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IN THE SUPREME COURT OF FLORIDA

AUTO OWNERS INSURANCE CO.,

Petitioner,

v.

MICHAEL TOMPKINS,

Respondent.

_____/

SUPREME COURT CASE NO. 82,991
SECOND DISTRICT COURT NO. 93-881

ANSWER BRIEF OF RESPONDENT MICHAEL TOMPKINS

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STATEMENT OF THE CASE AND FACTS

The Respondent, Michael Tompkins, is referred to in this brief as Respondent, Plaintiff and/or Tompkins. The Petitioner is referred to as Petitioner, Defendant and/or Auto Owners. "R" is used to designate the portions of the record as necessary. All emphasis is added by counsel for Respondent unless noted to the contrary.

STATEMENT OF THE CASE

The chronology of the case as stated by Auto Owners is accurate. As to the issue before this Court, it is noteworthy that in the trial court Plaintiff's counsel asked for a verdict form that allowed for the award of future economic damages in the absence of a finding of permanent injury in this motor vehicle negligence case. That form of the verdict was denied and the verdict form that appears in the appendix to Auto Owners brief in this action was used over Plaintiff's objection. Additionally, Tompkins argued at the trial court level that the applicable law entitled him to recover future economic damages in the absence of the jury finding a permanent injury within a reasonable degree of probability. The trial judge disagreed and gave a jury instruction (found in Petitioner's appendix: "Spec. One") which required the jury to find a permanent injury within a reasonable degree of medical probability in order to award future economic damages. The instruction was given over Plaintiff's objection and argument based on much of the same case law Respondent maintains is dispositive of this appeal.

Tompkins' timely raised the jury instruction/verdict form issue in a motion for new trial that was denied by the trial judge. Tompkins appealed this issue to the Second District and further claimed error in the jury's apportionment and reduction for Tompkins' failure to wear a seat belt. Auto Owners cross appealed the denial of entitlement to attorney's fees where its offer of judgment was found to be unreasonable.[1] The Second District agreed with Tompkins that future economic damages were recoverable in the absence of permanency. While noting that the evidence adduced at trial presented a close call as to whether Tompkins' future economic damages exceeded the $25,000.00 set off from the tort feasor, the Second District nonetheless reversed for a new trial on future economic damages only. 627 So. 2d 1236 (2nd DCA 1993).

This Court has accepted jurisdiction apparently on the basis of conflict between the District Courts of this State as to whether the Plaintiff in a motor vehicle personal injury action is entitled to recover future economic damages where the trier of fact determines no permanent injury.

STATEMENT OF FACTS AND RECORD BELOW

The "facts" as portrayed by Petitioner Auto Owners omits important reference to the evidence and testimony in the trial court. Dr. Legere, a chiropractic physician who treated the Plaintiff both before and shortly after the motor vehicle accident, related that Tompkins was not at maximum medical improvement when

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[1] The Second District found the seat belt issue and the offer of judgment issue without merit and affirmed on those points.

he left Legere's care and that future chiropractic or medical care would be necessary (R. Vol. V, pg. 67). Following a short period of treatment with Legere, Michael Tompkins came under the care of treating orthopedic surgeon Dr. John Kagan. (R. Vol. II, pp. 261-288, Vol. VI, pp. 194-218). Dr. Kagan first saw Michael Tompkins on April 19, 1990. He was aware of Tompkins' previous medical history which he felt was basically non contributory. Dr. Kagan was aware of a prior workman's compensation accident sustained by Tompkins but as to this motor vehicle accident Kagan diagnosed "soft tissue type injuries in the cervical, thoracic area, and to a lesser degree in the lumbar areas. There was evidence of bilateral inflammation or impingement in the shoulder." (R. Vol. VI, pg. 199). Kagan felt that initially Tompkins would be physically limited in his job as a lawn maintenance worker. Following an MRI test, Tompkins returned to Kagan on October 18, 1990 and Kagan stated, "At that point I felt he had soft tissue cervical and lumbar symptoms. I felt that he rated a 5% impairment to the whole man and recommended that he <u>continue therapy or chiropractic management for flare-ups</u> and that he be returned to work with some limitations." (R. Vol. VI, pg. 203).

Dr. Kagan testified that on June 16, 1992 he rendered the following diagnosis:

> This man has worked diligently in therapy for treatment of soft tissue, cervical and lumbar injuries. He has mild disc bulging on the MRI of the lumbar region at L4-5 and L5-S1. He's had workup for headaches. He's had chiropractic management for some time. His original injury was June of '89. Given that it's now three years later and the patient is basically having the same symptoms, I felt that further therapy, chiropractic

> management was going to be of minimal short term relief only. As such, I'm recommending that he be considered at MMI, that he has a rateable permanent impairment of 6-8% at that point, and to be seen by us as needed. (R. Vol VI, pg. 204).

