IN THE SUPREME COURT OF FLORIDA

MILLIE WEYGANT Petitioner, vs. FORT MYERS LINCOLN MERCURY, INC., d/b/a FORT MYERS AMC JEEP, RENAULT and CHESTER MEREDITH, Respondents.	Case No. 81,008 District Court of Appeal 2nd District - No. 91-01902

APPEAL FROM THE SECOND
DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF

Mark A. Neumaier, Esq.
P.O. Box 8623
Tampa, FL 33674-8623
(813) 985-6617 / 852-8830
Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES:

STATEMENT OF THE FACTS AND OF THE CASE

The Petitioner appeals a decision of the Second District Court of Appeals dated December 2, 1992. This Opinion upheld a final judgment entered on a jury verdict, and an order denying Petitioner's Motion for New Trial. The trial proceeding was a personal injury suit for damages sustained in a motor vehicle accident.

References to the original record shall be referenced by the symbol (R:). References to the first supplemental record shall be referenced by the symbol (R1:). References to the second supplemental record shall be referenced by the symbol (R2:).

The Petitioner was a passenger in an automobile on April 30, 1986 when it was rear-ended by another vehicle driven by the Respondent, Chester Meredith. (R1: 48, 49) The Petitioner claimed that she suffered permanent back, neck and psychological injuries, or an permanent aggravation of a previous injury, as a result of the accident. (R: 1)

The Respondents admitted liability. (R1: 10, 23) However, they denied that the Petitioner's injuries were caused by the accident, and denied that the Petitioner suffered damages as a result of the accident. (R1: 10, 23)

At the jury trial in March of 1991, the Petitioner presented expert medical testimony from four different doctors that she had suffered a permanent injury or aggravation which was caused by the automobile accident on April 30, 1986. The Respondent did not rebut this testimony, as his only expert witness was unable to form

an opinion about causation or permanency. (R1: 651)

Nonetheless, the issues of causation and damages were allowed to go to the jury. The trial court denied the Petitioner's motion for directed verdict as to the permanency of the injury. The motion was based on Petitioner's position that after repeated testimony of permanency and causation by the expert medical witnesses, the Respondents failed to properly impeach Petitioner's experts, or to present any controverting medical expert testimony whatsoever. (R1: 657, 660)

The jury rendered a special verdict finding that the negligence of the Respondent Charles Meredith was not a legal cause of damage to Petitioner. (R1: 694, 704, 708) The trial court entered a final judgment based on this jury verdict, and denied the Petitioner's timely motion for new trial. (R: 59, 64, 68) It was from this final judgment and the order denying new trial that the Petitioner appealed to the Second District Court of Appeals. (R: 69)

The Petitioner testified at trial she had suffered a previous injury in 1980 on a work related accident. (R1: 41, 42) While working as a security manager at a Zayre's department store, she slipped off a ladder leading to an observation room. (Id.) She prevented herself from falling by grabbing onto the ladder with her right arm, suffering a jolt and injury to the right side of her neck. (Id.)

Petitioner suffered intermittent bouts of pain from the first injury prior to surgery performed in 1984. This pain focused

mostly in the right shoulder and in severe headaches, although there was some left side pain also. (R1: 45, 46) Only one incident of pain from the first injury resulted in hospitalization for pain control, in contrast to the Petitioner's history after the automobile accident, as shall be set forth below. (R1: 47, 369)

After suffering intermittent incidents of pain due to this initial injury, Petitioner ultimately submitted to neck surgery in February of 1984 in an effort to correct the problem. (R1: 43, 45) Unfortunately, this first surgery gave the Petitioner no relief. (R1: 47)

After the initial surgery in 1984 but prior to the automobile accident at issue, the Petitioner continued in physical therapy three times per week. (R1: 47) This therapy schedule interfered with her ability to work, although she was intermittently released to look for work by her physicians. (R1: 47)

Before the auto accident in 1986, the Petitioner continued to be able to play an active part in the lives of her two minor children, but was just restricted in her ability to lift heavy weights. (R1: 58) She was able to care for the children and to continue to enjoy family outings, to go fishing, bowling, and camping at least once each week. (R1: 59)

On the date of the accident, April 30, 1986, the Petitioner was a passenger in the back seat of a 1977 Plymouth Volare when it was rear-ended. As a result of the impact of the collision, the Petitioner's car rolled forward 20 feet. (R1: 14) The Petitioner testified without rebuttal that the car was quite extensively

damaged. (R1: 49) The entire back end of the car was "totalled", and the back windows shattered. (Id.) She testified that she did not remember the impact itself, because things happened so fast. (R1: 49, 50) She was looking to the left when Mr. Meredith's car impacted with hers.

The Petitioners' two minor children and her 84 year old mother in law, who were also passengers in the car, were transported to a hospital by ambulance. Petitioner's daughter said her neck "popped" with the collision. The Petitioner was transported in the front of the same ambulance. The Petitioner testified that she was given a cervical collar to wear and only began to experience pain after the shock of the impact wore off upon arrival at the hospital. (R1: 51) The Petitioner testified without rebuttal that she received emergency room treatment, and that x-rays were taken before she was released from the hospital the day of the accident. (R1: 51)

Petitioner suffered increased severe headaches and arm pain after her release from the hospital, as compared to before the accident. (Id.) Finally, she went back for an examination by Dr. Bercaw, a neurologist, six days after the accident. (R1: 52) She was admitted into the hospital that same day. (R1: 263) After an MRI was taken, she was referred to Dr. Lusk, an neurosurgeon, who operated on her in July of 1986. (R1: 53, 54)

The injury she sustained in the automobile accident, the Petitioner and her children testified, caused an abrupt change in her life. (R1: 59) She was no longer able to clean house, and the

children ended up having to do the housecleaning. (Id.) She was no longer able to go fishing or bowling, and her ability to bend and lift was further impaired and restricted. (R1: 60) She testified that she could no longer tilt her head back, could not sit for extended periods, and suffered severe insomnia due to extreme pain. (R1: 60, 61)

As a result of her constant, chronic pain, she testified, she became totally unable to care for her minor children, and they were forced to move out of her home and to move in with an adult son of the Petitioner. (R1: 65, 613) Simple actions such as vacuuming the house resulted in her being forced into bed for three days, on pain medication. (R1: 75, 76, 77) She could not bend over due to the pain. The Petitioner's 77 year old mother had to move in with her after the accident to help her. If no one was around to do things for the Petitioner, nothing got done. (Id.)

The Petitioner testified that since the accident, she had to lay down three or four times per day to rest her head and neck. (R1: 64) If she does not get this rest, her neck goes into painful spasms which last for weeks if not treated. (Id.) She had, since the accident, gone into the hospital for days at a time for pain treatment, on approximately 26 separate occasions.

She suffered much more severe arm and shoulder problems than she had before the 1986 accident. (R1: 55, 56) She had continuous, unbearable headaches from the pressure in her neck; the headaches prior to the accident were not as severe as those suffered afterwards. (R1: 56) She now had pain and muscle spasms

on the left which were new, and the right side pain was much more severe. (R1: 57, 58)

She continued on pain medication, but was now forced to take pain pills at least daily. (R1: 56) At the time of trial, she was taking pain and anti-depressant medication including Corgard, Estrogen Plus, Vistaril, and Sinequin. (R1: 72) More details of the medications prescribed are given below, with the synopsis of each attending physician's testimony.

