ORIGINAL

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

AUTO BUILDERS SOUTH FLORIDA, INC., a Florida corporation,

Petitioner,

v.

DANIEL M. BUCCI,

Respondent.

_____/

Supreme Court Case No: 90,534
4th DCA Case No: 95-4002

L.T. Case No: 93-5601 (04)
17th Judicial Circuit Court,
Broward County, Florida
Honorable Patricia W. Cocalis

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ANSWER BRIEF OF APPELLEE DANIEL M. BUCCI

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PREFACE

In this Brief, Appellant, Auto Builders South Florida, Inc., shall be referred to as "Auto Builders" or "Appellant." Appellee, Daniel M. Bucci, shall be referred to as "Bucci" or "Appellee." References to the record shall be identified by a parenthetical containing the "R" followed by the page number upon which the cited material appears, unless citation is directly from the trial transcript, which will be designated by "T."

I. APPELLEE'S STATEMENT OF THE CASE AND FACTS

This case comes to this Court from the Fourth District Court's decision found at Bucci v. Auto Builders of South Florida, 690 So. 2d 1387 (Fla. 4th DCA 1997). The Fourth District Court re-certified[1] two questions to this Court:

> 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?

As it had earlier decided in Allstate Ins. Co, v. Manasse, 68 1 So. 2d 779 (Fla. 4th DCA 1996), the Fourth District Court in Bucci answered the first (Manasse) question in the affirmative, agreeing that the jury's failure to award such future damages rendered the verdict inadequate as a matter of law. The Fourth District Court in Bucci also similarly answered the second (Manasse) question in the negative, finding the error preserved for review through the filing of Bucci's Motion for New Trial. Bucci, 690 So. 2d at 1388. There remains a question of whether this Court should grant jurisdiction based on the wording of the certified question(s) since Bucci's determination did not depend upon a finding of permanent injury.[2] The issue of liability was hotly contested. See e.g., T. 41-42, and Bucci's Initial brief at 9-12.

While the Fourth District Court's recitation of the facts initially appears sufficient, Bucci wishes to emphasize that it was rather clear to all parties and the judge that the jury was attempting

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[1] These two questions were previously certified in Allstate Ins. Co. v. Manasse, 681 So. 2d 779 (Fla. 4th DCA 1996), which remains pending before this Court.

[2] Since this matter did not involve an automobile, there was no threshold requirement to establish permanent injury. Accord Daigneault v. Gache, 624 So. 2d 818, 820 (Fla. 4th DCA 1993). While the concession by petitioner to permanency assists Bucci, the decision from the Fourth District Court does not depend upon that finding.

to (and actually did) improperly compromise the verdict:

The Jurors:	Dear Judge: (1) We want to award the Plaintiff money for his present medical expenses to date only. How do we fill out the form to reflect this? (2) How do we assign the percentage of negligence to arrive at the final medical expense amount?
* * *	
Defense Counsel:	I guess they want to give him money, also, and
The Court:	They want to make sure he gets a certain amount of money and they want to be able to do that by fixing the percentage of negligence, right?
Defense counsel:	Yes, that seems to be apparent.
The Court:	I think you're right, Mr. Reid, that seems to be what they want to do.

(T. 324, 325).[3]

The Fourth District Court of Appeals remanded this matter for "a new trial on both liability and damages." Bucci v, Auto Builders South Florida. Inc., 690 So.2d 1387, 1390 (Fla. 4th DCA 1997), and certified the above-mentioned questions to this Court.

II. SUMMARY OF THE ARGUMENT

These proceedings should be dismissed for lack of jurisdiction. This Court has postponed its determination on jurisdiction and it should decline to exercise jurisdiction, as the Fourth District

[3]With respect to future medicals, Bucci's experts divided them into three categories: pain management and therapy, chiropractic and medications. (T.T. 199). Since Bucci had a life expectancy of 45.8 years (T.T. 199-200), his expert in economics, David Williams, concluded that the future medical expenses would total $63 1,26 1 .00 (T.T. 199) which when reduced to present value totaled $98,485.00. (T.T. 201). Lastly, Bucci's orthopedic surgeon, Marc D. Golden, indicated that the Appellee would have ". . . days that are not going to be pain-free; there is going to be days that are going to be associated with pain and stiffness and he is going to have some limitation of what we would call his activities of daily living and that which may require treatment down the road." (Video Depo. Marc D. Golden, R. 529).

Court of Appeal did not technically pass upon the question it has certified to this Court. The question as phrased requires a finding of permanent injury, which - although true in this case - was not relevant nor determined by the Fourth District Court. The fact that this Court ordered briefs on the merits does not change the resulting need for dismissal where there is no jurisdiction.

