IN THE SUPREME COURT
OF THE STATE OF FLORIDA

GOVERNMENT EMPLOYEES
INSURANCE COMPANY,

Petitioner,

vs. Case No. 86-434

SUSAN KRAWZAK,

Respondent.

CANDACE LYN LIPPINCOTT,

Petitioner,

vs. Case No. 86-435

SUSAN KRAWZAK,

Respondent.
_____/

**DISCRETIONARY PROCEEDINGS
TO REVIEW A DECISION OF THE DISTRICT
COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT**

RESPONDENT'S ANSWER BRIEF ON MERITS

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STATEMENT OF CASE

Plaintiff, Susan Krawzak, instituted this action against Defendants, Government Employees Insurance Company and Candace Lyn Lippincott, in the Fifteenth Judicial Circuit for Palm Beach County, Florida on December 31, 1992. [R. 1-5] The Complaint charged that Defendant Lippincott injured Plaintiff in an automobile accident which occurred on May 8, 1991. The Complaint also charged that Defendant GEICO issued a policy of automobile insurance to the Plaintiff which provided uninsured/underinsured motorist coverage and that Plaintiff is entitled to the proceeds of that insurance.

This case was tried by a jury before the Honorable Ronald Alvarez on November 15-19, 1993. [TT. 1-1173] The jury returned a verdict finding that 1) the negligence of Defendant Lippincott was a legal cause of damage sustained by Plaintiff; 2) that Plaintiff did not sustain a permanent injury as a result of the automobile accident of May 8, 1991; and 3) that the damages sustained by Plaintiff for past medical expenses were $10,000, and for lost earnings - $9,600. [R. 99-100]

Final Judgment was entered in favor of the Defendant GEICO on November 30, 1993. [R. 101] On February 1, 1994 Final Judgment was entered in favor of Plaintiff against the Defendant, Candace Lyn Lippincott, in the sum of $19,600.00. [R. 111]

A Final Judgment for attorneys and costs was also entered on March 17, 1994 in favor of Defendant GEICO and against Plaintiff in the following amounts: attorney's fees - $7,432.50; expert fees - $400.00; costs - $3,981.45. [R. 152] Plaintiff timely appealed all judgments against her and the three appeals were consolidated. [R. 105, 115-117, 153-156]

The Fourth District Court of Appeal reversed and remanded for a new trial. [Petitioner's Supplemental Appendix A.10-19] In so doing, the Fourth District certified conflict with ***Colford v. Braun Cadillac, Inc.***, 620 So. 2d 780 (Fla. 5th DCA 1992), *rev. den.*, 626 So. 2d 1367 (Fla. 1993). The Defendants timely invoked the discretionary jurisdiction of this Court. The issue on jurisdiction was postponed, briefs on the merits were ordered and these proceedings ensued.

For purposes of information, the undersigned appellate counsel for Plaintiff, named Lippincott, announces that she is not related to the Defendant Lippincott. The Petitioners in this action, GEICO and LIPPINCOTT, will be referred to as their position in the trial court, i.e. Defendants. The Respondent in this action, KRAWZAK, will be referred to as her position in the trial court, i.e. Plaintiff. The Record on Appeal is referenced by the symbol of R and the appropriate page number. The trial transcript is referenced by the symbol of TT and the appropriate page number.

STATEMENT OF FACTS

The Accident

On May 8, 1991 Plaintiff Susan Krawzak was heading home from dropping off her son at baseball practice. She was stopped at a stoplight with her seatbelt on. After the light turned green, but before the traffic in front began moving, the Plaintiff was hit from behind by a car driven by Defendant Candace Lippincott. [TT. 358-359] Defendant Lippincott admits that the accident was her fault. [TT. 1044]

The Plaintiff's car was sandwiched between the Defendant's car and the car in front. The car buckled, the frame was bent, and the Plaintiff was unable to open her car door. The repairs to Plaintiff's car cost $2,300 and the car still shimmies when it goes over 40 mph. [TT. 358-359, 1045] Defendant Lippincott's car sustained minimal damage. [TT. 1045]

The accident forced Plaintiff's knees into the dash. She experienced pain in her knees and her neck. [TT. 366-367] The Defendant Lippincott testified that the Plaintiff complained only of knee pain at the scene. [TT. 1045] The Plaintiff went home, arranged for someone to pick up her son from baseball practice and got a neighbor to take her to the hospital. [TT. 364]

The Plaintiff

Susan and Gregory Krawzak have been married for twenty years. They met when he was in the Navy and she was a L.P.N. [TT. 330-332; 500] Susan received her nursing license from the Medical University of South Carolina in 1971 and worked for one year after her training. She stopped work to begin a family. The Krawzaks have two sons, Michael, age 19, and Christopher, age 16. [TT. 330-334; 408; 503]

Gregory Krawzak is a special agent for the Federal Bureau of Alcohol, Tobacco and Firearms who investigates federal crimes regarding arson and firearms. [TT. 335; 500] Susan Krawzak stayed home with her boys until she began some volunteer work for Palm Beach County. From 1984 to 1988 she worked part-time for the Palm Beach School Board as an instructional aide, for five to six hours during the school day, making six dollars an hour. [TT. 334-338; 409-411]

In 1988 Susan left the school system to complete a refresher course for L.P.N. licensing. After renewing her license, Susan began working as an L.P.N. for the Boca Community Home Health Program for ten dollars an hour. [TT. 336-338, 341; 411-412] She worked approximately twenty to thirty hours a week, earning between $200 - $300 a week, $10-$15,000 a year. [TT. 413]

In February, 1990 Susan went to work exclusively for Mrs. Koenigsberg, a patient of Boca Home Health. She was working approximately 25 hours a week, making $8.00 an hour, for a total of approximately $200 a week. [TT. 414] Shortly thereafter, looking

for a job with a future, she became employed by Wellington Regional Hospital as an L.P.N. [TT. 346, 415-418] She began employment as a per diem employee, and became a full time employee after approximately six months. [TT. 419-422] She continued with Wellington until the accident of May 8, 1991. [TT. 357]

Before the accident Susan had begun taking courses towards getting her R.N. [TT. 407; 507] Her son, Michael, would soon start college and the family needed additional income. [TT. 507]

Plaintiff's Prior Accidents

In October of 1987 while working as an assistant P.E. teacher, Susan Krawzak was carrying a balance beam. The beam shifted, Susan pulled on the beam to keep it from falling, and she hurt her neck. She had pain and muscle spasms in her neck, occipital pain into the shoulder, and she had difficulty moving her neck from side to side. [TT. 341-342; 423-427]

Susan went to the emergency room, was diagnosed with a minor neck sprain, and was sent home with a cervical collar. She was off work for three days and went to physical therapy a couple of times. After that she returned to full duties and had no further treatment. Since that time she has experienced occasional neckaches, a couple of times a year, usually brought on by stress. [TT. 341-342; 423-427]

On February 17, 1990 the Plaintiff was involved in a minor car accident. She was stopped at a light, as the light turned green and traffic started moving, someone crossed lanes, forcing traffic to stop.

A truck that was two cars behind Susan did not stop. Susan saw that the truck was not going to stop and tried to get in the other lane. She got partially in the other lane, the truck hit the car behind Susan, and that car clipped Susan's bumper. Her car was at a kitty corner and she clipped the car in front. The damage to her car was limited to two busted lights, one in front and one in back. [TT. 348-30; 427-435]

Susan's husband took her to the emergency room. X-rays were taken and she was told to wear a cervical collar. She experienced neck pain, muscle spasms, and pain in the right shoulder to the elbow. For a day or so she also experienced a tingling and burning in the finger of her right hand. She sought treatment from orthopedic specialist, Dr. Bruce Young. Physical therapy was prescribed for ten days. After therapy, Susan returned to work and felt recovered from this accident. She continued though to suffer from the occasional muscle spasm. [TT. 349-350; 427-435]

Dr. Bruce Young is a board certified orthopedic surgeon who saw Susan Krawzak on February 19, 1990 due to her involvement in a minor auto accident. She complained of pain in her neck, particularly on the right side radiating into her right shoulder and down her right arm to right elbow. She also had some initial tingling and burning in her right finger which had resolved at the time he saw her. [TT. 737-740; Pltf. Ex. #21; Young Deposition at pp. 4-6]

