IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 93,038

MICHAEL JON DiPIETRO and MYRA DiPIETRO, a/k/a MYRA BELLIO, a/k/a MYRA J. CHANDLER, a/k/a MYRA LaPOINT, a/k/a MYRA NO LAST NAME, a/k/a MYRA,

Petitioners,

v.

DAVID GRIEFER and ANN GRIEFER, his wife, as Guardians of the Person and Property of LAUREL B. GRIEFER, an Incompetent,

Respondents.

RESPONDENTS' ANSWER BRIEF ON THE MERITS AND INITIAL BRIEF ON CROSS-REVIEW

ON REQUEST FOR DISCRETIONARY REVIEW
FROM THE FOURTH DISTRICT COURT OF APPEAL

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TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued)

Page

TABLE OF CITATIONS

TABLE OF CITATIONS
(Continued)

Page

TABLE OF CITATIONS
(Continued)

Page

TABLE OF CITATIONS
(Continued)

Page

TABLE OF CITATIONS
(Continued)

Page

TABLE OF CITATIONS
(Continued)

Page

Constitutional Provisions

Other Authorities

REFERENCE TO SYMBOLS USED IN THIS BRIEF

David and Ann Griefer, the parents of Laurel Griefer, will be referenced in this brief as "the Griefers." Laurel will be referenced separately. Michael DiPietro, who drove the car which struck Laurel, will be referenced as "DiPietro."

The prior decisions in this case are *Griefer v. DiPietro*, 625 So. 2d 1226 (Fla. 4th DCA 1993), and *Griefer v. DiPietro,* 708 So. 2d 666 (Fla. 4th DCA 1998). The latter is the decision being reviewed. These are referenced as "*Griefer '93*" and "*Griefer '98,*" respectively. Copies of these decisions are attached as Appendices 1 and 2.

Citations to the record are referenced as "R", followed by the volume and page number as in: "R:1 at 5."

Citations to the supplemental record are referenced as "SR", followed by the volume and page number as in: "SR:1 at 104."

Citations to a second supplement to the record, submitted for Court approval on December 31, 1998, are referenced as "2SR", followed only by a page number as in: "2SR at 6."

Citations to the transcripts are referenced as "T", followed by volume, date and page number as in: "T:4:1/12/96 at 139."

Citations to the supplemental transcripts are referenced as "ST", followed by volume, date and page number as in: "ST:2:1/11/96 at 215."

The initial brief filed on behalf of DiPietro is referenced as "IB __."

INTRODUCTION

DiPietro has briefed three issues for the Court to consider, only one of which was presented as a basis for the Court's jurisdiction. DiPietro invoked the Court's conflict jurisdiction to review the award of prejudgment interest. The Griefers believe that jurisdiction was improvidently granted, and that the decision of the district court is both unique and consistent with precedent as to the principles which ground prejudgment interest.

There is less justification for the Court to delve into the three decisions of the district court on evidentiary rulings made by the trial court. The Court has often held that it would not review issues brought for review which were not the basis for invocation of the Court's jurisdiction.

A decision by the Court to deny review of all issues presented by DiPietro, even after oral argument presently scheduled for April 5, 1999, would not be out of line. In like circumstances, the Court has previously concluded that its tentative exercise of jurisdiction had been improvident. *E.g., St. Mary's Hospital v. Brinson*, 709 So. 2d 105 (Fla. 1998) ("We accepted jurisdiction . . . in order to resolve what appeared to be a conflict . . . . However, on closer examination, we find that review was improvidently granted . . . ."); *Department of Health & Rehabilitative Services v. National Adoption Counseling Service, Inc.*, 498 So. 2d 888 (Fla. 1986) (same).

STATEMENT OF THE CASE AND FACTS

DiPietro's Statement of the Case and Facts is incomplete, omitting relevant information which bears both on the Court's decision to continue the exercise of its review function, and to make any decision on the merits. The opinion of the district court states in exquisite detail the background facts which led to the trial court's exclusionary rulings (*Griefer '98*, 708 So. 2d at 668-70), and DiPietro has

not challenged the accuracy of the district court's recitations. DiPietro's "overview of the facts," in contrast, contains coloration and allegations that are notable for an absence of record references. To complete the record, the Griefers provide the following additional information.

I. Information about Laurel Griefer and the consequence of her accident.

Laurel Griefer suffered permanent, disabling injuries from her accident with DiPietro. Laurel had graduated with a master's degree from Florida State University, had worked as a broadcast journalist in Tallahassee and a legislative aide for a member of the Florida House of Representatives, and at the time of her injuries was working as an assistant vice-president at Michael Swerdlow Companies. (2SR at 6-7, 52). She was a licensed aircraft pilot, skier and scuba diver, and at age 35 she was engaged to be married. (2SR at 7, 52).

As a result of massive head injuries and brain damage from this accident, Laurel's IQ dropped from approximately 130 to 77, she was treated over significant periods of time at hospitals and rehabilitation institutions, and her engagement was terminated. (2SR at 7-10, 52, 90; *Griefer '93,* 625 So. 2d at 1227). She now has a permanent disabling condition which makes it impossible for her to sustain meaningful employment of any type (2SR at 10; *Griefer '93,* 625 So. 2d at 1227), and she is largely dependent on the care and resources of her parents as she had been prior to her permanent discharge from the hospital. (2SR at 9, 52).

Laurel was not capable of testifying at trial regarding the accident that changed her life. (R:1 at 138, ¶ 7).

II. Information about expert witnesses for the parties, their areas of expertise, and pre-trial activities which led the trial court to bar the Griefers' expert testimony.

The essence of DiPietro's defense of the trial court's sanction is that discovery regarding opinions to be rendered by a Griefer-listed expert, Dr. Harry L. Snyder, was hampered by the Griefers' delay in providing answers to interrogatories and the taking of his deposition. (IB 29). Contrary to DiPietro's assertion that he did not have the chance to depose the Griefers' expert until the "11th hour" (IB 29), DiPietro had received the answers to all of his interrogatories and had deposed Dr. Snyder well before trial (*Griefer '98*, 708 So. 2d at 668). (See, R:2 at 222; SR:1 at 3-93).

DiPietro knew that Dr. Snyder intended to testify as an expert in human factors engineering — the study of human capabilities and limitations as applied to understanding how an accident may have taken place where there are human contributing factors such as visibility and reaction time (R:1 at 119-29; SR:1 at 12, 15) — and he had interrogatory answers and Dr. Snyder's deposition testimony a full 16 days before the trial.[1] The completion of discovery regarding Dr. Snyder prior to trial, by the taking of his deposition and the delivery of interrogatory answers, prompted the Griefers to request clarification of Dr. Snyder's status. (R:1 at 130).

While the motion was pending and before the trial commenced, DiPietro gave his accident reconstruction expert, Dr. Charles Benedict, a transcript of Dr. Snyder's deposition for review and allowed the Griefers to re-depose Dr. Bene-

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[1] Dr. Snyder's deposition (SR:1 at 3-93) was filed in support of the Griefers' motion for new trial on liability, and has been included in the record on appeal by an order of the court which granted the Griefers' agreed motion to supplement the record on appeal.

dict. (R:2 at 244-60). In his deposition, Dr. Benedict expressed his ability to address human factors issues related to this case, and acknowledged that he had done so in the first trial of this case and/or in his earlier depositions. (R:2 at 247, 257). He stated that he had both studied and obtained experience as an expert in human factors analysis (R:2 at 246, 250), and that he had testified in that field of expertise in other trials. (R:2 at 247). Having reviewed Dr. Snyder's deposition and opinions, Dr. Benedict declared himself willing and able to address at least two of the areas in which Dr. Snyder proposed to testify. (R:2 at 251).[2]

The attorneys for the parties then exchanged pretrial communications about the extent to which Dr. Benedict would serve as DiPietro's expert on human factors, and the extent to which DiPietro would "consent" to let Dr. Snyder testify. (R:2 at 249, 253-54). When the pretrial hearing was held on the Griefers' clarification motion, DiPietro filed a motion *in limine* seeking to prevent Dr. Snyder from testifying on human factors (R:1 at 137-40) and argued that he had no time to get his own expert to countermand Dr. Snyder. (R:2 at 270-71). His counsel represented to the court, however, that he was not prejudiced in the human factors field in two of the areas as to which Dr. Snyder was expected to testify — what was visible, and what the human eye can see — because he and DiPietro "feel that Doctor Benedict can probably counteract those . . . . We don't have a problem with that." (R:2 at 270-72).

In his initial brief, DiPietro represents that the Griefers took an "all or nothing" stand concerning Dr. Snyder's testimony at trial, and that the Griefers

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[2] The full transcript of Dr. Benedict's deposition, and the January 9 pre-trial hearing where the issue was addressed, appear at R:1, pages 244-60, 261-75.

declined his offer to allow Dr. Snyder to testify in two limited areas. (IB 29). There is no record before the Court which supports that position. The record reveals only that ***counsel for the parties*** differed in their recollections of what had been said at trial concerning testimony by Dr. Snyder. (T:7:7/2/96 at 27-30).[3] The record unambiguously shows that, in the face of disagreement between counsel, DiPietro's motion *in limine* was effectively granted and, as the district court noted with incredulousness (*Griefer '98*, 708 So. 2d at 671), the trial court refused to allow Dr. Snyder to testify at all in the Griefers' case in chief unless the parties could agree (leaving open but later foreclosing the possibility that he might be called on rebuttal). (R:2 at 273).

DiPietro's expert witness at trial, Dr. Benedict, offered opinion testimony on both accident reconstruction issues *and* human factors analysis. In that later realm, Dr. Benedict testified

1. that DiPietro had insufficient perception reaction time due to the complex reaction involved in dealing with more "decisions and things the driver has to contend with" (T:6:1/17/96 at 49-50);

2. that the phantom vehicle pulled DiPietro's attention away from looking down the road (T:6:1/17/96 at 51);

3. that a pedestrian going across a street can see an oncoming car clearly, whether it has its lights on or not (T:6:1/17/96 at 67);

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[3] Argument by counsel is not "record evidence" or testimony, of course. *Allred v. Chittenden Pool Supply, Inc.*, 298 So. 2d 361, 365 (Fla. 1974).

4. that only when DiPietro again looked down the road after the distraction of the phantom vehicle was he able to see the white bag[4] (T:6:1/17/96 at 120-23);

5. that DiPietro did not see the white bag (T:6:1/17/96 at 124); and

6. that the headlights of the DiPietro vehicle would not have helped Laurel Griefer to see DiPietro's car, for with or without lights "you can see the car fine" (T:6:1/17/96 at 124), because "you can see [oncoming cars] without having your eyesight drawn to the headlights." (T:6:1/17/96 at 125).[5]

When the defense rested, the Griefers sought to rebut Dr. Benedict with their accident reconstruction expert, Dr. Fogarty, in order to demonstrate that the calculations of DiPietro's expert as to the speed of DiPietro's car and the trajectory of Laurel's body at the time of the impact were erroneous. (Proffer, ST:4:1/18/96 at 357, 358; ST:4:1/17/96 at 244). Their request was denied, on the ground that "[t]here's enough testimony in there already." (ST:4:1/17/96 at 254).

The Griefers also sought to call Dr. Snyder to rebut Dr. Benedict's opinions in the human factors realm, but he too was prevented from testifying. (ST:4:1/17/96 at 245). The trial court's rationale, again, was that

> [t]he jury has heard enough testimony. Actually, they are insufferably bored by a lot of it, and I know they know the

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[4] The term "phantom vehicle" was used at trial because no one at the scene of the accident other than DiPietro saw the vehicle that he said had pulled out in front of him and distracted his attention. (T:5:1/16/96 at 25).

[5] Subsequent to this testimony and in response to another question posed by the Griefers, DiPietro objected on the ground that Dr. Benedict was not offering human factors testimony, at which point Dr. Benedict re-characterized his previous testimony as that of an accident reconstructionist. *Id.* at 126-27.

issues and the law will cover the issues; and the rest you can argue. There's enough testimony in there already.

(ST:4:1/17/96 at 254, restated in full in *Griefer '98*, 708 So. 2d at 670).[6]

III. Recusal of the trial judge for bias before the conclusion of trial court proceedings, and the case-dispositive actions taken by the successor judge without reviewing the record.

The second jury trial of this matter was conducted before Judge Leroy Moe. (R:2 at 207). Immediately after trial, and even before post-trial motions were filed, the Griefers moved to recuse Judge Moe for bias and prejudice in the concluding phases of the trial. (R:2 at 210-18). Affidavits filed by the Griefers alleged that, at the conclusion of the trial and during closing argument, Judge Moe had conveyed to the jury his disbelief and disapproval of the Griefers' case through "vivid and negative facial expressions showing disbelief, incredulity, humor and disapproval [which] were a direct communication to jurors that the judge had strong and negative opinions of [the Griefers'] case." (R:2 at 213-18). Judge Moe recused himself from the case before any action was taken on the Griefers' post-trial motions. (R:2 at 338).[7]

Judge Reasbeck was appointed to succeed Judge Moe. The Griefers pointed out that Judge Reasbeck was unable to pass on post-trial motions from a

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[6] The trial court also expressed its belief that there was no need for human factors testimony in this case (ST:4:1/18/96 at 259), but the district court expressly rejected that alternate rationale for excluding Dr. Snyder (*Griefer '98*, 708 So. 2d at 671-72) and DiPietro does not defend the trial court's alternate position.

[7] Judge Moe's decision to recuse himself effectively established the legal sufficiency of the Griefers' motion. DiPietro did not challenge the propriety of Judge Moe's recusal on cross-appeal in the district court, arguing only that the motion was untimely.

trial over which he did not preside, based on evidence with which he was unfamiliar and after a taint of bias which resulted from Judge Moe's conduct. (R:2 at 362). In hearings on post-trial motions, Judge Reasbeck recognized that he was totally unfamiliar with the case (T:7:4/30/96 at 12; T:7:5/6/96 at 2; R:2 at 361), *as did counsel for DiPietro* who expressed his own doubt "whether a court can do this sort of thing . . . review a trial that Your Honor didn't sit in." (T:7:5/6/96 at 23, 24). Nonetheless, Judge Reasbeck entered an order denying the Griefers' motion for a new trial on rehearing (R:2 at 368) and subsequently signed the Final Judgment. (R:3 at 389).

SUMMARY OF ARGUMENT

The Court's grant of conflict review was improvidently granted. There is no decisional conflict, and the carefully thought-out decision of the district court has correctly applied the principles which underlay any award of prejudgment interest. The district court appropriately upheld the award of prejudgment interest under the rationale of *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So. 2d 212, 215 (Fla. 1985), which held that a jury *verdict* fixes the amount of a plaintiff's loss and that a later determination of comparative fault does not alter the *amount* of that loss. "Liability" and "damage" are distinct concepts. Under the *Argonaut* rationale, the loss amount is "liquidated" by the jury's verdict, and a calculation of prejudgment interest is merely a mechanical computation to be made by the court.