Even if the Court reaches the merits, Bucci should prevail as the Fourth District Court correctly found, both in Bucci v. Auto Builders of South Florida, 690 So. 2d 1387 (Fla. 4th DCA 1997) and in Allstate Ins. Co. v. Manasse, 681 So. 2d 779 (Fla. 4th DCA 1996), that a verdict is inadequate as a matter of law where the jury awards future medical expenses, but awards no damages for past or future lost earnings or pain and suffering. The case law and legislative history support the decision of the Fourth District Court of Appeal. (consistent with Bucci's position)

Finally, as the case law throughout Florida provides, an objection to such an inadequate verdict is properly preserved by the filing of a Motion for New Trial.

III. ARGUMENT

A. This Case Should be Dismissed for Lack of Jurisdiction

This Court - having postponed its determination and directed that briefs on the merits be filed - should not invoke its discretionary authority and accept jurisdiction of this case. The certified question(s) presumes a finding of "permanent injury," which is (more applicable in automobile accidents and) not applicable to the facts of the case here, since the jury made na specific finding of "permanent injury" in its verdict. (R. 454-56).[4]

Rule 9.120(d) of the Florida Rules of Appellate Procedure provides that "[if jurisdiction is

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[4]For example, in Mason v. District Board of Broward College, 644 So. 2d 160 (Fla. 4th DCA 1994), a jury awarded the plaintiff all of his medical expenses, but awarded zero damages for past pain and suffering. Indeed, in this case, the court focused on the issue of past pain and suffering (as a basis) because the jury in which that case had not **made** a finding of permanency

invoked under rules 9.030(a)(2)(A)(v) or (a)(2)(A)(vi) [certification by the district courts to the Supreme Court], no briefs on jurisdiction shall be filed." Thus, under the Florida appellate rules, the fact of certification - even if the certification itself is invalid - sets the jurisdictional wheels in motion. However, while a district court certification may be sufficient to confer tentative jurisdiction on this Court and act as the procedural device which triggers the filing of briefs on the merits, the separate question of whether a decision "passes upon" a particular question and therefore whether the Court should retain jurisdiction, remains open to challenge See, e.g., Gee v. Seidman & Seidman, 653 So. 2d 384 (Fla. 1995); Susco Car Rental Systems v. Leonard, 112 So. 2d 832 (Fla. 1959).

In Gee, this Court initially accepted jurisdiction in a case in which the Third District had certified a question as one of great public importance. This Court later concluded, however, that it was without jurisdiction for the same reason that there is no jurisdiction here - the Third District had not passed upon the question certified:

> We find that review was improvidently granted in this case as the question certified by the district court does not reflect the issue actually ruled upon by the court
>
> * * *
>
> Under Article V, Section 3(b)(4) of the Florida Constitution, this Court has jurisdiction to review "any decision of a district court of appeal that passes upon a question certified by
>
> * * *
>
> We find that review was improvidently granted in this case as the question certified by the district court does not reflect the issue actually ruled upon by the court.

Gee, 653 So. 2d at 384 [underline in the original].

Accordingly, since the question as phrased was not passed upon, by the Fourth District Court of Appeals, this Court should decline

to accept jurisdiction, and dismiss this case.

B. A Verdict Is Inadequate as a Matter of Law Where a Jury Finds That a Plaintiff Has Sustained a Permanent Injury and Awards Future Medical Expenses, but Awards No Past or Future Intangible Damages.

If the Court finds that there is jurisdiction, this Court should either affirm the decision of the District Court of Appeal without needing to address the certified question(s), or, alternatively, should answer this first certified question in the affirmative. The jury awarded all of the past medicals which Bucci incurred and over 81% of his future medicals when valued at current dollars. Nevertheless, the jury awarded zero damages for past pain and suffering, as well as for future intangible damages. This was error. Allstate Ins. Co. v. Manasse, 681 So.2d 779 (Fla. 4th DCA) (rev. pending, case no. 89,366 (1997) ("Non-economic damages encompass not only pain and suffering, but a host of other intangibles, such as mental anguish, inconvenience, disability and physical impairment"); Daigneault v. Gache, 624 So.2d 818 (Fla. 4th DCA 1993) (The law is well settled when a jury verdict awards to an injured person only the exact amount of the medical expenses incurred and nothing for pain and suffering that it is an inadequate verdict as a matter of law when there is uncontradicted evidence that the injured plaintiff suffered at least some pain from the injury).[5] When the jury sent out its questions, it was clear that the jury was attempting to compromise the verdict - and the judge's and defense counsel's concessions in that regard re-confirm that fatal reality:

> Defense Counsel: I guess they want to give him money, also, and
>
> The Court: They want to make sure he gets a certain amount of money and they want to be able to do that by fixing the percentage of negligence, right?

