IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,201

SELMA GROSS,

Petitioner,

vs.

REBECCA LYNN LYONS,

Respondent.

INITIAL BRIEF OF PETITIONER ON THE MERITS

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JURISDICTIONAL STATEMENT

The Petitioner, Selma Gross, invokes the discretionary jurisdiction of the Supreme Court to address the following question which has been certified by the Fourth District Court of Appeal as one of great public importance:

> WHERE A PLAINTIFF IS INVOLVED IN TWO UNRELATED ACCIDENTS AND SUES ONLY THE TORTFEASOR IN THE FIRST ACCIDENT, ARE THE PRINCIPLES OF APPORTIONMENT CONTAINED IN C.F. HAMBLEN, INC. V. OWENS, 127 FLA. 91, 172 SO. 694, 696 (FLA.1937), AND WASHEWICH V. LeFAVE, 248 SO. 2D 670, 672 (FLA. 4TH DCA 1971) APPLICABLE?

Gross v. Lyons, 23 Fla. L. Weekly D2185 (Fla. 4th DCA Sept. 23, 1998). This court has jurisdiction and discretion to entertain this question pursuant to article V, section 3(b)(4) of the Florida Constitution.

This question encompasses issues raised below regarding apportionment and the proper jury instruction to be given when a plaintiff is involved in two unrelated automobile accidents and elects to only sue the first tortfeasor. Gross seeks further review from this court since the district court decision finds for the first time that where apportionment of damages is not possible, the aggravation of injuries from a subsequent accident may be charged to a first tortfeasor.

This court has jurisdiction to review all issues raised below, even those issues unrelated to the certified question. See State v. Perry, 687 So. 2d 831 (Fla. 1997)

(recognizing jurisdiction to review all issues, but declining to review issue raised on cross-appeal because issue unrelated to certified question); Feller v. State, 637 So. 2d 911, 914 (Fla. 1994) (finding that given jurisdiction on the basis of the certified question, court has jurisdiction over all of the issues raised in case). In this appeal, Petitioner will be addressing mainly those issues related to the certified question. However, in order to have this court fully review all the issues raised at the Fourth District Court of Appeal, Petitioner will be arguing in support of the jury's verdict.

Additionally, this court may have jurisdiction to review this case pursuant to article V, section 3(b)(3) of the Florida Constitution. As stated by Judge Warner in her dissent and in her special concurrence on the motion for rehearing, the majority opinion conflicts with C.F. Hamblen, Inc. v. Owens, 127 Fla. 91, 172 So. 694 (1937) (finding that person whose negligence aggravates existing ailment must pay for original injuries and for results of disease), and with Great Atlantic & Pacific Tea Co. v. Lanteri, 221 So. 2d 158, 159 (Fla. 3d DCA 1969) (finding that jury properly instructed that if jury found plaintiff suffered damages as result of initial accident, it should eliminate from any damage award consideration of injuries sustained in subsequent accident).

STATEMENT OF THE CASE AND FACTS [1]

Petitioner/Defendant below, Selma Gross, seeks further review from the decision of the Fourth District Court of Appeal reversing and remanding this case for a new trial on all issues in light of the jury instruction given concerning a subsequent accident. Gross v. Lyons, 23 Fla. L. Weekly D1163 (Fla. 4th DCA May 13, 1998). This is a personal injury action arising out of an automobile accident which occurred on July 2, 1992. (R1. 1-2). The automobile operated by Respondent and Plaintiff below, Rebecca Lynn Lyons, was rear-ended by an automobile operated by Petitioner and Defendant below, Selma Gross. (T5. 526). Prior to trial, Gross admitted liability for causing the first accident, but denied being the legal cause of all of Lyons' damages. (R1.183).

During trial the issue of causation was heavily contested. The following witnesses testified on behalf of the Plaintiff: Dr. Steven Silverman, a chiropractor who treated Plaintiff (T2. 94-124); Plaintiff herself (T2. 127-146; T3. 215-232, 285-301; T5. 419-451); Plaintiff's mother, Thelma Lyons (T3. 153-189); Plaintiff's husband, Graham

[1] "R1.", "R2.", and "R3." refer to the record on appeal in this case. Although not indicated in the Index to the Record, Petitioner has assumed that the record was prepared in accordance with Rule 9.200(d)(B) and separated into "consecutively numbered volumes not to exceed 200 pages each." "T1.", "T2.", "T3", "T4.", "T5.", "T6.", "T7.", and "T8." refer to the eight volumes of the trial transcript included in the record on appeal. "PX" and "DX" refer to the plaintiff's and defendant's trial exhibits. The parties will be referred to by their proper names or as they appeared below. Unless otherwise indicated, all emphasis is supplied.

