IN THE SUPREME COURT OF THE
STATE OF FLORIDA

CASE NO. 93,353

SHIRLEY G. SAWCZAK,

Petitioner,

vs.

ALAN L. GOLDENBERG, M.D., ALAN L. GOLDENBERG, M.D., P.A., J. STERNBERG and S. SCHULMAN, M.D., CORP., ALAN ALARCON, M.D., and HUMANA INC., d/b/a WESTSIDE REGIONAL MEDICAL CENTER f/k/a HUMANA HOSPITAL BENNETT

Respondents.

ON PETITION TO INVOKE DISCRETIONARY JURISDICTION
TO REVIEW THE DECISION OF THE DISTRICT COURT
OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF ON THE MERITS OF RESPONDENT, ALAN ALARCON, M.D.

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Case No. 93,353

TABLE OF CONTENTS

PAGE(S)

Case No. 93,353

TABLE OF CITATIONS

CASES **PAGE(S)**

CASES **PAGE(S)**

CASES **PAGE(S)**

Sawczak v. Goldberg
Case No. 93,353

OTHER AUTHORITY

INTRODUCTION

This brief is filed on behalf of Dr. Alan Alarcon, Defendant in the trial court and Respondent here. Plaintiff-Petitioner Shirley Sawczak contends on appeal that the trial court erroneously refused to nullify the results of a two and one-half week jury trial because of alleged improper closing arguments by defense counsel and certain evidentiary errors. For the reasons discussed below, no basis has been shown for overturning the jury's verdict in favor of Dr. Alarcon and his co-defendants, and the trial court accordingly should be affirmed in all respects.

The letter "R." followed by a number refers to the particular page in the Record on Appeal prepared by the Fourth District Court of Appeal. The letter "T." followed by a number refers to the particular page in the Trial Transcript.

All emphasis in this Brief on the Merits is supplied by counsel unless otherwise indicated.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below

The Pleadings: Plaintiff Shirley Sawczak originally sued Dr. Alan L. Goldenberg and his professional association for injuries she sustained during a routine laparoscopic gallbladder removal procedure. (R. 1-9). A little over a year later she amended her Complaint to include Defendants-Respondents, J. Sternberg and S. Schulman, M.D. Corp. ("the Radiology Group"), Dr. Alarcon, and Humana, Inc. ("the Hospital"). (R. 70-93).

Dr. Alarcon, a radiologist, was sued for allegedly misreading cholangiogram (x-ray) films that were taken by Dr. Goldenberg during the surgery. The Radiology Group was sued under the theory of vicarious liability because Dr. Alarcon was their employee, and the Hospital was added because that is where Dr. Goldenberg performed the surgery. They all denied liability (R. 96, 102, 108, 111), and Dr. Alarcon alleged through an affirmative defense that the Plaintiff's injuries were caused by persons not within his control.

The Trial: The trial took place over a two and a half week period with a jury hearing testimony from one surgery expert and one radiology expert for each party, and reviewing several exhibits, most of which were Plaintiff's. (T. 3585-86). On the basis of two motions filed by the Plaintiff (R. 195, 221), each party named in the lawsuit was allowed one expert per specialty.[1] (R. 263).

[1] Although the Plaintiff complains on page 2 of the Brief on the Merits (Brief or "Br.") that she was unfairly disadvantaged by the trial court's denial of her motion to limit cumulative experts, Plaintiff's counsel admitted at the March 27, 1996 hearing (after the trial call) that the order regarding expert witnesses was clear and that he had not previously challenged it. (R. 1362). In addition, the conduct and trial strategy of Plaintiff and Defendant, Goldenberg, clearly show that it was their interests which were aligned. This was confirmed by the bankruptcy papers later filed by Dr. Goldenberg's bankruptcy counsel. (R. 1408). *See* Section I.B.1.a., *infra*, for further discussion on this point.

At the close of all the evidence, both Plaintiff and Dr. Alarcon moved for a directed verdict against Dr. Goldenberg. (T. 3155). Judge Frusciante granted the Motions for Directed Verdict finding that Dr. Goldenberg was negligent. (T. 3162-63).

After all the closing arguments were made, Plaintiff's counsel, Mr. Russomanno, moved for a mistrial on the basis of alleged improper comments made by defense counsel during closing arguments. (T. 3544-47). He also told the court that he had prepared a curative instruction but that he was concerned about whether the curative instruction properly addressed fundamental error. (T. 3544). After some argument between counsel, Mr. Russomanno withdrew his Motion for Mistrial and decided not to submit the curative instruction. (T. 3548-49).

Just before the jury was about to retire for deliberations, Dr. Goldenberg's attorney notified the court that he had just been informed that Dr. Goldenberg had filed for bankruptcy. (T. 3551-52). There was some argument as to whether the case should proceed against Dr. Goldenberg. (T. 3552-56). The judge ruled that the case should be submitted to the jury with Dr. Goldenberg on the verdict form. (T. 3559-60).

The Verdict: The jury found that Dr. Goldenberg was 100% negligent, and that his negligence was the legal cause of damage to the Plaintiff. (T. 3629). Damages in the amount of Four Million Six Hundred and Twenty-Nine Dollars ($4,000,629.00) were awarded. (T. 3631). None of the other Defendants was found liable. (T. 3629). The jury determined that the greater weight of the evidence did not support the Plaintiff's claim against any Defendant but Dr. Goldenberg. (T. 3571, 3629).

Post Trial Proceedings: Plaintiff moved for a new trial on liability against Dr. Alarcon, the Radiology Group, and the Hospital. (R. 1119). The Motion was based on: (1) alleged inflammatory and prejudicial remarks made by defense counsel during closing arguments which were objected to,

(2) remarks that were unobjected to, and (3) the cumulative effect of comments made during closing arguments that allegedly constituted fundamental error.[2] (6/11/96 T. 7).

In **denying** Plaintiff's Motion for New Trial, Judge Frusciante deferred to the jury's verdict and stated:

> **They [the jury] made their decision. It is not a decision that this court would disagree with given all the facts that I know about the case.**
>
> **I think the evidence is in conformity with the verdict. The verdict is in conformity with the evidence as it was presented, and it may be plaintiffs may say this, and with displeasure, but again we had a unanimous decision by the jury. I can't say that any of these other things would make the difference so that I would go ahead and grant a whole new trial, and I won't do it.**

(6/11/96 T. 37). In addition, the judge commented generally that the attorneys from both sides could have handled things better and that the Plaintiff was entitled to a fair trial, not a perfect trial. (6/11/96 T. 30-31).[3]

STATEMENT OF THE FACTS

The Surgery: Plaintiff entered Humana Hospital on April 7, 1992 for a routine gallbladder removal. Her surgeon was Dr. Alan L. Goldenberg.

Dr. Goldenberg had extensive experience performing gallbladder surgeries. (T. 998-99). He knew that it was imperative that he correctly identify a section of Plaintiff's anatomy called the cystic duct because it would eventually have to be severed in order to remove her gallbladder. (T. 884-85, 906). One of the major dangers of the operation is to mistake the cystic duct for the common bile

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[2] Dr. Alarcon disagrees with Plaintiff's assertions on page 2 of her Brief that defense counsel's closing arguments were "improper." To the contrary, the arguments were either fair inferences from the evidence and the conduct and trial strategy of Plaintiff and Dr. Goldenberg, not preserved, and/or did not rise to the level of fundamental error.

[3] Indeed, the self-serving nature of Plaintiff's complaints of an unfair trial seems obvious given her claims that the trial was fair in all respects except on the issue of Dr. Alarcon's liability (Br. p. 2). In other words, Plaintiff asserts that the trial was fair on the issues favorable to her -- the directed verdict against one of the Defendants, Dr. Goldenberg, and the jury award of approximately Four Million Dollars -- but unfair regarding the jury finding of no liability on the part of the other Defendants, particularly Dr. Alarcon.

or common hepatic ducts. (T. 2946). By viewing the television images of Plaintiff's ductal system, Dr. Goldenberg identified the cystic duct, clipped it, inserted a balloon catheter, and injected dye into the duct. (T. 845, 852, 1135, 1191).

After inserting the balloon catheter and dye into Plaintiff's cystic duct, Dr. Goldenberg visualized her ductal anatomy on a realtime basis through a second process called fluoroscopy. (T. 1140, 1154). This process allowed Dr. Goldenberg to freeze certain images of Plaintiff's ductal system (T. 1890), and enabled him to perform another procedure called an intraoperative cholangiogram (x-ray). (T. 1154).

As Dr. Goldenberg had done in many other gallbladder surgeries (T. 991, 1159), he took these x-ray films of Plaintiff's ductal system as seen through the fluoroscopy and chose four of the films to send to radiology for review. (T. 787, 1140, 1146, 1154, 1890, 1908). These films are taken during some but not all gallbladder surgeries to determine the existence or absence of gallstones.[4] (T. 832, 837, 956, 1827, 2175, 3040). Dr. George Tershakovec,[5] a surgical expert for Dr. Alarcon, testified that he only uses cholangiograms in ten percent of the gallbladder surgeries that he performs because a cholangiogram does not prevent injuries from occurring.[6] (T. 2185). Even Plaintiff's expert, Dr. Livingstone, testified that it is within the standard of care to perform this particular gallbladder surgery without the use of a cholangiogram. (T. 911).

When Dr. Goldenberg sent the films to radiology for review, he sent along a form called the Preliminary Report for comment. The Report did not reflect that Dr. Goldenberg had any special

[4] Dr. Goldenberg testified at his August 2, 1995 deposition that he ordered the x-ray films to determine the presence or absence of residual stones. (T. 835, 837-38).