The first of Petitioner's expert witnesses to testify was Dr. Hussey. This expert was a neurologist who first saw the Petitioner on February 1, 1983, prior to the date of the auto accident. (R1: 249, 253) She was complaining of problems with her neck, right shoulder and upper right extremity. (R1: 253) She gave this doctor a history of having suffered the 1980 injury at Zayre's, then suffering a gradual increase in pain in her anterior chest and neck. (R1: 254)

The doctor testified about the extensive testing conducted on the Petitioner in 1983, including myelogram, EMG's and nerve conduction tests. (R1: 255, 256) His diagnosis was of a C6 level radiculopathy, or pinched nerve on the side of the neck at the C6 nerve root. (R1: 257) After reviewing the x-rays, he found there was no herniated disc in Petitioner's neck at this time, three years before the accident at issue. (R1: 258)

After conservative treatment of these injuries suffered in 1980 proved unavailing, Dr. Hussey referred Petitioner to Dr. Lowell for a foraminostomy, which was duly performed. (R1: 259,

260, 281) Dr. Hussey continued to see and treat the Petitioner after this first surgery. She continued to have complaints of neck pain, muscle spasms, and headaches. She was treated with physical therapy and anti-inflammatory medications, as well as Limbitrol, Esgic, and other medications (Id., 262, 263) In 1984 and 1985 Dr. Hussey had repeated x-rays taken, and testified that he never saw any herniation in her discs. (R1: 261)

Petitioner did have periods between the surgery in 1984 and the date of the accident in April of 1986 when she was asymptomatic and could go back to work. (R1: 262) Overall since her first surgery, she had appeared to have improved somewhat and had stabilized and was doing reasonably well, although she continued to have significant cervical symptoms. (R1: 263) On occasion, she reported problems on both sides or on the left side of her neck. (R1: 285) Dr. Hussey in fact released her several times for job searches, although he had again taken her off of job search in March of 1986 on the recommendation of her physical therapist. (R1: 262)

Dr. Hussey's first examination of the Petitioner after the car accident was on July 3, 1986, when she reported her new injury to him. (R1: 263) She had already been hospitalized by Dr. Bercaw for ten days at that point in time, and wanted another opinion on her new injuries. (Id.) Her new problems centered in the left side, mainly in the left shoulder area, with severe pain for five to ten minutes at a time four to six times per day in the base of her skull. (R1: 264) Dr. Hussey also testified that the

Petitioner was having difficulty at this point with increasing anxiety and depression, possibly related to the chronic pain she was suffering. (Id.)

Extensive tests were again conducted, culminating in a referral for new MRI and EMG tests. (R1: 264, 265) The new MRI for the first time revealed a herniated disc on the left side at the C5-6 level, and mild herniation at the C6-7 level. (R1: 266) Dr. Hussey referred Petitioner to Dr. Lusk for surgery for these new injuries after conservative treatment had failed. (R1: 267, 268) Dr. Lusk performed the microdiskectomy at the C5-6 level. (R1: 268)

After this second surgery, the Petitioner continued in Dr. Hussey's care. Between the date of the second surgery and the date of trial, Dr. Hussey testified that Petitioner continued to suffer a lot of muscle spasms, headaches, and weakness in her arms. (Id.) She became increasingly anxious and depressed over the fact that she was in chronic pain and did not seem to be getting better.

She really was not doing very well during this entire time period, despite her referral to Doctors Lombillo and Huergo, psychiatrists, for treatment. (Id.) She was a surgical failure, and was basically unable to work after the automobile accident. (R1: 270) Dr. Hussey testified that, within a reasonable degree of medical probability, the Petitioner's chronic pain caused a deterioration in her physical and psychological conditions. (Id.)

Dr. Hussey noted that anxiety and depression come in varying degrees of severity with chronic pain. (R1: 269) There was no

indication of any malingering as to her symptoms. (R1: 270) He did recommend repeatedly to the Petitioner after the automobile accident that she place herself into a pain clinic. (Id.)

Dr. Hussey also testified that, within a reasonable degree of medical probability, the Petitioner would have future medical expenses, and outlined what these expenses would be. (R1: 271)

Finally and unequivocally, Dr. Hussey testified that within a reasonable degree of medical probability the Petitioner had suffered a permanent injury in the automobile accident of April 30, 1986. (Id.) This injury was superimposed over the old injury, and the effect of the accident on the old injury was to make it worse and to add a new component on the left side. (R1: 272)

He gave her an overall twelve per cent disability rating, of which eight per cent was attributable to the original injury and four per cent to the 1986 injury. (R1: 301) This disability rating did not include provision for the debilitating effect of pain. (R1: 310) If the pain component was considered, she was in his opinion basically disabled by pain. (R1: 311) All of his opinions were within a reasonable degree of medical probability. (R1: 314)

The Respondent attempted to attack the accuracy of the history given by the Petitioner to Dr. Hussey at various times. Dr. Hussey testified that in July of 1986, the Petitioner told him that she had been back to work and doing reasonably well before the accident. (R1: 292) She had not in fact worked since the 1984 surgery. (R1: 313) Petitioner had also told him that in January

of 1985, she suffered a severe and sudden pain in the left side of her neck when she turned while holding a basket of clothes, and suffered left side neck pain and weakness. (R1: 285, 286) In April of 1985 she reported bilateral pain, then in May of 1985 she reported continued left side pain and weakness. (R1: 286, 287, 288) Dr. Hussey did not change his diagnosis as a result of this cross examination.

Dr. Bercaw, a neurologist and psychiatrist, testified he first met the Petitioner on October 12, 1984. (R1: 363, 364) He stated that Dr. Lowell, the surgeon who had performed the first surgery on the Petitioner in 1984, had given her a seven per cent disability after that operation. (R1: 365)

Dr. Bercaw was the doctor who admitted the Petitioner to the hospital for pain control the first and only time before the car accident. (R1: 369) He admitted her in June of 1985 for a stay of eight days. (R1: 414) He felt that anxiety and depression were major problems in this hospitalization, but that afterwards she appeared to get better with therapy. (Id.) He saw her a total of four times before the automobile accident, the last time in January of 1986. (R1: 364, 369, 370)

He then saw the Petitioner six days after the motor vehicle collision, on May 6, 1986. (R1: 365, 370) She came in complaining of severe headaches, neck pain, left shoulder pain and severe immobility. (R1: 365, 366) He ordered extensive testing, including a CT scan and a myelogram. (R1: 366)

As the treating physician, he testified without rebuttal that

the Petitioner had many distinctive types of pain, and that the pain suffered after the 1986 accident was new and distinctive from that suffered before. (R1: 374) After the 1986 accident, Dr. Bercaw admitted the Petitioner to the hospital 24 or 25 times for pain control over the course of five or six years. Each and every one of these admissions was for severe, intractable, unbearable pain. (R1: 375) And her periods of recovery between hospitalizations continued to get shorter and shorter. (R1: 388) Petitioner was not, however, addicted to narcotics. (R1: 417)

The doctor testified that different persons have greatly different pain tolerances. (R1: 382, 383) The Petitioner had a problem with the way she reacted, psychologically, to pain. She converted depression and anxiety into physical symptoms; she is a somatizer. (R1: 384) The Petitioner's pain was not feigned or due to malingering; the pain was real to her. (R1: 385) Persons can have a predisposition to be a somatizer and yet lead a completely normal life in the absence of a trauma. (R1: 393) This psychological component or reaction got worse after the accident in 1986. (R1: 386)

Dr. Bercaw testified that, within a reasonable degree of medical probability, the Petitioner had suffered a permanent injury, which was caused by the automobile accident in 1986. (R1: 371) He felt he could causally relate the injury to the car accident not just by the patient's history, but by the American Medical Association guidelines. (R1: 428, 429) He assigned her a five per cent disability rating for this injury, for a total of

twelve per cent, including the previous injury. (R1: 371, 372) In the doctor's opinion, she was totally disabled because of her psychological impairment. (R1: 386, 393)

Dr. Bercaw also testified that the Petitioner would require ongoing medical treatment, and he recommended a pain clinic as the only thing that might help her. (R1: 388) The cost of a pain clinic is about $ 30,000.00 for the three week inpatient treatment. (R1: 387, 395) The doctor was also owed about $ 2,590.00 for treatment rendered to the Petitioner after the 1986 accident. (R1: 395, 397)

The Respondents again attempted to challenge the accuracy of the doctor's testimony due to alleged inaccuracies in her history. But the Petitioner's counsel specifically asked the doctor if anything brought up in cross would change his stated opinions. His answer was no. (R1: 432)

Dr. Lloyd Miller, a psychiatrist, testified that he conducted an independent medical examination on the Petitioner on October 25, 1985, after her first surgery but prior to the accident at issue. (R1: 490) He diagnosed the Petitioner as having at that time a psychogenic pain disorder. Although there may have been a physical basis for the Petitioner's pain complaints, he felt that psychological factors related to her pain and discomfort, especially her headaches. (R1: 497) Her constant pain in the right temporal region of her head was causally related to the 1980 injury. (R1: 507)

