IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

SUPREME CT CASE # 86,434

4DCA CASE NO.: 94-693
PALM BEACH

L.T. CASE NO.: CL 92 12961 AJ

GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Petitioner,

vs.

SUSAN KRAWZAK,

Respondent.

_____/

PETITION FOR DISCRETIONARY REVIEW
Pursuant to 9.030(a)(2)(A)(vi) Fla. R. App. P.
(Certified Conflict)

INITIAL BRIEF ON THE MERITS OF THE PETITIONER GOVERNMENT EMPLOYEES INSURANCE COMPANY

Submitted by:

JAMES M. MUNSEY, ESQ.
Fla. Bar No. 441848

JAMES M. MUNSEY, P.A.
215 Fifth Street - #100A
West Palm Beach, FL 33401
407/832-3034

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Authorities:

DESIGNATIONS

References to the Record on Appeal will be designated as **(R nnn)** where **nnn** is the page number as shown in the Index to the Record on Appeal.

References to the Appendix attached to the Initial Brief will be designated as **(A nn)** where **nn** is the page number of the Appendix.

The Petitioner, **GOVERNMENT EMPLOYEES INSURANCE COMPANY**, will be referred to as **GEICO**.

STATEMENT OF THE CASE AND OF THE FACTS

Petitioner, GEICO, hereby adopts the Statement of the Case and of the Facts as set forth in Petitioner, Lippincott's Initial Brief and Merits with the following additions.

Testimony from treating physicians, Joseph Purita, Leon Abram and Ignacio Magana, revealed that none of them were provided with any history by the plaintiff regarding previous injuries, complaints and symptoms of injuries to the areas of the body for which they were treating her (T. 620, 596, 834, 841, 842).

Dr. Michael Zeide, who performed a compulsory physical examination on behalf of the defendant, provided testimony that plaintiff indeed suffered a permanent injury, but that it was not causally related to the subject automobile accident (T. 988-990).

SUMMARY OF ARGUMENT

During the pendency of this appeal, this Court issued the decision of Auto-Owners Ins. Co. v. Tompkins, 651 So.2d 89 (Fla. 1995), which disapproved the threshold requirement of a permanent injury before future economic damages could be awarded. At the time this matter was tried, the controlling law was set forth in Josephson v. Bowers, 595 So.2d 1045 (Fla. 4th DCA 1992).

At oral argument, appellees conceded that the matter must be returned to the trial court, but argued that, as the court ruled in Tompkins, the only issue to be tried was whether and to what extent plaintiff was entitled to recover future economic damages.

The Fourth District decision to return the matter for a trial on all issues, based on the fact that a records custodian's substantive testimony was excluded is erroneous. Jennifer Wiggs, a records custodian for plaintiff's employer, was precluded from testifying by the court in light of the fact that the records were themselves stipulated into evidence. The necessity of a records custodian to authenticate records which were already in evidence is clearly cumulative and unnecessary.

In conflict with the Fifth District Court Appeal ruling in Colford v. Braun Cadillac, Inc., 620 So.2d 780 (Fla. 5th DCA 1992), the Fourth disapproved of the procedure whereby the uninsured motorist carrier is shielded from the jury's knowledge and counsel for the uninsured motorist carrier acts as co-counsel for the tortfeasor, with consent of the tortfeasor. The court while expressing its view that no basis exists in the contract between

plaintiff and her carrier for UM benefits, nonetheless ignores the efficacy of precluding a jury from being influenced by the presence of insurance. Additionally, the court, without saying so, implicitly acknowledges that the presence of the insurance will indeed affect a jury's determination of damages.

The procedures set forth in Colford benefit not only the uninsured motorist carrier and tortfeasor, but cause no harm to the plaintiff.

ARGUMENT

ISSUE I

THE FOURTH DISTRICT COURT OF APPEAL IMPROPERLY ORDERED A NEW TRIAL ON LIABILITY AND DAMAGES WHERE THE ONLY ERROR COMMITTED BY THE TRIAL COURT PERTAINED TO FUTURE ECONOMIC DAMAGES.

