IN THE SUPREME COURT OF FLORIDA

CASE NO: 89,366

District Court of Appeal,
4th District - No. 94-2318

ALLSTATE INSURANCE COMPANY,

FL BAR NO.: 436194

Petitioner,

vs.

MYRDA MANASSE,

Respondent.
_____/

INITIAL BRIEF OF PETITIONER, ALLSTATE INSURANCE COMPANY

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PREFACE

Petitioner, ALLSTATE INSURANCE COMPANY, will be referred to as "ALLSTATE", "Defendant", OK "Petitioner". Respondent, MYRDA MANASSE, will be referred to as "MANASSE", "Plaintiff", or "Respondent".

The following record citations will be used:

R - Record On Appeal

T1- Transcripts of Hearings of June 28, 1994 and July 28, 1994

T2- Trial transcripts of April 25th and April 26, 1994

A - Appendix

STATEMENT OF THE CASE AND FACTS

This case arises out of an automobile accident which occurred on August 22, 1992 in Palm Beach County. The primary issues addressed at the trial were the nature and extent of any injuries the Plaintiff sustained in the accident; whether the Plaintiff sustained a permanent injury; entitlement to past non-economic damages and to future economic and non-economic damages; and the effect on the Plaintiff's condition of other activities she engaged in, such as strenuous sporting activities and weightlifting, as well as a second automobile accident in April 1993. The Plaintiff presented evidence of neck and back pain dating from the August 22, 1992 accident, related a herniated lumbar disc and bulging cervical discs to that accident, and contended that future chiropractic care would be needed for pain relief. However, as is set forth below, conflicting evidence was presented to the jury as to all of the issues addressed at trial.

The Plaintiff testified that in the August 22, 1992 accident she did not hit anything inside the vehicle, but just shifted around. (T2. 37). She did not receive any medical treatment at the scene, nor did she ask for any. (T2. 37). She continued on to her mother's place of work, got money from her, and went shopping at a flea market. (T2. 8-9, 39). She then proceeded home and did her chores, which consisted of mopping and sweeping. (T2. 9, 20).

Although she claimed that she experienced pain from the day of the accident, she first sought treatment, in the form of chiropractic care, approximately a week later. (T2. 10, 38). Under the care of the chiropractor, Dr. Scott, her neck, shoulder, and headaches improved. (T2. 12, 52). After about six months, and before she was involved in a second accident in April 1993, she was discharged by Dr. Scott to home therapy. (T2. 18-19, 62-63). She did not begin having any radicular complaints of pain into her legs until early 1993, about four months after the August 1992 accident. (T2. 14, 53). She had experienced leg cramps, tingling, and ringing in her ears before the August 1992 accident. (T2. 54).

In 1992 and 1993 the Plaintiff played basketball and did weightlifting. (T2. 42-45, 50). At trial she testified that she had only played basketball one or two times and had only worked out with weights a couple of times after the 1992 accident. (T2. 42-45). However, she was impeached with her prior deposition in which she had testified that she had played basketball five to eight times and had continued to work out with weights once a week after the first accident. (T2. 42-45). The second accident occurred in April 1993, following which she did immediately go to the emergency room. (T2. 38, 41). When she applied for a job at McDonalds in June of 1993 she listed weightlifting as one of her activities. (T2. 50).

At the time of the first accident and thereafter the Plaintiff was employed at Kentucky Fried Chicken. (T2. 16-17).

After the first accident she was promoted to shift supervisor. (T2. 16-17). Her responsibilities as a shift supervisor include cleaning up, a little cooking, and being on her feet the entire time. (T2. 51-52).

After applying for the job at McDonalds in June 1993, she continued to work 40 hours a week at KFC, in addition to 20 hours at McDonalds. (T2. 47-48). She missed only one week of work after the accident. (T2. 50-51). There was no claim for past lost earnings submitted to the jury. (R. 49-51). She testified that her back pains have worsened due to her pregnancy. (T2. 55).

Radiologist Claude Naar, M.D., testified that he did cervical and lumbar MRIs of the Plaintiff on December 11, 1992. (T2. 63, 73). He found diffuse bulges at multiple levels on the cervical MRI and degenerative spondylosis. (T2. 81-83). The lumbar MRI showed an injury to L5-S1, which could have occurred any time in the past, (T2. 90-91). There were also bulges and desiccation at other levels in the lumbar spine. (T2. 92-93, 101). The desiccation at L5-S1 was advanced with loss of height, but no nerve root compression. (T2. 101). Many types of trauma can cause herniations, including sneezing, slip and fall, basketball, weightlifting, and jogging. (T2. 96, 109-110). Also, just because an MRI shows bulges or a herniation does not mean that these conditions are symptomatic. (T2. 85). An MRI does not tell the age or cause of a herniation. (T2. 110-111).

The chiropractor, Dr. Alan Scott, had not seen the Plaintiff since April 21, 1993. (T2. 112, 125). He testified that any further chiropractic care with regard to her disc "would only be palliative and supportive and temporary relief". (T2. 145). He estimated six to eight visits a year in the future at $65 to $80 a visit. (T2. 146-147). Her injuries were aggravated, and her pain increased, from the second accident. (T2. 163-164). She also sustained a new mid-thoracic injury. (T2. 166). Apart from pain relief, the continuation of care could help slow the spinal aging process by increasing flexibility. (T2. 153).

Dr. Scott acknowledged that other physicians, such as Dr. Stone and Dr. Saiontz, had indicated improvement of the Plaintiff's complaints as early as October 1992, and that her headaches, shoulder, and neck had mostly subsided as of December 1992. (T2. 167469). He also acknowledged that his findings regarding pain were inconsistent with those of other doctors for the same time period. (T2. 171-172).