He testified that the Petitioner had a zero to five per cent

permanent psychological disability attributable to the 1980 injury. (R1: 499) He did not recommend a pain clinic for the Petitioner because her pain was episodic and subject to quiescent periods of recovery. (R1: 500) Her mental condition alone at that time would not prevent her from working. (R1: 501) She appeared pleasant, charming, radiant, and well preserved. There was no evidence of mental illness, personality disorder, or severe depression. (R1: 505, 506)

Dr. Michael Lusk, the neurosurgeon who performed surgery on the Petitioner's neck after the motor vehicle accident, testified that he first saw the Petitioner on August 7, 1986 on a referral from Dr. Hussey. (R1: 157) He diagnosed the Petitioner as having mildly severe radiculitis, or arm pain. He found MRI correlation of her reported left side pain, with continued right side pain of a more chronic nature. He also noted that she was unable to tolerate the pain anymore, and diagnosed her pain intolerance through objective tests. (R1: 157, 158) She had a diminished range of motion, and had moderate acute distress with anxiety. (Id., 161)

He testified that Petitioner gave him a history of having had a previous injury in 1980, followed by surgery by Dr. Lowell. She reported having improved and that she was doing relatively well before the auto accident in 1986. (R1: 159)

CT scans taken and reviewed by Dr. Lusk revealed a cervical disc herniation at the level of C5, 6. (R1: 160) The disc was bulging against the ligaments, and the ligaments had stretched

considerably and actually slackened. (R1: 164, 165) This indicated to the surgeon that the disc had been bulging for a number of months, and was a new event. (R1: 164, 204, 206) The degree of ligament stretch revealed in the surgery was not consistent with a disc that had been bulging for several years.

The surgeon recommended surgery, and performed an anterior cervical microdiskectomy at the C5,6 level on August 18, 1986. (R1: 161, 163) This involved removing the disc, which he described as being ruptured, bulging, and herniated, but not exploded. (R1: 165) The doctor testified that the surgery he performed was substantially different from the earlier surgery performed by Dr. Lowell in 1984. (R1: 167)

He testified that the cause of the injury and subsequent bulging disc in the Petitioner's neck was, within a reasonable degree of medical probability, the automobile accident of April 30, 1986. (R1: 171) He testified that his diagnosis was that as a result of the automobile accident on April 30, 1986 the Petitioner suffered a permanent injury, within a reasonable degree of medical probability. (R1: 175) He assigned a total of ten percent permanent disability rating for her whole body due to the accident. (R1: 175. 176) However, the original injury from 1980 formed some portion of that ten percent disability. (R1: 235)

Without reviewing any CT scans taken before the April 30, 1986 injury, he could testify that the injury was closer to a new injury than to an aggravation. (Id., 177) But if a previous CT scan taken before the accident revealed no disc bulge, then this would

be a new injury rather than a mere aggravation of the previous injury of 1980. (R1: 177)

His diagnosis was of a chronic, acute flare-up of cervical pain, and his prognosis was for permanent neck pain. (R1: 178, 179) Although she had improved and would continue to improve somewhat since the surgery in August of 1986, there would always be some degree of permanent pain. (R1: 179)

The surgeon also confirmed the Petitioner's testimony that she did not receive relief from the surgery. She had a continued decreased range of motion in all directions. (R1: 169, 170) She could extend her neck only 10 degrees, rather than the normal 90 degrees. Her flexion was only 20 or 30 degrees, rather than the normal 80 to 90 degrees. Finally, her rotation was limited in both directions to 40 degrees, instead of the average 90 degrees. (Id.)

He limited her to two hours of any continuous activity, including sitting. (R1: 181) While the most comfortable position for the Petitioner would be laying flat with a small pillow under her neck, if she stayed in such a position for too long she would suffer a "crick" or local spasm. (Id.) She could not lift anything repeatedly, and was restricted on one-time lifting to weights of only 10 pounds or less. (R1: 180)

While the second surgery undergone by Petitioner is successful in bringing relief from cervical pain in 85 to 90 per cent of the cases, the doctor testified that the Petitioner fell within that 15 per cent in which it was unsuccessful. (R1: 167, 173, 233, 240)

Petitioner had "absolutely numerous" admissions to hospitals

and follow up meetings, because she was unable to deal with the neck pain and continuing similar complaints. (R1: 173) She came in repeatedly looking very, very haggard and in obvious pain. (R1: 185) She had morphine treatments during these numerous, three to five day hospitalizations. (R1: 186) This would break the cycle of severe pain and allow her to get back on oral medications, until two weeks or more later she would again develop a bad episode and have to be re-admitted. (R1: 186, 187)

Of the 14 hospitalizations in which he was personally involved going back to 1988, he testified that they were all the result of the 1986 motor vehicle accident, within a reasonable degree of medical probability. (R1: 188) She was simply to the point that she could not tolerate existing on the outside world without admission and pain control. (Id.)

He ultimately also found that there was a psychological component to the pain she was experiencing, and recommended that she seek the benefits of a 30 day inpatient pain clinic program. (R1: 174) When patients are as bad off as the Petitioner, he testified, they need to have in house treatment or actual hospitalization in a completely controlled environment. (Id.)

He stated that she was not malingering or hysterical in her pain symptoms. (R1: 171) She was suffering a lot of stress from the pain, and was unable to deal with it. (R1: 173) The tension or emotional aspect she was suffering from certainly aggravated or continued to cause her pain. (R1: 175) He also noted that she was under the continuing care of several psychiatrists. (R1: 175) He

testified that she was not addicted to her medications. (R1: 187)

Finally, he testified that the unpaid bills for his services to the Petitioner, reasonably related to the motor vehicle accident, were $ 10,450.00. (R1: 184)

On cross examination, the Respondent elicited testimony relating to the history given by the Petitioner to the surgeon to impeach its accuracy. The surgeon had been told that the Petitioner had done well up to the date of the accident after her prior surgery. (R1: 190) He understood from the Petitioner that she had suffered no left side pain prior to the 1986 car wreck. (R1: 193) He did not know that the Petitioner had reported incapacitating pain to another doctor six weeks prior to the April 30, 1986 accident. Id. But despite this attempted impeachment, the surgeon stuck to his testimony that, based on both the patient's history and his findings at surgery, the automobile accident was the major factor in causing the Petitioner's bulging disc permanent injury. (R1: 231, 232).

Dr. Michael Woulas was a psychiatrist who specializes in chronic pain disorders. (R1: 514, 515) He first met the Petitioner on January 23, 1988 for a psychological consultation. He both conducted a clinical interview and gave Petitioner a battery of personality tests. (R1: 521)

He testified that in his opinion, within a reasonable degree of medical probability, the Petitioner had suffered a neurological injury due to the accident of April 30, 1986. The zero to five per cent psychological impairment she had previously been diagnosed as

having had been aggravated and increased by the 1986 injury, to around forty per cent of her mental capability. (R1: 5328, 529, 530)

Chronic pain syndrome, according to Dr. Woulas, is triggered by a physical, neurological injury of some type. (R1: 530, 531) The psychological problems develop as a result of the physical injury and the limitations it places on the victim. The limitation on activities, in particular, causes a lot of stress in the person, which in turn intensifies the physical problems. Then a whole syndrome of psychological and emotional problems develop, like depression, anxiety, and a lot of stress. (R1: 531) He found that the Petitioner was suffering from this syndrome. (Id.)

Dr. Woulas testified that the Petitioner needed a comprehensive pain management program, including a pain clinic. (R1: 534) At the time of trial, he was still seeing the Petitioner twice per week, with no change in sight in her condition without the recommended treatment. (R1: 535) Her unpaid bill to this doctor was about $ 4,000.00. (Id.)

