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CLERK, SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

AUTO-OWNERS INSURANCE COMPANY,

Petitioner,

v.

APPELLATE CASE NO. 93-00881

82991

MICHAEL TOMPKINS,

Respondent.

PETITIONER'S JURISDICTIONAL BRIEF

On Review from the District Court
of Appeal, Second District
State of Florida

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TABLE OF CONTENTS

	<u>Page</u>
Table of Citations	ii
Statement of the Case and Facts	1
Summary of the Argument	2
Jurisdictional Statement	3
Argument	4,5,6
<p style="padding-left: 40px;">The Decision of the Second District Court of Appeal in this Case Expressly and Directly Conflicts with the Decisions of the District Court of Appeal, Fourth District, in <u>Josephson v. Bowers</u>, 595 So. 2d 1045 (Fla. 4th DCA 1992) and <u>Fazzolari v. City of West Palm Beach</u>, 608 So. 2d 927 (Fla. 4th DCA 1992), the Third District's opinion in <u>Thieneman v. Cameron</u>, 126 So. 2d 170 (Fla. 3d DCA 1961).</p>	
Conclusion	7
Certificate of Service	8

TABLE OF CITATIONS

<u>Cases</u>	<u>Page</u>
<u>Fazzolari v. City of West Palm Beach,</u> 608 So. 2d 927 (Fla. 4th DCA 1992)	i,2,4,5
<u>Josephson v. Bowers,</u> 595 So. 2d 1045 (Fla. 4th DCA 1992).	i,2,4
<u>Ketchen v. Dunn,</u> 619 So. 2d 1010 (Fla. 2d DCA 1993)	5
<u>Platt v. Schwindt,</u> 493 So. 2d 520 (Fla. 2d DCA 1986)	2,6
<u>Thieneman v. Cameron,</u> 126 So. 2d 170 (Fla. 3d DCA 1961)	i,2,4,6
 <u>Court Rules</u>	
Fla.R.App.P. 9.030(a)(2)(A)(IV)	3

STATEMENT OF THE CASE AND FACTS

The Respondent, MICHAEL TOMPKINS, brought a personal injury action against his underinsured motorist carrier, AUTO-OWNERS INSURANCE COMPANY, for damages he allegedly received as a result of an automobile accident that occurred on June 24, 1989. Following the entry of a Final Judgment for the Defendant, AUTO-OWNERS INSURANCE COMPANY, as well as a Final Order denying the Plaintiff's Motion for a New Trial, the Plaintiff/Respondent filed an Appeal with the Second District to review (among other issues) the trial court's decision in instructing the jury that future economic damages were recoverable only if the Plaintiff had sustained a permanent injury.

On December 3, 1993, the Second District Court reversed, in part, holding that the trial court erred in instructing the jury that future economic damages were recoverable only if the Plaintiff had sustained a permanent injury. See Appendix A.

The Petitioner's Notice to Invoke the Discretionary Jurisdiction of this Court was timely filed on December 29, 1993.

SUMMARY OF THE ARGUMENT

In this case, the Second District Court of Appeal held that it was error for the trial court to instruct the jury that future economic damages were recoverable only if the Plaintiff had sustained a permanent injury. The decision cannot be reconciled with the Fourth District decisions in Josephson v. Bowers 595 So. 2d 1045 (Fla. 4th DCA 1992) and Fazzolari v City of West Palm Beach, 608 So. 2d 927 (Fla. 4th DCA 1992), wherein the court held that the legal requirements in Florida are that there must be a permanent injury before a defendant may be held liable for future loss of income and other future damages in a personal injury claim.

Further, other district courts have held that where there is no evidence of permanent injury to the Plaintiff, the trial court properly refused to instruct the jury on the issue of future damages. Thieneman v. Cameron, 126 So. 2d 170 (Fla. 3d DCA 1961); Platt v. Schwindt, 493 So. 2d 520 (Fla. 2d DCA 1986).

Thus, the Petitioner contends that the decision of the Second District Court expressly and directly conflicts with the decisions of the Fourth District Court, which had been rendered prior to trial and prior to the decision of the Second District, as well as the decision of the Third District.

The issue of what damages are recoverable in personal injury cases is of statewide importance and should be considered by this Court, so that the law in Florida can be interpreted in a consistent and proper manner.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the Supreme Court or another district court of appeal on the same point of law. Fla.R.App.P. 9.030(a)(2)(A)(IV).