[5] Dr. Tershakovec has performed hundreds of laparoscopic gallbladder surgeries. (T. 2153).

[6] Similarly, Dr. Kenneth Fortgang, a radiology expert for Dr. Alarcon, testified that many times the surgeons do not care what the radiologists have to say about the intraoperative cholangiogram; they are happy with an interpretation the following day. (T. 3035). Dr. Fortgang is a board certified radiologist at Broward General and other North Broward Hospital District hospitals. (T. 3027).

Case No. 93,353

concerns about Plaintiff's anatomy. (T. 1932-33). To the contrary, the only information on the Preliminary Report was Plaintiff's name, the number of her operating room, and the date. (T. 1932).

Not being aware of any special concerns on the part of the surgeon, Dr. Alarcon reviewed the x-ray films the way he normally would and looked for retained stones in the common bile duct. (T. 1883). The Preliminary Report sent back to Dr. Goldenberg reflected his findings that the common bile duct was clear of stones and was otherwise normal. (T. 1886).

When the Radiology Technician returned to the operating room with the x-ray films and the Preliminary Report, she placed the films in the view box for Dr. Goldenberg to review (T. 790), and read the Report aloud to him. (T. 751). Although the films were available to him, Dr. Goldenberg never looked at the x-ray films that day. (T. 1169). In fact, Dr. Goldenberg did not even look at these films when the subsequent injury was detected, or when his reparative surgery was undertaken, or when he was initially sued. (T. 1169, 1254, 3079).

He continued with the surgery, removed the balloon catheter, and placed a second clip on the common bile duct instead of on the cystic duct where the clip belonged. (T. 1193, 1249). This is when the surgical accident occurred and Dr. Goldenberg mistakenly cut the common bile duct and not the cystic duct. (T. 1191, 2893). Again, the injury occurred after Dr. Alarcon read the subject films.

Dr. Goldenberg admitted to changing his testimony throughout the case. (T. 1244). Earlier on he testified by deposition and through interrogatories that he alone was responsible for Plaintiff's injuries. Later, he claimed that Dr. Alarcon bore some responsibility for Plaintiff's injuries. Undoubtedly, Dr. Goldenberg's change in testimony was directly related to his secret agreement with the Plaintiff that she would not seek to collect any judgment from Dr. Goldenberg.

The Injury: The accidental severing of Plaintiff's common bile duct caused bile to leak into her stomach and made her very ill.[7] (T. 2412). After having been discharged on April 8th, she was readmitted to the hospital on April 9th. (T. 1247). Several tests, including x-rays, were performed. Dr. Goldenberg was advised that the new x-ray films showed that there was a clip across the common bile duct which clearly represented an injury. (T. 1248).

The Evidence: In support of Plaintiff's position that Dr. Alarcon shares responsibility with Dr. Goldenberg for her injury, she relies almost exclusively on Dr. Livingstone's[8] testimony that Dr. Goldenberg misidentified her anatomy and clipped the wrong duct before he took the x-ray films and sent them to Dr. Alarcon on April 7th. (Br., pp. 2, 5-7). Every other witness (including Dr. Goldenberg) who testified on this issue stated that Dr. Goldenberg was in the right place prior to the cholangiograms being taken and that the misidentification occurred after the films were sent to Dr. Alarcon in radiology.[9] (T. 1193, 1249, 1996, 2174, 2362, 2783, 2853, 2879, 2882-84). Even Dr. Goldenberg's radiology expert, Dr. Pevsner, testified that there were no clips across the common bile duct on any of the four x-ray films, and that this suggested that the clips were placed there after the films were taken. (T. 2853).

Further, although contrary to all the other testimony, assuming arguendo, that Dr. Livingstone's interpretation of the films was correct and Dr. Goldenberg had clipped the common bile duct instead of the cystic duct before the films were taken, other witnesses testified that the films would not have prevented the injury. (T. 2185-86). In addition, Dr. Goldenberg testified through

[7] There was conflicting testimony regarding whether or not Plaintiff will need a liver transplant. (T. 935, 1433, 2192).

[8] Dr. Livingstone's specialty is cancer, not laparoscopic surgeries. (T. 988).

[9] The evidence overwhelmingly supports Dr. Alarcon's position that Dr. Goldenberg correctly clipped the cystic duct before the films were taken, and mistakenly clipped the common bile duct after the films and Preliminary Report were sent back to Dr. Goldenberg.

interrogatories dated 7/29/93, that even if he had been in the wrong spot before the films were taken, the radiologist would not have been able to tell that from the films. (T. 1184, 3081).

For the same reasons, Plaintiff's reliance on Dr. Livingstone's testimony that the films reflect that Dr. Goldenberg inserted the catheter into the juncture of the cystic and common hepatic ducts instead of the cystic duct, is equally misplaced. Dr. Steven Weiss Unger,[10] a board certified surgeon who specializes in laparoscopic gallbladder procedures (T. 2860-61), testified that it was in no way significant that the tip of the balloon catheter was in the common bile duct, and that it was a common occurrence during the cholangiogram. (T. 2887). Dr. Michael Raskin,[11] the Hospital's radiology expert, similarly testified that while the tip of the catheter was at the juncture of the cystic and common bile ducts, it was not something he would have reported to Dr. Goldenberg.[12] (T. 2026-28). He explained that it was not unusual for the catheter to move around a lot, and that the surgeon was in the best position to see where the catheter is pushed or pulled. (T. 2028). Further, Dr. Michael James Rush,[13] a radiology expert, testified that whether the balloon is in the common bile duct or the cystic duct has no bearing on the accuracy of the cholangiogram; the common bile duct was intact from the liver to the small bowel. (T. 2795).

Dr. Livingstone's testimony that cholangiogram films are taken for the dual purpose of detecting gallstones and to define the anatomy (Br., p.6) was also contradicted by almost every

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[10] Dr. Unger was the surgical expert for the Radiology Group.

[11] Dr. Raskin is a board certified radiologist, and a former Chairman of the Department of Radiology at Mt. Sinai Hospital. (T. 1971-72).

[12] Dr. Raskin's "admission," as characterized by Plaintiff on page 7 of her Brief, that it was not normal for the tip of the catheter to be in the common bile duct, is more accurately described as Dr. Raskin's comment that generally in this type of surgery the catheter is inserted into the cystic duct and not the common bile duct. (T. 2026-28).

[13] Dr. Rush, an expert witness for the Radiology group, is Chief of Radiology at North Ridge Medical Center in Fort Lauderdale and at Palmetto General Hospital in Dade County. (T. 2708). He is board certified, and testified that he interprets about five (5) cholangiograms per week. (T. 2709-10).

witness who testified, including Dr. Goldenberg. (T. 835). It was undisputed that the purpose of cholangiogram x-ray films is to determine the presence of gallstones. (T. 837, 956, 1827, 2175, 3040). The only argument was whether the films served other purposes such as to aid in correctly identifying the anatomy or to detect an anomaly.[14] (T. 902, 910). However, Dr. Goldenberg admitted that he took the films to detect gallstones, that he knew where he was prior to taking the films, that he saw an anomaly during the fluoroscopy, and that he never expected Dr. Alarcon to tell him he was in the wrong place. (T. 837, 1193, 1249, 3081).

The same analysis applies to the Plaintiff's criticism of the findings in the Preliminary Report. (Br., p. 7). Even if Dr. Goldenberg relied on the films to confirm that he was in the right place, most of the witnesses including Dr. Goldenberg testified that he had correctly identified Plaintiff's anatomy before the films were taken. Thus, the Report was an accurate reflection of what was shown in the x-ray films.

Moreover, nearly every witness including the Plaintiff's radiology expert, Dr. Russell, and both Dr. Goldenberg and his radiology expert, Dr. Pevsner, agreed that the Preliminary Report was accurate and technically correct. (T. 1307, 1581, 1990-91, 2840, 2870, 3036-37). The only dispute centered on whether the Report was complete. (T. 1581-82).

Dr. Unger testified that there was nothing misleading in the Preliminary Report, and there was no causal relationship between the Report and the injury that occurred. (T. 2889, 2895). In addition, Dr. Rush testified that the Report adequately, accurately, and correctly described the important aspects of what the x-ray films showed.[15] (T. 2717). Further, contrary to Dr. Livingstone's opinion

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[14] Dr. Alarcon did not concede the importance of the radiologist's verifying the anatomy, as Plaintiff asserts in her Brief at page 7, footnote 4. Rather, Dr. Alarcon testified to the general principle that it was important to verify the anatomy; he did not testify that it was the radiologist's responsibility or that a cholangiogram was the only way to verify the anatomy. (T. 1849-50).

[15] Specifically, he testified that the Report told the surgeon what he needed to know - there was good visualization of the duct; there was free flow into the duodenum; there were no stones; there was a minimal irregularity and it was unclear what that was. (T. 2720).

that Dr. Alarcon fell below the standard of care in interpreting the x-ray films (T. 879), Drs. Unger, Tershakovec, and Raskin all testified that the Preliminary Report met the appropriate standard of care. (T. 1990-91, 2184, 2869-70). Another expert witness, Dr. Fortgang, testified that the Report exceeded any standard of care that a reasonably prudent radiologist would be expected to employ. (T. 3036). Similarly, Dr. Tershakovec commented that he would expect nothing different from the radiologists at his hospitals. (T. 2184).