The Griefers were not responsible for the delay between the jury's verdict setting the amount of their loss in 1991, and the entry of a judgment setting the proportion of that loss for which DiPietro is responsible. DiPietro was. The Griefers' appeals from two trials which the district court has held to be flawed were necessitated by errors which *DiPietro* injected into those proceedings. The

Griefers' desire for a fair trial on liability was fully vindicated by the district court's two decisions which reversed the flawed jury trials on liability.

As a matter of equity, the district court was correct in holding that the Griefers were prejudiced by the time loss of money on whatever sum is ultimately found to be due them from DiPietro. DiPietro was not prejudiced, for he had the opportunity to earn interest on the funds which he has retained since 1991.

There is no reason for the Court to provide DiPietro with a second, full record review of the district court's decision with respect to evidentiary rulings of the trial court. These other issues are not related to the issue of prejudgment interest, and the Court has frequently declined to provide a second merits review under these circumstances. Moreover, the issues implicated by the three trial court rulings involve well-established principles from decisions of this Court which simply call for an application to the particular facts here. There is no policy reason for the Court to express itself again on these same points of law. In any event, the district court's treatment of the three evidentiary issues raised by DiPietro was correct. The trial court grossly abused its discretion by denying the Griefers an opportunity to present expert witness testimony to the jury on the issue of human factors analysis, and in denying them rebuttal on both accident reconstruction and human factors.

If the Court elects to consider the evidentiary rulings raised by DiPietro, then it must also consider another issue of reversible error which was presented to the district court but found unnecessary to reach. The acts of denying the Griefers' post-trial motions and entering judgment were done by a trial judge who never heard any evidence in the proceeding, after the presiding judge had recused himself after tainting the jury verdict with overt prejudice and bias against the Griefers.

ARGUMENT

The four issues decided by the district court are offered for review here by DiPietro. The first, relating to prejudgment interest, was the basis of the Court's grant of discretionary review on the basis of decisional conflict. The Griefers respectfully reiterate what they suggested in their jurisdictional brief, that the district court's decision to allow an award of prejudgment interest was a matter of first impression which does not conflict with the case law or principles which underlay prejudgment interest. The district court discussed the applicable facts and policy considerations at length in its opinion, providing a strong reason for the Court to forego a second, independent expression of opinion on that issue.

Should the Court elect to address the issue, however, the decision of the district court should nonetheless be affirmed. The district court's decision represents a correct application of the doctrinal foundation for prejudgment interest and, in relation to the facts here, provides equity between the parties.

The other three issues briefed by DiPietro ask the Court to second guess the district court's determination that the trial court had abused its discretion in denying the Griefers an opportunity to present relevant, non-cumulative, expert witness testimony to the jury. As noted earlier and more fully discussed below, the Court need not and should not reach any of these issues. The intense record review required for an evaluation of the evidentiary issues DiPietro has presented — issues which have no prospect of providing precedent for any other court or any legal guidance to attorneys in any other judicial proceeding — is the assigned domain of the district courts under the present constitutional scheme for the distribution of judicial powers. A discussion of the rationale for leaving record review to judges of the district courts appears in *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980).

In any event, even if the Court were to accept DiPietro's invitation to provide a minute and detailed record review of the trial court proceeding, and even if the Court were then to agree with DiPietro that the district court was wrong on *all three* of the issues it considered (as would be necessary for the Court to grant the relief which DiPietro seeks[8]), the Court could not provide that relief without delving into yet another issue, not reached by the district court, which was presented to that court as an independent ground for reversal and a new trial on liability.

The district court stated in *Griefer '98* that, because it was reversing on the basis of the exclusionary rulings which prevented the Griefers from establishing their case, the court "need not reach the other grounds [presented by the Griefers] for reversal." 708 So. 2d at 672.[9] The primary other ground which had been raised before the district court was the denial of post-trial motions and entry of judgment by Judge Reasbeck, following the recusal of Judge Moe for communication of his anti-Griefer bias to the jury.

Grounds for reversal presented to a district court but not addressed in the court's opinion are preserved for review once the Court accepts a case for

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[8] DiPietro asks the Court to reverse and remand for reinstatement of the jury's liability determination in the second trial. (IB 44). If the district court was correct on *either* issue, however, DiPietro would not be entitled to a reinstatement of the verdict and judgment rendered in the second trial.

[9] The district court stated, as well, that it did not need to address issues on cross-appeal raised by DiPietro other than prejudgment interest. *Griefer '98*, 708 So. 2d at 672. DiPietro has not raised any of those other cross-appeal issues here, however, as a consequence of which they are deemed abandoned. *Korabeck v. Childs,* 98 Fla. 576, 124 So. 24 (Fla. 1929); *City of Miami v. Steckloff,* 111 So. 2d 446 (Fla. 1959); *Bell v. State*, 289 So. 2d 388 (Fla. 1973).

plenary review. *Savoie v. State*, 422 So. 2d 308, 312 (Fla. 1982) ("once this Court has jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised in the appellate process, as though the case had originally come to this Court on appeal"); *Cantor v. Davis*, 489 So. 2d 18, 20 (Fla. 1986) (deciding an issue which the district court never reached because it had not been decided in the trial court).[10] This independent taint to the second trial is alone sufficient for the Court to leave intact the district court's decision that a new trial on liability is necessary.

I. The district court correctly held that the Griefers are entitled to prejudgment interest.

The district court in this case was asked to decide whether prejudgment interest on a pre-determined amount of damages should run from the date of a jury verdict throughout subsequent retrials on liability, even though the percentage of a defendant's comparative fault and consequently the Griefers' ultimate dollar award, will not be determined until a jury fixes them with finality. That situation is quite unique in Florida. The uniqueness of the situation brings into play equitable factors not present in the usual case where the gap in time is only the brief interval between jury verdict and the entry of judgment.

Some of the many Florida appellate decisions in which jury trials have been reversed for a retrial only on liability are referenced in *Griefer '93*, 625 So. 2d at 1229. In only *one* Florida appellate decision, however — the one now before the Court — has there been any consideration or discussion of the issue of prejudgment interest in that circumstance. The decision of the district court on

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[10] While the Griefers believe the Court should not entertain the non-conflict issues presented by DiPietro, the recusal issue must be reached if the Court decides otherwise, in order to avoid a piecemeal adjudication.

the issue of prejudgment interest here is completely without conflicting decisional precedent from any other Florida appellate court. That absence of conflicting Florida precedent goes to the heart of the Court's "jurisdiction" under Article V, section 3(b)(3) of the Constitution, of course. It is significant that the district court has provided a thorough and thoughtful analysis of the prejudgment interest issue which these unique facts present.

If the Court were to adhere to its tentative decision to address prejudgment interest, however, it would find that the district court's decision is wholly consistent with the doctrinal underpinning for prejudgment interest awards, and fully consistent with the economic and equitable considerations that would pertain in the all-too-infrequent situation which exists here. Affirmation of the district court's decision is appropriate on legal grounds, and it is "just" under the facts of this case.

DiPietro argues that any award of prejudgment interest in this case is contrary to Florida law, based on an analysis along the following lines.

1. He asserts that, until *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So. 2d 212 (Fla. 1985), prejudgment interest was never available in personal injury cases in the absence of a statutory authorization. (IB 20-21).

2. He asserts that, in *Argonaut,* the Court created a common law authorization for prejudgment interest in order to make a personal injury plaintiff "whole" for amounts which had in fact been paid out of pocket, with the interest to run from the date on which a jury "liquidates" the amount of those damages. (IB 22).

3. He asserts that, like the situation addressed in *Alvarado v. Rice,* 614 So. 2d 498 (Fla. 1993) (no "payment" of claimed medical expenses), and unlike the situation in *Lumbermens Mutual Casualty Co. v. Percefull*, 653 So. 2d 389

(Fla. 1995) (no "payment" required in contract cases), in this case Laurel Griefer has no "vested property right." (IB 22).

4. He asserts that the *Argonaut* and *Alvarado* principle was expanded in *Palm Beach County School Board v. Montgomery*, 641 So. 2d 183 (Fla. 4th DCA 1994), to authorize prejudgment interest dating from the entry of a jury verdict which remains undisturbed, both as to liability and damages, throughout later proceedings in the lawsuit. (IB 22-23).

5. He asserts that the *Montgomery* decision is not entirely an incorrect application of the principles of *Argonaut* and *Alvarado* because, when a verdict remains intact both as to liability and damages, the "verdict is in essence, the judgment." (IB 23). In that circumstance, he says, the defendant has a choice of either paying the verdict at that point, or withholding payment until the entry of judgment and then providing the plaintiff with prejudgment interest.

Yet, DiPietro argues that this case is different in kind from *Argonaut* and *Montgomery* because the Griefers delayed DiPietro's ability to pay a sum certain by appealing the liability portion of the first jury's verdict. (IB 23-24).[11] DiPietro embellishes this argument by asserting that the Griefers' award of $2,075,000 is not an out-of-pocket expenditure,[12] and that Laurel Griefer has no

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[11] In *Griefer '93*, 625 So. 2d at 1229, the Griefers had challenged the insufficiency of the jury's damage award by appealing the trial court's denial of additur. (2SR at 16-22). That "legal" ruling by the court did not prevent the district court from holding on rehearing that the verdict amount was not *factually* challenged on appeal, so that a retrial on damages was unnecessary.

[12] The record does not indicate that the economic damage award excludes out-of-pocket expenditures, and DiPietro himself recognizes that the award of $2,740,000, actuarially reduced to $775,000, in part reflects "medical expenses, etc." (IB 24). There is no evidence in the record as to whether

(continued . . .)

vested right to any damage verdict. (IB 24-25). These arguments did not persuade the Fourth District, and they are no more persuasive here.

A. The decision of the district court is consistent with the doctrinal underpinnings for an award of prejudgment interest.

In arguing here that the Griefers' appeals of liability have prevented DiPietro from paying any damage award, and that the award does not reflect out-of-pocket expenditures which would give Laurel a vested property right, DiPietro misconceives the fundamental nature of prejudgment interest in Florida. Prejudgment interest is only the time cost of money added to a damage award which, once fixed *in amount* by a jury, runs from the occurrence of a plaintiff's loss. The rationale for prejudgment interest was stated with elegant simplicity in *Argonaut*, where the Court observed that since at least before the turn of the century,

> prejudgment interest is merely another element of pecuniary damages . . . . Under the "loss theory," . . . the loss itself is a wrongful deprivation by the defendant of the plaintiff's property.

474 So. 2d at 214-15. From that elemental description of prejudgment interest, the Court held that prejudgment interest becomes "merely a mathematical computation" once a ***verdict*** has liquidated the damages as of a date certain — "a purely ministerial duty of the trial judge or the clerk of the court to add the appropriate amount of interest to the principal amount of damages awarded in the ***verdict***." *Argonaut,* 474 So. 2d at 215 (emphases added).

(. . . continued)

the Griefers paid out or simply became indebted for the medical and other expenses which compose a part of the economic award.

The language of *Argonaut* indicates that the triggering mechanism for the mechanical award of prejudgment interest is the "verdict," as DiPietro has recognized. (IB 21). It is highly significant that the Court pegged liquidation of the damage amount as of the date of a "verdict," rather than as of entry of a "judgment." An understanding of the Court's rationale for that distinctive choice, and how the "loss" doctrine relates to that choice, is found in the roots of *Argonaut*.

The *Argonaut* case involved prejudgment interest on a subrogation claim brought by an insurance company against its negligent insured. The case came to the Court from the Fourth District, based on a conflict with *Bergen Brunswig Corp. v. State, Department of Health and Rehabilitative Services*, 415 So. 2d 765 (Fla. 1st DCA), *review denied*, 426 So. 2d 25 (Fla. 1983).

In addressing the conflict, the Court viewed the Fourth District's denial of prejudgment interest as a "holding that the comparative negligence factor made the award of damages uncertain and, thus, unliquidated." *Argonaut*, 474 So. 2d at 213.[13] The Court characterized *Bergen Brunswig* as announcing that "a claim becomes liquidated and susceptible of prejudgment interest when a verdict has the effect of fixing damages as of a prior date." *Id.* at 214. In describing the *Bergen Brunswig* decision, the Court noted that the First District had repudiated its prior holding that no prejudgment interest could be awarded unless there can be a "conclusive determination of an exact *amount* due." *Argonaut*, 474 So. 2d at 214

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[13] The insurer had paid property owners for fire damage to an apartment building, and then pursued subrogation and prejudgment interest against its negligent insured. In the subrogation suit, the property owners were found to be 25% at fault for the fire loss, so the full amount paid by the insurer to the property owners could not be recovered from the tortfeasor/defendant. *Argonaut*, 474 So. 2d at 213.

(emphasis added), quoting from the First District's prior decision of *McCoy v. Rudd*, 367 So. 2d 1080, 1082 (Fla. 1st DCA 1979).

The Court resolved the conflict in decisions by rejecting the Fourth District's rationale, and approving that expressed in *Bergen Brunswig*. *Argonaut*, 474 So. 2d at 214. The unmistakable choice of the Court was to require that interest — dating from the insurance company's "loss" by payment to the property owners — be added to the verdict amount awarded in the subrogation suit *after* reduction of the plaintiff's proportion of comparative fault. The Court's adoption of the *Bergen Brunswig* "better rule" — that a jury verdict liquidates a claim by fixing damages as of a prior date — and its rejection of the Fourth District's notion that no prejudgment interest award is possible unless there has been a conclusive determination of an *exact* amount due (474 So. 2d at 214), pointedly defines the policy rationale for prejudgment interest in Florida.

Laurel's "loss" occurred in 1988, and the dollar price-tag for that loss was fixed for all time, by a jury, on September 4, 1991. *Griefer '98*, 708 So. 2d at 672. At that point, the Griefers were in the same position as the insurance company in *Argonaut* which had paid the property owners at any earlier point in time. They were in the same position as Mr. Percefull in *Lumbermens Mutual Casualty Co. v. Percefull*, 653 So. 2d 389 (Fla. 1995), who had a prior indebtedness. DiPietro was "indebted" to the Griefers for a sum certain that the jury had liquidated. All that remained was precisely what was left undone in *Argonaut* — to have a jury determine the defendant's proportionate share of fault so that the court or the clerk could mechanically add prejudgment interest to the defendant's dollar liability.

There is one difference between this case and *Argonaut*: the fact that the *Argonaut* plaintiff had paid out all of its loss prior to bringing the subrogation suit, whereas here the record does not establish one way or the other the extent to

which the Griefers had paid out some of the medical and other expenses fixed as their economic loss. Nonetheless, the district court's decision here — awarding prejudgment interest dating from Laurel's "loss" at the hands of DiPietro on the full amount of the jury's damage-liquidating verdict — is faithful to the *Argonaut* rationale.

Nothing in the Court's decisions after *Argonaut* has changed the fundamental nature of a prejudgment interest as being simply an element of damages mechanically appended to a damage verdict in order to make a plaintiff financially whole. The *Alvarado* and *Lumbermens Mutual* cases, of course, distinguish previous payment of the loss sum in tort and contract suits, for the purpose of awarding prejudgment interest, but the rationale for such a distinction after *Argonaut* is worthy of re-evaluation.