ARGUMENT

The decision of the Second District Court of Appeal in this case, Tompkins v. Auto-Owners Insurance Company, 18 FLW 2562 (December 3, 1993), expressly and directly conflicts with the decisions of the Fourth District Court in Josephson v. Bowers, 595 So. 2d 1045 (Fla. 4th DCA 1992) and Fazzolari v. City of West Palm Beach, 608 So. 2d 927 (Fla. 4th DCA 1992), and with the Third District in Thieneman v. Cameron, 126 So. 2d 170 (Fla. 3d DCA 1961).

The Second District Court of Appeal, in the instant case, held that it is error to refuse to give a jury instruction, and/or a verdict form, allowing for determination of special damages for future medical expense even if the jury finds that the Plaintiff did not sustain a permanent injury. This ruling conflicts with above decisions of the Fourth District, which hold opposite to the Second District, that there must be a permanent injury before a defendant may be held liable for future loss of income and other future damages in a personal injury claim. The Petitioner respectfully submits that this court should grant discretionary review and resolve the conflict by quashing the decision of the Second District Court.

The decision of the Fourth District Court in Josephson v. Bowers, 595 So. 2d 1045 (Fla. 4th DCA 1992), reversed where the jury found no permanent injury but awarded the appellee damages for past and future loss of income. Explaining:

The verdict is inconsistent with the legal requirement in Florida that there be a permanent injury before a defendant may be held liable for *future* loss of income and other *future damages* in a personal injury claim (emphasis added).

Further, in Fazzolari v. City of West Palm Beach, 608 So. 2d 927, 929 (Fla. 4th DCA 1992), the Fourth District Court of Appeals affirmed, holding that there must have been a determination that there was a permanent injury in order for the jury to award future damages.

Thus, the Fourth District Court has "expressly" held that before a defendant may be held liable for future loss of income and other future damages in a personal injury claim, a permanent injury must be found.

Not only are the Fourth District Court decisions in direct conflict with the decision at bar, but also the Second District Court in Ketchen v. Dunn, 619 So. 2d 1010 (Fla. 2d DCA 1993), wherein the court stated that a party may recover damages relating to medical expenses and loss of earnings as a result of bodily injury, sickness or disease regardless of whether those items of damages accrued in the past or will be suffered in the future. Therefore, the verdict form should have allowed the jury to consider damages for future medical expenses even if they found that the appellant did not sustain a permanent injury.

However, the Second District, as well as the Third District have also held that where there is no evidence of permanent injury

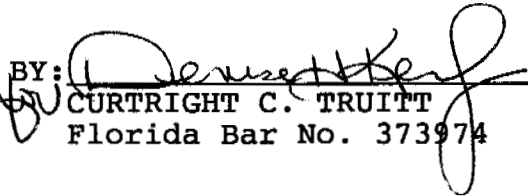
to the Plaintiff, the trial court properly refused to instruct the jury on the issue of future damages. See Thieneman v. Cameron, 126 So. 2d 170 (Fla. 3d DCA 1961). As reasoned in Platt v. Schwindt, 493 So. 2d 520 (Fla. 2d DCA 1986), where there is evidence of permanent injury, it is error for the court to refuse to instruct the jury on loss of earning capacity. It is fundamental that these decisions stand for the proposition that future wage loss (earning capacity) is properly compensable as a result of a permanent impairment of the ability to earn money.

The conflict which exists between our district courts of appeal have rendered the law in a state of conflict on the issue of tort damages. The integrity of our judicial system is weakened if this court refuses to take jurisdiction, and would leave a great number of litigants uncertain over their rights and defenses.

CONCLUSION

This court has discretionary jurisdiction to review the decision below and the court should exercise that jurisdiction to consider the merits of the petitioner's argument.

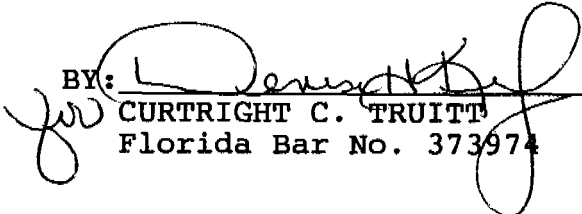
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by regular U.S. Mail to Jay Cooper, Post Office Box 2366, Fort Myers, Florida 33902, on this 7 day of January, 1994.

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