His examination revealed diminished range of motion about her cervical spine, stiffness of her neck, tenderness of neck and shoulder muscles. Reflexes, strength, sensory function and sensation were all normal. [TT. 737-740; Pltf. Ex. #21; Young Deposition at p. 7]

Susan's x-rays were basically normal with slight degeneration and narrowing at level C/6-7 which the doctor did not believe to be significant. Rather, the doctor diagnosed a cervical strain which is a soft tissue muscular tenderness, ligaments injury without any clear neurologic involvement, nerve damage or disc herniation. [TT. 737-740; Pltf. Ex. #21; Young Deposition at p. 10]

She was prescribed physical therapy, muscle relaxers, pain medication and was instructed to say out of work for ten days. The doctor saw her once more on March 2nd and recommended that she continue physical therapy and remain out of work. She was markedly improved, but not fully resolved. Susan did not return to see Dr. Young. [TT. 737-740; Pltf. Ex. #21; Young Deposition at p. 11]

On February 27, 1991 Susan was helping to move a patient from his bed to a wheelchair. The patient began to fall and Susan, in assisting the patient, sprained her shoulder and lower back. She did not sprain the neck itself. She did experience pain in the shoulder muscle and when the spasms were bad the neck would be involved in the spasm. [TT. 351-358; 436-444]

Susan experienced neck pain and spasms, difficulty with moving her head in all directions, pain from her shoulder into her elbow, decreased sensation in her right arm, and on one occasion tingling down to one finger on her right hand. Since this accident happened at work, Susan was required to see Dr. Douglas Gula, who is an orthopedic doctor. She continued to see Dr. Gula until May 6, 1991, two days before the accident involved in this case. [TT. 351-358; 436-444]

Susan was restricted to light duty work but continued to work full-time. She was engaged in a physical therapy program throughout her treatment. She was still experiencing occasional pain, but by May 8, 1991 her problems were improved and she returned to full duty the weekend preceeding this Monday accident. She was directed to use common sense when lifting. [TT. 351-358; 436-444]

Dr. Douglas Gula is a board certified orthopedic surgeon who saw Mrs. Krawzak from March 1, 1991 through May 6, 1991 as a result of the injury she sustained lifting a patient on February 27, 1991. The doctor had no particular independent recollection of Susan and testified from his notes. [R. 159-190]

The doctor's examination on March 1, 1991 revealed trapezius and lumbar pain, with limited range of motion in the lumbar spine. The doctor found there to be a soft tissue injury involving the entire spine and prescribed anti-inflammatory medicine, physical therapy and restricted Susan to light duty. The doctor expected resolution of this injury to take several months. Nevertheless, he saw her frequently until May 6th due to insurance requirements. [R. 159-190]

The doctor saw Mrs. Krawzak on nine occasions between March 1 and May 6, 1991. She steadily improved except for small setbacks due to straining herself again with patient care. On May 6, 1991 Dr. Gula found that Mr. Krawzak had sustained maximum medical improvement and released her for full duty. [R. 159-190]

Dr. Gula testified that neurological testing on Susan was normal and that she did not exhibit the radiculopathy which required an MRI. Mrs. Krawzak's problems were muscular in nature and not disc related. [R. 159-190]

The Injury

Immediately after the accident Susan's knees and neck were painful. She could not use her left leg due to the knee injury and could not move her neck in any direction. As time progressed the pain in her neck grew worse, and her knees got better. Her neck pain radiated down into her right arm and has progressed to constant pain in her fingers. This pain has been alot more frequent, severe and long lasting than the pain she suffered before the May '91 accident. In addition, the pain was more involved with her arm and fingers than ever before. [TT. 366-371]

Susan began seeing orthopedist, Dr. Joseph Purita after this accident. [TT. 366-367; 919] Dr. Purita is a board certified orthopedic surgeon. He began seeing Susan Krawzak on May 13, 1991 and continued to see her until August 23, 1991. Dr. Purita specializes in knees and believes that Mrs. Krawzak came to him because he had helped her husband with knee problems. Susan suffered from torn cartilage in her knee and a typical whiplash injury with neck spasms. [TT. 998-1005]

Dr. Purita prescribed a conservative course of treatment which included moist heat, physical therapy, muscle relaxers and pain medication. Susan's knee problem resolved but her neck got worse.

The neck pain got worse and continued to spread. Dr. Purita recommended that Susan get an MRI. The MRI revealed a small central herniation at level C/5-6 and a possible small central herniation at level C/6-7. It also revealed arthritis, loss of water content in the discs and osteophytes, i.e. bone spurs. [TT. 1014; 1023-1025]

Dr. Purita recommended a continued course of conservative treatment, with surgery possible depending upon Susan's progress. Dr. Purita testified that on September 23, 1991 he released her for light duty to see how she did. He also testified that the herniation probably occurred as a result of the May 1991 accident. And, as time goes by herniation and pain have increased. [TT. 1020-1039]

Susan testified that this time physical therapy did not help and she did not improve. She does not recall Dr. Purita releasing her to go back to work and she did not try to do so. She continued physical therapy for approximately 18 months. [TT. 369-371]

Next, Susan consulted with a board certified orthopedic spine surgeon, Dr. Leon Abram. Dr. Abram saw Susan on March 2, 1992. His examination revealed tenderness in the neck, a reduced range of motion of the cervical spine and the reflex examination in her upper extremity showed some slight reduction on the right in the brachioradialis at the wrist. Her x-rays showed a degenerative disc disease at C/5-6 and C/6-7, i.e. disc space narrowing and osteophytes, bone spurs. This is part of the aging process and may or may not produce pain. [TT. 542-550]

Dr. Abram ordered a new MRI and an EMG and nerve conduction studies. The EMG and nerve conduction studies were performed by Dr. Belaga, a board certified neurologist. These tests showed some degree of instability in the paravertebral muscles, which suggests cervical spine trauma. The MRI revealed two herniated discs. Dr. Abram recommended removal of the discs and replacement with a bone graft. [TT. 555-567]

Dr. Abram testified that within a reasonable degree of medical probability, it was his opinion that Susan was permanently injured as a result of the May, 1991 accident and that surgery was needed. The cost of the surgery would range from $12 to $20,000, with total cost being approximately $50,000. [TT. 567-576]

Susan next sought the advice of board-certified neurologist, Dr. Ignacio Magana, whose practice is limited to problems of the spine and spinal cord. [TT. 374; 769-770] He first saw Susan on March 23, 1993. She had had two MRI's, one on August 26, 1991 and one on June 19, 1992. Both studies showed herniated discs at C/5-6 and C/6-7. The herniations were central and the subarachnoid space on both sides was completely obliterated. This means that the disc herniation was outside the disc going through the spinal fluid all the way up against the spinal cord. There was also a suggestion that the spinal cord was being displaced posteriorly. Susan's x-rays showed anterior spurring, spurring in front of the spine and not near the spinal cord. The spurring was minimal and a common finding for a 39 year old woman. The x-rays also showed degenerative disc disease at level C/6-7 with a loss of height, but not at level C/5-6. [TT. 771-794]

In examining Susan, Dr. Magana observed that she was limited in moving her neck in all directions, the biceps reflex was absent or depressed, indicating a herniated disc and a compression of the nerve root. Dr. Magana recommended a diskectomy and fusion at levels C/5-6 and C/6-7. [TT. 791] Without surgery, Susan has an increased risk for paralysis which could be caused by a fall or other trauma. And no treatment other than surgery was likely to make Susan better. The longer people wait to have this surgery, the less chance of maximum improvement. [TT. 796-797]

Dr. Magana performs approximately 100 cervical operations a year and operated on Susan on April 7, 1993. Due to the increased risk of paralysis, this surgery must be performed through the throat. An MRI is limited to two millimeters of resolution. What you see in surgery is more specific than what you see on an MRI. During surgery, Dr. Magana made the following observations: minimal anterior spurring at level C/6-7 and no significant spurring at C/5-6; a frank herniated intervertebral disc at level C/5-6. There was a tear at the back of this disc and a piece of disc material was coming through this tear. This material was sticking through the ligament and directly into the right neural foramen, i.e. the bony canal in which the nerve root passes on the right side. At the C/6-7 level there was a moderate size herniation where the back of the disc was torn, and extended back. The worst problem was at level C/5-6. The discs were removed and a cadaver bone used for the bone graft. [TT. 798-810]

