IN THE SUPREME COURT OF FLORIDA

NO. 83,154

ROLAND PIERRE ANGRAND, etc., et al.,

Petitioner,

vs.

MICHAEL KEY, D.O.,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Dr. Key offers the following Statement of the Case and Facts to supplement and/or clarify the facts offered by Petitioner, Roland Angrand.

This appeal followed a hotly contested medical malpractice lawsuit, which resulted in a verdict in Angrand's favor in the amount of $777,389.10 and a final judgment (after set-offs for settlements with prior defendants) in the amount of $277,389.00 (R. 169-170, 210). The case arose out of Dr. Key's (a radiologist) alleged negligence in interpreting two sets of ultrasound films of Carolyn Angrand, Petitioner's deceased wife. Dr. Key's findings had been that Mrs. Angrand was pregnant and that he detected a live, single intrauterine fetus. (T. 546).

In fact, the evidence showed that Mrs. Angrand was a five-foot six-inch, 337-pound woman who had the rarest, least diagnosable type of pregnancy--an interstitial ectopic pregnancy. (T. 402, 569-572). An interstitial pregnancy develops outside the uterine cavity, but within the walls of the uterus where the fallopian tubes insert. (T. 152-153, 569). The evidence showed that only about one percent of all pregnancies are ectopic and an interstitial ectopic is the rarest of that one percent. (T. 569-570). It was also shown to be the most problematic because it proceeds further than most ectopic pregnancies, produces the least symptoms, and is the most difficult to diagnose. (T. 572).

At trial, the issue of liability was highly disputed, both as to whether Dr. Key deviated from the standard of care and as to whether Dr. Key's actions proximately caused Mrs. Angrand's death. Although the Plaintiff's medical expert reluctantly admitted that Dr. Key read the first set of films correctly, he faulted Dr. Key for failing to get follow-up studies to the first set of films, for making a definitive diagnosis from the second set of films based solely upon

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the limited films he received, and for making findings without a clinical history. (T. 14, 30, 35, 37-39, 92).

Dr. Key's medical expert countered that Mrs. Angrand's condition was so rare and her pregnancy had progressed so far, that 99.99% of the time, Dr. Key's reading of the second set of ultrasound films would have been correct. (T. 592). His opinion was that the incorrect diagnosis was not a result of negligence. (T. 605).

The evidence showed that the ultrasound films were difficult to read in part because of Mrs. Angrand's massive obesity. (T. 99, 544-545). The experts also concurred that the interstitial ectopic pregnancy is not completely within or outside the uterus and is thus considered a grey area, and difficult to diagnose. (T. 103, 106, 569, 596-597).

Dr. Key moved for a directed verdict at the close of the Plaintiffs' case and again at the close of his case, asserting that proximate causation had not been established. The trial court denied the motions. (T. 449, 619-620; 635-638). On appeal, the Third District agreed that, as it viewed the record, there was a jury question on the issue of liability. *Key v. Angrand*, 630 So. 2d 646, 651 at n. 8 (Fla. 3d DCA 1994).

It was against this backdrop of, at the very least, an extremely close question on liability, that Angrand presented his witnesses on damages. Angrand devoted nearly 2/3 of his case to damages testimony. Angrand put on seven different witnesses to discuss the relationship between the decedent and the claimants and the claimants' feelings and reactions to Mrs. Angrand's death. (T. 253, 278, 305, 335, 353, 365, 419). This improperly admitted and prejudicially cumulative testimony forms the basis of the Third District's reversal and this Court's review.

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First of all, over objection the court allowed Dr. Platt-- a self-styled "thanatologist" -- to offer "expert" testimony about the impact of Mrs. Angrand's death on Roland Angrand (her husband) and John Whymms (her son). While Dr. Platt's curriculum vitae recited in Petitioner's statement of the facts is fairly accurate, Angrand has omitted several important facts concerning Dr. Platt. For example, Dr. Platt admitted that no university in the country confers a degree in thanatology. (T. 120). Only one university in the country confers a Ph.D. in sociology/psychology with a concentration in thanatology and he has never attended that university. (T. 120). Although Angrand contends that Dr. Platt is working on his post-doctorate in the field of thanatology at Harvard University, the evidence showed that Dr. Platt's study actually consisted of a correspondence course and his attendance at Harvard University on two occasions for two or three days, with a total of only five credits so far. (T. 121-122). In fact, he has not even stated a degree objective at the school because he is waiting to "decide what degree program [he is] trying to achieve" and the school will "look and see if those five hours apply." (T. 122).

Moreover, as the district court noted, Dr. Platt was not a counselor or treating professional who provided any treatment to the survivors. (T. 120, 630 So. 2d at 650, n. 7). Dr. Platt is neither a psychiatrist nor a psychologist. Instead, he merely has a Ph.D. in sociology and receives 75% of his income as a litigation consultant. (T. 140, 306).

Dr. Platt met with the Plaintiffs once, more than six years after Mrs. Angrand's death. (T. 309, 316, 129-130). Dr. Platt admitted that he had no idea what the survivors' grief responses were for the six-year period from the time Mrs. Angrand died to the time he conducted his approximately one-hour long interview. (T. 129-130).

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Most importantly, Dr. Platt admitted in this case that the subject of grief is within a jury's understanding:

> Dr. Key's counsel:
>
> Q. Sir, is it your opinion that lay people don't understand grief?
>
> Dr. Platt:
>
> A. No, it's my opinion that there are dimensions to this, that because we don't talk about it and share it much with other people nor the society at large that we're not as aware of all the details.