Dr. Huergo, a psychiatrist, testified that he first saw the Petitioner on August 29, 1989. He had a history on the Petitioner of pain, insomnia, and depressive symptomology. It was a chronic history at this point; the Petitioner couldn't eat, work, or move around. (R1: 447) He diagnosed her as having major depression, as well as neck pain. (R1: 453) Depression added a mental component to her perception of pain. (R1: 460) He testified that it was his opinion that the Petitioner was not a malingerer. (R1:

487)

In his mental examination of the Petitioner, he concluded that the underlying tone was of anger, that she had been suffering so long, and that no one was able to do anything about it. (R1: 459) His secondary diagnosis was of a somatiform pain disorder, and conversion reaction. (R1: 462, 464) A second opinion was sought from a Dr. Francis, who agreed with Dr. Huergo and Dr. Bercaw that the Petitioner had a somatiform pain disorder. (R1: 462, 463)

Dr. Huergo recommended inpatient psychiatric treatment with supportive therapy during a consultation on December 8, 1989. (R: 469) He felt that the Petitioner was craving pain medication, and needed to be placed into a drug rehabilitation clinic. (R1: 459, 466, 467, 470, 479) He filed a petition for order for involuntary treatment for drug dependency against the Petitioner because he felt she was at risk for abusing medication. (Id., 471)

Dr. Huergo had no opinion about the causation of the injuries Petitioner had suffered, but noted that 95 per cent of somatiform disorder patients had sustained an injury. (R1: 472, 473, 481) He also noted that it is not unusual for long term pain sufferers to become depressed. (R1: 480) Dr. Huergo's unpaid medical bills for services to the Petitioner were $ 2,600.00. (R1: 483)

Dr. Mellish was the Petitioner's expert economist who testified regarding the her economic damages due to past and future medical expenses, as outlined by the doctors who had seen her, and regarding her loss of past and future income. (R1: 560 through 576) He testified without rebuttal that the Petitioner's past

medical expenses were $ 121,827.85. Her past loss of income was between $ 34,213.00 and $ 61,277.00. (R1: 571, 572)

He also testified that her future medical and economic expenses were between $ 333,369.00 and $ 864,189.00. (R1: 571 through 576) His testimony included an itemization of her future medical expenses. (Id.) These amounts were accurate within a reasonable degree of certainty within the profession of economists. (R1: 576)

The Respondents called only two witnesses: Sheri Conwell, the EMS worker who transported the Petitioner and her family to the hospital after the 1986 automobile accident, and Dr. Lowell.

The gist of the EMS worker's testimony was that, according to the trip sheet, no vital signs were taken on the scene or in the ambulance of the Petitioner, and she was transported as a "10-12" or non-patient visitor. The witness had no independent recollection of the incident. (R1: 620-627)

Dr. Lowell was a neurosurgeon who first saw the Petitioner for a worker's compensation evaluation on February 1, 1984. Petitioner reported longstanding headache and cervical problems which she attributed to the 1980 injury. (R1: 631, 632) She claimed chronic neck and right arm pain. The doctor arranged a CT head scan and x-rays, which were normal. (R1: 633)

Dr. Lowell found his test results to be normal, and stated that there was no clinical evidence to support Petitioner's complaints of pain. He believed they were due more to tension anxiety than anything. (R1: 636)

After seeing her again on February 15, 1984, with no report of improvement, the doctor arranged for surgery. On February 28, 1984 he performed a right C5-6 laminectomy and foraminotomy. His ultimate diagnosis was of a cervical spondylitic disease at C5-6. (R1: 637, 640) There was no evidence of any disc herniation or disc bulging. (Id., 652) At follow-up visits in March and May of 1984, the Petitioner reported much improvement. But in June the pain began recurring, and the doctor began suspecting a functional overlay. (R1: 640, 641, 642)

On June 18, 1984 he determined that the Petitioner had reached maximum medical improvement, and assigned her a seven per cent permanent disability rating. (R1: 642) He restricted her from heavy labor, carrying or pushing things with her head, and from bouncing up and down while sitting, such as while operating heavy equipment. (R1: 644) But he stated she should be all right for every day activities. (Id.)

In early August of 1984 she reported headaches, insomnia, neck and right arm pain. But a few days later she reported improvement. (R1: 645) Dr. Lowell did not see the Petitioner again until March 20, 1989. He determined at this time that she did have a functional overlay. (R1: 646, 647) The Petitioner reported having her surgery in 1986, and gave a history of progressive and insidious neck, right shoulder and arm pain. (Id.)

The doctor examined cranial and cervical MRIs of the Petitioner, and found advanced degenerative disease at the C5-6 level, with some less significant degenerative changes at C6-7.

(R1: 648) This was the Petitioner's last visit to this doctor. (Id.)

When pressed as to whether or not the 1986 accident had caused the Petitioner to sustain a permanent injury, Dr. Lowell was unable to express an opinion. (R1: 651) He could not say for sure that she had not suffered a permanent injury, because he had done a very brief work-up after the date of the car accident. (Id.) He also deferred to the treating psychiatrists as to whether there was a physical component to the pain the Petitioner was suffering in 1989. (R1: 654)

REFERENCES MADE TO WORKER'S COMPENSATION CLAIM BY RESPONDENTS

A procedural ruling of the trial judge to which the Petitioner assigned error was his refusal to grant her Motion in Limine, or to sustains objections, as to any references to the worker's compensation claim or litigation of the Petitioner relating to her 1980 injury. (R1: 3) The trial court ruled that it would not excise all references to worker's compensation in the depositions to be introduced, or in the trial itself. It did rule that it would not allow evidence relating to the actual receipt of worker's compensation payments as a collateral source of recovery. (R1: 7)

As a result of the trial court's ruling, the Respondent's counsel routinely referred to the 1980 injury as the "worker's compensation" injury throughout the trial and in his closing argument. At R1: 93 and 95, during cross of Petitioner, Respondent asked questions about her job search as a worker's compensation obligation. The Court denied a contemporaneous objection to this

first reference to worker's compensation benefits at page 94, and permitted continued questions along this line throughout the remainder of the trial.

At page 108 of R1, Respondent asked Petitioner on cross whether it was true that in the "worker's compensation case" she had more right-side complaints of pain, and if in the "worker's compensation" deposition she claimed more right side pain. Counsel for the Respondent then referred to the deposition "in your worker's compensation case", at page 108.

At page 109 of R1 Respondent asked Petitioner whether she was trying to put emphasis on her right side pain in her "worker's compensation case". References were again made on cross to Petitioner's deposition in "your worker's comp case" at page 115, and she was asked if she was emphasizing her right side pain to Dr. Bercaw when "trying to feature the worker's comp claim".

Again at page 117, Respondent asked "did you not tell the attorney in the worker's comp case" that the disability was due to the "worker's compensation injury", rather than the automobile accident. A reference to the worker's compensation nature of Petitioner's 1980 injury was also made in the portion of the deposition transcript read to the jury at page 117, lines 15 through 21. At pages 121 and 127, counsel for the Respondent again managed to insert references to worker's compensation in questions to the Petitioner.

In light of the repeated references by counsel for the Respondent to worker's compensation in the cross and the trial

court's overruling of objections made thereto, the Petitioner's attorney asked two clarifying questions on redirect relating to those issues. (R1: 129)

At page 421 of the transcript, counsel for Respondent asked Dr. Bercaw on cross examination whether the Petitioner's problems originated in the "worker's comp" injury. Dr. Woulas was likewise asked on cross examination at page 538 whether all of Petitioner's pain started in the "worker's comp, or on-the-job injury".

Finally, the Respondent in his direct examination of his only expert witness, Dr. Lowell, made reference to the fact that the examination performed by the doctor in 1984 were worker's compensation related. (R1: 632)

In his closing argument, counsel for Respondent referred to the Petitioner's worker's compensation case, claim, or litigation on no less than 8 separate occasions. (R2: 40, 41, 48, 50)

> "When she's in her worker's comp case trying to get that type of benefit, specifically on May 21, 1990, long after the 1986 accident, ... this is her sworn answers." ...
>
> "Why is she saying that? First place, I think it's probably true, but even if it weren't there, she's trying to prove it's a right-sided problem, because here in this worker's comp she's trying to get benefits for left-sided." (R2: 48, closing argument by counsel for appellee)

Although the Petitioner's theory of the case included both aggravation of a pre-existing injury and that a new injury occurred, the trial judge refused to grant a requested aggravation or concurrent cause jury instruction. (R1: 666, 671) The Petitioner made a timely Motion for Directed Verdict and later a

timely Motion for New Trial, both of which the trial court denied. (R1: 657, 660) (R2: 59, 68)

The Second District in the opinion here under review affirmed the trial court's judgment and orders.

