Supreme Court of Florida

Case No. 90,534

District Court of Appeal,
Fourth District, Case No. 95-4002

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

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

Petitioner,

vs.

DANIEL M. BUCCI,

Respondent.
_____/

****

INITIAL BRIEF OF THE PETITIONER,
AUTO BUILDERS SOUTH FLORIDA, INC.

****

Respectfully submitted,

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STATEMENT OF THE CASE AND THE FACTS

INTRODUCTION: THE PARTIES

The Petitioner, Auto Builders South Florida, Inc. (hereinafter "Auto Builders"), was the defendant in the trial court action and the appellee/cross-appellant in the district court of appeal.[1]

The Respondent, Daniel M. Bucci (hereinafter "Bucci"), was the plaintiff in the trial court action and the appellant/cross-appellee in the district court of appeal.

For the sake of brevity and clarity, the Petitioner will refer to the parties throughout this brief either by proper name or as they stood in the trial court as plaintiff and defendant.

A. THE NATURE OF THE CASE.

Auto Builders respectfully petitions this Court, pursuant to Rule 9.030(a)(2)(A)(v), Fla.R.App.P., to take jurisdiction of this action and review the questions certified to be of great public importance by the Fourth District Court of Appeals in Bucci v. Auto Builders South Florida, Inc., 690 So.2d 1387 (Fla. 4th DCA 1997). Specifically, in Bucci, *supra*, the Fourth District "re-certified" the two questions previously certified to be of great public importance in Allstate Ins. Co. v. Manasse, 681 So.2d 779 (Fla. 4th DCA 1996), which included the following:

> 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?

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[1] Respectively, Bucci v. Auto Builders South Florida, Inc., 17th Judicial Circuit Court, Broward County, Florida, Case No. 93-5601 (04), and Bucci v. Auto Builders South Florida, Inc., District Court of Appeal, Fourth District, Florida, Case No. 95-4002.

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

Allstate, 681 So.2d at 784.

Auto Builders respectfully suggests that a more specific phrasing of the questions might be found in the body of the court's decision in Allstate, *supra:*

> [D]oes a finding of a permanent injury and an award of future medical expenses render a zero verdict for future intangible damages inadequate as a matter of law?
>
> Should a party be required to object to an inadequate verdict, which is based on the jury's answers to special interrogatories, prior to the discharge of the jury, as required for classic cases of inconsistent verdicts?

Allstate, 681 So.2d at 783.

B. THE COURSE OF THE PROCEEDINGS.

Auto Builders does not take issue with the statement of pertinent facts set forth by the Fourth District Court as follows:

> [Bucci] appeals a final judgment entered pursuant to a jury verdict awarding him past and future medical expenses only, in connection with an injury he sustained after falling into a ditch or hole on property being constructed by [Auto Builders]. Auto Builders cross-appeals the trial court's denial of its motion for directed verdict. We reverse and remand for a new trial on liability and damages.
>
> It is uncontradicted Bucci sustained a permanent injury when he fell while walking across a partially constructed Ed Morse auto dealership in Davie, Florida, after his vehicle became disabled late one night. The construction site was not fenced or posted with warning signs, and was not lit. Bucci sustained a permanent impairment of between 5% and 12% of the body as a whole. He received

> medical care for several years following the accident, and submitted evidence of medical expenses totalling $19,438.15. At the close of Bucci's case, Auto Builders moved for a directed verdict on the basis that Bucci was a trespasser rather than an uninvited licensee. Its motion, and renewed motion for a directed verdict, were denied.
>
> During deliberations the jury wrote a note to the trial judge stating it wanted to award Bucci money only for his present medical expenses to date. It asked: "How do we assign the percentages of negligence to arrive at the final medical expense amount?" The jury was instructed to follow the instructions given. It returned a verdict finding Auto Builders 20% negligent and Bucci 80% negligent for his injuries. It awarded Bucci $20,000 in past medical expenses and $80,000 in future medical expenses, denying any award of past or future lost earnings or pain and suffering. Bucci did not object to the verdict before the jury was discharged, but filed a motion for new trial, arguing the verdict was inadequate as a matter of law because the jury awarded medical expenses yet failed to award either past or future lost wages or pain and suffering. Bucci's motion was denied and final judgment was entered in the amount of $20,000.

Bucci, 690 So.2d at 1388.

C. DISPOSITION IN THE LOWER TRIBUNAL.

Following the trial of Bucci's negligence action against Auto Builders, the jury returned a verdict finding Auto Builders 20% negligent and Bucci 80% comparatively negligent for his injuries. [R. 454-56]. The jury awarded Bucci $20,000 in past medical expenses and $80,000 in future medical expenses, but did not award any past or future lost earnings or any recovery for pain and suffering. [Id.].

Bucci did not object to the verdict before the jury was

discharged [T. 332-34], but filed a motion for new trial, arguing the verdict was "inadequate" as a matter of law because the jury awarded medical expenses yet failed to award either past or future lost wages or pain and suffering. [R. 457-61].

Auto Builders responded in opposition to Bucci's request for a new trial, specifically arguing that the plaintiff had waived the right to move for a new trial by not objecting to any "inconsistency" in the verdict before the jury was discharged. [R. 463-65]. At the hearing on Bucci's motion for new trial, the trial judge expressly observed:

> Court: I knew there was going to be a problem, and I want you to go back and get that transcript because I said to you: Counsel, is there any problem with the Jury verdict as it stands? I hear nothing. Would either of you like to do anything about it? I hear nothing. [R. 608-09].

The trial judge further inquired of counsel: "Isn't there something that says when the Court gives you a verdict, you can correct it; and you have the obligation to do that?" [R. 609]. Plaintiff's counsel responded, in short, that the rule the judge referred to applied only to an "inconsistent" verdict, not to an "inadequate" verdict. [Id.].

The trial judge denied the plaintiff's motion for new trial and the plaintiff's motion for rehearing. [R. 466-68; 469]. As noted above, the Fourth District Court reversed the order and remanded the case for a new trial on liability and damages. Bucci, supra, 690 So.2d at 1388. Specifically, the court stated:

> This case is remanded for a new trial on both liability and damages, because the issue of liability was hotly contested and the damage award was clearly inadequate. We cannot say

> the inadequacy of the verdict was induced by the jury's misconception of the law or failure to consider all elements of damages, rather than the result of a compromise on the issue of liability. Watson v. Builders Square, Inc., 563 So.2d 721 (Fla. 4th DCA 1990). The questions posed during the jury's deliberations, viewed together with its ultimate award, strongly suggest it reached a compromise verdict.

Bucci, 690 So.2d at 1389.

In so ruling, the Fourth District re-certified the two questions of great public importance previously certified in Allstate v. Manasse, *supra*.

> Regarding the inadequacy of the jury's verdict caused by its failure to award future noneconomic damages, we certify to the Florida Supreme Court the same question certified in Manasse.
>
> In Manasse we also certified the question of whether a party must object before discharge of the jury in order to preserve appellate review of an inadequate verdict. Manasse, 681 So.2d at 784. We noted the law did not require a contemporaneous objection and request for resubmission of a special verdict, and recognized a question remained whether a different rule should apply where the claim of an inadequate verdict is also based on the jury's answers to special interrogatories. Id. As we did in Manasse, we conclude Bucci preserved the issue of an inadequate verdict for review, and again certify the second question certified in Manasse.

Bucci, 690 So.2d at 1388-89.

On May 8, 1997, Auto Builders served its notice to invoke the discretionary jurisdiction of this Court, pursuant to Rule 9.030(a)(2)(A)(v), Fla.R.App.P., seeking review of the questions certified by the Fourth District Court to be of great public importance in Bucci, *supra*, and Allstate, *supra*.

SUMMARY OF THE ARGUMENT

Certified Question No. 1: Does a finding of a permanent injury and an award of future medical expenses render a zero verdict for future intangible damages inadequate as a matter of law? Auto Builders respectfully submits that the foregoing question should be answered in the negative: a finding of a permanent injury and an award of future medical expenses does *not* automatically render a zero verdict for future intangible damages "inadequate as a matter of law" because cases can and do exist where a plaintiff is permanently injured and incurs future medical expense, yet does not sustain future intangible damages.

Furthermore, the nature of *future* damages is such that much discretion must be afforded to the finder of fact. While as to past damages the court has a record that allows close scrutiny of what has already happened, the same cannot be said as to future losses. Due to the speculative nature of what may occur in the future, great latitude has and should be left to the jury in its determinations as to these damages. It does not necessarily follow, one from the other, that an award of future medical expenses requires an award of future noneconomic damages.

Certified Question No. 2: Should a party be required to object to an "inadequate" verdict, which is based on the jury's answers to special interrogatories, prior to the discharge of the jury, as required for classic cases of "inconsistent" verdicts?

Auto Builders respectfully submits that the foregoing question should be answered in the affirmative: a party should be required to object to an "inadequate" verdict, if based upon the jury's

"inconsistent" answers to special interrogatories, prior to the discharge of the jury.