Dr. Kagan was questioned by Plaintiff's counsel as to the necessity for future medical care for Michael Tompkins. The record testimony was as follows:

> Question: What does the future hold for a gentlemen of Mr. Tompkins' age with these types of injuries, doctor? That is, what can he expect medically as time goes on?
>
> Answer: I think he'll have some flare ups, some periods where he has a lot of pain and limited motion and he may need a short course of physical therapy. By that I mean 2-4 weeks, something like that.
>
> * * *
>
> Question: Do you have any opinion as to how long he will suffer from the effects of these soft tissue injuries?
>
> Answer: It is really hard to say for sure, maybe years.
>
> Question: What is the typical cost or price of physical therapy for soft tissue injuries such as his in a facility here in Lee County?
>
> Answer: It is probably going to run maybe $70.00 to $100.00 per visit three times a week for four weeks, so it is 12 visits, so maybe $1,000.00, something like that. (R. Vol VI, pp. 207-208).

Dr. Kagan went on to state that the $1,000.00 quoted price would be for one area of the body (a cervical flare up for example) and that if Mr. Tompkins was treating for two areas of the body, the price would double. (R. Vol. VI, pg. 208). Finally, Dr. Kagan stated, "Within reasonable medical probability I think he will have flare ups. If you ask me to quantitate how many a year, it would be hard for me to say. He might have one, he might have three. We can't say within reasonable medical probability exactly how many he

will have, but I think he will have some problems." (R. Vol. VI, pg. 208).

At the time of his trial in November 1992 Michael Tompkins testified that he was still treating for his injuries with a massage therapist who originally treated him in Dr. Kagan's office (R. Vol. V, pp.93-94). Tompkins stated that he normally went to the massage therapist one time a week and that the treatment was $40.00 a session. (R. Vol. V, pg. 94). Plaintiff also stated that he planned to continue with his massage therapist in the future (R. Vol. V, pg. 97), and that his physical limitations had caused him to have to hire extra labor in his lawn care business. Tompkins also identified Plaintiff's Exhibit No. 8 as the summary of income lost as a result of his injuries from having to hire extra labor.

To counter Kagan's testimony as to permanent injury and the need for future medical or chiropractic care, Auto Owners called neurologist Dr. Lane Carlin who opined that Mr. Tompkins did not have a permanent injury and needed no future care. (R. Vol VI, pp. 150-174). The defense IME physician did diagnose" spinal pain following a motor vehicle accident with no evidence of neurologic injuries." (R. Vol. V, pg. 157). This IME neurologist agreed in cross examination that an individual can have a permanent soft tissue injury without there being any neurological involvement (R. Vol. V, pg. 174).

At the charge conference, Tompkins maintained that he would be entitled to an award of future damages on the evidence presented regardless of whether the jury found a permanent injury. As

support for that position, Plaintiff's counsel cited Smey v. Williams, 608 So. 2d 886 (5th DCA 1992), Chapman v. Dillon, 415 So. 2d 12 (Fla. 1982), Iowa National Mutual Insurance Co. v. Worthy, 447 So. 2d 998 (5th DCA 1984), and Bennett v. Florida Farm Bureau Casualty Insurance Co., 477 So. 2d 608 (5th DCA 1985). At this charge conference, Plaintiff's counsel also proffered the Florida Bar News of September 15, 1992 where the Florida Supreme Court Committee on Standard Jury Instructions sought commentary on a proposed Standard Jury Instruction consistent with Plaintiff's position on future economic damages. Plaintiff's proposed form of verdict was rejected by the trial judge (R. Vol. VI, pg. 367) and Plaintiff objected to the Court's instruction that future damages for medical expenses or loss of earning capacity could only be awarded if the jury found a permanent injury. (R. Vol. VI, pp. 367-368). Over Plaintiff's objection the Court utilized the verdict form "wherein permanent injury is a threshold question for future economic damages". (R. Vol. VI, pg. 368).

The jury returned its verdict on the form proposed by Auto Owners. The jury found no permanent injury and thus did not reach the questions on future economic damages. Admittedly the trial judge in the instant action did not have the benefit of the Second District's decision in Ketchen v. Dunn, 619 So. 2d 1010 (2nd DCA 1993) when Tompkins' claims were submitted to the jury. In Ketchen v. Dunn as well as the instant case [Tompkins v. Auto Owners Insurance Co., 627 So. 2d 1236 (2nd DCA 1993)], the Second District has followed the weight of authority developed in Florida motor

vehicle accident cases and squarely held that future economic damages are recoverable in a motor vehicle accident negligence case in the absence of a jury's finding of permanent injury. A contrary result has been reached in some case law decisions of the Fourth District Court of Appeal. The narrow issue presented is ripe for resolution by this Court.

