IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 93,527

VIVIAN TRUJILLO,

Petitioner,

vs.

UNIROYAL TIRE COMPANY,
a foreign corporation, et al.,

Respondents.

**ANSWER BRIEF OF RESPONDENTS,
UNIROYAL TIRE COMPANY and
GENERAL MOTORS CORPORATION**

On Discretionary Review From a Decision
of the Third District Court of Appeal

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CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Florida Rule of Appellate Procedure 9.210(a)(2), undersigned counsel certifies that this Answer Brief of Respondents, Uniroyal Tire Company and General Motors Corporation, is printed in 12-point Courier type.

INTRODUCTION

This brief is submitted on behalf of Defendants, Uniroyal Tire Company ("Uniroyal") and General Motors Corporation ("General Motors") in support of a decision by the Third District Court of Appeal. That decision reversed an order entered by Judge Juan Ramirez granting Plaintiff, Vivian Trujillo, a new trial in this products liability action after a jury found a defect, but then determined that Plaintiff's comparative negligence was responsible for 99% of her damage and her failure to wear a seat belt was responsible for 100% of Plaintiff's damage.

The parties will be referred to by proper name or as they appeared below. The following symbols will be used:

"R." -- Record on Appeal

"T." -- Trial Transcript

"P. Exh." -- Plaintiff's Exhibits[1]

"D. Exh." -- Defendants' Exhibits

"P. App." -- Plaintiff's Appendix to Supreme Court Brief

For the Court's convenience, Defendants have prepared an Appendix to this brief which includes the Trial Court Order granting a new trial designated as "D. App. 1."

[1] Defendants included the relevant trial exhibits as A.3 to its brief in the Third District.

STATEMENT OF THE CASE AND FACTS

(1) Course of Proceedings Below

On June 29, 1985, Plaintiff, Vivian Trujillo, and ten passengers were traveling in her 1984 Suburban on a straight, good road when she felt a quick "jiggling and immediate boom." (T. 379) She slammed on the brakes and lost control of the vehicle. It left the roadway, rolled over, and Plaintiff was ejected. (T. 321, 380) Plaintiff sued the tire manufacturer, Uniroyal, and the vehicle manufacturer, General Motors, alleging a defect in the tire caused the accident. (R.1-45)

After abandoning manufacturing and design defect theories, the sole liability question posed to the jury was as follows:

> 1. Did UNIROYAL TIRE COMPANY and GENERAL MOTORS CORPORATION, place the subject product on the market with a defect by virtue of the failure to warn Plaintiff of the risk in failing to properly repair punctures in tires, and whether this defect a legal cause of damage to Plaintiff? (R. 692-94; P. App. 4)

Plaintiff claimed that she should have been warned about proper repair methods so she could have directed the repair facility to make the correct repair. (T. 1139)

The jury returned a verdict for Plaintiff, but found Mrs. Trujillo's negligence was responsible for 99% of her damage. It awarded $16,981 in past economic damages and $10,000 for past pain and suffering. The jury next found that 100% of Plaintiff's damages were caused by her failure to wear a seat belt. (R. 692-94)

Post trial, the court granted an unrequested additur from $0 to $26,981 with no reductions for comparative fault or the seat belt defense. (R. 817-21; A.1) As an alternative to the additur, the Court indicated it would grant a new trial on all issues. Defendants rejected the additur and appealed the Court's new trial order as well as the denial of their motion for directed verdict. (R. 797)

After the Third District reversed, Plaintiff sought review in this Court claiming conflict as to the standard of review of orders granting a new trial.

(2) Statement of the Facts

Plaintiff's Warnings Theory

There was no dispute that the subject tire had been improperly repaired with an external plug, and that neither tire nor its accompanying materials included a warning not to plug a tire. (T. 402, 828, 833).[2] Thus, the only issue was whether a warning concerning proper repairs should have been given to Plaintiff and if so whether such failure caused Plaintiff's damage.[3]

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[2] There was no evidence presented as to when the tire was repaired, who took it for the repair or what repair facility performed the bad repair. The vehicle was being leased by a company owned by Plaintiff and her ex-husband, but she was the primary driver. (T. 328) None of the people who might have used the vehicle recalled a tire repair. (T. 116, 310, 328, 1117-27) Plaintiff never attempted to find or sue the repair facility responsible for the bad repair. (T. 1128)

[3] No manufacturer includes Plaintiff's proposed warning on their tire. (T. 866) In fact, the Federal Motor Vehicle Safety Standard 109, governing tires does not require a warning as to the steps necessary to repair a tire. (T. 1223)

Plaintiff's expert, Jordan, testified that other tire manufacturers warranties included statements to the effect that if a tire were plugged or improperly repaired, the warranty would be voided, (T. 827), but Plaintiff did not present any expert to testify that her proposed warning was appropriate or that the lack of such a warning made the product defective. Rather, Plaintiff primarily relied upon her own testimony that she should have been told not to plug a tire so that she could tell the repair facility. (T. 1139)

Defendants responded that the tire, as well as the material which accompanied it, warned consumers about the dangers associated with underinflation or other damage to the tire. (T. 300, 360, 644, 1115) For example, the tire contained the following warning:

> Safety warning. Serious injury may result from tire failure due to underinflation or overloading. Follow owner's manual. (D. Exh. D)

The owner's manual included similar warnings:

> CAUTION: To reduce the risk of loss of vehicle control and personal injury:
>
> - Tires must be properly inflated . . . (P. Ex. 7 at 5-16)
>
> * * * *
>
> Excessive speed, underinflation or excessive loading, either separately or in combination, can cause heat buildup and possible tire failure. (Id. at 5-21).

Plaintiff also received a Uniroyal warranty policy with warnings concerning the risks associated with underinflation. (P. Exh. 8) It also specifically advised owners not to effect a repair on their own. Id. Plaintiff's expert Jordan explained that the average person should not perform the repair because of all the

steps necessary to do the job right. (T. 858) He also testified it is the responsibility of the tire repair facility to be trained and to effectuate a proper repair, and those businesses should not have to rely on the customers to tell them how to do their repair. (T. 843, 859)

Defendants next presented evidence of the voluminous information that had, for years, been disseminated to repair facilities and was widely available. (T. 587-89, 865-66, 975)[4] Plaintiff's expert, Edwards, agreed that those materials warned tire repair facilities that it is improper to use a plug alone. (T. 587-88, 592) He also noted that this was common knowledge.

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[4] For example, the Uniroyal Information Bulletin distributed to all major Uniroyal outlets cautioned:

> 1. External Plug Repairs are not generally satisfactory. This is particularly true for punctures in the outer row and in the buttress or sidewall. These may suffice as a temporary expedient but must be supplemented with a proper patch applied to the inside of the tire to be considered a permanent repair. (D. Exh. AAA).

Additionally, the Rubber Manufacturers Association ("RMA") publishes an information bulletin and wall chart, both of which are distributed to all customers and outlets including gas stations and tire repair facilities. (D. Exh. G, BBB; T. 1243, 1251) These materials specifically describe proper repair procedures.

The Tire Industry Safety Council disseminates materials that warn about the danger of underinflation and advise consumers to consult a tire dealer when there is a problem. (D. Exh. F at 11; T. 1224)

The General Motors' owner's manual also warns on this point:

> DO NOT put air back in a tire that has been run flat, or is seriously law on air, without first having the tire taken off the wheel and the tire and tube checked for damage. (P. Exh. 7 at 3-7)

Similarly, the flyer for the Patch Rubber Company which sells the material used in repairing tires warns about proper repair procedures. (D. Exh. CCC; T. 1253)

Defendants' tire experts, Dodson and Harrison, also explained that because there are multiple steps involved in doing a proper repair, a warning stating "Do not plug a tire" would be insufficient. (T. 976) It would also be inaccurate because it might be misunderstood so as to not allow a plug even in conjunction with a patch. (T. 988-99, 1344) Alternatively, it would be impractical to include all of the steps necessary to a proper repair on the side of a tire. (T. 1237) Such a warning would be "far too complicated to be an effective warning." (T. 1255, 1264) In light of the foregoing, Harrison opined that the better way to deal with the issue is to tell the consumer to take their vehicle in for repairs. (T. 1321, 1345)

Along the same lines, Defendants' experts explained that since there are multiple causes of underinflation, only one of which is a bad repair, the most effective warning is one directed to the dangerous condition -- underinflation -- rather than specific causes. (T. 1002-03) Plaintiff's expert, Jordan, concurred that tires can lose air for a number of reasons and each could lead to underinflation. (T. 854-56)

These opinions were actually supported by Plaintiff's own testimony. She agreed a poor repair or any one of a number of other occurrences will result in underinflation and that both Uniroyal and General Motors warned of the risk of loss of control and personal injury if the tires are not inflated properly. (T. 1120-21, 1129, 1132-39) As such, Plaintiff was warned about the danger of underinflation, regardless of the cause, and was told to take the tire to a professional for service because of the

number of steps to make a proper repair. (T. 1143-45) Plaintiff further admitted she would rely on the repair facility to know the proper repair method and to perform the repair properly. (T. 1123)

Evidence as to Plaintiff's Comparative Fault

After answering the first verdict interrogatory in the affirmative, the jury found Plaintiff 99% responsible for her damage. The record was replete with evidence of Plaintiff's negligence in operating the tire in an underinflated condition and negligence in the manner in which she operated the vehicle after the tire failure thereby resulting in the rollover accident.