People who have surgery more than a year following an accident, do not do as well as those who have surgery earlier. Two years went by between Susan's accident of May 1991 and her surgery of April, 1993. For Susan, the pressure of the spinal cord has been resolved and so the problems at those levels have been removed and will not get worse. Her chances of neurological deterioration are substantially reduced. The surgery is not restorative, but she has had some improvement with both pain reduction and function increase. She will still have limitations. [TT. 810-814]

After surgery, Susan was not allowed to do housework, drive or work. On September 30, 1993 Dr. Magana believed Susan was capable of light duty work beginning on a part time basis. Susan cannot return to her former position. In addition, there is no way to know if Susan will actually be able to work. [TT. 817-821]

The doctor also gave his opinion with in a reasonable degree of medical probability that Susan Krawzak was permanently injured and disabled as a result of the May 1991 accident, and that surgery was needed as a result of the accident. [TT. 800-801]

Susan does not have a normal neck. Future problems she will face include: chronic neck pain; headaches; difficulties reaching overhead; doing heavy lifting and pulling; she will frequently need to change her position; and she will be unable to return to jobs she could do in the past. [TT. 814-821]

Susan will probably need the following future medical care: annual cervical spine x-rays for 3-5 years at a cost of $45 a piece; an annual medical visit for the next two years at a cost of between $45

to $60 each; physical therapy for 3-5 years at a cost of $1,600 per year; over the counter pain medication; and a follow-up MRI at a cost of $2,500. [TT. 814-817]

Dr. Michael Zeide is a board certified orthopedic surgeon who specializes in hip and knee replacement. He examined Susan Krawzak for the Defendants on April 1, 1993 and October 7, 1993 and reviewed all her medical records. Dr. Zeide testified that the MRI's showed two mild central herniated discs. This finding is important because a central herniated disc does not press on the nerve root and does not produce the symptoms of which Susan complained. Whereas a herniation on the right side presses on that nerve root and produces symptoms on the right side. A herniation on the left side produces symptoms on the left. [TT. 869-886]

Dr. Zeide admitted that a doctor can see more in surgery than on an MRI and also admitted that Dr. Magana's operative notes revealed that disc material had pierced the neural foram and was impinging on the right nerve root. He also admitted that such a fragment impinging on the nerve root could cause Susan's symptoms. [TT. 933, 975]

Susan's records also showed anterior and posterior osteophytes, i.e. bone spurs and disc degeneration disease or a narrowing of the discs. These problems are caused by aging or trauma. Susan's problems were more than average for her age. [TT. 888-890]

Dr. Zeide testified that there was no way to tell if Susan had a herniated disc before the May, 1991 accident because she did not have an MRI before the May, 1991 accident. [TT. 892-893]

Radiculopathy means irritation of a nerve root. It produces the symptoms of numbness, tingling, burning, radiation, loss of the perspiration phenomenon, and loss of sensation in the distribution of that particular nerve root. Radiculopathy can be produced by a number of causes including a herniated disc, an enlarged artery, tumor or osteophyte pressing on a nerve root, and a metabolic chemical disturbance that causes nerve root irritation. [TT. 894-898]

Dr. Zeide did not think a herniated disc was causing Susan's problems. Rather, he believed her problems were caused by the osteophytes pressing on the nerve root. Although Dr. Zeide admitted that surgery might help eliminate some pain, he believed that it would not completely resolve Susan's symptoms and was not indicated. [TT. 898; 904-908]

Dr. Zeide testified that he thought Susan Krawzak sustained some soft tissue injuries as a result of the May, 1991 accident involving the ligaments and muscles in the neck and that she did not require any surgery. He further stated that he believed Susan had a temporary, not a permanent aggravation of a pre-existing condition. [TT. 921-923]

Dr. Zeide also testified that it was his opinion within a reasonable degree of medical probability that Susan Krawzak sustained a permanent injury as a result of the May, 1991 accident. The doctor also admitted that many people have osteophytes with no pain at all and after an automobile accident are in a lot of pain and sometimes permanent pain. In addition, the doctor testified that he could not say within a reasonable degree of medical probability that Susan's symptoms came from osteophytes. [TT. 951; 974-975]

Dr. Zeide stated that anyone who has a spinal fusion has a permanent impairment and that he does not think that Susan has a permanent injury which resulted from the May, 1991 accident. [TT. 988-990]

Doctors Abram, Magana and Zeide were each questioned regarding whether a patient who had Susan's prior accidents and experience would have sustained a permanent injury and all agreed that she would not. [TT. 536-540, 785-788, 928-933]

The Plaintiff - Before and After

The Krawzak family enjoyed many activities together. They enjoyed going to the beach, for walks, to the movies, white water rafting and attending all of their sons' baseball games. Indeed, Susan was team mother. She also did all the housework and enjoyed doing yard work. Since the accident Gregory Krawzak testified that everything is upside down. Susan can't do anything much anymore - not even go for walks or to the movies. She has gained 30 lbs. from this inactivity and her wedding rings don't fit. [TT. 335-337; 343-345; 500-507]

Her condition is aggravated by standing or sitting in one position for longer than 10-15 minutes. She had been unable to work, or resume her family activities and much of her normal household duties. For example, she can't vacuum and she can't carry groceries. She is in constant pain of varying degrees and has been unable to return to work. [TT. 343-345; 402-407; 500-507]

Susan's neighbor, James Dawson testified that he knew Susan for seven months before the May, 1991 accident. Their families had become friends and Susan would sometimes baby-sit for the Dawsons. Before the accident Susan was active and unlimited. Since the accident she is slow moving and immobile, she can't baby-sit or do the things she did before the accident. [TT. 687-689]

David Everett is a vocational rehabilitation counselor who reviewed Susan's records and examined Susan. He testified that her physical condition precluded her from a wide range of work and that she could not return to L.P.N. work. However, Mr. Everett stated that pursuant to Dr. Magana's plan of a beginning four hour day of sedentary activity, he believed Susan could find employment such as a home health staff coordinator or blood bank intake worker, making $5-$7 an hour. He stated that this placement would take between three to six months. [TT. 690-705]

Dr. Bernard Pettingill is an economist who testified regarding Susan's damages. Her past medical expenses were summarized in Plaintiff's Exhibit #17 as $36,640.54. [TT. 630-635] If Susan is unable to return to work as an L.P.N. Dr. Pettingill calculated the present value of her wage loss at $414,653. If she is able to return to work part-time, this loss would be reduced by earnings of $233,834, leaving a loss of $180,189. This loss was calculated pursuant to her 13 week wage statement prior to the accident of $11.39 an hour and an average 40 hour week. [TT. 644-650; Pltf. Ex. #22] Dr. Pettingill also calculated Susan's past wage loss to be $47,725. [TT. 649]

The Trial Proceedings

This trial commenced with consideration of a motion by Defendant GEICO to permit it to participate as a silent party to the trial and for its attorney to sit as co-counsel to Defendant Lippincott. Defendant GEICO announced that it had waived its subrogation rights against Mrs. Lippincott. [TT. 3-8; R. 33-36] The trial judge believed that this was an improper charade and denied the motion. [TT. 32-33]

After jury selection had commenced the trial judge declared a mistrial and reversed himself. He announced that although he disagreed strongly, he believed that he was bound by precedent to grant the motion. The jury selection process began again with no mention of Defendant GEICO and with its attorney sitting as co-counsel to Defendant Lippincott. [TT. 108-116, 274]

During cross examination of Plaintiff Susan Krawzak, the following questions and answers took place:

> *"Q. And during that year 1990, you earned 30,000 to $40,000 a year?*
> *A. I'm not sure of the exact amount. I know it was approximately 500 a week. I think that works out to be more towards 25,000.*
> *Q. Mrs. Krawzak, do you recall when I took your deposition in this case?*
> *A. Yes.*
> *Q. And do you recall you were under oath at that time to tell the truth?*
> *A. Yes.*
> *Q. And do you recall your lawyer was present at that time?*
> *A. Yes.*

A. *Do you recall being asked the following question and giving the following answer -- and for counsel's benefit this is page 23, line 11 -- Question: Okay, you started there February of '90. So would it be your belief or your recollection that you earned 30 to $40,000 during the year 1990? And your answer at that time was, yes. Is that what you testified at that time.*

A. *That's what I said.*

Q. *Now, that simply was not true, is that correct, ma'am.*

A. *No.*

Q. *Well, what do you mean no? Was the statement that you made on deposition true or not true?*

A. *The answer was not true.*

Q. *Isn't it a fact, Mrs. Krawzak, isn't the truth that when you started at Wellington Regional in February of 1990, you didn't start full-time at all, did you?*

A. *It was full-time per diem was the technical term, I believe.*

Q. *You were a per diem employee, not a full-time employee, is that correct?*

A. *I thought the term was full-time per diem.*

Q. *And as a per diem employee, you would have worked approximately 16 hours over two weeks or eight hours a week or about one day a week, is that accurate?*

A. *No.*

Q. *Mrs. Krawzak, I'm once again going to show you a document and ask if this refreshes your recollection.*

A. *(Witness complies).*

THE COURT: Excuse me, Counsel, come up. I apologize. Please mark this portion of the testimony so we can come back to it on the next break.

