnity Co. v. Muscato*, 305 So.2d 228 (Fla. 4th DCA 1974), *cert. denied*, 321 So.2d 76 (Fla.1975).

10. The plaintiff's complaint in this case alleged injuries which "losses (sic—should be injuries) were either permanent or continuing in nature." Although not an issue on appeal, the joinder of an essential allegation in the disjunctive ("permanent") with an insufficient alternative allegation ("continuing in nature") is an insufficient allegation of the essential allegation which in good form should have tracked the statutory language ("permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement").

than scarring or disfigurement" and if that fact is not established by a preponderance of the evidence, the plaintiff is not entitled to recover damages for any permanent injuries.[11] The trial court erred in failing to give such an instruction.

[15] Permanency of injury is considered in the Florida Standard Jury Instructions only in model instruction 6.9a relating to life expectancy and the use of mortality tables. Unfortunately the Standard Jury Instructions do not contain an instruction on the no-fault threshold issue of permanent injury contained in section 627.737(2)(b) and should be amended to do so. The trial judge in this case declined to give such an instruction requested in writing by the defendant because the defendant offered no authority to instruct on that issue. The statute establishing such permanency as a condition precedent to recover for personal injuries resulting from a motor vehicle creates the issue necessitating an instruction and is the only authority needed but an appropriate form of standard jury instruction would not only be helpful to the bench and bar but could avoid unusual expensive litigation such as in this case.[12]

JURY INSTRUCTION ON COMPARATIVE NEGLIGENCE BASED ON POSSIBLE TRAFFIC INFRACTION BY PLAINTIFF

[16–18] The defendants appeal the trial court's denial of the defendants' request that the jury be instructed in accordance with Standard Jury Instruction 4.11 that if the jury found that the nominal plaintiff Linda violated either section 316.183 (unlawful speed) or section 316.1925 (careless driving) the jury was permitted to consider that fact in determining if the plaintiff Linda was guilty of negligence which contributed to causing the accident which negligence should be compared with the negligence, if any, of the defendants, in assessing the amount of reasonable damages. The trial judge gave an instruction based on Florida Standard Jury Instruction 4.10 which generally states the legal principle that violation of a traffic regulation prescribed by statute is evidence of negligence but declined to instruct the jury on the two statutes apparently on the basis that there was no evidence upon which the jury could lawfully conclude that at the time of the accident the nominal plaintiff Linda was violating the statutes prohibiting speeding and careless driving.[13] Perhaps, consistent with this erroneous admission of evidence that the police officer did not issue a traffic citation to Linda, the trial court believed such evidence affirmatively established that Linda was not speeding or careless or perhaps the trial court agreed with plaintiff's counsel's assertions that there was no evidence of such speeding or careless driving. In either event we disapprove and reverse. There was evidence upon which

11. *See Wooten v. Collins*, 327 So.2d 795 (Fla. 3d DCA 1976) *disapproved on other grounds, Calhoun v. New Hampshire Insurance Co.*, 354 So.2d 882 (Fla.1978). If *Souto v. Segal*, 302 So.2d 465 (Fla. 3d DCA 1974) is read to hold that it is not reversible error to refuse to give a properly requested instruction on no-fault threshold issues, then we respectfully decline to follow that case on that point and hereby certify conflict with that case. The plaintiff's argument that there was authoritative testimony that Linda's personal injuries were permanent or that defense counsel argued the permanency issue to the jury misses the point. The jury is not bound by law to accept as true and correct the plaintiff's evidence as to the permanency of her injuries, whether or not that evidence is contradicted by other evidence. *See Burton v. Powell*, 547 So.2d 330 (Fla. 5th DCA 1989). Parties are entitled to have the court instruct the jury as to the issues in the case and as to the burden of proof and persuasion as to those issues.

12. Whether or not it would be reversible error to refuse a motion or request for a special verdict as to this threshold issue it would be good form and the better practice to submit the issue to the jury for a specific determination in order to insure the issue is properly considered. *See Hoffman v. Jones*, 280 So.2d 431 (Fla.1973).

13. The trial court's refusal to give a requested instruction on the basis that there is no evidentiary support for the instruction constitutes, in effect, a directed verdict against the party requesting the instruction and a factual finding that there is no evidence from which the jury could lawfully find the fact in issue. This conclusion should be cautiously approached in view of the fact that in a jury trial the jury is entitled to determine questions of credibility and to draw inferences from facts they believe.

the jury could have reasonably found those facts. The speed limit was 25 miles per hour and, while at one point Linda testified that she was doing 25 miles per hour or less at another point she was going 28 or 30 miles per hour. The issue as to if Linda was speeding and, if so, exactly when and where and how much or whether it contributed to the accident, should have been left to the jury to decide. Likewise, Linda testified that before the accident she noticed Lisa Wallace's vehicle backing out but commencing to apply her brakes she looked into her rearview mirror to see how close a following vehicle was and struck the Wallace vehicle before she looked back ahead. This fact alone, or in combination with other evidence relating to the general driving conditions, would support a jury finding that Linda was guilty of careless driving and violation of the statute and of some degree of negligence.

The trial court order denying a new trial is reversed and the cause remanded for a new trial in accordance with this opinion.

REVERSED and REMANDED.

GOSHORN and HARRIS, JJ., concur.

CITY OF CAPE CORAL, Florida, a municipal corporation of the State of Florida, Appellant,

v.

WATER SERVICES OF AMERICA, INC., a Wisconsin corporation, Appellee.

No. 89-03011.

District Court of Appeal of Florida, Second District.

Sept. 21, 1990.

Unsuccessful bidder appealed from judgment entered by the Circuit Court, Lee County, Robert T. Schafer, Jr., J., determining that city did not act improperly when it rejected construction bid on water treatment system. The District Court of Appeal, 510 So.2d 934, affirmed. On review for direct conflict of decisions, the Supreme Court, 529 So.2d 279, quashed and remanded. On remand, the Circuit Court, Lee County, R. Wallace Pack, J., entered judgment in favor of bidder, and city appealed. The District Court of Appeal, Campbell, J., held that: (1) bidder was entitled to recover bid preparation costs and prejudgment interest thereon when city failed to adhere to its representation that bid would not be rejected on ground that bidder was not licensed general contractor; (2) unsuccessful bidder has no cause of action against public entity for lost profits by reason of its failure to become successful bidder; and (3) bidder was not entitled to award of attorney fees.

Affirmed in part, reversed in part and remanded with instructions.

1. Interest ⇐39(2.30)
Municipal Corporations ⇐335(2)

City's representation that bid on proposed contract would not be rejected on ground that bidder was not licensed general contractor induced bidder to incur costs to submit bids and, thus, bidder was entitled to recover bid preparation costs and prejudgment interest thereon when city failed to adhere to its representation. West's F.S.A. § 489.101 et seq.

2. Estoppel ⇐85

Statement in invitation to bid, that contract would be awarded to evaluated low, responsive and responsible bidder, even if considered promise, would not support action for promissory estoppel for lost profits by unsuccessful bidder; city rejected bidder on explicit advice of its attorney.

3. Public Contracts ⇐10

Public entity's rejection of contract bids is subject to some exercise of discretion and standard by which that discretion is judged is that it should not be arbitrary, unreasonable or capricious, but should be

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing was delivered to Thomas E. Wheeler, Jr., whose mailing address is Post Office Box 12564, Pensacola, Florida 32573-2564, on January 2, 1992.

Attorneys for petitioner