The case law concerning "inadequate" verdicts evolved for the most part around the "general verdict" form which stated: "We find for the plaintiff and assess damages at $_____." Since the enactment Florida's Tort Reform and Insurance Act, and Florida Statute § 768.77 in particular, tort cases are now submitted to the jury with a special interrogatory verdict form which causes a finding of liability, followed by a zero verdict on a proven element of damages, to be inconsistent and inadequate. Therefore, a party who wishes to appeal such a verdict should be required to preserve the error by an objection prior to discharge of the jury.

Requiring a timely objection to "inconsistent" answers to special interrogatory verdict questions would serve the important purpose of allowing the trial court an opportunity to correct inherent defects in the verdict prior to the discharge of the jury. As it presently stands, courts are not given the opportunity to obviate the need for a new trial by simply requiring an objection to an "inadequate" award arising from "inconsistent" answers to special interrogatory verdicts. Furthermore, requiring such a timely objection is consistent with fundamental principles of fairness which dictate that relitigation on purely technical and avoidable grounds deprives the prevailing party of their earned verdict and gives the opposition an unearned "second bite at the apple." As it presently now, parties are free to intentionally, for tactical reasons, chose not to bring the claimed error to the trial court's attention at a time when it could be quickly and easily corrected, thereby avoiding the need for an entire new

trial. This is, of course, completely inconsistent with the well settled principle of law that one may not assert error upon an action of the trial court in which he himself has acquiesced, nor does it serve the ends of judicial economy or of conserving the resources of litigants and the courts.

Finally, the trial court cannot be said to have abused its broad discretion in the present case by denying the plaintiff's motion for new trial where, upon the specific facts of this case, the defendant so clearly waived the right to object to the jury's verdict before the jury was discharged. A trial court's discretion to grant a new trial is of such firmness that it should not be disturbed except on a clear showing of abuse, and a heavy burden rests on appellants who seek to overturn such a ruling. Any such alleged abuse of discretion must be patent from the record. Upon the facts of this case, however, there was no such abuse of discretion and the trial court's ruling should not have been overturned.

ARGUMENT

CERTIFIED QUESTION NO. 1

DOES A FINDING OF A PERMANENT INJURY AND AN AWARD OF FUTURE MEDICAL EXPENSES RENDER A ZERO VERDICT FOR FUTURE INTANGIBLE DAMAGES INADEQUATE AS A MATTER OF LAW?

The Petitioner respectfully submits that the foregoing question should be answered in the negative: a finding of a permanent injury and an award of future medical expenses does *not* automatically render a zero verdict for future intangible damages inadequate as a matter of law. Quite simply, cases can and do exist where a plaintiff is permanently injured and incurs future medical expense, yet does not sustain future intangible damages.

In support of its position, Auto Builders concurs in and adopts as its own view the dissenting opinion of Judge Klein in Allstate Ins. Co. v. Manasse, 681 So.2d 779 (Fla. 4th DCA 1996). "The nature of future damages is such that much discretion must be afforded to the finder of fact. While as to past damages we have a record that allows us to scrutinize very closely what has already happened, the same cannot be said as to future losses. Due to the somewhat speculative nature of what may occur in the future, it is perhaps not unwise to afford great latitude to the jury in its determinations as to these damages." Allstate, 681 So.2d at 785 (Klein, J., dissenting), *quoting*, Dyes v. Spick, 606 So.2d 700, 704 (Fla. 1st DCA 1992).

> Future damages are, by nature, less certain than past damages. A jury knows for a fact that a plaintiff has incurred past medical expenses, and, when it finds those expenses to have been caused by the accident, there is generally something wrong when it awards

> nothing for past pain and suffering. The need for future medical expenses is often in dispute, however, as it was here. *It does not necessarily therefore follow, in my opinion, that an award of future medical expenses requires an award of noneconomic damages*.

Allstate, 681 So.2d at 785-86 (Klein, J., dissenting) (emphasis added).

The majority decision in Allstate observed that "[w]hat has never been explicitly addressed by any court is whether, once the jury finds that the plaintiff has suffered a permanent injury within reasonable medical probability, the jury has discretion to refuse to award any money for noneconomic damages?" [681 So.2d at 781]. It should be noted, however, that the majority in Allstate addressed the "permanent injury" and future damage questions because Allstate was an automobile case concerned, in part, with the statutory threshold requirement of permanent injury in order to recover future damages, as well as this Court's decision in Auto-Owners Insurance Co. v. Tompkins, 651 So.2d 89 (Fla. 1995) (holding that while proving a permanent injury is a "significant factor in establishing the reasonable certainty" of future economic damages, it is not a prerequisite; rather, the plaintiff must only establish that the future economic damages are "reasonably certain to occur"). [Id. at 90-91].

In contrast, the present case of Bucci v. Auto Builders is not an automobile case and the jury made no specific finding of "permanent injury" in its verdict. [R. 454-56]. Nevertheless, it was undisputed in this case that Bucci suffered at least some measure of permanent physical impairment (i.e., between 5% and 12%) as a result of his accident. Bucci, 690 So.2d at 1388.

Therefore, in short, as to the award of *past* medical expenses with no corresponding award for *past* pain and suffering, the Fourth District reversed the judgment in this case as "inadequate" based upon its prior holdings in Allstate, *supra*, and Mason v. District Bd. of Trustees of Broward Community College, 644 So.2d 160 (Fla. 4th DCA 1994). "Pursuant to Mason, 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. "Regarding the inadequacy of the jury's verdict caused by its failure to award *future* noneconomic damages, we certify to the Florida Supreme Court the same question certified in Manasse." [Id.].

With respect to Judge Klein's dissenting opinion, the majority in Allstate further observed:

> Judge Klein asserts that a finding of permanent injury combined with an award of future medical expenses does not mandate an award of future noneconomic damages. Simpson [662 So.2d 959 (Fla. 5th DCA 1995)] from the fifth district supports Judge Klein's position; Butte [521 So.2d 280 (Fla. 2d DCA 1988)] from the second district reaches an opposite conclusion.

Allstate, 681 So.2d at 781.

As Judge Klein observed, however:

> The majority relies on Butte [supra], describing it as "factually similar"; however, in that case the jury awarded nothing for past noneconomic damages. *The majority has not cited a single case in which an appellate court ordered a new trial under the circumstances of this case, i.e., for the sole reason that the jury declined to award future noneconomic damages*.

Allstate, 681 So.2d at 784 (Klein, J., dissenting) (emphasis added).

Upon the foregoing, Auto Builders respectfully submits that the inherent nature of *future* damages is such that considerable discretion has been and must be afforded to the finder of fact. Due to the speculative nature of what may occur in the future, courts must afford great latitude to the jury in its determinations as to these damages. The cases relied upon by the majority in Allstate and the court's opinion in Bucci do not hold otherwise. The Fourth District Court's first certified question should therefore be answered in the negative. A finding of a permanent injury and an award of future medical expenses does not in and of itself automatically render a zero verdict for future intangible damages inadequate as a matter of law.

Notwithstanding the foregoing discussion, this first issue regarding the "adequacy" of any *future* noneconomic damage award is not dispositive of the present case. That is, the Fourth District Court would have been bound to reverse the judgment and remand the case for a new trial on liability and damages based upon its findings that the award of *past* damages was "inadequate" as a matter of law, together with the conclusion that the jury rendered an improper "compromise" verdict in this case. *See*, Bucci, 690 So.2d at 1389, *citing*, Watson v. Builders Square, Inc., 563 So.2d 721 (Fla. 4th DCA 1990). In contrast, the truly dispositive issue in the present case arises from the Fourth District's second certified question as to "whether a party must object before discharge of the jury in order to preserve appellate review of an inadequate verdict." Bucci, 690 So.2d at 1388, *citing*, Manasse, 681 So.2d at 784.

CERTIFIED QUESTION NO. 2

SHOULD A PARTY BE REQUIRED TO OBJECT TO AN INADEQUATE VERDICT, WHICH IS BASED ON THE JURY'S ANSWERS TO SPECIAL INTERROGATORIES, PRIOR TO THE DISCHARGE OF THE JURY, AS REQUIRED FOR CLASSIC CASES OF INCONSISTENT VERDICTS?

In Manasse, *supra*, the Fourth District further certified the question of whether a party must object before discharge of the jury in order to preserve appellate review of an inadequate verdict. Bucci, 690 So.2d at 1388, *citing*, Manasse, 681 So.2d at 784. "We noted [in Manasse] the law did not require a contemporaneous objection and request for resubmission of a special verdict, and recognized *a question remained whether a different rule should apply where the claim of an inadequate verdict is also based on the jury's answers to special interrogatories*." Bucci, 690 So.2d at 1388 (emphasis added).