[5]See also Watson v. Builders Sauare. Inc., 653 So.2d 721 (Fla. 4th DCA 1990); Gonzalez v. Westinghouse Elec. Corp., 463 So.2d 1229 (Fla. 4th DCA 1985); Skelly v. Hartford Cas. & Ins. Co., 445 So.2d 415 (Fla. 4th DCA 1984); Rodriguez v. Allgreen Corn., 242 So.2d 741 (Fla. 4th DCA 1971); and Pickel v. Rosen, 214 So.2d 730 (Fla. 3rd DCA 1968).

Defense counsel: Yes, that seems to be apparent.

The Court: I think you're right, Mr. Reid, that seems to be what they want to do. (T. 325). See also T. 324.

As both the general case law and specific discussion in the majority decisions in the Fourth District Court in both Bucci and Allstate - the two cases which certified the questions before this Court today - support Bucci and that this Court, if it accepts jurisdiction, should answer the first question in the affirmative.

In Bucci v. Auto Builders of South Florida, 690 So. 2d 1387 (Fla. 4th DCA 1997), it was evident that the jury was confused or otherwise was attempting to do something inconsistent with the law. Indeed, the jury wrote a note to the trial judge [that in essence [indicated] that the jury wanted to award Bucci money only for his present medical expenses to date. The jury found Auto Builders 20% negligent and Bucci 80% negligent for his injuries, awarding Bucci the present value of $20,000 in past medical expenses and $80,000 in future medical expenses, but did not award any past or future earnings or pain and suffering. Id. at 1388. The court analyzed Manasse and Mason. In ultimately determining that in Manasse, the court reversed a verdict in which the jury found that plaintiff sustained a permanent injury and awarded past noneconomic damage and future medical expenses, without awarding any future noneconomic damages. Manasse, 68 1 So. 2d at 780 (citing Mason). The court in Bucci found that the jury's failure to award Bucci past noneconomic damages, in light of its award of past medical expenses, renders its verdict inadequate as a matter of law. Bucci, 690 So. 2d at 1388.

Indeed, in Manasse, the jury awarded plaintiff $10,000 for future medical expenses, and $2,000 for past pain and suffering. The jury did not award any future noneconomic damages. After thorough discussion of its previous decision in Mason v. District Board of Trustees, 644 So. 2d 160

(Fla. 4th DCA 1994), the court stated that the jury's finding of past pain and suffering, and future medical expenses, made it illogical or unreasonable for the jury to have concluded that there would be zero future intangible damages associated with the permanent injury and future medical care. Manasse, 68 1 So. 2d at 781.

The court in Manasse discussed at [Mason v. District Board of Broward College, 644 So. 2d 160 (Fla. 4th DCA 1994)], which also supports Bucci's position. In Mason - where the jury made no specific finding of permanency - the court held that an award of medical expenses for treatment provided to relieve pain without a commensurate award for related pain and suffering is inadequate as a matter of law. The jury awarded the plaintiff damages for all of his past medical expenses, but awarded nothing for his past pain and suffering. In reversing the denial of plaintiffs Motion for Additur or New Trial, the court stated:

> The jury in the instant case found the negligence of appellee caused damages to appellant. It also found each party fifty percent negligent. The jury went on to award appellant all of his medical expenses, but awarded appellant zero damages for past pain and suffering. In a similar situation, this court held that such an award by a jury was inadeauate as a matter of law. See *Daigneault v. Gache*, 624 So.2d 8 18 (Fla. 4th DCA 1993), rev. *denied,* 634 So.2d 623 (Fla. 1994). In *Daigneault,* this court reasoned that since the jury found all of the injured party's medical expenses were necessary or reasonably obtained by appellant as a result of her injuries, it "logically follows that the jury had to believe that appellant suffered some degree of pain and discomfort as a result of her injuries."

Id. at 820.

Even more compelling, the Fifth District Court of Appeal went further in Simpson v. Stone, 662 So. 2d 959 (Fla 5th DCA) 1995), suggesting that defense counsel or the trial judge should not sit idly by when they can otherwise contribute to the avoidance of another trial. Adopting the concurring opinion of judge Altenbernd in Cowen v. Thorton, 62 1 So. 2d 684 (Fla. 2d DCA 1993), the court in Simnson wrote:

> In light of the existing case law, however, plaintiffs trial counsel had no reason to believe that a timely objection was necessary to challenge the inadequate verdict post trial. Especially when neither the trial judge nor defense counsel raised this problem before the jury was discharge, I do not believe it would be appropriate in this case to require the plaintiff to have objected to the verdict prior to the discharge of the jury.