> "Weygant contends the jury improperly found that the negligence of the appellees was not the legal cause of weygant's injuries -- despite uncontradicted expert medical testimony to the contrary. Weygant thus asks this court to follow the First District's holding in Morey v. Harper, 541 So.2d 1285 (Fla. 1st DCA 1989), and find that a jury verdict must be consistent with any uncontradicted evidence presented by a medical expert. We, however, cannot so find and hereby certify conflict with Morey to the extent that it evinces such a holding."

SUMMARY OF ARGUMENT

The trial court erred in denying the Petitioner's motion for directed verdict and in entering judgment on the jury verdict, because there was undisputed medical testimony of causation and of permanency by four different medical experts. Under the Morey case, the experts' findings were materially uncontroverted and the verdict was therefore contrary to the manifest weight of the evidence. Even if the history relied on by the experts was inaccurate, the court erred in denying the Petitioner's motions for directed verdict and for new trial. The Second District's decision not to follow the Morey line of cases was error.

The trial court also erred in denying the Petitioner's motion in limine relating to references to worker's compensation claims and litigation by the Respondent. The requirement that such references not be allowed is substantive and cannot be waived. It is evident from the jury's verdict, which was against the manifest weight of the evidence, that the repeated references and argument relating to worker's comp benefits caused the jury to rule based on prejudice or passion rather than the evidence.

ARGUMENT

I. THE MOREY LINE OF CASES SHOULD BE APPROVED BY THIS COURT, AND THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL SHOULD BE REVERSED.

The instant personal injury case, as presented to the Second District Court of Appeals below, required a determination as to whether the competent, substantial evidence supported the trial court's denial of the Petitioner's motions for directed verdict and for new trial, and was sufficient to support the jury's defense verdict. The competency of the defense evidence was the focus of inquiry.

It is the position of the Petitioner in this appeal that the case law has generated a requirement that the competent, substantial evidence which may be considered - and to which a jury's consideration is restricted - is expert medical testimony, with certain explicit provisions relating to the impeachment of that testimony in the event of inadequate predicate.

THE STANDARD OF REVIEW OF JURY VERDICTS.

The standard of appellate review of a jury verdict is normally a simple examination of whether there is sufficient substantial, competent evidence to support the verdict, looking at all the evidence in the light most favorable to the winning party. It is the duty of the appellate court to review the evidence and, if it finds the verdict and judgment is, as a matter of law, without sufficient evidence to support it, it is the appellate court's duty to set it aside. Renvart Lumber Yards v. Levine, 49 So.2d 97 (Fla.

1951)

Alternately stated, the jury may not be permitted to base its decisions on matters outside the evidence or on speculation. The trier of fact may not rule based on mere speculation or conjecture. DeHart v. DeHart, 360 So.2d 1285 (Fla. 2d DCA 1978)

There have always been restrictions on the type of evidence which juries have been permitted to consider in reaching their determinations. Consider the law of hearsay, and its artificial but judicially approved restrictions on what evidence may be properly given to - and considered by - a jury. Section 90.802, Fla. Stat.

It has also always been the law of this state that jury determinations are reviewable upon motion for new trial, and may be reversed if the jury's decision strays from the manifest weight of what is considered, from a legal standpoint, to be competent, substantial evidence. This was clearly set forth in this court's analysis of the law in Ruth v. Sorenson, 104 So.2d 10 (Fla. 1958)

There, this court distinguished between the law of the State of Florida on this issue and the different standard under the federal court system. It was always the common law that the trial court had the power, upon the filing of a motion for new trial, to set aside the jury verdict if it was contrary to the manifest weight of the substantial, competent evidence. And that same power to invade the province of the jury was extended to the appellate courts by the legislature as far back as 1853.

> "...soon after this State was admitted to the Union the Florida Legislature abrogated the common-law limitation

> on review by an appellate court of the evidence. This it did by Ch. 521, Acts of 1853 (now appearing in substantially its original form as Section 59.06(1), Fla.Stat.1957, F.S.A.), which recited that 'Whereas, It is expedient that certain orders and judgments of the Circuit Courts of this State, which now depend on the uncontrolled discretion of said Courts, should be reviewable in the Supreme Court,' and expressly provided that an order either granting or denying a motion for new trial could be assigned as error in an appeal to this court and here reviewed 'in the same manner and under the like rules and regulations as in other cases.' The 1853 Act was considered by this court in Knox v. Barnett, 1882, 18 Fla. 594. After pointing out that the federal decisions as to appellate review of the evidence were 'precedents not applicable here', the court said:
>
> > 'We think there is no doubt of our power and duty to review the evidence before the Circuit Court upon exception to this order refusing a new trial, where the motion for the new trial was upon the ground that the finding was contrary to the evidence and to law.'
>
> ...
>
> ...Accordingly, we hold that the order of a trial judge denying a motion for new trial on the ground that the verdict of the jury is contrary to the manifest weight of the evidence is reviewable in the appellate courts of this state on an appeal from the final judgment..." Id. at 15.

Thus, there is no question but that jury verdicts are subject to appellate review on the basis that they may be contrary to the manifest weight of the evidence. The question then becomes the critical one in this case: what sort of evidence in a particular case is competent and substantial, and which is incompetent and insubstantial?

On the particular area of the use of expert opinions in auto accident personal injury cases, the law has undergone a slow transformation over the years, driven by changes in statutes in

this area by the legislature.

The fact that certain issues are set aside by the legislature for determination by expert testimony has long been recognized by the courts of this state. In Shaw v. Puleo, 159 So.2d 641 (Fla. 1964), this court addressed and acknowledged this.

In Puleo, the district court had applied an erroneous standard of proof into a personal injury case. The First District had applied to a PI case the law of medical malpractice cases that expert opinion is both necessary and sufficient to establish injury, even in the case of contrary lay evidence.

> "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 . ... 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. Shaw, supra at 642, quoting the district court's opinion, citation to malpractice law case omitted.

The district court, however, had jumped the gun in its ruling. As noted by this court, the law was that in medical malpractice cases, the fact issues of proper expert diagnosis and treatment - or misdiagnosis and mistreatment - was beyond the scope in most cases of persons of common experience. Therefore expert opinion testimony was necessary and, if unrebutted by other medical

testimony, sufficient to establish these narrow fact issues. Shaw, supra at 643.

But this law did not apply at that time to normal personal injury cases, so the district court's opinion was wrong.

> "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. ... 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." Id. at 643. 644.

But since the Shaw decision came down in 1964, the law of personal injury in auto accident cases has been invaded and redefined by the legislature to provide a limited statutory cause of action. Recovery now depends on the establishment by expert medical testimony of the existence of a technically defined medical condition; the "permanent injury". Section 627.737(2)(b), Florida Statutes. The district court's opinion in Shaw now has proper application due to this change in the law.

Under Florida's No-Fault law, the victim is not entitled to recover damages for personal injuries caused by the negligent operation of the tort-feasor's motor vehicle unless the plaintiff first establishes that he or she suffered a "permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement". Estate of Wallace v. Fisher, 567 So.2d 505 (Fla. 5th DCA 1990) This condition, which by definition is defined only by reference to medical testimony, is a condition

precedent or threshold requirement to the plaintiff's right to recover damages for personal injuries under this statutory cause of action. Id.

The Morey case line has defined a standard of proof relating to expert opinion in auto accident personal injury cases which should be adopted by this court. Morey v. Harper, 541 So.2d 1285 (Fla. 1st DCA 1989)

THE MOREY STANDARD OF REVIEW.

Review of jury verdicts in personal injury cases where the issues are causation and permanency has been more narrowly delineated by the district court case law in recent years.

