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SUPREME COURT OF FLORIDA

SUPREME CT. CASE NO.: 93,038

4TH DCA CASE NOS.: 96-2481
96-2958, 96-2964 & 97-0223

L.T. CASE NO.: 90-20360-14

Florida Bar #710482

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.

INITIAL BRIEF OF PETITIONERS

ON REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

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PREFACE

Throughout this Brief, the Plaintiffs/Appellants, David Griefer and Ann Griefer, as guardians of Laurel Griefer will be referred to collectively as "Plaintiffs" or as "the Griefers" or by the proper names were appropriate. The Defendants/Appellees, Michael Jon DiPietro and Myra DiPietro, will be referred to collectively as "Defendants" or by their proper names where appropriate. References to the record will be proceeded by "R." followed by the appropriate volume and page numbers. References to transcripts will be proceeded by "Tr." followed by the appropriate volume number and page number.

INTRODUCTION AND GENERAL OVERVIEW OF THE FACTS

Laurel Griefer, an excited bride-to-be, hurried out of David's bridal shop across a four-lane street in a busy business district; in her right hand she carried a long, wide white garment bag containing a recently purchased wedding gown. She proceeded across the street with this bag held high by her head so that the bag would not drag on the pavement. At a 5 mph pace she stepped, without looking or without being able to look due to the position of the bag by her head, into the path of the oncoming white Camaro driven by Michael DiPietro, and owned by Myra DiPietro. The evidence showed that Michael could do nothing to alter the course of events. After nearly five full days of trial on the issues of fault only, the jury decided that Laurel's act of striding out into traffic without looking was mostly the cause of the unfortunate accident. Competent substantial evidence supports the jury's decision.

It is basic to the jurors' common driving experience and indeed, even to their experience as passengers on the roadway, that a pedestrian may abruptly step in front of a moving vehicle without leaving the driver a chance to avoid her. This is what the jurors decided at bar and the Fourth District Court of Appeal should not have disturbed it.

STATEMENT OF THE CASE AND OF THE FACTS

Introduction

This Court is asked to review and to quash the decision of the Fourth District Court of Appeal which held for the first time in Florida in a personal injury case, that Plaintiffs are entitled to prejudgment interest before the entry of the judgment and on an incomplete jury verdict which to this point, has not been rendered against the Defendant. In its current form, the verdict cannot be reduced to judgment.

The DiPietros also seek reinstatement of the verdict rendered by the second jury in this case, since the Fourth District improperly decided that reversal and remand for a new trial is warranted because the trial court excluded the testimony of the Griefers' human factors expert to testify in the Plaintiffs' case. It will be shown below that the Fourth District Court of Appeal also reversibly erred in reversing the jury verdict on the ground that the Griefers' human factors expert and their accident reconstructionist should have been allowed to testify in rebuttal.

It is the DiPietros' position that the Fourth District's decision to allow prejudgment interest under the facts and procedural posture of this case is contrary to Florida law and is inequitable and manifestly unfair. It will be also shown that the Fourth District Court of Appeal wrongly reversed the jury's determination of liability in this case as the trial court correctly excluded the testimony of Dr. Snyder based upon the actions of the Plaintiffs in the trial court. Also, neither Dr.

Snyder's nor Dr. Fogerty's testimony is proper rebuttal evidence under Florida law.[1]

Griefer I

This action was commenced by the Griefers as the guardians of Laurel Griefer, their daughter, who was seriously injured while a pedestrian who attempted to cross a four-lane street known as Las Olas Boulevard in Fort Lauderdale, Florida. Michael DiPietro operated the motor vehicle which struck Laurel as she crossed the street.[2] In "Griefer I" (as in Griefer II, the second trial) the Plaintiffs' theory of the case was that Michael did not keep a proper lookout; was travelling in excess of the posted speed; and did not have his headlights on. The Defendants' theory was that Laurel stepped in front of the moving automobile without looking and that Michael could not have avoided the accident.

In Griefer I, the jury found Laurel 70% negligent and Michael 30% negligent. The jury awarded $2,740,000.00 in future economic damages reduced to present value in the amount of $775,000.00. The jury further awarded $1,300,000.00 in non-economic damages making the total award $2,075,000.00. The net recovery, reduced by Laurel's 70% fault resulted in the entry of a judgment for the Griefers in the amount of $622,250.00.

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[1] This Court has the discretion to review all issues in the case once it exercises its discretionary jurisdiction. Savoie v. State, 422 So.2d 308 (Fla. 1982); Cantor v. Davis, 489 So.2d 18, 20 (Fla. 1986).

[2] The facts are stated in more detail infra, as they are pertinent to the Court's inquiry with respect to the rulings on the admissibility of the Griefers' expert witnesses' testimony challenged here.

The Griefers appealed to the Fourth District Court of Appeal. They sought a new trial on liability and damages. They argued that a new trial on these issues was warranted because the trial court failed to give an additur and a requested jury instruction on unlawful speed. The District Court reversed the judgment and verdict and remanded for a new trial on the issues of fault and damages because of the failure to give the jury instruction. On rehearing, the Court decided that a new trial on liability only was warranted, since the failure to give the jury instruction on unlawful speed did not affect the damages amounts decided by the first jury.[3]

Griefer II

The case was returned to the trial court for retrial. Given the reversal, The Defendants moved to vacate the earlier entered judgment. (I.; 102-106) That was granted and the Court ordered the judgment vacated. (I; 113) During the interim between trials, the Griefers moved to amend their complaint to include a claim for prejudgment interest from the date of the jury verdict in the first trial. The trial court allowed the amendment and denied the DiPietros' challenge to the amendment via a Motion to Strike or Dismiss. (I.; 87)

The case proceeded at trial a second time on the issue of liability only. The jury determined that Laurel was 90% negligent and that Michael was 10% negligent. (I.; 162-163)

The Plaintiffs again appealed arguing, inter alia, that the

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[3] Griefer v. DiPietro, 625 So.2d 1266 (Fla. 4th DCA 1993).

trial court erred by failing to allow their human factors expert to testify either or direct or in rebuttal. They also argued that their expert accident reconstructionist who testified at length on direct, Dr. Fogerty, should have been allowed to testify on rebuttal as well. The DiPietros contend that the Fourth District should not have reversed the jury verdict based on these contentions.

The Underlying Theories Of The Plaintiffs And Defendants In Griefer II.

The underlying contentions of the parties are important to the issue of whether the trial court correctly conditionally admitted the testimony of Dr. Snyder and excluded the testimony of Dr. Snyder and Dr. Fogerty on rebuttal. The contentions are crucial because it will be seen below that the Plaintiffs amply presented evidence to support their theory of the case, without the need to present the testimony of two expert witnesses and rebuttal testimony, against the testimony of the DiPietros single expert witness.

The Plaintiffs contended that Michael was negligent driving at dusk or after dark without the headlights of his vehicle being on. The Plaintiffs contended that this created a trap for Laurel as she allegedly viewed traffic pass from her right to her left as she faced southbound in the middle of the four-lane, east-west roadway. The Plaintiffs contended that since other vehicles had their headlights on, Michael's failure to use his headlights caused Laurel to perceive Michael's car as either a parked car or an open space in the traffic. The Plaintiffs also argued that Michael

exceeded the speed limit and that because of the lack of headlights, could not see Laurel as well as if he had them on.

