IN THE 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

REPLY BRIEF OF PETITIONER, AUTO-OWNERS INSURANCE COMPANY

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ARGUMENT

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

While Respondent appears to agree with Petitioner that the Florida Motor Vehicle No-Fault law is not controlling of this issue, the Answer Brief fails to address the abundant authority that Florida courts have created by holding that a permanent injury or impairment is necessary to support an award for future wage loss (earning capacity) or future medical expense. The cases of *Smey v. Williams, 608 So.2d 886 (Fla. 5th DCA 1992), Ketchen v. Dunn, 619 So.2d 1010 (Fla. 2d DCA 1993)* and the Second District's opinion in this matter, *Tompkins v. Auto-Owners Insurance Company (627 So.2d 1236 (Fla. 2d DCA 1993)*, are the only decisions which allow future economic recovery in a personal injury action absent a permanent injury or impairment. These decisions are a significant departure from and clearly ignore the precedent established by this Court and the district Courts of appeal requiring such a threshold to be met. The cases cited in the Initial Brief were not exhaustive, with there being many others to support this principle.

Illustrative is *Smith v. Tantlinger,* 102 So.2d 840, 841 (Fla. 2d DCA 1958), wherein the Second District approved the following jury instruction in a personal injury case:

> ...you are entitled to consider the health and physical condition of the Plaintiff before and after injuries; the loss of time and incapacity to follow his usual occupations since the injury; and sums necessarily and reasonably expended or incurred by him for the services of physicians, surgeons, or therapist seeking his cure; any sums necessarily and

> reasonably expended for hospital expenses, medicines and mechanical aides for braces for his body as a result of such injuries; the bodily pain and anguish he has suffered and will continue to suffer by reason of such bodily injury; effect the injury on his age, sex, condition and circumstances in life and earning capacity. *If you find that the Plaintiff has been **permanently injured or disabled***, you may award him such sums as will compensate him for such injury. You may consider his probable future earnings from the present time to the end of his life expectancy; his earning capacity at the time of the injury and the extent to which that capacity has been reduced by the injury. The amount you find as future damages must be reduced to the present value, and such present values awarded by your verdict. (emphasis added)

The *Smith* Court explained that the charge for the claim of permanent injury was correct as to how the jury should "consider any difference in his earning capacity as reduced by the injury". Id; at 842.

Likewise the Second District in *Grant v. Hoffman,* 151 So.2d 287 (Fla. 2d DCA 1963), held that where the Plaintiff introduced testimony that her injuries would result in a permanent injury, she was entitled to an instruction on diminished earning capacity. *See also Otrega v. Perrini & Sons, Inc.*, 371 So.2d 203 (Fla. 2d DCA 1979). The Plaintiff's argument as to a distinction between the case at bar and the sufficiency of evidence to warrant a jury instruction for future damages is without merit. The jury below was instructed that they could award future economic damages if they found the Plaintiff sustained a permanent injury (Apx to Initial Brief). This was a question of fact as Dr. Kagan testified that the Plaintiff had in fact suffered a permanent injury.

Without this testimony the jury would not have been instructed of this issue, or more probably, a directed verdict ordered. *See Platt v. Schwindt*, 493 So.2d 520 (Fla. 2d DCA 1986); *Allstate Insurance Company v. Shilling*, 374 So.2d 611 (Fla. 4th DCA 1979); and *Hatfield v. Wells Brothers Insurance Inc.*, 378 So.2d 33 (Fla. 2d DCA 1979).

The Petitioner does not take issue with decisions of the Florida Supreme Court discussing the constitutionality of the no-fault act. Clearly, those cases do not stand for the proposition that future economic damages are recoverable in absence of a threshold injury, but explain that whatever out-of-pocket expenses the injured party has incurred, and which are not paid or payable by no-fault insurance, are recoverable against the tortfeasor. The concept of the no-fault act was to "assure prompt payment of out-of-pocket losses to a large group and reduces greatly the likelihood of the filing of suits, thus reducing congestion in the courts and delays in court calendars and affording prompt relief to injured parties in need". *Lasky v. State Farm Insurance Company*, 296 So.2d 9, 16-17 (Fla. 1974), *see also Chapman v. Dillon*, 415 So.2d 12 (Fla. 1982).

Not only is such a "bright line" standard for recovering future economic damages called for when reviewing the applicable law, but having such a threshold simply makes good common sense. Within the arena of personal injury litigation, having clear principles for recovery can only help to promote a sound tort system.

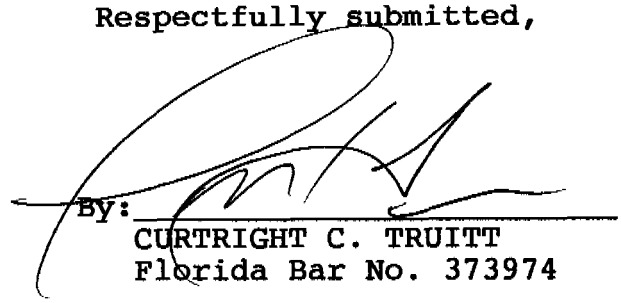
To allow the decisions from the Fifth and Second Districts to stand undermines long standing traditional tort principles, and would promote forcing jurors to speculate on awarding damages which are clearly not compensable. Common sense tells us that if the trier of fact believes that the Plaintiff is permanently injured then future damages (when supported by the evidence), must be considered and, conversely where the jury finds that such an injury was not suffered then it must be instructed that future damages can not be awarded. This has long been the status of the law despite recent attempts to weaken its effect and Petitioner urges this Court to reaffirm and restate the limitation on future economic damages absent a finding of permanent injury.

The "math" of the subject case was stated so that the Court could see there was no evidence to support a verdict in excess of available liability insurance credit and seat belt reduction. This was not meant to cloud the legal issue of whether or not such a threshold should apply in tort cases. Nevertheless, the facts clearly demonstrate the need for basic principles or elements of damage in the personal injury case. While litigation often turns on many subjective factors, weighing of evidence etc., to follow the cases relied upon by Respondent invites jurors to "plug" in a figure in the space on the verdict form for future economic loss, as it not only comes before the question of permanency, but the jury is told they can award damages in such fashion. *See Fla. Std. Jury Inst. 6.1(d) (Civil).*

In conclusion, Petitioner asks for this Court to quash the

Second District's opinion below and to approve *Josephson v. Bowers*, 595 So.2d 1045 (Fla. 4th DCA 1992), *Fazzolari v. The City of West Palm Beach*, 608 So.2d 214 (Fla. 4th DCA 1992) and the other cases cited which require a permanent injury threshold for future economic damages in personal injury claims.

Respectfully submitted,



By: _____
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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 12th day of May, 1994.

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