Although Dr. Russell testified the Report left out some information concerning an apparent deviation of the bile duct on two of the four films,[16] nearly all of the witnesses testified that there was no anomaly of the films. (T. 924, 1034, 1894, 2170-71, 2731, 3044). Even the Plaintiff's surgery expert, Dr. Livingstone, testified that any apparent anomaly was actually the elbow of the surgeon bending the area. (T. 924). He agreed with Dr. Alarcon that the alleged anomaly was a traction effect. (T. 1034). Finally, while both Dr. Russell and Dr. Pevsner testified that Dr. Alarcon should have ordered additional films (T. 1581-82, 2663-64), their opinions are contrary to those of nearly every other expert witness, including Dr. Goldenberg, that Plaintiff's anatomy was correctly identified before the x-ray films were taken and sent to Dr. Alarcon, and additional films would not have prevented the injury to Plaintiff. (T. 2181).

In short, to the extent the alleged comments during closing argument are deemed improper, they do not change the facts of this case. The evidence in this case overwhelmingly supports the jury verdict that Dr. Goldenberg was 100% negligent,[17] and that none of the other Defendants was liable.

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[16] Dr. Alarcon testified that the fact that the alleged anomaly only appears on two of the four films shows that there is no anomaly, but rather a traction effect caused by the surgical instruments which would disappear when the instruments were removed. (T. 1897, 1946-47).

[17] Dr. Goldenberg himself admitted on more than one occasion that no one else was responsible for Plaintiff's injuries but himself. (T. 1175-76, 1306, 3073).

ISSUES

I. WHETHER THE TRIAL JUDGE ABUSED HIS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR NEW TRIAL, AND ERRED AS A MATTER OF LAW.

II. WHETHER THE TRIAL JUDGE ABUSED HIS DISCRETION IN LIMITING EXPERT WITNESS TESTIMONY.

III. WHETHER ANY NEW TRIAL MUST INCLUDE BOTH LIABILITY AND DAMAGE ISSUES.

SUMMARY OF ARGUMENT

This appeal is about a Plaintiff who has a judgment against a negligent surgeon, and her attempt to distribute liability among the three Defendants exonerated by the jury. Since Plaintiff cannot collect her full damage award from the negligent surgeon, she has appealed the trial court's denial of her Motion for New Trial based on alleged inflammatory and prejudicial comments made by defense counsel for the three Defendants exonerated by the jury.

Plaintiff claims that these alleged comments constitute fundamental error even though she failed to object to most of them, and when an objection was made and sustained, she did not request a curative instruction or a mistrial. Plaintiff has thus failed to preserve the alleged error, and waived the issue for appellate review.

Further, Dr. Alarcon denies that the alleged comments were improper. Instead, the comments were fair inferences from the evidence and the conduct and trial strategy of Plaintiff and Dr. Goldenberg, her surgeon. Even if the alleged comments were indeed technically improper (which is denied), they did not result in an unfair trial or in a miscarriage of justice. In other words, they did not rise to the level of fundamental error. The verdict would have been the same even if the comments had not been made.

Moreover, Plaintiff has not and cannot argue that the verdict is unsupported by the evidence. Dr. Goldenberg, admitted that he was negligent, and that there was nothing that Dr. Alarcon could

have done to prevent Plaintiff's injury. Even Plaintiff's own expert witnesses did not agree on how to interpret the x-ray films.

Plaintiff instead claims that the trial judge also erred in allowing the defense to introduce cumulative expert testimony. However, it was Plaintiff who filed two motions to limit expert witness testimony to one per specialty per party. Although she later moved to strike one of the radiology experts because the Radiology Group only had vicarious liability, the judge denied the motion because it was made after trial call, and Plaintiff's counsel admitted that he knew the Radiology Group only had vicarious liability from the time he filed the complaint. Plaintiff cannot now claim that she was denied a fair trial because the judge abused his discretion in granting her own motions or in refusing to change the prior rulings.

ARGUMENT

I. THE LOWER COURT'S DENIAL OF PLAINTIFF'S MOTION FOR NEW TRIAL SHOULD BE AFFIRMED BECAUSE THERE WAS NO ABUSE OF DISCRETION AND NO FUNDAMENTAL ERROR.

A. A Stricter Standard Of Review Is Required Where The Alleged Error Was Not Preserved And No Curative Instruction Was Submitted.

Plaintiff argues that the alleged improper comments either individually or cumulatively constitute fundamental error and asks this Court to review the comments as a matter of law. In doing so, she fails to recognize that in Florida the denial of a motion for new trial is reviewed under an abuse of discretion standard by the appellate court, and arrives there under a presumption of correctness. Cloud v. Fallis, 110 So. 2d 669, 673 (Fla. 1959); Pix Shoes of Miami, Inc. v. Howarth, 201 So. 2d 80, 81 (Fla. 3d DCA 1967). Great deference is accorded the decision of the trial judge because he is in the best position to determine whether the claimed errors affected the result in a particular case. Cleveland Clinic Florida v. Wilson, 685 So. 2d 15, 16 (Fla. 4th DCA 1996). *See also* Tyus v. Apalachicola Northern Railroad Co., 130 So. 2d 580, 588 (Fla. 1961).

Whether the trial judge has abused his discretion in denying a motion for new trial is determined by the "reasonableness" test. Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980). Under this test, the appellate court must determine whether the trial court's order was arbitrary, fanciful, or unreasonable. *Id.*; Saunders v. Smith, 382 So. 2d 1254, 1255 (Fla. 4th DCA 1980). In explaining the discretionary standard of review, this Court, in Canakaris, 382 So. 2d at 1203, stated that the appellate court must fully recognize the superior vantage point of the trial judge, and that his ruling should be disturbed only when his decision fails to satisfy this test of reasonableness. In the instant case, given the overwhelming evidence that it was Dr. Goldenberg's negligence alone that caused the Plaintiff's injury, it cannot be plausibly argued that the court's denial of Plaintiff's Motion for New Trial was arbitrary, fanciful, or unreasonable.

Moreover, if, as in this case, most of the alleged improper comments were not objected to, and where an objection was made and sustained no contemporaneous motion for mistrial was made, the alleged errors are unpreserved and waived for appellate review.[18] Hagan v. Sun Bank of Mid-Florida, 666 So. 2d 580, 585 (Fla. 2d DCA 1996) ("difficult, if not impossible, to determine whether the failure to move for a mistrial in a timely manner was a tactical decision or an oversight"). *See* Gregory v. Seaboard System Railroad, 484 So. 2d 35 (Fla. 2d DCA 1986) (order granting new trial reversed where 22 of 28 statements cited as grounds for new trial were unobjected to and not mentioned in motion for mistrial).[19] Although Plaintiff did move for a mistrial at the end of closing arguments, she withdrew the motion when the judge would not reserve ruling. (T. 3548-49).

While Dr. Alarcon acknowledges that fundamental error is an exception to the general rule on preservation of error, this Court has held that: "[t]he failure to object is a strong indication that, at the time and under the circumstances the [plaintiff] did not regard the alleged fundamental error as harmful or prejudicial." Ray v. State, 403 So. 2d 956 (Fla. 1981). In fact, more than 42 years have elapsed since this Court last reversed for a new trial based on unobjected-to closing argument. Seaboard Air Line Railroad Co. v. Strickland, 88 So. 2d 519 (Fla. 1956). Almost a decade-and-a-half after Strickland, this Court defined fundamental error as "error which goes to the foundation of the case, or goes to the merits of the cause of action," which appellate courts should apply "very

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[18] It is also well-established that where, as here, the trial judge has extended counsel an opportunity to cure an error, and counsel fails to do so, such error, if any, was invited and will not warrant reversal. Sullivan v. State, 303 So. 2d 632, 635 (Fla. 1974), *cert. denied*, 428 U.S. 911 (1976). *See* City of Coral Gables v. Levison, 220 So. 2d 430, 431 (Fla. 3d DCA 1969) (reversal not warranted where trial counsel "invited error" by not taking advantage of the trial judge's offer to cure any alleged error with an instruction). Further, contrary to Plaintiff's claim that no curative instruction could have erased the prejudice caused by the alleged improper comments, numerous courts have held just the opposite. *See* Section I.D., *infra*, and cases cited therein.

[19] *See also* Murphy v. Technology Innovations International, Inc., 710 So. 2d 587 (Fla. 4th DCA), *rev. granted*, ____ So. 2d _____ (Fla. August 7, 1998); Weise v. Repa Film Int'l., Inc., 683 So. 2d 1128, 1129 (Fla. 4th DCA 1996); Donahue v. FPA Corp., 677 So. 2d 882, 884 (Fla. 4th DCA 1996); Nelson v. Reliance Insur. Co., 368 So. 2d 361 (Fla. 4th DCA 1978); LeRetilley v. Harris, 354 So. 2d 1213, 1214 (Fla. 4th DCA 1978).

guardedly." Sanford v. Rubin, 237 So. 2d 134, 137 (Fla. 1970). In Sanford, this Court held that the unconstitutionality of a statute under which attorney's fees were awarded was not fundamental error which could be raised for the first time on appeal. Dr. Alarcon submits that the error argued in Sanford was more egregious than the alleged improper argument of defense counsel.

More significantly, the last time this Court addressed unobjected-to argument in a civil case was in 1961, in Tyus v. Apalachicola Northern Railroad Co., 130 So. 2d 580 (Fla. 1961). Tyus is significant because, although the First District had reversed a plaintiff's verdict in a wrongful death action because of unobjected-to argument, this Court quashed that decision, holding that there should have been an objection. The arguments made by plaintiff's counsel in Tyus, which are set forth in the dissent, are as bad as, if not worse than, the arguments reversed in the cases cited on Page 12 of Plaintiff's Brief.