His impairment rating of the Plaintiff was based largely on the films. (T2. 178). He also gave her an additional rating from the second accident of 5%, and acknowledged that another doctor had given her 7% from the second accident. (T2. 176-177).

Another of the Plaintiff's treating physicians, neurosurgeon Dr. Henry Saiontz, testified that in his opinion the disc at L5-S1 was protruding or bulging, but was not

herniated. (T2. 196-204). Surgery was not indicated. (T2. 204, 232). He would call this an early bulging condition which was not pressing on the nerves to cause sciatica. (T2. 206). Although there would continue to be arthritic changes these would not necessarily cause any problems. They may or may not. (T2. 207-208). The cervical MRI could be interpreted as normal. (T2. 225).

Dr. Saiontz further testified that disc abnormalities can result from many causes, including running and weightlifting. (T2. 226). A disc such as the Plaintiff's could be from a sports injury. (T2. 237). He also testified that disc bulges and herniations many times are asymptomatic. (T2. 227-228). The Plaintiff's were not pressing on any nerves and she was not making any radicular complaints. (T2. 231). He had not found a disability or placed any restrictions on her. (T2. 235). He acknowledged that an impairment rating is for litigation purposes, not treatment. (T2. 234).

The radiologist retained by Defendant, Dr. Henry Pevsner, testified that he had reviewed the cervical and lumbar MRIs. (T2. 238-239, 244). The cervical MRIs were normal. (T2. 259). Although there were degenerative changes and bulges demonstrated on the lumbar MRIS, he demonstrated that the discs still provided a good cushion, and that these type of changes simply occur earlier in some people than others. (T2. 268-269). Excess weight can be a factor. (T2. 270). The lumbar bulge is not touching any nerves. (T2. 273-274). Many people

have bulges on an MRI but no symptoms, and he could not see any reason that the Plaintiff's MRI findings would cause pain. (T2. 291-292). The bulge shown is into a space that does not contain any nerves. (T2. 296).

The last witness was the Defendant's IME physician, Dr. Melvin Young. (T2. 298, 302-303). He examined the Plaintiff on January 21, 1994. (T2. 302-303). She reported she had been working at KFC for the past two years, 45 or more hours a week, and that she was starting school to become a nursing assistant in February. (T2. 305). She was seven weeks pregnant. (T2. 313). She reported that the second accident had aggravated her problems. (T2. 312).

Dr. Young read the cervical MRI as normal. (T2. 324). He felt that the lumbar MRI did show a bulge or herniation at L5-S1, but that it did not touch any nerve roots or the spinal cord. (T2. 324). Fifteen percent of patients under the age of 25 to 30 have a herniation on MRI but no symptoms. (T2. 325). There were no objective findings on his exam or on the studies he reviewed to indicate that she had sustained a permanent injury from the August 1992 accident, or that would be consistent with her pain complaints. (T2. 329-330).

The jury entered a verdict finding that the Plaintiff sustained a permanent injury as a result of the August 1992 accident and that there was no comparative negligence on her part. The jury awarded the Plaintiff $2,000 for past non-

economic damages[1], $10,000 for future medical expenses, and zero dollars for future non-economic damages. (R. 49-51). The Plaintiff's attorney did not object to the form of the verdict or request that the jury be sent back to consider an award for future non-economic damages. ALLSTATE was entitled to a setoff from the verdict of the tortfeasor's policy limits of $10,000, which had been paid previously. (R. 56-59). After application of the setoff, judgment for the Plaintiff was entered in the amount of $2,000. (R. 56, 72).

It was not until the filing of her Motion for New Trial that the Plaintiff claimed the award of future medical expenses without an award for future non-economic damages was inconsistent. (R. 52-54). The Plaintiff also contended that the award for future damages was inadequate and contrary to the manifest weight of the evidence. (R. 52-54). The Plaintiff did not challenge the amount of the award of past non-economic damages. (R. 52-54).

ALLSTATE filed its Opposition to the Plaintiff's Motion for New Trial on the basis that there was evidentiary support for the jury to conclude that future medical care would be of benefit, but would not be necessary because of pain. Thus, the jury could reasonably award future medical expenses, but still disbelieve the Plaintiff's claims of continued pain and suffering. ALLSTATE also contended that the Plaintiff was required to raise the inconsistency in the verdict at the time

[1]No claim for past economic damages was submitted to the jury.

of trial, and provide the jury with an opportunity to correct the verdict before discharge, and that she could not make the argument for the first time in a Motion for New Trial. (R. 62-69).

The trial judge denied the Plaintiff's Motion for New Trial, stating in part that

> The jury could reasonably have concluded such paliative care was reasonable but that future pain and suffering was either not proven by the greater weight of the evidence or was not compensable . . . .

(R. 70). The court cited Sweet Paper Sales Corp. v. Feldman, 603 So.2d 109 (Fla. 3d DCA 1992), Odom v. Carney, 625 So.2d 850 (Fla. 4th DCA 1993), and Moorman v. American Safety Equipment, 594 So.2d 795 (Fla. 4th DCA 1992), rev. denied, 606 So.2d 1164 (Fla. 1992) in support of the order. (R. 70).