The Defendants contended that Laurel hurried from David's Bridal Shop with her wedding gown. In her right hand, a wide, white, long, gown bag was held high above her head so it would not drag the roadway. Laurel successfully crossed the first two westbound lanes of the east-west roadway. At a 5 mph pace, she continued across the eastbound lanes in this manner, without looking, because of the position at which she held her dress. The Defendants contended there was nothing Michael could do to prevent the collision.

The Evidence Upon Which The Jury Rendered Its Verdict

The Plaintiffs read portions of the deposition testimony of Michael DiPietro and also excerpts of his testimony in the prior trial. Those reveal that Michael was on his way to the first night of his new job hosting a "Murder Mystery Cruise." (Tr. IV; 7) He left early (approximately 6 p.m.) for the 8 p.m. departure of the cruise. (Tr. IV; 7, 154) He was not "running late" at all. (Tr. IV; 7) Michael also testified live before the jury.

Regarding the lighting conditions, Michael testified that when he left home, it was dusk. He also testified that he did not have his headlights on and stated frankly, he did not remember turning the headlights on or off, following the accident. (Tr. IV; 16, 154, 170) Yet, he was still able to see vehicles on the road. (Tr. IV; 154, 161) He was able to see his dashboard. He recalled observing it several times. (Tr. IV; 155, 171, 173)

Michael testified that he turned eastbound on Las Olas Boulevard which is an east/west roadway, having two lanes in the eastbound direction and two westbound lanes. (Tr. IV; 8) Prior to the accident, he stopped for a traffic signal in the right-hand lane closest to metered parking spaces on the adjacent curb in the westbound lanes of travel. (Tr. IV; 8, 17-18, 155) The light changed and as he cleared the intersection, Michael observed a vehicle that abruptly pulled out from one of the metered parking spaces in front of him and to his right. (Tr. IV; 8, 155, 157) In response, Michael moved to the eastbound left-hand lane to give the vehicle room. (Tr. IV; 8, 159) The vehicle also moved into the left-hand lane ahead of Michael, accelerating. (Tr. IV; 8, 20, 157) At this point, out of the corner of his eye, Michael observed a white bag to the left of his lane of travel. It appeared to him that it was propelled by or lifted in the breeze. (Tr. IV; 21, 160) Michael hesitated momentarily, but proceeded further because he thought it was just a bag. (Tr. IV; 160) Still, he testified that he veered somewhat to the right to avoid the bag. Just as he struck the bag, he realized that he had also struck Laurel, who was carrying the long wedding dress bag in her right hand, held head-high, shielding her from Michael's view, as she walked horizontally across Michael's path of travel toward her car. Her vehicle was parked across the street from the bridal shop. (Tr. IV; 160) At no time before impact did Michael realize it was a person on the roadway. To him, it appeared as some sort of bag or other object. (Tr. IV; 37) Michael thought it could have been a large trash bag

being wind-blown. (Tr. IV; 38-39)

Michael was unsure regarding when he applied his brakes, whether it was before, at, or immediately after impact. (Tr. IV; 42-44, 160) Prior to impact, Michael testified he was travelling at "normal speed" except for the time he slowed due to his observance of the vehicle pulling from the metered parking space. (Tr. IV; 52) He could not, however, testify as to his exact speed at impact.

Faye Zollick, a civilian traffic accident investigator for the City of Ft. Lauderdale, stated that when she arrived at the scene at 6:30 p.m., it was dark. (Tr. IV; 62-63) Ms. Zollick testified that the area was lighted by lights from local businesses in the district. (Tr. IV; 62-63) She confirmed that Michael related to her at the accident scene that a vehicle had pulled out from a parking space adjacent to his lane of travel. (Tr. IV; 58) Michael also recounted his perception of the white bag immediately prior to the impact. (Tr. IV; 65) While at one point, the witness stated that she failed to remember a "noticeable breeze", she also stated that there could have been enough breeze to cause leaves to rustle--corroborating Michael's testimony. (Tr. IV; 61, 62)

Ft. Lauderdale patrolman Douglas Hartman was the first officer on the scene. He was approximately 100 feet away from the impact. He heard a thud but did not hear any tires screeching prior to impact. The officer testified that he found lighting conditions dark, but had no problem seeing vehicles on the roadway due to lighting in the area. (Tr. IV; 79-84)

The video deposition of witness Mel Wiggins was played. After bicycle-riding, Wiggins was seated on a bench on the southeast corner of the intersection just east of the accident scene. (Tr. IV; 89) He first observed Laurel in the middle of Las Olas which is divided by a double yellow line. Laurel was wearing a red dress that Mr. Wiggins had no difficulty seeing. (Tr. IV; 90) He testified that Laurel was carrying some sort of bag in her right hand. It was held high because it was long and would otherwise drag. (Tr. IV; 90-91) Laurel was facing south so that she was facing across the eastbound lanes of Las Olas and not to her right, which is in a westerly fashion toward oncoming traffic such as Michael's vehicle. (Tr. IV; 90-92; 109-112) Mr. Wiggins stated that he did not see Laurel as she stepped from the place where he last observed her but only saw her as she was struck. (Tr. IV; 117)

It was evident that Laurel was in a hurry. Ms. Geyer stated at first that Laurel did not appear to be in a hurry as Laurel spoke to a photographer on the way out of the store. Still, Ms. Geyer acknowledged that Laurel told the photographer that she only had a minute since she just called her fiance and said that she had finally found a wedding dress. (Tr. IV; 136-137) Ms. Geyer also overheard Laurel tell her fiance that she would be home shortly. (Tr. IV; 140) Ms. Geyer additionally admitted that Laurel told the photographer she was in a hurry and he could only have five minutes of her time. (Tr. IV; 142-143)

The Conditional Allowance of Dr. Snyder's Testimony

Prior to the commencement of trial, the Plaintiffs failed to respond to discovery requests propounded regarding expert witness opinions. In large measure, the Defendants propounded the interrogatories since the Plaintiffs added Dr. Harry Snyder to their list of expert witnesses. He was an additional expert of the Plaintiffs and did not testify in Griefer I, whereas Drs. Fogerty and Benedict did. Because the interrogatories went unanswered, an ex-parte motion to compel was filed and the trial court ordered the interrogatories answered within 10 days from November 27, 1995.