Bollerman (T3. 190-213; T7. 645-646); Bernard Pettingill, Ph.D., an economist (T3. 235-284); and Dr. G. Clay Baynham, M.D., an orthopedic surgeon who treated Plaintiff (T4. 318-409).

The following witnesses testified on behalf of the Defendant: Dr. Norman Henry Pevsner, a radiologist who reviewed the x-rays, MRIs and the CT scans of the Plaintiff (T5. 453-518); Defendant herself (T5. 524-533; T7. 771-772); Alvin S. Hyde, M.D., Ph. D., a retired physician and physiologist who consults in the area of crash injury causes and testified as biomechanical expert (T6. 568-617; T7. 647-701); Dr. Richard J. Stroop, an anesthesiologist, who attempted to give Plaintiff a lumbar epidural to block pain on October 21, 1992 (T6. 619-634); Cliff Berger, a manager at Braman Honda who testified regarding the lack of damage to Plaintiff's vehicle (T7. 702-711); and Dr. Donald Lambe, an orthopedic surgeon, who performed an independent medical examination of Plaintiff (T7. 712-770).

Gross described the impact as very minor, with minimal damage to both vehicles. (T5. 526-30; T7. 651-53). Gross testified that Lyons appeared to be uninjured. (T5. 530). Lyons and Gross waited 30 to 40 minutes and then left the accident scene. (T5. 529). After leaving the accident scene, Lyons was taken by her father-in-law to Good Samaritan Hospital's emergency room for treatment, complaining primarily of neck pain. (T2. 135-36). At the emergency room, x-rays were taken and medication prescribed, then

Lyons was released. (T2. 136).

Five days after the accident, Lyons began treatment with Dr. Baynham, an orthopedic surgeon. (T2. 138). Lyons' complaints, according to Dr. Baynham's records, included neck and lower back pain. (T4. 389-90l; DX.2). Lyons took two weeks off from her babysitting job after the accident, then returned to her normal duties which consisted primarily of driving children to and from school. (T2. 129-30, 137).

On September 15, 1992, three months after the first accident, Lyons was involved in a second automobile accident. (T3. 218). Lyons did not began physical therapy until September 18, 1992, three months after the first accident and three days after the second accident. (T3. 218). At trial, Lyons claimed that she did not suffer any additional injuries as a result of this second accident and that her damages resulted from the first accident. (T3. 218). Lyons sought to recover mainly for a claimed lower back injury. (T3. 219). Plaintiff alleged that the second accident caused only a temporary aggravation of her lower back complaints. (T3. 221).

During trial, and when providing a history to Dr. Baynham, Lyons maintained that she had no prior back history. (T2.142; T4. 325, 337). However, it was revealed that Lyons had reported back pain to a chiropractor with whom she treated in February 1992. (T2. 103, 111; T7. 784; DX.31). In addition, there was evidence that physical therapy was being prescribed for "cervical sprain" prior to the second accident, and for lower back

complaints after the second accident. (DX.13; T4. 382). In October 1992, Lyons reported to a treating physician that her major back injuries occurred in the September 1992 accident. (T6. 621). In addition, Lyons admitted during cross-examination that she had experienced back pain, as well as neck pain, prior to the first accident. (T2.140; T7. 784). Lyons reported that her lower back pain improved after the surgical fusion performed by Dr. Baynham on her lower lumbar spine on February 21, 1995. (T3. 288-90; T4. 371).

Expert medical witnesses on both sides agreed that Lyons, who was 19 years old at the time of the accident, had a preexisting Pars defect which probably developed during adolescence. (T4. 332, 388-89; T5. 467-68; T7. 731). The defect consisted of a separation, or spondylolysis, of a disc in the lumbar region of the spine. (T5. 467-68). There was expert testimony that a Pars defect can be asymptomatic, with the possibility of it becoming symptomatic due to trauma. (T4. 333-34; T5. 492). Based on the foregoing evidence, Gross claimed that any of Lyons' medical problems resulted from her preexisting Pars defect or alternatively from the second accident. (T8. 914). Gross argued that the July 2, 1992 accident did nothing to create the circumstances that resulted in Plaintiff's surgery. (T8. 914).