In Tyus, the contemporaneous objection rule outweighed, in this Court's view, the possible injustice resulting from the closing argument. As this Court emphasized, the trial judge "who was in the milieu of the court room throughout the trial," was in "a much better position" than an appellate court, to determine if the argument was so prejudicial as to require a new trial. 130 So. 2d at 588.

Given the nature of the remarks which this Court held not to be fundamental error in Tyus, and this Court's later definition of fundamental error in Sanford v. Rubin, Dr. Alarcon submits that the Plaintiff should not be permitted to raise the closing arguments issue for the first time on appeal.

Furthermore, as the court in Hagan, 666 So. 2d at 584, stated, there is no "right" to a post-trial remedy in a civil case for fundamental error. The court explained that even if there was error in a closing argument, it is not structural or per se error. *Id.* The movant must always establish that the closing argument was harmful before either the trial or appellate court can override the jury or grant a new trial. *Id.* The court described the movant's burden as being "extremely close to a Catch-22

because the trial attorney who did not object must establish that the closing argument was exceptionally objectionable." *Id.* at 586.

In recognizing that a stricter standard of review should be applied by the appellate courts for unpreserved error as opposed to preserved error, the court in Hagan held that in reviewing a motion for new trial based on unpreserved error, the appellate court must first determine whether the trial judge abused his broad discretion in ruling on what effect the alleged prejudicial comments had on the jury's rational consideration of the case, and, second, whether the comments resulted in fundamental error and caused the jury to return an erroneous verdict. *Id.* at 587. The court also said: "[t]hat is, the court must determine whether the error so irreparably harmed the foundation of the case that, if not corrected, it would undermine the public's confidence in the judicial system. This seems to us a difficult standard to pass." *Id.* (emphasis added).

In his scholarly opinion, Judge Altenbernd further explained that:

> [a]ny unpreserved error that is so pervasively prejudicial and fundamental as to warrant a new trial should also be an error that demonstrably misled the jury. If the record does not disclose that the improper argument resulted in a miscarriage of justice, there is no harmful error justifying a new trial, especially in the absence of an objection by an interested party.

Hagan, 666 So. 2d at 587. Applying this rationale to the unpreserved error in Hagan, the court concluded that the trial judge: (1) abused his discretion in granting the motion for new trial because there was nothing in the record to suggest that the jury verdict was contrary to the weight of the evidence, and (2) erred as a matter of law in determining that counsel's "golden rule" argument was fundamental error requiring a new trial. *Id.* at 588.

Similarly, under the reasoning in Hagan, it cannot be plausibly argued that the trial judge here abused his discretion in determining that the alleged improper comments were not prejudicial or inflammatory enough to preclude the jury's rational consideration of the evidence in this case, and did not err in finding that the alleged comments individually and cumulatively did not rise to the level

of fundamental error. In the final analysis, the verdict would have been the same even if the alleged improper comments had not been made.

Plaintiff asserts that she was forced to withdraw her motion for mistrial because the trial judge would not reserve ruling until after the verdict. However, this Court has held that the trial judge has discretion in this matter. Ed Ricke and Sons, Inc. v. Green, 468 So. 2d 908, 910 (Fla. 1985). While the trial judge noted that he had the power to reserve ruling on a motion for mistrial (T. 3548), he asked Plaintiff's counsel to decide one way or the other whether he wanted to move for mistrial. (T. 3547). The failure of Plaintiff's counsel to do so stands in sharp contrast to his post-trial sense of `outrage' at the alleged improper comments by defense counsel, and totally sabotages counsel's argument that these alleged comments constituted fundamental error requiring a new trial as a matter of law.

If, as Plaintiff asserts in her Brief at page 42, "[t]he stench from the improper comments could not be removed by anything the trial court could possibly say," and could not be cured by instruction, then why not move for mistrial? Again, in Saxon v. Chacon, 539 So. 2d 11, 12 (Fla. 3d DCA 1989), the court would not grant a new trial where plaintiff's counsel expressly refused to move for a mistrial after the trial court invited him to do so.

With respect to Plaintiff's position that fundamental error occurs when a party's right to a fair trial has been extinguished, the trial judge ruled:

> I did my best to have a fair trial. Clearly, it was not perfect, and far from it. I think that the overall view of the cumulative effect of the decisions that I made are such that when you look at them for plaintiff, for defendant, against defendant, against plaintiff, that the appellate courts would feel that it was still a fair trial.

(6/11/96 T. 34). This is especially true when it was Plaintiff's counsel who set the tone for closing argument before defense counsel presented their arguments to the jury. He told the jury:

> You hold a tremendous power in your hands. You hold the power to right wrong. (T. 3219).

. . . .

> Despite all the work and the efforts and the experts and everything else, we still have not the power to be able to deliver for Shirley full and complete justice. You do. (T. 3220). This operative report is pure fiction, fiction. What's on here is not what happened in this case. It's not what happened. (T. 3221-22).

As the judge noted at the hearing on Plaintiff's Motion for New Trial, although the attorneys from both sides could have handled things better, the Plaintiff still received a fair trial. (6/11/96 T. 30-31).

Ultimately, whether this Court reviews the lower court's denial of Plaintiff's Motion for New Trial under an abuse of discretion standard or under the exceedingly narrow standard of fundamental error, Plaintiff must establish that the closing argument was harmful before the Court can override the jury verdict and grant a new trial. Tyus, 130 So. 2d at 587 (Fla. 1961); Weise, 683 So. 2d at 1129; Hagan, 666 So. 2d at 584; Rohrback v. Dauer, 528 So. 2d 1362, 1363-64 (Fla. 3d DCA 1988). Given that nearly every witness including the Defendant, Dr. Goldenberg, testified that he alone was responsible for Plaintiff's injuries,[20] the assertion by Plaintiff that a handful of allegedly improper comments by defense counsel, even if made, during a two and a half week trial, precluded the jury's rational consideration of the case or undermined the public's confidence in the judicial system seems highly implausible.

In light of these facts and the jury's finding that Dr. Goldenberg was 100% liable for Plaintiff's injuries, what would undermine the public's confidence in our justice system is a retrial of the three Defendants who exonerated by the jury's verdict. Where, as here, the overwhelming evidence suggests that the verdict would have been the same even if the alleged improper comments had not been made, public confidence in our justice system is not served by seeking a damage award from the three Defendants already tried and found not liable by a jury's verdict.

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[20] As reflected in the Statement of Facts, the overwhelming evidence supports Dr. Alarcon's position that there was nothing that he could have done to prevent Plaintiff's injury. Most of the witnesses testified that Dr. Goldenberg clipped the correct duct before the x-ray films were taken and sent to Dr. Alarcon in radiology, that he did not and could not have relied on Dr. Alarcon to tell him he was in the wrong place, that the Preliminary Report was accurate and correct, that there was no anomaly on the films, that Dr. Goldenberg clipped and severed the wrong duct after the films were taken, and that additional films would not have prevented Plaintiff's injury.

For all of these reasons, and those which follow, Dr. Alarcon respectfully submits that the trial judge did not abuse his discretion in denying Plaintiff's Motion for New Trial, and even if some of the comments made by defense counsel are properly considered improper (which is denied), they do not rise to the level of fundamental error. [21]

B. Defense Counsels' Remarks Were Fair Comment On The Evidence And Did Not Result In A Miscarriage Of Justice.

1. Closing Argument of Dr. Alarcon's Counsel, Crane Johnstone

a. Proper Comment on Relationship Between Plaintiff and Dr. Goldenberg

The Plaintiff states that Mr. Johnstone, as an officer of the court, should have accepted the representations of her counsel and of Dr. Goldenberg's counsel, that there were no "secret deals" between them. (Br., pp. 13-14). She then complains that Mr. Johnstone, during cross-examination of Dr. Goldenberg, "raised the unfounded accusation that plaintiff's counsel was in 'collusion' with Dr. Goldenberg and had 'choreographed' his direct examination." (emphasis added).

First and foremost, Plaintiff's citation to page 1364 of the trial transcript reveals that the word "collusion" was used by Plaintiff's counsel at a side bar out of the presence of the jury. This was not a quote from Mr. Johnstone's cross-examination of Dr. Goldenberg or his closing argument. *See* St. Lucie Harvesting & Caretaking Corp. v. Cervantes, 639 So. 2d 37, 39 n. 1 (Fla. 4th DCA), *rev. denied*, 642 So. 2d 1362 (Fla. 1944).

Plaintiff also takes issue with two comments made by Mr. Johnstone during his closing argument regarding cooperation between Plaintiff and Dr. Goldenberg, arguing that these comments

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[21] Judge Schwartz, in Marks v. DelCastillo, 386 So. 2d 1259, 1267 (Fla. 3d DCA 1980), held that the fundamental error exception does not apply if it cannot be said that the Plaintiff would have prevailed if the offending comments would not have been made. He explained: "... while the evidence in question was undoubtedly harmful to the defendants' position, it surely cannot be said that it is certain, or even highly probable, that the plaintiff would or could not have prevailed before the jury if, upon proper and timely objection, the offending testimony had been excluded at trial."

are tantamount to accusing Plaintiff's counsel of committing a fraud upon the court. To the contrary, pointing out that both Plaintiff and Dr. Goldenberg were trying to place the blame for Plaintiff's injury on the other Defendants is not an accusation that opposing counsel is a liar, nor is it a claim that counsel has "tricked" the jury or committed a "fraud" on the court. In any event, although Plaintiff argues that the trial judge erred in not finding that these two comments were prejudicial and inflammatory enough to affect the jury verdict, Plaintiff's counsel did not move for mistrial when his objections were made and sustained, and declined to move for mistrial or to submit a curative instruction when invited to do so by the trial judge after closing arguments. (T. 3548-49). The failure of Plaintiff's counsel to move for mistrial or to submit a curative instruction shows that even he did not think the comments were prejudicial or inflammatory enough to affect the jury verdict or to require a new trial.[22]

Plaintiff next complains that Mr. Johnstone accused her counsel of trying to mislead the jury when he argued that despite the attempts by Plaintiff's counsel to twist the notes and testimony of one of the expert witnesses, that the witness had correctly read the x-ray films and determined that they were of diagnostic quality. In addition, Plaintiff claims that Mr. Johnstone injected an "inflammatory, personal opinion" into the trial when he commented in closing argument that this lawsuit would never have been brought against Dr. Alarcon if Dr. Goldenberg had accepted responsibility.