Plaintiff's expert Dodson testified that the companion tire had been operated underinflated during its life:

> [B]ased on the compression grooves, based on the shoulder wear, I would say that **this tire had a history of being run underinflated**, not to the point of being flat or anything like that, but being run underinflated enough to where it exacerbated or increased the thread wear. (T. 952) (emphasis added).

He then indicated that he found similar physical evidence on the subject tire:

> Q. And, again, what does this tell us or tell you as the tire expert about the service life and the history of this tire.
>
> A. Well, what the compression grooves tell you is that you've got a tire with a **chronic** history of overdeflection . . . (T. 958)

Since the owner's manual and tire warned about the dangers of operating the vehicle with tires in an underinflated condition, this would certainly constitute comparative negligence.[5]

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[5] Plaintiff argues that Dodson could not pinpoint the time when the repair began to leak, but the precise timing is irrelevant given his testimony that the tire was run in a

There was also evidence that, but for Plaintiff's negligence, she would have been able to avoid the accident after the tire failure. Defendants' accident reconstructionist, Larry Tomlinson, opined Plaintiff was driving 75 mph when the tire failed. (T. 1515) Plaintiff locked her brakes, which resulted in a loss of steering. (T. 1509) The tire rim gouged into the pavement, causing the vehicle to rotate. (T. 1509-10) The vehicle went off the roadway sideways at approximately 39 mph. (T. 1516) As it was sliding, the wheels were tripped and the vehicle rolled over. (T. 1409)

Tomlinson opined that had Plaintiff instead been traveling at 55 mph when the tire failed and she slammed on her brakes, the vehicle would have stopped before it left the paved roadway and thus avoided the accident. (T. 1518) Even if she were traveling at 67 mph, her vehicle would not have left the roadway. (T. 1518) Tomlinson also noted that "hard braking is not what you do when you have a tire blow." (T. 1517) If Plaintiff had not slammed on the brakes, this accident would not have happened. (T. 1590) Tomlinson also presented a videotape of a light truck suddenly losing air in the right rear tire at a speed of 55 mph. (t. 1374, 1377) This demonstrated that a vehicle is easily controlled after a tire failure. (T. 1383) While Plaintiff's expert, Nunn, calculated a lesser speed, he agreed that Plaintiff locked up the brakes causing her to lose steering. (T. 224, 229) He also agreed

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chronic underinflated condition.

that had the vehicle remained on the roadway, it would not have overturned. (T. 224)

Evidence as to the Seat Belt Defense

Another hotly contested issue at trial concerned the seat belt defense. The parties agreed Plaintiff was not wearing her belt, but disagreed whether there was sufficient evidence that the belt was available and operational, and whether Plaintiff's failure to wear her seat belt contributed in whole or part to her damages.

Plaintiff's consulting physician, Dr. Goodgold, testified Plaintiff's injury was the result of a tremendous hyperextension of the neck which could have occurred in two ways: (1) Plaintiff had her head back and hit up against the roof of the vehicle, or (2) ejection from the vehicle. (T. 438, 442)

There was evidence that neither of these would have been possible had Plaintiff been belted. First, had Plaintiff been belted, she would not have been ejected. (T. 248, 1507) Second, Tomlinson testified that the lap belt would have prevented Plaintiff from impacting her head with the interior of the vehicle. (T. 1500-02)[6] Rather, she would have hit sideways on the B pillar, which would not cause a hyperflexion of the neck as described by the doctor. (T. 1507) Even Plaintiff's expert, Nunn, said that had Plaintiff been wearing her belt, it may have prevented her injuries:

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[6] On this issue, Tomlinson saw no "physical evidence . . . from the vehicles that would be consistent with Mrs. Trujillo having had she been belted, having hit her head caused by the roof crush." (T. 1412) Dr. Goodgold had not examined the vehicle for a dent in the roof. (T. 481)

Q: Do you have an opinion as to whether the seat belt, if Vivian Trujillo were wearing a seat belt at the time of the accident, if that would have prevented her injuries?

A: It could have or it could not. . . . (T. 249)

In further support of his position, Tomlinson explained that the lap belt is the primary protection in a rollover and it is not affected by the comfort feature, thus negating Plaintiff's theory that even if she had been belted, the comfort feature of the shoulder belt would have allowed enough slack so that Plaintiff's head could have struck the roof. (T. 1505) Tomlinson also testified that had Plaintiff been belted, the shoulder harness would have locked before the vehicle left the roadway as a result of the braking of the vehicle. (T. 1506)

Evidence As to Non-Economic Damages

The jury awarded $10,000 for Plaintiff's past pain and suffering. The evidence as to each of Plaintiff's medical complaints was hotly contested at trial.

Plaintiff's primary injury was the fracture of her spine. (T. 652) Plaintiff's treating physician, Dr. Dusseau, confirmed that this injury was limited to the broken bone and there was no injury to her spinal cord or the peripheral nerves and thus, no sensory or motor loss. (T. 652, 660, 667) Using the low-risk procedures of cervical traction and a halo brace, Plaintiff's neck was immobilized. (T. 655-56, 685) After being fitted with the brace, Plaintiff remained hospitalized for 19 days without complications and was able to get up and move without difficulty.

(T. 660, 661). Four months later, the halo was removed and replaced with a light weight collar. (T. 666)

Throughout her follow-up care, Dr. Dusseau indicated she was "doing great" and was "up and about with little complaints." (T. 662) At Plaintiff's last visit to Dr. Dusseau in December, 1995, she was doing well with no neurological deficits, the broken bone was healed, and Plaintiff continued to report no pain. (T. 665-66, 669) She was given instructions to discontinue the use of the collar and resume normal activities.[7] (T. 1094) The recovery time of six months was normal for the type of injury sustained and her treatment went very well compared to other patients with the same condition. (T. 622) Plaintiff was instructed to return if she had any problems. (T. 673) She never returned. (T. 612, 673) Three years later, before this lawsuit was filed, she told another physician that she had completely recovered. (T. 1095)

Dr. Goodgold, who was hired solely to give an opinion in support of Plaintiff's claim, testified based upon a 1990 examination of Plaintiff in her counsel's office. (T. 428, 430, 484, 485) He opined Plaintiff had lost 30% of the movement in her neck based solely upon an "eyeballed" measurement. (T. 444, 469) He did not use a measuring instrument which is the recommended procedure to determine range of motion, much less the three

[7]Although Plaintiff complained about limitations on her physical activities, the doctor's only suggestion was to eliminate contact sports or other activities that might result in head or neck injuries, because of the risk of future injury. (T. 670)

mobility measurements the AMA recommends. (T. 469, 471, 473) Using the American Medical Association Guide, Dr. Goodgold opined Plaintiff had a 12% disability to the body as a whole. (T. 452) Dr. Dusseau disagreed with this rating based on her condition only six months after the accident, and opined she would qualify for a 4% permanent impartial rating. (T. 672)

The doctor's opinion as to a disability rating was undermined by the fact that Plaintiff herself said she did not need a special mirror for driving, (T. 1197), even though Dr. Goodgold stated that a person who loses 30% mobility in their neck will have trouble driving because of the difficulty in turning their neck. (T. 500) Further, the jury had the opportunity to observe Mrs. Trujillo’s movements during the course of the trial and, as pointed out by defense counsel, she "seem[ed] to be moving pretty good." (T. 1070)

Plaintiff also asserted that she suffered a loss of sensation in the back of her scalp. (T. 446) However, this was not a complaint on her medical record, she admitted she never reported this to Dr. Dusseau when he treated her, and she did not identify this as a complaint in answers to damage interrogatories in 1989. (T. 475, 1072, 1073)

Plaintiff also sought recovery for permanent pain in her right arm. Plaintiff conceded, however, that she had no complaint with respect to her right arm at the time of the accident, nor did she identify this as a complaint in her 1989 interrogatory answers.