In *Alvarado,* the Court distinguished *Argonaut* on the ground that the plaintiff had not suffered the loss of a vested property right (614 So. 2d at 499), while in *Lumbermens Mutual* the Court held that payment in fact is not a bar to prejudgment interest in a contract suit. Although the importation of "property" concepts into a prejudgment interest analysis derives from the Court's reference to "property" in *Argonaut*, there can be little doubt that, in *Argonaut*, the Court intended the liquidation of a damage sum by a ***verdict*** to establish a "property" right as of the date of the loss. The Court was clear that uncertainty as to the amount of loss prior to the jury's verdict does not "affect[] the award of prejudgment interest . . . [as the] *loss itself* is a wrongful deprivation by the defendant of the plaintiff's property." *Argonaut,* 474 So. 2d at 215 (emphasis added). The "loss" in contract suits retains its property character because

> [w]hether Percefull uses this money to pay medical bills or for some other purpose does not change the fact that a debt has been created.

653 So. 2d at 390. That same "debt" rationale should apply in personal injury cases, based on the doctrinal underpinning of *Argonaut*.

The district court's decision here reflects the well-documented distinction between liability and damages which was inherent in *Argonaut*. The key to *Argonaut's* rationale is liquidation of the dollar amount of the loss by a jury, not the confluence of that damage determination with the allocation of liability through a determination of comparative fault.

In a contract suit, the sum owed is liquidated for purposes of awarding prejudgment interest because it is known and certain despite the lawsuit.

> The fact that there is an honest and bona-fide dispute as to whether the debt is actually due has no bearing on the question. The rule is that if it is finally determined that the debt was due, the person to whom it was due is entitled not only to the payment of the principal of the debt but to interest at the lawful rate from the due date thereof.

Parker v. Brinson Constr. Co., 78 So. 2d 873, 874 (Fla. 1955). Here, the $2,075,000 damage award for Laurel's injuries was liquidated in amount with finality by a jury in 1991, and the fact there is a bona fide and honest dispute as to whether DiPietro is fractionally or fully responsible for Laurel's injuries should not have any bearing on an award of prejudgment interest for whatever dollar sum is ultimately prescribed.[14] The district court reflected the reasoning of *Parker* when it held:

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[14] Establishment of the dollar amount of Laurel's loss before liability proportions are determined differentiates this case from *Zorn v. Britton*, 120 Fla. 304, 307, 162 So. 879, 881 (1935), an early personal injury case in which the Court held that it had "never recognized an allowance of interest on *unliquidated* damages for personal injuries . . . ." (emphasis added), and the other cases referenced by DiPietro on this point.

> We reject the DiPietros' argument that damages are not liquidated until the jury determines the amount of comparative negligence. That is a liability issue which will not change the total amount of damages suffered by the Griefers.

Griefer '98, 708 So. 2d at 673. The district court properly followed the reasoning of *Argonaut*, *Parker* and *Lumbermens Mutual*.

DiPietro's contention that Laurel had no vested property right, because the damage amount does not reflect true out-of-pocket expenditures, should not change the rationale for an award of prejudgment interest. To the extent of DiPietro's liability for $2,075,000 — whatever his proportion or share might be — Laurel and the Griefers indeed have a property right, for as the district court sagely observed:

> Regardless of how much the recovery is reduced by comparative negligence, the damages were liquidated in 1991. Not awarding interest from that date would deprive the Griefers of a substantial part of their damages . . . .

Griefer '98, 708 So. 2d at 673.

Put another way, the Griefers can only be made whole with an award of prejudgment interest whether a third jury finds Laurel wholly free of fault, 99.9% at fault, or at some percentage level in between.[15] The Griefers will need interest on any resultant sum owed by DiPietro in order to compensate them for the loss of the time value of that amount of money. Calculation of that interest sum will be a purely mathematical matter.[16]

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[15] If the jury were to determine that Laurel was 100% liable for her injuries, DiPietro would owe neither damages nor interest.

[16] "Once a verdict has liquidated the damages as of a date certain, computation of the prejudgment interest is merely a mathematical computation." *Argonaut,* 474 So. 2d at 215.

The rationale of *Argonaut* — rejecting the need for a conclusive determination of the exact amount due a plaintiff in favor of recognizing liquidation of the loss amount before comparative fault is determined — is reflected in *Palm Beach County School Board v. Montgomery,* 641 So. 2d 183 (Fla. 4th DCA 1994). The district court in this case referenced its *Montgomery* decision. DiPietro notes a disagreement with *Montgomery* in *Rockman v. Barnes*, 672 So. 2d 890 (Fla. 1st DCA 1996). In that case, however, the court only held that the legislature's shift from a perpetually-set interest rate on judgments to one that is adjusted annually had no bearing whatever on that district court's previous decision regarding the commencement date of ***post-judgment*** interest. The disagreement with *Montgomery* expressed in *Rockman* reflects a mix-up between pre- and post-judgment interest.

Whatever the efficacy of *Rockman*, neither that case nor *Montgomery* involved a liquidated damage sum fixed by the jury which remained undisturbed through subsequent liability trial proceedings, as was the case here. In this case, at the end of the day, the district court approved prejudgment interest because of the unique situation of there having been no challenge to the ***amount*** of the damage award prior to a determination of comparative liability, whenever that occurs. The district court quite properly applied a principle comparable to law of the case, not different in kind from the vesting of a legal right, when it recognized that a previous jury had fixed a damage amount in 1991 which neither party subsequently challenged.

DiPietro's callous contention that the Griefers seek to benefit from the accrual of interest when they themselves were responsible for delay in the entry

of any judgment, due to their "successive appeals,"[17] is a reflection of the "penalty" theory for prejudgment interest which the Court expressly rejected in *Argonaut*. The policy established by the district court for this unusual class of case — not DiPietro's assertion of blame — is fiscally and legally consistent with *Argonaut*. In any event, DiPietro is wrong to place blame on the Griefers, for those appeals were necessary to correct successive trials which were flawed because *DiPietro himself* infected them with legal error. *See Griefer '93,* 625 So. 2d at 1229 (error to prevent an instruction which the Griefers sought on unlawful speed under an applicable statute); *Griefer '98,* 708 So. 2d at 672 (error to exclude expert witnesses).

If "blame" is to be considered, the Griefers are blameless. The district court has twice established the *bona fides* of their appeals. Any blame for the long delay between the jury's unchallenged assessment of the financial harm to Laurel and the entry of a judgment in this case lies at DiPietro's doorstep, and there is no reason that DiPietro should profit from an 8-year accrual of interest on whatever portion of $2,075,000 a jury ultimately decides represents his indebtedness to the Griefers. The district court quite appropriately analogized the situation here to a contract suit in which the amount owed is liquidated, and only entitlement is litigated.

B. As a matter of equity and economics, the award of prejudgment interest is consistent with the principles which underlay *Argonaut* and *Montgomery*.

DiPietro argues that an award of prejudgment interest in this case is inequitable and unfair to him, contending that delay could almost double the jury's award so that the Griefers have no inducement "to settle or tender a

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[17] DiPietro's jurisdictional brief at 7-8.

reasonable demand." (IB 25, 26, 27-28). DiPietro's appeal to equity and settlement incentives is misguided. All of the equities in this tragedy of personal harm and mistried lawsuits lie with the victim of DiPietro's careless driving, Laurel Griefer, and not with DiPietro.

The starting point for consideration of "equity" in this case is its history. Laurel's accident occurred ten years ago, on November 17, 1988. Her first trial took place in the fall of 1991. The jury in that trial awarded the Griefers economic damages in the amount of $2,740,000 for lost past wages, medical expenses and other expenditures, which was reduced to a present value of $775,000. *Griefer '93*, 625 So. 2d at 1228. The actuarial reduction was effected to bring the "loss" to its *then* value, as if it were then immediately payable. Non-economic damages were also awarded.[18]

On appeal, the jury verdict and judgment were both reversed because the trial court had accepted DiPietro's erroneous request that the Griefers be denied a jury instruction on the statutory directive against unlawful speed so that he, DiPietro, could effectively get a directed verdict on the issue of unlawful speed. *Id.* On rehearing the court held that only liability should be retried, and it refused to disturb the aggregate jury award of $2,075,000. *Id.* at 1229.

A second jury trial was held to determine the extent to which DiPietro was liable for Laurel's injuries. Following that trial, the trial court entered a judgment which applied DiPietro's jury-determined percentage of fault to the

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[18] Were the Court to conclude that prejudgment interest is not properly awardable in this case, then it logically follows that the actuarial value of the economic damage portion of the jury verdict should be recalculated to compute the present monetary value of $2,740,000 as of the date judgment is entered on the third jury's determination of comparative fault. *See Griefer '98*, 708 So. 2d at 673.

previously-fixed damage sum of $2,075,000. The trial court then mechanically supplemented the resulting judgment with interest dating from the date on which the district court had determined, in the first appeal, that the Griefers' damage award became fixed — September 4, 1991.

On appeal, the second jury trial on liability was set aside because DiPietro again led the trial court into reversible error — prevailing on the court to "sanction" the Griefers for a non-prejudicial discovery violation which barred testimony from their only human factors expert, and denied them the opportunity to rebut defense testimony on human factors and accident reconstruction. That directive for a third liability trial has now been delayed further by DiPietro's petition for repetitive record review here.

The history of this lawsuit demonstrates that all of the "delay" in fixing with finality the liability of DiPietro for his injuries to Laurel is directly attributable to his own misadventures in the trial court in an effort to avoid his responsibility to the Griefers. Counting from the 1991 starting date for a computation of prejudgment interest as determined in *Griefer '93*, more than seven years of prejudgment interest will have accrued up to the moment in time when the Court hears oral argument on April 5, 1999 (if the authorization for prejudgment interest is upheld). That happenstance, however, is purely a function of the litigation process in the courts of Florida, and not a consequence of any action taken by the Griefers in the course of pursuing a "just" level of compensation for Laurel's injuries.[19]

The appellate and retrial processes have literally taken years, but the time between the jury's unchallenged determination of the amount of damages and the

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[19] The motto for justice in Florida, emblazoned on the floor of the rotunda of the Supreme Court, states: "Soon enough, if right."

entry of a judgment is a function — as much as anything for which "blame" can be laid — of DiPietro's litigation tactics in fouling two successive liability trials.[20] There have been no delaying tactics by the Griefers.

There is no merit in DiPietro's contention that it was "inequitable" to him for the Griefers to have insisted through appropriate legal means that they be given a trial unmarred by legally erroneous rulings of the trial court which DiPietro induced. Any issue of "equity" involves simple economics: that is, who really benefits from an allowance of prejudgment interest in this situation, and who really suffers from a denial of those sums. Setting aside blame altogether, the foundation for an award of prejudgment interest is nothing more than a recognition that money has a financial value to a payor or a payee. Since September 1991, the Griefers had spent, incurred liability or suffered the loss of $2,740,000, according to the jury. The trial court actuarially compressed that number to $755,000, to reflect DiPietro's liability for payment *at the time judgment was entered in 1991*. Not the first dollar of more than $2 million in economic loss has yet been received by the Griefers, however, despite the fact that over seven years have elapsed since their loss was established.