The interrogatories remained unanswered and, as a result, the Defendants moved to strike Dr. Snyder from appearing as an expert, since they were unaware of his opinions and had an insufficient amount of time to prepare to rebut the opinions. At the scheduling conference approximately 2 1/2 weeks before trial, the Judge granted the motion to strike, subject to allowing Dr. Snyder to testify by agreement of the parties in order to avoid the obvious prejudice. (R. 239)

After travelling to North Carolina to depose Dr. Snyder and being unable to do so due to an illness, the Defendants eventually deposed Dr. Snyder in Ft. Lauderdale on December 27, 1995, 13 days before trial. At the scheduling conference, however, Plaintiffs' counsel informed the trial court that Dr. Snyder had no time to attend a deposition until the trial. The Plaintiffs then moved for clarification of the earlier order striking Dr. Snyder as a witness. (R. 130-132) The chronology of events is succinctly set forth in the transcript of the hearing. (Supp. II; 1-15) Defense

counsel explained that while Dr. Benedict could address some of Dr. Snyder's opinions concerning what was visible, a motion in limine would be filed to seek to limit Dr. Snyder's testimony to exclude areas Dr. Benedict could not address. (Supp. II; 10-12) The Judge abided by his previous order which stated that Dr. Snyder could testify pursuant to the agreement of the parties. (Supp. II; 13) In effect, the Court's order allowed testimony from Dr. Snyder to the extent it could be addressed by the Defendants' only expert. The order, entered five days before trial, also stated that the trial court would consider Dr. Snyder testifying in rebuttal, if necessary. (Supp. II; 14)

The Expert Testimony At Trial

Dr. Fogerty offered opinions concerning the "bottom line" aspects of the accident dealing with accident reconstruction. For example, Dr. Fogerty testified that Laurel crossed the street at approximately 5 mph or 7 ft/sec. immediately prior to impact. (Tr. V; 66-67) He testified that five or six seconds elapsed from the time Laurel left the curb in front of David's until the time of the accident and that she most probably travelled a diagonal path toward her vehicle, parked on the curb opposite the bridal store. (Tr. V; 75-77) He testified that Michael had less than 2 1/2 seconds to avoid the accident but that he had the opportunity to avoid the collision. (Tr. V; 90, 94) Dr. Fogerty testified as to the range of speeds at which the DiPietro vehicle was travelling. This was between 29.5 - 37/43 mph. (Tr. V; 102-104) Dr. Fogerty also had the perception that Laurel was in a hurry crossing the

street. (Tr. V; 143) Dr. Fogerty explained the variation in the ranges of numbers since it was undetermined whether Michael braked before or at impact. (Tr. V; 144)

On cross-examination, Dr. Fogerty admitted he could not discount the fact that Michael's vehicle could have been travelling at 25 mph (well below the speed limit) at impact. (Tr. V; 148) This was consistent with Michael's estimate of his speed. (Tr. IV; 31)

While purporting not to in a self-serving fashion, Dr. Fogerty offered "human factors" opinions regarding the circumstances and conditions at the time of the accident and how the lighting conditions influenced those involved. These opinions supported the Plaintiff's theory of the case.

Dr. Fogerty testified that the fact that the white Camaro driven by Michael was stopped at the intersection down the street from the point of the collision without headlights is important. This is because the pedestrian, Laurel, had the opportunity to reach a (wrong) conclusion by observing the vehicle in the right-hand lane. If the Camaro's headlights were not on, Dr. Fogerty opined that the other cars parked in spaces adjacent to the right-hand lane caused Laurel to have to make a decision whether the Camaro was one of the cars actually parked, or one travelling in the stream of traffic without its lights on in her direction. (Tr. V; 28) Thus, Dr. Fogerty offered opinions supporting Plaintiffs' theory that the fact that the Camaro's lights were off created a trap for Laurel traversing the roadway. In addition, Dr. Fogerty

opined that eyes go to lit areas like a moth to a flame as opposed to unlit areas such as the Camaro. (Tr. V; 29) Dr. Fogerty testified that there is greater demand for the attention of the eyes to move from an unlit source to a lit source. (Tr. V; 29) Dr. Fogerty testified that the lack of headlights in the area was a "major factor" with respect to the lighting conditions and the cause of the accident. (Tr. V; 30)

Additionally along these lines, Dr. Fogerty testified that it was an important fact that Michael saw a bag moving from his left to right as it assisted Dr. Fogerty in his opinion as to causation. This is so, Dr. Fogerty testified, since it deals with the judgment of an individual who was driving. (Tr. V; 36) Dr. Fogerty stated that his son drove a 1983 Camaro similar to that of Michael's and testified to his observations as did Dr. Benedict. Dr. Fogerty personally drove it after sunset and he testified it would be pretty hard to observe the dashboard without the headlights being on. (Tr. V; 40) As a result, it would take longer to glean information from the dashboard. (Tr. V, 41) Dr. Fogerty stated that most people move their eyes toward the dash with relative frequency during a 15-minute drive and observe it with "pretty good frequency." (Tr. V, 41) Dr. Fogerty added that the amount of time the pedestrian is on the street was an important factor as it affects the driver's ability to see the pedestrian. (Tr. V; 58)

Dr. Fogerty testified extensively concerning Michael's ability to see in Laurel's direction and why the "phantom vehicle" did not inhibit his line of sight. Dr. Fogerty also testified at length

regarding simple and complex reaction times and the judgment employed in reacting to Laurel on the roadway. (Tr. V; 89-91) Dr. Fogerty concluded that Laurel was on the roadway a sufficient amount of time for Michael to see her and react to avoid the collision. If the Camaro had its headlights on, there was a "significantly increased" opportunity for Laurel to see it. (Tr. V, 106-107, 110)

Dr. Charles Benedict was called by the Defendants as an accident reconstruction expert. Just as Dr. Fogerty testified to his personal experience driving a Camaro, Dr. Benedict described how he drove an exemplar Camaro tried to duplicate the conditions at the accident scene by travelling there to see for himself, what the driver of the Camaro could see. This was done by Dr. Benedict in addition to performing the necessary measurements upon which he based his calculations. (Tr. VI; 12) Dr. Benedict testified regarding what he could see when he visited the accident site. He did not testify what Laurel or Michael thought, or should have perceived.

He stated he could see the Camaro clearly as it moved from the stop bar even with its lights off. (Tr. VI; 67) Dr. Benedict could see the dashboard "fine" when he drove an exemplar 1983 Camaro with its lights off but also stated it was better if the lights were on. (Tr. VI; 70) The simulation included having a vehicle pull from a parking space into westbound traffic, moving toward Dr. Benedict who was in the position of Laurel Griefer. Dr. Benedict acknowledged that the simulation was not exact but was

important in understanding the circumstances surrounding the accident. (Tr. VI; 16)

Dr. Benedict disagreed with Dr. Fogerty's opinion that Laurel was struck by the right front of the vehicle (which means that Laurel almost entirely crossed the front of the vehicle before impact). Dr. Benedict stated that Dr. Fogerty's opinion was inconsistent with the laws of physics as it failed to take into account Laurel's left-to-right motion across the face of the vehicle at 5 mph. (Tr. VI; 27-33)

Dr. Benedict testified that the Camaro could not have been travelling at the high-end of speed as testified to by Dr. Fogerty, given the distance between the stop bar and the point of impact. He explained that the Camaro could not have attained that speed in that distance. (Tr. VI; 44-45) Dr. Benedict testified that there was not enough time for Michael to avoid Laurel by braking. (Tr. VI; 47-48, 66) Dr. Benedict opined there was only one second between the time Laurel left the center of the roadway and the time of impact. (Tr. VI; 63) His opinion was that the speed of the Camaro at impact was 24 mph. (Tr. VI; 54) This testimony was extensively attacked on cross-examination as is shown, infra.