(T. 128).[1]

It was that testimony, as well as a review of the trial transcript, which led the Third District to hold as follows:

> We conclude that the testimony of the grief expert should not have been admitted. Review of the trial transcript shows that the expert in this case did not testify as to anything that was outside of the common experience, or common sense, of the jury, most of whom had also experienced the death of a loved one in the past[7] It is self-evident that grief is a profound and difficult experience which takes a long time to overcome; that different people handle their grief in different ways and on different timetables; and that the closer the relationship, the deeper the sense of loss experienced by the survivors. The expert added nothing beyond what the survivors themselves, their minister and other family members testified to as to the close relationship Mrs. Angrand had with her husband and son and the loss felt by them after her death.
>
> [7] Indeed, the expert acknowledged that lay people understand grief quite well; he simply makes them aware of the details of the experience....

[1] All emphasis is supplied by counsel unless otherwise indicated.

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630 So. 2d at 650.

Secondly, as the Third District noted, numerous lay witnesses also testified regarding grief in addition to Dr. Platt's testimony. Both John Whymms (the decedent's son) and Roland Angrand (the decedent's husband) themselves testified as to the grief they were suffering. (T. 365, 419). The court also allowed testimony from Mrs. Angrand's father (Stanley Whymms), her Reverend, her sister (Edith Whymms), and John's prior school guidance counselor. (T. 253, 278, 335, 353). These witnesses again reiterated the same grief evidence and testified about what a religious woman Mrs. Angrand was (T. 255, 280, 340, 421, 425); how happy she was to be pregnant (T. 260, 341); how close she and John were (T. 257-259, 287, 339); and how grief stricken John became upon Mrs. Angrand's death. (T. 261, 287-288, 342, 355). Edith and Stanley Whymms additionally testified as to how the death impacted Roland. (T. 261, 343).

Upon review of this evidence, the Third District held that admission of Dr. Platt's testimony was reversible error because:

> The expert testimony, when added to the lay testimony, tended to make grief-related testimony a feature of the trial.
>
> * * *
>
> Because of the prejudicial nature of the testimony and the heavy emphasis given this issue at trial, we reverse and remand for a new trial on liability and damages.

Id. at 651.

SUMMARY OF THE ARGUMENT

This is a case where the issue of the survivors' grief became the overwhelming focus of the case. Petitioner presented nearly twice as many witnesses and devoted far more time to this issue than the issues of negligence and causation, improperly swaying the jury from fairly carrying out its duty to decide the case without passion or prejudice. Accordingly, the Third

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District's finding that a new trial on liability and damages is warranted should be approved.

As the Third District properly found, the admission of testimony by Angrand's grief expert, Dr. Platt, constitutes reversible error. Expert testimony on grief should not have been admitted in this case because it did not assist the jury, because Dr. Platt was not a properly qualified expert, and because his testimony was more unfairly prejudicial than probative.

Since the one thing certain in life is death, the concept of grief is within the common everyday comprehension of jurors. "Expert testimony" on this subject does not assist the jury and does nothing more than substitute the expert's opinions for the jury's. Secondly, even if expert testimony on grief could assist the jury, such testimony should come from a qualified expert, such as a treating physician or mental health professional. Dr. Platt provides no counseling services whatsoever. Instead, he interviewed the Plaintiffs once, six years after the death of Mrs. Angrand, as part of his practice as a litigation consultant which constitutes 75% of his annual income. In any event, Dr. Platt's testimony should have been excluded because his testimony was more prejudicial than probative. His "scientific" approach to the subjective issue of grief was unduly persuasive. Moreover, Dr. Platt's testimony was admitted on top of six lay witnesses who testified about the issue of grief. By failing to exclude Dr. Platt's testimony, or alternatively, limit the number of lay witnesses testifying on this subject, the trial court permitted the issue of the survivors' grief to become a feature of the trial, warranting a new trial on all issues.

Another ground exists for reversal and remand for a new trial, at least on the issue of damages. The court improperly excluded the testimony of Mrs. Angrand's treating physicians, Dr. Susan Fox and Dr. Morry Fox, and failed to instruct the jury on comparative negligence.

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The court erroneously applied the Dead Person's statute and granted Angrand's motion in limine which sought to exclude any testimony by the Foxes as to medical orders which they gave to the decedent and which she failed to follow. The Foxes' testimony was critical evidence to prove Dr. Key's affirmative defense of comparative negligence.

However, even without the Foxes' testimony, the trial court erred in failing to at least instruct the jury on the issue of comparative negligence. The medical records admitted into evidence showed that Mrs. Angrand missed scheduled doctor appointments and that despite her obviously high risk medical status, she did not seek any medical attention at all during two months of her pregnancy. The evidence warranted a comparative negligence instruction.

ARGUMENT

I. THE TRIAL COURT ERRED IN ALLOWING EXPERT TESTIMONY ON GRIEF AND/OR ALLOWING GRIEF TESTIMONY TO BECOME THE FOCUS OF THE TRIAL.

In the event this Court accepts jurisdiction, the Third District's opinion, reversing and remanding for a new trial, should be approved.[2] As the Third District correctly held, the trial court committed reversible error by allowing the issue of the survivors' grief to unfairly permeate Angrand's case. The court first erred in permitting Dr. Platt to testify. The court further compounded the error when it permitted six other lay witnesses to testify about grief -- thereby making the issue of grief the overwhelming focus of the Plaintiff's case.

As Angrand concedes, expert testimony is inadmissible unless it satisfies the four-prong

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[2] In its February 17, 1994 order, this Court issued a briefing schedule but postponed its decision on jurisdiction. As discussed in note 2, *infra*, Dr. Key respectfully suggests that this case and *Holiday Inns, Inc. v. Shelburne*, 576 So. 2d 322 (Fla. 4th DCA), *dismissed*, 589 So. 2d 291 (Fla. 1991), certified to be in conflict, are factually distinguishable. Accordingly, jurisdiction need not necessarily be accepted.

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test of admissibility developed by the Florida courts and dictated by the Florida Evidence Code. The expert testimony:

(1) must be helpful to the trier of fact;

(2) the witness must be qualified as an expert;

(3) must be applied to evidence offered at trial;

(4) evidence, though technically relevant, must not present substantial danger of unfair prejudice that outweighs its probative value.