SUMMARY OF THE ARGUMENT

In a motor vehicle negligence case for personal injury damages, a Plaintiff in Florida is entitled to future economic damages without proof of a permanent injury within a reasonable degree of medical probability. It is clear from the Florida Statutes encompassing the no fault law and the case law interpreting the same that the permanent injury threshold is only applicable to a recovery for intangible or non economic damages. Only some poorly reasoned opinions from the Fourth District Court of Appeal infer to the contrary and these opinions should be disapproved by this Court.

In this case, competent evidence was adduced at trial that the Plaintiff would continue to suffer pain and exacerbation of his injuries into the future requiring physical therapy or medical treatment on an as needed basis. The evidence of record clearly provided a basis for a jury to award the Plaintiff future medical expenses. The Second District in this action was correct in holding that future economic damages can be recovered in the absence of a permanent injury. Auto Owners confuses the weight to be given the evidence adduced below with the sufficiency of that evidence to support a jury award for future economic damages had the proper jury instruction been given and correct verdict form utilized.

Where competent evidence is produced by a Plaintiff at trial that would justify a finding of future medical expenses or economic damages, Florida motor vehicle tort law permits recovery for the

same. A jury finding that an injury is not permanent does not indicate that the future effects of that injury have "resolved" or will not occur. There is no speculation by the trier of fact where a sufficient evidentiary basis appears. While this general rule would appear to apply to all personal injury actions, it is apparent that the Legislature specifically intended future economic loss to be recoverable in the absence of a finding of permanent injury as is clearly set forth in the Florida no fault statutes.

Auto Owners co-mingles arguments about the weight to be given the evidence at trial and the effect of the jury's apportionment of damages for failure to wear a seat belt, but these arguments do not address the narrow legal issue presented. In accordance with statutory and case law, Respondent respectfully maintains that this Court should approve and affirm the decision of the Second District in this action and disapprove other District Court decisions that suggest to the contrary.

LEGAL ARGUMENT

WHETHER FUTURE ECONOMIC DAMAGES IN A MOTOR VEHICLE PERSONAL INJURY ACTION CAN BE RECOVERED BY A PLAINTIFF WHO DOES NOT SUSTAIN A PERMANENT INJURY.

The Second District's decision in Ketchen v. Dunn and in the instant case as well as the Fifth District's decision in Smey v. Williams, 608 So. 2d 886 (5th DCA 1992) are later pronouncements of well settled law that is contrary to Petitioner's position on appeal before this Court. The authorities that support Petitioner's position are out of sync with numerous District Court opinions contrary to Auto Owners' reasoning. Auto Owners would

have this Court ignore the clear legislative intent embodied in the applicable statutory language and the well reasoned District Court decisions that have interpreted the same.

The starting point for legal analysis begins with Florida Statute 627.737. The statute would appear to be clear on its face where it provides in subsection (1) that - "Every owner, registrant, operator or occupant of a motor vehicle with respect to which security has been provided... is hereby exempted from tort liability...to the extent that the benefits described in S. 627.736(1) are payable for such injury...unless a person is entitled to maintain an action for pain, suffering, mental anguish and inconvenience for such injury under the provisions of subsection (2). Subsection (1) of the statute clearly indicates that to the extent no fault benefits are available to an injured claimant, there can be no duplication of benefits in an action against the tort feasor. Certainly the statute makes no mention of economic damages in excess of no fault benefits as not being recoverable in the absence of a permanent injury. The statute clearly goes on to state in subsection (2) that as to non-economic or intangible damages, a Plaintiff must meet the permanent injury threshold.

This Court and the District Courts have addressed the interplay of the statutes referenced above and the limitations on tort damages recoverable in a motor vehicle accident case. The history of the no fault law and the damages recoverable under it is set forth in the District Court decision in Iowa National Mutual

Insurance Co. v. Worthy, 447 So. 2d 998 (5th DCA 1984). The decision in Worthy cites the 1972 "no fault" statutes which were originally intended to give exemption from tort liability to the extent of PIP benefits payable under Section 627.736(1), Florida Statutes. As noted in Worthy, the permanent injury threshold is applicable only when the plaintiff seeks damages for pain, suffering, mental anguish and inconvenience resulting from bodily injury caused by the negligent operation of a motor vehicle. Worthy at page 1001.

