W00A

SUPREME COURT OF FLORIDA

AUTO-OWNERS INSURANCE COMPANY, Petitioner, v. MICHAEL TOMPKINS, Respondent.	**	Case No: 82,991 District Court of Appeal, 2nd District No: 93-00881

PETITIONER'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Petitioner will be referred to as Petitioner, Defendant and/or Auto-Owners Insurance Company. Respondent will be referred to as Respondent, Plaintiff and/or Tompkins. "R" shall be used to designate the record on appeal. "Apx" shall be used to designate the appendix attached hereto.

STATEMENT OF CASE

Plaintiff, Michael Tompkins was involved in a motor vehicle accident with an underinsured motorist on June 24, 1989 (R 1-41, 554). Mr. Tompkins settled with the tortfeasor for his liability limits of $25,000, and filed suit against his underinsured motorist carrier, Auto-Owners (R 1-41,49-50,554).

Liability having been admitted, the case went to trial on issues of causation and damages, with the jury finding no permanent injury and awarding only past medical expenses. The jury also found that the plaintiff contributed to his injuries by eighty (80%) percent for his failure to wear an available and fully operational seat belt (R 406-408, Apx). The $25,000 received from the tortfeasor exceeded the net jury award, and judgment was entered for petitioner (R 528).

The plaintiff appealed to the Second District Court of Appeals claiming error in the Court's instruction on future damages and the jury's finding reduction on the seat belt defense for failure to wear a seat belt. The Second District granted a new trial on

damages, holding the instruction to the error, and affirmed on the seat belt issue. *Tompkins v. Auto-Owners Insurance Company*, 627 So. 2d 1236 (Fla. 2d DCA 1993). This Court accepted petitioner's request for conflict jurisdiction by Order of March 9, 1994.

STATEMENT OF FACTS

Plaintiff complained of permanent soft tissue injuries to his neck, back and shoulder (R 1-42) and presented evidence that his injuries were permanent through the testimony of Dr. John Kagan. Dr. Kagan first saw the plaintiff after the accident in April of 1990 (R 195-196,205, 206).

Dr. Kagan assigned the plaintiff an impairment rating of five (5%) percent and felt that he had reached maximum medical improvement ("MMI") on June 16, 1992 (R 204-206). Dr. Kagan was not aware that Mr. Tompkins had been treated for similar complaints ten days before the accident by a chiropractor, Dr. Gerald Legere (R 210-211,439-452,100-112). Dr. Kagan's relating the injuries to the accident was based on what the plaintiff told him, and thus was operating under the assumption that before the accident the plaintiff was not having the problems complained of(R 214). Dr. Kagan placed no work restrictions on the plaintiff (R 207), but did feel Mr. Tompkins should continue therapy or chiropractic treatment for "flareups."

Dr. Kagan was unable to quantify how many "flareups" the plaintiff might have - "he might have one, he might have three. We cannot say within a reasonable degree of medical probability

exactly how many he will have, but I think he will have some problems" (R 208). Dr. Kagan also stated he did not know how long the plaintiff would suffer from his injuries, noting that for a "flareup" a short course of physical therapy for one part of the body would cost $1,000 (R 207-208).

No other physician testified that the plaintiff had a permanent injury as a result of the subject accident, as Dr. Legere explained that when he last saw the plaintiff he had not reached maximum medical improvement and had no opinion regarding permanency as a result of the subject accident (R 60-69).

Dr. Harry Lowell, a neurosurgeon who had employed the plaintiff for lawn and grounds maintenance for his home and office complex for years, testified that the plaintiff was a rather wiry, active person and he saw no indication that he was physically impaired in any significant way. Dr. Lowell, coincidentally, also treated the plaintiff for a work related injury in 1980, with complaints of neck and arm pain (R 139-145).

A defense examination was performed by Dr. Lane Carlin, a neurologist, who testified that after review of all of the medical records and from examining the plaintiff that it was his opinion that Mr. Tompkins had not sustained a permanent injury as a result of the subject accident (R 150,153,183,473-475). Dr. Carlin felt there should be no restrictions on the plaintiff's employment or activities and he saw no reason for future medical care (R 161).