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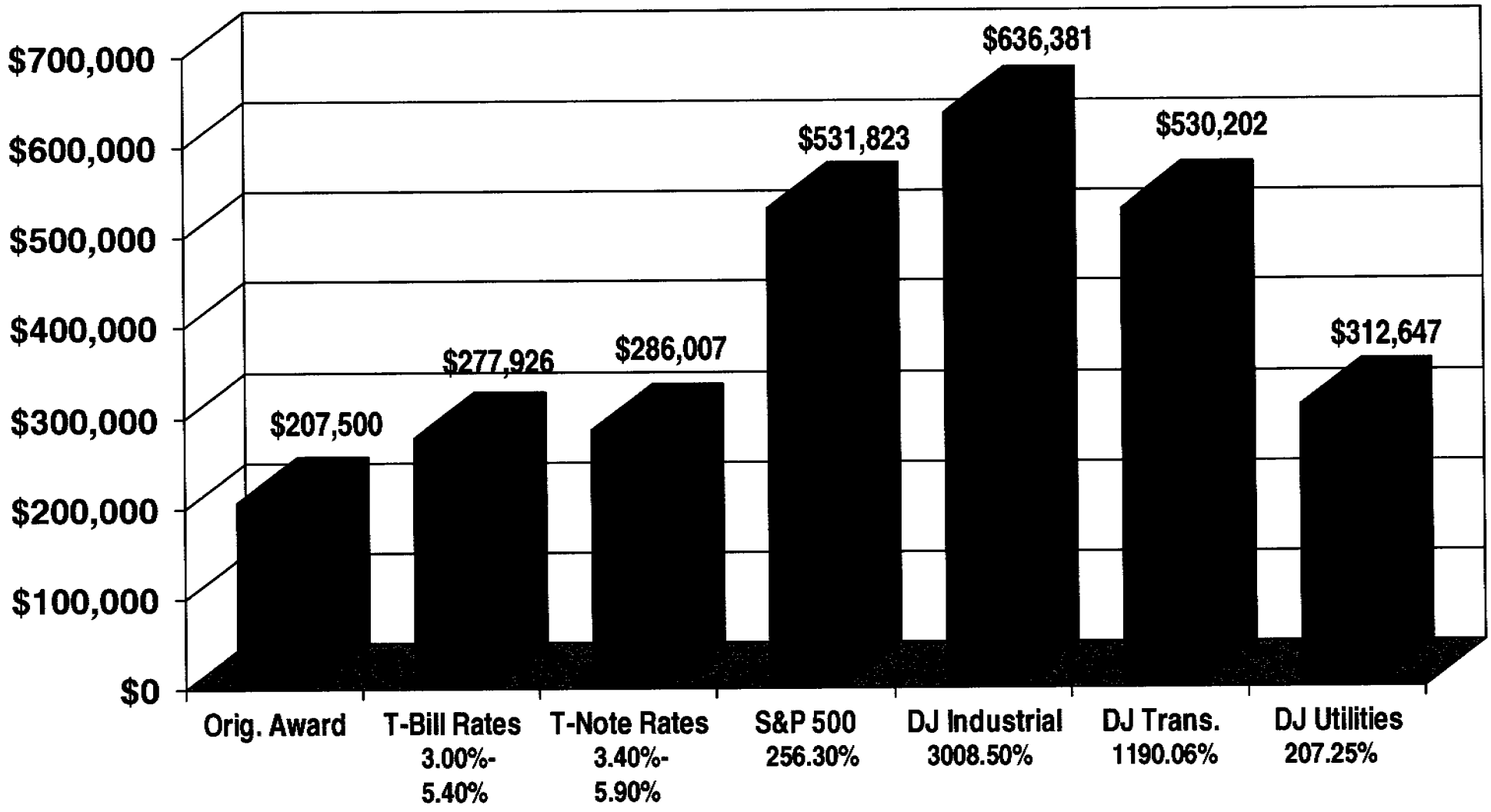
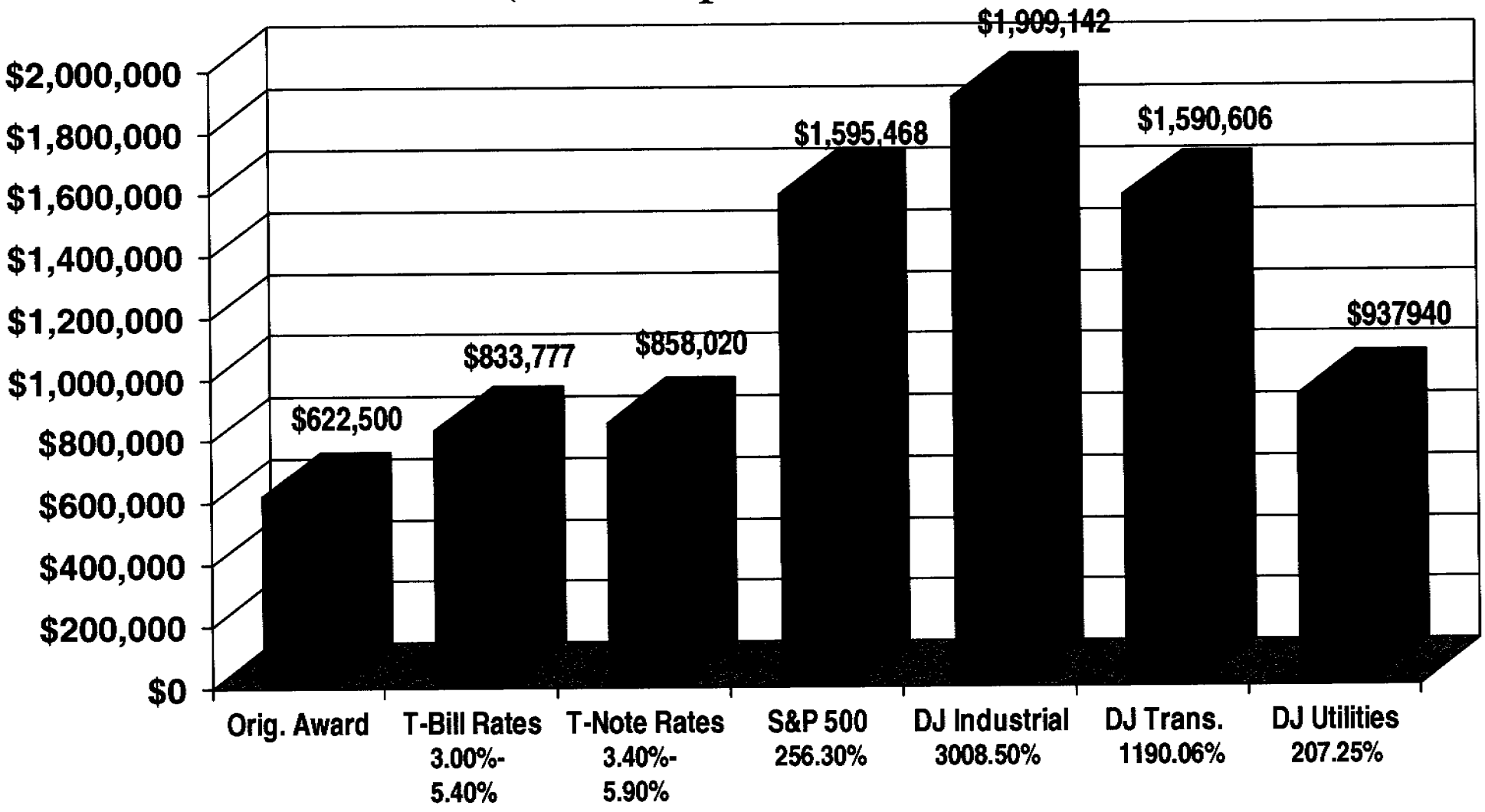
[20] The situation here is completely dissimilar to the "delay" decision on which DiPietro relies for arguing that prejudgment interest should not be awarded: *Volkswagen of America, Inc. v. Smith*, 690 So. 2d 1328 (Fla. 1st DCA 1997). In that case, the court denied prejudgment interest against a defendant who the plaintiff had ***dismissed*** from the lawsuit, based on an election of remedies. The court's decision was based on the unremarkable proposition that the plaintiff had waived any right to prejudgment interest against the dismissed defendant during the time that the dismissal was in effect. 690 So. 2d at 1332. DiPietro cannot be seriously suggesting that the Griefers' pursuit of a fair trial through the exercise of the right of appeal was tantamount to the *Volkswagen* situation.

DiPietro contends that he is prejudiced by having had no ability to pay the Griefers and thereby cut off interest accumulations which will increase the amount ultimately owed. But he fails to acknowledge that, during the entire period that he has *not* paid out any money, any unpaid sums for which he ultimately will be responsible have been available to earn a return *for him*. The following four pages of charts reflect the amounts which DiPietro could have accumulated in various investment opportunities if he is ultimately found to have been at fault for 10% of Laurel's injuries (as the second jury determined without evidence from the Griefers' human factors expert), for 30% of Laurel's injuries (as the first jury determined without having been instructed on the legislature's condemnation of unlawful speed), for 50% or even for 100% (as might be determined by a jury which would hear all of the Griefers' experts and which would be given proper instructions).

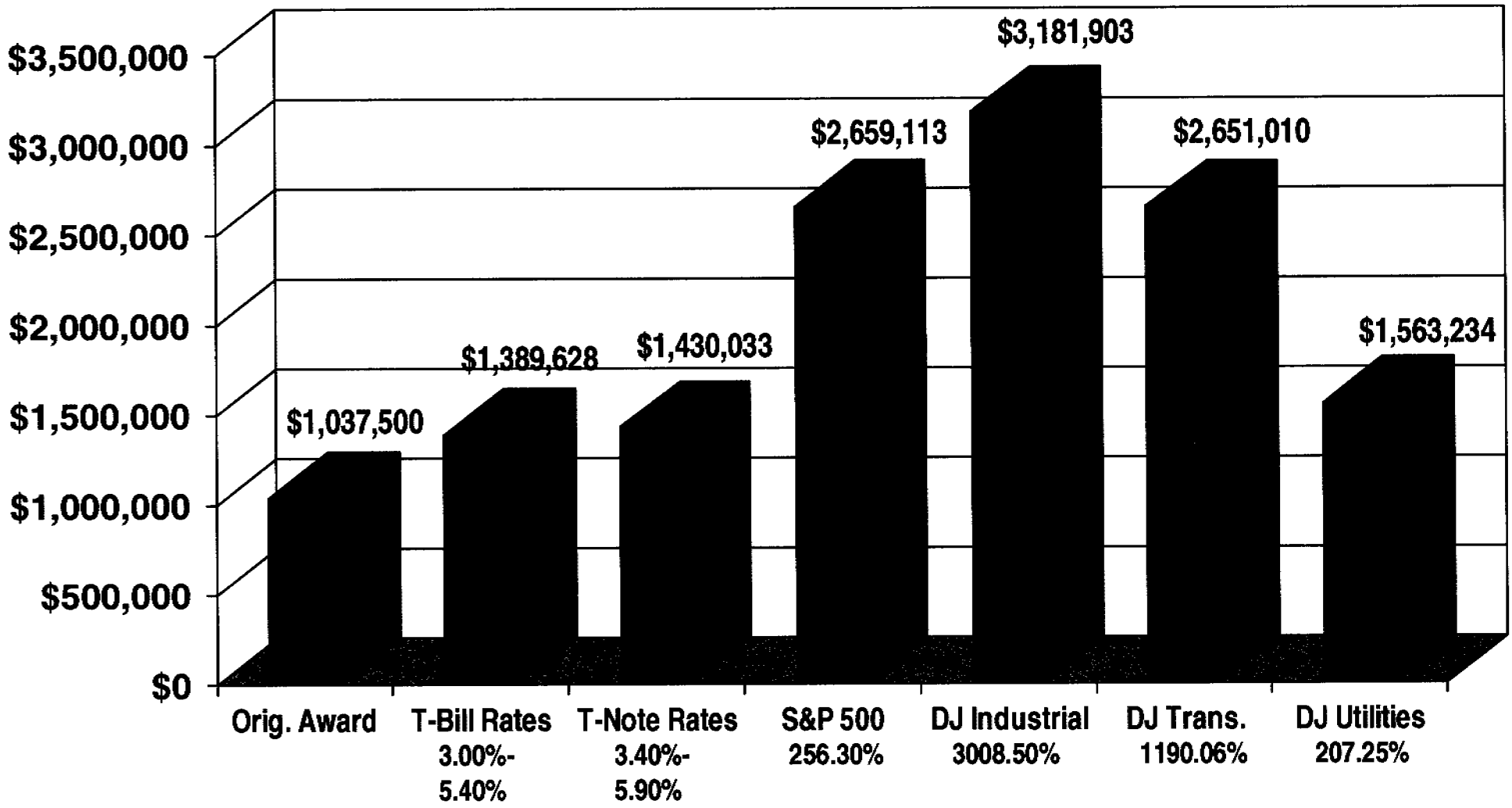
Projected Values of DiPietro's Funds Based on 10% Liability (As of April 5, 1999)



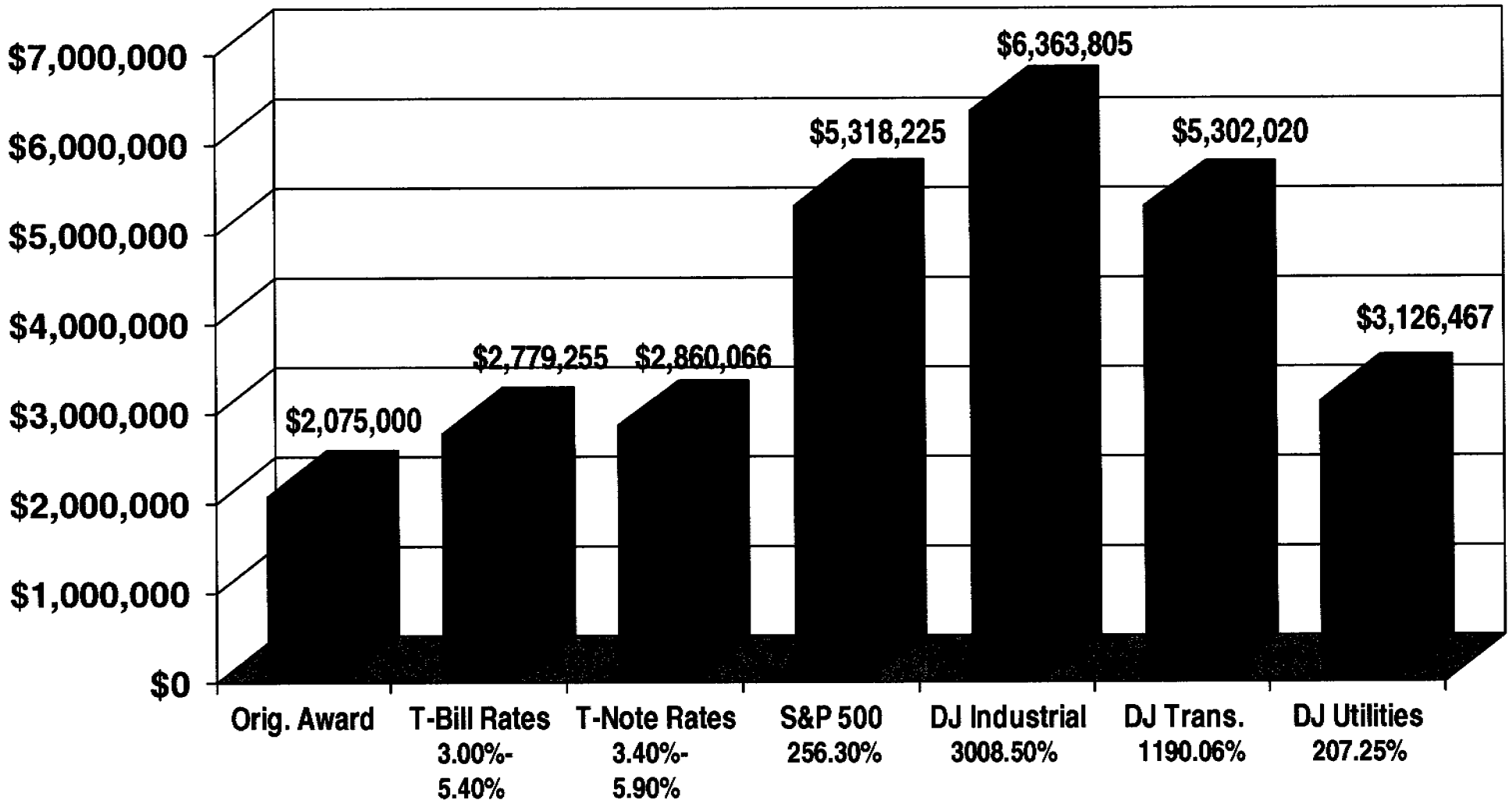
Projected Values of DiPietro's Funds Based on 30% Liability (As of April 5, 1999)



Projected Values of DiPietro's Funds Based on 50% Liability (As of April 5, 1999)



Projected Values of DiPietro's Funds Based on 100% Liability (As of April 5, 1999)



These charts show economic reality: that DiPietro is not financially harmed by having to pay prejudgment interest from September 1991 *no matter what level of liability is ultimately set by a jury*, since *he* has had the time benefit of money during the period he held the Griefers' money. Put another way, these charts show that the payment of prejudgment interest to the Griefers will simply put DiPietro in the same financial position he would have had if he had written a check to the Griefers in September 1991 for the amount which is ultimately determined to be his financial responsibility for the auto accident which forever altered Laurel's life, whatever that amount may be. The earnings he has thus far pocketed will follow that payment to the Griefers, and thereby prevent a windfall to him on *their* money.

DiPietro's contention that the law favors settlements, and that an award of prejudgment interest creates a disincentive for the Griefers to tender a reasonable "demand," is unpersuasive. Throughout the first trial and appeal, and continuing until the Griefers moved on remand to amend their complaint to seek prejudgment interest, the Griefers had not asked for prejudgment interest. Moreover, DiPietro was apparently quite satisfied with the jury's determination of both liability and damages in the first jury trial, for he filed no cross-appeal. (2SR at 43-82). If the potential for prejudgment interest was a disincentive for the Griefers to settle or present a reasonable tender of demand, as DiPietro suggests, then it is equally true that the *absence* of any such potential would have been an incentive *for him* to settle with a reasonable tender of payment.[21]

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[21] Even ***after*** the Griefers' complaint was amended to seek prejudgment interest, economic and market conditions in the United States were running in DiPietro's favor *despite* any running of prejudgment interest. From the date of the Griefers' amendment seeking prejudgment interest (October 18, 1994) until now (December 31, 1998), the Dow Jones industrial average

(continued . . .)