(T. 1063, 1066)[8] She first reported this complaint to a doctor in 1990 at which time she stated that this pain began three years after the accident. (T. 1071) Dr. Goodgold agreed that if her right arm did not begin to hurt until years after the accident, he would not attribute that pain to the accident. (T. 511)

Lastly, Plaintiff claimed permanent memory loss but this was another symptom that was not reported on any medical record until 1988 and was not reported as a problem on Plaintiff's answers to interrogatories in 1989. (T. 1079) Thus, Plaintiff agreed that her complaint of memory loss was recent. (T. 1079)[9]

Evidence as to Economic Damages

As to economic damages, the jury limited its award to the stipulated medical expenses of $16,981 and did not award lost income. (T. 645)

The evidence showed that Plaintiff and her ex-husband were each 50% owners of a wholesale food business and that Mrs. Trujillo's income was derived from this family business.

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[8] Plaintiff did injure her left arm in the accident, but this injury was healed one month later. (T. 449, 662, 1064) Thus, it appeared Dr. Goodgold had confused Plaintiff's right arm with her left.

[9] Even though Plaintiff presented the testimony of a psychologist, Dr. Loeffler, to opine that she did indeed suffer from a problem with memory loss, the doctor, did not know anything about the injury she actually sustained, (T. 791), nor was he competent to testify as to objective evidence of the problem since he was not a physician. (T. 798) Thus, his "causation" opinion was based simply on the fact that Plaintiff said the memory problem began after the accident. (T. 790) Moreover, Dr. Loeffler testified that ordinarily, he would expect this type of problem to show up within six months of the accident. (T. 795) Dr. Goodgold offered no opinion that this memory loss was caused by the accident. (T. 448)

(T. 294-95, 326, 620) Plaintiff missed work for four months and then returned on a part-time basis. (T. 330)

In 1984, Plaintiff's income was $22,600. (T. 344) In 1985, the year of the accident, it was agreed Plaintiff was paid her wages by collateral sources and thus she did not suffer a loss of wages in that year. (T. 1102)[10] The evidence was also undisputed that Plaintiff's income has increased each year since the accident. (T. 619) Thus, in the ten years since the accident, Plaintiff's income rose from $29,200 to $72,500. (T. 1099-1104)[11]

Jury Instructions and Verdict Form

Post-trial, the court concluded that the verdict form was improper and that the jury misunderstood the law concerning the defenses. (R. 817-21) These issues must be viewed against the backdrop of the jury charges and verdict form.

Defendants' proposed jury instruction concerning affirmative defenses included Plaintiff's negligence in operating the vehicle and in maintaining the tire. (P. App. 2) Plaintiff's only

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[10] The court indicated it would address the collateral source payments post trial, (T. 1103), and if the jury awarded lost wages or medical expenses, it would be reduced. (T. 1458) In light of the zero damages, that reduction was never made, but would have to be applied if an award were made to Plaintiff.

[11] Plaintiff claimed that had she not been injured, her income would have been even higher because the business would have continued to increase "vertically." (T. 332-22) She presented no expert evidence to support this point; however, and the evidence that was presented contradicted Plaintiff. For example, from 1981 to 1983, the business actually decreased slightly from 2.16 million to 2.15 million to 2.05 million. (T. 335, 1193) From 1983 onward, the business made modest increases each year, including the year of the accident. (T. 341, 1106) Thus, the pattern of business income was unchanged by the accident.

objection was the inclusion of a third affirmative defense -- negligence of the repair facility. (T. 1443-46) In fact, Plaintiff's proposed instruction was similar. (P. App. 1)

With respect to the seat belt defense, Plaintiff argued that Defendants failed to establish the vehicle was equipped with an available and fully operational seat belt and thus, there should be no seat belt defense and/or no preemptive instruction on that issue. (T. 1460-62; R. 618) The trial court disagreed and used Defendants' proposed instruction. (T. 1462; (P. App. 2)

As to the verdict form, Plaintiff challenged Defendants' position that the jury should not be asked to separately decide if there was a defect and if Defendants were negligent. (T. 1469-76; R. 668-72) The court decided that only a defect question should be submitted to the jury. (T. 1476) At that point, Defendants' counsel referenced the remaining questions on their verdict form, but no other objections were raised. (T. 1476-77)

The next day, defense counsel provided copies of the jury instructions and verdict form as modified pursuant to the court's instructions. (T. 1541) Plaintiff's only request was that in Question One, the word "product" be used instead of "tire," and the "claim" be defined as a "strict liability" claim. (T. 1541-43)

The Verdict

During deliberations, the jury asked the following question:

> We have a problem with interpretation. Does it mean that if there is no specific warning about improper repair, then by virtue of that omission must we answer yes to Number 1? If we answer yes to Number 1, can we still answer 100 percent for Vivian Trujillo on Number 3.

(T. 1728) The court instructed the jury to carefully review the instructions and verdict form, but indicated to counsel that if there were an inconsistent verdict, he would send the jury back for further deliberations. (T. 1734)

Immediately after the jury returned its verdict, the court conducted the following sidebar:

> THE COURT: Okay. I don't know, first of all, if they've made any reduction. I think we might want to make sure they haven't made any reduction already. I don't know if we're going to reduce the verdict by 100 percent or by 99 percent.
>
> MS. LUMISH: Your Honor, it is our position they've done everything they need to do. We can take it up after the jury has been discharged. Any of these issues, they'd been told not to make reductions.
>
> THE COURT: You are satisfied with that?
>
> MR. LUIS STABINSKI: Well, I find myself very hard to conceive--it seems like there are reductions in here.
>
> * * * *
>
> MR. LUIS STABINSKI: Yes. The problem is with the pain and suffering and all that. I mean, it is just inconceivable that is the amount, but if that is what they--I guess I'll have to deal with that on an additur for whatever it is.
>
> THE COURT: **Right. So nobody is asking for anything from the Court at this time?**
>
> MS. LUMISH: Correct.
>
> MR. LUIS STABINSKI: **I don't think there is anything I can ask at this time.** (T. 1737-38) (emphasis added)

The court discharged the jury and commented" "Given the size of the verdict and everything, I'm going to wait for any motions, but I would be disinclined to reduce the $26,981." (T. 1739)

The New Trial Order

Post trial, the court denied Defendants' motion for judgment in accordance with its directed verdict motion which argued that Plaintiff failed to prove the breach of a duty to warn which was the legal cause of damage to Plaintiff. (R. 817) As to Plaintiff's motion for new trial, the court found that the verdict as to comparative negligence, the seat belt defense and damages was against the manifest weight of the evidence, that the verdict from was improper and the verdict inconsistent. (R. 817-21) Based on these findings, the court granted an unrequested additur from $0 to $26,981, the amount of damages found by the jury or alternatively ordered a new trial. (R. 821) The Third District reversed and this Court granted review.

SUMMARY OF THE ARGUMENT

Plaintiff was injured when an improperly repaired tire failed. Rather than locate and sue the repair facility responsible for the poor repair, Plaintiff sought to impose liability against the tire manufacturer and vehicle seller under a theory that these entities had a duty to warn her of the risks of improper repairs and to tell her how to perform a proper repair.

The jury announced in no uncertain terms that while it believed Defendants failed to warn Plaintiff of a risk, Plaintiff was responsible for her own damages as a result of her negligence in maintaining the tire and operating the vehicle and further by her failure to wear a seat belt. The jury also chose to disbelieve Plaintiff’s characterization of the seriousness of her injuries. That should have been the end of this lawsuit. Instead, the judge usurped the jury’s function, selecting the evidence it believed and

rejecting other competent testimony in reaching its conclusion that a new trial should be granted.

The Third District proper concluded that the trial court abused its discretion in finding that the jury verdict as to comparative negligence, the seat belt defense and damages was contrary to the manifest weight of the evidence. As to comparative negligence, no reasonable persons would agree that there was "no evidence" that Plaintiff's negligence caused the tire failure or the accident given the expert's testimony that the tire was being run in a chronic underinflated condition and the evidence that had Plaintiff been driving at the speed limit and not slammed on her brakes, the vehicle would not have even left the roadway. As to the seat belt defense, Plaintiff's expert testified without objection that had Plaintiff been wearing her seat belt, she would not have been injured in the manner described by Plaintiff's doctor. As to damages, the trial court's findings were nothing more than an impermissible reweighing of the evidence.

Further, the trial court's legal rulings as to the verdict were erroneous. While the trial court concluded that the verdict form was incorrect, it ignored the fact that Plaintiff failed to object. In any event, the verdict form was proper. Similarly, Plaintiff failed to object to any inconsistency in the verdict and thus, this could not form the basis for the court's rejection of the jury verdict.