ALLSTATE had served an Offer of Judgment on the Plaintiff on March 14, 1994 pursuant to Section 768.79, Florida Statutes, in the amount of $4,001. (R. 21, 55). Based upon the Final Judgment in the amount of $2,000, ALLSTATE moved for determination of entitlement to attorneys' fees and costs pursuant to the Offer of Judgment. (R. 56-59). A hearing was held on June 28, 1994 before the Honorable Robert M. Gross. (T1. 1). At that time Judge Gross acknowledged that Defendant met the mathematical calculations to be entitled to attorneys' fees and costs, but stated that he still needed to determine whether the offer was made in good faith. (T1. 7-8). Over

objection of defense counsel, Judge Gross required him to meet the initial burden of demonstrating that the offer was in good faith. (T1. 8-9). Counsel advised the court as follows:

> What I would say, all discovery had been performed. We had an IME from Dr. Melvin Young who had indicated that there was no permanency in this case. We had a ten thousand dollar setoff in the tortfeasor. The Plaintiff had already received ten thousand dollars. And it was our position that four thousand dollars was certainly a good faith offer. We had made that offer in good faith. We left it open for the full thirty days. They did not accept that. We also had taken the Plaintiff's deposition. We found that there were also issues of another automobile accident afterwards and whether or not a jury was going to put, look at it as if, well, the automobile accident that was second, not this one which was the first one, could have caused some of her injuries if in fact they found the permanency. And I don't see where it can be anything but a good faith offer if the jury itself came back with a verdict less than what we had offered to pay the Plaintiff. (T1. 9).

In response, counsel for the Plaintiff did not dispute the basis for the offer as stated by Defendant, but rather set forth the reasons that the offer was not accepted, as follows:

> Judge, first of all, as to the second accident, the second accident was well after the first accident when an MRI had already been completed showing clear herniation from the low back. Her doctor had, primary physician, had discharged her with an impairment rating. All this occurred before the second accident and it was indicated in the deposition testimony and all of her medicals in the first case were fairly certain. You know, I think under this case, as I indicated, of an eighteen year old female Plaintiff, eleven hundred dollars property damage, no prior

> accidents, no evidence whatsoever was presented that she injured herself before, prior to the accident in question. And clearly I think the jury verdict is seeking ten thousand future medicals, no future pain and suffering, that type of injury I clearly think four thousand dollars -- fourteen thousand total for an eighteen year old with a badly herniated disc is not a good faith offer. (T1. 9-10).

At that point Judge Gross stated that he found that the offer was not in good faith and disallowed the entitlement to attorneys' fees and costs. (T1. 10-22, R. 71).

ALLSTATE thereafter moved for rehearing on the basis that the court had misconstrued Schmidt v. Fortner, 629 So.2d 1036 (Fla. 4th DCA 1993) in determining that Defendant's Offer of Judgment was not made in good faith. (A. 1-3). In the meantime Judge Gross' division was taken over by the Honorable Moses Baker. (T1. 14-25). At a hearing on July 28, 1994, Judge Baker declined to reconsider the ruling of Judge Gross and denied the Motion for Rehearing. (T1. 14-25, R. 73).

ALLSTATE timely appealed the denial of attorneys' fees and costs. (R. 74-77). The Plaintiff filed a Notice of Cross-Appeal and an Amended Notice of Cross-Appeal of the denial of her Motion for New Trial. (R. 80-84).

In a 2-1 decision, the Fourth District Court of Appeal reversed the judgment and remanded for a new trial on damages, including the issue of permanency and which would not be limited to non-economic damages. Allstate Insurance Company v. Manasse, 21 Fla. L. Weekly D2102 (Fla. 4th DCA September 25, 1996). The court found that the only testimony regarding the

need for future medical expense related to treatment for complaints of pain, and thus the jury could not logically award damages for the treatment, but not the pain requiring it. The court did not address in its opinion the testimony of Dr. Scott that future treatment would be needed for reasons other than pain relief, The court also held that where a jury determines that there was a permanent injury and that future medical treatment is needed, it is not logical for the jury to **award** nothing for future intangible damages. However, the court acknowledged that the current jury instructions do not tell the jury that they are required to award non-economic damages if they find a permanent injury and award economic damages. The majority agreed with Judge Klein's dissent that with the current instructions the jury would not be disregarding the law by finding a permanent injury and future medical expenses, but no future non-economic damages.

On the issue of inconsistency of the verdict such as to require an objection prior to discharge of the jury, the court found that the verdict was inadequate and an objection was not required.

Judge Klein dissented, citing the discretion that is afforded the trial judge in denying a Motion for New Trial, and distinguishing the decisions requiring a finding of past non-economic damages if past economic damages are awarded, from awards of future non-economic damages, which are far more

speculative. He also noted that the verdict in this case was permissible under the jury instructions given.

The majority certified two questions to the Supreme Court of Florida as being of great public importance, and Judge Klein agreed with the certification. The questions are:

> WHERE A JURY FINDS THAT A PLAINTIFF HAS SUSTAINED A PERMANENT INJURY AND AWARDS FUTURE MEDICAL EXPENSES, BUT AWARDS NO FUTURE INTANGIBLE DAMAGES, IS THE VERDICT INADEQUATE AS A MATTER OF LAW?
>
> IF SUCH A VERDICT REQUIRES A NEW TRIAL, MUST THE PLAINTIFF HAVE OBJECTED BEFORE THE DISCHARGE OF THE JURY?

21 Fla. L. Weekly at D2104.

Because the court reversed for a new trial, it did not reach the issue raised by ALLSTATE as to whether the trial court improperly failed to award attorneys' fees pursuant to the Offer of Judgment. 21 Fla. L. Weekly at D2104, fn.1. ALLSTATE timely sought to invoke the discretionary jurisdiction of this court.