Contrary to Plaintiff's assertions that all of the above alleged derogatory comments by Mr. Johnstone constituted an attack on the integrity of Plaintiff's counsel resulting in fundamental error and a denial of Plaintiff's right to a fair trial, these comments are more properly characterized as

[22] Indeed, this is not surprising given that only two of the comments, even if improper, were made in the presence of the jury. Plaintiff's counsel objected, and the judge sustained the objections and instructed the jury to disregard the comments. (T. 3451-52). As Plaintiff acknowledges, all of the other alleged improper comments recited by Plaintiff in her Brief on the Merits at pages 15-17 took place at a side bar conference.

permissible inferences drawn from Mr. Johnstone's view of the evidence. *See* Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985) ("[t]he proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence.").

This Court, writing in the context of a criminal case, stated that it is not improper to characterize a witness as a "liar" if there was a basis in the evidence to do so:

> ... When counsel refers to a witness or a defendant as being a "liar," and it is understood from the context that the charge is made with reference to testimony given by the person thus characterized, the prosecutor is merely submitting to the jury a conclusion that he is arguing can be drawn from the evidence. It was for the jury to decide what evidence and testimony was worthy of belief and the prosecutor was merely submitting his view of the evidence to them for consideration.

Craig v. State, 510 So. 2d 857, 865 (Fla. 1987). Similarly, it is not improper for an attorney to inject his personal opinions, beliefs, and attitudes into a case if they are clearly and directly linked to the evidence. Forman v. Wallshein, 671 So. 2d 872, 874-75 (Fla. 3d DCA 1996).

It is patently clear from the record here that Mr. Johnstone's alleged improper comments were in fact permissible inferences drawn from his view of the evidence. For example, Dr. Goldenberg admitted that he knew prior to the trial that he was going to be called by Plaintiff as a witness, and that he pretty much knew in advance what the Plaintiff's questions to him would be. (T. 1360). Further, Dr. Goldenberg was the second witness that Plaintiff called in her case-in-chief. Moreover, like the jury, counsel observed the demeanor of the parties which showed that the other three Defendants cooperated and worked with each other but Dr. Goldenberg did not.

While Dr. Alarcon disagrees that Mr. Johnstone's comments are tantamount to accusing Plaintiff's counsel of fraud, any questions about whether the comments were reasonable inferences drawn from the trial are answered in Dr. Alarcon's favor by the bankruptcy pleadings filed by Dr. Goldenberg after a directed verdict was entered against him, and before the jury retired to deliberate damages and the potential liability of the other three Defendants. His bankruptcy counsel, as an officer of the court, alleged in an "Emergency Motion to Set Aside Order Modifying Automatic Stay"

that: **Plaintiff and Goldenberg discussed the doctor's pending bankruptcy; Plaintiff asked Goldenberg to stay in the trial "for the sole benefit of Sawczak ... to recover from third parties"; the parties agreed "that they would not pursue ... Goldenberg ... against any recovery or in settlement ..."; and "[t]his matter was tried differently [by Goldenberg] due to the agreement with Plaintiff's counsel and [Goldenberg's] counsel in the State Court proceeding. If the Plaintiff was going to proceed vigorously against [Goldenberg], [Goldenberg] would have tried the case on his ability relating to his own defenses and would have instituted different strategy."** (R. 1408-12).

It thus appears that the representations by Plaintiff's counsel and Dr. Goldenberg's counsel that there were no agreements between them were false. Not only were Mr. Johnstone's comments reasonably inferred from the trial proceedings, but in fact specifically mandated by this Court. Dosdourian v. Carsten, 624 So. 2d 241 (Fla. 1991).

In Dosdourian, this Court held "Mary Carter" agreements[23] void and extended this ban to agreements, like the one here, where the defendant receives a covenant not to sue in exchange for remaining in the litigation. *Id.* at 246-48. This Court also held that the same policy reasons requiring the disclosure of secret settlement agreements in the "Mary Carter" line of cases applied even where the motivations of the settling parties are not as clear. Thus, even if an agreement is "not the usual Mary Carter agreement," it must be disclosed if it falls within the scope of these type of secret settlement agreements. *Id.* The agreement revealed in this case fell within that scope since it was a secret agreement for Dr. Goldenberg to insulate himself from financial liability in exchange for remaining in the litigation. As in Dosdourian, the jury would have had a right to know that there was "in fact, no actual dispute" between Plaintiff and Dr. Goldenberg.

[23] In the "usual" Mary Carter agreement, the defendant secretly agrees with the plaintiff that if the defendant continues to defend himself in court, his maximum liability will be diminished proportionately by increasing the liability of the other co-defendants. *Id.* at 243.

Plaintiff's argument that Mr. Johnstone's comments are tantamount to accusing Plaintiff's counsel of fraud defies belief given the bankruptcy pleadings filed on behalf of Dr. Goldenberg. Moreover, Mr. Johnstone never disputed that Plaintiff had a legitimate injury. As noted above, the comment that both Plaintiff and Defendant Goldenberg were trying to place the blame for that injury on the other Defendants is not tantamount to calling counsel a liar nor is it a claim that counsel has "tricked" the jury, which is what occurred in Owens Corning Fiberglas Corp. v. Morse, 653 So. 2d 409 (Fla. 3d DCA 1995).

Finally, even if the comments were improper, the few sentences spoken by Mr. Johnstone on this issue did not constitute fundamental error. If Plaintiff's counsel thought that these comments would deprive Plaintiff of a fair trial, he would have moved for a mistrial. Moreover, when Plaintiff's counsel objected, the trial judge asked the jury to disregard the comments. (T. 3451-52). This Court must assume that the jury, as instructed, disregarded Mr. Johnstone's comments. Wasden v. Seaboard Coast Line R. Co., 474 So. 2d 825 (Fla. 2d DCA 1985), *rev. denied*, 484 So. 2d 9 (Fla. 1986). Under any standard of review, Plaintiff cannot plausibly argue that the trial judge's denial of her Motion for New Trial based on these allegations was arbitrary or unreasonable, or that they precluded the jury's rational consideration of the evidence.

b. No Abuse of Discretion in Trial Court's Denial of Motion for New Trial Based on Unobjected-to, Proper Comment on Weight to be Given Plaintiff's Radiology Expert's Deposition Testimony, and No Fundamental Error.

Plaintiff next takes issue with comments that Mr. Johnstone made concerning the deposition testimony of her radiology expert. She argues that since there was a pretrial order limiting each attorney to one expert per specialty, Mr. Johnstone improperly suggested to the jury that Plaintiff could have called more radiology experts to testify.

Even if Mr. Johnstone had implied that Plaintiff could have, but did not, call further radiology experts, any error was both waived and cured. Plaintiff's counsel never objected to these statements.

Furthermore, during rebuttal, Plaintiff's counsel skillfully eliminated any chance that the jury could be misled by Mr. Johnstone's statement:

> Experts, one per specialty. We talked about expert witnesses. Each party was limited in this case to one per specialty. . . .
>
> . . . .
>
> Everybody has one per specialty. We had Dr. Livingstone as our surgeon. We had Dr. Russell as our radiologist. . . . Johnstone had a surgeon. . . . Johnstone had a radiologist. . . . O'Hara had a surgeon ... the hospital had a radiologist. . . . O'Hara had a radiologist, as well. So everyone had one per specialty. That's how that came down.

(T. 3530-31). Thus, the jury could not have been left with the impression that Plaintiff had fewer experts than the Defendants because her case was weaker than the Defendants' case.

Moreover, the alleged improper comments by Mr. Johnstone are better understood when read in context. Mr. Johnstone was fairly commenting that Plaintiff's allegations that Dr. Alarcon fell below the standard of care and caused injury to her were weakened by the fact that her only radiology expert, Dr. Russell, testified by deposition and did not appear at trial, thus hampering the jury's ability to gauge his credibility.

In addition, Mr. Johnstone correctly told the jury that the Plaintiff had two weeks to call her witnesses. It was a fair inference that the fact that Plaintiff chose to read Dr. Russell's testimony in a rush, at the end of the day, reflected the level of importance Plaintiff attached to this witness. *See, e.g.*, Linehan v. Everett, 338 So. 2d 1294 (Fla. 1st DCA 1976) (plaintiff's attorney should have been allowed to comment in closing argument that defendant's IME physician was not called by defendants to testify at trial).