Kruse v. State, 483 So. 2d 1383 (Fla. 4th DCA 1986), *dismissed*, 507 So. 2d 588 (Fla. 1987); *Buchanan v. Seaboard Coast Line Railroad Co.*, 381 So. 2d 229 (Fla. 1980); Sections 90.403, 90.702, 90.704, Fla. Stat. (1991). Angrand failed to satisfy his burden of proving admissibility according to this test. *Barrel of Fun, Inc. v. State Farm Fire & Casualty Co.*, 739 F. 2d 1028 (5th Cir. 1984).

A. Dr. Platt's Testimony Was Not Helpful To The Jury.

First of all, this testimony was not helpful to the jury. By Dr. Platt's own admission, juries can understand grief -- he simply makes them aware of some of the "details". (R. 128). The "details" he described are nothing more than common sense factors which affect how the survivors grieve. Dr. Platt listed five factors: (1) who else has died in the survivor's life; (2) how important the decedent was in the survivor's life; (3) whether the death was sudden and unexpected; (4) whether the death was painful; and (5) whether the death was preventable. (T. 316-319). These were the very same "details" discussed at length by John and Roland, as well as by Stanley Whymms, Edith Whymms and Reverend Henderson.

As the Third District in this case aptly noted:

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> It is self-evident that grief is a profound and difficult experience which takes a long time to overcome; that different people handle their grief in different ways and on different timetables; and that the closer the relationship, the deeper the sense of loss experienced by the survivors.

Key, 630 So. 2d at 650.

Angrand contends with bravado that "The Third District's opinion is wrong!" but fails to give any clear explanation why. (Petitioner's Brief, at p. 20). Angrand's primary contention appears to be that the Third District must be wrong because its conclusion differs from that of the Fourth District in *Holiday Inns, Inc. v. Shelburne*, 576 So. 2d 322 (Fla. 4th DCA), *dismissed*, 589 So. 2d 291 (Fla. 1991). He further argues that *Shelburne* was correct because it considered and relied on Dr. Platt's explanation of the grief processes and factors that affect grief. (Petitioner's Brief, at p. 21). However, as shown above, the Third District also considered these very same factors relied on by Dr. Platt. The Third District simply concluded that these factors were nothing outside the common sense or common experience of the jury. *Key*, 680 So. 2d at 650. That the Third District reached a different conclusion than the *Shelburne* court does not mean that the Third District is wrong, it simply means that the two opinions are different, thus leading to the present certification of conflict.[3]

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[3] Angrand seeks review here pursuant to Article V, Section 3(b)(4) of the Florida Constitution, providing review for decisions of a district court of appeal certified to be in direct conflict with a decision of another district court of appeal. Dr. Key respectfully submits that there is no direct conflict between this case and the *Shelburne* case. Dr. Key agrees that the two opinions do conflict insofar as the Fourth District found that grief is not within a jury's ordinary understanding and the Third District found that grief is within a jury's ordinary understanding. However, simply because the opinions may differ in part, does not mean that the decisions conflict. *Gibson v. Maloney*, 231 So. 2d 823 (Fla.), *cert. denied*, 398 U.S. 951 (1970)(construing prior constitutional jurisdictional provision which likewise required conflict of decisions).

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Angrand criticizes the Third District for holding that it is "self-evident" that "grief is a profound and difficult experience" which affects "different people... in different ways" and for determining what is or is not a matter of common sense. However, someone must make that determination. And, by statute and by common law, the legislature and courts have deemed that the courts must make that determination.

> There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding on the subject involved in the dispute.

Sponsor's Note to Fla. Stat. § 90.702 (1991), quoting Ladd, *Expert Evidence*, 5 Vand. L. Rev. 414, 418 (1952). This test is truly no different than the standard applied by the court in *Seaboard Coast Line Railroad Co. v. Hill*, 250 So. 2d 311 (Fla. 4th DCA 1971), quoted at great length by Angrand in his brief. In *Hill*, the expert was able to explain why his testimony actually provided the jury with information outside their common understanding. In this case,

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Here, the decisions are not necessarily in direct conflict because our case held as it did, not only because Dr. Platt's testimony was not helpful to the jury, but because the testimony was more unfairly prejudicial than probative due to the cumulative nature of the grief testimony. The fact that grief became a feature of the trial was clearly an explicit ground for the court's decision and the Third District could have reached the same result even if it had found that the issue of grief is not within a jury's common understanding. On the other hand, the issue of cumulative testimony was never raised nor ruled on by the court in *Shelburne*.

Where a cause is before this Court on the basis of conflict but the two cases supposedly in conflict are distinguishable on their facts, jurisdiction should not be accepted, or if it is accepted, should be discharged. *Dept. of Revenue v. Johnston*, 442 So. 2d 950 (Fla. 1983). This Court's jurisdiction to review decisions of the district courts is limited and strictly prescribed. *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980) (discussing historical development leading to constitutional amendment of Article V, Section 3 and intent to limit Supreme Court's jurisdiction). Because the record shows that this case and the *Shelburne* case are factually distinguishable, Dr. Key suggests that this Court decline to accept jurisdiction.

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Dr. Platt could not do that. In fact, he admitted that grief is within the jury's understanding. Here, Dr. Platt's testimony failed to assist the jury to determine the facts "in a way more meaningful than would occur if the jury asked a group of wise courtroom bystanders for their opinions." *Mercado v. Ahmed*, 756 F. Supp. 1097, 1103 (N.D. I11. 1991) (holding that an economist's expert testimony as to the monetary value of the pleasure of plaintiff's life was inadmissible).

Dr. Key submits that there are some universal truths and matters of common sense to which we can all agree. An anecdote often told by evidence professors in describing principles of effective cross-examination comes to mind:

> When you are the prosecutor in a criminal case and the Defendant puts his mother on the stand, you need only ask her one question - - "You're the Defendant's mother, aren't you?"