Dr. Benedict's testimony concerning lighting and each party's ability to observe the other was based upon his personal observation under similar conditions. For instance, he testified that the Camaro could still be seen by him without having his eyesight drawn to headlights. (Tr. V; 125) He also testified that as he drove down the street, his vision was drawn to the car

pulling from the parking space. He testified that peripheral vision was not taken into account by him. (Tr. V; 121)

Dr. Benedict's opinion was that once Laurel stepped into the eastbound lane of travel, the accident was not avoidable. (Tr. V, 73)

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal's decision to award prejudgment interest to the Griefers in this case must be reversed. The rule in Florida is that personal injury Plaintiffs are not entitled to prejudgment interest except for out-of-pocket, pecuniary losses for past medical expenses. Here, there is no jury award for past medical expenses. The first jury determined an amount of damages based upon future, intangible losses such as future pain and suffering and future monetary damages in which the Plaintiff had no vested interest. Because these elements of damages are not ascertainable or liquidated until a jury determines their amounts, prejudgment interest cannot fairly attach to those elements of damages. Until the third jury decides whether, and the extent of Michael DiPietro's liability, the amounts of damages owed by the Defendants cannot be determined. The Fourth District Court of Appeal erred by determining that prejudgment interest is owed by the DiPietros.

The Fourth District Court of Appeal reversibly erred by awarding a new trial at all. Contrary to the Fourth District's rulings, the Plaintiffs presented extensive evidence regarding what the parties could see and the lighting conditions at the time of the accident. The trial court correctly excluded the testimony of Dr. Snyder from being presented on direct, as the Defendants were only able to learn of his opinions less than two weeks before trial over the Christmas and New Year holiday. The element of surprise was no longer present but certainly, the element of prejudice was.

The Plaintiffs chose to take an all or nothing stance in the trial Court, even though the Defendants stated that they would agree to a partial admission of Dr. Snyder's testimony in limited areas that could be countered by Dr. Benedict. Under these circumstances, the broad discretion this Court granted trial courts with respect to the administration of the orderly conduct of a trial was not abused by the trial judge, and the Fourth District Court of Appeal erred in determining otherwise.

Neither Dr. Snyder's nor Dr. Fogerty's testimony is admissible on rebuttal. Dr. Snyder's testimony would have added to the Plaintiffs' case to be sure, but this is not the purpose of rebuttal. Dr. Fogerty and Dr. Benedict, who are both accident reconstructionists, testified from strikingly similar points of view. The admission of Dr. Snyder's testimony on rebuttal would only serve to buy the Plaintiffs an unfair advantage of having two experts and the last word before the jury. Also, Dr. Snyder's testimony would have only served to escalate the degree of technical information placed before the jury. It would not serve to "rebutt". The Fourth District Court of Appeal reversibly erred in determining otherwise.

Dr. Benedict was questioned at length on cross-examination with respect to the fact that his estimate of the height of the Camaro, the windshield, and Laurel's trajectory may have been inaccurate. He was forced to recalculate the estimate of the speed of Michael's vehicle. He testified that based upon the actual height of the Camaro that Michael's vehicle could have been

travelling 10 miles an hour faster than his estimate on direct. The jury had a sufficient amount of information before it to conclude, if it wanted, that Dr. Benedict's speed calculations were inaccurate. The admission of Dr. Fogerty's testimony to establish that would have been overkill, and the Fourth District Court of Appeal erred in awarding a new trial on this issue.

It is respectfully requested that this Court reverse and remand for the reinstatement of the jury verdict without the award of prejudgment interest.

ARGUMENT

I. THE FOURTH DISTRICT COURT OF APPEAL ERRED REVERSIBLY BY DETERMINING THAT THE GRIEFERS ARE ENTITLED TO PREJUDGMENT INTEREST IN THIS PERSONAL INJURY CASE BY FINDING THAT THE DAMAGES WERE LIQUIDATED BY THE JURY IN THE FIRST TRIAL IN 1991.

Introduction

Florida has never allowed a prejudgment interest award to a Plaintiff suing for personal injury damages except for actual "out of pocket" losses for past medical expenses. The decision of the Fourth District Court of Appeal currently under review by this Court is the first time any appellate court in this state has expressly awarded prejudgment interest for anything other than actual out of pocket losses for past medical expenses to a personal injury Plaintiff. It is respectfully submitted that the Fourth District erred in allowing post judgment interest in this case because the Court strayed from long standing precedent and because it is unjust and inequitable to do so under the facts and circumstances of the instant case.

Prejudgment Interest Is Not Awarded To Personal Injury Plaintiffs Except For Amounts Attributable To Actual, Out Of Pocket Past Medical Losses.

Florida follows the general rule that prejudgment interest is not awarded in personal injury cases in the absence of a statute permitting the award. Farrelly v. Heuacker, 118 Fla. 340, 343, 159 So. 24, 25-26 (1935); Zorn v. Britton, 120 Fla. 304, 307, 162 So. 879, 880-881 (1935); Jackson Grain Company v. Hoskins, 75 So.2d 306, 310 (Fla. 1954) and Parker v. Brinson, 78 So.2d 873, 874-875

(Fla. 1955) (each recognizing the rule). This Court stated the general rule thusly:

> "The general rule is that, in the absence of statute, interest cannot be awarded as damages in actions for personal injuries, because the amount and the measure of damages is largely discretionary with the jury and is in consequence unliquidated until the trial." Farrelly, 159 So. at 25. Emphasis added.[4]

There were no significant developments in the general rule until this Court revisited the issue in a tort case that did not involve personal injury claims. In Argonaut Insurance Company v. May Plumbing Company, 474 So.2d 212 (Fla. 1985), this Court held that the Argonaut Insurance Company was entitled to prejudgment interest in a subrogation action on an amount already paid for a fire loss to an insured apartment complex which was caused by May Plumbing Company. This Court explained that under the loss theory of the award of interest, prejudgment interest attaches to the loss itself due to the wrongful deprivation of the Plaintiff's property. This Court reasoned that a Plaintiff is to be made whole from the date of the loss once a finder of fact has determined the amount of loss and the Defendants' liability for the loss. 474 So.2d at 215. This Court held that when a verdict liquidates damages on the amount of the Plaintiff's out of pocket pecuniary loss, he or she is entitled to prejudgment interest from the date of that loss.

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[4] The reason prejudgment interest statues are important is that they place conditions upon the award that protect against results such as that in the instant case. For example, Plaintiffs are often required to make a reasonable demand that is rejected before prejudgment interest accrues in personal injury cases, because the damages are uncertain of easy calculation.

474 So.2d at 215. Importantly, this Court acknowledged the continued vitality of the general rule that prejudgment interest is not available in personal injury cases. 474 So.2d at 214 n. 1.

After Argonaut, the Court was asked to examine whether a Plaintiff in a personal injury case is entitled to prejudgment interest for "out of pocket" past medical expenses. This Court reiterated its holding in Argonaut and held that a personal injury Plaintiff, who suffers the loss of a vested property right in money he or she expended to cover medical expenses, is entitled to recover prejudgment interest attributable to the payment of those past medical expenses. Alvarado v. Rice, 614 So.2d 498, 499-500 (Fla. 1993). In Alvarado, this Court noted that the Plaintiff did not suffer the loss of a vested property right, since she did not pay her bills prior to the entry of the judgment. The theme in each of these cases is that prejudgment interest attaches to damages that are vested and ascertainable.

This Court examined whether prejudgment interest is awardable to Plaintiffs who were owed ascertainable, medical benefits under an insurance policy in Lumberman's Mutual Casualty Co. v. Percefull, 653 So.2d 389 (Fla. 1995). The Court found that prejudgment interest is awardable based upon the claims which created an ascertainable amount to which the Plaintiffs had a vested right.