Auto Builders respectfully submits that the certified question should be answered in the affirmative -- a party *should* be required to object to an "inadequate" verdict, if based upon the jury's "inconsistent" answers to special interrogatories, prior to the discharge of the jury -- but not necessarily because "a different rule should apply." Rather, Auto Builders' two-fold argument is based, first, upon the well established rule that any defect as to the form of a verdict is waived by the failure to object thereto; Higbee v. Dorigo Hotel Runnymede, Inc., 66 So.2d 684 (Fla. 1953); and, second, upon Auto Builders' assertion that the "defect" the plaintiff complains of in this case -- i.e., an award of past economic damages without a corresponding award of past noneconomic damages (even if only a nominal recovery) -- is, in fact,

"inconsistency," and not "inadequacy." In large part, the second prong of Auto Builders' argument is derived from the rationale set forth in Judge Altenbernd's concurring opinion in Cowen v. Thornton, 621 So.2d 684 (Fla. 2d DCA 1993):

> *The jury's verdict in this case is both inconsistent and inadequate*. Because the jury answered a special interrogatory verdict form, it expressly found that the defendant's negligence was a legal cause of damage, and then awarded *no damages*. If the plaintiff had objected to this *patent inconsistency* before the jury was discharged, the jury could have been reinstructed and may have reached a legal verdict.
>
> It has long been the general rule that a party is obligated to object to an *inconsistent* verdict prior to discharge of the jury, but may challenge an *inadequate* verdict by post trial motion. Nix v. Summitt, 52 So.2d 419 (Fla. 1951); Higbee v. Dorigo, 66 So.2d 684 (Fla. 1953); Cowart v. Kendall United Methodist Church, 476 So.2d 289 (Fla. 3d DCA 1985). In the past, the typical general verdict form stated: "We find for the plaintiff and assess damages at $_____." When the jury awarded zero damages on such a verdict form, the result was not patently inconsistent. In such circumstances, it was not illogical to permit a posttrial challenge to the substance of a verdict in the absence of a prior challenge to the verdict's procedural accuracy.
>
> Since the enactment of section 768.77, Florida Statutes (1991), most tort cases are now submitted to the jury with *an interrogatory verdict form that usually causes a zero verdict to be both inconsistent and inadequate*. I am inclined to believe that *a party who wishes to appeal such an erroneous verdict should be required to preserve the error by an objection prior to discharge of the jury*.

Cowen, 621 So.2d at 688 (Altenbernd, J., concurring) (emphasis added).

A. THE PLAINTIFF'S TRUE OBJECTION TO THE VERDICT IN THIS CASE, WHICH WAS BASED ON THE JURY'S ANSWERS TO SPECIAL INTERROGATORIES, IS THAT THE VERDICT WAS "INCONSISTENT" FOR FAILURE TO AWARD PAST AND FUTURE NONECONOMIC DAMAGES IN CONNECTION WITH PAST AND FUTURE ECONOMIC DAMAGES; THEREFORE, EITHER A TIMELY OBJECTION TO SUCH "INCONSISTENCY" SHOULD BE REQUIRED OR THE PLAINTIFF'S POSTTRIAL CHALLENGE TO THE VERDICT SHOULD BE WAIVED.

As will be discussed in more detail below, courts are presently faced with the "recurring problems highlighted by this case"; specifically, "the problem presented where the jury's award of zero damages appears *not only inadequate* but *logically inconsistent* with other findings it has made on the special verdict form." Allstate, 681 So.2d at 783 (emphasis added).

While this problem has arisen with increasing frequency since special verdicts became mandatory in personal injury cases,[2] Auto Builders further suggests that at least part of the problem apparently stems from the lack of any clear definitions of "inadequate" and "inconsistent" verdicts. To the contrary, the terms appear to be most often used not as legal terms of art but, rather, in their commonly understood sense of meaning. In fact, the terms "inconsistent" and "inadequate" are sometimes used as though they were interchangeable in cases where the distinction between them and the question of waiver is not a critical issue. *See, e.g.*, Butte v. Hughes, 521 So.2d 280, 281 (Fla. 2d DCA 1988) ("The jury's zero verdict for general damages was grossly inadequate and totally *inconsistent* with its finding of permanent

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[2] "From a review of the appellate cases decided subsequent to the enactment of section 768.77, it appears that the most frequent source of review is the zero damages award rendered by a jury for noneconomic damages." Allstate, 681 So.2d at 783, fn. 4.

injury and with its award of future medical expenses.") (emphasis added); Smith v. Turner, 585 So.2d 397 (Fla. 5th DCA 1991) ("a finding of a permanent injury would have been *inconsistent* with a zero damages verdict...)(emphasis added). Dictum from such cases has obviously added to the existing confusion. *But see,* Simpson v. Stone, 662 So.2d 959 (Fla. 5th DCA 1995) ("No mention was made in Butte or Smith about the significance of the word inconsistent and the requirement of bringing an inconsistent verdict to the attention of the court before a jury is discharged. We suspect that in Butte the issue was never raised, and we can attest to the lack of argument on the issue in Smith.").

Auto Builders submits that a proper analysis of the subject should begin with the commonly understood meaning of the terms. For example, Webster has defined the terms as follows:

> **in·ad·e·qua·cy** \ 1: the quality or state of being inadequate 2: INSUFFICIENCY, DEFICIENCY
>
> **in·con·sis·tent** \ lacking consistency: as a: not compatible with another fact or claim <~statements> b: containing incompatible elements <an~argument> c: incoherent or illogical in thought or actions: CHANGEABLE d: not satisfiable by the same set of values for the unknowns <~equations> <~inequalities>

In seeming accord with the foregoing definitions, cases dealing with an insufficient *amount* of recovery have traditionally been addressed as "inadequate" verdict cases, while cases concerning the logical *consistency* of the jury's verdict (notwithstanding the amount of recovery) are treated as "inconsistent" verdict cases.

For example, in Dyes v. Spick, 606 So.2d 700 (Fla. 1st DCA 1992), the plaintiff underwent a lumbar myelogram and lumbar

disc surgery one month after his accident, and his condition required a second myelogram and operation. The undisputed evidence showed that the plaintiff endured "virtually constant pain" for six months between operations, restricting his physical activity and his ability to sleep. Following the second operation, plaintiff spent five days in the hospital and six weeks at home recuperating. The medical evidence indicated that the plaintiff suffered a 14% permanent whole body impairment as a result of his injury, and that he would suffer pain in his back and knee indefinitely into the future. Upon these facts, the First District Court found that a $5,000 award for "past pain and suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience, and loss of capacity for the enjoyment of life (noneconomic damages)," was "inadequate" as a matter of law. Dyes, 606 So.2d at 702, *citing*, Figueredo v. Keller Indus., Inc., 583 So.2d 432 (Fla. 3d DCA 1991). Therefore, Dyes is the classic example of an "inadequate" verdict case; that is, the jury verdict, while awarding the plaintiff *some* amount of recovery ($5,000), was ultimately determined to be *insufficient* in its amount. In the absence of a zero damage award, however, there was no discussion of any "inconsistency" in Dyes.

In contrast, cases examining "inconsistent" verdicts traditionally focus on the logical or legal irreconcilability of multiple findings by the jury, not the amount of the award. For example, in Lindquist v. Covert, 279 So.2d 44 (Fla. 4th DCA 1973), the plaintiff was injured in a three car collision. The plaintiff, Covert (who was driving the car in the middle), filed suit against the driver of the car in front of her (Smith) and the driver of the car behind her (Lindquist). The jury returned a verdict against

both defendants and assessed the plaintiff's damages at $20,000. The jury also returned a verdict against the defendant Smith and in favor of defendant Lindquist on the latter's cross-claim. "It is this verdict which becomes the proverbial fly in the ointment." Lindquist, 279 So.2d at 45.

> As a starting point in our discussion, we would concede that the two verdicts were *inconsistent* with one another. Obviously the verdict for the plaintiff against Lindquist and Smith necessarily implies that Lindquist *was negligent* in driving his vehicle into the plaintiff's vehicle. The verdict in favor of Lindquist, on the other hand, necessarily finds that Lindquist *was not negligent* in striking the plaintiff's vehicle -- which collision was the only collision in which Lindquist was involved and thus the only source of his injury. However, when these verdicts were read, neither Lindquist nor Smith raised an objection to their inconsistency. This problem was not called to the court's attention until the motions for new trial were filed.

Lindquist, 279 So.2d at 45 (emphasis added).

Upon the foregoing, the Fourth District Court held in Lindquist that "any error of the trial court related to the receipt of the inconsistent verdicts has not been preserved for purposes of this appeal, because of the appellants' failure to object thereto before the jury was discharged." Id.[3]

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[3] *See also*, Wiggs and Maale Const. Co. v. Harris, 348 So.2d 914 (Fla. 1st DCA 1977) (a jury could not legally and consistently find the defendant negligent and liable to the plaintiff while also allowing the same defendant to recover indemnity from a co-defendant (thereby impliedly finding that the putative indemnitee was without fault); nevertheless, the court held that "no objection was raised as to its inconsistency with the first verdict... [t]herefore, any error relating to the receipt of the inconsistent verdicts has not been preserved for purposes of appeal...").

In short, the jury verdicts at issue in Lindquist, *supra*, and Wiggs and Maale Const. Co., *supra*, are classic examples of "inconsistent" verdicts -- i.e., verdicts containing multiple findings by the jury which are either logically or legally irreconcilable with each other. In contrast, the jury verdict in Dyes, *supra*, is a classic example of an "inadequate" verdict -- i.e., a verdict which awards the plaintiff at least some amount of recovery for all elements of damages to which he is entitled, but which is otherwise inadequate or insufficient in its amount.