The point of this story is clear. All juries will understand that a mother may do or say anything to protect her child. Similarly, all juries will understand the concept of grief -- that the more important the decedent is to the survivor; that the more painful and unexpected the decedent's death; that the less prepared the survivor is for the decedent's passing, the more the survivor will suffer. Expert testimony is simply unnecessary.

So too, contrary to Angrand's position, no expert testimony is necessary to explain that survivor's particular pain. Even Dr. Platt's own definition of grief makes clear that it is a purely individual, subjective issue. He defined grief as "the response to loss....How you feel about that loss, the total reaction to it is your grief." (T. 309). This Court has suggested that the appropriate person to testify as to these damages in a wrongful death case is the survivor. *Martin v. United Security Services, Inc.*, 314 So. 2d 765 (Fla. 1975). In upholding the

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constitutionality of the newly enacted wrongful death statute, this Court held that a claim for the survivor's pain and suffering (or grief) is a reasonable alternative to dividing among the survivors the amount formerly recoverable for the decedent's pain and suffering. This Court stated:

> The new item of damage is much more susceptible of proof, since the party claiming damage for the pain and suffering is available to testify, while the claim formerly permitted under Section 46.021 for the decedent's pain and suffering had to be based upon testimony of others.

Id. at 771. Thus, this Court has recognized that a claim for intangible wrongful death damages is best proved by the party actually suffering the damages.

Angrand improperly seeks a ruling which allows an expert to usurp the jury's role of assessing the Plaintiffs' claims of pain and suffering. Florida courts have long disapproved of the use of other similar "expert" testimony which does nothing more than substitute the expert's common sense for that of the jury. *See Florida Power Corp. v. Barron*, 481 So. 2d 1309 (Fla. 2d DCA), *rev. dismissed*, 488 So. 2d 829 (Fla. 1986) (admission of expert testimony that powers of concentration deteriorate during time on a job constitutes reversible error); *Lamazares v. Valdez*, 353 So. 2d 1257 (Fla. 3d DCA 1978) (admission of psychologist's testimony that defendant was untruthful and liable to make a mistake in driving was reversible error); *Nelson v. State*, 362 So. 2d 1017 (Fla. 3d DCA 1978) (court correctly excluded testimony of psychologist on memory process and eyewitness identification since "it is within common knowledge of the jury that a person being attacked...undergoes stress that might cloud a subsequent identification); *Seaboard Coast Line Railroad Co. v. Kubalski*, 323 So. 2d 32 (Fla. 4th DCA 1975) (court erred in permitting safety consultant to give opinion testimony as to how

average man reacts when driving in a line of traffic because it was within the jury's common understanding).

Moreover, the Third District's conclusion that these types of factors (or "details") that Dr. Platt apprised the jury of are within the jury's common sense has been embraced by other jurisdictions. *See Hartnett v. Union Mutual Fire Ins. Co.*, 569 A. 2d 486 (Vt. 1989) (expert testimony on issue of parental grief unnecessary because it involved matters within common knowledge and experience of jury); *Robles v. Chicago Transit Authority*, 527 N.E. 2d 361 (Ill. App.), *appeal denied*, 535 N.E. 2d 410 (Ill. 1988) (trial court did not err in excluding expert testimony as to grief suffered by decedent's family; family members were most appropriate witnesses to testify as to their grief); *El-Meswari v. Washington Gas Light Co.*, 785 F. 2d 483 (4th Cir. 1986) (trial court reasonably determined that expert testimony on grief was inadmissible because it would not significantly assist the jury). Expert testimony on the subject of a survivor's understandable and expected grief for his loved one is simply unnecessary.

Further, contrary to Angrand's contention, the Third District's findings are not illogical. Angrand complains that the Third District concluded:

> 1. Although the witness was qualified to express an expert opinion on the subject--
>
> 2. The opinion expressed on the subject was not the subject of expertise even though the subject matter opined was within the expert's expertise.

(Petitioners' brief, p. 27). To say that Dr. Platt's testimony is inadmissible even though he is an expert is no different than the conclusion reached by the court in *Nelson v. State*, *supra*, excluding the testimony of the expert psychologist on memory process and eyewitness identification. There too, the appellate court found that the doctor was "an expert on the

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subject," but that the "subject [was] not a proper one for admission of expert testimony" because it was within a jury's common understanding. *Id.* at 1021.

Angrand also argues that expert testimony is necessary because if all people grieve differently and on different timetables, then the jury has no other way to know the extent of the loss. This proposition is entirely untrue. The jury has a very clear way to learn of the survivors' grief -- through the survivors' testimony or the testimony of their friends and relatives. This is no different than how pain and suffering is explained and an award made in any personal injury case. Although expert accident reconstructionists, physicians, and physical therapists might describe the plaintiff's accident, medical condition, and physical limitations, only the plaintiff (or his family and friends) needs to describe his subjective pain.

Similarly, no expert testimony was necessary here. John and Roland explained their pain and suffering as a result of Mrs. Angrand's death, as did their minister, acquaintances, and family members. John explained that he has not celebrated a birthday or holiday since his mother died; that he lost his faith in God as a result of his mother's death; and that over six years after her passing, he still visits her grave two to three times a month to remind himself that he had a mother. (T. 429-432). John's aunt described breaking the news of his mother's death to John and John running out of the house screaming. (T. 342). She explained that to this day John has remained depressed and that he eventually quit school as a result of this. (T. 342-343). Roland explained his love for his wife and his reliance on her. (T. 209, 212). Roland's father-in-law described arriving at the hospital hours after Mrs. Angrand died, and discovering Roland crying on his mother-in-law's shoulder and the three of them crying together. (T. 261). Roland explained how he misses his wife and described his fear or inability to trust another

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woman the way he trusted Carolyn. (T. 216).