Id. at 961.

Continuing with the line of cases supporting Bucci, the appellate court in Casper v. Melville Corp., 656 So. 2d 1354 (Fla. 4th DCA 1995) found a verdict inadequate as a matter of law where it awarded all of the medical expenses incurred to the alleviate the pain and suffering, but awarded nothing for the pain and suffering itself. Quoting from Daigneault v. Gache, 624 So. 2d 818 (Fla. 4th DCA 1993), the court reasoned:

> While the jury was free to disbelieve appellant's claim of pain and suffering, and was also at liberty to reject the testimony of her treating physician . . . the jury could not responsibly disbelieve appellant's claim of pain and still find that all of the medical treatment rendered ... to alleviate those complaints of pain was reasonable and necessary. Since the jury found that all of appellant's medical expenses . . . was for treatment necessarily and reasonably obtained by appellant as a result of her injuries, it logically follows the jury had to believe that appellant suffered some degree of pain and discomfort as a result of her injuries . . . [If was thus unreasonable for the jury to not have awarded the appellant some amount of her past physical pain and suffering. The verdict, which awarded zero for that element of damages, was therefore inadequate as a matter of law.

Id. at 1355, citing Daigneault, 624 So. 2d at 820. The jury verdict of zero dollars for past bodily injury, and pain and suffering was inadequate as a matter of law in light of the passenger's uncontroverted testimony of pain and suffering coupled with the jury finding that medical expenses were incurred by the passenger were both reasonable and necessary. Id.

The court in Casper similarly noted the obvious inadequacy, finding it inexplicable for the juries in both Daigneault and Mason to award damages for the injured seeking treatment because of pain, but refusing to award awarded damages for the pain itself. Casper, 656 So. 2d at 1355. See

also Daigneault, 624 So.2d at 820; Mason, 644 So.2d at 161.[6]

Similar support for Bucci is found in Butte v. Hughes, 521 So. 2d 280 (Fla. 2nd DCA 1988), also cited in Manasse. In Butte, the Second District reviewed the trial court's denial of the plaintiffs motion for new trial and for additur. The jury had found that the plaintiff sustained a permanent injury as a result of the accident, awarded $9,000 for future medical expenses, but returned a zero verdict on the plaintiff's pain and suffering and loss of consortium. The court, in reversing and remanding for a new trial, stated that "the jury's zero verdict for general damages was grossly inadequate and totally inconsistent with its finding of permanent injury and with its award of future medical expenses." Id. at 28 1

In Harrison v. Housing Resources Management, 588 So. 2d 64 (Fla. 1st DCA 1991), the court found that the jury's award of medical expenses for the tenant's and her daughter's psychological injuries caused when the tenant had been threatened with a knife, tied to her bed, and sexually assaulted by unknown assailant was wholly inconsistent with the jury's finding that the tenant and her daughter suffered no compensable pain and suffering. Id, at 66-67. The court's explanation is also analogously instructive in the case at bar:

> The jury's award of damages for the appellants' medical expenses demonstrates its acceptance of the appellants' psychological injuries, for their past medical expenses were incurred for psychological services and their claim for future care was based upon their anticipated need for more of those services. In our view, the jury's acceptance of the appellants' psychological injuries is wholly inconsistent with its finding that they endured no compensable pain and suffering.

Id. at 66-67. See also Een v. Rice, 637 So. 2d 331 (Fla. 2nd DCA 1994) (new trial on liability and necessary required where "the issue of liability in this case was hotly contested, as shown by the

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[6]The focus on Mason is significant, and again amplifies why this Court should dismiss for want of jurisdiction, as the jury there had similarly not made a "finding" of permanency (yet reversed for the plaintiff).

jury's verdict finding the appellant sixty percent negligent and the appellee forty per cent negligent")

Similarly, in Smith v. Turner, 585 So. 2d 395 (Fla. 5th DCA 1991), the court found that the jury verdict which awarded medical expenses to the plaintiff who complained of a back injury, but which awarded no money for pain and suffering required a new trial on all issues. Cf. Kirkland v., Allstate Ins. Co., 655 So. 2d 106 (Fla. 1st DCA 1995).