SUMMARY OF ARGUMENT

POINT I

Where there was evidence in the record to support the jury's award of future medical expenses, but no future intangible damages, and where there was extensive conflicting evidence as to the existence of pain and suffering, it was proper for the trial judge to deny the Plaintiff's Motion for New Trial. Determination of the propriety of such a verdict must be made based on the facts of each case, and should not be determined inadequate as a matter of law. It is well established that under proper facts, an award of future medical expenses but no pain and suffering, may be supported by the evidence, and is not inadequate or inconsistent. The cases in which awards of economic damages without non-economic damages have been reversed generally involve past pain and suffering, and also involve fact scenarios where it is undisputed that the Plaintiff had pain and suffering, but no award whatsoever was made. These are distinguishable from the present facts. The cases most closely on point to the present facts have upheld awards of future economic damages but no future non-economic damages.

POINT II

Allstate does not concede that the verdict was inconsistent. However, should this court agree with the Fourth District that there is a facial inconsistency in the verdict,

the Plaintiff was required to raise the inconsistency prior to the jury's discharge, so that the jury would have an opportunity to correct the verdict. The failure to do so constitutes a waiver. This verdict is an inconsistent, rather than inadequate, verdict, if it is either. There was no dispute that there was ample evidence from with the jury could have found no permanent injury and no need for future medical expenses whatsoever. The only contention was that because the jury awarded future medical expenses it was required to also award future pain and suffering. It has repeatedly been recognized by Florida courts that a problem with the form of a verdict which could easily have been corrected at the time the verdict was rendered should not be permitted to deprive the opposing party of its verdict in allowing a second "bite at the apple".

POINT III

There was insufficient basis for the trial judge to determine that ALLSTATE's Offer of Judgment was not made in good faith pursuant to the standards set forth in Schmidt v. Fortner, 629 So.2d 1036 (Fla. 4th DCA 1993); Knealins v. Puleo, 675 So.2d 593 (Fla. 1996); and TGI Friday's, Inc. v. Dvorak, 663 So.2d 606 (Fla. 1995). The "good faith" requirement is established as long as there is some reasonable basis for the offer, and "lack of good faith" and "bad faith" necessarily include lack of intent to enter into a binding agreement if the

offer if accepted. In the present case counsel for ALLSTATE stated on the record factors supporting a reasonable basis for the amount of the offer, and there was nothing whatsoever to indicate that ALLSTATE did not intend to conclude a settlement or that the sole purpose of the offer was to create an entitlement to attorneys' fees. Notwithstanding the characterization as lack of good faith, it appears that the trial judge actually relied upon the reasonableness of rejection from the Plaintiff's standpoint in denying entitlement to attorneys' fees.

ARGUMENT

I. WHERE A JURY FINDS THAT A PLAINTIFF HAS SUSTAINED A PERMANENT INJURY AND AWARDS FUTURE MEDICAL EXPENSES, BUT AWARDS NO FUTURE INTANGIBLE DAMAGES, IS THE VERDICT INADEQUATE AS A MATTER OF LAW?

The test for determining whether a verdict is inadequate or against the manifest weight of the evidence, and thus whether the trial judge has abused his discretion in denying a Motion for New Trial, is that of "clear, obvious and indisputable" evidence. McNair v. Davis, 518 So.2d 416 (Fla. 2d DCA 1988); Perenic v. Castelli, 353 So.2d 1190 (Fla. 4th DCA 1977), cert. denied, 359 So.2d 1211 (Fla. 1978). If there is evidence in the record below to support the jury's decision, it is reversible error to grant a new trial. State Farm Mutual Automobile Insurance Company v. Brooks, 657 So.2d 17, 19 (Fla. 3d DCA 1995).

Determination of sufficiency of the evidence to support an award on an item of damage in a particular case must necessarily be made based upon the evidence admitted in that case, and cannot be determined as a matter of law. The holding of the majority of the Fourth District that there is an automatic entitlement to an award of future intangible damages if there is a finding of permanent injury and award of future medical expenses is contrary to well established case law that these findings must be determined based upon the evidence in each individual case. A finding of permanent injury and that

future medical expenses are reasonably certain to be incurred does not necessarily equate with future pain and suffering or other items of intangible damage.

Simpson v. Stone, 662 So.2d 959 (Fla. 5th DCA 1995), is substantially similar to the present case. The jury found that the plaintiff suffered a permanent injury and awarded $5,400 for future medical expenses, but nothing for non-economic damages. The court held that

> Given the limited and contested evidence presented regarding [the plaintiff's] expected future medical expenses, it cannot be said that a jury of reasonable men and women could not have reached the instant verdict.

Id. at 962. In a footnote to the above language, the court noted that a chiropractor had testified that the Plaintiff would require chiropractic care for the rest of her life, but she presented no evidence of having had treatment from January of 1991 until the time of trial in October 1993. Id. at 962, fn.2.

Thus, the evidence as to future treatment is substantially similar to the present case, where there was only limited chiropractic testimony about the need for future visits, and the plaintiff had not had any treatment for approximately a year prior to trial. It should be noted that there is additional evidence in the present case in the form of the chiropractor's testimony that future treatment would be for reasons unrelated to pain and suffering or other intangible

damages that apparently was not presented in Simpson. Further, in the present case there is ample testimony, as set forth above, that the plaintiff's radiographic findings of abnormalities in her discs would not necessarily be conditions which would cause pain and that any continued complaints of pain could be for reasons unrelated to the August 1992 accident, such as strenuous sporting and weightlifting activities, or the April 1993 accident.