The above recited principles were applied and arguably extended in a fact situation somewhat analogous to, but not governing, the situation presented at bar. In Palm Beach County

School Board v. Montgomery, 641 So.2d 183 (Fla. 4th DCA 1994), which was a decision relied upon by the District Court in the instant case, the Court held that personal injury Plaintiffs are entitled to "prejudgment" interest from the date the jury enters their verdict on liability and damages, to the date of the entry of the judgment, where the verdict remains undisturbed throughout the future proceedings in the case. In Montgomery, supra, the Defendants filed post trial motions causing a six month delay in rendition of a final judgment. The Montgomery court, without discussion, apparently affirmed the award of post-verdict, prejudgment interest on all damages--not just on the Plaintiffs' "out of pocket" losses for medical expenses. The Court thus departed further from the precedent as announced in Alvarado.

The Montgomery decision is not completely in error. Where a jury's verdict in a personal injury case determines that a Defendant is liable for a specific amount of damages, and both of those determinations remain intact, interest (whether or not termed "prejudgment") can attach because the Plaintiffs at that stage have a vested interest in an amount of money recoverable from the Defendant. The verdict is in essence, the judgment. The amount of damages is liquidated as they are readily ascertainable from a reading of the verdict as is the Defendants' liability. The Defendant at that point can simply pay the verdict or the judgment entered on the verdict. Alternatively, the Defendant can continue to pay interest as compensation to the Plaintiff for the delay in payment of the amount of the verdict. None of this is present in

the case at bar and is at least one reason why the Fourth District Court of Appeal erred in relying on Montgomery.

In the case at bar, the jury's verdict has been disturbed twice due to appeals lodged by the Griefers. The verdict in this case has never remained intact and thus, liquidated throughout the course of proceedings. The Griefers have consistently sought to overturn the results of jury trials thereby delaying the entry of a judgment. In turn, it also prevents the DiPietros from tendering any payment, unlike the Defendant in Montgomery who had the ability to do so. Montgomery also awarded blanket prejudgment interest presumably on all elements of damage including intangible damages as well as future damages in which a Plaintiff has no vested interest, and no pecuniary loss prior to the entry of a judgment. These distinctions are important in consideration of the precedent established in this state, and the Fourth District's departure from it.

The Fourth District's decision under consideration here departs from precedent and fails to explain the reason for the departure. This Court has taught practitioners in this state that interest is an element of damages and its purpose is to return to the Plaintiff money to compensate the Plaintiff for the lack of the use of the money expended for pecuniary losses caused by a Defendant. Here, there is no award of "out of pocket" pecuniary loss by either jury. All economic damages (except for lost, past wages, medical expenses, etc.) are compensation for prospective losses, not out of pocket losses. The non-economic damages

awarded, whether past or future, clearly are not tangible, readily ascertainable, vested, pecuniary losses suffered by the Plaintiff. Concomitantly, no value has been retained by the DiPietros regarding these damages. The decision regarding the award of interest at bar is simply not supported by any precedent in this state nor is it supported by its underlying reasoning. The decision at bar simply should be reversed.

Further, the District Court's decision is not consistent with equitable considerations or policy reasons why interest is an element of damages. The DiPietros should not be required to pay money damages when they cannot determine, with reasonable accuracy, what they owe and the date they began to owe it. The Griefers seek statutory interest for nearly eight years, yet the DiPietros have no ability to determine how to pay it. The amount cannot be paid because the amount is unascertainable until the third jury decides the issue of whether Michael is at all at fault for causing the accident.

Currently, the DiPietros owe the Griefers nothing. But the Fourth District Court of Appeal has held that the Plaintiffs are entitled to interest (on that amount?) if and when they recover a verdict to their liking. This is neither fair nor equitable.

Further, it cannot be said that the Griefers are deprived of the use of money awarded by the first jury's verdict since Laurel has no vested right to any damages verdict. Since prejudgment interest is merely an element of damages, prejudgment interest necessarily cannot exist until the third jury determines whether

any damages are owed.

The reason interest is allowed in contract cases and in property damage loss cases, and in personal injury cases on the amount of medical expenses paid is that the value of the property loss, the value of the performance, is capable of ascertainment before suit. Thus, as in the subrogation claim involved in Argonaut, supra, the presence of tangible loss, which was the amount the insurance company paid to its insured, was readily ascertainable and capable of being paid by the Defendant before suit. The Defendant in Argonaut did not have to rely solely upon a jury determination to fix otherwise intangible amounts. While the Defendant might contest the amount of the loss, it was still capable of ascertainment. However, in personal injury cases such as the one involved at bar, other than actual pecuniary expenses paid by the Plaintiff, there is no present tangible loss in existence prior to the entry of a judgment. This is why interest cannot attach to damages in personal injury cases other than the out of pocket pecuniary losses. This is why the District Court erred here.

In addition, the fact that the Plaintiffs have caused the delay in payment should not be overlooked as an equitable consideration. There is no inducement to settle or tender a reasonable demand when the Plaintiffs know they are entitled to interest which possibly could result in the recovery more than twice the award itself. The incentive or lack thereof to bring a case to settlement is a prominent factor recognized in the statutes

or rules in those states which allow prejudgment interest in personal injury claims. That legislation recognizes the need of the Defendant to ascertain the precise amount of damages claimed by a Plaintiff in personal injury cases and thus, gain the ability to settle the claim to avoid further payment of interest. Indeed, some statutes require that a reasonable demand be given by the Plaintiff as a pre-condition to the recovery of prejudgment interest.[5]

The considerations of fairness and equity that focuses upon which party is causing the delay in payment and evaluation of the ability to ascertain the damages has been recognized in courts of this state. In Volkswagen of America, Inc. v. Smith, 690 So.2d 1328, 1331-1332 (Fla. 1st DCA 1997), the Court recognized that there should not be an automatic award of interest as an element of damages. The Court recognized that the prejudgment interest rule benefits the Plaintiff who should not be rewarded for the continued delay in payment of the damages he or she claims.

Without much discussion, the First District Court of Appeal has held that a personal injury Plaintiff is not allowed interest from the date of the verdict rather than from the date of the judgment. Easkold v. Rhodes, 632 So.2d 146, 147 (Fla. 1st DCA 1994) and Rockman v. Barnes, 672 So.2d 890, 891 (Fla. 1st DCA 1996). Presumably, the foundation of these decisions rests upon

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[5] See, Validity and Construction of State Statutes or Rules Allowing or Changing Rate of Prejudgment Interest in Tort Actions. 40 A.L.R. 4th 147 (1986), see also the discussion in Woods v. Farmers Insurance Company of Columbus, 106 Ohio App. 3d 389, 666 N.E. 2d 283 (1995).

the inability to determine the amount of damages unless the Defendant is found liable and to what extent.

Courts of other states recognize the rule that where a verdict or judgment is disturbed during the course of an appeal or through post-trial motions, no interest accrues. See, Bilotta v. Kelly Company, Inc., 358 N.W. 2d 679, 681 (Minn. Ct. App. 1984); Muchmore Equipment, Inc. v. Grover, 334 N.W. 2d 605, 610 (Iowa 1983) [Following rule when a judgment is reversed the interest is not computed and accrued during the pendency of appeal.]; South Dakota Building Authority v. Geiger Burger Associates, 414 N.W. 2d 15, 19 (S.D. 1987).