In Hartsfield v. Orlando Regional Medical Center. Inc., 522 So. 2d 66 (Fla. 5th DCA 1988), the jury awarded $20,000 to the injured victim, and zero dollars to his mother. The Court held that the existence of clear evidence of reasonably necessary future medical expenses precluded a zero verdict on the mother's claim.

The law supports Bucci's position, and thus, if this Court takes jurisdiction on the merits, it should either affirm, the decision of the Fourth District Court of Appeal or otherwise answer the first certified question in the affirmative.[7]

1. The Legislative History supports Bucci.

Although not a necessary step to rule in Bucci's favor, a review of the legislative history also supports affirmance of the District Court's decision.

The Tort Reform and Insurance Act of 1986, Chapter 86-160 laws of Florida attempted to provide guidance to courts with respect to their findings of adequacy concerning jury verdicts. The prefatory findings included the following:

> **WHEREAS,** the legislature desires to provide a rational basis for determining damages for non-economic losses which may be awarded in certain civil actions, recognizing that such non-economic losses should be fairly compensated and that the interests of the injured party should be balanced against the interests of society as a whole, in that the burden of compensating for such losses is ultimately born by all

[7]. The verdict in Bucci is most certainly inadequate, despite Auto Builders' wishes to the contrary. The verdict may also be inconsistant but that does not alter the results. Thus, the Fourth District Court of Appeal was correct in its application of the law to these facts.

persons, rather than by the tortfeasor alone. [underline supplied]

The body of the act also contains further findings, including, "the purpose of this act [is]. . . to ensure that injured persons recover reasonable damages. . . ." Id. Sec. 2. The legislature further demonstrated its desire to have courts closely review verdict awards when it stated "it is the intention of the legislature that awards of damages be subject to close scrutiny by the courts and that all such awards be adequate and not excessive. Section 768.74 (3), Fla.Stat. (1989) (emphasis added). Immediately thereafter, the statute set out five criteria to be applied by courts in determining the adequacy of verdicts by stating:

> In determining whether an award is excessive or inadequate in light of the facts and circumstances presented to the trier of fact and in determining the amount, if any, that such award exceeds a reasonable range of damages or is inadequate, the court shall consider the following criteria:
>
> a. Whether the amount awarded is indicative of prejudice, passion, or corruption on the part of the trier of fact;
>
> b. Whether it appears that the trier of fact ignored the evidence in reaching a verdict or misconceived the merits of. the case relating to the amounts of damages recoverable;
>
> c. Whether the trier of fact took improper elements of damages into account or arrived at the amount of damages by speculation and conjecture;
>
> d. Whether the amount awarded bears a reasonable relation to the amount of damages proved and the injury suffered; and
>
> e. Whether the amount awarded is supported by the evidence and is such that it could be adduced in a logical manner by reasonable persons.

Section 768.74 (5), Fla. Stat. (1989).

The record evidence in the case at bar does demonstrate an intention of the jury to compromise its verdict, in effect "ignoring the evidence in reaching a verdict" as set forth in "b." The case law cited above is consistent with this conclusion. Applying the other two relevant criteria -

"d" and "e," one can see that the award of medical expenses does not "bear a reasonable relationship" to the zero damages awarded for past or future lost wages or pain and suffering. Thus, the legislative avenue takes us to the same destination - reversal, as the "amount awarded" is not "supported by the evidence" and the verdict is therefore inadequate as a matter of law Id. In addition to the cases cited above, see Bucci, 690 So. 2d 1389 ("[the questions posed by the jury's deliberations, viewed together with its ultimate award, strongly suggests it reached a compromise verdict").[8]

The jury was confused and/or desired to compromise the verdict in derogation of the law. The jury specifically asked the court how to help them compromise the verdict, and the court's and defense counsel's specific concessions in that regard are also fatal to the Petitioner's position in this regard. (T. 323-25). The Petitioner's argument thus being dealt a fatal blow, a new trial on liability and damages was appropriate,[9] and if the Court deems it appropriate to take jurisdiction, should therefore affirm, or answer the first certified question in the affirmative.

C. **When a Verdict Is Inadequate as Matter of Law a Plaintiff Has No Obligation to Object Before the Jury's Discharge.**

This Court should answer the second question in the negative, allowing a party to preserve

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[8]The court also noted that the issue of liability was "hotly contested" and that the verdict could have been the result of a "compromise on the issue of liability." Id. See also cases cited above, and Callowav v. Dania Jai-Alia Palace. Inc., 560 So.2d 808 (Fla. 4th DCA 1990) (verdict inadequate as a matter of law where jury returned a verdict in an amount less than her proven reasonable and necessary medical bills); Cowen v. Thornton, 621 So.2d 684,687 (Fla. 2d DCA 1993) (similarly awarding a new trial). See also Watson v. Builders Sauare. Inc., 563 So.2d 72 1 (Fla. 4th DCA 1990).