It should be noted that the jury awarded the plaintiff a total of $10,000 over a period of forty years for future medical expenses, which is $250 per year. At the stated rate of Dr. Scott, $65 to $80 per visit, the jury awarded funds for only 3 to 4 visits a year, or half of the 6 to 8 to which Dr. Scott testified the plaintiff would need. Therefore, the jury could well have concluded that in addition to the treatment to assist with slowing degeneration and maintaining the flexibility of the spine, the Plaintiff would need other treatments for pain, but that the continuation of the pain was not related to the August 1992 accident. Also, given the minimal number of visits per year, the jury would not necessarily have to award damages for "inconvenience", particularly where no evidence was presented in that regard.

The cases relied upon by the majority of the Fourth District and/or the Respondent are distinguishable as involving situations where the evidence was "clear, obvious, and indisputable" as to pain and suffering, and generally involved

a failure to award any damages for past pain and suffering. For instance, in Aymes v. Automobile Insurance Company of Hartford, Connecticut, 658 So.2d 1246 (Fla. 4th DCA 1995), the plaintiff suffered three broken ribs, a broken clavicle, facial lacerations and scarring and a severed ligament in her finger, but was awarded medical expenses only and nothing for pain and suffering. In Daigneault v. Gache, 624 So.2d 818 (Fla. 4th DCA 1993), rev. denied, 634 So.2d 623 (Fla. 1994), the court held that denial of appellant's Motion for New Trial was an abuse of discretion where the jury awarded appellant only the exact amount of her medical expenses, but nothing for past pain and suffering, in light of "uncontradicted evidence that the injured plaintiff suffered at least some pain from the injury." Id. at 819. In Cowen v. Thornton, 621 So.2d 684 (Fla. 2d DCA 1993), rev. denied, 634 So.2d 629 (Fla. 1994), the court held that a new trial was mandated in light of substantial amounts of economic damages and that the defendants did not challenge the amount of damages, but only the fact that they had caused the damages, and where the plaintiff received no award whatsoever for either economic or non-economic damages, past or future. In Harrison v. Housing Resources Management, Inc., 588 So.2d 64 (Fla. 1st DCA 1991), no pain and suffering damages were awarded where the plaintiff was sexually assaulted at knifepoint. In Sears Roebuck & Co. v. Genovese, 568 So.2d 466 (Fla. 4th DCA 1990), the plaintiff had TMJ surgery but received no pain and suffering damages. In Watson v. Builders Square,

Inc., 563 So.2d 721 (Fla. 4th DCA 1990), the plaintiff had back surgery from being hit by steel studs, but was awarded only medical expenses, and no pain and suffering whatsoever. In Massev v. Netschke, 504 So.2d 1376 (Fla. 4th DCA 1987), the minor plaintiff suffered a fracture to his thoracic spine, four fractures of his right arm and wrist, a broken toe and contusions and abrasions, and was hospitalized twice for various procedures, but was awarded no damages whatsoever, economic or non-economic, despite a finding of liability against defendant. Finally, in Thornburq v. Pursell, 446 So.2d 713 (Fla. 2d DCA 1984), a child's two front teeth were knocked out but he was given past medical expenses only.

The factual distinctions between the above-referenced cases and the present case are readily apparent. Not only was the evidence in the present case in direct conflict as to whether the Plaintiff would experience any future pain and suffering, or if so, whether such pain and suffering or other non-economic damages were related to the 1992 accident, but in addition the Plaintiff received only $2,000 for past pain and suffering, the reasonableness of which was not contested.

It should be noted that in Mason v. District Board of Trustees of Broward Community College, 644 So.2d 160 (Fla. 4th DCA 1994) the plaintiff contended that in view of a $9,000 award for past medical expenses and lost earnings, the jury was required to award damages for future medical expenses and lost earnings and future pain and suffering. The jury had also not

awarded any past pain and suffering. The only error the court found was the lack of award for damages for past pain and suffering on the basis that it was undisputed that all of the treatment was for the relief of pain. This is contrary to the present case, where past pain and suffering was awarded and there was testimony that the future treatment would be for other purposes as well. Significantly, the court found that "the nature of future damages is such that much discretion must be afforded to the finder of fact." Id. at 161. Based on conflicting evidence, the court concluded that the jury could properly have declined to award future damages.

In Butte v. Hushes, 521 So.2d 280 (Fla. 2d DCA 1988), the court found inadequate and inconsistent a verdict which awarded $9,000 for future medical expenses but $0 for future pain and suffering. There is no reference to any dispute in the evidence concerning future pain and suffering or of any alternative basis for an award of future medical expenses, contrary to the facts of the present case.

The cases most closely on point to the present facts hold that an award of future medical expenses, but no future pain and suffering, is neither inadequate nor inconsistent. In Sweet Paper Sales Corp. v. Feldman, 603 So.2d 109 (Fla. 3d DCA 1992), the jury awarded future medical expenses and lost earnings ability of $5,000, and awarded past pain and suffering, but no future pain and suffering. The plaintiff claimed that this was an inconsistent verdict. The appellate

court disagreed, concluding that "the jury was in no way precluded from concluding that whatever pain was related to plaintiff's accident injuries had ended by the time of trial." Id. at 110.