Obviously, settlement incentives or disincentives have no bearing whatever on the issue before the Court.

The district court accurately observed that the Griefers would not be compensated for all of their loss without an award of prejudgment interest. *Griefer '98,* 708 So. 2d at 673. That, the Griefers suggest, is the only equitable result in this unusual and unique circumstance.

II. The district court correctly reversed the rulings of the trial court which excluded testimony from the Griefers' expert witnesses.

In addition to arguing the issue regarding prejudgment interest which grounded the Court's review, DiPietro has attempted to shoehorn into the Court's review a challenge to the district court's treatment of three, case-specific evidentiary rulings made in the trial court.[22] DiPietro does not suggest that any of the three presents decisional conflict. He seeks only a second analysis of the record, and simply asks the Court to disagree with the district court's analysis and conclusions.

The Court is not obliged to give DiPietro a second appeal on the rulings of the trial court, of course. In this case, there are at least four compelling reasons not to do so.

(. . . continued)
increased 234% from 3,917.54 to 9,181.43, while the statutory rate of interest on judgments ranged from 12% in 1994, to 8% in 1995, to 10% from 1996 forward.

[22] DiPietro's initial brief lumps together as one issue the denial of rebuttal testimony by two separate experts for the Griefers. The Griefers here treat separately the trial court's exclusion of rebuttal testimony on human factors issues that was offered through Dr. Snyder, and rebuttal testimony on accident reconstruction that was offered through Dr. Fogarty.

First, the evidentiary rulings addressed by the district court are neither related to nor necessary for a resolution of the prejudgment interest issue. The Court has often stated that it would not address issues unrelated to the issue on which its jurisdiction was invoked. *E.g., Thom v. McAdam*, 626 So. 2d 184 (Fla. 1993) (declining to review issues other than the one on which conflict jurisdiction was based); *Rowlands v. Signal Constr. Co.*, 549 So. 2d 1380, 1383 n.4 (Fla. 1989) (same); *W.R. Grace & Co.-Conn. v. Waters*, 638 So. 2d 502, 506 n.4 (Fla. 1994) (declining to address issues unnecessary to resolution of a certified question); *Burks v. State*, 613 So. 2d 441, 444 n.6 (Fla. 1993) (declining to address issues not within the scope of certified question).

Second, there is absolutely no policy reason or precedential benefit to an opinion from the Court on these issues. The district court wrote an extensive opinion on each of the three evidentiary rulings, setting forth the facts in detail and discussing critically all of the applicable law. DiPietro nowhere suggests that the district court did not accurately or thoroughly state the facts, the positions of the parties, or the legal principles which the Griefers and he raised (and which he is now re-asserting here).

Third, there is no jurisprudential reason for the Court to write on these evidentiary issues. The legal principles involved in this case, and the case law that governs, are "old hat." The district court acknowledged (*Griefer '98,* 708 So. 2d at 670) that this Court has already spoken on the issues which govern the outcome of this case: that a trial court's decision to impose sanctions is an exercise of discretion;[23] and that appellate review of that exercise is governed by

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[23] *Mercer v. Raine*, 443 So. 2d 944 (Fla. 1983); *Binger v. King Pest Control*, 401 So. 2d 1310 (Fla. 1981).

the standard of reasonableness.[24] DiPietro does not ask the Court to depart from or re-define those precedents. He relies on those same authorities, and simply asks the Court to apply the facts here to reach a different conclusion than the one which the district court published. Another iteration of those principles by the Court would be of no benefit to either the bench or the bar.

DiPietro simply seeks a full, second appeal of the trial court's exclusionary rulings for his private interests, having no concern for the Court's constitutional role as the policy-making body in the state's judicial structure. Yet the whole point of Court review is to address issues of statewide significance; second-guessing the district courts is not an appropriate use of the Court's resources or time. Indeed, the Florida Constitution was amended in 1980 to withdraw from the Court's purview precisely the type of "record proper" review which was sought only because a litigant was dissatisfied with a decision rendered by a district court. *State v. Hegstrom*, 401 So. 2d 1343 (Fla. 1981), *overruled on other grounds, State v. Enmund,* 476 So. 2d 165 (Fla. 1985); *see also,* England, Hunter & Williams, *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform,* 32 U. FLA. L. Rev. 147, 178-80 (explaining the abolition of the *Foley* doctrine which had allowed jurisdiction based on "record proper").

Fourth, were the Court to consider the trial court's evidentiary rulings, it would necessarily conclude that the district court appropriately corrected the trial court's abuses of discretion in denying the Griefers an opportunity to present their case to the jury in full. The district court has faithfully noted, wrestled with and followed the teachings of *Mercer, Canakaris* and *Binger*, and it has thoughtfully considered decisions from other district courts — including a highly

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[24] *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980).

relevant decision which this Court declined to review: *Keller Industries v. Volk,* 657 So. 2d 1200 (Fla. 4th DCA), *review denied*, 666 So. 2d 146 (Fla. 1995). *See* the discussions of these cases in *Griefer '98*, Appendix 2.

In the following subsections of this brief, the Griefers have provided an individual evaluation of each of the exclusionary rulings considered by the district court.

A. The district court correctly held that the trial court abused its discretion in excluding human factors testimony from Dr. Snyder in the Griefers' case in chief.

The first ruling which DiPietro asks the Court to review involves a detailed analysis of pre-trial events to determine if there was a discovery violation by the Griefers which warranted the extreme sanction of excluding testimony by their only human factors expert.[25]

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[25] DiPietro has not taken issue with the right of a party to present expert witness testimony on human factors matters. The significance of that field of expertise cannot be minimized, and testimony of that nature is particularly apt in an accident case such as this one. In *Public Health Foundation for Cancer and Blood Pressure Research, Inc. v. Cole*, 352 So. 2d 877 (Fla. 4th DCA 1977), *cert. denied*, 361 So. 2d 834 (Fla. 1978), the court approved expert testimony from a psychologist (such as Dr. Snyder) relative to the deceptive quality of various factors present in the environment of the accident, and the manner in which a person would react to these factors.

> The significance of and the reaction of a human being to these factors might reasonably be held to involve a knowledge that was within the sphere of the witnesses' expertise and beyond the scope of the common knowledge of the jurors.

Public Health Foundation, 352 So. 2d at 882. This Court, as well, has viewed testimony of this nature as being an aide to jurors. *See, Buchman v. Seaboard Coast Line R.R. Co.*, 381 So. 2d 229 (Fla. 1980).

DiPietro's position is that he would have been "prejudiced" if the trial court had not stricken Dr. Snyder as an expert witness for the Griefers. He acknowledges that he was not "surprised" by Dr. Snyder's proposed testimony, however. (IB 34). His argument on this point, consequently, boils down to whether the Court wants to re-evaluate the record to decide if the district court was justified in determining from the record that there was no "prejudice" to DiPietro from the Griefers' delay in providing discovery regarding Dr. Snyder[26] and that, on the other side of the ledger, there was "judicial overkill" in denying the Griefers the exclusion of their only expert on human factors. *Griefer '98,* 708 So. 2d at 671.

The exclusion of expert witness testimony is discretionary with the trial court, of course, but that exercise of discretion is never without limits. *See Honeywell, Inc. v. Trend Coin Co.*, 449 So. 2d 876 (Fla. 3d DCA 1984), *decision quashed on other grounds*, 487 So. 2d 1029 (Fla. 1986). The severity of the discovery sanction should be commensurate with the violation in order to preserve one of a party's most important due process rights — the right to call witnesses. *Miles v. Allstate Ins. Co.,* 564 So. 2d 583 (Fla. 4th DCA 1990); *LoBue v. Travelers Ins. Co.,* 388 So. 2d 1349, 1351 (Fla. 4th DCA 1980), *review denied,* 397 So. 2d 777 (Fla. 1981). The extreme sanction of barring the testimony of a party's expert witness, let alone where the expert will be the only person testifying for that party in the particular field of expertise, is justified as being within the court's discretion only if the opposing party will suffer undue "surprise" or demonstrated "prejudice." *Binger v. King Pest Control,* 401 So. 2d 1310 (Fla. 1981). DiPietro disclaims surprise on this record, as he must.

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[26] "[T]here is no evidence in this record of any prejudice to the DiPietros." *Griefer '98,* 708 So. 2d at 671.

Only "prejudice" is at issue, and the nature of "prejudice" that will warrant striking a witness is analyzed carefully in *Binger*.

In *Binger*, the Court emphasized the discretion reposed in trial courts for the preparation and trial of a lawsuit, as DiPietro has noted. That case turned on wholly undisclosed witnesses, though, in relation to the notion that trials in Florida are no longer trial by "ambush." 401 So. 2d at 1314. In ***that*** context, the Court held that trial courts should be guided in allowing or foreclosing testimony from an undisclosed witness by prejudice to the objecting party in the form of "surprise in fact" to the objecting party. *Id.* That factor is not present here. Nor are other factors identified in *Binger* as being relevant to the question (*Id.*), as is easily shown. A keen analysis of those types of factors, and the competing considerations regarding "prejudice" in the context of an alleged discovery violation, was made in *Keller Industries v. Volk*, 657 So. 2d 1200 (Fla. 4th DCA), *review denied*, 666 So. 2d 146 (Fla. 1995).

In *Keller*, a defense expert's deposition had been taken eight months prior to trial, before he had formed an opinion as to how the accident occurred. The expert developed his opinion on the issue in the middle of trial. Although the plaintiff was allowed to re-depose him at that juncture, the trial court declined to let him testify as a witness for the defense. The district court held that his exclusion was an abuse of discretion, since he was the defendant's only witness on liability.

> A trial court clearly may exercise its discretion in imposing sanctions . . . . In this case, however, the trial court, by excluding the foregoing testimony, engaged in judicial overkill. One of a party's most important due process rights is the right to call witnesses . . . . A trial court should only exclude witnesses under the most compelling of circumstances.

Keller Industries, 657 So. 2d at 1202-03 (citations omitted).

There is no dearth of other decisions which have reversed trial courts for excluding expert testimony. For example, *see Millar v. Tropical Gables Corporation*, 99 So. 2d 589 (Fla. 3d DCA 1958); *Gifford v. Galaxie Homes of Tampa, Inc.*, 223 So. 2d 108 (Fla. 2d DCA), *cert. denied*, 229 So. 2d 869 (Fla. 1969); *Sheckler v. City of Mt. Dora*, 395 So. 2d 1188 (Fla. 5th DCA 1981); *Honeywell, Inc. v. Trend Coin Company*, 449 So. 2d 876 (Fla. 3d DCA 1984), *decision quashed on other grounds,* 487 So. 2d 1029 (Fla. 1986).

The discovery violation decisions on which DiPietro relies (IB 32-34) fall into three categories. Some address the element of surprise which he has acknowledged is *not* an issue in this case. *Office Depot, Inc. v. Miller,* 584 So. 2d 587 (Fla. 4th DCA 1991); *Pipkin v. Hamer,* 501 So. 2d 1365 (Fla. 4th DCA), *review denied*, 513 So. 2d 1062 (Fla. 1987). Some address the willful disobedience of a court order, which also is not present here.[27] *SNW Corp. v. Abraham,* 491 So. 2d 1223 (Fla. 4th DCA 1986); *Grau v. Branham,* 626 So. 2d 1059 (Fla. 4th DCA 1993).

The remaining cases reflect still other types of prejudice which can warrant the striking of a witness but which, again, are not present in this case. In analyzing this latter class of cases, it is important to remember that DiPietro has been resisting the Griefers' claim of his responsibility for Laurel's injuries for over eight years, and that he had a full exposure to their theories of his liability in a complete trial before the one which is now before the Court for review. There

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[27] The trial court made no finding that the Griefers willfully violated a court order. In fact, DiPietro openly recognized the unintentional nature of their delay in filing answers to interrogatories during the parties' negotiations regarding Dr. Snyder's deposition. (T:7:7/2/96 at 14).

was nothing that DiPietro didn't know or couldn't anticipate about the nature of the Griefers' proof.

In *Florida Marine Enterprises v. Bailey*, 632 So. 2d 649 (Fla. 4th DCA), *review denied*, 641 So. 2d 1345 (Fla. 1994), the unfair advantage which turned the tide in favor of the objecting party was her being forced "to choose between frantic last minute discovery and unjustified delay of her trial." 632 So. 2d at 652. DiPietro, however, was not faced with that Hobson's choice. He had fully prepared Dr. Benedict to address human factors issues, both for this trial in 1996 and for the first trial of this lawsuit in 1991, and consequently had no need for frantic last minute discovery. He never requested a delay in the start of the trial in the event Dr. Snyder was allowed to testify.[28]

In *Grau v. Branham,* 626 So. 2d 1059 (Fla. 4th DCA 1993), the objecting party didn't know before trial what the witness was going to say. DiPietro knew what Dr. Snyder was going to say, though, and indeed was ready to counter it. DiPietro had carefully prepared his expert for the opinions of Dr. Snyder.

> His name was timely disclosed to the defense, who received the answers to his interrogatories and took his deposition two weeks in advance of trial . . . . Dr. Benedict was fully capable of addressing each of the opinions formed by Dr. Snyder and had done so prior to his deposition.

Griefer '98, 708 So. 2d at 671.

In *Office Depot, Inc. v. Miller*, 584 So. 2d 587 (Fla. 4th DCA 1991), both the surprise and the prejudice lay in the inability of a party to "prepare for an opinion that it doesn't know about." 584 So. 2d at 590. That was certainly not

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[28] The trial court had indicated it would deny the Griefers a postponement concerning new areas of testimony posed by DiPietro's expert, Dr. Benedict. (ST:2:1/11/96 at 4-8).

the case here. In *Acquisition Corp. of America v. American Cast Iron Pipe Co.*, 543 So. 2d 878 (Fla. 4th DCA 1989), the content of the expert's testimony was not known until the day before trial, again a situation wholly unlike the one here.

The district court carefully considered its responsibility to review the trial court's rulings in light of strictures imposed by this Court, being "mindful of the standard of [reasonableness expressed in] *Canakaris*." The court faithfully discharged its responsibility when it relied heavily on *Keller* to hold that the total bar to testimony from Dr. Snyder was judicial overkill. *Griefer '98*, 708 So. 2d at 671.

DiPietro argues that the court placed too much reliance on *Keller* (IB 36), which he claims differed because it involved the exclusion of the defendant's *only* witness on liability. He contends that the Griefers were not in the same position because their accident reconstruction expert, Dr. Fogarty, had testified in their case in chief to "all" of the topics that Dr. Snyder intended to address, and that he had agreed that Dr. Snyder could testify in two limited areas but the Griefers insisted that he testify in full or not at all. (IB 36-37). Neither attempt to distinguish *Keller* or criticize the Fourth District's reliance is supported by the record.