Q. *(By Mr.. Supran) Mrs. Krawzak, does the document that I just -- or several documents that I just showed you refresh your recollection as to whether*

or not you were a per diem employee working or scheduled to work 16 hours every two weeks?
A. That's what the document says.
Q. Or eight hours a week?
A. Yes.
Q. Or one day a week?
A. That's what it says."

[TT. 418-421]

On redirect, the Plaintiff testified as follows:

"Q. Now, also when Mr. Supran cross examined you, you said that when you made the statement that you were earning 30 to $40,000 a year at Wellington, that statement was not true. It sounded like you were admitting that you lied intentionally. Is that what you were saying?
A. No.

MR. SUPRAN; Object to the form. Leading.

THE COURT: Overruled.

Q. (By Mr. Asencio) It's very important when you're in a courtroom, Susan, that we understand exactly what you mean. So please tell us exactly what you meant when you said that statement was not true?

MR. SUPRAN: Based on the Court's rule number eight for that question.

THE COURT: Do you want to approach counsel?

MR. ASENCIO: I'll rephrase the question.

Q. (By Mr. Asencio) What did you mean when you said that wasn't true?
A. Earning 30 to 40,000.
Q. What is the explanation for you having made that statement when you were in deposition?

A. *At deposition I was doing quick figuring at $500 a week. I do not recall ever working one day a week. I believe the figure was given to me and I agreed to it.*

Q. *Now, it sounded as though during cross examination that you only worked one day a week when you were at Wellington when you first worked there. Is that your testimony?*

MR. SUPRAN: Objection. Leading.

THE COURT: Sustained.

Q. *(By Mr. Asencio) What was your exact testimony Susan, with regards to your working at Wellington when you first went there?*
A. *I recall working more than one day a week.*
Q. *Mr. Supran showed you your work records, right?*
A. *He showed me the contract.*
Q. *He showed you a contract?*
A. *Yes.*
Q. *Do you know whether or not whatever was said there necessarily means that you worked that much time?*
A. *No, that was the proposed amount of time.*
Q. *Okay. I'm going to show you what's been marked as Plaintiff's Exhibit Number 15. Do you see what that is?*
A. *It's a pay stub.*
Q. *Okay, When Mr. Supran questioned you, he said you only earned $10,000 for 1990. And you said, I guess so. Was that what you answered?*
A. *Yes.*
Q. *Now, does Exhibit Number 15 show what you, in fact, earned in 1990 from Wellington?*
A. *Up until November.*
Q. *Okay, up until November?*
A. *This is for November 23rd.*
Q. *Okay. And what did you earn up until November, that is working February to November?*
A. *13,941....*
Q. *And with regard to the statement you made to Mr. Supran when he questioned you about your income,*

tell us whether or not you had any intent to mislead anyone?
A. No, I did not."
[TT. 477-480, 490]

The Plaintiff called Jennifer Wiggs, who was employed as a personnel assistant at Wellington Hospital. The Defendant contended that Ms. Wiggs' testimony was not relevant and the trial court sustained this objection. [TT. 754-765] The testimony of Ms. Wiggs was proffered. She testified that a per diem contract signed by a nurse is just a minimum guideline and does not restrict the nurse to work only one day a week. And, indeed, that some per diem workers work full time. Ms. Wiggs also verified the 13 week wage statement showing the money made by Susan Krawzak immediately prior to the May, 1991 accident. [TT. 823-827; Pltf. Ex. #22] Susan was placed on medical leave after the May, 1991 accident. Medical leave lasts for up to six months. Susan's position was held for six months, but she did not return. [TT. 826-827]

In closing argument, defense counsel announced that this case was about truth; that cross examination was a constitutional right whose purpose was to flush out the truth; that Mrs. Krawzak had a wonderful memory for her counsel's question, but for his questions, she couldn't recall. [TT. 115-117] He then proceeded as follows:

"Mrs. Krawzak, the year 1990, the year right before this accident, you made 30 to $40,000 a year? Something like that I believe she said. Well, we had taken her deposition. We knew what she was going to say. There are no surprises in this system here. On deposition under oath when asked how much she earned for the calendar year 1990, she testified 30 to $40,000. When confronted

with it on the witness stand in this courtroom and when shown the document that she was really a per diem employee for the first six months she worked at Wellington, maybe working one or two days a week, she finally admitted that maybe it was more like 10,000 that year. Characterize that as a mistake? Do you characterize that answer she gave me on deposition as a mistake? Common sense dictates most people have some idea within a range of how much they've earned. It's not like she mistook the wrong year. She never in her life earned that much money.

You're going to hear a jury instruction on the believability of witnesses, what you ought to consider in evaluating the believability of witnesses. And one of those elements is any interest the witness may have in the outcome of the case. Well, who has the most interest in the outcome of this case? Do you believe when I took her deposition that there was any motivation or any interest in telling the defense lawyer that she earned 30 to $40,000 the year before this accident when she's now trying to claim money for the rest of her life based on the fact she says she can't work? Is there an interest to settle the case perhaps?"
[TT. 1117-1118]

The trial court judge made repeated statements throughout this trial that if this case did not go to the jury by 3:00 p.m. on Friday afternoon, he would declare a mistrial. [TT. 192, 264, 495, 527, 968-970, 1053, 1060-1064, 1072-1074, 1077, 1087] At the conclusion of the evidence the judge stated as follows:

'THE COURT: I'm bringing the jury back at 12:50. That leaves two hours and ten minutes for the remainder of this trial. Based upon my experience it takes 15 to 20 minutes to read all of the instructions. That would leave an hour and 50 minutes for closing and a charge conference.

Now, before I decide how much of this hour and 50 minutes is going to be dedicated to the charge conference or to the closing argument, I'm going to give you what I have marked through and made comments on Mr. Supran's jury instructions. And I'm going to leave that with you and come back at five minutes before the jury comes back and see if we have worked through all of the problems with the jury instructions. If we have, then the remaining time, two hours and ten minutes, I will allow one hour max per side for closing. If not, we will take the time and do a charge conference, and the time that we use in a charge conference will be deducted from the time remaining until 3:00 at which point if the jury has not been instructed, I will declare a mistrial."
[TT. 1072-1073]

The use of Plaintiff's jury instructions were denied. [TT. 1075-1077] The Plaintiff requested but was denied a special instruction on permanent injury. [TT. 107-1 82; Court's Ex. #3] The Plaintiff objected to the verdict form and to the reading of the jury instructions. [TT. 1084-1087, 1163-1166]

SUMMARY OF ARGUMENT

This case is before this Court on a certification by the Fourth District Court of Appeal of conflict with ***Colford v. Braun Cadillac, Inc.***, 620 So. 2d 780 (Fla. 5th DCA 1993), *rev. den.*, 626 So. 2d 1367 (Fla. 1993). The issue in conflict is whether an underinsured motorist carrier should be permitted to deceive the jury by sitting at trial as a silent party and pretending that its counsel is counsel for the defendant tortfeasor. The Fourth District correctly recognized that the statutory scheme is crystal clear and was not intended to permit an underinsured motorist carrier to enjoy the privileged status of secret party. In addition, this Court, as it did in ***Dosdourion v. Carsten***, 624 So. 2d 241 (Fla. 1993) should prohibit such jury deception.