This sympathetic and compelling testimony by the Petitioners and their family members adequately conveyed their pain and needed no expert buttressing. Moreover, the testimony clearly conveyed the survivors' reactions to Mrs. Angrand's death both at the time of her death and today, without any need for Dr. Platt's explanation of "grieving tasks" (accepting the death, dealing with the pain, adjusting to the loss, and moving on -- T. 314 --). *See also Martin v. Rieger*, 711 S.W. 2d 776, 778 (Ark. 1986) (in upholding jury verdict for surviving husband's mental anguish over defendant's objection that no more than normal grief was experienced, the Court listed 13 factors which can be evaluated by the lay fact-finder in determining the appropriateness of the award, including: duration and intimacy of the relationship; attitude of decedent and survivor toward each other; duration and intensity of the sorrow; violence and suddenness of the death; crying spells; adverse effect on survivor's work or school; and change of personality of the survivor).

B. Dr. Platt Was Not A Properly Qualified Expert

Next, Dr. Key takes issue with that portion of the Third District's opinion that held that Dr. Key was qualified to render the grief testimony. Even if this Court were to find that the subject of grief is not within a jury's common understanding, Dr. Platt was not a proper expert in this case. Dr. Platt was allowed to give testimony as to the survivors' mental/psychological states although he is neither a psychiatrist, a psychologist, nor a treating physician. Dr. Platt is only a sociologist[4] who receives 75% of his income as a litigation consultant because he has

[4] Sociology is the "science of society, social institutions, and social relationships..." *Webster's Third New International Dictionary*, © 1981.

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taken courses in "thanatology", a subject which is not recognized as worthy of a degree in any university in this country.

When Florida courts have allowed expert testimony concerning a party's mental state, they have required that a qualified psychiatrist or psychologist render the opinion. *See State v. Hickson*, 630 So. 2d 172 (Fla. 1993) (testimony of psychologist regarding battered wife syndrome admissible if witness is sufficiently qualified); *Kruse v. State*, 483 So. 2d at 1386 (Fla. 4th DCA 1986) (testimony of physician outlining formal training and experience and her licensing as a physician in two states with specialty in child and adolescent psychiatry established qualifications to render opinion whether sexual assault victim was suffering from post traumatic stress syndrome).

Dr. Platt admitted that he is not a counselor and does not have any degree, certificate, or other objective acknowledgment of his study in thanatology. Dr. Platt could name only one university in the entire country which even provides a concentration of thanatology as part of a doctorate program. Dr. Platt has never attended that university. (R. 120). In short, even if thanatology were a proper subject of expert testimony, Dr. Platt is not a proper expert to testify on the subject.

C. The Evidence, Even If Technically Relevant, Was More Unfairly Prejudicial Than Probative.

Further, even if this Court were to find that grief is not within the common understanding of the jury and that Dr. Platt is a proper expert to testify on the issue, admission of his testimony was nevertheless reversible error in this case because it was more unfairly prejudicial than probative. While Angrand argues that this goes to the weight of Dr. Platt's testimony, the Rules of Evidence make clear that the question of whether the danger of unfair prejudice

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outweighs the probative value goes to the question of admissibility. Section 90.403, Fla. Stat. (1991).

To begin with, contrary to Angrand's suggestion, Dr. Platt's testimony was not any less prejudicial because it was clinical. In fact, Dr. Platt's clinical and scientific approach to this entirely subjective issue made the testimony more prejudicial. Dr. Platt used the same facts testified to by the lay witnesses but stamped a scientific imprimatur on those facts by adorning them with fancy sociological semantics to the facts. This Court has recently recognized that "[e]xpert testimony generally has an 'aura of special reliability and trustworthiness....'" *State v. Hickson*, 630 So. 2d 172, 176, n.9 (Fla. 1993).

Indeed, that the testimony appears "scientific" has been held grounds to exclude grief expert testimony because of its potential for unfair prejudice. *Navarro de Cosme v. Hospital Pavia*, 922 F.2d 926 (1st Cir. 1991). In *Cosme*, the plaintiffs brought suit against a hospital and physician for the death of the plaintiff/mother's fetus. The trial court excluded the testimony of an "expert grief counselor" and the appellate court affirmed the decision. *Id.* at 931-932. The Court found that because the expert had only met the plaintiffs twice, and had not met them until more than two years after the death of the fetus, the counselor's testimony might be

> too broad, too general, too technical, too, perhaps, scientific....

Id. In this case, Dr. Platt met the plaintiffs only once, more than six years after Mrs. Angrand's death. His testimony was likewise too scientific and too likely to influence the jury simply because it appeared "scientific."

Furthermore, a separate ground of unfair prejudice exists in this case which warrants reversal even if this Court finds that grief expert testimony is ordinarily admissible. The trial

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court here abused its discretion by admitting cumulative testimony on the issue of grief. The court not only allowed Dr. Platt's testimony, but then also allowed a parade of fact witnesses to play the same tune. First Stanley Whymms (Mrs. Angrand's father) and Reverend Henderson (Mrs. Angrand's minister) testified about both John and Roland's grief. Next, Dr. Platt testified as to both John and Roland's grief based solely on what they told him. After Dr. Platt, Edith Whymms (Mrs. Angrand's sister) testified about John and Roland's grief. Next, Madie Walker (John's guidance counselor) testified about John's grief. Finally, Roland and John each took the stand and again repeated what Dr. Platt had testified to and what the other witnesses had testified to about their own and each other's grief.