While on other issues and in other cases the jury is still free to disregard the opinion testimony of an expert, [see, e.g., Slater v. City of St. Petersburg, 449 So.2d 1006 (Fla. 2d DCA 1984); Shaw, supra.], it is submitted that this should no longer an accurate statement of the law with respect to causation and permanency in auto accident personal injury cases. Morey, supra; Rhodes v. Easkold, 588 So.2d 267 (Fla. 1st DCA 1991).

Another narrow area for which only expert medical testimony is relevant has been created in the case law. Much like malpractice cases in 1964, permanent injuries under the No-Fault law must be defined by expert testimony alone. And like in malpractice cases, if the only competent - i.e. expert - evidence supports the plaintiff, as all of the expert testimony in uncontradicted in her favor, it is improper for the case to either go to a jury in the first place or for a contrary jury verdict to

withstand a motion for new trial.

The First District Court of Appeals noted that the determination of what constitutes a permanent injury must, under the current statutes, be left to physicians trained in that profession.

> "Hence, the language requiring proof of a permanent injury based on a reasonable degree of medical probability has established a requirement that can only be satisfied by expert medical testimony. See Fay v. Mincey, 454 So.2d 587 (Fla. 2d DCA 1984); Avis Rent-A-Car Systems, Inc. v Stuart, 301 So.2d 29 (Fla. 2d DCA 1974). 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. Scarfone v. Magaldi, 522 So.2d 902 (Fla. 3d DCA), rev. denied by 531 So.2d 1353 (Fla. 1988). See also, Short v. Ehrler, 510 So.2d 1110 (Fla. 4th DCA 1987)." Morey, supra, at 1288.

In the Morey auto accident case, the plaintiff offered the expert testimony of three doctors, Dr. Esquivia-Munoz, Dr. Flinchbaugh, and Dr. Scharf. Dr. Esquivia-Munoz did not testify whether the plaintiff had suffered a permanent injury as a result of the accident. Dr. Flinchbaugh testified that, based on a patient history of no prior back symptomatology, he diagnosed that plaintiff had suffered permanent injuries to the neck and back which were related to the accident there at issue, and gave her a 5 % permanent disability rating. But on cross examination he stated that even if the history of no prior symptoms was inaccurate, it would not change his diagnosis of permanency.

Finally, Dr. Scharf testified that the plaintiff had suffered a 5 % permanent disability as a result of the accident due to the injury she suffered to her wrist, neck and back. The plaintiff had given him a history of prior back and neck problems. This doctor was not asked whether any inaccuracies in the history would result in his changing his opinion.

The trial court in that case, on those facts, denied the plaintiff's motion for directed verdict on causation and permanency, and entered judgment on a jury verdict for the defense. The plaintiff's motion for new trial was denied.

On appeal, the defense asserted that the medical evidence of causation and permanency were controverted based on the fact the opinions were given from inadequate histories. There was credible evidence there that the injured party affirmatively misrepresented her medical history to the examining physicians. Thus, there was lay testimony which might be said to controvert or place in doubt the expert testimony, if it was determined to be competent and substantial.

Despite this argument, the First District reversed and remanded for a new trial. It ruled that while expert testimony can be attacked for lack of predicate, the law necessitates that in the face of a preliminary showing of expert testimony on causation and permanency, the defense must either obtain an explicit admission that the incorrect history affects the doctor's opinion on these issues, or must present direct medical testimony to rebut the expert's opinion.

Morey states a refined standard for review of impeachment due to alleged inaccuracies in the medical histories given to the doctor, restricting consideration of alleged inaccuracies to the expert alone:

> "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. Dr. Scharf 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. Because the medical testimony of permanency was not based on an accurate factual predicate, ... we conclude that the court did not err in refusing to direct a verdict for the appellant on this issue. We do hold, however, that because the medical evidence, although based on an inaccurate predicate, was uncontroverted on this record, the jury's verdict finding of no permanent injury was contrary to the manifest weight of the evidence under the authority of Scarfone v. Magaldi. Accordingly, we reverse and remand this cause for new trial." Id.

In the instant case, four different medical doctors testified that the Petitioner suffered a permanent injury or aggravation as a result of the accident of April 30, 1986. None changed his testimony despite cross examination as to the accuracy of the histories upon which their opinions were based. All who were asked affirmatively stated that the discrepancies in the history given would not affect their opinions.

And the Respondent did not present any expert medical testimony whatsoever that the Petitioner had not suffered a permanent injury, or that her injuries were not caused as a result of the car accident. The expert medical testimony was thus

materially uncontroverted. Morey, supra.

The instant case presented an even stronger case for reversal and remand for a new trial on damages only than the Morey case, under the standard of law set forth therein. This court has the benefit of the testimony of not one but two doctors who examined and treated the Petitioner before as well as after her car accident. They both testified that despite inconsistencies about in Petitioner's statements at different times as to what pain she suffered in different parts of her body, it was their expert opinions that she had in fact suffered a permanent injury caused by the car accident.

The authority of the Morey case was further bolstered in the case of Rhodes, supra.. In that personal injury case before the First District, the plaintiff presented the depositions of three physicians at trial.

Dr. Flynn, an orthopedic surgeon, testified that the only trauma suffered to plaintiff's leg was her auto accident, according to the history given by the patient.

Dr. Vervoort, the second medical expert, opined that the plaintiff suffered a permanent injury as a result of the car accident. He admitted that he relied in part on plaintiff's history in reaching this opinion.

Finally, Dr. Jankauskas, the plaintiff's treating physician before and after the accident, testified that plaintiff had come in often for treatment of pre-existing neck, back and leg pain. After admitting some such problems in a pre-trial deposition, she

ultimately denied such pre-existing symptoms at trial.

The jury found specifically found that the plaintiff had not suffered a permanent injury, although it did grant her an award of economic damages. The appellate court reversed, based on Morey.

> "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 any different had they known Mrs. Rhodes' complete medical history. Because the medical evidence of permanency was therefore uncontroverted,, the jury's finding of no permanent injury was contrary to the manifest weight of the evidence, and appellant's motion for new trial should have been granted." Id., citing Faucher v. R. C. F. Developers, 569 So.2d 794 (Fla. 1st DCA 1990)

Both the Morey and the Rhodes cases also cited as authority the case of Scarfone v. Magaldi, 522 So.2d 902 (Fla. 3d DCA 1988), rev. den. 531 So.2d 1353 (Fla. 1988). That court also reversed a judgment based on the jury's verdict of no permanent injury, as being against the manifest weight of the evidence.

In Scarfone, the plaintiff presented medical evidence of permanent injuries sustained as a result of the subject automobile accident, and the defendants offered no contrary medical evidence. The appellate court ruled that it was error to deny the plaintiff's motion for new trial in this circumstance, and remanded for new trial.

The Fourth District examined the issue of when medical testimony is uncontroverted so as to require reversal of a jury

verdict in the case of Short v. Ehrler, 510 So.2d 1110 (Fla. 4th DCA 1987). In that case, the jury presented a zero verdict despite uncontroverted expert testimony that the plaintiff had sustained some damages. The trial court denied the motion for new trial, holding that the jury could conclude that the plaintiff's damages were not causally related to the injuries she suffered in the accident. The Appellate court reversed.

The plaintiff in Short was the driver of a car rear-ended by a vehicle driven by one of the defendants. There was, as in the instant case, no issue as to liability for the accident, to which the defendants stipulated, and the case went to the jury on the issue of damages. The defense, as here, focused on a preexisting back injury of the plaintiff.

> "The plaintiff's two medical experts, while conceding the preexisting injury, unequivocally testified that there was an identifiable aggravation because of the car accident, resulting in at least a twelve percent permanent functional impairment. Even the Doctor named by the defense testified that some aggravation 'could' have resulted from the car accident though he testified that no more than a 'small degree' of the permanent impairment percentage could be related to the automobile mishap. As a consequence, there was no testimony whatever that her condition was not aggravated so that, at the very least, nominal damages should have been awarded." Id.

The Fourth DCA reversed and remanded the case for new trial.