The plaintiff testified that his gross and net income had remained "pretty much the same over the last several years" (R 103). However, Mr. Tompkins maintained that he has had to pay for

extra help for labor for large jobs with his argument being that his past out-of-pocket expense for medical expense and lost income was $34,479.50 (R 383). The jury was asked by plaintiff's counsel to award $27,000 for future wage loss and $10,000 in future medical expense (R 390-391).

The Trial Court instructed the jury that if they found that the plaintiff had sustained a permanent injury within a reasonable degree of medical probability, they could consider future economic loss. Absent such a finding, damages were to be limited to out-of-pocket expenses for past wage loss and medical expenses (R Apx, 421,427-430,506-524).

The verdict was for past unpaid medical expenses in the amount of $9,385.44, with no award for wage loss. The jury concluded no permanent injury was sustained by the plaintiff and that the plaintiff contributed to his damages by eighty (80%) percent for failing to wear his seat belt (R Apx,406-408,433-434). The net verdict was $1,877.09 (R 528).

SUMMARY OF ARGUMENT

One seeking damages for personal injuries should not be entitled to future economic loss without proving a permanent injury. The law in Florida has long been that such a threshold is necessary for recovery. Opinions from the Second and Fifth District Courts of Appeal are against the weight of authority, conflicting with many decisions of Florida's appellate courts, including the Florida Supreme Court.

In the absence of a permanent injury or impairment, not only should a litigant be prevented from recovery of such future damages on sound legal principles, but simple logic and public policy dictate the same result. Allowing a jury to consider future damages after finding the plaintiff suffered no permanent injury, simply makes no sense as the fact finder has determined that the injury has resolved based on the evidence presented. Such a rule would promote speculation by the jury as to what damages are awardable, as it is clearly inconsistent to allow consideration for future damages for a non-permanent injury.

No doubt trials are now being conducted in some districts of our state where the courts, attorneys, and jurors are confused on the issue of permanency and what relationship it has on damages recoverable. Moreover, without such a threshold for future economic loss, the failure of a plaintiff to establish such an injury becomes only relevant to the issue of pain and suffering in a motor vehicle case.

In the instant case, the Second District has, in effect,

concluded, that without a permanent injury the jury could have found that the plaintiff sustained over $125,000 in damages, the amount necessary to exceed the $25,000 of underlying lability coverage after applying an 80 percent reduction for failure to use a seat belt. There was no competent evidence of such damage at trial, especially in light of the jury determining there was no permanency and refusing to award past wage loss. The damages assessed were for outstanding medical expenses not paid or payable from personal injury protection benefits.

The petitioner urges this Court to reverse in accordance with the manifest authority presented in support of its argument.

ARGUMENT

Future economic damages in a personal injury action are not recoverable by one who has not sustained a permanent injury

Prior to the opinions from the Fifth District in *Smey v. Williams*, 608 So. 2d 886 (Fla. 5th DCA 1992), and the Second District in *Ketchen v. Dunn*, 619 So. 2d 1010, (Fla. 2d DCA 1993), the law was well settled that in order to recover future economic loss in a personal injury action, a plaintiff must prove a permanent injury or impairment. This common law principle was not impacted by the adoption of The Florida Motor Vehicle No-Fault Law, as it prevents recovery for pain and suffering absent a threshold injury (permanent injury, scarring, or loss of important bodily function), and requires a claimant's own carrier to pay at least $10,000 for medical expense and wage loss. *See* Fla. Laws Ch. 82-243; Fla. Stat. §627.730 - §627.7372 (1992); *Lasky v. State Farm Insurance Co.*, 296 So. 2d 9, 13-14 (Fla. 1974); *See generally*, Truitt, *Florida's No-Fault Thresholds and Exemptions: What Do They Really Mean?* Fla. Bar J., Dec. 1993, at 69-72.