As noted by Judge Altenbernd in Cowen, *supra*, the traditional case law concerning "inadequate" verdicts has evolved around the "general verdict" form which stated: "We find for the plaintiff and assess damages at $_____." Cowen, 621 So.2d at 688 (Altenbernd, J., concurring). As noted since then by numerous cases from the various district courts (discussed below), the "proverbial fly in the ointment" has been the subsequent enactment of the Tort Reform and Insurance Act, which became effective in 1986,[4] and which provides in pertinent part:

> 768.77. Itemized Verdict
>
> (1) In any action to which this part applies in which the trier of fact determines that liability exists on the part of the defendant, the trier of fact shall, as a part of the verdict, itemize the amounts to be awarded to the claimant into the following categories of damages:
>
> (a) Amounts intended to compensate the claimant for economic losses;
>
> (b) Amounts intended to compensate the claimant for noneconomic losses; and

[4] Ch. 86-160, § 56, at 752, Laws of Florida.

> (c) Amounts awarded to the claimant for punitive damages, if applicable.
>
> (2) Each category of damages, other than punitive damages, shall be further itemized into amounts intended to compensate for losses which have been incurred prior to the verdict and into amounts intended to compensate for losses to be incurred in the future. Future damages itemized under paragraph (1)(a) shall be computed before and after reduction to present value. Damages itemized under paragraph (1)(b) or paragraph (1)(c) shall not be reduced to present value. In itemizing amounts intended to compensate for future losses, the trier of fact shall set forth the period of years over which such amounts are intended to provide compensation.

Since the enactment of § 768.77, the "general verdicts" described above are no longer used in negligence cases in Florida. Rather, juries are required to itemize each category of damages as economic, noneconomic and punitive, and to then further itemize each category of damages (except punitive) into past and future losses. Furthermore, in light of the repeated holdings from around the state that an award of past medical expenses without an accompanying award of past noneconomic damages is "inadequate as a matter of law," *see, e.g.*, Mason, *supra*, Simpson, *supra*, Daigneault v. Gache, 624 So.2d 818 (Fla. 4th DCA 1993), the Petitioner submits (as did Judge Altenbernd in Cowen, *supra*) that a verdict which purports to make such an award is "inconsistent" on its face and should therefore require a timely objection.

The companion question as to whether an award of *future* medical expenses is "inadequate as a matter of law" without a corresponding award of *future* noneconomic damages, is the subject of the first question certified by the Fourth District Court in Allstate, *supra* (above). As noted, the Petitioner herein

respectfully submits that the answer to the Fourth District's first question should be no; a finding of a permanent injury and an award of future medical expenses does *not* automatically render a zero verdict for future intangible damages inadequate as a matter of law; largely because of the inherent differences between past and future damage awards, and the inherently speculative nature of the latter. *See, e.g.*, Dyes, *supra;* Mason, *supra.* However, should this Court respond to the first certified question in the affirmative (or otherwise essentially hold that an award of future medical expenses without an accompanying award of future noneconomic damages is "inadequate as a matter of law"), the Petitioner would then suggest that the same patent inconsistency would exist in a contrary verdict and should, therefore, also require a timely objection in order to preserve the issue as a basis for new trial or an appeal.

B. OVERVIEW OF THE CASE LAW AND THE "RECURRING PROBLEMS" ASSOCIATED WITH THE FAILURE TO MAKE A TIMELY OBJECTION TO THE "INCONSISTENCY" OF AN "INADEQUATE" VERDICT.

The Petitioner would respectfully note at the outset that a complete survey of the existing case law on this subject would literally consume this entire brief (and, perhaps, several more). Accordingly, Auto Builders offers the following overview of the case law in an attempt to bring as much relevant discussion as possible -- both favorable and adverse to its position -- to the Court's attention.

In Allstate Ins. Co. v. Manasse, 681 So.2d 779 (Fla. 4th DCA 1996), the court expressly addressed "the problem presented where the jury's award of zero damages appears not only inadequate

but logically inconsistent with other findings it has made on the special verdict form." Allstate, 681 So.2d at 783.

> Our court has not previously required a plaintiff to object prior to the discharge of the jury. We have routinely reviewed cases without the requirement of a contemporaneous objection where a finding of inadequacy was based on answers to special interrogatories. See, e.g., Daigneault; Mason. We implicitly rejected a requirement in Berez v. Treadway, 599 So.2d 1028 (Fla. 4th DCA 1992). Yet we struggled with this issue in Hendelman v. Lion Country Safari, 609 So.2d 766 (Fla.App. 3d DCA 1992) (Dell, J., concurring and Anstead, J., dissenting), review dismissed, 618 So.2d 209 (Fla. 1993). [Id.].[5]

It should be noted, however, that the issue presented by this case was not addressed by the Fourth District in either Daigneault, *supra*, or Mason, *supra*. Rather, those cases (like the cases cited in them) dealt solely with the alleged "inadequacy" of the verdict where the jury awarded recovery of past medical expenses without an award of past noneconomic damages. *See*, Daigneault, 624 So.2d at 819-20, *citing*, Watson v. Builders Square, Inc., 563 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 Corp., 242 So.2d 741 (Fla. 4th DCA 1971); Pickel v. Rosen, 214 So.2d 730 (Fla. 3d DCA 1968); and, Mason, 644 So.2d at 161, *citing*, Daigneault, *supra*. In short, there was no discussion whatsoever in either Mason or Daigneault on the question of whether the plaintiff

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[5] The proper citation should be to Hendelman v. Lion Country Safari, Inc., 609 So.2d 766 (Fla. 4th DCA 1992). That is, the Fourth District's opinion in Allstate, *supra*, contains a typographical error wherein the decision in Hendelman is erroneously identified as a Third District court case.

had waived an objection to the inconsistency of the verdict.

Similarly, the court's statement in Allstate, *supra*, that "[w]e implicitly rejected a requirement in Berez v. Treadway, 599 So.2d 1028 (Fla. 4th DCA 1992)," seems unsupported by that decision.

In Berez, *supra*, two verdicts were at issue after trial of the plaintiff's negligence action to recover for injuries caused by a dog bite. The jury initially returned a verdict for the plaintiff, awarding damages for past and future economic damages. Zero damages were awarded for past or future noneconomic damages. After the jury had been discharged, the plaintiff moved for a mistrial based upon the verdict and, in response, the defendant requested that the jury be recalled and instructed on "nominal damages" in view of the zero damage award. Over the plaintiff's objections, the jury was brought back into the courtroom and reinstructed. The jurors retired to re-deliberate, thereafter awarding the plaintiff $200 for past noneconomic damages and $100 for future noneconomic damages. The plaintiff's motion for new trial was denied, and the plaintiff appealed.

In reversing the case for a new trial, the Fourth District expressly stated that it did not reach the question of the "adequacy" of the damage award because the plaintiff's motion for a mistrial "should have been granted based upon the internally *inconsistent* verdict." Berez, 599 So.2d at 1029 (emphasis added), *citing*, Pickel v. Rosen, 214 So.2d 730 (Fla. 3d DCA 1968); Ledbetter v. Todd, 418 So.2d 1116, 1117 (Fla. 5th DCA 1982). The express holding of Berez was that "a jury may not be recalled after discharge to reconsider an *inconsistent* verdict." Id.

Therefore, the court's statement in Allstate, *supra*, that Berez "implicitly rejected a requirement" of a contemporaneous objection to an inadequate verdict seems unsupported by the decision, first, because the court expressly did not reach the "adequacy" issue, and, second, because the court expressly described the award of economic damages without a corresponding award of noneconomic damages (even if nominal) as "inconsistent." Moreover, the plaintiff in Berez made a timely objection to the verdict; i.e., she moved for a mistrial; and this was the motion which the court held on appeal should have been granted. There was, of course, no question presented but that a motion for mistrial if not timely made would have been waived.

As to the issue presented in this case, the court in Allstate, *supra*, stated that it also "struggled with this issue" in Hendelman v. Lion Country Safari, 609 So.2d 766 (Fla. 4th DCA 1992), a rather unusual case in which the jury awarded the plaintiff $1,000 in *future* noneconomic damages with no award for *past* noneconomic damages. The trial court denied the plaintiff's motion for new trial and the Fourth District affirmed *per curiam* without a written opinion. Judge Walden concurred in the *per curiam* affirmance; however, Judge Dell concurred specially and Judge Anstead dissented, both with written opinions.

In short, Judge Anstead's dissent relied upon the traditional rules and stated that he would reverse the order denying a new trial because, in a case such as this where the jury awarded the plaintiff damages for future pain and suffering, but awarded zero damages for the past noneconomic damages, "a new trial is required regardless of whether the plaintiff objects at the time that the

verdict is returned that the verdict is inconsistent." Hendelman, 609 So.2d at 768 (Anstead, J., dissenting), *citing*, Berez, *supra*; Massey v. Netschke, 504 So.2d 1376 (Fla. 4th DCA 1987); Cowart v. Kendall United Methodist Church, 476 So.2d 289 (Fla. 3d DCA 1985).

In contrast, Judge Dell stated that "the judgment rendered in this case should be affirmed [because] the jury rendered an inconsistent verdict when it awarded future damages without awarding past damages." Hendelman, 609 So.2d at 766 (Dell, J., concurring specially).