In fact, of the 11 witnesses Plaintiffs presented at trial (including Dr. Key's deposition testimony), seven of the witnesses testified about the survivors' grief. Thus, nearly 65% of the Plaintiffs' case was devoted to grief testimony. The cumulative effect of these witnesses' testimony -- extolling Mrs. Angrand's virtues and expressing, over and over again, the survivors' grief -- was so prejudicial and, as the Third District aptly found, made grief such a "feature of the trial," that it deprived Dr. Key of a fair trial. Angrand's "machine gun" approach to this trial was to continually fire the jury with bullets of sympathetic grief testimony. *See Sharp v. Lewis*, 367 So. 2d 714, 716 (Fla. 3d DCA 1979) (J. Pearson concurring) (reversible error may arise where comments of counsel are so strategically placed that their cumulative effect can be seen from reading the entire record -- akin to the perforated design of the bullets of a machine gun on its target). The cumulative impact of Angrand's grief testimony was fatal to Dr. Key's case. *Kane Furniture Corp. v. Miranda*, 506 So. 2d 1061 (Fla. 2d DCA), *rev. denied*, 515 So. 2d 230 (Fla. 1987).

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In *Miranda*, the court found reversible error in a personal injury case, in part because the trial court had allowed four different witnesses to testify as to the decedent's good-natured disposition and the family's loving relationship. Here, seven witnesses testified on the subject. The survivors' understandable (and, in fact ordinarily expected) grief over Mrs. Angrand's loss became the focus of the trial, blurring the jury's ability to clearly perceive and decide the issues. The court should have excluded Dr. Platt's testimony. Alternatively, the court should have limited the number of lay witnesses who discussed damages.

D. The Standard of Review

Finally, Dr. Key takes issue with the standard of review (abuse of discretion) that Angrand has tried to foist upon this Court in determining the issue of the admissibility of Dr. Platt's testimony. This Court need not go so far as finding an abuse of discretion, but rather need only find that the trial court erred because the record shows that the decision to permit Dr. Platt's testimony was made only because the trial court believed it was bound by the Fourth District opinion in *Shelburne*. The trial court stated:

> Folks, the district court[5] seems to indicate that the subject of grief and bereavement is not an area within the normal everyday comprehension of jurors. I must say I'm rather surprised. However, that is their opinion. With the background and the fact that it's taught at three hundred schools, of course, I can understand why it might be, under some circumstances, for psychologist and psychiatrist, *but with this appellate decision I guess I'm stuck with it.*

(T. 303) (emphasis supplied). Thus, there was no reasoned exercise of discretion in admitting this testimony. In fact, a fair reading of the judge's comments indicate just the opposite -- that

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[5] The context of the discussion on this page makes clear that the court was referring to the *Shelburne* opinion.

in his discretion he would have excluded the testimony, particularly because Dr. Platt was neither a psychologist nor psychiatrist, were he not bound by the Fourth District decision.

In conclusion, the findings of the Third District should be approved. Even if this Court determines that expert testimony on a survivor's grief is ordinarily a proper subject of expert testimony, and that Dr. Platt was a properly qualified expert, the Third District decision reversing the trial court should not be disturbed because the admission of Dr. Platt's testimony coupled with the extensive lay testimony on grief, made grief-related testimony an unfair feature of the trial.

II. THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF DR. SUSAN FOX AND DR. MORRY FOX AND IN FAILING TO INSTRUCT THE JURY ON COMPARATIVE NEGLIGENCE.

Regardless of this Court's decision regarding Argument I, if this Court accepts jurisdiction it should at the very least reverse for a new trial on damages because of the trial court's erroneous exclusion of the testimony of Drs. Susan and Morry Fox.[6] Dr. Key's comparative negligence defense was pulled out from under his feet at the start of trial when the trial court improperly granted Angrand's Motion in Limine, excluding any testimony by these doctors. Dr. Key contended that Mrs. Angrand had failed to follow certain instructions given to her by the Foxes. The doctors were previously defendants in the lawsuit but had been dismissed by the time of trial. By excluding their testimony, Dr. Key had no way to prove that Mrs. Angrand was given medical instructions by her treating physicians which she failed to

[6] Once the Court accepts jurisdiction, it may review and dispose of all issues properly presented in the case. *Allen v. State*, 326 So. 2d 419 (Fla. 1975); *Negron v. State*, 306 So. 2d 104 (Fla. 1974), *overruled on other grounds, Butterworth v. Fluellen*, 389 So. 2d 968 (Fla. 1980).

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follow. Thus, the trial court deprived Dr. Key of any meaningful opportunity to prove comparative negligence.

A. The Dead Person's Statute Did Not Apply

The trial court incorrectly found that the Foxes were incompetent to testify because of the Dead Man's statute, (hereinafter referred to as Dead Person's Statute, as suggested by *Viscito v. Fred S. Carbon Co.*, 19 Fla. L. Weekly D971 (Fla. 4th DCA May 4, 1994)). Neither the language of the statute nor caselaw supports the ruling and Angrand never satisfied his burden of proving that the Foxes were incompetent. *Hackmann v. Hyland*, 445 So. 2d 1079 (Fla. 3d DCA 1984). The Third District properly concluded that the trial court misapplied the Dead Person's Statute. However, the Third District erred in failing to reverse on this issue because of an alleged lack of proffer.

As an initial matter, the Third District's decision that the Dead Person's statute did not preclude this testimony was decidedly correct. The Dead Person's statute provides in part:

> No person interested in an action or proceeding against the personal representative, heir at law, assignee, legatee, devisee, or survivor of a deceased person, or against the assignee, committee, or guardian of a mentally incompetent person, shall be examined as a witness regarding any oral communication between the interested person and the person who is deceased or mentally incompetent at the time of the examination.

Fla. Stat. §90.602 (1991).

The clear language of the statute shows it applies only where a witness has an interest against an estate. Thus, on its face, the statute does not apply to a wrongful death case by the estate against a party. *See Helms v. First National Bank of Tampa*, 28 So. 2d 262 (Fla. 1947). *See also Matthews v. Hines*, 444 F. Supp. 1201, 1204 (M.D. Fla. 1978) (kind of interest

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precluded under the Dead Person's statute is a claim of right or title against a decedent or his estate). The Foxes never had any interest against the estate, only an interest they were defending from the estate's attack.