In *Thieneman v. Cameron*, 126 So. 2d 170, 171 (Fla. 3rd DCA 1961), the plaintiff brought suit for personal injuries sustained in an automobile accident. The trial court refused to instruct the jury on future damages, with the Third District affirming, holding there was no evidence of permanent injury, and "therefore the court properly refused to instruct upon the issue of future damages." In *Atlantic Coast Line Railroad Co.*

v. Ganey, 125 So. 2d 576, 579 (Fla. 3rd DCA 1960), the court was faced with a similar issue - entitlement to future loss of earnings. The Third District explained that "in Florida, the measure of future loss to be compensated by damages is the loss of the capacity to earn, that is, the permanent impairment of ability to earn money ..." *citing Renuart Lumber Yard, Inc. v. Levine*, 49 So. 2d 97 (Fla. 1950); *Mullis v. City of Miami*, 60 So. 2d 174 (Fla. 1952); *Smith v. Tantlinger*, 102 So. 2d 840 (Fla. 2d DCA 1958).

The rule that a permanent injury or impairment is the foundation for an instruction allowing the jury to consider loss of earning capacity (future) has been consistently followed by Florida's district courts of appeal. In *Burris v. Bowe's Funeral Home, Ltd.*, 204 So. 2d 257 (Fla. 2d DCA 1967), the Second District explained that the issue of loss of earning capacity should go to the jury if there is sound competent evidence of a permanent, disabling injury. *See also Platt v. Schwindt*, 493 So. 2d 520 (Fla. 2d DCA 1986) ("unrefuted evidence of permanent injury"), and Fla. Std. Jury Instr. (Civ.) 6.9(a).

Perhaps the most often cited case on the evidence necessary to support an award for future earning capacity is *Allstate Insurance Company v. Shilling*, 374 So. 2d 611, 613 (Fla. 4th DCA 1979), where the Court discussed in detail this aspect of damage. The Fourth District held that there must be evidence of some degree of permanent injury to warrant recovery for the loss of earning capacity. *See also Long v. Publix*

Super Markets, 458 So. 2d 393 (Fla. 1st DCA 1984), (plaintiff had 5% disability of her arm); *Hubbs v. McDonald*, 517 So. 2d 68 (Fla. 1st DCA 1987) (trial court directed to instruct jury to consider the effect of plaintiff's permanent impairment on her future earning capacity).

The Florida Supreme Court in 1936 held "in order that a jury may assess damages for any permanent injury, it must appear to them that the injury is reasonably certain to impair the health and earning capacity of the injured person in the future." *Baggett v. Davis*, 169 So. 372, 377 (Fla. 1936). The most recent pronouncement of the entitlement to future economic damages being conditioned on a permanent injury was in *Josephson v. Bowers*, 595 So. 2d 1045 (Fla. 4th DCA 1992), wherein, the court stated:

> We agree with the appellant that the verdict is inconsistent with the legal requirements in Florida that there be permanent injury before a Defendant may be held liable for future loss of income and other future damages in a personal injury claim.

It is clearly evident that *Smey v. Williams, Ketchen v. Dunn, supra*, and Second District's opinion in the case at bar are all in direct opposition to *Josephson* as well as decisions of this Court and the district courts of appeal. It should be noted that at the time of the subject trial *Ketchen* had not been decided.

Allowing one to recover future economic loss absent a permanent injury is devoid of logic and only serves to create confusion which leads to inconsistent verdicts. Permanent injuries are those which by very definition connote being

"substantial" and likely to result in "long term suffering" while non permanent injuries are those of a "transient" nature. *See Lasky, supra* at 19-20.

In *Fazzolari v. The City of West Palm Beach*, 608 So. 2d 927 (Fla. 4th DCA 1992), the court explained that when there is no question that a plaintiff has suffered a permanent injury and where the jury compensates for past damages, it is error not to award future damages; however, there must be a determination that there was a permanent injury to justify future damages. The jury was instructed in *Fazzolari*, similar to the case at bar, that they could award future damages *if* they found a permanent injury, with the jury determining that such an injury had not been sustained by the plaintiff.