Although this Court may consider any issue raised and argued, it is certainly appropriate for the Court to decline to review uncertified issues. In this case there is no reason for this Court to exercise its discretion on the issues not involved in the certified conflict. Alternatively, if some ancillary issues are to be addressed, all should be addressed.

The undisputed evidence in this case establishes past medical expenses of $36,640.54. And all of the credible and proper testimony in this case establishes that Plaintiff sustained a permanent injury as a result of the accident in question. Yet, the jury returned a verdict for less than the undisputed expenses and found no permanent injury.

This result reflects the many errors which occurred during this trial. For example, the Plaintiff was prejudiced by: the trial court's refusal to admit critical evidence; the time limits set for charge conference and closing argument; the Defendants' charge that Plaintiff had lied; and jury instructions and a verdict form which were incomplete, confusing and contradictory.

In addition, the trial court improperly permitted the underinsured motorist carrier, Defendant GEICO to deceive the jury by sitting as a silent party and representing that its counsel represented the Defendant Lippincott.

For whatever reason it occurred, the jury's verdict is inconsistent, inadequate and contrary to the manifest weight of the evidence. A new trial on all issues is mandated!

ARGUMENT

I.

THE ACTUAL STATUS OF AN UNINSURED OR UNDERINSURED MOTORIST CARRIER WHO IS LAWFULLY SUED AND JOINED AS A PARTY DEFENDANT MUST BE DISCLOSED TO THE JURY. (Response to Defendants' Point II)

Florida Statutes §627.727(6) (1991) permits an insured to join his underinsured motorist carrier in an action against the underinsured tortfeasor. In addition, it has been held that such joinder is mandatory. [***Wardrop v. Government Employment Insurance Co.***, 567 So. 2d 1012 (Fla. 3d DCA 1990), *rev. den.* 581 So. 2d 168 (Fla. 1991)]

The Fifth District Court of Appeal has held that a plaintiff may be prevented from disclosing to the jury the existence of a party, i.e. the underinsured motorist carrier, and that the carrier's attorney may participate and represent to the jury that he is the tortfeasor's co-counsel. [***Colford v. Braun Cadillac, Inc.***, 620 So. 2d 780 (Fla. 5th DCA 1993), *rev. den.*, 626 So. 2d 1367 (Fla. 1993)]

The trial court in this case strongly disagreed with the ***Colford*** decision, but decided that it was bound to follow this decision. [See Statement of Facts at p. 18] The Fourth District disagreed with ***Colford*** and has certified the conflict of decisions to this Court.

GEICO is both the liability insurer and the underinsured motorist carrier in this case. The Plaintiff, by contract as well as by statute, has a direct right of action against GEICO as her underinsured

motorist carrier. In ***Shingleton v. Bussey***, 223 So. 2d 713 (Fla. 1969) this Court held that a plaintiff, as a third-party beneficiary of the motor vehicle policy, had a direct cause of action against a liability insurer and may join the insurer as a defendant along with the insured. In addition this Court stated as follows:

> *"...it seems anomalous to public policy to procedurally sanction and condone a situation where the ultimate beneficiary of policy proceeds is deprived by a provision in the policy of an open, speedy and realistic opportunity to pursue his right of an adequate remedy at law jointly against the insured and insurer. Especially is the result obtained by such policy restriction incongruous where the insurer participates in the controversy, not as a joint defendant in the proceedings brought by the injured plaintiff against the insured, but, rather, as the undisclosed guardian of the interests and rights of the insured-and of counsel, of the insurer's interest also...*
>
> *If a joinder is allowed initially, all the cards are on the table and all interrelated claims and defenses can be heard and adjudicated reciprocally among all parties and the plaintiff will have the same initial right as insurer now avails itself against plaintiff to protect his rights against the insurer. In this manner the interests of all the parties and the concomitant right to expeditiously litigate the same in concert are preserved."*
> [223 So. 2d at pp. 719-720]

The legislature overruled ***Shingleton*** by enacting the non-joinder statute in 1976. This statute provides that *"no motor vehicle liability insurer shall be joined as a party defendant in an action to determine the insured's liability..."*. [§627.7262, Fla. Stat. (1991)] However, this statute does not apply to an uninsured or underinsured motorist carrier. Florida Statutes contain both the non-joinder of insurers statute, F.S. §627.7262 (1991), and F.S. §627.727(6) (1991) which permits joinder of the underinsured

motorist carrier in an action against the underinsured tortfeasor. It simply makes no sense for the legislature to have enacted §627.727(6), as written, if it intended for the carrier to enjoy the privileged status of a secret party.

Moreover, this Court has clearly announced that public policy will not permit the deception of juries by a charade conducted by the litigants. [***Dosdourian v. Carsten***, 624 So. 2d 241 (Fla. 1993)] But that is precisely what happened in this case. As the Fourth District stated in the case at bar:

> *"An uninsured or underinsured motorist carrier should not be able to hide its true identity by being severed from the lawsuit while retaining its influence over the conduct of the lawsuit as co-counsel for the tortfeasor. In this case, this procedure seems inherently unfair to the plaintiff, deceptive to the jury, contrary to the insurance contract entered into between the plaintiff and its insurer, and contrary to statute."*
> [Petitioners' App. A. 19]

The Defendants' benefit/detriment analysis misses the point. The issue at bar is one of statutory construction, not a benefit/detriment analysis. Second, the detriment to Plaintiff is real, substantive and harmful. She has both a contractual and statutory right to sue ***her*** insurance carrier. Third, the matter at issue concerns underinsured motorist insurance, ***not*** liability insurance. And finally, as noted by the Fourth District, if the reasoning of the Defendant -- that its presence as an insurance company would serve no purpose other than to increase the amount of the jury verdict was accepted, all "deep pocket" defendants would have the same argument. And, of course, there is no rule of procedure or principle

of law which would justify such a result where a plaintiff has a right of direct action. [Petitioners' App. at A. 17]

It is also quite interesting as noted by the Fourth District that GEICO does not seek an absolute ban on disclosure of its identity in all such litigation. Rather, GEICO seeks the ability to use this charade at its discretion. When GEICO views the charade as operating in its favor, then it contends it should have the right to wear its mask. However, when the mask may not be helpful, i.e. in cases of aggravated liability or in cases of an unsympathetic tortfeasor, then GEICO wants the right to remove the mask. [Petitioners' App. at p. A-17]

In addition, Defendant Lippincott's claim of detriment is highly suspect. It is believed that Defendant Lippincott and Defendant GEICO have entered into an agreement for Lippincott to stay in the suit, but GEICO to assume all liability for any judgment. Interestingly, all attempts to uncover this agreement and for the trial court to conduct an *in camera* inspection were vigorously contested by Defendants and denied by the trial court. [TT. 828, 859-865, 1042] This Court should put an end to the game playing.

Dosdourian stands for the proposition that public policy will not permit juries to be deceived by litigants. Yet, that is precisely what Defendants were allowed to do. Defendant GEICO is a party to this action and had a contractual relationship with the Plaintiff. Plaintiff was entitled to join Defendant GEICO and was entitled for the jury to be informed of all parties and their interest in this case. Prejudice is inherent because of the violation of the substantive rights of Plaintiff.

In the event this Court elects to consider the certified conflict between this case and ***Colford***, Plaintiff respectfully requests that this Court adopt the decision of the Fourth District in the case at bar.

II.

THERE IS NO REASON FOR THIS COURT TO EXERCISE ITS DISCRETION TO PROVIDE A SECOND REVIEW TO DEFENDANTS ON THE ISSUES NOT INVOLVED IN THE CERTIFIED CONFLICT.
(Partial Response to Defendants' Points I, III & IV)

It is beyond dispute that this Court may consider any issue raised and argued, dispute the fact that such issues are not involved in the certified question or conflict. [***Savoie v. State***, 422 So. 2d 308 (Fla. 1982); ***Tillman v. State***, 471 So. 2d 32 (Fla. 1985)] However, it is also quite appropriate for this Court to decline to review uncertified issues. For example, as this Court stated in ***Berezovsky v. State***, 350 So. 2d 80, 81 (Fla. 1977):

> *"The District Court has reviewed the sufficiency of the evidence in this case and found that the jury's verdict is supported by the record. Having resolved the conflict of decisions which brought the case to us, we see no reason to provide a full second review of the evidence."*

And, also as this Court stated in ***Trushin v. State***, 425 So. 2d 1126, 1130 (Fla. 1982):

> *"While we have the authority to entertain issues ancillary to those in a certified case, **Bell v. State**, 394 So. 2d 979 (Fla. 1981), we recognize the function of district courts as courts of final jurisdiction and will refrain from using that authority unless those issues affect the outcome of the petition after review of the certified case."*

There is no reason to accord the Defendants a second review of the issues ancillary to the issue involved in the certified conflict of cases. Accordingly, any consideration by this Court should be confined to the ***Colford/Krawzak*** conflict.