Furthermore, even if the comment could be considered contrary to the Code of Professional Conduct, that does not mean it is fundamental error. The purported errors here are not like those in the First District case relied on by Plaintiff (or in the cases cited therein, none of which are Florida

Supreme Court cases).[24] Indeed, the Second, Third and Fourth Districts do not as a matter of course even find unethical comments (which these were not) to be fundamental error. *See, e.g.*, Gregory v. Seaboard System Railroad, 484 So. 2d 35 (Fla. 2d DCA 1986) (remarks regarding counsel's disbelief in the defendant's testimony did not deny the defendants a fair trial); Kelley v. Mutnich, 481 So. 2d 999, 1000 (Fla. 4th DCA 1986) (unprofessional remark does not necessarily justify a mistrial or a new trial); Wasden, 474 So. 2d at 830-31 (admission of unethical comments is not tantamount to fundamental error); Hartford Acc. and Indem. Co. v. Ocha, 472 So. 2d 1338, 1343 (Fla. 4th DCA 1985) (improper rhetoric harmed the reputation of the legal profession but did not require new trial); Bishop v. Watson, 367 So. 2d 1073 (Fla. 3d DCA 1979) (comment of counsel in closing argument suggesting that jury discount witness's testimony does not amount to fundamental error). Moreover, even though the First District Court of Appeal found fundamental error in Sacred Heart Hospital, the court later clarified its holding and reaffirmed its position that a closing argument which violates Rule 4-3.4 does not necessarily constitute fundamental or harmful error. *See* Winterberg v. Johnson, 692 So. 2d 254, 255 (Fla. 1st DCA 1997); Rockman v. Barnes, 672 So. 2d 890, 892 (Fla. 1st DCA 1996) (J. Wolf concurring).

c. No Abuse of Discretion in Trial Court's Denial of Motion for New Trial Based on Unobjected-to Comment that Plaintiff's Theory of Liability was Found Unprecedented by Expert Witnesses, and No Fundamental Error.

One piece of evidence highlighting the flaw in Plaintiff's theory of liability was that no expert had ever seen a case where a surgeon blamed a radiologist for the surgeon's misidentification of the anatomy. It was Plaintiff's counsel himself who raised this issue by asking defense experts whether they had ever seen such a scenario. The experts testified that they had not. Defense counsel was

[24] Plaintiff relies on Sacred Heart Hosp. of Pensacola v. Stone, 650 So. 2d 676 (Fla. 1st DCA 1995), where the court found fundamental error based on such errors as calling a witness a liar, repeatedly telling the jury that counsel believed the party was not negligent, and asking the jury to deal "very, very harshly" with the defendants.

therefore not referring to other lawsuits nor testifying as to his opinion of the existence of such lawsuits, but instead was merely relating to the jury the information elicited from the experts by the Plaintiff. Thus, the comment was merely a fair inference drawn by defense counsel from the admitted evidence and was not testimonial.

Plaintiff also waived any alleged error associated with this remark by failing to object during closing arguments. *See* Section I.A., *infra*, and cases cited therein. Even in Bellsouth Human Resources Admin., Inc. v. Colatarci, 641 So. 2d 427, 429 (Fla. 4th DCA 1994), cited by the Plaintiff, the court underscored the necessity for an objection to preserve review.[25] Finally, in Parker v. Hoppock, 695 So. 2d 424 (Fla. 4th DCA 1997), another case relied on by Plaintiff, although the Fourth District found certain remarks which referred to matters outside the evidence to be improper and compared them to those made in Colatarci, the district court specifically held that these remarks alone would not have warranted reversal.

d. No Abuse of Discretion in Trial Court's Denial of Motion for New Trial Based on Benign, Unobjected-to Comments on the Jury's Role, and No Fundamental Error.

1. Counsel's Unobjected-to Comment Did Not Ask the Jury to Be The Conscience of The Community.

Plaintiff complains that Mr. Johnstone commented that a verdict against Dr. Alarcon would improperly approve of Dr. Goldenberg shifting his responsibility for the injury to Dr. Alarcon. Counsel's four sentences on this subject were simply a comment on the interpretation that would be drawn by those that examined the verdict. Counsel did not play to the specialized sensitivities or fears of a Broward County jury in making this remark. Counsel did not ask the jury to make an example of Dr. Goldenberg nor did he threaten the jury that a verdict for Plaintiff would put an end

[25] In any event, the Colatarci court reversed for a new trial on other grounds and its comments regarding closing argument were merely dicta.

to receiving medical care in Broward County. Accordingly, Plaintiff's reliance on Norman v. Gloria Farms, Inc., 668 So. 2d 1016 (Fla. 4th DCA 1996), is misplaced.

In that fact-sensitive case, the defense counsel (representing a hog farm) specifically warned the jury (most of whom were hog-hunters) that "a verdict . . . against [the defendant] is going to bring an immediate halt to hog hunting in Okeechobee." *Id.* at 1021. In contrast, as long as the comment is a fair inference from the evidence, as it was in the case, it is proper. *See* Brumage v. Plummer, 502 So. 2d 966 (Fla. 3d DCA 1987) (new trial order reversed because plaintiffs' counsel's closing remarks--that defendant/doctor's negligence was so gross that to allow doctor to walk out of courtroom without liability was unconscionable--were proper comment on the evidence).

Even if the statement had been improper, any error was waived because Plaintiff failed to object and the error was not "fundamental." *See, e.g.*, Blue Grass Shows, Inc. v. Collins, 614 So. 2d 626 (Fla. 1st DCA 1993) (counsel's argument that jury was the "conscience of the community" and that verdict would set the standard as to "what kind of protection you want for the citizens of this town," was not fundamental error); Florida Crushed Stone Co. v. Johnson, 546 So. 2d 1102 (Fla. 5th DCA 1989) (conscience of community argument not reversible error where not followed with a request that the jury punish the opposing side).

Likewise unavailing is Plaintiff's reliance on the Fourth District's decision in Kelley for her assertion that Mr. Johnstone improperly commented to the jury that they were chosen because they had "the stamina and intelligence" to separate out the claims in this case. In Kelley, 481 So. 2d at 1001, the district court specifically held that while comments by counsel during closing argument that he liked the jury when he picked them and continued to like them were both inaccurate and inappropriate, the remarks were not sufficiently egregious to warrant a mistrial or a new trial.

Plaintiff's other argument, that Mr. Johnstone tried to evoke the jury's sympathy for his client by arguing that Dr. Alarcon had been pulled into a lawsuit from his work in Belle Glade, is misleading because it is cited out of context. If the immediately preceding and subsequent

paragraphs of Mr. Johnstone's closing argument are read (T. 3465-66), it is clear that his statements are made to rebut Plaintiff's attacks on Dr. Alarcon's credibility and to show why he may have appeared to have given equivocal testimony during his deposition. No error was committed.

2. The Unobjected-to "God Help Physicians" Comment Did Not Ask the Jury to "Send a Message."

The unobjected-to comment quoted by Plaintiff[26] did not ask the jury to "send a message", as that term is used by the cases relied upon by Plaintiff. *Cf.* S.H. Investment and Development Corp. v. Kincaid, 495 So. 2d 768 (Fla. 5th DCA 1986) (counsel told jury its "voice" would reach from here to the New York corporations involved in the case). Instead, counsel's comment essentially criticized that under Plaintiff's theory, the jury would be imposing liability without proximate causation. In any event, it was certainly not the type of inherently prejudicial statement necessary to constitute fundamental error. *See* Blue Grass, *supra* (even improper "conscience of community" argument does not create fundamental error); Eichelkraut v. Kash N' Karry Food Stores, 644 So. 2d 90 (Fla. 2d DCA 1994) (unpreserved error based on comments referring to huge corporation as attempting to "squash plaintiff like a bug" did not constitute fundamental error).

The mere use of the word "preposterous" also does not create fundamental error. In Baptist Hospital, Inc. v. Rawson, 674 So. 2d 777 (Fla. 1st DCA 1996), cited by Plaintiff, the plaintiff's attorney not only used the word "ridiculous," but argued that a verdict for the defendant would "breed irresponsible medicine," that counsel had "transposed" himself into the plaintiff and woke up in "a cold sweat," and that the defendant's defense was an "insult to your system of justice." *Id.* at 779.

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[26] They have just said you should have told the surgeon something he already knew about. Well, that's preposterous. If that's what makes a med mal case in this state, then God help any physician who is sued. (T. 3465).

e. Counsel Did Not Improperly Comment On the Credibility Of The Witnesses or Merits of the Case.

Mr. Johnstone's mere passing use of the term "I" or "we" was simply a figure of speech and does not constitute was vouching for the credibility of the witnesses or the merits of the case. *See* Forman, 671 So. 2d at 875 (use of "I think" and "I believe" in defense counsel's closing argument was merely "a figure of speech and could not reasonably be understood as a prohibited expression of personal opinion."); Wasden, 474 So. 2d at 832 ("use [of] the words, "I'm telling you," "I say baloney," "I would suggest to you," "we knew," was in context of commenting upon matters in evidence and "[a]lthough such phrases might have been better avoided, they do not render the closing argument inflammatory.").

In addition, while the Plaintiff relies on Blue Grass, 614 So. 2d at 628, for her assertion that an attorney's personal comments on the evidence are improper, that case held that even though counsel's "conscience of the community" argument was improper, reversal was not warranted absent a contemporaneous objection, request for curative instruction, or motion for mistrial. The court added that this was particularly true where counsel did not follow the improper remark with a suggestion or request that the jury should punish the defendant. *Id.* at 629. In the other case relied on by Plaintiff, Stokes v. West 'N Wild, Inc., 523 So. 2d 181 (Fla. 5th DCA 1988), a new trial was ordered where improper remarks were made and the judge refused to give a curative instruction or grant a mistrial. Furthermore, counsel's discussion about Plaintiff spending time on non-issues was within the latitude afforded closing argument and was a fair inference from the evidence.

Even if Mr. Johnstone had been trying to "vouch" for the evidence, no harm followed since Mr. Johnstone told the jury that his opinions were irrelevant. (T. 3446). Moreover, the court instructed the jury in the beginning of the trial, during closing, and again during the jury charges that counsel's statements are not evidence and that the jury's verdict must be based on the evidence.