In Lasky v. State Farm Insurance Co., 296 So. 2d 9, 14 (Fla. 1974) this Court stated: "Thus the insured party will receive such benefits as payment of his medical expenses and compensation for any loss of income and loss of earning capacity under the insurance policy he is required by law to maintain, up to the applicable policy limits, and may bring suit to recover such of these damages as are in excess of his applicable policy limits." Lasky emphasized in Worthy at page 1001.

This Court in Lasky considered the constitutional challenges to the 1972 Florida Automobile Reparations Reform Act. At the time Lasky was decided the no fault threshold for a recovery for pain and suffering damages could be met in three situations: (1) where the medical expenses threshold exceeded $1,000.00, (2) where the injury or disease consisted in whole or in part of a permanent disfigurement...loss of a body member, permanent injury within reasonable medical probability, permanent loss of a bodily function, or death, and (3) where the injuries consisted in whole

or in part of fractures to weight bearing bones. Lasky at page 20.[2] As can be gleaned from the Lasky decision and its analysis of the early no fault legislation, there was a legislative intent to do away with traditional tort lawsuits in favor of a no fault system of benefits to the extent those benefits were paid or payable. The provision of the former law that placed a threshold for intangible damages at a $1,000.00 medical expense level shows the legislative intent to do away with a class of traditional tort litigation in exchange for a certain level of benefits to be carried by each insured under a statutory plan. The fact that a monetary limit was once the threshold for intangible damages shows that the idea of a threshold to recovery has nothing to do with whether a permanent injury indicates that a particular type of damages have "resolved".

Reference to West Florida Statutes Annotated Section 627. 730 at page 622 reveals the Florida Legislative Service Bureau-1971 notes. Those comments highlight that the Legislature in 1971 was faced with the task of seeking long term reform thus adopting a substantive change from the traditional tort liability system. The third paragraph of these comments states in part:

> "Benefits are payable up to a total of $5,000.00. These include medical care, income loss, funeral costs up to $1,000.00, and incidental expenses incurred. Suit may be instituted to collect from the party at fault for economic losses incurred in excess of these amounts.

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[2] The classification in the then existing Florida Statute 627.737(2) allowing a pain and suffering recovery where the enumerated fractures where sustained was held unconstitutional by the Lasky court but the first two classifications of no fault threshold were held to be constitutional.

> Suit is not allowed to collect general damages for pain and suffering unless medical expenses exceed $1,000.00; or there is an injury consisting of a permanent disfigurement, a fracture..."

The Florida Motor Vehicle No Fault Law found in Florida Statute 627.730-627.7405 states in Section 627.731 "Purpose" that the purpose of the no fault law is to provide, "With respect to motor vehicle accidents, a limitation on the right to claim damages for pain, suffering, mental anguish, and inconvenience." When one reads the 1971 Legislative Service Bureau comments referenced above in conjunction with 627.731 "Purpose", it is clear that the Legislature has always intended that economic damages be recoverable in a Florida action whether or not a given party has met the "applicable threshold" at the time.

When the legislature amended the no fault law in 1977 a constitutional challenge was raised. This Court in Chapman v. Dillon, 415 So. 2d 12 (Fla. 1982) upheld the provisions of the 1979 no fault insurance law as constitutional. After addressing the constitutional challenge this Court explained: "Under the new provisions the injured party still recovers most of his out of pocket expenses from his own insurer and is allowed to bring suit for the remainder." Chapman at page 18. The Chapman decision reaffirmed the viability of the reasoning in Lasky v. State Farm Insurance Co., and noted that the "permanent injury" threshold was a classification only necessary to recover for pain and suffering. Chapman at pages 18, 19.

In addition to the Worthy decision noted above, much of the law interpreting the no fault limitations on the right to damages

has been developed in the Fifth District. In Bennett v. Florida Farm Bureau Casualty Insurance Co., 477 So. 2d 608 (5th DCA 1985) the court reiterated that, "A tort feasor is liable to the injured party for the percentage of medical expenses and lost wages not payable under PIP coverage and for any amount of these damages which exceed the statutory limits, without regard to the threshold requirements of Section 627.737(2), Florida Statutes." Bennett at page 608. And recently in Smey v. Williams, the court further clarified the existing law when it stated: "An automobile accident victim may recover excess damages relating to medical expenses and loss of earnings as a result of bodily injury, sickness or disease whether or not those two items of damages accrued in the past (prior to trial) or will be suffered in the future (after trial)." Smey at page 887.