The Fourth District reiterated its support of the Morey line of cases in the more recent case of Jarrell v. Churm, 18 F.L.W. D130 (Fla. 4th DCA Dec. 30, 1992).

In Jarrell, the plaintiff suffered neck and lower back injuries as a result of a car accident. Her position that the

injuries were permanent were supported by expert testimony. She had a pre-existing condition which had pre-disposed her to injury in this sort of accident. Id. at 130.

There, as here, the defense offered no expert testimony. The defense relied upon three factors as evidence of lack of permanency: the relationship between counsel and the treating physician, the medical history showing a pre-existing condition, and a videotape showing plaintiff turning her head to look to the rear of her vehicle and carrying furniture from her home to her garage.

The jury granted a defense verdict. The Fourth District reversed and held not only that the defense verdict was contrary to the manifest weight of the evidence, but that the plaintiff was entitled to a directed verdict on the issue of permanency.

> " A directed verdict is appropriate only where there is no evidence or there are no inferences which may be drawn from the evidence to support the position of the party moved against. Hendricks v. Dailey, 208 So.2d 101, 103 (Fla. 1968); Marcano v. Puhalovich, 362 So.2d 439, 441 (Fla. 4th DCA), dismissed, 365 So.2d 714 (Fla. 1978).
>
> Additionally, the issue of permanency of an injury is ordinarily one to be decided by the jury. ... However, the status of permanency is a medical diagnosis. Its existence, vel non, must initially be established by expert medical testimony in order to present a prima facie case. ... When the proponent of permanency supports that hypothesis with expert testimony, the opponent of permanency, in order to carry the issue to the jury, must either: (1) present countervailing expert testimony; (2) severely impeach the proponent's expert; or (3) present other evidence which creates a direct conflict with the proponent's evidence. Such is not the case here.
>
> ...
>
> ...plaintiff's expert was familiar with the medical

history and obviously factored that into his diagnosis of permanency. ... It was incumbent upon the defense either to present its own expert testimony that the video tape illustrated a malingering plaintiff, or, at the very least, to inquire of plaintiff's expert whether the activities engaged in by plaintiff had any substantial impact on his professional opinion that plaintiff had suffered a permanent injury. ...

The foregoing implies, and therefore we explicitly recite, that, based solely upon consideration of evidence which does not clearly and directly contradict an expert opinion or the facts upon which that opinion is predicated, a jury of lay persons cannot be credited with having the technical expertise to totally disregard an expert medical opinion. There were no such direct conflicts in the record of these proceedings.

The defense could have presented its own expert testimony, or it could have cross-examined plaintiff's expert to demonstrate to the jury that the activities engaged in by plaintiff were inconsistent with a diagnosis of permanent injury. The defense having failed to do so, the jury was not free to make its own diagnosis. We therefore reverse and remand with directions to enter a directed verdict for plaintiff on the issue of permanency and for a trial on damages." Id. at 130, 131.

The First, Third and Fourth Districts are thus all in accordance with the above enunciated rule of law as to when medical testimony is materially uncontradicted.

The Second District had not determined its position on the Morey doctrine before the instant case. McMillion v. Whalen, 553 So.2d 1376 (Fla. 2d DCA 1989) But in the instant case the Second District specifically declined to follow the authority of the Morey line of cases, on the grounds that juries should be allowed to consider lay evidence of no causation or permanency even in the face of unrebutted expert medical testimony.

" In the case at bar, all of the expert medical witnesses testified that Weygant suffered some degree of

> permanent injury as a result of the automobile accident at issue. There was, however, other conflicting testimony, including Weygant's own testimony, indicating that Weygant's injuries were not permanent in nature and that they were not caused by the instant auto accident. ...
>
> ...to the extent Morey holds that a jury verdict must be consistent with medical testimony which is uncontroverted by other medical testimony, despite the fact that testimony was based on an inaccurate predicate and was indeed controverted by other evidence, we disagree and hereby certify conflict therewith."

The Second District has thus framed its understanding of the Morey ruling in terms of an improper invasion of the province of the jury to consider all of the evidence before it in reaching its verdict. Petitioner would submit that this analysis misses the mark. The Morey case and other cited cases made the determination that only expert medical testimony (or proper impeachment of the underlying history) is competent on these issues in cases such as this.

The Morey case appropriately holds that since the determination of causation and permanency is a question which by its very nature can only be determined by expert testimony, only expert rebuttal testimony or proper impeachment are competent to controvert a prima facie case.

A hypothetical example follows in the endnote to this brief which shows the absurdity of a contrary rule of law. What policy purpose is supported by allowing an inherently unqualified jury to "make its own diagnosis" as to a medical condition in the face of uncontradicted expert testimony?

The legislature and courts have determined the issue of permanent injuries and their causes to be beyond the realm of ordinary experience as a matter of law. Why should expert medical testimony be required to prove causation and permanency of injuries if mere lay testimony affirmatively disregarded by even the defense expert is sufficient to rebut that showing?

It is the substantive law in this area which makes the issues for determination a restricted battlefield of expert opinion. Where only one side shows up for the battle, it is against the manifest weight of the evidence for the jury to render its decision in favor of the party which defaults in presenting any competent contrary evidence.

It is submitted that for this court to fail to approve the Morey line of cases, and to allow juries to disregard totally uncontradicted expert testimony about conditions which only experts are competent to establish, is to detract from the appellate courts' power of review over illegal jury verdicts. There is no policy reason to so restrict the court's power of review. If a jury is to be allowed to make decisions based on incompetent evidence, there is no way to control the risk of speculation and prejudice.

This court should approve the Morey line of cases already adopted by the First, Third and Fourth Districts.

As to the relief sought by the Petitioner in this case, the court should remand for trial on the issue of damages only. It is submitted that it would not be appropriate to remand for a new

trial on all issues, under the Morey case. The evidence was undisputed as to the severity of impact, and the Respondents admitted liability. Burton v. Powell, 547 So.2d 330 (Fla. 5th DCA 1989) There was no issue raised below of comparative fault: Petitioner was a passenger in the vehicle struck by Respondent. Id.

The jury came back with a defense verdict, but could not properly have found that there were no damages suffered by the Petitioner. Under this verdict, the medical providers of the Petitioner will be left high and dry with unpaid bills for treatment of over $ 121,000.00. There was also uncontradicted evidence of economic damages suffered by Petitioner.

A directed verdict on liability would properly entitle the Petitioner to at least some of her actual medical and economic damages, and taxation of her costs. Griffis v. Hill, 230 So.2d 143 (Fla. 1970); McClellan v. Industrial Fire & Casualty Ins. Co., 475 So.2d 1015 (Fla. 4th DCA 1985)

Based on the undisputed expert medical evidence in this case, the jury's verdict was clearly contrary to the manifest weight of the evidence and must be reversed. The case should be remanded for a new trial on the issue of damages only.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING REPEATED REFERENCES TO BE MADE TO THE PETITIONER'S PENDING WORKER'S COMPENSATION CLAIM AND LITIGATION.

Admission of evidence concerning the Petitioner's prior litigation and worker's compensation claim is reversible error, particularly where these references become a fixture of the trial. Colvin v. Williams, 564 So.2d 1249 (Fla. 4th DCA 1990). While the question of prior injuries may be relevant, the question of prior or concurrent litigation was not relevant to any of the issues in this case. Inquiry of prior injuries can be made without reference to litigation, and failure to do so is reversible error. Colvin, supra.

The collateral source doctrine is well established in the jurisprudence of this state. Gormley v. GTE Products Corp., 587 So.2d 455 (Fla. 1991); Calloway v. Dania Jai Alai Palace, Inc., 560 So.2d 808 (Fla. 4th DCA 1990), Urbanek v. Hinde, 497 So.2d 276 (Fla. 3d DCA 1986) The doctrine allows an injured party to collect full damages, irrespective of coverage or payment for any element of the damages by any source other than the tort feasor. Gormley, supra.

Under the doctrine, it is error to permit the defense to present evidence, inquire of witnesses, or argue to the jury regarding worker's compensation at trial, and such references are grounds for reversal. Section 627.7372, Fla. Stat.; Kreitz v. Thomas, 422 So.2d 1051 (Fla. 4th DCA 1982); Urbanek, supra.