Plaintiff's counsel objected to one of the statements. Upon doing so, the court told defense counsel to "refrain from personal attacks on the attorneys. Let's comment upon the evidence." (T. 3448). Thus, any alleged error associated with that remark was cured. The cases cited by Plaintiff do not hold otherwise.

f. "Hired gun" Reference was Limited, Cured, and Harmless Error.

Although Mr. Johnstone called Forman a "hired gun," Plaintiff's counsel immediately objected and the court provided a curative instruction, telling the jury to disregard the comment. (T. 3475). Thus, to the extent that any error could have been committed, it was cured by the court. Indeed, Budget Rent-A-Car Systems, Inc. v. Jana, 600 So. 2d 466 (Fla. 4th DCA 1992), cited by Plaintiff, squarely held that a curative instruction removed any prejudicial effect of a "hired gun" reference. *Id.* at 468.

In any event, these comments could not possibly form the basis for Plaintiff's claim of reversible error since Forman's testimony went solely to damages and Plaintiff is seeking a new trial on liability only. Moreover, the fact that the jury awarded the Plaintiff more damages than either Forman testified to or she requested proves that any alleged error was harmless.

g. No Error In Unobjected-to Remark Which Did Not Comment on the Court's View on Alarcon's Liability.

Counsel's statement that the Court had not directed a verdict against any Defendant other than Dr. Goldenberg "with good reason" was not a reference to how the trial court viewed the case. Instead, it was merely a fair comment on the evidence and the status of the trial -- that liability against Goldenberg was clear but that liability against the remaining defendants was not and would be decided by the jury. There is no error in informing the jury that a directed verdict has been granted as to a party. Conklin Shows, Inc. v. Clementi, 448 So. 2d 588 (Fla. 5th DCA 1984).

2. Closing Argument of the Radiology Group's Defense Counsel, Dennis O'Hara

a. Proper Comment on Relationship Between Plaintiff and Dr. Goldenberg

Like the statements discussed in Section B.1.a., the statements by Mr. O'Hara were also fair inferences from the evidence. For example, Plaintiff's first quoted comment preceded Mr. O'Hara's argument that both Plaintiff's counsel and Dr. Goldenberg's counsel had indicated, contrary to the testimony, that the primary reason for the cholangiograms is to verify anatomy. (T. 3397). The second quoted comment preceded O'Hara's argument that Plaintiff's counsel, Dr. Goldenberg's counsel, and Dr. Goldenberg were the only ones, contrary to all other expert testimony, to argue that a "congenital anomaly" existed. (T. 3405-06). Thus, it was a fair comment on the evidence that Dr. Goldenberg was aligned with the Plaintiff on these issues and both were contrary to all other Defendants' positions.

b. Argument that 20% of Plaintiff's Requested Damages was Sufficient, if Error, was Harmless.

Plaintiff concedes that Mr. O'Hara's 20% comment "may not have swayed the jury on the damages issue." (Br., p. 33). She nevertheless argues that these comments, which related only to damages, somehow affected the liability issue alone. This does not follow.

Further, Plaintiff's claim that these statements portrayed her counsel as liars is not supported by the record, including the portion of the record quoted in Plaintiff's Brief. Mr. O'Hara stated that he was "in no way belittling Mrs. Sawzcak's situation or her damages" but that Plaintiff's damages request was simply not fair and reasonable. (T. 3427). This argument was not without some basis in the record. As Mr. Miller later explained during his closing, if you invested Plaintiff's money in investments bearing ten and a half percent interest, you would need twenty-five to forty percent less than Plaintiff's suggested figure to arrive at the same future value. (T. 3498).

Plaintiff's reliance on Ocha, 472 So. 2d 1338, does not help her cause. The Ocha court held that an argument that plaintiff's attorneys "always ask for at least ten or fifteen times what they want" was not highly prejudicial and affirmed the trial court's denial of a new trial on this basis, despite the court's disapproving comment on the argument. *Id.* at 1343.

c. O'Hara Did Not Vouch For The Credibility of Plaintiff's Theories.

Mr. O'Hara's unobjected-to use of the phrase "I'm not making this up" was not an implication that Plaintiff's counsel was making things up. The phrase was simply used to point to the testimony and evidence that had been admitted and to emphasize that such trial evidence supported counsel's arguments.

Further, although the terms "bogus" and "B.S." were perhaps indelicate, the isolated and unobjected-to use of these words cannot create fundamental error. *See, e.g.*, Wasden, *supra* (use of term "baloney" not highly inflammatory).[27]

3. Closing Argument of the Hospital's Defense Counsel, Mark Miller - Unobjected-to Remarks Were Not Injection of Personal Opinion.

Within the 36 pages of Mr. Miller's closing argument, Plaintiff picked out five instances of counsel using such phrases as "I don't think" or "I don't believe." As discussed in Section B.1.e., the use of these types of phrases have not been found to be inflammatory or to create fundamental error.[28] Furthermore, as discussed above, the jury was told throughout the trial that the attorneys' statements were not evidence.

[27] The same is true of Mr. Miller's "bass-akwards" phrase.

[28] *See, e.g.,* Wasden, 474 So. 2d at 832 (use of phrases "I'm telling you," "I say baloney," "I would suggest to you" were used to comment upon matters in evidence and did not render argument inflammatory).

C. Error, If Any, Committed During Closing Argument Was Waived.

Plaintiff clearly waived any error which allegedly occurred during the closing arguments. First, as Plaintiff concedes in her Brief, she failed to object to most of the arguments. Second, for those arguments Plaintiff did object to, the court sustained the objection, but plaintiff failed to request a curative instruction or a mistrial. This likewise constitutes waiver.

Florida courts consistently hold that "a failure to request a mistrial, after an objection to improper statements in a closing argument has been sustained, constitutes a waiver of that objection." Eichelkraut, 644 So. 2d at 92, *citing*, Newton v. South Florida Baptist Hospital, 614 So. 2d 1195 (Fla. 2d DCA 1993); *see also* Ed Ricke, 468 So. 2d at 910 ("unless the improper argument constitutes fundamental error, a motion for mistrial must be made `at the time the improper comment was made.'"); Russell v. Guider, 362 So. 2d 55 (Fla. 4th DCA 1978) (clearly improper comments made during closing argument did not warrant new trial in absence of contemporaneous motion for mistrial or curative instruction).

In her Brief, Plaintiff attempts to argue that she did not waive her request for mistrial since she had initially coupled her motion with a request that the trial court defer its ruling. This argument ignores the fact that Plaintiff's counsel later made the tactical decision to abandon his request for a mistrial. Specifically, when the trial court asked during sidebar, "what is the requested relief," Plaintiff's counsel responded that if the court would not reserve ruling on the request for mistrial, then he was not requesting one. (T. 3548-49). Consequently, what occurred in the instant case is completely distinguishable from what occurred in the cases Plaintiff cites.

In both Ed Ricke, 468 So. 2d 908 and Colatarci, 641 So. 2d 427, motions for mistrial were made and ruled upon. In the instant case, however, Plaintiff's initial suggestion of a mistrial was abandoned because she never secured a ruling. *See* Newton, 614 So. 2d at 1196 (failure to secure a ruling on an objection waives it). Although Ed Ricke gives the trial court discretion to postpone

ruling on a mistrial, it does not require that the court postpone the ruling. Thus, Plaintiff clearly waived her motion for mistrial by receding from her original suggestion and failing to secure a ruling.

Finally, all Plaintiff's attempts at justifying her reason for failing to request a mistrial amount to nothing more than a tactical decision to forgo a request for mistrial, which Plaintiff now regrets. Her belated request for a new trial should be denied. Nadler v. Home Insurance Co., 339 So. 2d 280 (Fla. 3d DCA 1976) (appellate court affirmed denial of motion for new trial where trial court expressly noted that counsel was waiving mistrial after counsel stated that he would not ask for such at that stage in the proceedings). Plaintiff clearly waived her request for a mistrial.

D. Curative Instructions Should Have Been Requested.

As Plaintiff concedes, the court requested a curative instruction and Plaintiff's counsel specifically declined to provide one. (T. 3549). Contrary to Plaintiff's position, numerous courts have held that the types of arguments complained of by Plaintiff are remedied by cautionary instructions. *See, e.g.,* Jana, 600 So. 2d at 468 (curative instruction remedied "hired gun" reference); Cummins Alabama, Inc. v. Allbritten, 548 So. 2d 258 (Fla. 1st DCA 1989) (argument inviting the jury to analyze appellant's actions in light of what they would have done was not sufficiently prejudicial to warrant new trial in light of curative instruction given to jury); Wasden, 474 So. 2d at 831 (when court instructed jury to disregard inflammatory closing remark, it must be assumed jury followed court's instruction, and where court told jury counsel's arguments were not evidence, the error was hardly fundamental); Dixie-Bell Oil Co., Inc. v. Gold, 275 So. 2d 19 (Fla. 3d DCA 1973) (comment during closing argument which amounted to personal attack on the opposing attorney was cured by instruction from the court that only testimony from the witness stand is evidence). Moreover, the comments relied on in the instant case, even if they had been improper, were not inflammatory or inherently prejudicial like those in the cases cited by Plaintiff.[29]

[29] *See* Walt Disney World v. Blalock, 640 So. 2d 1156 (Fla. 5th DCA 1994) (comments included repeated references to WDW having "ripped off the plaintiff's thumb," WDW was

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN LIMITING EXPERT WITNESS TESTIMONY TO ONE EXPERT PER SPECIALTY PER PARTY.