Independent of the new trial order, the trial court erred in denying Defendant's motion for judgment in accordance with its motion for directed verdict. The evidence in this case establishes

that any duty to warn as to the risks of improper repairs was satisfied by the language provided on the tire and accompanying material, as a matter of law, Plaintiff cannot prevail on this theory. Furthermore, there is no duty to warn Plaintiff how to do a proper repair when it is undisputed that Plaintiff did not, would not, and should not perform the repair. Additionally, Defendants owed no duty to prevent the misconduct of the non-party repair facility. In any event, even if there was a duty, it was satisfied by the warning directing the consumer not to do the repairs. Finally, Plaintiff failed to establish that any lack of warning was the legal cause of Plaintiff's damages. As such, Plaintiff's speculative proof is insufficient to support a jury award.

ARGUMENT

The trial court ruled that the jury's findings as to comparative negligence, the seat belt defense and damages were contrary to the manifest weight of the evidence, that the jury verdict was inconsistent and that the verdict form was improper. Plaintiff has sought review of the Third District's decision arguing that the court failed to properly apply the "reasonableness test" set forth in E.R. Squibb and Sons, Inc. v. Farnes, 697 So. 2d 825 (Fla. 1997).

As will be shown below, the District Court properly applied the reasonableness test in overturning the trial court's order granting a new trial upon the finding that the verdict as to comparative negligence, the seat belt defense and damages was against the manifest weight of the evidence. The trial court's other two findings -- alleged inconsistency of the verdict and improper verdict form -- challenge legal rulings made by the court which are reviewed de novo. See Heckford v. Florida Department of Corrections, 699 So. 2d 247 (Fla. 1st DCA 1997). Thus, as to those aspects of the order, there is no conflict with the discretionary standard of review and no error in the trial court's order.

I. THE DISTRICT COURT PROPERLY APPLIED THE STANDARD OF REVIEW IN REVERSING THE TRIAL COURT'S DECISION THAT THE VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

In order to discuss the appellate court standard of review, it is necessary to first consider the circumstances under which a trial court can grant a new trial:

> Clearly, it is a jury function to evaluate the credibility of any given witness. Fierstos v. Cullum,

> 351 So. 2d 370 (Fla. 2d DCA 1977). Moreover, the trial judge should refrain from actions as an additional juror. Laskey v. Smith, 239 So. 2d 13 (Fla. 1970). Nonetheless, the trial judge can and should grant a new trial if the manifest weight of the evidence is contrary to the verdict. Haendel v. Paterno, 388 So. 2d 235 (Fla. 5th DCA 1980). In making this decision, the trial judge must necessarily consider the credibility of the witness along with the weight of all of the other evidence. Ford v. Robinson, 403 So. 2d 1379 (Fla. 4th DCA 1981). The trial judge should only intervene when the **manifest** weight of the evidence dictates such action.

Smith v. Brown, 525 So. 2d 868, 870 (Fla. 1988). A verdict is against the manifest weight of the evidence only when it is clear, obvious and indisputable that the jury was wrong. Miller v. Affleck, 632 So. 2d 79 (Fla. 1st DCA 1993); Andrews v. Tew, 512 So. 2d 276 (Fla. 2d 1987), rev. denied, 519 So. 2d 988 (Fla. 1988); Becker v. Williams, 652 So. 2d 1182 (Fla. 4th DCA 1995); Bern v. Spring, 565 So. 2d 809 (Fla. 3d DCA 1990).

Once the trial court exercises its discretion to award a new trial, the appellate court must determine whether there has been an abuse of that discretion. The test applied is one of reasonableness:

> If reasonable [persons] could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion.

E.R. Squibb and Sons, Inc. v. Farnes, 697 So. 2d 825, 826-27 (Fla. 1997), quoting Baptist Memorial Hospital v. Bell, 384 So. 2d 145, 146 (Fla. 1980) and Smith v. Brown, 525 So. 2d 868 (Fla. 1988). Here, reasonable persons could not have concluded that the verdict was against the manifest weight of the evidence.

But, before looking at the specific findings made by the trial court, this Court should first examine the procedure used by the court to order a new trial. Consistent with its comments when the

verdict was returned, the court granted an unrequested additur up to the amount of the verdict and then refused to permit a reduction for comparative fault or the seat belt defense. While the additur may no longer be technically at issue because it was rejected, the court's blatant attempt to use this device to rearrange what it considered to be an improper verdict cannot be ignored in determining whether the trial court abused its discretion.

It is well established that an additur may only be permitted upon motion, but no motion was made in this case. See section 768.043, Florida Statutes (1995); Fitzmaurice v. Smith, 593 So. 2d 1197 (Fla. 4th DCA 1992). Moreover, an additur may not be used to reapportion liability amongst the parties, yet the court added to the award, while dismissing the jury's allocations of comparative fault.[12] Rowlands v. Signal Constr. Co., 549 So. 2d 1380 (Fla. 1989); St. Pierre v. Public Gas Co., 423 So. 2d 949 (Fla. 3d DCA 1982); John Sessa Bulldozing, Inc. v. Papadopoulous, 485 So. 2d 1383 (Fla. 4th DCA 1986) (reversing additur which would have raised judgment to amount it would have been had the jury allocated comparative fault in manner contemplated by court.) Finally, the court ordered a new trial on all issues if Defendants chose not to accept the additur; while a proper additur would have limited the new trial to damages only.

A. The Third District Correctly Concluded That The Trial Court Abused Its Discretion In Ruling That The Jury's

[12]Thus, while the court found the zero damages awarded to be shockingly low, the court did not increase that sum and thereafter allow the deductions to be taken as required by law for comparative fault or collateral source.

Finding Of Comparative Negligence Was Against The Manifest Weight Of The Evidence.

The first basis upon which the court granted a new trial was that the jury's finding of 99% comparative fault was against the manifest weight of the evidence. Since the trial court was required to articulate the basis upon which it reached that conclusion, the starting point of the analysis must be that finding:

> **The facts were undisputed** that this accident happened on a straight, flat road, and that in the absence of the product defect, the blowout would never have occurred. **There was no evidence** that Trujillo's alleged negligence caused the tire failure. (R. 818) (emphasis added).

Reversing, the Third District ruled:

> We have thoroughly reviewed the trial transcript and record in this case and conclude that there was substantial competent evidence to support the jury verdict. The trial judge's conclusion that there was no evidence that plaintiff's alleged negligence caused the tire failure is simply incorrect. There was testimony that the plaintiff's tires suffered form chronic under inflation which condition could have caused the blowout. There was additional testimony that plaintiff was speeding at the time the tire blew and that she responded poorly by locking her brakes. As noted above, the defendant's expert, Tomlinson, testified that plaintiff was driving 75 mph when the tire failed. He opined that had she been travelling between 55 and 67 mph her vehicle would not have gone off the road. He further testified that had she not slammed on her brakes the car would not have left the roadway and overturned. This evidence, along with the other highly disputed facts of this case, created credibility issues which were properly for the jury to decide. See Tuttle v. Miami Dolphins, Ltd., 551 So. 2d 447, 482 (Fla. 3d DCA 1988) ("A trial court may not invade the province of the jury by reweighing the credibility of the witnesses and the evidence").

711 So. 2d at 608.

Plaintiff challenges the Third District's findings on these issues, arguing first that since the cause of the underinflation was the plug repair, the court was inaccurate in finding that there

was evidence that underinflation caused the blowout. (Plaintiff's brief at 15). On this issue, Defendant's expert Dodson testified that the subject tire and companion tire were being run in a grossly underinflated condition for an extended period of time. As set forth on the tire and in the owner's manual, underinflation can lead to tire failure and personal injury. (P. Exh. 7 at 1-1; D. Exh. D) Thus, under Defendants' theory of the case, the jury was free to determine that Plaintiff warned about the danger of underinflation and the failure to heed that warning constituted negligence irrespective of the cause of the underinflation. As such, the Third District was not "inaccurate" on this point, but rather the trial court was "simply incorrect." As such, it was an abuse of discretion for the trial court to conclude that there was "**no evidence**" that Trujillo's own negligence caused the tire failure.

But, there was even more evidence of Plaintiff's responsibility in causing the accident. There was testimony that Plaintiff was speeding and that had she instead been traveling at the speed limit, she would have been able to stop the vehicle before it left the roadway and rolled over. Additionally, there was evidence from both sides that had Plaintiff not slammed on the brakes, the accident would not have occurred. Finally, the jury was presented with a videotape demonstrating the ease with which a vehicle can be controlled after a tire failure.[13] Thus, far from clearly, obviously, and indisputably demanding a verdict in favor

[13] The trial judge was not present when this videotape was shown.

of Plaintiff, there was evidence from which the jury could find Plaintiff 99% responsible.