Where evidence of pain and suffering is in conflict, it is for the jury to determine what they believe, and this is particularly true as to future damages due to their speculative nature. State Farm Automobile Insurance Companv v. Brooks, 657 So.2d at 18; Dyes v. Spick, 606 So.2d 700, 704 (Fla. 1st DCA 1992). It is well established that upon the proper facts a jury may award damages for medical expenses, but decline to award any amounts for pain and suffering. City of Miami v. Smith, 165 So.2d 748 (Fla. 1964); Fitzgerald v. Molle-Teeters, 520 So.2d 645 (Fla. 2d DCA 1988), rev. denied, 529 So.2d 694 (Fla. 1988); White v. Martinez 359 So.2d 7 (Fla. 3d DCA 1978). In Smith the plaintiff was awarded the exact amount of medical expenses, and his motion for new trial on the ground that no allowance was made for pain and suffering was denied. The court found

> In the instant case the jurors may well have concluded that although there was in fact no compensable pain and suffering, the petitioner, nevertheless, had incurred medical expense and was to that extent entitled to recover.

Id. at 750. In Fitzgerald the court came to the same conclusion, citing the Smith case. Id. at 648. Both Fitzgerald and White recognized that the jury may disbelieve a

plaintiff's testimony regarding pain and suffering, or **may** attribute it to other causes.

Accordingly, ALLSTATE respectfully requests that the court answer the first certified question in the negative.

11. IF SUCH A VERDICT REQUIRES A NEW TRIAL, MUST THE PLAINTIFF HAVE OBJECTED BEFORE THE DISCHARGE OF THE JURY?

If the court is in agreement with ALLSTATE's position on Point I, the issue of waiver by failure to raise any inconsistency at the time of the verdict is moot. However, if the court accepts the position of the Fourth District majority opinion that as a matter of law a finding by the jury of permanent injury and award of future medical expenses requires an award of future non-economic damages, it is apparent that failure to award future non-economic damages constitutes an inconsistency on the face of the verdict which must be raised before the jury is discharged, or it is waived. ALLSTATE would submit that it cannot logically be supported, on the one hand, that the jury must award future pain and suffering if it finds permanency and awards future medical expenses, and, on the other hand, that such a verdict does not constitute an inconsistency on the face of the verdict, but is merely "inadequate" as to the award of future medical expenses.

It is significant that MANASSE does not dispute that the jury had ample evidence from which it could have found no permanent injury, and no need for future medical expenses whatsoever. The contention was, rather, because the jury awarded future medical expenses it was required to also award future pain and suffering. This appears to be the basis for the Fourth District's majority decision as well. Clearly, this is an inconsistency in the verdict, and not an inadequacy.

Cf., Kirkland v. Allstate Ins. Co., 655 So.2d 106 (Fla. 1st DCA 1995) (where no award of any future damages, claim was one of inadequacy of verdict, not inconsistency).

Numerous Florida appellate decisions have recognized that inconsistencies in the form of a verdict which are not of a constitutional or fundamental character must be brought to the attention of the court at the time the verdict is returned and an opportunity provided for the jury to correct the verdict. Sweet Paper Sales Corp. v. Feldman, 603 So.2d 109 (Fla. 3d DCA 1992); Robbins v. Graham, 404 So.2d 769 (Fla. 4th DCA 1981); Atlantic Coast Line R. Co. v. Price, 46 So.2d 481 (Fla. 1950); Lindsuist v. Covert, 279 So.2d 44 (Fla. 4th DCA 1973); Grossman v. Sea Air Towers, Ltd., 513 So.2d 686 (Fla. 3d DCA 1987), rev. denied, 520 So.2d 584 (Fla. 1988); Gould v. National Bank of Florida, 421 So.2d 798 (Fla. 3d DCA 1982).

The Feldman case is particularly on point where the same contention was made there as here, that an award for future economic damages, but nothing for future pain and suffering, were inconsistent. Although, as indicated in Point I above, the court found that the verdict was not inconsistent, the court also stated

> Further, any inconsistency problem appellant now claims was obvious when the verdicts were returned and could have been corrected or preserved for review by additional instructions or a special verdict form. Appellee's failure to object to the verdict -- on issues not of a constitutional or fundamental character -- constituted a waiver.

Id. at 110.

Another case on point is Southeastern Income Properties v. Terrell, 587 So.2d 670 (Fla. 5th DCA 1991). That case involved an inconsistency in a jury verdict where the jury had awarded future lost earnings but failed to award past lost earnings. The inconsistency was found to have been waived on appeal where the appellant had not brought it to the attention of the Court at the time that the verdict was rendered, the Court finding that the omission could have been easily cured if it had been timely raised.

Similarly, as the Court found in Price, 46 So. 2d at 43:

> Although the form of the verdict was imperfect when the jury made it apply where there was a finding against one plaintiff and for the others, still we think their intent was plain, and this, after all, is the test. No objection was made at the time the verdict was presented, and we understand it did not occur to court or counsel that there was any irregularity until after the jury had dispersed. In such circumstances exception to the form was waived. (Citation omitted).

And in Lindquist, 279 So.2d at 45, in holding that an inconsistency in a verdict was waived where it was not called to the trial court's attention until motions for new trial were filed, the court recognized:

> Certainly this court does not approve the creation of technical barriers to appellate review. At the same time, however, there would be very little fairness in reversing the plaintiff's judgment because of an inconsistency in the verdict which could have been corrected in virtually no time at all by resubmission of the cause to the

> jury had either of the appellants raised the matter before the jury was discharged. (Citations omitted).

See also Grossman, 513 So.2d at 689 ("failure to object to the obvious inconsistency in the jury verdict constituted a waiver"); Gould, 421 So.2d at 802 (where inconsistencies were obvious when verdicts were returned and could have been corrected, failure to object on issues not of constitutional or fundamental character constituted a waiver of the defects). It was also acknowledged that any defect in a verdict form is waived by the failure to object in Shofner v. Giles, 579 So.2d 861 (Fla. 4th DCA 1991).