At the time this matter was tried, the controlling precedent regarding recovery of future medical expenses and lost wages was set forth in the case of Josephson v. Bowers, 595 So.2d 1045 (Fla. 4th DCA 1992) and Fazzolari v. City of West Palm Beach, 608 So.2d 927 (Fla. 4th DCA 1992), review denied, 620 So.2d 760 (Fla. 1993). Indeed, this was still controlling law at the time the initial briefs were filed by the parties. However, during the period after the briefs were filed and before oral argument, the Supreme Court handed down its decision in Auto-Owners Ins. Co. v. Tompkins, 651 So.2d 89 (Fla. 1995). Tompkins disapproved the threshold requirement of a permanent injury before future economic damages could be awarded. At oral argument, defendants conceded that, in light of Tompkins, the case must be returned to the trial court for the sole purpose of a trial on future economic damages, if any. Petitioner's position was that the issue of permanency had been determined and need not be disturbed. In fact, this position was consistent with the court's ruling in Tompkins.

The Fourth District Court's combining the future economic damage issue with the error in excluding the testimony of Jennifer Wiggs (which will be addressed later in this memo) in order to support a decision granting a new trial on all issues is error.

ISSUE II

THE FOURTH DISTRICT DECISION THAT THE EXCLUSION OF TESTIMONY WAS AN ABUSE OF DISCRETION WAS ERRONEOUS WHERE THE WITNESS WAS NOT REVEALED UNTIL TRIAL, THE TESTIMONY WAS CUMULATIVE AND NOT RELEVANT TO ANY ISSUE AT TRIAL.

The trial court refused to admit the testimony of Jennifer Wiggs. Miss Wiggs was not listed on any party's witness list, rather, she was designated by plaintiff as the "records custodian" of the hospital where plaintiff was previously employed, Wellington Regional Medical Center. The proffered testimony of Ms. Wiggs indicates that she would have explained what a "per diem" employee was. As indicated by the Fourth District Court, the "personnel assistant, an independent witness," would explain plaintiff's pre-accident status.

First of all, plaintiff's employment records from Wellington Regional were stipulated into evidence. A records custodian was thus unnecessary to authenticate said records. These records included information regarding how often plaintiff worked and how much she earned. Additionally, plaintiff presented testimony as to how often she worked and how much she earned. Thus, the issues of how much she worked, how much she earned and her employment status was information already in evidence. Anything to be added by Miss Wiggs was simply cumulative.

Secondly, Miss Wiggs sole function as the records custodian was simply to authenticate records. To allow a party to list "records custodian" on its witness list with no name, and then

bring in a witness under the guise of being a "records custodian" to provide substantive testimony outside of the authentication of records would seem to be the type of gamesmanship that courts have been criticizing and chastising lawyers about for quite some time. Unless appellate courts allow the trial judge to use its own discretion in determining whether such a "surprise" witness should be allowed to testify, the efficacy of providing any type of witness list is severely impaired. See Florida Marine Enterprises v. Bailey, 632 So.2d 649 (Fla. 4th DCA 1994) and Binger v. King Pest Control, 401 So.2d 1310 (Fla. 1981). If Jennifer Wiggs was going to provide substantive testimony helpful to the plaintiff, shouldn't defendants be given the opportunity to know this beforehand and take discovery with regard to any relationship that may exist between a witness and a party? To force defense counsel to explore such relationship during testimony at trial in front of a jury, is simply unfair. The Fourth District Court ruling on this issue essentially rewards plaintiff's counsel for his failure to comply with the pretrial order in direct conflict with the court's previous decision of Pipkin v. Hamer 501 So.2d 1365 (Fla. 4th DCA 1987).

It should be pointed out that the Fourth District Court was in error to indicate that the record is devoid of any claim of "surprise" by the defense in objecting to Miss Wiggs' testimony. As indicated in the record (T. 754).