> [A]n 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*.

Hendelman, 609 So.2d at 766-67 (Dell, J., concurring specially) (emphasis added), *citing*, Burgess v. Mid-Florida Service, 609 So.2d 637 (Fla. 4th DCA 1992); Moorman v. Am. Safety Equip., 594 So.2d 795 (Fla. 4th DCA 1992); Robbins v. Graham, 404 So.2d 769 (Fla. 4th DCA 1981); Lindquist v. Covert, 279 So.2d 44 (Fla. 4th DCA 1973).

Judge Dell further reasoned that a party should not be permitted to "circumvent" these cases by later arguing that the verdict is "inadequate" or "contrary to the manifest weight of the evidence." Id. "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.

Such is the position of the Petitioner in this case. True, a "zero damage" award in the face of uncontradicted evidence of such damages (or recovery for elements of other inextricably related damages), might *also* be viewed as an "inadequate" damage award; but it is first and foremost a patently inconsistent award which immediately alerts its recipient to its objectionable nature. Therefore, fundamental fairness and sound policy dictate that a timely objection be made or be waived.

"One of the purposes of interrogatory verdicts is to provide a means of checking the work of the jury." State, Dept. of Transp. v. Denmark, 366 So.2d 476 (Fla. 4th DCA 1979). "The ability to scrutinize a verdict for either inadequacy or excessiveness based on the use of an itemized verdict was part of the stated legislative intent in enacting section 768.77, which mandates itemization of damage amounts broken down into categories." Allstate, *supra*, 681 So.2d at 783, fn. 4. As a general rule, objections to the form of the verdict, must be timely made and failure to object results in a waiver. Robbins v. Graham, 404 So.2d 769 (Fla. 4th DCA 1981). *See also*, Burgess v. Mid-Florida Service, 609 So.2d 637 (Fla. 4th DCA 1992). "This problem has arisen with increasing frequency in personal injury cases since special verdicts became mandatory." Allstate, 681 So.2d at 783. "Only with special verdicts does a court have the opportunity to scrutinize the verdict and discern logical inconsistencies in the jury's findings." Id. "Cases are thus having to be retried because juries are not being properly instructed. Nor are juries

being given the opportunity to obviate the need for a new trial by the requirement of an objection to an inconsistent award." Allstate, 681 So.2d at 784 (Klein, J., dissenting), *citing*, Simpson v. Stone, 662 So.2d 959 (Fla. 5th DCA 1995).

Even Judge Anstead's dissenting opinion in Hendelman, *supra*, expressly recognized that his position was based upon the traditional rule that "a zero verdict in the face of undisputed evidence of damages ordinarily requires a new trial." Therefore, he voted to remand the case for a new trial on damages, "[r]egardless of the soundness of the policy behind the rule..." Hendelman, 609 So.2d at 768 (Anstead, J., dissenting).

In contrast, the Petitioner herein respectfully submits that when the underlying factual scenario which informs the rule has changed, so must the rule. Specifically, Florida's Tort Reform and Insurance Act, and Florida Statute § 768.77 in particular, has eliminated the use of general verdict forms, around which most of the case law dealing with "inadequate" and "inconsistent" verdicts previously evolved. The use of a general verdict form in the past did not permit judicial scrutiny of awards in the context of discrete and identifiable elements of damages; the special interrogatory verdict form clearly does.

Therefore, if an award of past medical expenses which is unaccompanied by an award of past noneconomic damages is, in fact, "inadequate as a matter of law" (as it was held to be in Mason, *supra*, and Daigneault, *supra*), then a jury verdict awarding such a recovery is patently inconsistent on its face and should require a timely objection at the time of rendition if it is ever to be objected to at all.

In closing, Auto Builders would note that the foregoing discussion focuses primarily on the precedents of the Fourth District simply because the decision and certified questions from Bucci v. Auto Builders South Florida, Inc., 690 So.2d 1387 (Fla. 4th DCA 1997) and Allstate Ins. Co. v. Manasse, 681 So.2d 779 (Fla. 4th DCA 1996), are the questions presently under review; and not because the "recurring problems" identified in Allstate, *supra*, are in any way limited to the jurisdictional boundaries of the Fourth District.

To the contrary, the Second District addressed this same issue in Cowen v. Thornton, 621 So.2d 684 (Fla. 2d DCA 1993), and, as noted above, it is in large part Judge Altenbernd's concurring opinion in Cowen which supports Auto Builders' present contention. That is, "[t]he jury's verdict in this case is both inconsistent and inadequate"; therefore, "a party who wishes to appeal such an erroneous verdict should be required to preserve the error by an objection prior to discharge of the jury." Cowen, 621 So.2d at 688 (Altenbernd, J., concurring). "If the plaintiff had objected to this patent inconsistency before the jury was discharged, the jury could have been reinstructed and may have reached a legal verdict." Id.

Furthermore, the Second District in Cowen, *supra*, expressly relied upon the Fourth District decision in Watson v. Builders Square, Inc., 563 So.2d 721 (Fla. 4th DCA 1990), for the proposition that "[w]hen a damage award is clearly inadequate and the issue of liability was contested, it gives rise to a suspicion that the jury may have compromised its verdict." Cowen, 621 So.2d at 687, *citing*, Watson, *supra*. This, of course, was the

same decision the Fourth District relied upon in Bucci in stating:

> We cannot say the inadequacy of the verdict was induced by the jury's misconception of the law or failure to consider all elements of damages, rather than the result of a compromise on the issue of liability. Watson v. Builders Square, Inc., 563 So.2d 721 (Fla. 4th DCA 1990). The questions posed during the jury's deliberations, viewed together with its ultimate award, strongly suggest it reached a compromise verdict.

Bucci, 690 So.2d at 1389.

Notwithstanding the foregoing (or Judge Altenbernd's concurring opinion), the Second District in Cowen, *supra*, adhered to what it viewed as the settled rule regarding challenge to an "inadequate" or an "inconsistent" verdict, and concluded:

> Thornton argues that Cowen failed to preserve this error because Cowen did not bring the inconsistency of the verdict to the trial court's attention before the jury was discharged. This court, however, has ruled previously that there is no waiver of this issue when the plaintiff has filed a motion for new trial which challenged a zero verdict after a jury found liability.

Cowen, 621 So.2d at 687, *citing*, Surety Mortgage, Inc. v. Equitable Mortgage Resources, Inc., 534 So.2d 780 (Fla. 2d DCA 1988).

The First District Court has also generally adhered to the traditional rule; for example, as it did in Kirkland v. Allstate Ins. Co., 655 So.2d 106 (Fla. 1st DCA 1995).

In Kirkland, *supra*, the jury verdict awarded Mr. Kirkland approximately $25,000 for his past economic damages and $5,000 for his past pain and suffering, but awarded $0 for future economic and noneconomic damages. The verdict further denied any recovery at all on Mrs. Kirkland's claim for past and future loss of

consortium. The trial court denied the plaintiffs' motion for new trial based, *inter alia*, upon the grounds that the Kirklands failed to timely object to the verdict prior to the discharge of the jury. In reversing the case for a new trial, the First District stated:

> The court erred in so ruling because the Kirklands' motion was based on the inadequacy of the damage award in the verdict, not on the inconsistency of the verdict. The law does not require an objection to be made when the verdict is received before the jury is discharged for a party to challenge the adequacy of the damage award in a motion for new trial.

Kirkland, 655 So.2d at 108, *citing*, Cowen, *supra*, and Cowart, *supra*.

The Third District's decision in Cowart v. Kendall United Methodist Church, 476 So.2d 289 (Fla. 3d DCA 1985), is perhaps one of the most frequently cited decisions in this area; in particular, Chief Judge Schwartz's statement that "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 weight of the evidence." Cowart, 476 So.2d at 290. Ironically enough, however, the Third District's decision in Savoca v. Sherry Frontenac Hotel Operating Co., Inc., 346 So.2d 1207 (Fla. 3d DCA 1977), is also frequently cited in support of the opposite waiver argument. *See, e.g.*, Delva v. Value Rent-A-Car, 693 So.2d 574 (Fla. 3d DCA 1997); Cowen, *supra* (Altenbernd, J., concurring).

Specifically, in Savoca, *supra*, Mrs. Savoca suffered injuries in a slip and fall accident at the Sherry Frontenac Hotel. Her

husband also presented a derivative claim for medical expenses he incurred on her behalf. The jury returned a verdict of $65,000 for Mrs. Savoca, but awarded Mr. Savoca no damages on his derivative claim. The matter of possibly "inconsistent verdicts" was raised by the defendant immediately after rendition of the verdict, but the plaintiffs successfully resisted resubmission of the case to the jury. On these facts, the Third District affirmed the denial of plaintiffs' motion for new trial, and stated:

> First, no objection to the verdicts was made by plaintiffs' counsel who refused to concede error. In addition, the inconsistency could have been corrected before the jury was discharged if, as counsel for defendant suggested, the cause was resubmitted to the jury. However, plaintiffs' counsel refused to agree to this suggestion. Thus, any error as to the receipt of the inconsistent verdicts has not been preserved for purposes of this appeal.

Savoca, 346 So.2d at 1209.