In summary, the District Court of Appeal reversibly erred by ordering that interest be calculated on the amount of the award from the date of the first jury's verdict. Whether the term liquidated or ascertainable is used, the amount of the Plaintiffs' damages is simply unknowable unless, and until, a third jury decides the degree of fault, if any, attributable to the Defendants. The Court's decision fails to compensate the Griefers for out of pocket pecuniary loss. Instead, it rewards the Griefers for continuing to challenge jury verdicts that find an ever increasing amount of fault attributable to the Plaintiff. Prejudgment interest should not attach since the amount of damages is unknowable. Under these circumstances the award of prejudgment interest should be reversed.

II. THE TRIAL COURT PROPERLY PRECLUDED DR. SNYDER FROM TESTIFYING IN THE PLAINTIFFS' CASE-IN-CHIEF; AND THE FOURTH DISTRICT COMMITTED REVERSIBLE

ERROR IN DETERMINING THAT THE TRIAL JUDGE ABUSED HIS DISCRETION.

Introduction

The Fourth District Court of Appeal has reversed the trial court's exercise of broad discretion to exclude the testimony of the Griefers' additional human factors expert, Dr. Snyder. The District Court reversibly erred in overriding the exercise of that discretion. Binger v. King Pest Control, 401 So.2d 1310 (Fla. 1981).

The District Court, in effect, rewarded the Plaintiffs for their failure to comply with the requirements set forth in the court order which required disclosure of their expert witness in a meaningful way. The Plaintiffs failed to comply with discovery requests despite being ordered to answer expert witness discovery. It was not until after the expert was stricken that the discovery was answered and the expert deposed on the 11th hour before commencement of trial. The result rendered by the Fourth District is that the Defendants are punished for the Plaintiffs' non-compliance with court orders and the rules of discovery.

In addition, Dr. Snyder, a human factors expert, was not wholly prevented from testifying. He was able to testify to the extent that the parties could agree. The Defendants, on the record, agreed to two areas to which Dr. Benedict, who is not a human factors expert, could testify. Instead of offering Dr. Snyder's limited testimony, the Plaintiffs chose to stand pat, and maintain an all or nothing stance regarding the admissibility of Dr. Snyder's testimony.

When it appeared that Dr. Snyder's testimony would not be admitted in its entirety, the Plaintiffs argued that it was admissible in rebuttal. But each and every point addressed by the Defendants' expert had already been addressed by the Plaintiffs' expert, Dr. Fogerty, in their case in chief. It will be shown below that Dr. Snyder's testimony was inadmissible in rebuttal. The trial judge simply, correctly prevented a trial by ambush by his rulings. The Plaintiffs violated the spirit and substance of this Court's teaching in Binger v. King Pest Control, 401 So.2d 1310 (Fla. 1981).

The Events Leading Up To The Order Conditionally Admitting The Testimony Of the Plaintiffs' Additional Expert.

At bar, the pretrial order required the disclosure of all expert witnesses sixty days before trial which was by November 11, 1995. (R. 110) The trial was specially set to commence on January 9, 1996. (R. 110) The Plaintiffs timely served a disclosure listing "Harry L. Snyder, Ph.D. CLE", but no further information was given. (R. 114-115) In an effort to learn of the expert witness' opinions, interrogatories were propounded on October 12, 1995. When the deadline for responding to the interrogatories passed, an ex-parte order compelling the answers was entered. The Plaintiffs never answered the discovery pursuant to the ex-parte order. The Defendants then travelled to North Carolina to depose the witness but were unable due to the witness' illness. Alternative dates were requested from the Plaintiffs but they claimed the witness was unavailable before the trial. At the

pretrial conference, the Plaintiffs' failure to respond was brought to the Judge on the Defendants' motion to strike the expert from testifying. The trial judge conditionally granted the motion but allowed Dr. Snyder to testify if the parties could agree. (R. 239)

The entry of the order suddenly spurred Plaintiffs into action and Dr. Snyder became available for deposition. Expert witness interrogatories were answered contemporaneously as well. Dr. Snyder was presented for deposition in Ft. Lauderdale, Florida, on December 27, 1995--13 days prior to trial and three days before discovery cut-off. Dr. Snyder had not even visited the accident scene until December 26, 1995. This certainly explains why the Plaintiffs did not produce the expert's opinion through discovery answers or the expert for testimony until 13 days before trial.

Following Dr. Snyder's deposition, the Plaintiffs moved for clarification of the order alerting the Court to the fact that Dr. Snyder was deposed. This motion was brought on January 4, 1996, now five days before trial. (R. 130-132) The Judge abided by his prior ruling that Dr. Snyder could not testify unless there was an agreement by the parties but also noted that the Plaintiffs may present the testimony in rebuttal, if warranted. (R. 159)

The Standard Governing The Issue

This Court has announced several guiding principles which, if properly applied by the Fourth District, would have resulted in an affirmance by that Court.[6] This Court agreed with the Fourth

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[6] Ironically, the author of Binger is the advocate for the Griefers at bar.

District Court which held that the key to the proper administration of the rules and orders regarding disclosure of expert witnesses is the trial judge, who is clothed with broad discretion to resolve such questions. Binger, supra, 401 So.2d at 1311. This Court then agreed with the Fourth District's determination in Binger that prejudice exists where, as here, the objecting party could have taken action to protect themselves if they had proper notice of the witness and no alternative existed to resolve the prejudice. Id.

This Court expressly approved the approach which: "...places all problems regarding the testimony of undisclosed witnesses within the broad discretion of the trial judge." Binger, 401 So.2d at 1313.

Unless the abuse of discretion is clear, trial courts must be allowed to enforce the pretrial orders to achieve the orderly and efficient administration of justice and fairness to all parties involved. Florida Marine Enterprises v. Bailey, 632 So.2d 649, 651 (Fla. 4th DCA 1994), citing, Binger, supra. The trial court, in its discretion, may exclude evidence not disclosed as required by pretrial order. S. N. W. Corp. v. Abraham, 491 So.2d 1223, 1224-1225 (Fla. 4th DCA 1986). In addition to not complying with the pretrial order, the Plaintiffs failed to comply with discovery orders compelling disclosure of expert opinions. This has also been held as a proper ground for exclusion of the evidence. N. T. Dolan v. Springlite Bottled Water Corp., 656 So.2d 211, 212 (Fla. 3rd DCA 1995), Brinkerhoff v. O. B. Linkous, 528 So.2d 1318 (Fla. 5th DCA 1988). Judge Moe's decision to exclude the testimony was

not an abuse of discretion as at least, reasonable men can differ regarding the propriety of the ruling. Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980).

Indeed, the Fourth District itself has explained that "listing" a witness means something more than merely naming a witness to avoid prejudice. The subject matter of the testimony must be accurately set forth. Florida Marine Enterprises, supra, 632 So.2d at 652. The mere listing of an expert witness does not fulfill the purpose of pretrial disclosure without the ability to discover the opinions of the expert or, at least, be apprised of the testimony. Id.

In Florida Marine Enterprises, supra, the Fourth District describes the scenario here:

> "Where, as here, a party without good cause improperly discloses witnesses, and by virtue of the improper disclosure gains an unfair advantage over the opposing party who was in compliance with the pretrial order, Binger gives the trial court discretion to strike these witnesses to prevent the objecting party from being forced to choose between frantic last minute discovery and unjustified delay of their trial. This is not a fair manner in which to 'cure the prejudice' caused by the defendants' failure to timely prepare their case, and we hold that Binger does not require such a result here.
>
> In the instant case, the trial court properly found that unfair prejudice to plaintiff existed because she would be unable to counter testimony offered so late in the game. See, Grau v. Branham, 626 So.2d 1059, 1061 (Fla. 4th DCA 1993) ("Neither side should be required to engage in frantic discovery to avoid being prejudiced by intentional tactics by the other party")." Florida Marine Enterprises, supra, 632 So.2d at 652-653. Parenthetical in the original.