Plaintiff argues that the Third District improperly applied the standard of review because (1) it improperly based its ruling on the fact that there was substantial competent evidence to support the verdict and (2) its statement that the trial court was "simply incorrect" constituted a reweighing of the evidence. To the contrary, the issue is whether reasonable persons would agree with the trial court that "**the facts were undisputed** that . . . in the absence of a product defect the accident would not have occurred," and "**[t]here was no evidence** that Trujillo's alleged negligence caused the tire failure." Having reviewed the record in this case, the Third District correctly ruled that there **was** evidence of Trujillo's negligence in causing the tire failure and that **there was a dispute** as to whether absent the defect, the accident would have occurred.

Under similar circumstances, Florida courts have often reversed orders granting new trials. For example, in Bern v. Spring, 565 So. 2d 809 (Fla. 3d DCA 1990), the trial court ordered a new trial because it felt the evidence should have persuaded the jury to find in the plaintiff's favor. The Third District reversed:

> This case did not present a clear, indisputable series of events; the facts surrounding the incident that occurred when [the defendant] backed his car into the vehicle [the plaintiff] was allegedly occupying were in dispute. The record reveals sufficient evidence and testimony to support a finding in [the defendant's] favor. Thus, the jury verdict was not contrary to the weight of the evidence. The trial court's order granting a new trial was clearly improper and constituted an abuse of discretion. Id. at 810.

Similarly, in Becker v. Williams, 652 So. 2d 1182 (Fla. 4th DCA 1995), the Fourth District reversed a new trial order in a medical malpractice case because the trial judge, disagreeing with the jury, chose to believe plaintiff's experts over defendants' experts, and reweighed the evidence. 652 So. 2d at 1185. See also Tuttle v. Miami Dolphins, Ltd., 551 So. 2d 447, 482 (Fla. 3d DCA 1988) (error to grant a new trial where there was testimony supporting prevailing party's version of the accident); Morrison v. Intercounty Constr. Corp., 368 So. 2d 104 (Fla. 4th DCA 1979) (setting of precise percentage of negligence is peculiarly within the judgment of the jury.); Andrews v. Tew, 512 So. 2d 276 (Fla. 2d DCA 1987), rev. denied, 519 So. 2d 988 (Fla. 1988) (court improperly reweighed the evidence to grant a new trial); Ludlum v. Rothman, 503 So. 2d 974 (Fla. 4th DCA 1987) (court impermissibly gauged credibility of witnesses and assessed weight to be given conflicting testimony).

Because the only way for the trial court to have reached its conclusion that there was no evidence of comparative fault was to have disbelieved Defendants' expert, whom the jury apparently chose to believe, the court usurped the function of the jury. As such, the trial court abused its discretion in granting a new trial.

B. The Third District Correctly Concluded That The Trial Court Abused Its Discretion In Rejecting The Jury's Determination As The Seat Belt Defense.

With respect to the seat belt defense, the trial court's findings were lengthier, but equally unsupportable. First, the court found that "Defendants did not present testimony of any medical doctors to prove how the mechanics of Plaintiff's injury

(C-2 fracture) was caused by her failure to wear a seat belt," that Defendants' expert Tomlinson was not qualified to offer opinions as to biomechanics, and that Tomlinson's testimony as to the mechanism of injury was based on a description from defense counsel. (T. 818-19).

Plaintiff complains that the Third District accepted Tomlinson's testimony without addressing his lack of competency and by mischaracterizing his testimony. However, the Third District did not need to address the competency question because the record is crystal clear that Tomlinson's opinion on the effect of wearing a seat belt was admitted **without objection**. (T. 1412, 1500-02, 1507). As such, these arguments have been waived. Jennings v. Stewart, 308 So. 2d 611 (Fla. 3d DCA 1975); Stockman v. Duke, 578 So. 2d 831 (Fla. 2d DCA 1991).

Moreover, while Plaintiff assumes Defendants' evidence of medical causation came from their accident reconstructionist, Tomlinson, the evidence reflected that Tomlinson did **not** opine as to the cause of Plaintiff's injury, he simply accepted the medical opinion of Plaintiff's consulting physician, Dr. Goodgold that the injury was caused either by hypertension caused by hitting the roof or by ejection. (T. 438, 442) Tomlinson then testified, **without objection**, that based on the physical evidence from the belt, had Plaintiff been belted she could not have hit her head in the manner which Plaintiff's medical doctor said would cause the injury, nor would she have been ejected. (T. 1412, 1500-02, 1507) Plaintiff simply fails to recognize the distinction between offering the medical opinion and relying upon that opinion to testify in an area within Tomlinson's expertise.

The court also found that even if qualified, Tomlinson's testimony was based on inadequate data since he relied only upon the assertions of counsel. This again reflects a misunderstanding and/or misreading of the record. Tomlinson specifically indicated that he had read Dr. Goodgold's trial testimony. (T. 1565)[14]

Finally, the trial court concluded it was against the manifest weight of the evidence to find that had Plaintiff been wearing a seat belt, she would have avoided all injuries including bruises, cuts, or stitches. Given that the focus of Plaintiff's case was on the "severe injury" -- i.e., her neck, the jury may have decided not to include the cuts and scrapes as part of its damage award. In that event, the "damages" awarded, would have only been for the very injuries which Defendants' expert attributed to the failure to wear a seat belt.

In light of the foregoing, there was no basis in the record to support a finding that Defendants failed to present competent evidence supporting their seat belt defense. Thus, once again, no reasonable person would agree with the trial court's finding that the jury's verdict as to the seat belt defense was against the manifest weight of the evidence. As such, the Third District properly reversed the new trial order.

C. The Third District Correctly Concluded That The Trial Court's Findings As To Damages Constituted An Abuse Of Discretion.

[14] Experts were excluded from the rule of sequestration and thus could read trial testimony.

The trial court concluded that $10,000 for non-economic damages was shockingly low. Specifically, the court found:

> The evidence was undisputed that the Plaintiff suffered a C-2 fracture of her spine, was in a halo brace for at least three months, and suffered various other bruises, cuts, stitches, and a broken rib. **It was undisputed** that Plaintiff suffered permanent loss of rotation in her neck, permanent loss of sensation and numbness in her scalp, permanent pain in her neck and right arm, and significant permanent memory loss. The plaintiff's experts testified that Trujillo had at least a 4% or a 12% permanent disability and that she suffered memory loss as a result of the accident. Defendants presented no expert testimony in rebuttal of the findings in ¶ j(ii) and (iii). (sic) (R. 820) (emphasis added). The evidence that Ms. Trujillo has a permanent injury and continues to suffer at least some pain and suffering show that a $0.00 award for future damages is shockingly low and contrary to the manifest weight of the evidence. (R. 820-21).

Once again however, reasonable persons could not agree that the verdict was against the manifest weight of the evidence.

Perhaps the primary problem with the court's analysis was its conclusion that significant aspects of Plaintiff's damages were undisputed. The record reveals otherwise. The fact that Defendants did not call their own medical experts to testify does not mean that Plaintiff's testimony was undisputed. To the contrary, Defendants were able to rebut Plaintiff's damages claims through their cross examination of Plaintiff's witnesses.

First, as to damages for past pain and suffering, the evidence showed that Plaintiff's injury was in essence a broken bone which did not cause any spinal cord or nerve injury. She consistently reported no pain and the fracture healed well. After discharge from her physician, she sought no further treatment and there was evidence that the injury would not cause future arthritic problems. Plaintiff was awarded $10,000 for these injuries.

As to future pain and suffering, the court focused on Dr. Goodgold's finding of a disability. However, on cross examination, it was shown that he did not properly make this determination, and thus, the jury was certainly free to disregard his opinion. And, most importantly, the jury's own observation of Plaintiff was "evidence" that she was in no pain and suffered no permanent impairment.

The trial court also found the evidence to be undisputed that Plaintiff suffered other permanent injuries. In fact, there was abundant evidence that the complaints of pain in her right arm, loss of sensation in her scalp, and memory loss did not arise until **years after** the accident. Indeed, Plaintiff conceded as much on the issue of memory loss. (T. 1079) Given the absence of proof of causation and the lapse of time between the accident and the onset of Plaintiff's claimed additional damages, the jury was free to reject these claims and limit their award to past damages.

As to economic damages, the trial court found:

> The evidence also undisputedly showed that Trujillo missed about six months of work as a result of the accident, yet the jury awarded no lost wages. (R. 821).

In fact, the parties agreed that Plaintiff was reimbursed from collateral sources for lost wages in the year of the accident and thus, no evidence of losses was presented for that year. Beyond that, there was evidence that the business increased each year as did Plaintiff's personal income. Thus, the jury was entitled to reject any claim for lost wages and reasonable persons could not agree to the trial court's contrary conclusion.