Second, the statute was inapplicable because it applies only to those parties with an interest in the lawsuit and Drs. Susan and Morry Fox did not have such an interest. Florida applies a two-fold test to determine who is an interested party and therefore incompetent under §90.602 -- whether:

> (1) a witness will directly benefit from the litigation
>
> -or-
>
> (2) the record can serve as legal evidence for or against the witness in other litigation.

Id. at 1204-1205. Neither of these requirements was satisfied in this case. To satisfy the first prong, the judgment in the case must have a direct effect upon the witness. *Proprietors Ins. Co. v. Valsecchi*, 435 So. 2d 290 (Fla. 3d DCA 1983), *rev. denied*, 449 So. 2d 265 (Fla. 1984). This trial, which was only against Dr. Key, could not directly benefit the Foxes in any way. Second, since the Foxes were not parties to the lawsuit[7] and the Plaintiffs had resolved their claims against the Foxes at the time of trial, the record could not have been used against them.

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[7] Dr. Morry Fox settled his case as a result of mediation prior to trial. (R. 128). Dr. Susan Fox was dismissed from the case in 1986. (App. 1). Angrand's counsel intimated that Dr. Susan Fox might have an ongoing interest because her insurer had supposedly left the statute of limitations open. (T. 250). Angrand's counsel also claimed that he believed Dr. Morry Fox was a co-defendant with Dr. Key in another case. (T. 251). However, counsel for Dr. Key advised the court that no such lawsuit existed and offered to swear in Dr. Key to testify to that. (T. 251). The court granted the motion in limine without hearing Dr. Key's testimony and without receiving any proof of an ongoing interest. Even if the court accepted Angrand's argument concerning Dr. Susan Fox, Dr. Morry Fox should have been allowed to testify since he clearly had no ongoing interest after settling the claim against him.

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The trial court improperly considered the Foxes' prior interest in ruling on the motion.[8] A witness' competency to testify must be determined at the time of trial. *Palmer v. Liberty National Life Ins. Co.*, 499 So. 2d 903 (Fla. 1st DCA 1986), *rev. denied*, 508 So. 2d 15 (Fla. 1987). Even a witness who was once an interested party is competent to testify once he loses that interest in the action. *See Palmer*, 499 So. 2d at 904 (prior stockholder of defendant company not interested party where stock is divested prior to trial); *Security Trust Co. v. Grant*, 155 So. 2d 805 (Fla. 3d DCA 1963) (plaintiff's attorney who had signed a contingency fee agreement but had withdrawn from case prior to trial and thus entitled only to quantum meruit was not an interested party). *See also Monger v. Monger*, 390 S.W. 2d 815 (Tx. Ct. App. 1965) (divestiture of witness' interest in subject matter of suit (ownership of land) pertaining to deceased's estate destroys disqualification of witness as interested party). Because the Foxes had no remaining interest in this litigation at the time of trial, they were competent to testify.

The prejudicial effect of the exclusion of this testimony became manifestly clear at the time of the charge conference. Dr. Key requested a jury instruction on comparative negligence. (T. 625-626). Because Dr. Key had been precluded from examining the Foxes to question them about instructions they had given to Mrs. Angrand which she failed to follow, the only remaining evidence concerning comparative negligence was a page from the Fox medical records. The page was admitted into evidence (App. 2) and showed that Mrs. Angrand missed

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[8] The court remarked "I understand what the Defense's position is. They certainly had an interest. They may have some interest at this point." (T. 250). The court never explained what interest that might be nor did Angrand prove such a present interest. Angrand bore the burden of proving the Foxes' incompetency. *Hackmann v. Hyland*, 445 So. 2d 1079 (Fla. 3d DCA 1984).

at least two appointments during her pregnancy and did not have medical attention from March 1, 1985 to May 7, 1985, a month before her death. (R. 145). Angrand objected to the comparative negligence jury instruction and the following discussion ensued:

> Angrand's counsel: May I respond? There has to be competent testimony. There has to be evidence besides [Dr.Key's counsel's] idea that makes comparative negligence in a medical malpractice. He didn't ask any doctor --
>
> The court: I agree.

(T. 626). Of course Dr. Key could not "ask any doctor" about Mrs. Angrand's comparative negligence -- because the two doctors who knew those answers had been improperly deemed incompetent to testify. At Angrand's request the court improperly excluded the Foxes' testimony and then Angrand unfairly asserted the absence of testimony to destroy Dr. Key's comparative negligence case. The court's erroneous ruling excluding their testimony mandates reversal.

Moreover, contrary to the Third District's finding on this issue, Dr. Key did not waive his argument by failing to proffer the excluded testimony. A proffer of testimony is unnecessary where the court deems a witness incompetent to testify, particularly because of the Dead Person's statute. *Wright v. Schulte*, 441 So. 2d 660 (Fla. 2d DCA 1983), *pet. for rev. denied*, 450 So. 2d 488 (Fla. 1984); *In re Estate of Lynagh*, 177 So. 2d 256 (Fla. 2d DCA 1965).

The Third District held that the Evidence Code, and specifically Rule 90.104, changed this longstanding rule.[9] The Third District's finding was incorrect because the law even prior

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[9] Rule 90.104 provides in part:

> (1) A court may...reverse a judgment...on the basis of...excluded evidence when a substantial right of the party is

to adoption of our current evidence code always provided that an offer of proof ordinarily had to be made to preserve an objection to the exclusion of evidence. *Morey v. State*, 72 Fla. 45, 72 So. 490 (1916). Where evidence was excluded because of the Dead Person's statute, the law simply carved out an exception to that proffer rule. *In re Estate of Lynagh*, 177 So. 2d 256 (Fla. 2d DCA 1965). Further, *Wright v. Schulte*, decided after the adoption of the present Evidence Code, makes clear that the law on proffers being unnecessary if evidence is excluded on the basis of the Dead Person's statute remains intact. Similarly, *O'Shea v. O'Shea*, 585 So. 2d 405 (Fla. 1st DCA 1991) recently reconfirmed the rule that where evidence is rejected as a class, no proffer is necessary.