In Smey, the jury found that the plaintiff had not sustained a permanent injury but awarded $11,000.00 for past medical expenses and past loss of earnings and in excess of $80,000.00 for future medical expenses and future lost earning ability. The defendant in the Smey action argued on appeal that a permanent injury was necessary for the recovery of future medical expenses and lost earnings. The Fifth District disagreed and affirmed the jury's verdict. In the final paragraph of the Smey decision, the court noted that the defendant at one point took the position that under general law existing prior to the no fault statutes, future economic damages could not be recovered in the absence of a permanent injury. This position was apparently questioned by the

district court panel at oral argument and when questioned, "The defendant seemed to finally retreat to the proposition that evidence had to clearly support damages relating to injuries such as future medical expenses and future loss of earnings. With this last proposition we agree." Smey at page 887.

Consistent with the Smey decision, the evidence of record before this Court is adequate to support a jury award of damages for future medical expenses and future loss of earning capacity. The testimony of Plaintiff's treating orthopedic surgeon, Dr. John Kagan, would support a jury award for future medical expenses had the form of the verdict allowed for such an award. The form of the verdict submitted by the Defendant and used in this action precluded the jury's award of future economic damages.

The Second District Court of Appeal recently held in Ketchen v. Dunn, 619 So. 2d 1010 (2nd DCA 1993):

> "We agree with the appellant's contention that the court erred by refusing the appellant's request that the verdict form allow the appellant to recover her future medical expenses even if the jury found that the appellant did not sustain a permanent injury. Although Florida's no fault scheme establishes an exemption from tort liability for a class of damages paid or payable by PIP, an injured party is not precluded from bringing an action against the vehicle owner or operator for damages in excess of the statutorily required amount. An injured party may recover excess damages relating to medical expenses and loss of earnings as a result of bodily injury, sickness, or disease whether or not those two items of damages accrued in the past or will be suffered in the future. Smey v. Williams, 608 So. 2d 886 (Fla. 5th DCA 1992). Since the appellant presented evidence supporting its claim for future medical expenses, the court erred in not allowing the jury to determine if the appellant was entitled to them. Smey. See also Cronin v. Kitler, 485 So. 2d 440 (Fla. 2d DCA), rev. denied, 492 So. 2d 1333 (Fla. 1986). Contra Fazzolari v. City of West Palm Beach, 608 So. 2d 927 (Fla. 4th DCA 1992);

Josephson v. Bowers, 595 So. 2d 1045 (Fla. 4th DCA 1992). Ketchen at pg. 1013.

In two footnotes, the court in Ketchen found "noteworthy" the committee comments to the Standard Jury Instructions-Civil Cases, 613 So. 2d 1316 (Fla. 1993). Those comments explain that the "Standard Jury Instructions do not attempt to define the terms (permanent injury within a reasonable degree of medical probability) and leave their explanation to the testimony of the experts and argument of counsel." The committee comments further state that: "If a claimant does not establish permanency, claimant still may be entitled to recover economic damages that exceed personal injury protection benefits" with a reference to 627.737(2), Florida Statutes (1991) and Smey. Ketchen and the committee comments to the Standard Jury Instructions-Civil Cases are on all fours with Tompkins v. Auto Owners.

Petitioner seeks to support its position on appeal with cases that pre date the no fault law. Auto Owners' reliance on Thienenam v. Cameron, 126 So. 2d. 170 (3rd DCA 1961) is misplaced. The Thienenam decision pre dates the no fault law by at least a decade. The brief two page opinion in Thienenam is scant on its facts but states: "An examination of the record in light of appellant's brief demonstrates that there was no evidence of permanent injury to the Plaintiff-wife. Therefore, the court properly refused to instruct upon the issue of future damages." Thienenam at page 171. It is noteworthy that the Third District in reviewing the record found "no evidence of permanent injury" as opposed to some competent evidence of permanent injury as is the situation in the

instant case. It would be pure speculation some 30 years later as to what the trial court's proper instruction would have been on future damages had any competent evidence of permanent injury been presented at trial.

Auto Owners cites three more recent cases in support of its argument in this appeal. Allstate Insurance Co. v. Shilling, 374 So. 2d 611 (4th DCA 1979), Hubbs v. McDonald, 517 So. 2d 68 (1st DCA 1987), and Josephson v. Bowers, 595 So. 2d 1045 (4th DCA 1992) must be scrutinized carefully to determine whether there is any precedential value in these cases and whether they comport with the weight of authority in Florida case law. A close examination of these cases shows that the holdings refer to factual circumstances (or the lack thereof) easily distinguished from those in the instant case.