Another similar situation arose in Hendelman v. Lion Countrv Safari, Inc., 609 So.2d 766 (Fla. 4th DCA 1992), rev. dism., 618 So.2d 209 (Fla. 1993). The jury awarded nothing for past pain and suffering, when it was undisputed that the minor plaintiff had sustained such damages, and awarded $1,000 for future pain and suffering, and total damages of $1,000. As Judge Dell said in his special concurrence:

> Based on the record in this case, an award of future damages without a finding of past damages was facially and internally inconsistent. Therefore, if appellant had informed the trial court of the jury's error before the court dismissed the jury, the jury's intent could have been ascertained and the verdict corrected. On the other hand, if the jury persisted in its determination that appellant had sustained no past damages, the court would have had a basis for a new trial. This court has consistently held that a party's failure to object or otherwise inform the court of an inconsistent verdict before the jury is dismissed waives the inconsistency

> in the verdict as a point on appeal. [citations omitted] It follows that a party may not circumvent these cases by later arguing the verdict is inadequate or contrary to the manifest weight of the evidence. It also seems logical that in most cases an inconsistent verdict would be either inadequate or contrary to the manifest weight of the evidence.

Id. at 766-767. The special concurrence specifically distinguished two of the cases relied upon below by MANASSE, Massey v. Netschke, 504 So.2d 1376 (Fla. 4th DCA 1987), and Cowart v. Kendall United Methodist Church, 476 So.2d 289 (Fla. 3d DCA 1985). (See, Anstead, J., dissent in Hendelman.)

In the present case, assuming there was any inconsistency in the verdict, (which ALLSTATE does not concede), it could have been corrected very simply by sending the jury back for further deliberations with an instruction that if they awarded future medical expenses they were also required to award an amount for future pain and suffering. As the court said in Moorman v. American Safety Equipment, 594 So.2d 795, 799-800 (Fla. 4th DCA 1992), rev. denied, 606 So.2d 1164 (Fla. 1992):

> It is quite basic that objections as to the form of the verdict or to inconsistent verdicts must be made while the jury is still available to correct them. . . .[T]he importance of the right to trial by jury implicates a strong deference to a jury's decision, requiring that its verdict be sustained if at all possible. Moreover, the societal interest in furnishing only a single occasion for the trial of civil disputes would be entirely undone by the granting of second trials for reasons which could have been addressed at the first.
>
> ...

> Here, there are compelling reasons not to excuse a previous failure to speak out when the original jury itself could have corrected the supposed error. They are found, as we have already said, in the sanctity of a jury verdict and society's interest in avoiding repeat trials for the same dispute. Verdict inconsistencies which could have been corrected while the jury was still available are simply not important enough to bypass the ordinary finality attached to their decision.

See also Odom v. Carney, 625 So.2d 850, 851, fn.1 (Fla. 4th DCA 1993); Butte v. Hughes, 521 So.2d 280 (Fla. 2d DCA 1988).

There is no apparent reason why MANASSE's counsel could not have raised the same issues of inconsistency when the verdict was returned that were raised in the Motion for New Trial six days later. Possibly a tactical decision was made not to resubmit the element of future pain and suffering to the same jury which had awarded only $2,000 for past pain and suffering. It is also significant that the Plaintiff's counsel in the Motion for New Trial refers to the verdict as not only inadequate, but inconsistent. As the court said in Keller Industries, Inc. v. Morgart, 412 So.2d 950 (Fla. 5th DCA 1982):

> While we agree with appellant that there was error regarding the inconsistent interrogatory verdicts, we cannot reverse the judgment. The fault (failure to timely raise inconsistent verdict] should not be laid upon the trial judge; rather it must be placed upon the . . . trial attorney who led the court into error by approving, or failing to object to, the form of the verdict before it was submitted to the jury. Trial counsel also failed to bring the inconsistent verdict to the attention of the trial court before the jury was discharged thus preventing the timely correction of the problem by the trial

> judge. For all we know . . . trial counsel intentionally, for tactical reasons, chose not to bring the problem to the court's attention.

In Simpson v. Stone, 662 So.2d 959 (Fla. 5th DCA 1995) the court, quoting from Cowen v. Thornton, 621 So.2d at 684, rev. denied, 634 So.2d 629 (Fla. 1994), found that although an award of future medical expenses without an award of future pain and suffering was an inconsistent verdict, since existing case law (apparently referring to 1993 or the earlier time of the trial in the Cowen case) was not clear as to the necessity for an objection, the objection was essentially excused. The court also noted the lack of objection by the trial court or defense counsel, the necessity of which was criticized by the special concurrence.

It is submitted that any perceived lack of clarity based on Cowen, was certainly no longer present as to Simpson, given that the Cowen decision had been rendered. Certainly, it was no longer present at the time of the trial in the instant case. As set forth above, there were numerous decisions, even prior to Cowen and Simpson, (the opinion in the latter case having been issued after the trial in this case), which held that in substantially similar circumstances, the verdict was considered inconsistent, and a contemporaneous objection was required. The requirement of a contemporaneous objection should not be excused in the present case.

ALLSTATE would respectfully request that the court answer the second certified question in the affirmative.

111. WHETHER THE TRIAL JUDGE ERRED IN DETERMINING THAT ALLSTATE'S OFFER OF JUDGMENT WAS NOT MADE IN GOOD FAITH AND DENYING ENTITLEMENT TO ATTORNEYS' FEES PURSUANT TO ALLSTATE'S OFFER OF JUDGMENT.