In *Smey*, the jury found no permanent injury, but yet awarded $80,480.00 for future medical expense and future loss of earning ability. The Court affirmed, reasoning that the defendant was only exempt from tort liability to the extent that no-fault benefits were paid or payable, and for pain and suffering where there was no threshold injury. In sharp contrast to decades of case law, the Fifth District concluded that an injured party in a personal injury action may recover medical expenses and loss of earnings "whether or not the two items of damage accrued in the past (prior to trial) or will be suffered in the future (after trial)." The defendant argued that the no-fault thresholds prevent recovery of future economic damages. While the court correctly pointed out that section 627.737 of the Florida statutes only provides a limit

on non-economic damages, the court completely overlooked fundamental tort principles of Florida common law establishing such a threshold for future economic loss.

In *Ketchen*, the trial court refused the plaintiff's request that the verdict form permit the jury to award future medical expense even if they found no permanent injury. The Second District reversed on the authority of *Smey*, also noting that the permanent injury thresholds contained in the no-fault law only apply to pain and suffering.

In 1993, this Court approved the publication of Florida Standard Jury Instruction 6.1 (d), noting that it expressed no opinion as to the correctness of the instruction. *See In Re: Standard Jury Instructions in Civil Cases*, 613 So. 2d 1316 (Fla. 1993). The instruction provides 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 further directs that the notes on use should be considered and that the damages recoverable, in the absence of permanency and which have not been paid or payable by personal injury protection benefits, should be enumerated.

Interestingly, the instruction does not indicate what those elements of damage are, but the notes on use and comments thereto provide that the no-fault statute only sets a threshold to the recovery of non-economic damages and if the claimant does not establish permanency, he or she may still be able to

recover economic benefits that exceed personal injury protection coverage. The comments provide an example that when a claimant at trial is not at maximum medical improvement and will have a "limited" period of future loss of income or medical expense, the jury should be instructed to consider any such damage as is reasonably certain to incur in the future.

The instruction, taken with the comments and notes on use thereto is not only a departure from the law, but provides more questions than answers to jurors who are instructed and want to use common sense in their deliberations. *See Fla. Std. Jury (Civ) Ins.* 2.1. It is axiomatic that where the jury determines no permanency, there is no basis for concluding that it is reasonably certain for plaintiff to incur future wage loss and medical expenses. Also, this is inconsistent with Standard Jury Instruction (civil) 6.9 which allows for the consideration of the plaintiff's life expectancy ***if*** he or she has been "permanently injured."

Illustrative, is the above example which indicates that future economic damages may be awarded when a plaintiff has not reached maximum medical improvement. While this may be in accordance with the law *if* the jury agreed with the physician or physicians who testified in favor of permanency, but would be contrary to a finding of no permanency which cannot be harmonized with not being at MMI. Surely, adding the MMI factor to the equation would be an unwieldy standard in determining the elements of damage.

In passing on the constitutionality of the no-fault law,

this Court in *Chapman v. Dillon*, 415 So. 2d 12, 18 (Fla. 1982), explained that an injured party may recover "out-of-pocket expenses" not paid or payable by no-fault coverage, regardless of whether a permanent injury is sustained. This is not a departure from the common law principle of no future damage without a permanent injury, but simply allows the plaintiff to be made whole, economically, for his or her "out-of-pocket" or past loss.

Confusion could have been created by the use of the words "earning capacity," as the no-fault law in section 627.736 requires the no-fault carrier to pay in disability benefits, wage loss, or loss of earning capacity. In *Iowa National Mutual Insurance Co. v. Worthy*, 447 So. 2d 998 (Fla. 5th DCA 1984), the court stated that regardless of whether the plaintiff suffered a permanent injury, if there is economic loss in excess of PIP benefits, the negligent party is responsible for "the 20% of medical expenses not paid under PIP coverage provided by §627.736(1)(a) and the 40% of lost gross income and earning capacity not payable under PIP coverage..."