In Plaintiff's next argument she claims that she was denied a fair trial because the trial judge abused his discretion in allowing the defense to introduce cumulative radiology opinions. However, the judge allowed "each attorney" to call one expert witness per specialty at trial, in accordance with the two motions filed by Plaintiff to limit expert witness testimony to one per specialty per party. (R. 195, 221, 805). At trial, Plaintiff and each of the Defendants was represented by separate counsel. Since the testimony presented to the jury was exactly what Plaintiff had asked for, i.e., one expert per specialty per party, Plaintiff's argument fails and she cannot now raise this issue on appeal.

Plaintiff next complains that the trial judge should have granted his Motion to Strike Expert Witnesses (R. 805), and required Dr. Alarcon and the Radiology Group to share one radiology expert because the Radiology Group only had vicarious liability. The judge denied the Plaintiff's request at the March 27, 1996 hearing on various pretrial matters after the following colloquy:

> **THE COURT: When was this made aware to you?**
>
> **MR. FIORE: It's been aware to me since I filed the complaint that we have only vicarious claims. In fairness to the court, I have known this since the time I filed.**
> **However, when we deposed Michael Rush, the radiologist in question, who they have listed as a primary radiologist, when we deposed him we learned that the opinions of Dr. Rush are overlapped with the radiologist of Mr. Johnstone and that is why I am bringing it before the court now. Because there is--they are overlap.**
>
> **THE COURT: When did you do that?**
>
> **MR. FIORE: Depose Dr. Rush?**
> **Bob, do you have a date?**
>
> **MR. PARADELA: Four months ago. This is the same--he is basically moving for rehearing on this order that he claims is so crystal clear.**

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compared to "`some nickel and dime carnival' throwing `pixie dust' to delude the jurors"); Mohammad v. Toys R Us, 668 So. 2d 254 (Fla. 1st DCA 1996) (improper comments included asking jury whether "everyone realize[s] that they could have -- may have already settled").

> **THE COURT: Counsel, stop right there. What is good for the goose is good for the gander. The order speaks for itself.**
>
> **Again, I expect both sides, if there is any need to be some relief from this order based upon the unusual, special circumstances of the individual people involved, I expect it before and not after the trial call. This is, let the record reflect, after the trial call.**

(R. 1379-81). (emphasis added).

Where, as here, the Plaintiff asked the court to limit each attorney to one expert witness per specialty, and the court granted her motions, she cannot now claim that she was denied a fair trial because the judge abused his discretion in granting her own motions. Upon questioning from the trial judge at the March 27 hearing, Plaintiff's counsel admitted that he knew the Radiology Group only had vicarious liability from the time the Complaint was filed. Given this admission, and the Plaintiff's subsequent motions to limit expert witness testimony which were granted by the trial judge, she cannot now claim that the judge's refusal to change his prior rulings constituted reversible error.

Plaintiff also complains that Dr. Margarita Alarcon was allowed to testify as a quasi-expert to bolster the defense case. This is simply not true. While the trial judge commented that she may implicitly be seen as another expert witness, he further stated: "... I have to watch the amount of time and effort that we spend on her, so the jury doesn't perceive her as such." (T. 2982).

The trial judge permitted her testimony only because a report that she had prepared was already in evidence. (T. 2983). Dr. Margarita Alarcon briefly testified that she reviewed the x-ray films taken by Dr. Goldenberg and dictated a report on her interpretation of the films. (T. 3084-85). Since she did not present her expert opinion on the films, it is not accurate to state that she testified as a quasi-expert to bolster the defense case. Her entire testimony takes up four pages of an almost 4,000-page trial transcript. (T. 3083-87). Moreover, while Plaintiff claims that the "gross unfairness of this ruling" was demonstrated by defense counsel closing argument, none of the comments cited by Plaintiff in her Brief, pages 45-46, mention Dr. Margarita Alarcon.

Finally, Plaintiff argues that Defendants should have been limited to fewer experts to balance the scales of justice because their interests were "linked inextricably." As previously argued in Section B.1.a., infra, this claim by Plaintiff is incredulous given the bankruptcy pleadings filed by Dr. Goldenberg admitting that it was his interests that were linked to Plaintiff, and that his trial strategy would have been different if not for the agreement between them.

Furthermore, the trial judge did not abuse his discretion in denying Plaintiff's Motion to Strike Experts because: (1) the Motion was made after the trial call and after discovery had been completed; (2) the Motion was made after the Plaintiff had twice before moved to limit expert witness testimony and the judge had granted the motions; (3) Plaintiff's counsel admitted he knew the Radiology Group only had vicarious liability from the time he filed the Complaint; and (4) when Plaintiff originally moved to limit expert witness testimony to one per specialty per party she knew that she was the only Plaintiff and that she was suing four Defendants.

At trial, both the Plaintiff's radiology expert, Dr. Russell, and Dr. Goldenberg's radiology expert, Dr. Pevsner, testified against Dr. Alarcon. Thus, the Plaintiff actually had one more radiologist on her side than she originally planned for.

The court was well within its discretion in allowing each party to have its own expert. Regulating the number of expert witnesses is a matter exclusively within the discretion of the trial court. Harrison Land Dev., Inc. v. R&H Holding Co., 518 So. 2d 353, 353 (Fla. 4th DCA 1988); Webb v. Priest, 413 So. 2d 43, 45 (Fla. 3d DCA 1982) (limiting plaintiff to two expert witnesses was within court's discretion, although precluding opinion questions was an abuse of discretion).

III. IF A NEW TRIAL IS AWARDED, IT MUST BE ON BOTH LIABILITY AND DAMAGES.

In the unlikely event a new trial is ordered in this case, it should be on liability and damages. The Plaintiff's secret "Mary Carter" agreement which was never disclosed to the jury alone justifies that both issues be retried.

In addition, according to the Plaintiff, the Defendants' closing arguments impermissibly inflamed and prejudiced the jury against Plaintiff's counsel. While Defendant disagrees on this point, in the event this court decides to grant Plaintiff's Motion for New Trial, it must order a new trial as to both liability and damages -- not, as Plaintiff requested, as to the issue of liability alone. "A partial new trial to a single issue is inappropriate when the new trial is necessitated by some error at trial which has prejudiced the jury broadly on all issues." *See, e.g.,* Porter v. Gordon, 46 So. 2d 19 (Fla. 1950); Deese v. Whitebelt Dairy Farms, Inc., 160 So. 2d 543 (Fla. 2d DCA 1964)." Cedars of Lebanon Hospital Corp. v. Silva, M.D., 476 So. 2d 696, 704 (Fla. 3d DCA 1985).

Plaintiff claims that the closing arguments so tainted the jury against Plaintiff's counsel personally and were so prejudicial as to "pervade the entire trial," that a new trial is necessary even without objection. However, Plaintiff requests a new trial on liability only. Plaintiff nevertheless asks this Court to use the supposedly improper damages arguments to form the basis of the new trial order. On page 34 of her Brief, she states:

> "these type of improper comments are designed to ... obscure the jury's ability to decide all issues on the merits. The comments going to Plaintiff's damages case, in conjunction with the many other inflammatory comments, were cumulatively prejudicial to Plaintiff's liability case against three of the four defendants, and constitute fundamental error." (Emphasis added).

The test for whether a new trial should be ordered on one or both issues is whether or not the alleged errors prejudiced or inflamed the jury as to both the liability and damages aspect of the case. *See* Griefer v. DiPietro, 625 So. 2d 1226 (Fla. 4th DCA 1993).[30]

[30] In Griefer, *supra*, the error complained of was a jury instruction which related solely to the liability issue. Unlike the instant case, there was no assertion in Griefer that improper comments were made concerning the calculation of damages that could have possibly affected the jury's decision or inflamed the jury in general. In fact, the Fourth District expressly noted that the erroneous jury instruction "did not affect the calculation of damages by the jury nor did it inflame the jury." Griefer, 625 So.2d at 1229. To the contrary, in this case, Plaintiff has spent nearly the entire 50 pages of her Brief arguing that Defendants' comments "inflamed the jury."

In the event that this Court orders a new trial, Dr. Alarcon agrees it should be as to the three Defendants at issue. If this Court orders a new trial as to the issue of agency between Dr. Goldenberg and the Hospital, the new trial should be only as to the Plaintiff and Hospital since the issues would be irrelevant to the remaining Defendants.[31]

CONCLUSION

Defendant-Respondent, Dr. Alan Alarcon, respectfully requests that this Court affirm the Fourth District's Opinion, the trial court's order denying the Motion for New Trial and the Judgment entered pursuant to the jury's verdict.

Respectfully submitted,

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[31] Defendant has not addressed the merits of Plaintiff's Argument III for that reason. Further, it is axiomatic that if Dr. Alarcon is not negligent, the Hospital could not be held vicariously liable for him.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the above Brief on the Merits was mailed this _____ day of November, 1998, to the following counsel of record: **Herman J. Russomano, Esquire**, Russomano & Borrello, P.A., Attorneys for Petitioner, 150 W. Flagler Street, Suite 2101, Museum Tower, Miami, FL 33130; **Shelley Leinicke, Esquire**, Wicker, Smith, Tutan, O'Hara, P.O. Box 14460, One E. Broward Boulevard, 5th Floor, Fort Lauderdale, FL 33302; **Robert J. Fiore, Esquire**, Robert J. Fiore, P.A., Co-counsel for Petitioner, Courthouse Tower, Suite 401, 44 West Flagler Street, Miami, FL 33130; and **Clark J. Cochran, Jr., Esquire**, Billing, Cochran, Heath, Lyles & Mauro, P.A., 888 SE Third Avenue, Suite 301, Fort Lauderdale, FL 33316.

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