As noted by Grau v. Branham, 626 So.2d 1059, 1061 (Fla. 4th DCA 1993), it is simply not enough that a party know what a witness may say. The prejudice lies in the inability to counter. "A party can hardly prepare for an opinion that it doesn't know about ..." Office Depot, Inc. v. Miller, 584 So.2d 587, 590 (Fla. 4th DCA 1991). To the same effect, please see, Metropolitan Dade County v. Sperling, 599 So.2d 209 (Fla. 3rd DCA 1992); Acquisition Corp. of America v. American Cast Iron Pipe Company, 543 So.2d 878, 881 (Fla. 4th DCA 1989) [No abuse of discretion in striking expert who was offered to depose a week before trial and expert viewed property immediately before trial]; Brinkerhoff v. O. B. Linkous, supra, 528 So.2d at 1319 [Order striking expert affirmed even though case continued due to failure to provide opinion]; Pipkin v. Hamer, 501 So.2d 1365 (Fla. 4th DCA 1987).

The Ruling In This Case

Despite the above, the Fourth District held that the DiPietros were not surprised by the testimony and thus, Dr. Snyder should have been allowed to testify. The Fourth District overlooks the fact that allowing discovery on the eve of trial may cure "surprise", but does not cure the prejudice of allowing the Plaintiffs two experts to advance the Plaintiffs' case from technical points of view which the Defendants are unable to counter.

Contrary to the reasoning underpinning the Fourth District Court of Appeal's decision that the DiPietros were not prejudiced. Dr. Benedict was not: "...fully capable of addressing each of the

opinions formed by Dr. Snyder and had done so prior to his deposition." While Dr. Snyder is a human factors expert, Dr. Benedict is not a human factors expert and took no such courses. (II, p. 12 "Shrunk Transcript") In a deposition taken by the Plaintiffs the day before trial in order to learn of Dr. Benedict's ability to counter Dr. Snyder's testimony, Dr. Benedict stated that he considered himself an expert in human factors within a "certain framework". (II, p. 13 "Shrunk Transcript")

After learning that Dr. Benedict's opinions regarding the speed of the vehicle and his opinions on lighting would be the same as in the first trial and as in previous depositions, the Plaintiffs proceeded to ask specific questions directed to Dr. Snyder's opinions involving the affect of the lighting at the time of the accident, what the human eye could perceive, and reactions to the perception. Dr. Benedict was unable to answer questions regarding what amount of light Laurel would have perceived from reflection from the vehicle driven by Michael or from that vehicles headlights. (II, pp. 39-40 "Shrunk Transcript")

Dr. Benedict did not know the terms used by Dr. Snyder. For instance, he could not define the term "ambient illuminance", "chrominance characteristics", "chromaticity coordinates", or the difference between "reflectants" and "illuminance". Dr. Benedict was unable to agree or disagree with Dr. Snyder's conclusions regarding the visibility of the bag containing the wedding gown. (II, pp. 44-48) Dr. Benedict could not, and did not, comment on any of the opinions rendered by Dr. Snyder. Dr. Benedict basically

placed himself behind the wheel of an exemplar Camaro at or about the same time of day, at the exact location and made personal observations. (II, pp. 58-59) Dr. Benedict was not able to address each and every opinion rendered by Dr. Snyder. Indeed, he was unable to define the terms. At trial, he stated positively he could not offer human factors testimony on how the human eye reacts to light and the like. (Transcript of Proceedings Excerpt, 1/17/96, VI; 127)

It was also pointed out that the Defendants did not want to offer Dr. Benedict up to Plaintiffs' counsel as grist for the cross-examination mill due to Dr. Benedict's lack of experience and expertise. (Tr. VII; 26-27) Dr. Benedict was simply not a "cross-over expert" as claimed by the Plaintiffs and found by the Fourth District.

The Fourth District also placed too much reliance upon Keller Industries v. Volk, 657 So.2d 1200 (Fla. 4th DCA 1995), rev. den. 666 So.2d 146 (Fla. 1995). Volk involved a case where the party's only witness on liability was an expert who was totally excluded from testifying. The Volk court found this significant. The court noted that a trial court should be extremely cautious in excluding the parties' only witness. Id. at 1203. Here, the Griefers' only witness was not excluded. Dr. Fogerty testified to all of the topics the Griefers stated Dr. Snyder would address. Volk is simply unsupportive of the Griefers here. This is especially true in the instant case. The Defendants attempted to agree with the Plaintiffs to allow Dr. Snyder to testify at least in limited areas

upon which Dr. Benedict could opine and the offer was rejected in favor of an all-or-nothing stance. Under these circumstances, the trial court's exercise of discretion in not allowing Dr. Snyder to testify in the Plaintiffs' case-in-chief was proper. The Fourth District's order must be reversed.

The Griefers waited until the eve of trial to allow the DiPietros to discover the opinions of Dr. Snyder. Once the opinions were learned, it was discovered that DiPietro's only expert could not effectively counter all the opinions but could do so on a limited basis. The Plaintiffs rejected an offer to allow Dr. Snyder to testify as to these limited areas. Dr. Fogerty and Dr. Benedict testified to the same subjects and indeed, Dr. Fogerty's opinions may have exceeded the scope of opinions addressed by Dr. Benedict. Reversible error has not been demonstrated by the exclusion of Dr. Snyder's testimony and Dr. Fogerty's testimony on rebuttal. Executive Car and Truck Leasing v. DeSerio, 468 So.2d 1027 (Fla. 4th DCA 1985).

The authorities teach that under the above circumstances, the trial court's ruling was justified as the Defendants were surely prejudiced. The fact that Dr. Snyder was deposed does not cure the prejudice of late compliance with discovery and the trial order. The Snyder deposition, taken less than two weeks before the trial commenced and three days before the close of discovery required defense counsel to: 1) evaluate the testimony; 2) have the testimony transcribed; 3) send it to its only expert for review and comment to evaluate whether he could counter the newly discovered

opinions; 4) discuss the possibilities with the clients; 5) hire an expert to rebut that which Dr. Benedict could not; 6) have that expert review all of the materials and the accident scene including all testimony, evidence, etc.; 7) advise counsel of his or her opinion; 8) conduct an evaluation of the expert's opinion; and 9) make that expert available to the Plaintiffs for discovery. And that all must occur during the holiday season of the weeks of Christmas and New Year! Plainly, the trial court correctly excluded the testimony of Dr. Snyder and the Fourth District erred by disturbing the exercise of that discretion.

III. NEITHER DR. SNYDER'S NOR DR. FOGERTY'S TESTIMONY IS ADMISSIBLE AS REBUTTAL EVIDENCE AND THE FOURTH DISTRICT ERRED IN REVERSING ON THIS GROUND.