Worthy is consistent with *Lasky v. State Farm* and *Chapman v. Dillon*, and should not be construed to alter the requirement of permanent injury to recover future economic tort damages, as the use of the term "earning capacity" for PIP benefits is not used in the same context as "earning capacity" in the traditional tort case. An example is if someone is employed, PIP pays the wages he or she lost and the negligent party must pay the wage loss exceeding the PIP limits until disability

ends. If the person was not working at the time of the accident, but had a reasonable expectation of employment and income during the disability period, he or she has suffered loss of "earning capacity" and this coverage is paid by no-fault coverage. *See generally* Rule 4-176-010 of the Florida Department of Insurance.

Conversely, turning to the personal injury suit the tortfeasor should not have to pay for loss of ability to earn money in the future, because no such loss can exist without permanent injury or impairment.

There also appears to be confusion by what are past and what are future damages. Clearly, the line of demarcation, is that damages prior to trial are "past" and damages reasonably to be incurred in the future are "future." Moreover, the jury's determination of the nature of the injury when the verdict is returned is conclusive, as neither party can present additional testimony to alter the jury's findings. *Faulkner v. Allstate Insurance Co.*, 367 So. 2d 214 (Fla. 1979) and *Calhoun v. New Hampshire Insurance Company*, 354 So. 2d 882 (Fla. 1978). In other words, the jury is asked to determine if the plaintiff has suffered a permanent injury based on the evidence, and <u>not</u> whether the plaintiff will sustain such an injury in the future.

In conjunction with the well reasoned decisions supporting Petitioner's argument, the practical danger of following the cases that allow a plaintiff to recover future economic damages without a permanent injury is that the parties have no real way

of determining the damages prior to trial. The jury would be allowed to find no permanency, obviously agreeing with defense evidence, yet feel future loss is warranted based on the plaintiff's medical testimony. The common law threshold regarding economic damages, which has long provided litigants, courts, and attorneys a way of evaluating the tangible damages will have been revoked if the decisions relied on by respondent are allowed to stand.

Another example of the uncertainty inherent in eliminating the future economic standard is found in the instant facts. There is a $25,000 set-off or credit for the limits of the liability policy. Additionally, prior to applying the set-off any damages would have to be reduced by eighty percent for failure to wear a seat belt. Therefore, the court below has ruled that even with the jury determining that Mr. Tompkins did not sustain a permanent injury, they should have been able to consider and to award future economic damages in excess of $125,000 ($125,000 x 20% less $25,000), stating "although this may be a close question, we cannot say as a matter of law no recovery is possible." *Tompkins v. Auto-Owners Insurance Company*, 627 So. 2d 1236 (Fla. 2d DCA 1993).

This reasoning is incredulous and clearly supports speculation by the jury as: 1) no past wage loss was awarded; and 2) no evidence was presented that plaintiff would probably need future medical care or the duration thereof.

It is fundamental that an award for future medical treatment must be supported by medical probability - not

possibility. *3-M Corporation - McGhan Medical Reports Division v. Brown*, 475 So. 2d 994 (Fla. 1st DCA 1985); *O'Neal v. Pine Island Fish Camp, Inc.*, 403 So. 2d 980 (Fla. 1st DCA 1979); *and Broward Community College v. Schwartz*, 616 So. 2d 1040 (Fla. 4th DCA 1993); *contra, White v. Westlund*, 18 Fla. L. Weekly D2010 (Fla. 4th DCA Sept. 15, 1993).

Based upon the authority cited and argument presented above, petitioner urges that the opinion below be quashed and the judgment of the trial court be reinstated. Further, petitioner requests that the opinions in *Josephson v. Bowers*, 595 So. 2d 1445 (Fla. 4th DCA 1992); *Fazzolari v. City of West Palm Beach*, 608 So. 2d 927 (Fla. 4th DCA 1992); and *Thieneman v. Cameron*, 126 So. 2d 170, 171 (Fla. 3rd DCA 1961) be approved.