> "These cases reason that introduction of collateral source evidence misleads the jury on the issue of

> liability and, thus, subverts the jury process. Because a jury's fair assessment of liability is fundamental to justice, its verdict on liability must be free from doubt, based on conviction, and not a function of compromise. Evidence of collateral source benefits may lead the jury to believe that the plaintiff is 'trying to obtain a double or triple payment for one injury', Clark, 416 So.2d at 476, or to believe that compensation already received is 'sufficient recompense.' Kreitz, 422 So.2d at 1052. Despite assertions that collateral source evidence is needed to rebut or impeach, 'there generally will be other evidence having more probative value and involving less likelihood of prejudice than the victim's receipt of insurance-type benefits.' Williams, 309 So.2d at 11.
>
> ...Equity and logic demand that the burden of proving such an error harmless must be placed on the party who improperly introduced the evidence. Putting the burden of proof on the party against whom the evidence is used, as the district court did, would simply encourage the introduction of improper evidence." Gormley, supra, at 458, 459, citing Clark v. Tamp Elec. Co., 416 So.2d 475 (Fla. 2d DCA 1982) and Williams v. Pincombe, 309 So.2d 10 (Fla. 4th DCA 1975).

The United States Supreme Court and the Supreme Court of Alabama, among other tribunals, also have approved the same rule of law. Tipton v. Socony Mobil Oil Co., 375 U.S. 34, 11 L. Ed 2d 4, 84 S.Ct 1 (1963); Gribble v. Cox, 349 So.2d 1141 (Ala. 1977); see also 47 A.L.R. 3d at page 238.

The Petitioner here properly made a motion in limine to avoid any references to worker's compensation in the trial, which was denied, and made a contemporaneous objection to the initial reference to worker's compensation. This is all that is required; an objection need not be repeated every time the same error is made, providing the court has already ruled on the objection. Rindfleisch v. Carnival Cruise Lines, Inc., 498 So.2d 488 (Fla. 3d

DCA 1986)

Indeed, the collateral source rule is not a rule of evidence that can be waived but a substantive rule of law that cannot be avoided even if it is the injured party who introduces the evidence of collateral compensation. Parker v. Wideman, 380 So.2d 433 (Fla. 5th DCA 1967)

The problem with the Respondent's references to worker's compensation were compounded in this case not just because the jury could have felt that any award of damages should be reduced or eliminated due to the existence of outside benefits, but because it could have wrongfully believed that the Petitioner was "double dipping" and seeking both worker's compensation and personal injury awards. Gormley, supra. As noted in the Statement of Facts, defense counsel argued exactly that with his eight references to Petitioner's workman's compensation claim, in closing argument.

> "To determine litigiousness to be the proper subject of cross examination for impeachment purposes would be tantamount to stating that one creates a legal wrong by enforcing one's rights when they are violated. Such would be a gross infringement upon the basic rights granted to us by the Constitution of the State of Florida, which in Section 4 of the Declaration of Rights, F.S.A. in essence states that all of the courts of this state shall be open so that every person for any injury done to him or his lands,, foods, person or reputation shall have remedy by due course of law and right and justice shall be administered without sale, denial or delay." Zabner v. Howard Johnson's, 227 So.2d 543, 546 (Fla. 4th DCA 1969)

The Respondent's conduct in not only referring to the worker's compensation nature of the prior injury of the Petitioner in its questioning, but also interweaving it into a major component of its

argument was prejudicial. This conduct, permitted by the trial court, was in its collective import so extensive that its influence pervaded the entire trial. Tyus v. Appalachicola Northern R. Co., 130 So.2d 580 (Fla. 1961)

It appears from the jury's verdict here, which was entered against the manifest weight of the evidence, that the jury ruled based on prejudice or passion due to these repeated improper references to worker's compensation. Wheeler v. Yellow Cab of Orlando, 66 So.2d 501 (Fla. 1953)

The jury's verdict must be reversed when, as here, it is contrary to the manifest weight of the evidence or when it is motivated by prejudice, passion, mistake, or other improper cause. Id. The trial court's erroneous refusal to grant the motion in limine or to sustain the Petitioner's objections were error which require reversal.

The Second District dismissed this issue without discussion in its opinion. It is submitted that the judgment should be reversed and the case remanded for a new, untainted trial on this ground alone, even if the court determines that it will not approve the Morey line of cases as set forth above.

CONCLUSION

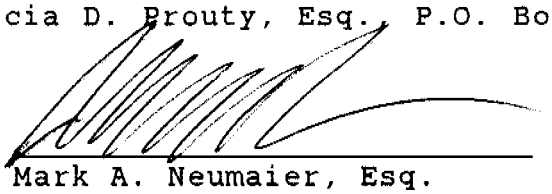
The trial court committed error in failing to grant the Petitioner's motion for new trial. The uncontradicted medical evidence of causation and of permanency demonstrates that the jury's verdict was against the manifest weight of the evidence, and must be reversed.

The trial court's failure to grant the Petitioner's motion in limine as to all references to worker's compensation claims, litigation, or cases was reversible error. The jury's verdict against the manifest weight of the evidence can be explained due to the its passion and prejudice raised by these unrestricted references.

This Court should reverse the jury's verdict and the judgment, and remand the cause for a new trial on damages only.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by U. S. Mail on February 16, 1993 to Floyd Price, Esq., P.O. Box 1519, Bradenton, FL 34206, Mark Yeslow, Esq., P.O. Box 9226, Ft. Myers, FL 33902, and to Patricia D. Prouty, Esq., P.O. Box 1519, Bradenton, FL 34206.



Mark A. Neumaier, Esq.
P.O. Box 8623
Tampa, FL 33674
(813) 985-6617 / 852-8830
Counsel for Petitioner
Florida Bar No. 436208

ENDNOTE - HYPOTHETICAL PERSONAL INJURY TRIAL.

Consider this hypothetical: The plaintiff claims to have suffered a broken spine caused by the car accident, a rear-end collision at ninety miles per hour. She was ejected and launched 150 feet through the air. The defense stipulates to liability but denies that she suffered any damages, permanent or otherwise.

At trial, plaintiff presents four examining and treating physicians, all of whom state that it is their considered expert opinions that the plaintiff's broken back is a permanent injury caused by the auto accident.

Whereupon, defense counsel springs his surprise. Cross-examining the plaintiff, he attacks:

"Q. Is it not true, madam, that the very day before your car accident, your minor child in fact stepped on a sidewalk crack on the way home?"

The plaintiff (an unsophisticated and superstitious person) breaks down in tears. "Yes, yes, she did. She didn't mean to do it - it was an accident!"

"Q. And what happens if you step on a crack?"

"A. (Sobbing) ...Break your mother's back."

The members of the jury (all, by coincidence, also superstitious) solemnly nod their heads as one and begin to rock their chairs.

Counsel for the plaintiff hurriedly recalls the four physicians, and asks each of them if the fact that the plaintiff's child had stepped on a crack was the cause of her broken back. All

agree that, in their expert opinions, the child's mistake had nothing to do with the permanent injury.

But again the defense pounces.

"Q. Doctor, during the course of taking your history, did the plaintiff tell you that her child had stepped on a crack?"

"A. Well, no, but - "

"Q. Nothing further!"

The jury retires for two minutes and comes back with a verdict that the plaintiff suffered no damages as a result of the accident.

Now, consider the appeal of this hypothetical trial under the Morey standard. There was no defense expert testimony as to causation or permanency. The plaintiff's experts were not contradicted by any expert testimony, and upon cross examination specifically stated that the alternate cause of injury proposed by the defense was nonsense, and that the incomplete history taken did nothing to change their opinion. Under the Morey case the jury verdict would be set aside and the case remanded for determination of damages.

But under the decision of the Second DCA here under appeal, the jury verdict would be sustained. There was lay testimony of an alternate source of any injury which was in contradiction to the experts, despite their disavowal of that testimony as probative. The jury felt that the lay testimony was competent, although the experts did not. There would be no appellate determination as to whether the controverting evidence was competent by reference to the experts themselves.