Allstate concentrates on the excessiveness of a damages award for future pain and suffering. The Fourth District found itself mainly concerned with the question of what evidence is necessary to support a recovery of damages for diminution of earning capacity. It does appear from the text of the opinion that each of the Plaintiff's three examining physicians in this action felt that the Plaintiff had suffered some degree of "partial permanent disability". Allstate at page 612. Concerned with the type of evidence that would allow a recovery for impairment of earning capacity, the court stated that the impairment of earning capacity must be shown with reasonable certainty and there needs to be "evidence that would permit the jury to arrive at a pecuniary value

for the loss." The Fourth District said, "In most cases, evidence tending to show the existence of some degree of permanent injury is sufficient to warrant an instruction on damages for impairment of earning capacity, provided there exists some basis upon which the jury can reasonably assess damages." Allstate at page 613.

The decision in Allstate indicates a requirement of evidence that tends to show some degree of permanent injury. No rule is announced that a permanent injury must be found to recover loss of earning capacity, only that there must be some evidence to warrant an instruction on the loss. Allstate complained on appeal that the Plaintiff "was working at the same job she had prior to the accident, and that no loss of earnings occurred as the result of the accident." Allstate at page 613. On the very same page of that opinion, the court stated:

> "Appellants misconceive the principles underlying an award of damages for impairment of earning capacity. Such an award is based upon the determination that the capacity to labor has been diminished as a result of the injury sustained and is not dependent upon the injured party's earnings either prior to or following the accident. [Citations omitted.] The fact that the injured party has resumed work after receiving the injury and is working at the time of trial does not prevent recovery for impairment of earning capacity. Such facts are merely evidence to be weighed by the jury in determining whether or not the injured party's earning capacity has been impaired. The instant record reveals sufficient evidence to support the jury's award." Allstate at page 613.

While Petitioner argues in this appeal that Tompkins' earning capacity claim was "resolved" by a finding of no permanent injury, Allstate recognizes a contrary rule. The Allstate court does seem to equate the terms permanent injury with permanent impairment

which adds to confusion on what constitutes crossing the "no fault threshold". As noted previously, there appears to be no guidance in the statutes or case law as to whether these terms should be synonymous. Auto Owners argues in this appeal that because the jury at trial awarded no damages for past wage loss, there could be no damages for future wage loss or loss of earning capacity. Allstate would allow a contrary result.

Hubbs v. McDonald, 517 So. 2d 68 (1st DCA 1987) also concerns itself with diminution of earning capacity. The court in Hubbs said that, "A jury instruction on diminished capacity to earn in the future is warranted when the record demonstrates the existence of reasonably certain evidence that the capacity to labor has been diminished and that there is a monetary standard against which the jury can measure any future loss". Hubbs at page 69 citing Long v. Publix Supermarkets, Inc., 458 So. 2d 393 (1st DCA 1984)[3] and Allstate Insurance Co. v. Shilling.

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[3] Long indicates that the plaintiff in that action had a 5% "disability" of her arm, was 10% less efficient in her job, and that there was evidence of her current dollar earnings. The Long court said: "The fact that the plaintiff at the time of trial is earning as much or more than she did prior to the injury does not preclude her from asking the jury to consider loss of future earning capacity. Such circumstances may make her burden of persuasion more difficult, by they do not defeat her opportunity to try." Long at page 394.

Burris v. Bowe's Funeral Home, Ltd., 204 So. 2d 257 (2nd DCA 1967) which is cited by Petitioner sets out in detail the medical testimony in that action on the plaintiff's limitations in stooping and bending and her own testimony as to her hourly wage. The Appellate Court held that the evidence was sufficient to warrant a jury instruction on loss of earning capacity.

The Hubbs court went on to state that the evidence in that action was that the Plaintiff had an impaired ability to lift, bend and stoop on a repetitive basis. The Plaintiff in the Hubbs action modified her work habits. Similarly, Mr. Tompkins testified in this case that his work habits had been modified. Rejecting an argument that the "test for entitlement" to an instruction on loss of future earnings was dependent upon earnings before or after the injury, the Hubbs court stated that the test is "whether the injured party's capacity to labor has been diminished by virtue of the injuries suffered" and evidence of "a monetary standard against which the jury can measure any future loss." Hubbs at page 69.

The Hubbs standard was met in the instant case as to the loss of Mr. Tompkins' ability to earn money in the future through the summary of his past lost earnings and need for additional labor. The evidence was very specific as to future medical expenses as Dr. John Kagan indicated it was probable that Mr. Tompkins would have flare-ups and the cost of treatment for those flare-ups was given. Tompkins himself testified to the costs he was paying out of pocket at the time of trial.