Dr. Snyder was the Griefers' *only* human factors witness. Dr. Fogarty did not testify in that realm. Over and over again, the trial court, Dr. Fogarty himself *and* counsel for DiPietro made clear to the jury that Dr. Fogarty was ***not*** qualified to testify on human factors issues and that he was not purporting to do so. (T:5:1/16/96 at 19, 27-28, 29, 30, 84 (DiPietro's counsel objecting to a question because Dr. Fogarty's "not qualified as a human factors expert"), 85, 109 (DiPietro's counsel objecting that a question was a "human factors questions. [sic] That's not an engineer's question."), 110). DiPietro's attempt to characterize snippets of testimony from Dr. Fogarty's time on the witness stand as being

human factors testimony is an artificial and senseless exercise, given that everyone at the trial, from the judge to DiPietro's own counsel, drummed into the jury that he was only qualified to speak and testify as an expert on accident reconstruction.

The scope of what Dr. Snyder alone had to say to the jury, but which was barred by DiPietro's objection, shows what the Griefers were barred from presenting. Dr. Snyder would have been the *only* expert to testify for the Griefers as to the incredulousness of DiPietro's position that light reflecting off the windshield and paint of his Camaro was just as detectable to Laurel as headlights would have been. (SR:1 at 42). Dr. Snyder would have been the *only* expert to testify for the Griefers on tests that would confirm that DiPietro should have seen the white bag carried by Laurel when she was in either of the two westbound lanes. (SR:1 at 60-61). Dr. Snyder would have been the *only* expert to testify for the Griefers that DiPietro should have seen the white bag with peripheral vision if he had been looking at the roadway. (SR:1 at 56). Dr. Snyder would have been the *only* expert to testify for the Griefers that the white bag carried by Laurel was highly visible from the time she initially left the curb until impact, and that DiPietro should have perceived the bag was being carried by a person. (SR:1 at 70-71). Dr. Snyder would have been the *only* expert to testify for the Griefers that had the headlights of the Camaro been on, the car would have been much more visible to Laurel since a car without headlights would appear to be a gap in traffic. (SR:1 at 77, 79, 83).

Not one shred of this testimony was heard by the jury. There's little wonder that, without the benefit of this testimony, the jury found Laurel to be 90% negligent for not seeing a Camaro being driven without headlights at or in excess of the speed limit after dark.

DiPietro contends, without any record reference for support, that the Griefers took an "all or nothing" approach to the introduction of Dr. Snyder's testimony. The district court heard this same argument. The record overwhelmingly demonstrates that DiPietro and the Griefers could not agree at trial on the issue of human factors testimony, and that absent an agreement between the parties the trial court would not permit Dr. Snyder to testify. Irrespective of what DiPietro may have "agreed" could be presented to the jury, the Griefers should have been allowed to present all of their human factors testimony. A sanction of witness prohibition was too extreme for the unintentional discovery violation of an untimely delivery of interrogatory answers for a witness who had already been deposed.

As an attempt to show prejudice, DiPietro suggests that between the time he deposed and got interrogatory answers from Dr. Snyder and the date scheduled for trial, he would have had to undertake nine separate activities in order to prepare for Dr. Snyder's testimony. (IB 37-38). This contention is contradicted by the record. DiPietro had Dr. Snyder's answers to interrogatories and his deposition *before* the cut-off for discovery. Under the schedule set *by the trial court*, the Griefers were not responsible for the fact that trial was scheduled for early January, or that preparation for trial was required over the year-end holidays. More importantly, to the credit of DiPietro's counsel, he in fact completed most (if not all) of the nine steps in time for trial, without ever asking for a continuance.[29]

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[29] For example, there is no indication on the record whether or not DiPietro's expert could have gone to the scene of the accident in the two weeks prior to trial. He had visited the scene on four prior occasions, though. (T:6:1/17/96 at 11).

Finally, DiPietro argues that Dr. Snyder's testimony would have been cumulative, and that the Griefers would have had two experts on the subject while he only had one. The testimony of Dr. Snyder most assuredly would not have been cumulative, as the district court pointed out (*Griefer '98,* 708 So. 2d at 671), and DiPietro miscounts the number of human factors experts which were lined up by the parties. He did indeed have one: Dr. Benedict. The Griefers had none, though, without Dr. Snyder. As noted, their accident reconstruction expert, Dr. Fogarty, was *not* a witness on human factors issues. (*See* T:5:1/16/96 at 109).[30]

There were no compelling circumstances calling for the drastic remedy of excluding Dr. Snyder's testimony on direct. DiPietro was neither surprised nor unprepared for the introduction of expert testimony on human factors, and DiPietro did not suffer the type of prejudice which the courts have found can warrant a complete exclusion of an only witness on a critical point of evidence.

B. The district court correctly held that the trial court abused its discretion in preventing the Griefers from presenting rebuttal testimony by Dr. Snyder on human factors issues.

DiPietro contends that there was no error in preventing Dr. Snyder from testifying on rebuttal after the jury heard human factors testimony from Dr. Benedict. Exclusion of *rebuttal* testimony is an abuse of discretion, however, when it is not cumulative of other evidence presented by the party proposing it.

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30 The upshot of excluding Dr. Snyder was to aggravate and compound the prejudice to the Griefers from Dr. Benedict's testifying for DiPietro on human factors, since the Griefers were not allowed to counter his testimony. *Griefer '98*, 708 So. 2d at 671. Unquestionably, that imbalance of testimony contributed to the jury's assignment of only 10% fault to DiPietro, and 90% to Laurel.

Heberling v. Fleisher, 563 So. 2d 1086 (Fla. 4th DCA 1990), *review dismissed*, 570 So. 2d 1305 (Fla. 1990); *Young-Chin v. City of Homestead*, 597 So. 2d 879, 883 (Fla. 3d DCA 1992) ("limiting rebuttal which goes to the heart of the principal defense and which is not cumulative of evidence presented in plaintiff's case in chief is an abuse of discretion"). *See also McFall v. Inverrary Country Club, Inc.*, 622 So. 2d 41 (Fla. 4th DCA 1993), *review denied*, 634 So. 2d 624 (Fla. 1994).

The Griefers' trial theory was that DiPietro was negligent in failing to see what was available to be seen when he drove a car without lights after dark, and when he struck Laurel as she attempted to cross the street holding a dress covered by a large, white plastic bag. For his part, DiPietro asked the jury to believe that Laurel caused her own injuries by not using a crosswalk and holding her wedding dress so that she could not see oncoming cars, and that DiPietro was unable to avoid the accident because another vehicle distracted his attention.

Key to the Griefers' case was human factors testimony which would show that DiPietro should have observed the 10-square foot white plastic bag carried by Laurel using either direct or peripheral vision, notwithstanding distraction from the phantom vehicle, and that the absence of headlights on DiPietro's car both caused Laurel to misperceive that there was a break in the traffic and impaired DiPietro's ability to see Laurel. Evidence of peripheral vision, reflected light, visibility of the white garment bag, distraction from another vehicle as it affected the driver's ability to avoid the accident, the absence of headlights having the appearance of a gap in traffic, and visibility of a vehicle without lights were only some of the subjects which Dr. Snyder's rebuttal testimony would have addressed and refuted.

None of this was cumulative to evidence presented by the Griefers. Dr. Fogarty did not testify concerning these matters. In fact, when he was asked

whether movement of the phantom vehicle would have precluded DiPietro from seeing Laurel, and when he was asked about the importance of no headlights to DiPietro's seeing Laurel in time to stop, the trial court sustained objections by DiPietro's counsel on the ground that the witness was not qualified as a human factors expert. (T:5:1/16/96 at 84, 107). Yet Dr. Benedict, who took advantage of information from Dr. Snyder's deposition, was primed by DiPietro to opine quite extensively on human factors issues. (T:6:1/17/96 at 12, 15, 46-47, 49-51).

The testimony of Dr. Benedict on human factors issues opened the door to human factors rebuttal. In denying the Griefers the opportunity to rebut, the trial court abused its discretion on that crucial issue.

C. The district court correctly held that the trial court abused its discretion in preventing the Griefers from presenting rebuttal testimony by Dr. Fogarty on accident reconstruction issues.

Dr. Benedict made a number of miscalculations in expressing his expert opinion on the speed at which DiPietro was driving, and on Laurel's location in relation to the vehicle when she was hit. Counsel for the Griefers endeavored to identify some of these errors in cross-examination, but the Griefers sought to adduce accident reconstruction *expertise* to establish the significance of Dr. Benedict's errors.

Rebuttal through Dr. Fogarty would have contradicted Dr. Benedict as to the height of the Camaro, which he had never checked and had only "assumed" as a basis to calculate the point of impact, and as to the Camaro's speed. (T:6:1/17/96 at 142). Rebuttal would have disclosed that he miscalculated the trajectory of Laurel's body after she was hit, and DiPietro's speed. This was

classic rebuttal testimony which can be countered effectively only with an expert, irrespective of the cross-examination efforts of counsel. Yet it was excluded for no better reason than the trial court's belief that the jury was bored, by *the same judge who periodically displayed his disdain for the Griefers' claims at roughly that same moment during the trial.* The trial court's ruling was properly reversed by the district court under the rationale of *Zanoletti v. Norle Properties Corp.*, 688 So. 2d 952 (Fla. 3d DCA 1997).

Zanoletti, like this case, involved a pedestrian hit by a motor vehicle. The situation called for expert opinions from accident reconstructionists. The defense expert testified that the sole cause of the accident was the failure of the pedestrian to yield to the truck. When the defense rested, the plaintiff sought to have rebuttal testimony from its accident reconstruction expert *to show that the calculations made by the defense expert were erroneous.*[31] The trial court barred the testimony, but the district court reversed. The court emphasized the message of *Young-Chin,* that a restriction on rebuttal which goes to the heart of the principal defense is an abuse of discretion. The factual similarities between *Zanoletti* and this case are unmistakable.

III. A new trial was required when the presiding judge recused himself for his prejudicial conduct during the jury trial, and it was error for the successor judge to deny post-trial motions and enter a final judgment based on evidence he never heard.

Irrespective of the exclusionary rulings which formed the basis for reversal by the district court, another issue that must be considered is the taint to the second trial from the denial of post-trial motions and the entry of judgment by a

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[31] The district court's decision does not indicate whether the expert was cross examined, but it can be assumed that he was.

judge who had no familiarity with the lawsuit, following the establishment of anti-Griefer bias in the conduct of the predecessor judge.[32]

More than forty years ago, the Supreme Court decided that a successor judge could not correct errors of law committed by his predecessor, and could not review and reverse the final orders and decrees of his predecessor. *Groover v. Walker*, 88 So. 2d 312, 313 (Fla. 1956). As a logical extension of this rule, it has been held that a successor judge may not *enter* an order or judgment based on unfamiliar evidence which was heard only by a predecessor. *Beattie v. Beattie*, 536 So. 2d 1078 (Fla. 4th DCA 1988). In that case, the trial judge had orally announced his ruling before being removed from the bench by the Supreme Court, and the successor judge entered an order formalizing that oral ruling. Based on "existing law" (536 So. 2d at 1079), the order entered by the successor judge was reversed.

To the same effect is *Anders v. Anders,* 376 So. 2d 439 (Fla. 1st DCA 1979), where the trial judge had orally announced his intention to grant a directed verdict but left office without reducing his decision to writing. The successor judge denied a motion for rehearing and entered final judgment, stating that he considered those acts to be ministerial. The final judgment was reversed, on the principle that the judge who heard the evidence could well have changed his mind. "In effect, no decision has been made in this case." 376 So. 2d at 440.

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[32] DiPietro argued in the district court that the motion to recuse was not lodged by the Griefers on a timely basis. That argument is meritless. The motion was filed within ***days*** of the events which prompted it — the trial court's communication of his personal dismay with the Griefers' case during the concluding phases of the case and closing argument. (R:2 at 210).

The same principle was applied in *Bradford v. Foundation & Marine Construction Co.*, 182 So. 2d 447 (Fla. 2d DCA), *cert. denied*, 188 So. 2d 821 (Fla. 1966). There, after trial of a non-jury contract action but before entering judgment, the trial judge retired. The case was transferred to another judge, who made findings on the record alone and entered a final decree. The district court was faced squarely with the issue of whether it was error for the successor judge to enter findings and a final decree in a case tried but unresolved by a predecessor judge:

> Reason and conscience lead this court, in line with other jurisdictions, to adopt the rule that where oral testimony is produced at trial and the cause is left undetermined, the successor judge cannot render verdict or judgment without a trial de novo, unless upon the record by stipulation of the parties.

182 So. 2d at 449.

After the jury verdict had been rendered in this case, but before post-trial motions on evidence were heard, the trial judge recused himself based on allegations (necessarily deemed true for purposes of the motion[33]) that he had conveyed to the jury his "disbelief, incredulity, humor and disapproval" of their case. (R:2 at 210-18). That action required a new trial, and DiPietro's counsel all but acknowledged that fact. (T:7:5/6/96 at 23, 24). It is difficult to imagine a more compelling scenario for application of the established law which prohibits a

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[33] *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332, 1334 (Fla. 1990).

successor judge from ruling on a pending motion for new trial, or entering judgment in a case in which he or she did not preside.[34]

CONCLUSION

The district court properly held, on this first occasion where the question has arisen in Florida, that a damage award fixed in amount by a jury and unchallenged throughout subsequent liability trials, bears prejudgment interest from the date on which the jury's amount became final. The reasoning of the district court is sound, and the Court should either deny review as improvidently granted or affirm the district court's decision.

The Court need not reach the evidentiary issues DiPietro has argued, but if it does it will find that the district court was correct in holding that the trial court abused its discretion by preventing the Griefers the opportunities to present expert testimony that went to the heart of their case. In any event, even if the district court was wrong in ordering a new trial on those grounds, a new trial is nonetheless required based on the actions take by a successor judge following recusal for cause of the judge who presided over the trial.

The Court is respectfully requested to find that jurisdiction was improvidently granted, or to affirm the district court's decision to remand for a new trial on liability.

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[34] In *Otis Elevator Co. v. Gerstein*, 612 So. 2d 659 (Fla. 3d DCA 1993), on which DiPietro had relied below, it was determined that a successor judge has the authority to rule on a pending motion for new trial in a jury case *where the trial judge had previously entered judgment on the jury verdict.* This is a critical distinction not present here.

Respectfully submitted,

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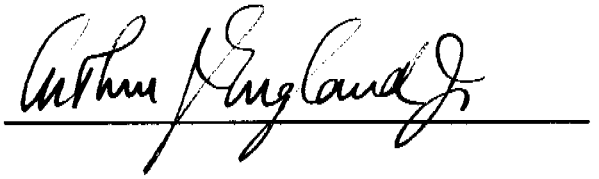

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APPENDICES

David GRIEFER and Ann Griefer, his wife, as Guardians of the Person and Property of Laurel B. Griefer, an Incompetent, Appellants,

v.

Michael Jon DiPIETRO and Myra DiPietro, a/k/a Myra Bellio, a/k/a Myra J. Chandler, a/k/a LaPoint, a/k/a Myra No Last Name, a/k/a Myra, Appellees.

No. 92-0237.

District Court of Appeal of Florida, Fourth District.

June 2, 1993.

On Motion for Rehearing Sept. 8, 1993.