The Third District's ruling is entirely consistent with many decisions from Florida courts which have reversed orders improvidently granting a new trial on the issue of damages. For example, in State Farm Mut. Auto. Ins. Co. v. Brooks, 657 So. 2d 17 (Fla. 3d DCA 1995), the trial court granted a new trial after a jury awarded no damages in spite of expert medical testimony that the plaintiff was suffering discomfort. The Third District reversed, finding that the evidence on the damages sought was conflicting, and that the jury may have perceived a "lack of veracity" as to certain testimony, and that the "discrepancies and vacillations" in the plaintiff's own testimony "could have provided sufficient conflicting lay evidence to support the jury's rejection of certain medical evidence presented." Id. at 18, 19. See also Morrison, 368 So. 2d at 105 ("although we could well affirm a much higher award, we cannot rule that the verdict lacks support in the record. Here again, this is a matter peculiarly in the decisional power of the jury"); Frye v. Suttles, 568 So. 2d 983, 985 (Fla. 1st DCA 1990) ("we cannot second guess the jury's measurement of what is inherently measurable"); Rice v. Everett, 630 So. 2d 1184 (Fla. 5th DCA 1994) (jury could reject medical testimony in favor of evidence of plaintiff's physical capabilities).

Likewise in the present case, the jury was free to believe that Plaintiff had fully recovered from her injuries and was not entitled to future damages. Thus, for example, while Plaintiff suggests that just because the doctor was discredited as to his opinions concerning some symptoms, it does not discredit his opinions as to permanency, in fact, the doctor's credibility was for the jury to decide. Accordingly, because reasonable persons

could not agree that the amount of the verdict was against the manifest weight of the evidence, the court erred in granting a new trial.

IV. THE TRIAL COURT'S LEGAL RULINGS AS TO THE VERDICT AND VERDICT FORM WERE ERRONEOUS.

Independent of its findings as to the weight of the evidence, the trial court concluded that the form of the verdict was improper and that the verdict was inconsistent. Plaintiff complains that the Third District's decision is once again in conflict with the test of reasonableness and that reversal is required in any event because the court failed to address the issue.

In contrast to the broad deference accorded the trial court's decision to override the jury verdict on the grounds that it is contrary to the manifest weight of the evidence, the appellate courts stand on an equal footing in addressing a legal question. See Heckford v. Florida Department of Corrections, 699 So. 2d 247 (Fla. 1st DCA 1997) (error in ruling on admission of evidence); see also Tri-Pak Machinery, Inc. v. Hartshorn, 644 So. 2d 118, 119 (Fla. 2d DCA 1994); American Employers Insurance Co. v. Taylor, 476 So. 2d 281, 283 (Fla. 1st DCA 1985) (if the trial court's ruling is "grounded on a question of law, the appellate court is on the same footing as the trial judge . . and the broad discretion rule loses much of its force and effect.") State Farm Mutual Automobile Insurance Co. v. Gage, 611 So. 2d 39 (Fla. 4th DCA 1992). As such, there certainly is no conflict with the "reasonableness" standard as set forth in E.R. Squibb.

Moreover, even if these issues were ones to be measured by some discretionary standard, the law is well established that an order granting a new trial based on unpreserved error automatically constitutes an abuse of discretion absent a finding of fundamental error. Sears, Roebuck & Co. v. Jackson, 433 So. 2d 1319 (Fla. 3d DCA 1983); Tri-Pak. As the following discussion demonstrates, neither of these issues were preserved for appellate review. Thus, while Plaintiff complains that the Third District did not specifically address these issues in their opinion, it was not required to address an issue that was not properly before it. Even if preserved, no error in the verdict has been shown.

1 A New Trial Was Not Required Based On The Form Of The Verdict.

In an additional effort to avoid the comparative fault and seat belt findings, the trial court concluded that the:

> failure to give Plaintiff's verdict form, which instructed the jury not to consider Plaintiff's failure to wear a seat belt in considering the preliminary comparative negligence question, and which differentiated the comparative negligence for the accident from the damages caused by the failure to wear the seat belt, contributed to the jury's confusion and necessitated a new trial. (R. 819-20).

The trial court order in this regard was in error.

1. Plaintiff's failure to object to the form of the verdict waived the issue for review.

Pursuant to well-established Florida law, objections with respect to jury instructions and verdict form must be specifically raised before the trial court in order to preserve the issue for appeal. Thus, in Middelveen v Sibson Realty, Inc., 417 So. 2d 275, 276-77 (Fla. 5th DCA), rev. denied, 424 So. 2d 762 (Fla. 1982), the court observed:

> [t]o properly preserve error for appellate review on the giving of an instruction requested by the opposing party, it is necessary that a distinct and specific objection be made. A general objection is not sufficient.
>
> Thus, in the face of no objection or only a general objection to instructions requested by the opposing party, the trial court has not been given the opportunity to rule on a specific point of law, and there is no issue created or preserved for appellate review. (citations omitted).

See also DuPuis v. 79th Street Hotel, Inc., 231 So. 2d 532 (Fla. 3d DCA), cert. denied, 238 So. 2d 105 (Fla. 1970); McDonough Power Equip., Inc. v. Brown, 486 So. 2d 609, 610 (Fla. 4th DCA 1986).

Moreover, the mere filing of an alternative proposal does not preserve the issue for review unless the alternative is brought to the trial court's attention. Concept, L.C. v. Gesten, 662 So. 2d 970, 972, n.1 (Fla. 4th DCA 1995) (Florida Rule of Civil Procedure 1.470(b) contemplated not simply the filing of proposed instructions, but that the requested charge be brought to the court's attention); Luthi v. Owens-Corning Fiberglas Corp., 672 So. 2d 650 (Fla. 4th DCA 1996) (error in failing to give a requested charge not preserved where plaintiff never brought the particular instruction to the court's attention at the charge conference, and thus it was not considered).

The record in this case is clear that Plaintiff did not preserve the issue of the propriety of the verdict form as a basis for a new trial or appeal because Plaintiff did not object to the language regarding comparative fault or the seat belt defense. Moreover, while Plaintiff submitted a verdict form with the language she now seeks, she never brought this proposal to the trial court or opposing counsel's attention so that the court could

address these issues. As a result, the court never had an opportunity to accept or reject the questions on Plaintiff's proposed verdict form. Accordingly, it was error as a matter of law to grant a new trial based on this unpreserved error. Sears; Cushman & Wakefield of Florida Inc. v. Comreal Miami Inc., 683 So. 2d 208 (Fla. 3d DCA 1996) (preservation of objection applies to new trial order as well as appeal).[15]

2. There was no error in the Verdict Form which would support a new trial.

Even assuming arguendo that the issue was preserved, the trial court erred in concluding that the verdict form resulted in confusion which necessitated a new trial. To the contrary – the verdict form reflects Florida law on this defense and does not support a finding that the jury was confused.

In Insurance Company of North America v. Pasakarnis, 451 So. 2d 447, 454 (Fla. 1984), the Supreme Court first recognized the seat belt defense and set forth the verdict interrogatories relating to the seat belt defense. Id. at 454.[16] The form set forth in Pasakarnis was presented to this jury.

Second, a review of the charges as a whole reveals that the jury was properly advised on the distinction between comparative fault and the seat belt defense. The instructions identified only

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[15] Even though the preservation issue has been raised throughout and was a significant aspect of the argument in the Third District, Plaintiff fails to even acknowledge the waiver issue in its brief.

[16] While there have been a number of changes to the defense both legislatively and by common law, Pasakarnis is still controlling with respect to this 1985 accident. And, obviously, the Court's interpretation of a subsequently added statute in Ridgley v. Safety Kleen Corp., 693 So. 2d 934 (Fla. 1996) is absolutely irrelevant to the issues before the Court.

two defenses with respect to comparative negligence: Plaintiff's negligence in operating the vehicle and Plaintiff's negligence in maintaining the tire. There was no mention of the failure to wear a seat belt. Later, after the damage instructions were read, the jury was told:

> An additional question for your determination on the defense is whether some or all of Vivian Trujillo's damages were caused by her failure to wear a seat belt. (T. 1718)

These instructions were then carried through to the verdict form where separate questions were asked on each issue. There is simply no basis to conclude that the jury was confused by the verdict form or that they twice reduced the verdict based on the same negligent acts.