> "Your Honor, the matter I'd like to take up, I guess, is somewhat of a surprise. I don't believe it was on the schedule in terms of witnesses, but Mr. Asencio plans to put on the stand now the personnel records custodian from

Wellington Regional Hospital where the plaintiff was employed before this accident." (emphasis mine)

"The records have already been stipulated into evidence, her entire personnel file is in evidence."

Jennifer Wiggs' testimony would have been that the plaintiff worked as much as the personnel records indicate. This does nothing to bolster the credibility of the plaintiff. The records speak for themselves.

ISSUE III

THE TRIAL COURT PROPERLY PERMITTED GEICO TO WAIVE ITS RIGHT TO PARTICIPATE AT TRIAL WHERE IT WAS NOT REPRESENTED BY COUNSEL AND AGREED TO BE BOUND BY THE JUDGMENT.

Petitioner, GEICO, respectfully adopts the argument set forth by Petitioner, Lippincott, on this issue.

ISSUE IV

THE FINAL JUDGMENT SHOULD NOT BE REVERSED WHERE THE JURY INSTRUCTIONS ON THE AWARD OF MEDICAL EXPENSES WERE CLEAR AND UNAMBIGUOUS AND COULD NOT HAVE CONFUSED THE JURY.

Given the state of the law with regard to recovery of future economic damages in the absence of permanency at the time this matter was tried, the jury instruction could not have been any clearer. The trial court stated the following:

> "If the greater weight of the evidence does not support the claim of Susan Krawzak on the issue of permanency, you should award 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 incident in question. You shall consider the following elements of damage:
>
> Any earnings lost in the past, 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 of expense of surgery, hospitalization, medicine, therapy, rehabilitation for medical care and treatment necessarily or reasonably obtained by Susan Krawzak in the past or to be so obtained in the future."

The Fourth District Court was somewhat unsure as to whether or not the wording of this jury instruction indeed caused any confusion. It noted that the jury did not award the entire amount of past lost wages and medical bills. However, this could just as easily be attributable to the jury finding the defense argument persuasive that cost for surgery, etc., were not causally related

to the accident, but rather to a pre-existing condition. Likewise, the awarding of a portion of her lost wages representing six (6) months to a year of income immediately post-accident is consistent.

Certainly, in light of the Tompkins decision, the entire jury instruction regarding permanency and elements of damages will have to be redone as, regardless of whether there is a permanency, plaintiff is entitled to have a jury decide whether she should recover lost wages, loss of earning capacity, past medicals and future medicals.

CONCLUSION

The Fourth District Court of Appeal decision should be quashed and the case remanded with instructions to order a new trial as to future economic damages only. Indeed, the only error committed at the trial level, which could not have been corrected since the Tompkins decision had not been handed down, related to the question of future economic damages, which may now be recoverable by the plaintiff in the absence of a permanent injury.

Additionally, on re-trial, GEICO should be allowed to exclude itself from the trial in order to prevent prejudice to the tortfeasor.

CERTIFICATE OF SERVICE

I HEREBY CERTIFIED that a copy of the foregoing has been furnished by U.S. Mail to **DIEGO C. ASENCIO, ESQ.**, 777 S. Flagler Drive, 8th Floor, West Tower, West Palm Beach, FL 33401; **MARCIA K. LIPPINCOTT, ESQ.**, 1235 North Orange Avenue, Suite 201, Orlando, FL 32804; and to **BARD D. ROCKENBACH, ESQ.**, at Sellars, Supran, Cole, Marion & Bachi, PA, 1250 Northpoint Parkway, P.O. Box 3767, West Palm Beach, FL 33402-3767, this **30th** day of **October**, 1995.

James M. Munsey, PA
Flagler Court Bldg.
215 Fifth St., Suite 301A
West Palm Beach, FL 33401
Tel: 407 832-3034
Attorney for **Petitioner/GEICO**

By: _____
JAMES M. MUNSEY
Florida Bar No: 441848