If this court reverses and the final judgment for the Plaintiff in the amount of $2,000 is upheld, ALLSTATE would request that the court review the denial of its entitlement to attorneys' fees pursuant to its Offer of Judgment. The issue was not reached by the Fourth District in light of the reversal of the denial of the Plaintiff's Motion for New Trial, but needs to be determined if this court reverses the Fourth District.

The court held in Schmidt v. Fortner, 629 So.2d 1036 (Fla. 4th DCA 1993), that once the mathematical calculations of Section 768.79, Florida Statutes, were met, the offering party was entitled to attorneys' fees and costs unless the offer was not made in good faith. It is respectfully submitted that the trial judge erred in his application of Schmidt in the present case in determining that ALLSTATE'S offer was not made in good faith. The trial judge also erred in placing the burden on ALLSTATE to establish good faith, rather than placing the burden on MANASSE to prove absence of good faith.

The Schmidt court addressed the good faith requirement in considerable detail. Initially, the court stated as follows:

> As can be seen from the court's explanation, its basis for denying attorney's fees was that the plaintiffs lacked "reasonably reliable" evidence to

> support the amount of damages sought in their demand for judgement. We do not understand the good faith requirement of section 768.79(7)(a), however, to demand that an offeror necessarily possess, at the time he makes an offer or demand under the statute, the kind or quantum of evidence needed to support a judgment. *The* ***obligation of good faith merely insists that the offeror have some reasonable foundation on which to base an offer.***

Id. at 1039 (emphasis added).

The court further considered as part and parcel of a "bad faith" offer the lack of an actual intent to settle the case at the figure offered. As the court said:

> [B]oth the absence of good faith and the presence of bad faith reasonably seem to us to include not intending to settle the case at the figure offered or demanded. Making an offer without any intent to conclude a binding agreement seems to us the essence of both "not in good faith" and "bad faith".
>
> A mere belief that the figure offered or demanded will not be accepted, on the other hand, does not necessarily suggest to us either the absence of good faith or the presence of bad faith -- at least where the offeror fully intends to conclude a settlement if the offer or demand is accepted as made, and the amount of the offer or demand is not so widely inconsistent with the known facts of the case as to suggest on its face the sole purpose of creating a right to fees if it is not accepted.

Id. at 1040, fn. 5.

Applying the criteria set forth in Schmidt, it is apparent that ALLSTATE'S offer was made in good faith. Counsel stated, as set forth above in the Statement of the Case and Facts, that there was "reasonable foundation" for the offer, and there is

nothing in the record to suggest that ALLSTATE was unwilling to conclude a settlement if the offer was accepted. Nothing in the amount of the offer suggests that it was made for the sole purpose of setting up a later entitlement to fees.

Despite the court's characterization of the determination as pertaining to "good faith", it is apparent from the record that the court actually looked at reasonableness of rejection of the offer. This is improper in determining entitlement to fees. Knealins v. Puleo, 675 So.2d 593, 595 (Fla. 1996); TGI Friday's, Inc. v. Dvorak, 663 So.2d 606 (Fla. 1995); Government Employees Insurance Company v. Thompson, 641 So.2d 189 (Fla. 2d DCA 1994). The factors addressed by counsel for Plaintiff, on which the trial judge apparently relied in determining the lack of good faith, related to his opinion of the merit of the claim and evaluation of the questions of fact and law at issue. These factors have been specifically enumerated by this court and the Schmidt court as inappropriate to consider in determining entitlement to fees, but rather should relate only to the amount of fees awarded. Knealing; Dvorak.

Respondent's argument below was that ALLSTATE in making its offer had to accept the truth of all of the evidence and expected testimony in the case favorable to the Plaintiff, in order to meet the standard of good faith. Significantly, Respondent does not dispute that there was in fact evidence anticipated to be presented at trial of the favorable IME, and a second accident which had caused and/or exacerbated injuries,

nor does Respondent dispute the amount of anticipated setoffs. Respondent apparently is arguing that a party making an offer of judgment cannot weigh the probabilities of a jury accepting or rejecting conflicting evidence, which is a necessary part of settlement evaluation. That Respondent may have reached a different conclusion -- that a jury would accept her testimony and treating physicians' opinions regarding the nature and extent of her injury from this accident without question -- and therefore declined to accept the offer, has no bearing on ALLSTATE's good faith in making the offer. As the court said in Schmidt, there just needs to be some reasonable basis in the record for the amount of the offer. However, there is no requirement to show that the offer is reasonable from the standpoint of the offeree. Knealing; Dvorak; Schmidt. In the present case there was extensive conflicting evidence on causation, permanency, and extent of pain and limitations of which the Plaintiff complained.

Finally, the trial judge improperly placed the burden on ALLSTATE to establish the "good faith" requirement of the offer. The court held in Schmidt that "the legislature intended to place the burden on the offeree to prove the absence of good faith" (Id. at 1041, fn. 6.) Here, the Respondent's counsel did not dispute the factors enumerated by ALLSTATE as the basis for the offer, but only set forth their own view of the case as to the factors that the jury would look at instead of those relied on by ALLSTATE. There was nothing

at all to suggest that ALLSTATE was unwilling to actually conclude a settlement for the figure offered. This record is insufficient to show that the Offer of Judgment by ALLSTATE was not made in good faith.

ALLSTATE would respectfully request that this court reverse the trial court's denial of entitlement to attorneys' fees and remand for further proceedings.

CONCLUSION

The decision of the Fourth District Court of Appeal should be reversed, and the cause remanded for determination of the amount of trial and appellate attorneys' fees to which ALLSTATE is entitled.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail this 22d day of January, 1997 to:

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By_____
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