[9]See. e.g., 1661 Corp. v. Snyder, 267 So.2d 362,364 (Fla. 1st DCA 1972) (To grant a new trial on the issue of damages alone, it must appear that on the evidence adduced at trial the liability of the defendant was unequivocally established without substantial dispute and the inadequacy of the verdict was induced by the misconception of the law or the failure of the jury to consider all of the elements of damages submitted, and not as a result of a compromise by the jury on the issue of liability).

the error by making a motion for new trial.

Consistent with this request, appellate courts have "routinely reviewed cases without the requirement of a contemporaneous objection where a finding of inadequacy was based on answers to interrogatories." See Allstate Ins. Co. v. Manasse, 681 So. 2d 779, 783 (Fla. 4th DCA 1996), also citing Kirkland v. Allstate Ins. Co., 655 So. 2d 106 (Fla. 1st DCA 1995); Simpson v. State, 662 So. 2d 959,961 (Fla. 5th DCA 1995); Cowen v. Thornton, 621 So. 2d 684,688 (Fla. 2d DCA 1993) (Altenbemd concurring), rev, denied, 634 So. 2d 629 (Fla. 1994); Daigneault v. Gache, 624 So.2d 818 (Fla. 4th DCA 1993), and Mason v. District Board of Trustees, 644 So. 2d 160 (Fla. 4th DCA 1994). Indeed, in this regard, the Court in Manasse noted its "implicit reject[ion]"of such a requirement in Berez v. Treadway, 599 So. 2d 1028 (Fla. 4th DCA 1992). See Manasse, **681 So. 2d** at 783. Thus, contrary to Petitioner's hopeful claims that Bucci somehow "waived" its right to challenge the verdict here, the law quite amply supports that Bucci was timely (and proper) in raising the claims in its motion for new trial. See also Massey v. Netschke, 504 So. 2d 1376, 1377 (Fla. 4th DCA 1987).

Further supportive is the clarifying decision in Cowart v. Kendall United Methodist Church, 476 So.2d 289 (Fla. 3rd DCA 1985):

> In order to dispel any existing confusion on the matter, which we think is mostly unjustified in any event, we specifically hold that a contemporaneous objection to a zero verdict in a derivative personal injury claim, even though accompanied by a money award in the nonderivative one, is not required to preserve the claim that the award of no damages is inadequate or contrary to the evidence.

Id. at 290. Accord Hendelman v. Lion Country Safari. Inc., 609 So. 2d 766,768 (Fla. 4th DCA 1992)

(Anstead, J., dissenting). The majority at the Fourth District Court, both in Manasse and in Bucci, also noted that the law did not require a contemporaneous objection and request for resubmission of a special verdict. Bucci, 690 So. 2d at 1388-89 ("As we did in Manasse, we conclude that Bucci preserved the issue of an inadequate verdict for review . . . ."). Cf. Allstate Ins. Co. v. Daugherty, 638 So. 2d 612, 613 (Fla. 5th DCA 1994) (distinguishing between internal inconsistencies and inconsistency with proof)."

Thus, Bucci should be found to have properly preserved this issue through his filing of the motion for new trial.

1. The cases relied upon by the Appellant finding waiver are distinguishable

Most of the cases in which a party has been obligated to object prior to the discharge of a jury have pertained to purely internally inconsistent verdicts. That is, they involve matters which demonstrated that the verdicts conflicted with themselves without regard to whether or not they were inadequate or excessive as a matter of law.

For instance, in Moorman v. American Safety Equip., 594 So.2d 795 (Fla. 4th DCA 1992), the court had to review a product liability case involving a seat belt. The special interrogatory verdicts in dispute were:

> 3 (a) Did defendant [ASE] place a seat belt on the market with a defect which was the legal cause of damage to [Moorman]?

"Even if this Court were to change the law, it would only be just to make such a change apply prospectively. See, e.g., U.S. v. Foster, 783 F. 2d 1082, 1086 (D.C.D.C. 1986) (en banc) ("we find that it was reasonable - indeed, the only responsible course - for counsel for defendant to proceed . . . While it may be true . . . that we might change the circuit law . . . [t]o change the ground rules after the trial would not merely deprive the defendant of a benefit he thought he had, but would retroactively convert a thoroughly sensible trial tactic into a disastrous one"); Liegakos v. Cooke 108 F.3d 144, 145 (7th Cir. 1997) (commenting that the a subsequent change in a procedural rule would in effect foreclose that relief on retrial is unfair and "has the potential to trap unwary (or even hyperwary) litigants").