In the later decision of Cowart, *supra*, wherein the Third District held that "a contemporaneous objection to a zero verdict in a derivative personal injury claim ... is not required to preserve the claim that the award of no damages is inadequate," Chief Judge Schwartz explained the holding of Savoca (and, apparently, why he thought "any existing confusion on the matter" was "mostly unjustified") as follows:

> The decision of this court in Savoca [*supra*], upon which the appellees and the trial court have relied for the contrary proposition, does not hold otherwise. Savoca involved that aspect of *the general rule requiring the timely assertion below of correctable error*, Diaz v. Rodriguez, 384 So.2d 906 (Fla. 3d DCA 1980), *which applies to a claim that multiple jury verdicts or answers to special*

> *interrogatories are inconsistent with or contrary to each other -- a contradiction which could obviously be resolved, one way or the other, if an objection is raised when the verdicts are returned so that the jury may reconsider the case as a whole.* State Department of Transportation v. Denmark, 366 So.2d 476 (Fla. 4th DCA 1979); Lindquist v. Covert, 279 So.2d 44 (Fla. 4th DCA 1973); Wiggs & Maale Construction Co. v. Harris, 348 So.2d 914 (Fla. 1st DCA 1977); see Higbee v. Dorigo, 66 So.2d 684 (Fla. 1953). We held in Savoca that, because plaintiffs' counsel not only did not request resubmission, but successfully resisted defendant's suggestion that this be done, this rule precluded the plaintiffs' appellate assertion that a zero verdict for a husband's derivative claim was "inconsistent" with a substantial damage award for the injured wife. By the same token, a defendant's initial challenge on appeal to a verdict for the injured spouse on the ground of inconsistency with a no damage finding in the derivative claim is barred by the failure to assert that position when the verdicts were returned.

Cowart, 476 So.2d at 290 (emphasis added).

In sum, the Third District decision in Savoca, *supra*, apparently held (i.e., according to the explanation in Cowart, *supra*) that the plaintiffs waived any objection to inconsistency in the verdict by virtue of their successful resistance to the defendant's request that the case be resubmitted to the jury. In contrast, the plaintiff in Cowart, *supra*, "pointedly [did] not complain that his verdict is 'inconsistent' with his wife's; indeed, he correctly points out that there is nothing necessarily or legally 'inconsistent' between an award to the injured person and a finding of no damages in the derivative claim, which may be perfectly appropriate if the evidence on the point is insufficient or conflicting." Cowart, 476 So.2d at 291. In any event, the

court in Cowart concluded that "a zero damage verdict for the plaintiff, even when coupled with a finding of liability against the defendant, may be tested for inadequacy in the light of the evidence of the case raised, as here, only by an appropriate (and required) motion for new trial on these grounds." Id.

The true irony of Cowart is perhaps found in the court's statement that "[d]espite having said all this, we do not reverse [because] there is a real possibility that the jury, albeit incorrectly, included Mr. Cowart's claim for loss of consortium in his wife's award..." Cowart, 476 So.2d at 292. The court then closed with a footnote, stating:

> It may be that this result renders what has gone before technically unnecessary to the disposition of the case and therefore dictum. We consider that the effort may nonetheless have been worthwhile in aiding in the understanding of a troublesome area of the Florida law.

Id. at fn. 7. Despite the Third District's best efforts, however, the Petitioner herein respectfully submits that this area of the law remains "troublesome" at best.

For example, in Alamo Rent-A-Car, Inc. v. Clay, 586 So.2d 394 (Fla. 3d DCA 1991), four seaman were riding in a rented car when the driver fell asleep at the wheel and ran off the road. The driver and two passengers were killed; the third passenger was seriously injured. In the subsequent lawsuit against the driver, the jury awarded the four plaintiff children (two left by each of the two decedents) the same damage award -- $800,000 for intangible losses -- despite the fact that all the children were of different ages. On appeal, the Third District, first, rejected the

contention that any of the damage awards, considered individually or collectively, could be deemed "excessive." Further, the court stated:

> At the outset, we think that the defendant's failure to raise this claim -- which, citing Salazar v. Santos & Co., 537 So.2d 1048 (Fla. 3d DCA 1989), review dismissed, 544 So.2d 200 (Fla. 1989), review denied, 545 So.2d 1367 (Fla. 1989), is essentially that it is *inconsistent* to award the same damages to children of different ages -- resulted in a *waiver* of its ability to make the argument on appeal. See Higbee v. Dorigo, 66 So.2d 684 (Fla.1953); Wiggs & Maale Construction Co. v. Harris, 348 So.2d 914 (Fla. 1st DCA 1977); Lindquist v. Covert, 279 So.2d 44 (Fla. 4th DCA 1973). *If a claim had been made when the jury returned, it may well have corrected the defect* by awarding a larger amount for any of the children, rather than reducing some of the awards to under $800,000. Since it deliberately made the choice not to risk that result, Alamo may not claim error here. Cowart v. Kendall United Methodist Church, 476 So.2d 289, 290 n. 2 (Fla. 3d DCA 1985).

Alamo Rent-A-Car, 586 So.2d at 394 (emphasis added).

Similarly, in Delva v. Value Rent-A-Car, 693 So.2d 574 (Fla. 3d DCA 1997), the plaintiff sustained permanent injuries in an automobile collision, including two spinal fractures and optic nerve damage. In answer to special interrogatories, the jury found the driver of the defendant's car 100% liable for the accident. As to damages, the jury found that the plaintiff sustained permanent injuries and it assessed $20,034 for past medicals; $1,000,000 for fifty years of future medicals (reduced to a present value of $480,000); and $20,000 in past noneconomic damages, but nothing for future noneconomic damages. Following the verdict, plaintiff's counsel pointed out the apparent inconsistency in the $1,000,000

and zero verdicts for future intangibles and requested that the case be resubmitted to the jury to reconcile them. The defense, however, successfully resisted this suggestion. Subsequently, the trial judge orally granted a defense motion for a "mistrial" and granted the plaintiff a new trial because "the damage verdicts were inconsistent" and the future medical award was excessive. Delva, 693 So.2d at 575.

On appeal, the Third District reversed with directions to enter judgment on the jury verdict, stating:

> Even assuming arguendo both that an award for future expenses is necessarily legally inconsistent with a zero verdict for future pain and suffering, *but see* Allstate Ins. Co. v. Manasse, 681 So.2d 779, 784 (Fla. 4th DCA 1996) (Klein, J., dissenting), and the even more dubious proposition that the defendant may be heard to complain about it, *compare* Allstate Ins. Co. v. Manasse, 681 So.2d 779 (Fla. 4th DCA 1996) (plaintiff contending that zero verdict for future non-economic damages was inadequate and inconsistent with award for future medicals), *there is no doubt that such an inconsistency may, and if possible, should be cured by permitting the jury to resolve it*. *See* Cowart v. Kendall United Methodist Church, 476 So.2d 289 (Fla. 3d DCA 1985). In this case, the jury, after being told that the two verdicts could not stand together, could have transposed the awards, divided the $1,000,000 between the two elements, or even left the $1,000,000 where it stood and added an additional amount for future intangibles. *By objecting to the plaintiff's specific request that the jury be allowed to obviate the inconsistency problem in any of these ways, the appellee effected a binding waiver of its right to a new trial on that ground*.

Delva, 693 So.2d at 576-77 (emphasis added), *citing*, Cushman & Wakefield, Inc. v. Comreal Miami, Inc., 683 So.2d 208 (Fla. 3d DCA 1996); Higbee v. Dorigo, 66 So.2d 684 (Fla. 1953); Hendelman v.

Lion Country Safari, Inc., 609 So.2d 766 (Fla. 4th DCA 1992)(Dell, J., concurring specially), rev. dis., 618 So.2d 209 (Fla. 1993); Alamo Rent-A-Car, Inc. v. Clay, 586 So.2d 394 (Fla. 3d DCA 1991); Cowart, 476 So.2d at 289; Wiggs & Maale Const. Co. v. Harris, 348 So.2d 914 (Fla. 1st DCA 1977); Lindquist v. Covert, 279 So.2d 44 (Fla. 4th DCA 1973); Savoca v. Sherry Frontenac Hotel Operating Co., 346 So.2d 1207 (Fla. 3d DCA 1977).[6]

Finally, there is the Fifth District's decision in Simpson v. Stone, 662 So.2d 959 (Fla. 5th DCA 1995), wherein the plaintiff and her husband appealed the denial of their post trial motion for a new trial because, although the jury found that the plaintiff suffered a permanent injury, it failed to award her any noneconomic damages. The jury also awarded no damages on the husband's claim for loss of consortium. Specifically, the jury found the present value of future medical expenses to be incurred to be $5400, but awarded the plaintiff no damages for pain and suffering. Therefore (the plaintiffs asserted), the jury's verdicts were inadequate and properly challenged by a motion for new trial. In response, the defendant argued that the verdict was "inconsistent," that the plaintiffs should have raised the issue before the jury was discharged, and that the plaintiffs waived the inconsistency by

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[6] *See also*, Sweet Paper Sales Corp. v. Feldman, 603 So.2d 109, 111 (Fla. 3d DCA 1992) ("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."), *citing*, Gould v. National Bank of Fla., 421 So.2d 798 (Fla. 3d DCA 1982); Robbins v. Graham, 404 So.2d 769 (Fla. 4th DCA 1981); Moorman v. American Safety Equipment, 594 So.2d 795 (Fla. 4th DCA 1992); Wackenhut Corp. v. Canty, 359 So.2d 430 (Fla. 1978).

failing to do so.