Negligence suit was brought against motorist on behalf of injured pedestrian. The Circuit Court, Broward County, Jeffrey E. Streitfeld, J., entered judgment in favor of pedestrian based on jury verdict which awarded substantially less damages than those requested. Appeal was taken on behalf of pedestrian. The District Court of Appeal, Warner, J., held that: (1) objection to denial of cause challenge to perspective juror was untimely; (2) refusing to give requested instruction on unlawful speed was error; (3) error was not cured by giving up instruction on careless driving; and (4) new trial was required on liability issues only.

Reversed and remanded for new trial.

[1] APPEAL AND ERROR ⚖200
30k200
In order to preserve denial of cause challenge to prospective juror, it is necessary not only to exhaust all remaining challenges and to request additional peremptory challenges but also to identify to trial court particular objectionable juror whom party would have struck had peremptory challenges not been exhausted.

[2] JURY ⚖142
230k142
Challenge to prospective juror was untimely when party waited until motion for new trial to first identify which juror would have been excused had peremptory challenges remained.

[3] AUTOMOBILES ⚖246(56)
48Ak246(56)
Injured pedestrian was entitled to requested instruction on unlawful speed in negligence suit against motorist in light of testimony that motorist may have been speeding at time of accident and driving past sunset without headlights on. West's F.S.A. § 316.183.

[4] APPEAL AND ERROR ⚖1067
30k1067
Giving jury instruction on careless driving, in negligence suit by injured pedestrian, would not cure error resulting from refusal to give requested unlawful speed instruction; careless driving statute does not apprise jury requirement that speed be reasonable and prudent under circumstances. West's F.S.A. § 316.183.

[5] APPEAL AND ERROR ⚖1178(6)
30k1178(6)
Erroneous failure to give requested unlawful speed jury instruction in suit by injured pedestrian against motorist required new trial on liability issues only, and not on damages, where failure to give requested instruction did not affect calculation of damages or inflame jury.

[6] NEW TRIAL ⚖161(1)
275k161(1)
Denial of additur motion in negligence suit by injured pedestrian was appropriate where trial court considered statutory criteria and properly refused to sit as juror with veto power. West's F.S.A. § 768.043.

***1227** Ben J. Weaver, Weaver, Kuvin & Weaver, P.A., and C. Daniel Petrie, Jr., Esler, Petrie & Salkin, P.A., Fort Lauderdale, for appellants.

Edward D. Schuster, Pyszka, Kessler, Massey, Weldon, Catri, Holton & Douberley, P.A., Fort Lauderdale, for appellees.

WARNER, Judge.

Appellants, as guardians of their adult daughter, challenge a final judgment in her favor but for substantially less than the damages requested. They claim that the trial court erred in the jury selection process, in allowing improper argument, in failing to give a jury instruction on unlawful speed, and in failing to award an additur to the jury award. We find error in refusing to give the jury instruction and

reverse for a new trial.

Laurel Griefer was leaving a bridal shop carrying her just-purchased wedding gown when, while crossing the street, she was struck by appellee's automobile. She suffered severe head injuries, leaving her in a coma. After she came out of the coma, her personality had changed entirely resulting in the end of her engagement, the loss of her employment, and the inability to work at a steady job.

Appellants' claim of negligence against appellee was premised on the fact that appellee did not have his lights on even though the accident happened forty-five minutes after sunset and on the claim that appellee was speeding and inattentive. Appellee claimed that Ms. Griefer was comparatively negligent in that she was holding her wedding gown bag over her head, blocking her view of the road. Appellee saw the white plastic bag blowing just a second or two before impact but did not realize there was a person behind the bag.

***1228** The jury found Ms. Griefer 70% negligent and appellee 30% negligent. It awarded $2,740,000 in economic damages, reduced to a present value of $775,000. It further awarded $1,300,000 in non-economic damages, for a total damage award of $2,075,000. With the reduction for appellant's comparative negligence, the net judgment to appellant was $622,500.

[1][2] Appellants first claim that the trial court erred in refusing to strike prospective jurors for cause when they expressed doubt about their ability to render a verdict in light of preconceived notions about damage limitations. However, this error was not preserved for review. See Trotter v. State, 576 So.2d 691 (Fla.1990). In order to preserve the denial of a cause challenge to a prospective juror it is necessary not only to exhaust all remaining challenges and to request additional peremptory challenges but to identify to the trial court a particular objectionable juror whom the party would have also struck had peremptory challenges not been exhausted. Appellants failed to do the latter. It was not until the motion for new trial that appellants finally indicated to the trial court which juror they would have excused had any peremptory challenges remained. Clearly this is untimely, as the purpose of identifying the objectional juror is to allow the trial court to correct the problem before the jury is seated.

[3] We find merit in appellants' second claim that the trial court erred in refusing to give appellants' requested instruction on unlawful speed based on section 316.183, Florida Statutes (1989). That statute states:

> No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event, speed shall be controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance or object on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.

The trial court refused to give the instruction, holding that there was no evidence from which the jury could conclude that appellee was speeding. In the instant case, the applicable speed limit was 30 miles per hour. Appellants' expert testified that within a reasonable degree of engineering certainty, appellee's speed was in the range of 28 to 43 miles per hour. While on cross-examination the expert admitted that he could not discount the possibility that appellee was going 25 miles an hour (approximately what appellee's expert testified to), he certainly did not recant his range of speed. By determining there was no evidence that appellee exceeded the speed limit, the trial court essentially weighed appellants' expert's testimony on direct examination with his later testimony on cross, resulting in a directed verdict on the issue of unlawful speed. See Estate of Wallace v. Fisher, 567 So.2d 505, 509 n. 13 (Fla. 5th DCA1990); Snedegar v. Arnone, 532 So.2d 717 (Fla. 4th DCA1988).

Moreover, despite some testimony that appellee's speed did not exceed the posted speed limit, there was evidence in the record from which the jury could infer that under the circumstances appellee should have been driving slower, including the fact that he was driving past sunset without his lights on. Sotuyo v. Williams, 587 So.2d 612 (Fla. 1st DCA1991), is particularly instructive on this point. As the appellants are entitled to instructions supported by the evidence and consistent with their theory of the case, it was reversible error to deny the instruction.

[4] Nor was the error cured by the giving of an instruction on careless driving. The careless driving statute does not apprise the jury of the requirement that speed be reasonable and prudent under the circumstances, including that it be reasonable in light of hazards existent under the circumstances. In Sotuyo and in Robinson v. Gerard, 611 So.2d 605

David GRIEFER and Ann Griefer, his wife, as Guardians of the Person and Property of Laurel B. Griefer, an Incompetent, Appellants/Cross-Appellees,

v.

Michael Jon DiPIETRO and Myra DiPietro, a/k/a Myra Bellio, a/k/a Myra J. Chandler, a/k/a Myra LaPoint, a/k/a Myra No Last Name, a/k/a Myra, Appellees/Cross-Appellants.

Nos. 96-2481, 96-2958, 96-2964 and 97-0223.

District Court of Appeal of Florida, Fourth District.

April 8, 1998.

Plaintiffs, as guardians of pedestrian, brought personal injury action against motorist who was driving without headlights. The Circuit Court, Broward County, Jeffrey E. Streitfeld, J., entered judgment on jury verdict for pedestrian. After remand for new trial on liability, 625 So.2d 1226, the Circuit Court, Leroy H. Moe and James M. Reasbeck, JJ., entered judgment on jury verdict finding pedestrian 90% negligent. Plaintiffs appealed. The District Court of Appeal, Warner, J., held that: (1) trial court abused its discretion in excluding testimony of plaintiffs' human factors expert as sanction for untimely response to expert interrogatories; (2) trial court should not have excluded plaintiffs' rebuttal testimony of both human factors expert and accident reconstruction expert; and (3) plaintiffs were entitled to award of prejudgment interest from date that jury in first trial determined damages.

Reversed for new trial on liability only.

[1] PRETRIAL PROCEDURE ⚿313
307Ak313
Trial court abused its discretion in completely excluding testimony of pedestrian's only human factors expert as sanction for pedestrian's untimely response to motorist's expert interrogatories; expert's name was timely disclosed to motorist, who received answers to interrogatories and took deposition two weeks before trial, defense expert was capable of addressing each of expert's opinions, motorist had conceded that expert could testify on specific subjects of luminosity and visuality, and defense expert testified regarding visibility.

[2] PRETRIAL PROCEDURE ⚿44.1
307Ak44.1
Trial court's decision to impose sanctions for discovery violations involves exercise of discretion.

[3] APPEAL AND ERROR ⚿1024.3
30k1024.3
To justify reversal of sanctions for discovery violations, sanctioned party must show that trial court clearly erred in its interpretation of facts and use of its judgment and not merely that court, or another fact-finder, might have made different factual determination.

[4] PRETRIAL PROCEDURE ⚿44.1
307Ak44.1
Severity of sanction should be commensurate with discovery violation.

[5] PRETRIAL PROCEDURE ⚿45
307Ak45
Although exclusion of witness's testimony is permissible sanction for discovery violation, it is drastic remedy which should be utilized only under most compelling circumstances. West's F.S.A. RCP Rule 1.380(b)(2).

[6] TRIAL ⚿62(2)
388k62(2)
Trial court should not have excluded rebuttal testimony of pedestrian's human factors expert, where her trial theory was that driver's failure to observe pedestrian crossing street while he drove car without headlights was negligence, and defense was that pedestrian negligently caused her own injuries by holding plastic bag containing wedding dress in way that prevented her from seeing oncoming traffic regardless of whether driver used headlights; rebuttal testimony was required on driver's ability to see pedestrian and effects of failure to use headlights.

[7] TRIAL ⚿62(3)
388k62(3)
Although trial court has broad discretion regarding admissibility of rebuttal testimony, it abuses that discretion when it limits non-cumulative rebuttal that goes to heart of principal defense.

[8] TRIAL ⚿62(2)
388k62(2)
Trial court should not have excluded rebuttal testimony from pedestrian's accident reconstruction

expert, which would have explained and contradicted material evidence offered by motorist's expert, including calculations and equations establishing trajectory of pedestrian after she was struck and the speed of car at time of impact; evidence would have assisted jury in weighing validity of motorist's expert.

[9] TRIAL ⚖62(2)
388k62(2)
Rebuttal to challenge calculations of defense expert is permissible rebuttal evidence.

[10] INTEREST ⚖39(2.50)
219k39(2.50)
Plaintiffs were entitled to award of prejudgment interest from date that jury in first trial determined damages, although first trial's liability determination had been reversed such that amount of comparative negligence was not set at that time.

[11] INTEREST ⚖39(2.15)
219k39(2.15)
Party is entitled to pre-judgment interest on its out-of-pocket, pecuniary losses once verdict has liquidated damages as of date certain.

[12] INTEREST ⚖39(2.50)
219k39(2.50)
Personal injury plaintiffs are generally not entitled to prejudgment interest because damages are uncertain and are not liquidated until determined by jury.

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WARNER, Judge.

In the second trial of this personal injury action, the trial court excluded testimony of the appellants' human factors expert for a discovery violation and refused to allow the appellants' accident reconstruction expert to testify in rebuttal. We hold that the exclusion of these experts' testimonies was error and reverse again for a new trial.

In our prior opinion in Griefer v. DiPietro, 625 So.2d 1226 (Fla. 4th DCA 1993)("Griefer I"), we summarized this case as follows:

> Laurel Griefer was leaving a bridal shop carrying her just-purchased wedding gown when, while crossing the street, she was struck by appellee's automobile. She suffered severe head injuries, leaving her in a coma. After she came out of the coma, her personality had changed entirely resulting in the end of her engagement, the loss of her employment, and the inability to work at a steady job.
>
> Appellants' claim of negligence against appellee was premised on the fact that appellee did not have his lights on even though the accident happened forty-five minutes after sunset and on the claim that appellee was speeding and inattentive. Appellee claimed that Ms. Griefer was comparatively negligent in that she was holding her wedding gown bag over her head, blocking her view of the road. Appellee saw the white plastic bag blowing just a second or two before impact but did not realize there was a person behind the bag.

Id. at 1227. We reversed the first trial and remanded for a new trial on liability only because of an error in refusing to give a requested jury instruction.

During pretrial procedures at the second trial, the appellants ("the Griefers") listed Dr. Snyder, a human factors expert, as one of their witnesses. Subsequently, the appellees ("the DiPietros") propounded expert interrogatories regarding Dr. Snyder, which were concededly not answered in the time provided. On November 27, 1995, the trial court entered an ex parte order granting the Griefers ten additional days in which to answer the interrogatories. The parties had already tried to take Dr. Snyder's deposition in his home state of North Carolina, but this deposition had to be cancelled due to the illness of Dr. Snyder. Before answering the interrogatories and within the extended period, counsel for the Griefers contacted the DiPietros' counsel and agreed to make Dr. Snyder available for deposition in Florida. Unfortunately, the Griefers' counsel did not confirm in writing that the deposition would substitute for written answers to the interrogatories.

When the Griefers failed to file timely answers to the interrogatories, the DiPietros moved to strike Dr. Snyder from appearing as an expert as a sanction. During the hearing on the motion, held on December 21, 1995, twenty- one days before trial and prior to the close of discovery, the Griefers hand delivered

their answers to the interrogatories to the DiPietros. Despite the fact that the interrogatories had been answered and the parties had scheduled Dr. Snyder's deposition six days later in Fort Lauderdale, the trial court entered an order granting the motion to strike Dr. Snyder "unless otherwise agreed between both parties." The DiPietros deposed Dr. Snyder as scheduled on December 27, 1995, fifteen days before trial. On January 3, 1996, the Griefers' counsel *669 wrote a letter to the DiPietros' counsel stating that he had been under the impression at the hearing on the motion to strike that their agreement to have Dr. Snyder deposed had cured any problems in having Dr. Snyder testify. Counsel also filed a motion to clarify the trial court's order striking Dr. Snyder's testimony, noting that it would be prejudicial for the court to strike Dr. Snyder from the witness list because the Griefers had provided answers to the interrogatories and the DiPietros had taken his deposition.

On January 8, 1996, twelve days after the DiPietros deposed Dr. Snyder and three days before trial, the Griefers redeposed the DiPietros' expert, Dr. Benedict, who had reviewed Dr. Snyder's deposition. Dr. Benedict, an accident reconstruction expert, stated that he had studied human factors in the course of his engineering experience and work and was knowledgeable about the field because it "was an integral part of engineering design." Throughout his career, he had analyzed hundreds of products relating to human factors issues and was able to define and explain the human factors issues involved. He had offered expert testimony on human factors issues in other cases. When asked about the human factors issues related to this case, Dr. Benedict responded that he had previously testified on those matters either at the first trial or in his previous depositions and therefore he felt competent to address those issues. During the deposition, counsel posed several human factors scenarios pertinent to the instant case, and Dr. Benedict was capable of giving opinions regarding them. When asked if he needed to conduct any additional testing to investigate or address any of Dr. Snyder's opinions, Dr. Benedict responded that he did not.