III.

THE FOURTH DISTRICT PROPERLY FOUND THAT THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF A WITNESS WHO COULD HAVE HELPED TO BOLSTER THE CREDIBILITY OF PLAINTIFF'S TESTIMONY.
(Partial Response to Defendants' Points I & III)

Plaintiff is entitled to present evidence on the facts that are relevant to his theory of the case. Evidence which assists in making known the truth upon an issue in question should be admitted. [***Donahue v. Albertson's, Inc.***, 472 So. 2d 482 (Fla. 4th DCA 1985)] As the Fourth District stated in ***Donahue***:

> *"... if evidence is relevant and has some degree of probative value however small, it is admissible, and its weight is for the jury."*

The credibility of Plaintiff was particularly critical in this case regarding the onset of her symptoms and the permanency of her injuries. The defense strenuously attacked the credibility of Plaintiff by using a mistake the Plaintiff made in deposition regarding her income in an effort to label Plaintiff a liar. [See Statement of Facts at pp. 18-22]

Jennifer Wiggs, is a personal assistant at Wellington Hospital, the employer of Plaintiff. The testimony of Ms. Wiggs was offered to support the Plaintiff's testimony regarding her status at Wellington, i.e. that per diem employees were not restricted to one day of work a week, but could work full time. [TT. 418-421, 477-480, 823-827]

The testimony of Jennifer Wiggs was important with respect to Plaintiff's credibility. It was extremely relevant and certainly not

cumulative. Indeed, it supported the Plaintiff's testimony that her status at Wellington was "full time per diem" and that she was not restricted to working one day a week. [TT. 418-421, 477-480, 823-827] Thus, the Fourth District found that:

> *"The probative value of this relevant testimony substantially outweighs any cumulative effect of the evidence. Id., see* ***LoBue v. Travelers Ins. Co.****, 388 So. 2d 1349 (Fla. 4th DCA 1980); rev. den. sub non.* ***Burns v. Stafford-LoBue****, 397 So. 2d 777 (Fla. 1981). That exclusion was not harmless, considering that plaintiff's credibility as to her prior health and work ability was significantly questioned by the defense."*
> [Petitioners' App. at A-14]

Defendants now claim surprise before this Court as the main reason for the exclusion of this testimony. However, it is interesting to note that in their briefs to the Fourth District Court of Appeal, neither Defendant raised this objection regarding the testimony of Ms. Wiggs. [Respondent's Appendix] Although the word "surprise" was used by defense counsel at trial, it is abundantly clear from the twenty four pages of the transcript devoted to the objections and argument regarding the admission of Ms. Wiggs' testimony that the **only** objection argued by Defendants' counsel was relevancy. [TT. 754-768] Indeed, after the proffer of Ms. Wiggs' testimony defense counsel stated as follows:

> *"Mr. Supran: I have no inquiries at this time. Note my objection made earlier as to the relevancy to the areas of inquiry other than the admission into evidence of the thirteen week wage and salary verification. And I will just adopt my earlier objections."*
> [TT. 827]

IV.

THE FOURTH DISTRICT PROPERLY FOUND THAT JURY INSTRUCTIONS ON MEDICAL EXPENSES WERE CONFUSING AND IMPROPER. (Partial Response to Points I & IV)

The jury was instructed as follows on damages:

> *If the greater weight of the evidence does not support the claim of Susan Krawzak on the issue of permanency, you should award to Susan Krawzak an amount of money which the greater weight of the evidence shows will fairly and adequately compensate Susan Krawzak for damages caused by the incidents in question. You shall consider the following elements of damage: any earning loss in the past.* ***The reasonable value or expense of medical care and treatment necessarily or reasonably obtained by Plaintiff, Susan Krawzak, in the past.***
>
> *However, if the greater weight of the evidence does support the claim of Susan Krawzak on the issue of permanency, then you should also consider the following elements: The* ***reasonable value or expense of surgery, hospitalization, medicine, therapy, rehabilitation and medical care and treatment necessarily or reasonably obtained by Susan Krawzak in the past or to be so obtained in the future.***
>
> [Petitioner's Appendix A. 14-15]

This instruction was clearly confusing because the jury could have believed that only if they found a permanent injury could they award items such as the past expenses of surgery, hospitalization, medicine, therapy and rehabilitation. Instructions which are contradictory and confusing constitute reversible error. [See eg. ***Poole v. Lowell Dunn Co.***, 573 So. 2d 51 (Fla. 3d DCA 1990)]

V.

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR NEW TRIAL AND ADDITUR.
(New Point raised by Plaintiff below)

In the event this Court elects to consider ancillary issues to the certified conflict, consideration should also be given to the other issues raised by Plaintiff on appeal to the Fourth District Court of Appeal.

Plaintiff requested a new trial and additur on a number of grounds. For example, the trial court improperly limited the time permitted for charge conference and closing argument; opposing counsel made improper arguments; and the verdict is inconsistent, inadequate and contrary to the manifest weight of the evidence. Due to these errors and all the other errors noted in this brief, the trial court abused its discretion in denying Plaintiff's Motion for New Trial and Additur.

A. It was improper for the trial court to limit the time permitted for charge conference and closing argument.

As the Fourth District stated in ***Woodham v. Roy***, 471 So. 2d 132, 134 (Fla. 4th DCA 1985):

> *"The fact that this is a civil proceeding does not mean that justice can be administered arbitrarily with a stopwatch. On the contrary, the rule of informed discretion announced in* ***May v. State****, supra, applies with equal force... In establishing the appropriate time*

limitation for closing argument, the court should consider the following factors: length of trial, number of witnesses, amount of evidence, importance of the case, number and complexity of issues, amount involved and press of time. In all events, the time must be reasonable and should permit counsel an adequate opportunity to relate the factual argument to the governing principles of law."
[See also ***Bell v. Harland Rayvals Transport, Ltd.***, 501 So. 2d 1321 (Fla. 4th DCA 1986); ***Knapp v. Shores***, 550 So. 2d 1155 (Fla. 3d DCA 1989)]

And, in addition, as stated by the Fifth District Court of Appeal in ***Strong v. Mt. Dora Growers Co-Op.***, 495 So. 2d 1238, 1240 (Fla. 5th DCA 1986):

"It is clearly an abuse of discretion for a court to make the length of closing argument contingent upon whether a charge conference is required. A party has a clear right to be heard on proposed charges. He is not required or expected to waive this right in order to obtain adequate time to present his closing arguments."

Yet, those rules were clearly violated in this case. The trial court judge ran a stop watch from the beginning of these proceedings to their conclusion and threatened mistrial if his schedule was not met. The judge forced the parties to choose between a charge conference and closing argument. [See Statement of Facts at pp. 23-24] These acts were error and demand reversal.