The last page of the Hubbs decision (page 70) indicates that the jury was "to consider the effect of Plaintiff's permanent impairment on her future earning capacity." Again, one cannot be sure whether this permanent impairment equates to permanent injury or whether the jury in fact found a permanent injury in the Hubbs case. Nonetheless, the thrust of Hubbs seems to be that there must be "some evidence" that a party was affected and will be affected

in the future plus evidence of a monetary standard to use as a yard stick. If Hubbs is correct as far as it goes, then the record before this Court clearly supports an award of future economic damages under the evidentiary standards voiced in Hubbs.

Josephson v. Bowers should have no value as precedent in that the two paragraph opinion recites no facts in support of its statement that-"The legal requirement in Florida is that there be a permanent injury before a defendant can be liable for future loss of income and other future damages in a personal injury claim". Josephson at page 1046. The Josephson opinion refers to Hubbs in a gloss over on the Hubbs decision. It appears that the jury in Josephson found no permanent injury, but there is no indication whether any evidence of permanent injury was presented to the jury.

In Fazzolari v. The City of West Palm Beach, 608 So. 2d 927 (4th DCA 1992) the Fourth District snowballs the decision in Josephson into the blanket statement that there must be a determination that there is a permanent injury to award future damages where the jury has compensated a Plaintiff for past damages. In Fazzolari, it appears that the court instructed the jury (as in the instant case) that they could award future damages if they found a permanent injury and the jury did not. Fazzolari at page 929. There is a long discussion in the opinion about the conflicting evidence on the permanent injury question. Of interest is a statement in this discussion that, "The defense expert testified that the plaintiff might need future treatment if he was having a flare-up, but with adequate treatment that he could do

almost anything that a normal individual could do...". Fazzolari at page 929. There is no statement as to the frequency of that treatment or its cost.

The Fourth District Court has developed its own case law in contradiction of the statutory no fault law and the weight of authority on what future damages are recoverable in the absence of permanent injury in a motor vehicle case. The above cited decisions appear to contradict the court's own opinion in McClellan v. Industrial Fire and Casualty Co., 475 So. 2d 1015 (4th DCA 1985) which clearly holds that even where a plaintiff does not suffer a permanent injury, he may still sue the tort feasor for benefits not payable under Section 627.736(1) of the Florida Statutes. The McClellan court cited as authority Chapman v. Dillon and Iowa National Mutual Insurance Co. v. Worthy. There is a conflict in the Fourth District's own decisional case law but McClellan alone is consistent with the statutory law. Respondent here would respectfully submit that the Fourth District got off the track established by the other decisional authorities in this State in Josephson and Fazzolari.

When one sets the poorly reasoned decisions of the Fourth District aside, Petitioner cannot distinguish Smey, Ketchen, nor the new Standard Jury Instruction 6.1. Indeed, Petitioner would have one read around the edges of the applicable established law and ignore the clear mandate of the Florida No Fault Law and the cases that have properly construed those statutes.

Auto Owners wants to reargue the weight to be given the evidence at trial in this appeal. This skirts the narrow legal issue presented. Although Auto Owners feels that Plaintiff's treating orthopedic surgeon's testimony was too speculative to support an award for future medical expenses, that testimony establishes that the effects of the Plaintiff's soft tissue injuries might go on for years and that as needed treatment would include physical therapy expenses of $1,000.00 to $2,000.00 per flare-up. (R. Vol. VI, pp. 203-208). Dr. Kagan's opinion that the Plaintiff would continue to have flare-ups was stated within "reasonable medical probability" but the doctor was unable to say within reasonable medical probability exactly how many flare-ups the Plaintiff would suffer. (R. Vol. VI, pg. 208).

Based on Dr. Kagan's testimony, a reasonable juror might well have awarded $1,000.00 to $2,000.00 per year over the remainder of the Plaintiff's life span (in excess of 30 years), if that jury found that the Plaintiff was likely to experience one flare-up per year for just one area of injury. Any number of other reasonable calculations for future medical expenses could have been made by the jury based on the evidence presented at trial had the proper jury verdict form been utilized. Dr. Kagan's testimony as a whole furnished the jury an evidentiary basis to find the need for future medical treatment as well as establishing the current cost of that treatment.