Further, the proffer should be deemed unnecessary under the alternative provision of Fla. Stat. §90.104 because the subject matter of the testimony to be elicited was clear from the context of Angrand's motion in limine. Angrand's motion, argued and decided during the trial, requested that the court exclude testimony related to the fact that Dr. Morry Fox and Dr. Susan Fox:

> prior Defendant[s] herein, had allegedly given orders or instructions to the decedent which she failed to heed and/or any other communications between [those] Doctor[s] and the decedent herein.

(R. 202). Thus, Angrand's motion all but conceded that Mrs. Angrand was given instructions by Drs. Morry and Susan Fox that Mrs. Angrand failed to follow.

> adversely affected and:
>
> * * *
>
> (b) When the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer of proof or was apparent from the context within which the questions were asked.

In any event, the record shows that Dr. Key's counsel unsuccessfully attempted to make a proffer of the Foxes' testimony but that the trial court was bound and determined to exclude these doctors' testimonies and that the court granted the motion in limine and foreclosed any further argument on the issue by ordering a recess. (T. 250-251).[10]

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[10] The argument on the Motion in Limine was as follows:

> THE COURT; All right. As far as Dead Man's Statute, I'm of the same opinion I was this morning. I think that the reliability of the testimony would be put in question and it should be excluded.
>
> DR. KEY'S COUNSEL; But... these individuals no longer have an interest in this case.
>
> THE COURT; I understand.
>
> DR. KEY'S COUNSEL: And I would be --
>
> THE COURT: I understand what the Defense's position is. They certainly had an interest. They may have some interest at this point. I think that --
>
> ANGRAND'S COUNSEL; For purposes of the record, I can show you as to Susan Fox the statute of limitations is still open because [the insurer] left the statute of limitations open at any time if --
>
> DR. KEY'S COUNSEL: I don't think anybody can extend.
>
> ANGRAND'S COUNSEL: I think carriers can extend it.
>
> DR. KEY'S COUNSEL: **Let me ask the Court a question. Can I call these individuals and ask them what they told the Plaintiff's decedent at this point and time.** If Mr. Merl wants to impeach with previous testimony fine, but right now Doctor Morry Fox has no interest in this case.
>
> ANGRAND'S COUNSEL: Yes, he does....In addition, we would also show that Doctor Morry Fox, I believe, is a co-defendant with Doctor Key.

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B. The Evidence Supported A Comparative Negligence Instruction.

Finally, even without the Foxes' testimony, the trial court should have at least instructed the jury on comparative negligence. The medical record showed that Mrs. Angrand missed two doctors' appointments and sought absolutely no medical care from March 1, 1985 to May 7, 1985, a month before her death. (App. 2). The evidence also showed that Mrs. Angrand had suffered a miscarriage three years earlier (T. 341, 384) and had pelvic inflammatory disease. (App. 2). This evidence was unrebutted and supported a comparative negligence instruction. *See Gumper v. Bach*, 474 So. 2d 420 (Fla. 3d DCA 1985) (patient's five-month delay in seeking treatment warranted comparative negligence instruction in medical malpractice case). The instruction was required as long as there was "some evidence tending to show negligence on the part of the plaintiff." *General Hospital of Greater Miami, Inc. v. Gager*, 160 So. 2d 749 (Fla. 3d DCA), *cert. denied*, 168 So. 2d 145 (Fla. 1964) (evidence tending to show that plaintiff

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> DR. KEY'S COUNSEL: I'd be happy to swear in Doctor Key because he's told me there is no other lawsuit.
>
> ANGRAND'S COUNSEL: Here's the case law that if they have an interest so closely --
>
> THE COURT; **I have a problem with it coming in. I will exclude it.**
>
> DR. KEY'S COUNSEL: Unless I can find somebody that was present, another witness. What I'd like to do is leave the door open so that if there were individuals who accompanied Mrs. Angrand to Doctor Fox's office, if they heard Doctor Fox make these statements then the statute would not apply.
>
> THE COURT: Motion in limine as to that is granted. Take a five minute recess.

violated doctor's orders supported contributory negligence instruction). Because of Mrs. Angrand's past obstetrical/gynecological problems and her morbid obesity, evidence that she failed to attend scheduled doctor visits and failed to get any medical treatment during her pregnancy for a period of over two months was sufficient to create a jury question as to whether Mrs. Angrand was comparatively negligent. The jury instruction should have been given.

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CONCLUSION

Based on the reasons and authorities argued above, if this Court accepts jurisdiction, Respondent, Michael Key, D.O., respectfully requests this Court to approve the Third District opinion insofar as its holding excluding the admission of Dr. Platt's testimony and remand for a new trial on all issues. Dr. Key further requests this Court to find that the exclusion of the testimony of Dr. Susan Fox and Dr. Morry Fox and the failure to instruct the jury on comparative negligence constitute reversible error.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief and attached Appendix was served by U.S mail this 8th day of June 1994 on:

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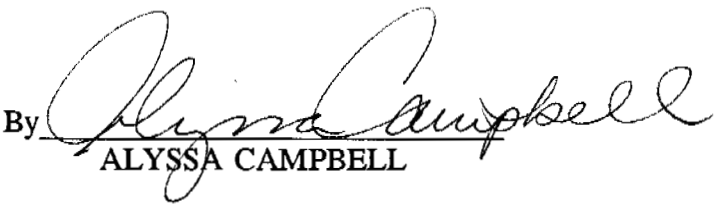
By 
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APPENDIX

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