At the outset, the Fifth District noted the apparent confusion raised by the indiscriminate use of the word "inconsistent"; for example, in Butte v. Hughes, 521 So.2d 280 (Fla. 2d DCA 1988) ("[t]he 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."); and, in Smith v. Turner, 585 So.2d 395 (Fla. 5th DCA 1991), rev. denied, 595 So.2d 559 (Fla. 1992) ("a finding of a permanent injury would have been inconsistent with a zero damages verdict under Hartsfield v. Orlando Regional Medical Center, Inc., 522 So.2d 66 (Fla. 5th DCA 1988)."). Nevertheless, the court recognized in Simpson, *supra*, that: "No mention was made in Butte or Smith about the significance of the word inconsistent and the requirement of bringing an inconsistent verdict to the attention of the court before a jury is discharged. We suspect that in Butte the issue was never raised, and we can attest to the lack of argument on the issue in Smith." Simpson, 662 So.2d at 961.

The Fifth District's decision in Simpson, *supra*, then went on at length to quote virtually the entire concurring opinion by Judge Altenbernd in Cowen, *supra*, wherein he essentially argued that the Florida Tort Reform and Insurance Act (§ 768.77) and the use of special interrogatory verdicts rendered the verdict in question both inadequate and inconsistent (discussed above).

Upon the foregoing, the Fifth District concluded in Simpson, first, as to the husband's derivative claim, "we agree with the conclusion reached [in Cowart, *supra*] 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 weight of the evidence." Simpson, 662 So.2d at 961, *quoting*, Cowart, 476 So.2d at 290. Second, as to the jury's denial of noneconomic damages for the wife, the court concluded that, "while the threshold finding of a section 627.737 permanent injury coupled with a denial of any damages for pain and suffering indeed appears to be inconsistent, the lack of clarity in the existing case law on this point, as noted by Judge Altenbernd, makes it inappropriate to find that Lois Simpson waived her right to challenge the verdict posttrial on the basis of inadequacy. Moreover, we note that defendant Stone, as well as the trial court, could have sought to minimize the risk of another trial by raising this issue prior to the discharge of the jury." Simpson, 662 So.2d at 961-62, *citing*, Allstate Ins. Co. v. Daugherty, 638 So.2d 612 (Fla. 5th DCA 1994); Cowen, *supra*, 621 So.2d at 688 (Altenbernd, J., concurring).

Concurring specially in the majority decision in Simpson, *supra*, Judge Harris stated:

> I concur in the majority opinion except that portion that defers the application of the inconsistent verdict in this cause to the general principle relating to inconsistent verdicts. We held in Keller Industries, Inc. v. Morgart, 412 So.2d 950, 951 (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 verdicts 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.

Simpson, 662 So.2d at 962 (Harris, J., concurring specially). In closing, Judge Harris noted: "First, even if the current law lacks certainty, clarification will not occur so long as courts, recognizing the problem, defer a definitive answer. Second, there should be no obligation on the court or on opposing counsel to raise the issue of inconsistent verdicts in order to preserve the issue for appeal." Id.

C. APPLIED TO THE FACTS OF THE PRESENT CASE, THE PLAINTIFF WAIVED HIS RIGHT TO CHALLENGE THE VERDICT AFTER DISCHARGE OF THE JURY AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE PLAINTIFF'S MOTION FOR NEW TRIAL WHERE THE PLAINTIFF HAD MORE THAN ADEQUATE TIME AND OPPORTUNITY TO OBJECT TO THE VERDICT BEFORE AND AFTER IT WAS RENDERED, AS WELL AS TO REQUEST FURTHER OR ADDITIONAL INSTRUCTION OF THE JURY WHICH THE PLAINTIFF KNEW WAS ABOUT TO RENDER THE ALLEGEDLY "INADEQUATE" VERDICT, AND YET THE PLAINTIFF FAILED TO DO SO.

In the course of the appeal below, the plaintiff asserted that the trial court erred in denying the plaintiff's motion for new trial where, as here, the jury rendered a verdict finding the defendant 20% negligent and the plaintiff 80% comparatively negligent, and awarded the plaintiff $20,000 for past medical expenses and $80,000 for future medical expenses, but awarded nothing for noneconomic damages such as pain and suffering, etc.

[R. 454-56]. In support of his position, the plaintiff relied on several pronouncements of Florida law which generally hold that "[j]ury verdicts have been held inadequate in any number of cases where the award is equal to or less than the uncontroverted medical bills." Calloway v. Dania Jai Alai Palace, Inc., 560 So.2d 808, 809 (Fla. 4th DCA 1990), *citing*, Griffis v. Hill, 230 So.2d 143 (Fla. 1970). In short, it was the plaintiff's position that "awarding an injured person only the exact amount of medical expenses incurred and nothing for pain and suffering 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." Daigneault v. Gache, 624 So.2d 818, 819 (Fla. 4th DCA 1993), *citing inter alia*, Watson v. Builders Square, Inc., 624 So.2d 721 (Fla. 4th DCA 1990).

In response to the plaintiff's appeal, the defendant conceded that the foregoing general propositions are accurate statements of controlling Florida law; however, none of the cases relied upon by the plaintiff in his attempt to set aside the jury's verdict and grant a new trial in this case deal with facts or proceedings similar to those presented by this case. For example, in none of the above-cited cases did the plaintiff stand silently by, *without objection*, after being expressly forewarned by the jury of its intent to render the allegedly "inadequate" verdict as was the case here where the deliberating jury sent a note to the judge stating:

> 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 percentages of negligence to arrive at the final medical expense amount?

[T. 324]. Upon reading these questions from the jury, it was abundantly clear to everyone in the courtroom that the jury was contemplating a "compromise" verdict. The trial judge expressly acknowledged that "[t]hey 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?" [T. 325]. Defense counsel agreed, "Yes, that seems to be apparent," [T. 325], and went on to observe, "Of course, they probably don't even want to say that the defendant is negligent, but they want to give him the $19,000." [T. 326]. Moreover, the jury's question as how to assign "the percentages of *negligence* to arrive at the final medical expense *amount*" showed clear intermingling of the liability and damage aspects of the case. [T. 324; emphasis added]. Quite simply, it was (and is) the defendant's position that the verdict in this case was a gift to a sympathetic plaintiff from a jury that did not perceive negligence on the part of a corporate defendant (although it did apparently sense deep pockets). This is, of course, an improper endeavor by the jury.

Notwithstanding the foregoing, once the plaintiff was presented with the situation described, and was thereby given an opportunity to either suggest an answer to the jury's question, or to request an additional or further jury charge regarding the difference between liability and damage aspects of the case, the plaintiff stated simply: "Judge, it's our opinion that you should instruct them to follow the instructions as presented." [T. 326]. The trial judge did exactly as the plaintiff requested [T. 329], and the jury returned the verdict that everyone knew beforehand they would: a $20,000/$80,000 award of past/future medical

expenses with a 20%/80% apportionment of fault (i.e., so as to award the plaintiff an amount which would cover his past medical expenses of $20,000 and nothing else). [T. 330-32]. The plaintiff thereafter requested that the jurors be polled, but offered *no objection* whatsoever to the propriety, consistency, or "adequacy" of the verdict. [T. 332-33]. Unfortunately, the trial transcript is silent with regard to other aspects of the discussion between the court and counsel which were had off the record, yet these matters were specifically recalled and discussed by the trial judge during hearing of the plaintiff's motion for new trial. [R. 605-15]. In denying the plaintiff's motion, the judge stated:

> The Court: I knew there was going to be a problem, and I want you to go back and get that transcript because I said to you: Counsel, is there any problem with the Jury verdict as it stands? I hear nothing. Would either of you like to do anything about it? I hear nothing.

[R. 608-09]. The trial judge ultimately inquired of counsel: "Isn't there something that says when the Court gives you a verdict, you can correct it; and you have the obligation to do that?" [R. 609]. It is the essence of the defendant's position in this appeal that the trial judge was correct and that the plaintiff most certainly should be held to have the obligation contemplated by the court. Quite simply, no party should be allowed to stand silently by in the face of obvious jury confusion or error for the sole purpose of obtaining an undeserved second bite at the apple when the necessity of a new trial before a new jury could have easily been avoided before the original jury was discharged. Therefore, the trial judge cannot be said to have abused her

discretion in denying the plaintiff's motion for new trial in this case where the plaintiff had more than adequate time and opportunity to object to the verdict *before* it was rendered, as well as to request further or additional instruction of the jury which the plaintiff knew was about to render the allegedly "inadequate" verdict, and where the plaintiff for whatever reason either failed to, or made a tactical decision not to, object to the verdict when it was rendered. *See, e.g.*, Eley v. Moris, 478 So.2d 1100, 1103 (Fla. 3d DCA 1985) ("Although the jury was initially confused, that confusion was cleared up when the errors in the first verdict form were pointed out by the court to the jury and the jury retired again to reconsider the case in light of the evidence and the instructions given."). The plaintiff should not be allowed to reap the benefit of "a second bite at the apple" from the confusion which it sowed or, at the very least, failed to object to.