B. It was fundamental error for the Defendants to call Plaintiff a liar in closing argument.

Initially, it should be noted that Defendants do not use the word "liar" but their presentation left the jury with no doubt as to their meaning. In a deliberate attempt to manipulate these proceedings, Defendants made it appear that Plaintiff had lied

regarding her income when no such occurrence had taken place. Then the Defendants made a production of this matter in closing argument. [See Statement of Facts at pp. 18-22]

It is clearly improper for an attorney to suggest to a jury that a witness was committing perjury. [***Hernandez v. State***, 22 So. 2d 781 (Fla. 1945); ***Venning v. Rae***, 616 So. 2d 604 (Fla. 2d DCA 1993); ***Kaas v. Atlas Chemical Co.***, 616 So. 2d 604 (Fla. 2d DCA 1993); ***George v. Mann***, 622 So. 2d 151 (Fla. 3d DCA 1993)] In addition, the impropriety does not rise or fall upon use of the term "liar", the implication is improper. [***George***, 622 So. 2d at p. 152]

C. The jury's verdict is inconsistent, inadequate and contrary to the manifest weight of the evidence.

The undisputed evidence in this case establishes past medical expenses of $36,640.54. In addition, all of the credible and proper testimony in this case establishes that Plaintiff sustained a permanent injury as a result of the May, 1991 accident. [See Statement of Facts at pp. 5-16] Yet, the jury returned a verdict of no permanent injury, net medical expenses of $10,000 ($20,000 - $10,000 collateral source set-off) and loss wages of $9,600. [See Statement of Case at p. 1]

A jury verdict is inadequate as a matter of law where negligence is not an issue and the award returned is less than the plaintiff's undisputed medical expenses. [***Grier v. Reed***, 426 So. 2d 1132 (Fla. 1st DCA 1983); ***Olds v. Stephenson***, 463 So. 2d 1241

(Fla. 2d DCA 1985); ***Borges v. Jacobs***, 483 So. 2d 773 (Fla. 3d DCA 1986)] Yet, that is precisely what happened in this case.

In addition, the verdict is inconsistent. In awarding the amount it did for medical expenses, the jury had to have included some of the cost of Plaintiff's surgery. [See Statement of Facts at pp. 17] And even Defendant's medical expert testified that the surgery would cause a permanent injury. [See Statement of Facts at p. 16] Thus, the amount awarded for medical expenses is inconsistent with the finding of no permanent injury. Inconsistent verdicts require a new trial. [See e.g. ***Butte v. Hughes***, 521 So. 2d 280 (Fla. 2d DCA 1988)]

And finally, all of the credible and proper testimony in this case establishes that Plaintiff sustained a permanent injury as a result of the May, 1991 accident. [See Statement of Facts at pp. 5-16] The Defendant's medical expert, Dr. Zeide, admitted, pursuant to he appropriate standard of medical probability, that Plaintiff sustained a permanent injury as a result of the May, 1991 accident.

> *"Q: Now, Doctor, did Mrs. Krawzak suffer a permanent injury as a result of the automobile accident of May 8, 1991?*
> *A: Yes.*
> *Q: Is that within a reasonable degree of medical certainty?*
> *A: Yes.*
> *Q: You agree that she suffered a permanent injury in this automobile accident, don't you?*
> *A: Based on the history, yes."*
> [TT. 951]

Defendant did attempt to rehabilitate Dr. Zeide's testimony. And Dr. Zeide did state that he didn't think that the Plaintiff had a permanent injury as a result of the May 8, 1991 accident. [TT. 988-990] However, this opinion was not expressed as being within the appropriate standard of medical probability and this blatant contradiction was never explained. [TT. 988-990] In addition, Dr. Zeide admitted that it was medically probable that Plaintiff's prior accident did not cause any permanent injury. [TT. 931-933] Dr. Zeide also testified that he believed that Plaintiff's problems were caused by osteophytes pressing on the nerve root. [TT. 898] But then he admits that he cannot say within a reasonable degree of medical probability that Plaintiff's symptoms came from osteophytes. [TT. 973] In short, Dr. Zeide's testimony cannot serve as the basis for the jury finding of no permanent injury.

The Defendants also points to the testimony of Dr. Douglas Gula as a basis for the jury verdict. Dr. Gula treated the Plaintiff prior to the May, 1991 accident. The Defendants are mistaken in their reliance upon the testimony of Dr. Gula as a basis for the jury verdict. Although Dr. Gula testified of similarities in the Plaintiff's medical complaints before and after the May, 1991 accident, he also testified that her problems before the May, 1991 accident were muscular in nature, not disc related, that she did not need an MRI, and that on May 6, 1991 she had achieved maximum medical improvement and she was released for full duty. [R. 159-190] Dr. Gula's testimony does not provide a basis for the jury verdict.

The opinions of Plaintiff's treating physicians were based on full knowledge of Plaintiff's history. [TT. 542, 567] All three physicians explicitly testified that the prior accidents did not cause Plaintiff permanent injury. [TT. 536-540, 784-788, 800-802] Rather, Plaintiff was permanently injured as a result of the May 8, 1991 accident and no other. [TT. 567-568, 800] The verdict was contrary to the manifest weight of the evidence and the trial court erred in failing to grant a new trial. [***Scarfone v. Magaldi***, 522 So. 2d 902 (Fla. 3d DCA 1988); ***Jarrell v. Churm***, 611 So. 2d 69 (Fla. 4th DCA 1992); ***Altilio v. Gemperline***, 637 So. 2d 299 (Fla. 1st DCA 1994)]

CONCLUSION

For the reasons stated herein, Plaintiff respectfully requests this Honorable Court to adopt the decision of the Fourth District in the case at bar and remand for a new trial on all issues.

RESPECTFULLY SUBMITTED this 30th day of November, 1995.

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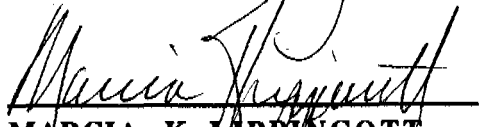

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 30th day of November, 1995 to: JAMES M. MUNSEY, ESQUIRE, Flagler Court Building, 215 Fifth Street, Suite 301 A, West Palm Beach, Florida 33401 and DANIEL M. BACHI, ESQUIRE and BARD D. ROCKENBACH, ESQUIRE, Post Office Box 3767, West Palm Beach, Florida 33402.

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IN THE SUPREME COURT
OF THE STATE OF FLORIDA

GOVERNMENT EMPLOYEES
INSURANCE COMPANY,

Petitioner,

vs. Case No. 86-434

SUSAN KRAWZAK,

Respondent.

CANDACE LYN LIPPINCOTT,

Petitioner,

vs. Case No. 86-435

SUSAN KRAWZAK,

Respondent.
_____/

**DISCRETIONARY PROCEEDINGS
TO REVIEW A DECISION OF THE DISTRICT
COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT**

APPENDIX TO
RESPONDENT'S ANSWER BRIEF ON MERITS

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IN THE DISTRICT COURT OF APPEAL
IN THE STATE OF FLORIDA FOURTH DISTRICT
P.O. BOX 3315, WEST PALM BEACH, FLORIDA 33402
4TH DCA CASE NO: 94-00113
PALM BEACH LT CASE NO: CO 92-12961 AJ

SUSAN KRAWZAK,

Appellant,

vs.

GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Appellee.
_____/

ANSWER BRIEF OF APPELLEE, GOVERNMENT EMPLOYEES INSURANCE COMPANY

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A. 1

Appellant assert that all of these cases are nothing more than "charades" as well?

Appellant asked the court to reverse and presumably remand this matter. If the court were to accept such argument, and remand the matter for trial with the jury being told of underinsured motorist coverage, the court would be conceding that the existence of insurance does indeed have an effect on a jury's determination regarding liability and damages.

With regard to the issue of an alleged agreement between Defendant, said argument, on its face, lacks any logical basis. First of all, Defendants in this case admitted liability and their interests were exactly the same as regards the damages of Plaintiff. To question whether they were acting "in concert" or "in collusion" seems to beg the question "Why wouldn't they act in concert or collusion?"

II. THE TRIAL COURT WAS WITHIN ITS DISCRETION IN REFUSING TO ADMIT EVIDENCE SUBMITTED BY PLAINTIFF.

Appellant alleges that the court abused its discretion in barring Plaintiff from testifying that she had never before claimed to have sustained a permanent injury. Actually, the transcript reveals that the evidence sought to be introduced by Appellant was her own opinion that before this accident, she never had a permanent injury, never said she had a permanent injury and never before filed a lawsuit or made a workers compensation claim for permanent injuries. (T. 276-281)

It is well settled that in order to preserve the record for appellate purposes, evidence ruled inadmissible must be proffered. At no time did Appellant proffer testimony regarding the subject evidence. Rather, her attorney merely argued this during a Motion in Limine hearing before the court prior to jury selection. Without such proffer, this court is precluded from ruling on this issue.

Appellant also argues that the court abused its discretion in refusing to admit the testimony of Jennifer Wiggs. Ms. Wiggs' testimony was proffered and would indicate that per diem employees at the hospital may work more than one day a week. Additionally, she was to testify as to the fact that the hospital would discharge an employee who could not come back to work after a six (6) month leave of absence.