CONCLUSION

Legal precedent overwhelmingly supports the rule that future economic damages in a personal injury action are not recoverable unless the plaintiff sustained a permanent injury. To allow otherwise is a clear departure from the common law doctrine and would promote uncertainty and speculation in the evaluation and assessment of damages.

Petitioner urges this Court to end the split of authority arising in recent years and promote judicial harmony by reaffirming the threshold rule for future economic tort damages.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by regular US Mail to JAY COOPER, ESQUIRE, Post Office Box 2366, Fort Myers, Florida 33902 on this 4th day of April, 1994.

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By _____
CURTRIGHT C. TRUITT
Florida Bar No: 373974

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA CIVIL ACTION

MICHAEL TOMPKINS and CHERYL TOMPKINS, Husband and Wife, Plaintiffs, vs. AUTO-OWNERS INSURANCE COMPANY, a Corporation, Defendant.	CASE NO. 91-5662 CA-WCM

VERDICT

We, the Jury, return the following verdict:

1. Was the negligence on the part of Otis Lightsey a legal cause of damage to the Plaintiff, MICHAEL TOMPKINS, as a result of the accident of June 24, 1989?

YES X NO_____

If your answer to question number 1 is NO, then your verdict is for the Defendant and you should not proceed further except to date and sign the verdict form and return it to the courtroom. If your answer to question number 1 is YES, please answer question number 2.

2. What is the amount of any damages sustained for medical expenses and wages lost in the past, not paid or payable by no-fault insurance?

$ 9,365.44

3. Did the Plaintiff sustain a permanent injury within a reasonable degree of medical probability as a result of the accident of June 24, 1989?

YES_____ NO X

If you found no permanent injury in question number 3 above, do not answer number four or number 5, but skip to number 6. If you found a permanent injury, please answer all the remaining questions.

4. What is the amount of any future damages for medical expenses and lost earning ability to be sustained by MICHAEL TOMPKINS in future years:

(a) total damages over future years?

$_____

(b) the number of years over which those future damages are intended to provide compensation?

_____ years

(c) what is the present value of those future damages? $_____

5. What is the amount of any damages for pain and suffering, disability, physical impairment, mental anguish, inconvenience, aggravation of a disease or physical defect, or loss of capacity for the enjoyment of life experienced or to be experienced by MICHAEL TOMPKINS,

(a) in the past? $_____

(b) in the future? $_____

6. Did MICHAEL TOMPKINS' failure to use a seatbelt produce or contribute substantially to producing any of his damages?

YES ___X___ NO _____

If your question to number 6 is NO, you should not proceed further except to date and sign the verdict form and return it to the

courtroom. If your answer to question 6 is YES, please answer question 7.

7. What percentage of MICHAEL TOMPKINS' total damages were caused by his failure to use a seatbelt?

80 %

Do not make any reduction of total damages because of MICHAEL TOMPKINS' failure to wear a seat belt. The court in entering judgment will make the appropriate reduction.

SO SAY WE ALL this 19th day of November, 1992.

/s/ Robert Stewart
FOREMAN or FOREWOMAN

This action is subject to the Florida Motor Vehicle No-Fault Law. The second issue for your determination is whether MICHAEL TOMPKINS sustained a permanent injury within a reasonable degree of medical probability as a result of the accident of June 24, 1989. Unless the Plaintiff proves by the greater weight of the evidence that he sustained such an injury, he is only entitled to receive damages for medical expense and wage loss in the past not paid or payable by No-Fault (PIP) insurance.

The Plaintiff's medical expenses and lost wages incurred in the past have been paid by Defendant, AUTO-OWNERS INSURANCE COMPANY, under his no-fault coverage up to the policy limits of $15,000.00. Therefore, in reaching your verdict, if you find for the Plaintiff, you are instructed not to consider nor award damages for personal injury protection benefits paid or payable.

GRANTED: _____

DENIED : _____