It is, of course, well settled that "a trial court's discretion to grant a new trial is 'of such firmness that it would not be disturbed except on a clear showing of abuse'..." Castlewood International Corp. v. LaFleur, 322 So.2d 520, 522 (Fla. 1975), *quoting*, Cloud v. Fallis, 110 So.2d 669, 672 (Fla. 1959). "A heavy burden rests on appellants who seek to overturn such a ruling, and any abuse of discretion must be patent from the record." Castlewood, 322 So.2d at 522.

> The test is whether the trial court abused its "broad discretion." If reasonable men could differ as to the propriety of the action taken by the trial court, then there is no abuse of discretion.

Ford Motor Co. v. Kikis, 401 So.2d 1341, 1342 (Fla. 1981). *See*

also, Freeman v. Bandlow, 143 So.2d 547 (Fla. 2d DCA 1962) ("The failure of the record to demonstrate an abuse of discretion on the part of the trial judge in denying plaintiff's motion for new trial necessitates an affirmance.").

In the present case, the plaintiff moved the trial court for a new trial arguing that the verdict was "inadequate" as a matter of law [R. 606-09], while the defendant responded that any objection to the verdict had been waived by the plaintiff for failure to timely object to the verdict as "inconsistent" when it was rendered. [R. 610-12]. In either case, the most distinctive characteristic of this case lies not in the often-gray distinction between "inadequate" and "inconsistent" verdicts[7] but, rather, in the fact that the parties 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. Particularly germane to such a situation is the following observation from 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 should not be laid upon the trial judge; rather, it must be placed upon the defendant's 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

[7] *See, e.g.*, State of Florida, Dept. of Transportation v. Denmark, 366 So.2d 476 (Fla. 4th DCA 1979), wherein the jury verdict is apparently interchangeably referred to as both "inadequate" and "inconsistent."

> jury. *Trial counsel also failed to bring the inconsistent verdicts 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, defendant's trial counsel *intentionally, for tactical reasons, chose not to bring the problem to the court's attention*.

Keller Industries, 412 So.2d at 951 (emphasis added). Similar reasoning led to the affirmance of the denial of a new trial in Lindquist v. Covert, 279 So.2d 44, 45 (Fla. 4th DCA 1973), wherein 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 plaintiff's 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*.

Lindquist, 279 So.2d at 45 (emphasis added). The same is true of the court's decision in State of Florida, Dept. of Transportation v. Denmark, 366 So.2d 476 (Fla. 4th DCA 1979), wherein it was stated:

> We cannot know for a certainty what the jury intended. But had the error [in the verdict] been called to the court's attention prior to the discharge of the jurors, the jurors would have had an opportunity to reconsider . . . and could then have returned a new verdict reflecting their findings. *That opportunity was foreclosed upon discharge of the jury without objection*.

Denmark, 366 So.2d at 478 (emphasis added). Also applicable is the following general statement from Robbins v. Graham, 404 So.2d 769 (Fla. 4th DCA 1981):

> [T]he court and counsel recognized the

> inconsistencies at the time the jury was still present, and under circumstances where the problem could have been corrected if a timely objection had been made and the issue re-submitted to the jury with appropriate additional instructions. * * *
>
> Objections to the form of the verdict, under these facts, must be timely made and failure to object resulted in a waiver by appellee. [Citations omitted]. Errors of form, where the intent of the jury is otherwise clear, should be raised on the spot, *notwithstanding the fact that it might be to the defendant's benefit to remain silent and subsequently seek a new trial*. This principle is founded on the concept of fundamental fairness. *Relitigation would deprive the appellants of their earned verdict and give the appellees an unearned additional bite at the apple*.

Robbins, 404 So.2d at 771 (emphasis added). *See also,* Savoca v. Sherry Frontenac Hotel Operating Co., Inc., 346 So.2d 1207, 1209 (Fla. 3d DCA 1977) (Held that "any error as to the receipt of the inconsistent verdicts has not been preserved for purposes of this appeal" because "the inconsistency could have been corrected before the jury was discharged if, as counsel for defendant suggested, the cause was resubmitted to the jury.").

Finally, there is, of course, the defendant's reliance on the concurring opinion in Cowen v. Thornton, 621 So.2d 684 (Fla. 2d DCA 1993), wherein Judge Altenbernd stated his view that "[t]he jury's verdict in this case is both inconsistent and inadequate"; therefore, "I am inclined to believe that a party who wishes to appeal such an erroneous verdict should be required to preserve the error by an objection prior to discharge of the jury." Cowen, 621 So.2d at 688 (Altenbernd, J., concurring) (emphasis added). Judge Altenbernd went on to concur in the granting of a new trial

in Cowen, however, because "plaintiff's trial counsel had *no reason to believe a timely objection was necessary* to challenge the inadequate verdict posttrial. *Especially when neither the trial judge nor defense counsel raised this problem before the jury was discharged*..." Cowen, 621 So.2d at 688 (Altenbernd, J., concurring) (emphasis added), *comparing*, Savoca v. Sherry Frontenac Hotel Operating Co., 346 So.2d 1207 (Fla. 3d DCA 1977) with Cowart v. Kendall United Methodist Church, 476 So.2d 289 (Fla. 3d DCA 1985). Accordingly, Auto Builders submits herein, as it did in the trial court and the Fourth District Court, that the present case is clearly distinguishable on this point. That is, the jury in Bucci made clear by its questions to the court during deliberations that it was attempting to reach a "compromise" verdict wherein it would award the plaintiff his past medical expenses and nothing else. [T. 323-30]. In response, the jury was simply told to follow the law [Id.] and, after the jury rendered the verdict everyone knew it was contemplating, the trial judge specifically asked the plaintiff if there was an objection. [R. 608-09]. On these facts, the plaintiff in Bucci (unlike the plaintiff in Cowen) had every reason to believe that a timely objection to the inconsistency of the verdict might be required and that the absence of such an objection would be a significant factor in the trial judge's refusal to exercise her discretion and grant the plaintiff a new trial. Nevertheless, no objection was heard from the plaintiff after the verdict was announced. [T. 332-34].

Therefore, upon the foregoing authorities and principles of law, Auto Builders respectfully submits that this Court should hold that, under the particular and specific facts of this case, the

plaintiff waived any right to object to either the "inadequacy" or "inconsistency" of the jury's verdict by failing to (or consciously deciding not to) object to the verdict rendered in this case. In all fairness, the plaintiff has had his day in court, and he had every opportunity to present his case to the jury, to present his view of the law to the court, and (uniquely enough) even had an opportunity to object to the jury's verdict *before* it was rendered as well as immediately after its announcement. In short, this plaintiff received a "compromise" verdict from the jury against a defendant that was plainly not liable (as was discussed at length in the defendant's cross-appeal from the denial of its motion for directed verdict), and this case should be controlled by the extremely well-settled general principle of law that "[o]ne may not assert error upon an action of the trial court in which he himself has acquiesced." Holmes v. School Board of Orange County, 301 So.2d 145, 146 (Fla. 4th DCA 1974). Furthermore, it is settled beyond argument that "waiver is the intentional relinquishment of a known right, or the voluntary relinquishment of a known right, or conduct which warrants an inference of the relinquishment of a known right," Peninsula Fed. Sav. & Loan Assn. vs. DKH Properties, Ltd., 616 So.2d 1070 (Fla. 3d DCA 1993), and, under the particular facts presented by this case, it cannot be said that the trial judge abused her broad discretion in denying the plaintiff's motion for new trial by finding that the plaintiff waived the right to challenge the verdict posttrial.

Accordingly, the trial court's order denying the plaintiff's motion for new trial and its final judgment should have been affirmed.

CONCLUSION

Upon the foregoing, the Petitioner, Auto Builders South Florida, Inc., respectfully submits that:

(1) The Fourth District Court's first certified question should be answered in the negative: a finding of a permanent injury and an award of future medical expenses does *not* automatically render a zero verdict for future noneconomic damages "inadequate as a matter of law."

(2) The Fourth District Court's second certified question should be answered in the affirmative: a party should be required to object to an "inadequate" verdict, if based upon the jury's "inconsistent" answers to special interrogatories, prior to the discharge of the jury.

(3) The Fourth District Court erred in reversing the trial court's denial of the plaintiff's motion for new trial under the specific facts of this case where the trial judge could not be said to have abused her discretion in denying the plaintiff's motion for new trial because the plaintiff waived any objection to the "inadequate" verdict by failing to object to the jury's "inconsistent" answers to special interrogatories, prior to the discharge of the jury.

Accordingly, the decision of the Fourth District Court should be reversed and the case remanded with instructions to reinstate the trial court's final judgment which was entered upon the jury's verdict.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail this 16th day of July, 1997, to: Mark S. Gold, Esq., Gold & Beller, P.A., 333 S.W. Second Street, Fort Lauderdale, Florida 33312.

Respectfully submitted,

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