Rebuttal testimony is directed to a new matter brought out by the defendant and is not evidence properly presented in the Plaintiffs' case-in-chief. Driscoll v. Morris, 114 So.2d 314, 315 (Fla. 3rd DCA 1959). A plaintiff may not use rebuttal to add facts unless it is required by reason of the new matter introduced by the defendant. Id. The admission or exclusion of this testimony is normally not an abuse of discretion. Heberling v. Fleisher, 563 So.2d 1086 (Fla. 4th DCA 1990); rev. dism., 570 So.2d 1305 (Fla. 1990).

As stated earlier, The Griefers' trial theory was that Michael failed to see what was available to be seen when he drove the Camaro without lights after dark. As demonstrated at length, supra, Dr. Fogerty testified extensively to this theory. This

testimony was necessary to present a prima facie case of negligence to bring to the jury, proving DiPietro's fault. Since this testimony should have been presented in the case-in-chief, it is improper rebuttal.

The theory that Laurel was confused by the gap caused by DiPietro's unlit vehicle was addressed by Dr. Fogerty as pointed out above. Dr. Benedict testified as to what he saw when he visited the accident scene under similar conditions. Dr. Benedict did not even attempt to answer as a human factors expert what Laurel or Michael might have perceived as a gap or "trap" caused by the failure to have the headlights on. Dr. Benedict simply refused to answer the question. (Tr. VI; 126-127) Dr. Benedict stated flatly when asked on cross-examination that he did not know about the limits of peripheral vision since he did not work with those in formulating his opinions. (Tr. VI; 121-123) Dr. Benedict did not testify regarding the subjects of peripheral vision or tunnel vision either on direct or on cross. Dr. Benedict clearly did not exceed the scope of the testimony presented by Dr. Fogerty. No new matter was addressed by Dr. Benedict. It was the Plaintiffs who, through cross-examination, "opened the door" to opinions to which Dr. Benedict could not testify. Still, Dr. Benedict did not "walk through the door" which was opened by Plaintiffs. Simply, Dr. Snyder's testimony would not be proper rebuttal under these circumstances.

In the Fourth District, the Griefers claimed that Dr. Snyder would testify as to Laurel's ability to see Michael and Michael's

ability to see her. The Griefers urged that Dr. Snyder would have testified to Laurel's ability to see the DiPietro vehicle; that DiPietro should have seen the dress bag with peripheral vision; that the bag was visible; and that Michael's failure to illuminate headlights caused what appeared to be a gap in the cars.

However, Dr. Fogerty testified that Laurel had the opportunity to observe a line of cars parked with their lights off and would have to make a decision as to whether the DiPietro vehicle was also one of them. This is because, he opined, eyes "go to" lit areas. (Tr. V; 28-29) Dr. Fogerty testified Laurel could have confused the DiPietro vehicle with one that was parked as opposed to travelling. (Tr. V; 29-30) The dashboard is a relatively "dark field" and would have increased the time for Michael to gather information. (Tr. V; 39-41) There was no line-of-sight blockage between Michael and Laurel due to the passage of the phantom vehicle. (Tr. V; 84-85) It was a sufficient opportunity to see Laurel and avoid a collision. (Tr. V; 93, 106-107) Dr. Fogerty stated that Laurel's ability to see the vehicle was diminished, and if the headlights were on, her opportunity to see the vehicle would have significantly increased. (Tr. V; 110)

There was clearly expert testimony on the parties' abilities to see each other from the Plaintiffs' perspective and in support of the Plaintiffs' theory. Dr. Snyder's testimony on the points would be cumulative and well beyond the scope of Dr. Benedict's opinions. Therefore, the failure to admit it, if error, is harmless error. In any case, the Fourth District Court of Appeal

erred reversibly by disturbing the verdict.

The Fourth District Court of Appeal also determined that Dr. Fogerty should have been allowed to testify on rebuttal to contradict evidence offered by Dr. Benedict regarding calculations and equations with regard to the trajectory of Laurel after she was struck and the speed of the vehicle at the time of impact. 708 So.2d 666, 672. This determination is in error.

Dr. Fogerty's testimony was crucial to the Griefers' case and was absolutely necessary to establish a prima facia case of negligence to present to the jury. Laurel did not testify. Thus, Dr. Fogerty's testimony was crucial to assigning fault in this case. The speed of the vehicle was not a new issue injected into the trial of this cause. Dr. Benedict's opinion that the DiPietro vehicle was driving below the speed limit is not a new matter injected into the cause.

The Fourth District's reliance upon Zanoletti v. Norle Properties Corp., 688 So.2d 952 (Fla. 3d DCA 1997) illustrates the error. In Zanoletti, the testimony of an accident reconstruction expert was not essential to prove a prima facia case of liability unlike the case at bar. 688 So.2d at 954. Unlike Zanoletti, the Griefers presented expert testimony in the case in chief because they had to in order to present a prima facie case to the jury, as Laurel has no accurate memory of the accident. These important factors which are not present here highlights why Dr. Fogerty's testimony was not admissible as rebuttal evidence and should not have been grounds for reversal of the trial court's ruling. See,

Rhodes v. Asplundh Tree Expert Co., 528 So.2d 459, 460 (Fla. 3d DCA 1988).

Additionally, the Fourth District Court of Appeal erroneously determined that Dr. Fogerty's testimony was needed on rebuttal to contradict Dr. Benedict's opinion regarding calculations and equations regarding the trajectory of Laurel after she was struck which relates to the speed at which the car was travelling at impact. Dr. Benedict was cross-examined at length and impeached on these very issues. One of the main points of contention was the height of the Camaro Dr. Benedict used in order to calculate the point of impact of Laurel on the windshield, which in turn had a direct bearing on the speed the vehicle was travelling. Dr. Benedict used a height of five feet. He was extensively impeached and admitted that he estimated the vehicle's height to be five feet and he did not measure it. Dr. Benedict was cross-examined on the fact that the Camaro was only 4.2 feet high. He was then asked to perform the speed calculation using the four foot height of the Camaro. It was shown that using Dr. Benedict's formula, the speed of the DiPietro vehicle increased by 10 miles per hour to 35 miles per hour using the height of 4.2 feet. Dr. Benedict performed this calculation and testified to the result to the jury on cross-examination. (Tr. VI; 138-145) Dr. Benedict flatly admitted that he never looked at the specific height of the Camaro before saying it was five feet. (Tr. VI; 161) There was simply no need to then call Dr. Fogerty to advise the jury that Dr. Benedict was wrong on the height of the Camaro, the trajectory of Laurel, and therefore

wrong on his determination of the speed of the vehicle should the jury have chosen to believe that. The Fourth District Court of Appeal erred in awarding a new trial on this issue.

CONCLUSION

WHEREFORE, due to the foregoing, the Petitioners respectfully request that this Court enter an order reversing the Fourth District Court of Appeal's award of prejudgment interest on intangible and future damages. In addition, the Petitioners respectfully request that this Court reverse the Fourth District Court of Appeal's award of a new trial for the reasons stated herein and for the reinstatement of the jury verdict with interest to run based upon past, out-of-pocket, pecuniary losses only.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail on November 23, 1998, to: KRUPNICK, CAMPBELL, MALONE, ROSELLI, BUSER, SLAMA & HANCOCK, P.A., 700 Southeast Third Avenue, Courthouse Law Plaza, Suite 100, Fort Lauderdale, FL 33316 and GREENBERG TRAURIG, 1221 Brickell Avenue, 21st Floor, Miami, FL 33131.

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