Yes No X

3(b) Was there negligence on the part of [ASE] which was the legal cause of damage to [Mooreman]?

Yes X No

After the verdicts were received ASE made no objection to their apparent inconsistency prior to the time that the jury was discharged. Thereafter, ASE filed a timely motion for new trial. The court concluded that ASE waived the issue of inconsistent verdicts, concluding that "[t]here is nothing unjust about refusing to relieve a party of its own failure to do something about an internal inconsistency in a verdict until long after the rendering jury had been discharged." Id. at 800. The court went on to note that "Verdict inconsistencies which could have been corrected while the jury was still available are simply not important enough to by pass the ordinary finality attached to their decision." Id.

Had there been an inconsistency in these verdicts, they easily could have been resolved in the simple manner of directing the jury to the alleged inconsistency. However, in this case, the court noted that the verdicts were not necessarily inconsistent since the jury could have concluded that ASE was liable for failing to warn of a possible defect which appeared only much later through ordinary use.

In Alamo Rent A Car . Inc. v. Clav, 586 So.2d 394 (Fla. 3rd DCA 1991), the defendants alleged that the verdicts were inconsistent since the same damages were awarded to children of different ages in a wrongful death suit. In reviewing the matter, the court concluded that if there was a defect, it could have been corrected if the jury had been placed on notice regarding the potential inconsistency. The defendants theory was that since the children were of differing ages, their losses should have been different. Once again, the court did not necessarily agree with this conclusion, but

noted that Alamo could not claim error when it made the choice not to request that the jury revisit the issue.

One of the clearest examples of an internally inconsistent verdict can be found in Burgess v. Mid-Florida Service, 609 So.2d 637 (Fla. 4th DCA 1992). Therein, the verdict provided:

2. What is the amount of any damages sustained for medical expenses and lost earnings or earning ability in the past? $30,500

3. What is the amount of any future damages for medical expenses and lost earning ability to be sustained in future years?

a. Total damages over future years? $156,000

* * *

c. What is the present value of those present damages? $186,500

4. What is the amount of any damages for pain and suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience, aggravation of a disease or physical defect, or loss of capacity for the enjoyment of life.

a. In the past? $25,133

b. In the future? $120,000

TOTAL DAMAGES OF CAROLINE BURGESS

(Add lines 2, 3c, 4a and 4b) $362,133

It is readily apparent that the jury increased the future economic figure by adding the past expenses to the future expenses in arriving at the figure inserted. This mistake appeared on the face of the verdict and, once again, easily could have been resolved in the simple manner of directing the jury's attention to the inconsistency in asking them to correct it. Failure to have done so waived the issue.

In Sweet Papers Sales Corp. v. Feldman, 603 So.2d 109 (Fla. 3rd DCA 1992), the relevant

portions of the jury verdict were:

> 5. What is the amount of any future damages for medical expenses and lost earning ability to be sustained in future years?
>
> a. Total damages over future years? $5.000
>
> b. The number of years over which those damages are intended to provide compensation?
>
> Lifetime
>
> c. What is the present value of those future damages? _____
>
> 6. What is the amount of any damages for pain and suffering, disability, physical impairment, mental anguish, inconvenience or loss of capacity for the enjoyment of life?
>
> a. In the past? $60.000
>
> b. In the future? $0

Prior to the time that the jury was discharged the plaintiff failed to object to the apparent inconsistency of awarding $5,000 in damages for lost lifetime earning ability combined with future medical expenses, while awarding nothing for future intangible injuries. The court once again concluded that the verdict was internally inconsistent since the $5,000 could have applied solely to lost earning ability. "Further, any inconsistency problem appellant now claims was obvious when the verdicts were returned and could have been protected or reserved for review by additional instructions or a special verdict form." Id. at 110.

The case of Lindauist v. Covert, 279 So.2d 44 (Fla. 4th DCA 1973) presents a somewhat complicated fact pattern which nevertheless is exemplary concerning the waiver rule regarding inconsistent verdicts. Therein, Kathleen Smith, Lou Covert, and Harry Lindquist were all traveling North on 1-95 with Smith respectively in the lead. After stopping short, Smith's vehicle was struck

by Covert's vehicle. Lindquist's vehicle struck Covert's vehicle, yet it never had any impact with the vehicle driven by Smith. The jury returned verdicts for Covert over Lindquist and Smith for money damages, as well as for Lindquist over Smith for money damages.