The court sustained objections to such testimony on grounds of relevancy and cumulativeness. The Plaintiff herself testified as to how much she worked. Additionally, her personnel records including a ledger card reflecting how many days she worked was indeed stipulated to and admitted into evidence. Thus, testimony on this issue is purely and simply cumulative and unnecessary.

With regard to the issue of the hospital's policy, Plaintiff's contention was that she could not return to work after six (6) months because of physical restrictions as opposed to any type of hospital policy. Therefore, such testimony from Ms. Wiggs was clearly irrelevant.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX 33156, WEST PALM BEACH, FL 33402

SUSAN KRAWZAK,

Appellant,

vs.

GOVERNMENT EMPLOYEES INSURANCE COMPANY, and CANDACE LYN LIPPINCOTT,

Appellees.
_____/

4th DCA Case No. 94-1056
94-0113

L.T. Case No. CL 92 12961 AJ

APPEAL FROM THE FIFTEENTH JUDICIAL CIRCUIT
The Honorable Harold Cohen, Presiding

ANSWER BRIEF OF THE APPELLEE CANDACE LYN LIPPINCOTT

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A.4

ISSUE II

THE TRIAL COURT PROPERLY REFUSED TO ADMIT EVIDENCE WHICH WAS CUMULATIVE AND FOR WHICH NO PROPER PREDICATE WAS ESTABLISHED.

The Plaintiff's Claim of No Prior Permanent Injury Was Irrelevant

At trial, Krawzak intended to testify that she never suffered a permanent injury before the subject accident. The purpose of this testimony, as stated by Plaintiff's counsel, was to confirm the non-existence of an injury prior to the subject accident by proving that Krawzak never made a claim or filed a lawsuit for personal injuries prior to the subject accident. The trial court refused to allow this testimony.

The decision of the trial court on this matter was correct as the Plaintiff sought to introduce this testimony for an improper purpose. Susan Krawzak testified that she was involved in an automobile accident in February 1990, in which she suffered a sprained neck (T-349) and had a work related injury in February 1991. (T-350) Both of these injuries caused her to seek treatment prior to the May 1991 accident involving Lippincott. It was at this point, apparently, that Krawzak would have testified that she never filed a lawsuit for either injury, thereby bolstering her claim that she was not seriously or permanently injured. Of course, one could easily come to the conclusion that although Krawzak was injured in the previous work related incident, she did not file suit because it was covered by workers compensation, and therefore there was no suit to file.

The two cases cited by Krawzak provide very clear examples of when evidence of prior litigation is relevant and when it is not. Colvin v. Williams, 564 So. 2d 1249 (Fla. 4th DCA 1990); Zenchak v. Kaeufer, 612 So. 2d 725 (Fla. 4th DCA 1993). In Colvin, the defendant sought to introduce

the prior litigation involving the plaintiff in an effort to prove that the plaintiff was litigious. This court held that such evidence is inadmissible because it has no relevance stating:

> "While the question of prior injuries was relevant, this inquiry could have been conducted without reference to the use of permanent impairment ratings in connection with litigation."

Colvin, 564 So. 2d at 1251.

In Zenchak, however, this court made an exception to this rule and held that a plaintiff may be impeached on a claim of a present injury by being questioned about the permanent impairment rating previously assigned to the same injury in previous litigation. In that situation, the fact that a plaintiff previously had an injury which was deemed to be permanent and collected compensation for it is relevant to a new claim involving the same injury. It has a direct bearing on the believability of the plaintiff that the prior injury had completely resolved before the recent re-injury.

The key to understanding the difference is in the meaning of "relevance" under § 90.401, Fla. Stat. (1993) which states that relevant evidence is evidence tending to prove or disprove a material fact. The evidence that a plaintiff was involved in litigation previously, when offered to prove litigiousness, is inadmissible because the fact be proved is not material. Conversely, evidence of a prior lawsuit and permanent impairment rating, when offered to prove that a certain injury is pre-existing, is admissible because it tends to prove a material fact.

Simply applying the relevancy rule to the evidence offered by Krawzak shows why it isn't relevant. Krawzak offered evidence of no prior lawsuits in an effort to prove that she was never hurt before. While the fact to be proved is material, the evidence offered does not tend to prove it. The

filing or not filing of a lawsuit is not dependent solely on whether a person is hurt. A lawsuit will probably not be filed, for instance, if the tortfeasor has no insurance and no collectible assets. A lawsuit will not be filed if, as in the case of Krawzak, the injury was covered by workers compensation. Certainly the facts of liability play a key role in deciding whether to file a lawsuit since a person who is completely responsible for his own injury has no one to blame but himself. Finally, whether there is a possibility of collecting the judgment form a lawsuit plays a large part in the determination of whether to file a lawsuit. In short, the lack of past litigiousness is no indication of the lack of past injury, any more than past litigiousness is proof that the present claim is a fraud or exaggeration.

In each instance where a plaintiff would seek to introduce the type of evidence offered by Krawzak, the focus of the trial would immediately turn to the facts of liability, damages, causation, collectibility of the judgment, and defenses involved in the prior injury. This process will make these collateral matters more important than the injury itself and will divert the focus of the trial away from the issues at hand. The better practice is to allow the Plaintiff to testify, as she did, that she was not injured before. Admitting evidence that no claim was filed would only dilute the evidence by interjecting extraneous and irrelevant matters into the trial. The trial court properly refused to allow the testimony.

The Testimony of Jennifer Wiggs was Irrelevant and Cumulative

During the testimony of the Plaintiff, an issue arose concerning Krawzak's income prior to the subject accident. In her deposition, Krawzak

testified that she made between $30,000-$40,000 per year but at trial she admitted that her deposition testimony was incorrect and that the true amount was closer to $10,000.00. Obviously, the issue was whether Krawzak lost any ability to earn income in the future. As part of that discussion, there was also some discussion about whether Krawzak was a "full time" employee of Wellington Regional Hospital or a "full time per diem" employee. Regardless of the name of her employment status, the amount of Krawzak's income was not changed.

The Plaintiff sought to introduce the testimony of Jennifer Wiggs, a personnel assistant at Wellington Regional, who would have testified about what a "per diem" employee is and how much an employee with that status would be permitted to earn in a given period. Her testimony was not offered to clarify how much Krawzak actually made in 1990. The Defendant objected to the testimony as irrelevant but had no objection to the admission of the wage summary showing how much Krawzak made in the thirteen weeks prior to the subject accident. (T-827)

The issue was how much Krawzak made in 1990 and her lost ability to earn income in the future, yet the proffered testimony had no bearing on that issue. Instead, Wiggs would have testified only about what Krawzak could have made if she worked more or less than she did on the per diem contract. None of her testimony would have changed the actual income previously testified to by Krawzak. The testimony was obviously irrelevant to any issue being litigated and was only relevant to the definition of "per diem contract work," and issue which was, itself, collateral. There was no point to admitting the testimony of Wiggs.

In addition to the foregoing, it should be pointed out that since the

jury found that there was no permanent injury, Krawzak could not be awarded future lost earnings. Any error involved in not permitting the testimony of Wiggs as it related to future earning capacity was rendered moot when the jury made that decision.

Medical Records Offered Were Inadmissible as Cumulative Hearsay

Like the testimony of Wiggs, there was no point to admitting the medical records of Dr. Gula, Dr. Young or Dr. Purita because they were cumulative. It is an established rule that even if evidence is wrongfully excluded at trial, it is not reversible error if the evidence would have been cumulative. Sims v. Brown, 574 So. 2d 131 (Fla. 1991). As a result of this rule, even if the medical records should have been admitted, the failure to do so does not require a new trial.

Testimony from all of the physicians was presented at trial, either live or through their depositions. As Krawzak points out in her brief, Dr. Gula had no independent recollection of the events of Krawzak's treatment and had to read his records. If the records have been read in, why should they also be admitted into evidence? Doing so would certainly be cumulative and, as pointed out above, the failure to admit cumulative evidence is not error. A similar argument may be made with regard to the records of Dr. Young. In his testimony, Dr. Young states that he is referring to his notes when recounting the patient's history and continually refers to the "chart" and "report" when explaining the patient's course of treatment. (R - 166, 167, 168) Finally, records of Joseph Purita, M.D. were properly excluded because he testified from them and admitting them at trial would also be cumulative.