The mere fact that the jury made a substantial reduction to the verdict either for comparative fault, or the seat belt defense or both, does not mean that there was error. See Houghton v. Bond, 680 So. 2d 514 (Fla. 1st DCA), rev. denied, 682 So. 2d 1099 (Fla. 1996) (reversing new trial order and reinstating verdict finding plaintiff 80% responsible for collision and 90% responsible for failing to wear seat belt). This is especially true given the jury's question during deliberations which demonstrated their intent to find Plaintiff responsible for her injuries. See Atlantic Coast Line R. Co. v. Price, 46 So. 2d 481 (Fla. 1950) ("although the form of the verdict was imperfect . . . we think their intent was plain, and this after all, is the test."). The jury's intent in response to those questions was clear and it should be given not

be disturbed. See McElhaney v. Uebrich, 699 So. 2d 1033 (Fla. 4th DCA 1997); Robbins v. Graham, 404 So. 2d 769 (Fla. 4th DCA 1981).

C. The Trial Court Erred In Granting A New Trial Based On An Alleged Inconsistency Between The Jury's Findings.

The court also ruled "the jury's findings that the Defendants placed a defective product on the market which caused Plaintiff's damages, is inconsistent with the jury's finding that Plaintiff's failure to wear a seat belt was 100% cause of her damages." (R. 817) This finding was erroneous because the issue was not preserved and in any event, no inconsistency exists.

1 Plaintiff affirmatively waived her opportunity to challenge any alleged inconsistent verdict.

Florida law is well settled that the failure to object to an inconsistent verdict before the jury is discharged constitutes a waiver. Delva v. Value Rent-A-Car, 693 So. 2d 574 (Fla. 3d DCA 1997). For example, the court in Keller Indus., Inc. v. Morgart, 412 So. 2d 950, 951 (Fla. 5th DCA 1982), held:

> While we agree with appellant that there was error regarding the inconsistent verdicts, we cannot reverse the judgment. . . Trial counsel also failed to bring the inconsistent verdicts to the attention of the trial court before the jury was discharged thus preventing the timely correction of the problem by the trial judge. For all we know, defendant's trial counsel intentionally, for tactical reasons, chose not to bring the problem to the court's attention.

See also Brown v. North Broward Hosp. Dist., 521 So. 2d 143 (Fla. 4th DCA 1988) (by failing to bring the issue to the court's attention before the jury was discharged, parties waived argument that finding hospital, but not treating physician liable, was inconsistent); Holland America Cruise, Inc. v. Underwood, 470 So.

2d 19, 21 (Fla. 2d DCA 1985); Gould v. National Bank of Florida, 421 So. 2d 798, 802 (Fla. 3d DCA 1982).

In the present case, Plaintiff acknowledged that the appropriate relief in the event of an inconsistent verdict would be to resubmit the case to the jury. However, when the jury returned its verdict and the parties were specifically asked whether they sought any relief before the jury was discharged, Plaintiff responded that she was not asking the trial court for anything at that time. It is clear that Plaintiff affirmatively chose not to have the case resubmitted and thus, she waived her ability to object to the allegedly inconsistent verdict rendered in this case. Delva. To now be permitted to go back and relitigate the issues would give Plaintiff "an unearned additional bite at the apple." Sweet Paper Sales Corp. v. Feldman, 603 So. 2d 109 (Fla. 3d DCA 1992). See also Odom v. Carney, 625 So. 2d 850 (Fla. 4th DCA 1993). Thus, the court erred as a matter of law in granting a new trial on this basis. Sears, Roebuck & Co. v. Jackson, 433 So. 2d 1319 (Fla. 3d DCA 1983); Cushman.

2. The jury's findings were not inconsistent.

Even if the issue were preserved, it is clear that there is no inconsistency in the jury's finding that there was a defect, but that 100% of Plaintiff's damages were caused by the failure to wear a seat belt. First, the standard jury instruction on the seat belt defense and the one used in this case specifically asks whether "some or **all** of Plaintiff's damages were caused by Plaintiff's failure to use a seat belt." See Fla. S.J.I. 6.14. Thus, Florida

law contemplates that a jury may find 100% of Plaintiff's damages to be caused by Plaintiff's action.

Second, the jury may have concluded that the failure to warn caused the accident thereby resulting in Plaintiff's injuries, but that if Plaintiff had been wearing her belt she would not have been injured at all. Although the court clearly disagreed with the jury's findings, it could articulate no reason such findings would be inconsistent. Florida law is clear, however, that "[a] verdict is clothed with a presumption of regularity and is not to be disturbed if supported by the evidence." Gould, 421 So. 2d at 802. See also Sweet Paper Sales, 603 So. 2d at 110. Accordingly, the trial court erred in finding the verdict to be inconsistent and in ordering a new trial.

III. ALTERNATIVELY, THIS COURT SHOULD FIND THAT THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION FOR DIRECTED VERDICT.

In addition to arguing that the court abused its discretion in granting a new trial, Defendants argued below that they were entitled to a directed verdict because Plaintiff failed to establish the breach of a legal duty which was a proximate cause of damage to Plaintiff. See, e.g., Greene v. Flewelling, 366 So. 2d 777 (Fla. 2d DCA 1978), cert. denied, 374 So. 2d 99 (1979). Judgment should be entered in favor of Defendants on this alternative basis.

1 Plaintiff Failed to Prove the Breach of Duty to Warn the Consumer of the Risks Associated with an Improper Repair.

The jury was asked to determine whether Defendants failed "to warn of the risks in failing to properly repair punctures in

tires." The improper repair according to Plaintiff was an external plug and the "risk" was underinflation which could cause a tire failure. The undisputed evidence shows, however, that Defendants did warn of the risk and Plaintiff herself concedes that she was aware of this danger.

The tire, the owner's manual, and the warranty all warned the owner that underinflation can lead to tire failure and serious injury. Plaintiff admitted that she had read these warnings, that she followed them, and that she was otherwise aware of this information as a matter of common sense. Accordingly, it was clear that any duty to warn was satisfied since Plaintiff was made aware of the danger. See, e.g., Clark v. Boeing Co., 395 So. 2d 1226 (Fla. 3d DCA 1981) (because plaintiff was aware that opening the airplane door would expose her to noise and fumes, and she voiced her objection to the captain, defendants had no duty to warn under the circumstances).

Plaintiff's only challenge to this warning was that it should have specifically referred to an improper repair as one of the causes of underinflation. In contrast, Defendants' experts explained that the most effective warning was one directed to the symptom -- underinflation -- rather than the laundry list of causes. In fact, that list would be too numerous to identify and could not be placed on the tire. Plaintiff presented no evidence to refute this point, other than her own "opinion." As such, Plaintiff failed to present any competent evidence that there was a breach of duty and, as such, a directed verdict was proper.

B. Plaintiff Failed to Prove the Breach of a Duty to Warn a Consumer not to Plug a Tire.

Even if this Court looks beyond the precise question asked of the jury and considers whether Defendants breached a duty by failing to warn Plaintiff not to plug a tire, Defendants were still entitled to a judgment in their favor because there is no legally recognized duty to warn a consumer how to do a repair which the consumer is warned not to perform.[17] Moreover, if such a duty existed, it was satisfied by the existing warnings.

1 Duty to warn.

Plaintiff concedes that she did not repair tires, that she read the material which warned her not to repair a tire herself, and she relied upon the tire repair facilities to do this work. Significantly, Plaintiff's own expert, Jordan, testified that because it is the technician's job to know how to do a repair technicians do not rely upon the consumer to instruct them and thus, the consumer need not warn the repair facility.

On these facts, there is no legal basis upon which to impose upon Defendants a duty to warn Plaintiff that plugging a tire is improper when it was the repair facility, not Plaintiff that would do the repair. It is undisputed that the misconduct here was that of the repair facility. Florida law has recognized that a seller does not have a duty to protect the buyer against the negligence of third parties. Vic Potamkin Chevrolet Inc. v. Horne, 505 So. 2d 560 (Fla. 3d DCA 1987), approved, 533 So. 2d 261 (Fla. 1988)

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[17] This issue as to whether a legal duty exists is a question of law for the court's determination. See Cecil v. D'Marlin, Inc., 680 So. 2d 1138 (Fla. 3d DCA 1996).

(finding no duty on the part of a car dealer to insure that a buyer has a valid license). See also Daly v. Denny's Inc., 694 So. 2d 775 (Fla. 4th DCA 1997) (no duty to prevent misconduct of third persons). In fact, Plaintiff's theory, taken to its illogical conclusion, would mean that a customer should be warned about how a mechanic should do a brake repair and a homeowner should be warned how an electrician should perform electrical work in the home. Quite simply, the duty to warn cannot be extended to these contexts.

The learned intermediary doctrine, a rule which has been traditionally applied to preclude liability against drug manufacturers where the manufacturer warned the prescribing physician is instructive here. In those cases, the court has explained:

> Prescription drugs are likely to be complex medicines, esoteric in formula and varied in effect. As a medical expert, the prescribing physician can take into account the propensities of the drug, as well as the susceptibilities of his patient. His is the task of weighing the benefits of any medication against its potential dangers. The choice he makes is an informed one, an individualized medial judgment bottomed on a knowledge of both patient and palliative Pharmaceutical companies then, who must warn ultimate purchasers of dangers sold over the counter, in selling prescription drugs are required to warn only the prescribing physician, who acts as a learned intermediary between manufacturer and consumer.