Petitioner cites Broward Community College v. Schwartz, 616 So. 2d 1040 (4th DCA 1993), 3M Corp. v. Brown, 475 So. 2d 994 (1st

DCA 1985), and O'Neil v. Pine Island Fish Camp, Inc., 403 So. 2d 980 (1st DCA 1979) for the proposition that a medical expert must testify in terms of probability or certainty as opposed to possibility. If as Petitioner contends, this is the law, then Dr. Kagan's testimony clearly meets the test. However, the law might not be so clear as to the admissibility of evidence of "possible" medical maladies or "possible attendant treatment". The Third District Court of Appeal in Vitt v. Ryder Truck Rentals, Inc., 340 So. 2d 962 (3rd DCA 1976) cited as precedent its own prior decision in Metropolitan Dade County v. Dillon, 305 So. 2d 36 (3rd DCA 1974) and stated:

> It is well established that evidence of future possible conditions and circumstances may be admitted in evaluating a plaintiff's present condition (citations omitted)...while the probative value of such evidence is not great, it is information the jury should have in the difficult task of trying to give plaintiff's condition a dollar value. Vitt at page 965.

As noted in the footnotes in Ketchen v. Dunn and the Committee comments to the Standard Jury Instructions, permanent injury is not defined by Florida Statutes or jury instructions. Considered logically, it is clear that a finding of no permanent injury for no fault or non economic damages purposes does not equate to a finding that all of the effects of a given injury have "resolved" and that no future medical treatment (or lost earning capacity) could result from the date of the trial forward. Even if a jury determines that a given injury is not permanent, the "transient" nature of the non permanent injuries could result in future damages where sufficient evidentiary basis is provided at trial.

Standard Jury Instruction 6.1 (d) was approved following the trial of the case that spawned this appeal. See, In Re: Standard Jury Instructions in Civil Cases, 613 So. 2d 1316 (Fla. 1993). Instructions on use indicate that if the evidence does not support the issue of permanency, the jury is to "award an amount of money which the greater weight of the evidence shows will fairly and adequately compensate for damages caused by the incident in question" and that the damages recoverable in the absence of permanency should be enumerated. The notes on use further recognize that the no fault statute only sets a threshold to the recovery of non economic damages where no permanent injury is found. An example is listed where a claimant at trial is not at maximum medical improvement and will have a "limited" period of future economic damages. The MMI example is only that: one example. Where a competent and sufficient evidentiary basis is provided, a jury can still conclude that a period of future economic loss (wage loss, earning capacity and/or future medical expenses) is reasonably certain to occur.

Auto Owners would read into Chapman v. Dillon, 415 So. 2d 12 (Fla. 1982) a definition of "out of pocket" expenses as indicating losses in the past only. This interpretation is not explained as such in the decision and ignores the clear meaning of the word "payable" as related to future damages.

Using the date of trial as the line of demarcation between past and future damages would operate to deprive litigants of their right to collect damages certain to occur but not yet reached in

the absence of permanency solely because that trial happened to come up before the full extent of the damages was realized. Such was not the intent of the Legislature in enacting the no fault law. Where there is a standard by which damages can be measured and evidence adduced that would support damages in the future, there exists a basis to award them for whatever length of time the jury determines. Similarly, the date that a case goes to trial will often have no bearing on medical treatment into the future and though such future damage is not susceptible of exact proof, juries have traditionally resolved the conflicts in the evidence to "fairly and accurately compensate".

Auto Owners argues that to allow the recovery of future economic damages absent a showing of permanency is to deprive litigants and their attorneys of a way of evaluating tangible damages. This is simply not the case given the broad discovery provisions of the Florida Rules of Civil Procedure. Whether damages are likely to occur for one year, five years, or conceivably a lifetime, if a party litigant does proper discovery it can certainly determine the parameters of any economic damages award and evaluate the damages in a case with the same degree of certainty whether the injuries are shown to be permanent or not.

In support of this "uncertainty" argument, Auto Owners argues that under the facts of the instant case, the Second District determined that there was sufficient evidence to award future economic damages in excess of $125,000.00. Again Petitioner mixes the seat belt reduction portion of the verdict form into an

analysis that asks the Court to re-weigh the evidence at trial. That is not the function of the Appellate Court. Certainly, had the jury been allowed to find future economic damages in the absence of permanency but failed to award them, Auto Owners would not be complaining that it got a bad result. As the Second District in Tompkins v. Auto Owners Insurance Co. noted, no one can say as a matter of law that no recovery for future damages was possible.

CONCLUSION

The Florida Statutes and case law precedent support the rule that future economic damages in a motor vehicle personal injury action can be recovered by an injured plaintiff even in the absence of a finding of permanent injury. This interpretation is consistent with the intent of the no fault law and the Supreme Court and District Court cases that have properly recognized that intent.

Respondent respectfully urges this Court to affirm and approve the ruling of the Second District in Tompkins v. Auto Owners and to end the apparent split in authority by disapproving those decisions of the District Courts that are inconsistent.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by U.S. Mail to CURTRIGHT TRUITT, P.O. Box 2706, Ft. Myers, FL 33902, this 22d day of April, 1994.

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