Neither Lindquist nor Smith objected to these verdicts as being inconsistent prior to the time that the jury was discharged, but instead called the matter to the court's attention in their respective motions for new trial. The court readily acknowledged that the two verdicts were inconsistent with one another. It should be borne in mind that at the time Florida was a contributorily negligent state. Accordingly, if Lindquist was negligent with respect to his driving concerning Covert's vehicle, he should not have been able to prevail against Smith for non-negligent driving. With respect to this facial inconsistency, the court stated:

> 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 plaintiffs judgment because of an inconsistency in the verdicts which could have been corrected in virtually no time at all by a resubmission of the cause to the jury had either of the appellants raised the matter before the jury was discharged. Id. at 45. See Stevens Markets. Inc. v. Markantonatos, Fla. 1966, 189 So.2d 624; CF. Higbee v. Dorigo, Fla. 1953, 66 So.2d 684 and Isenberg v. Ortona Park Rec. Center, Inc., Fla. App. 1964, 160 So.2d 132, 134. (Emphasis added)

The common denominator with purely internally inconsistent verdicts is that they can be easily resolved by resubmission to the jury. In all of the matters presented above, there is no need to reinstruct the juries concerning substantive matters of law. Such is not the case when verdicts are inadequate as a matter of law. As noted in Bucci, when there is an inadequate verdict, one cannot say whether or not it was induced by the jury's misconception of the law, its failure to consider all elements of damages, or even a result of a compromise on the issue of liability. Bucci, 690 So.2d at 1389.

Bucci agrees with the Appellant that the jury in this matter telegraphed its desire not to be

desirous of considering all elements of damages, as well as possibly being ready to compromise on the issue of liability when it asked the question "how do we assign the percentages of negligence to arrive at the final medical expense amount?" [R-324] Nevertheless, for the Appellee to assert that Bucci knew what was in the jury's minds prior to the rendition of their verdict is absurd. Bucci recognized that the jury had an obligation to follow the law and accordingly suggested to the judge that the jury be reinstruct ed to follow the instructions as previously given.

The Appellant devoted a large portion of its brief to the proposition that Bucci had a legal obligation to bring to the court's attention the inadequacy of the verdict prior to the jury being discharged. In fact, Auto Builders asserts that ". . . the most distinctive characteristic of this case lies . . . in the fact that the party knew, before the verdict was rendered, exactly what the jury was contemplating, and the plaintiff made no objection at the time, offered no suggestion of further or additional instruction, nor did anything whatsoever to avoid the rendition of the verdict which it now identifies as error." Such an assertion not only represents a blatant disregard for the status of controlling law in the jurisdiction where this matter was tried, but is compounded by defense counsel's own fatal concession that the jury was attempting to compromise the verdict, and own inaction in taking the alleged appropriate steps to correct the problem.

Thus, this Court should affirm the decision of the Fourth District Court in this regard.

V. CONCLUSION

This Court should not decline (or otherwise dismiss for lack of) jurisdiction of this case, as the precise certified question was not passed on by the Fourth District Court of Appeal.

The question as phrased requires a finding of permanent injury, which - although true in this case - was not relevant nor determined by the Fourth District Court. The fact that this Court ordered briefs on the merits does not change the resulting need for dismissal where there is no jurisdiction.

Even the Court reaches the merits, Bucci should prevail, as the Fourth District Court correctly found, both in Bucci v. Auto Builders of South Florida, 690 So. 2d 1387 (Fla. 4th DCA 1997) and in Allstate Ins. Co. v. Manasse, 681 So. 2d 779 (Fla. 4th DCA 1996), that a verdict is inadequate as a matter of law where the jury awards future medical expenses, but awards no damages for past or future lost earnings or pain and suffering. The overwhelming case load, the legislati e history, and fundemntal fariness support Bucci. Either this Court should affirm the appellate court decision, or otherwise answer the affirmative certified questions in the affirmative.

Bucci followed the overwhelming wealth of law in preserving the error by the filing of his Motion for New Trial. The ruling of the Fourth District Court of Appeal (and the other jurisdictions referenced herein) are legal correct and sensibly fair. Thus, this Court should answer the second certified question in the negative, or otherwise find that Bucci properly preserved any error by the filing of his Motion for New Trial.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 26th day of September, 1997 to: Eric Belsky, Esquire, Hinshaw & Culbertson, One East Broward Boulevard Suite 1010, Fort Lauderdale, Florida 33301.

By:_____
Scott A. Mager, Esquire

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