Buckner v. Allergon Pharmeceuticals, Inc., 400 So. 2d 820, 822 (Fla. 5th DCA), rev. denied, 407 So. 2d 1102 (Fla. 1981) (citations omitted). See also Felix v. Hoffman-LaRoche, 540 So. 2d 102, 104 (Fla. 1989). The defense is further justified by the patient's primary reliance on the judgment of the physician. Id. at 823.

Applying this doctrine, the court in Perez v. Lockheed Corp., 88 F.3d 340 (5th Cir.), cert. denied, 117 S. Ct. 583 (1996), found that an aircraft manufacturer had no duty to warn military pilots about the dangers inherent in the electrical circuit designs because that duty was discharged by warning the military as a learned intermediary. See also Eyster v. Borg-Warner Corp., 206 S.E.2d 668 (Ga. Ct. App. 1974) (no duty on manufacturer to warn of danger which is well known in the trade); Ritz Car Wash, Inc. v. Kastis, 976 S.W. 2d 812 (Tex. Ct. App. 1998); Mlott v. Whirlpool Corp., 676 N.Y.S.2d 383 (NY Sup. Ct. 1998) (manufacturer had no duty to instruct technician how to do installation that he was familiar and experienced in accomplishing).

Similarly here, Plaintiff was warned, and indeed she agreed that a tire repair should be performed only by trained personnel. Plaintiff also acknowledged that she relied upon the skill and judgment of the trained, well-informed technician to ensure her safety. The tire repair industry in turn was warned how to perform a proper repair. Accordingly, the policy underlying the "learned intermediary defense" is applicable to preclude liability here.

2. Breach of duty.

Moreover, even assuming there was a duty to warn concerning proper repair methods, that duty was met by virtue of warnings to consumers not to repair the tires themselves. It is further supported by the voluminous warnings sent to the repair facilities which undeniably warned how to properly repair a tire. In light of the foregoing, Defendants are entitled to a judgment as a matter of law on Plaintiff’s failure to warn claim.

C. Plaintiff Failed to Prove That Any Alleged Breach of Duty was the Legal Cause of Plaintiff's Damage.

In addition to the deficiencies in Plaintiff's proof as to duty and breach of duty, there is an absence of any proof of a causal link between Plaintiff's claim of a failure to warn and her injury. Florida law is well established that plaintiff must prove that defendant's act was a proximate cause of plaintiff's injury. West v. Caterpillar, 336 So. 2d 80 (Fla. 1976). To meet this test, Plaintiff must prove that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. Gooding v. University Hosp. Bldg. Inc., 445 So. 2d 1015, 1018 (Fla. 1984).

Thus, testimony about a **possible** cause of injury is insufficient. Plaintiff may not obtain a verdict based on speculation. See Reaves v. Armstrong World Indus., 569 So. 2d 1307 (Fla. 4th DCA 1990), rev. denied, 581 So. 2d 166 (Fla. 1991); Husky Indus., Inc. v. Black, 434 So. 2d 988 (Fla. 4th DCA 1988); Vecta Contract Inc. v. Lynch, 444 So. 2d 1093 (Fla. 4th DCA), rev. denied, 453 So. 2d 44 (Fla. 1984). Along the same lines, a plaintiff may not obtain a verdict by stacking one inference upon another unless the first inference is established to the exclusion of any other possible inference. Voelker v. Combined Ins. Co. of America, 73 So. 2d 403 (Fla. 1954).

In the present case, Plaintiff's causation proof is deficient because Plaintiff presented no evidence as to the circumstances surrounding the repair of the tire. Thus, she did not recall: (1) whether she had the tire repaired, (2) whether someone else

took the tire to be repaired, (3) when the tire was actually repaired, (4) who performed the repair, or (5) whether she even knew that the tire had been repaired prior to the accident.

Even if Plaintiff tries to fill the gaps by the use of inferences, the jury would have had to make multiple separate inferences – each of which is a leap of faith in the absence of supporting evidence – to reach a conclusion that the lack of a warning to Plaintiff about a prior tire repair caused Plaintiff's accident. Because there is no proof on causation, Plaintiff's burden has not been met. See Tschudy v. Firestone Tire and Rubber Co., 378 So. 2d 56 (Fla. 4th DCA 1979), cert. denied, 388 So. 2d 1119 (Fla. 1980) (Anstead J. specially concurring) (affirming directed verdict in favor of tire manufacturer on failure to warn claim where there was no proof as to "when, where or by whom" the tire was repaired and thus, the absence of a causal link between the claimed lack of warning and plaintiff's injury); American Motors Corp. v. Ellis, 403 So. 2d 459 (Fla. 5th DCA 1981), rev, denied, 415 So. 2d 1359 (Fla. 1982) (only by engaging in speculation could court find causal relationship between alleged failure to warn and injury; as such directed verdict should have been granted). A directed verdict should have been granted. Westley v. Hub Cycles, Inc., 681 So. 2d 719 (Fla. 2d DCA 1996), rev, denied, 677 So. 2d 842 (Fla. 1996); Barati v. Aero Indus., Inc., 579 So. 2d 176 (Fla. 5th DCA), rev. denied, 591 So. 2d 180 (Fla. 1991); Lopez v. FP&L, 501 So. 2d 1339 (Fla. 3d DCA), rev. denied, 513 So. 2d 1062 (Fla. 1987).

IV. ANY RETRIAL MUST INCLUDE ALL LIABILITY ISSUES, AND EXCLUDE DAMAGES.

In her final argument, Plaintiff contends that if awarded a new trial, it should be limited to comparative negligence and damages. Such an argument flies in the face of relevant law and is inconsistent with Plaintiff's argument in support of a new trial. Should this Court find that a new trial must be granted, then all liability issues must be tried including defect, causation and comparative fault. Moreover, under no circumstance is there a basis to retry the issue of damages at all.

First and foremost, it is clear that assuming a new trial were to be granted, the issue of defect and causation could not be separated from the comparative negligence determination. Plaintiff has argued that the jury verdict was inconsistent insofar as it found that the defect was the cause of Plaintiff's damages, but then found that Plaintiff's damages were 100% "caused by her failure to wear a seat belt" and that Plaintiff was 99% comparatively negligent. While Defendants strongly disagree with the notion that a new trial is required, it is apparent that if Plaintiff is right, the inconsistency can only be cured by retrying liability as well as comparative fault. Otherwise, the court would simply be guessing that the jury was confused on comparative fault, but not on liability. In fact, given the jury's question during deliberations,[18] it is quite obvious that their intent was to find

[18] The jury's question was as follows:

> We have a problem with interpretation. Does it mean that if there is no specific warning about improper repair, then by virtue of that omission must we answer yes to Number 1? If we answer yes to Number 1, can we still answer 100 percent for Vivian Trujillo on Number 3. (T. 1728)

Plaintiff 100% at fault. Thus, allowing a retrial on comparative fault without a retrial on liability would be improper and would result in a miscarriage of justice.

On this issue, Plaintiff's reliance on Shufflebarger v. Galloway, 668 So. 2d 996 (Fla. 3d DCA 1996) is to no avail. In Shufflebarger, the error in the first trial related to the failure to include a third party on the verdict form. This court found that since the negligence of the third party had already been litigated through an empty chair argument, there was no basis to conclude that defendants' liability should be retried. In contrast, in the present case, Plaintiff contends that there was confusion regarding the different questions on the verdict form which included the liability question. Thus, it would constitute nothing more than speculation to surmise that the jury understood the liability question, but not the comparative fault question.

Turning to the issue of damages, Plaintiff has articulated no basis from which this Court should conclude that a retrial on damages is necessary. As set forth above, the trial court abused its discretion in concluding that the verdict as to damages was against the manifest weight of the evidence. Further, there has been no argument that any alleged confusion on the liability and comparative fault findings spilled over into damages. Accordingly, should the Court decide that a new trial is proper, the parameters of that trial should not include damages.

CONCLUSION

Based on the foregoing, Defendants respectfully request this Court to affirm the Third District's decision.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this ____ day of March, 1999 to Luis Stabinski, Esq., Attorney for Plaintiff, Stabinski & Funt, 757 N.W. 27th Avenue, Third Floor, Miami, FL 33125-3093 and Bambi Blum, Esq., Bambi Blum, P.A., 46 SW First St., Miami, FL 33130-1610.

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WENDY F. LUMISH