Two days before trial, when the Griefers argued the motion for clarification of the order striking Dr. Snyder, the DiPietros' counsel complained that the allowance of a new expert would prejudice him because he did not have time to obtain his own expert to counteract the testimony. In response, the Griefers pointed to Dr. Benedict's deposition testimony, noting that he was qualified to address every aspect of Dr. Snyder's testimony. While not conceding the issue, the DiPietros' counsel stated that he did not object to Dr. Snyder giving his opinions on two specific areas of evidence, namely luminosity and visuality. Without giving the Griefers the opportunity to respond and notwithstanding the DiPietros' concession, the trial court refused to permit Dr. Snyder to testify at all as a witness in the case-in-chief but extended the possibility that Dr. Snyder could be called for rebuttal. The order on clarification stated that "the prior order entered by this Court with respect to the testimony of Dr. Harry L. Snyder shall stand, however, this Order shall not preclude the Plaintiffs from calling Dr. Harry L. Snyder for rebuttal testimony."

The case went to trial as scheduled. The Griefers called several witnesses to the accident as well as Dr. William Fogerty, an accident reconstruction expert, who testified that Michael DiPietro's vehicle did not have its headlights on. He opined that more than ninety-nine percent of drivers in South Florida use their headlights one-half hour after sunset, and "from a traffic engineering point of view," there was a greater command for eyes to move to a lit source than to an unlit source. Based on his investigation, he offered opinions as to how the accident happened, including the amount of time which elapsed between the time that Laurel Griefer started across the street and the time that she was hit, the path that she traveled, Michael's reaction time to avoid the accident, and the speed of Michael's car which was estimated at between 33 1/2 and 43 miles per hour, among others. When the Griefers' counsel asked Dr. Fogerty whether or not the "phantom vehicle," which Michael had testified to seeing pull out on the right side of the street, prevented Michael from seeing Laurel as she crossed the road, the DiPietros' counsel objected on the ground that the witness was not qualified as a human factors expert. The court sustained the objection. The question was restated and Dr. Fogerty testified, over objection, that the phantom vehicle would have caused no line of sight blockage. Thus, his testimony was based upon engineering principles, not human factors analysis.

*670 At the conclusion of the Griefers' case, their counsel proffered the substance of Dr. Snyder's testimony out of the presence of the jury. The DiPietros did not request any voir dire based on the proffered testimony.

For the defense, Dr. Benedict challenged many of

Dr. Fogerty's calculations and opinions. When he was questioned during cross-examination on the visibility of the DiPietros' car without headlights, he stated that he was not a human factors expert and did not have an opinion on that basis, but testified nonetheless that "with or without the lights, you can see the car fine." In addition, he claimed that he could see the unlit car during a reenactment of the incident that he had conducted at the accident scene.

After the close of the DiPietros' case, the Griefers sought to introduce rebuttal evidence by calling both Dr. Snyder to rebut Dr. Benedict's human factors opinion testimony and Dr. Fogerty to challenge the correctness of Dr. Benedict's calculations and equations. The trial court declined, stating:

> The jury has heard enough testimony. Actually they are insufferably bored by a lot of it, and I know they know the issues and the law will cover the issues; and the rest you can argue. There's enough testimony in there already.

After this rebuff, the Griefers proffered the rebuttal testimony following the retirement of the jury for deliberations.

The jury returned a verdict finding Michael DiPietro 10 percent negligent and Laurel Griefer 90 percent comparatively negligent. Five days after the verdict, the Griefers filed a motion to recuse the judge based on his purported conveyance to the jury of his disbelief and disapproval of their case through gestures, facial expressions, and admonitions to counsel. Subsequently, the Griefers filed a motion for new trial arguing that the court erred in striking Dr. Snyder as a witness in the case-in-chief and refusing to allow rebuttal testimony from Dr. Snyder and Dr. Fogerty. After the trial judge recused himself, the successor judge denied the motion for new trial. The Griefers appeal from the final judgment entered pursuant to the jury verdict.

[1][2][3][4] The Griefers contend on appeal that the trial court's exclusion of the testimony of their only human factors expert constituted an abuse of discretion, while the DiPietros respond that the court's exclusionary ruling was justified because the Griefers' late compliance with the discovery order prejudiced them. A trial court's decision to impose sanctions for discovery violations involves the exercise of discretion. See Mercer v. Raine, 443 So.2d 944, 946 (Fla.1983). In Mercer, the supreme court held that in reviewing the application of this discretionary power of the trial court the reasonableness test adopted in Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla.1980), should apply, and the discretionary ruling of the court should be disturbed only when it fails to satisfy this test. See Mercer, 443 So.2d at 946. To justify reversal of the sanctions, the appellant must show that "the trial court clearly erred in its interpretation of the facts and the use of its judgment and not merely that the court, or another fact-finder, might have made a different factual determination." Id. Nevertheless, the severity of the sanction should be commensurate with the violation. See Miles v. Allstate Ins. Co., 564 So.2d 583, 585 (Fla. 4th DCA 1990).

[5] Although the exclusion of a witness's testimony is a permissible sanction for a discovery violation under Florida Rule of Civil Procedure 1.380(b)(2), it is a drastic remedy which should be utilized only under the most compelling circumstances. See Acquisition Corp. of America v. American Cast Iron Pipe Co., 543 So.2d 878, 881 (Fla. 4th DCA 1989) (citations omitted). In Acquisition Corp., this court upheld the trial court's exclusion of an expert witness where the other party did not become aware of the witness's identity until one week before the trial and the content of his testimony until the day before trial. See id. By way of contrast, in Louisville Scrap Material Co. v. Petroleum Packers, Inc., 566 So.2d 277 (Fla. 2d DCA 1990), the second district found that the trial court's exclusion of a party's only expert constituted an abuse of discretion, even though the party did not produce the name of this expert before the pretrial conference, as required by the pretrial order, ***671** where the other party had knowledge of the subject matter of the expert's testimony ten days before trial and deposed him four days prior to trial. The appellate court concluded that the other party was not prejudiced, despite its claimed inability to obtain a rebuttal expert, because it not only had time to depose the expert and prepare for trial concerning his testimony, but also had four of its own experts ready to testify at trial. See id. at 278.

We have reversed trials for "unduly exclusionary" rulings with respect to trial witnesses. In Keller Industries v. Volk, 657 So.2d 1200 (Fla. 4th DCA), rev. denied, 666 So.2d 146 (Fla.1995), the appellees had taken the appellant's expert's deposition eight months before trial. At the time, the expert had no opinion as to how the accident had happened; however, he also had opinions on other issues in the case. Following commencement of the trial, the court permitted the appellees to redepose the witness and they discovered that he had developed an opinion

as to the cause of the accident. As a result, the court completely excluded the expert's testimony. Finding that the proffered testimony from the appellant's only witness on liability was critical to its defense, in reversing the judgment, we reasoned:

> [a] trial court clearly may exercise its discretion in imposing sanctions. In this case, however, the trial court, by excluding the foregoing testimony, engaged in judicial overkill.... A trial court should only exclude witnesses under the most compelling of circumstances. This is particularly so when the exclusion would be of a party's most important witness.

Id. at 1202-03 (citations omitted)(emphasis added). To strike all of the testimony was too extreme, and we suggested that the trial court should have barred only the new opinions, not those opinions to which the expert had testified in deposition and were known to the appellees. See id. at 1203.

In light of the foregoing authority, and mindful of the standard of Canakaris, we hold that the trial court erred in excluding the testimony of Dr. Snyder. His name was timely disclosed to the defense, who received the answers to his interrogatories and took his deposition two weeks in advance of trial. Moreover, there is no evidence in this record of any prejudice to the DiPietros. Dr. Benedict was fully capable of addressing each of the opinions formed by Dr. Snyder and had done so prior to his deposition. Incredibly, even when the DiPietros conceded that Dr. Snyder could testify on at least two subjects, the trial court refused to allow the testimony. This was error.

As the supreme court stated in Binger v. King Pest Control, 401 So.2d 1310 (Fla.1981), the prejudice involving witness testimony refers to the "surprise in fact of the objecting party, and it is not dependent on the adverse nature of the testimony." Id. at 1314. Given that the DiPietros were aware of the subject matter of Dr. Snyder's testimony several weeks before trial and that Dr. Benedict attested to his competency to address the human factors issues involved in the accident, the DiPietros were sufficiently prepared for trial regarding Dr. Snyder's testimony, thereby eliminating any potential prejudice caused by the Griefers' untimely response to the expert interrogatories. See Petroleum Packers, 566 So.2d at 278. As such, the sanction which the trial court imposed in excluding one of the Griefers' most important witnesses from the trial was overly severe. The court engaged in "judicial overkill," and in doing so, deprived the Griefers of their right to call an essential witness. See Keller, 657 So.2d at 1202-03.

We reject the contentions that Dr. Snyder's testimony was cumulative of other testimony offered. Moreover, we agree with the Griefers that the prejudice from the exclusion of Dr. Snyder's testimony was aggravated and compounded when Dr. Benedict was allowed to testify that a pedestrian could see the oncoming car regardless of whether it had its headlights on and to make several other observations which touched on human factors issues.

The trial court made an alternative finding that the testimony of Dr. Snyder would not assist the jury in any meaningful way. However, this finding is contrary to substantial case law permitting the admission of human factors testimony where unusual circumstances make it unlikely that the jury's common ***672** experience would enable it to resolve the factual issues. See Buchman v. Seaboard Coast Line R.R. Co., 381 So.2d 229 (Fla.1980); Public Health Found. for Cancer and Blood Pressure Research, Inc. v. Cole, 352 So.2d 877 (Fla. 4th DCA 1977); Seaboard Coast Line R.R. Co. v. Kubalski, 323 So.2d 32 (Fla. 4th DCA 1975); Seaboard Coast Line R.R. Co. v. Hill, 250 So.2d 311 (Fla. 4th DCA 1971). In Public Health Foundation, a case involving an individual who dove off of a seawall, struck the bottom and became paralyzed, we permitted the admission of human factors testimony on the "deceptive quality of various factors that were present in the environment and the manner in which a person would react to these factors." 352 So.2d at 879. We further said:

> The significance of and the reaction of a human being to these factors might reasonably involve a knowledge that was within the sphere of the witnesses' expertise and beyond the scope of the common knowledge of the jurors.

Id. Similarly, this case involves the deceptive quality of the environment surrounding the accident, and Dr. Snyder's testimony would have been useful and was admissible.

[6][7] We also find that it was error to exclude both Dr. Snyder's and Dr. Fogerty's rebuttal testimonies. Although a trial court has broad discretion regarding the admissibility of rebuttal testimony, it abuses that discretion when it limits non-cumulative rebuttal that goes to the heart of the principal defense. See Mendez v. John Caddell Constr. Co., 700 So.2d 439, 440-41 (Fla. 3d DCA 1997). The Griefers' trial theory was that Michael's failure to observe Laurel as she attempted to cross the street while he drove the

car without headlights constituted negligence. The DiPietros' defense was that when Laurel crossed the street outside of a crosswalk, holding her wedding dress in a manner that prevented her from seeing oncoming traffic, she negligently caused her own injuries, and that Michael was unable to avoid the accident due to the distraction of the phantom vehicle, irrespective of whether he used the car's headlights. Thus, in order to rebut the DiPietros' defense, the Griefers were required to present testimony on Michael's ability to see Laurel's ten square foot white plastic bag with either directional or peripheral vision, despite the distraction of a phantom vehicle, and the effects of Michael's failure to use the car's headlights on his ability to see Laurel and Laurel's corresponding ability to see the oncoming car. Dr. Snyder's testimony would have addressed these areas.

The exclusion of Dr. Snyder's testimony was not harmless. None of the proffered rebuttal evidence was cumulative to any other evidence presented during the Griefers' case-in-chief. In fact, the DiPietros objected when, during the Griefers case-in-chief, Dr. Fogerty was asked a question which the DiPietros identified as a human factors question.

[8][9] Finally, the refusal to permit rebuttal testimony from Dr. Fogerty was error. Dr. Fogerty's rebuttal testimony would have explained and contradicted material evidence offered by Dr. Benedict, including his calculations and equations establishing the trajectory of Laurel after she was struck and the speed of the car at the time of impact. Rebuttal to challenge the calculations of a defense expert is permissible rebuttal evidence. See Zanoletti v. Norle Properties, Corp., 688 So.2d 952 (Fla. 3d DCA 1997). Indeed, as emphasized in the Griefers' brief, "this is classic, admissible and essential rebuttal testimony--indispensable for the Griefers to assist the jury in weighing the validity of the DiPietros' expert."

[10] Because we reverse on the grounds of exclusion of the testimonies of the expert witnesses, we need not reach the other grounds for reversal. We also do not need to address the issues on cross-appeal, save one which will arise again on retrial. The DiPietros contend that the court erred in awarding prejudgment interest to the Griefers. In this case, the trial court awarded interest from September 4, 1991, the date that the jury in the first trial determined damages, which we did not reverse in Griefer I.

[11][12] A party is entitled to pre-judgment interest on its "out-of- pocket, pecuniary losses" once a verdict has liquidated the damages as of a date certain. Argonaut Ins. Co. ***673** v. May Plumbing Co., 474 So.2d 212, 215 (Fla.1985). Personal injury plaintiffs are generally not entitled to prejudgment interest because the damages are uncertain and are not liquidated until determined by the jury. However, in Palm Beach County School Board v. Montgomery, 641 So.2d 183, 184 (Fla. 4th DCA 1994), we held that:

> [w]hen a jury returns a verdict in a personal injury case that remains undisturbed throughout future proceedings in the case, the sum so fixed should be treated exactly the same as a liquidated breach of contract claim.

In Montgomery, this meant that the successful plaintiff was entitled to prejudgment interest for the period of time between the date of the jury verdict and the entry of judgment. See id.

While the liability finding in the prior trial was overturned on appeal, the damage verdict was undisturbed. We reject the DiPietros' argument that damages are not liquidated until the jury determines the amount of comparative negligence. That is a liability issue which will not change the total amount of damages suffered by the Griefers. Regardless of how much the recovery is reduced by comparative negligence, the damages were liquidated in 1991. Not awarding interest from that date would deprive the Griefers of a substantial part of their damages, as the following explanation demonstrates.

At the prior trial, the award of future economic damages was reduced to present money value as of the date of the verdict in 1991. Present money value is the value in current dollars of a future stream of payment. But in order for that present money value to replace the future income stream, it must be invested or earn interest to provide that future amount. Thus, for the Griefers' award to compensate them today for that future income stream reduced to present money value, they must have invested it from the date of the verdict. Actually, if the 1996 jury had determined damages, past economic damages, particularly lost income, would have increased to account for the years between 1991 and 1996, and future economic damages would have been slightly less. Because we fixed damages in 1991 by refusing to reverse as to damages, without the award of prejudgment interest the Griefers would not be compensated for all of their losses.

For these reasons, we reverse for a new trial on liability only. Should the Griefers once again obtain a judgment, interest shall be calculated on the amount of the award from the date of the first verdict.

FARMER and KLEIN, JJ., concur.

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