Even Dr. G. Clay Baynham, plaintiff's treating doctor and expert, agreed that spondylolisthesis preexisted the first accident and never even shifted as a result of the

first accident. (T4. 366, 383, 388-389, 399, 405). Dr. Baynham opined that Lyons had a post-surgery permanent impairment rating of 15 percent. (T4. 376). He stated that his opinions were based on her reported history. (T4. 337). He related her injuries to the July 2, 1992 accident, based on the history given to him by Lyons. (T4. 404). He did admit that in reviewing Lyons' prior medical records he did find notations of prior back care and treatment. (T4. 336). Dr. Baynham also stated that he could not "partition off any particular responsibility of the first accident versus second with regard to how she ended up ultimately. It's just not possible." (T4. 346-347). Because the second accident occurred within a few months of the first accident, there was not enough time to get a good idea about whether plaintiff was getting better or worse with regard to the first accident. (T4. 347). He concluded by stating that the first accident "could have caused the symptoms and that that resulted in her continued complaints" (T4. 408) and could be "partially attributed to her problem and some of it was preexisting." (T4. 409).

Defendant presented expert testimony that the first accident did not lead to the surgery. (T7. 728-31). Some experts blamed plaintiff's preexisting spinal defect for the surgery. (T5. 493). Others opined that the second accident was a cause. (T6. 621, 631-632). Based on the foregoing, Defendant claimed that any of Plaintiff's medical problems, including her back surgery, resulted from a preexisting back condition or alternatively from the second accident. (T8. 915).

Dr. Richard J. Stroop, one of defendant's experts, testified that plaintiff's "major back injuries occurred in the second accident." (T4. 621). On cross-examination, however, he stated that he was not testifying with regard to causation; that is, whether it was the first accident, the second accident, or a combination of both that ultimately led to plaintiff's surgery. (T6. 631-632).

Dr. Pevsner, another of Gross' experts, testified that x-rays taken before and after the accident showed that the Pars defect was not changed as a result of the accident. (T5. 478-83). That means that whatever was there before the first accident was there before surgery. (T8. 902). No slippage occurred beyond that which preexisted the accident. (T8. 903). The before and after films both showed a minor degree of slippage, or spondylolisthesis. (T5. 478-83). Additionally, Dr. Pevsner testified that most Pars defects are acquired by day in and day out stress. (T5. 489).

Dr. Hyde testified that the accident involved a very minor impact which could not have produced any musculoskeletal displacement. (T7. 649-54). Dr. Hyde stated that his conclusion was supported by the diagnostic films, which all experts agreed, showed an absence of any change in the spondylolisthesis as a result of the accident. (T7. 649-54). This means that the first accident did not cause any displacement. (T8. 904).

Dr. Hyde opined that, at most, the first accident could possibly have caused a temporary soft tissue injury, such as a muscle sprain. (T6. 610-11; T7. 649-54, 688). Dr.

Hyde testified that he had no opinion as to whether Lyons has a permanent impairment from some other cause. (T7. 692). However, Dr. Hyde had a definite opinion about whether the July 2, 1992 accident caused a permanent impairment. That definite opinion was absolutely and categorically that the accident did not cause a permanent impairment. (T6. 610-11; T7. 649, 651-53).

Dr. Hyde testified that a minor impact collision such as this one could only have caused a temporary soft tissue injury, at most. (T6. 610-11; T7. 649-54, 688). Dr. Hyde further stated that persons with a Pars defect with minimal listhesis, like Lyons, generally do not undergo surgery. (T7. 691). Dr. Hyde testified that ordinary life activities, such as picking up a baby, were much more likely to cause the need for surgery than the minimal impact collision in this case. (T7. 695-96). Evidence was presented that Lyons had a daughter, Brittany, who was born December 1988 and for whom Lyons was the primary caretaker. (T2.128; T3. 158-62).

Dr. Lambe examined Lyons at the request of the defense and concluded that there was no objective evidence of a permanent injury. (T7. 731). Dr. Lambe opined that Lyons had not sustained a permanent injury as a result of the accident. (T7. 731). Dr. Lambe actually stated was that he found no objective evidence of an injury resulting from the July 2, 1992 accident. (T7. 728-31). Dr. Lambe was of the opinion that Lyons had not sustained a permanent injury as a result of the accident and that Lyons had a

preexisting Pars defect which was not aggravated by the accident. (T7. 728-31). When asked if he would agree that Lyons had sustained a temporary injury as a result of the accident, Dr. Lambe stated:

> I don't know whether she injured her low back or not. I would agree she went to a doctor and complained of back pain a week after the accident.

(T7. 750). Additionally, Dr. Lambe questioned the wisdom of recommending surgery for a person with only subjective complaints of pain who is involved in litigation. (T7. 739).

At the close of the evidence, Plaintiff moved for a directed verdict on the issue of causation, arguing that because it was undisputed that she had sustained at least a temporary sprain as a result of the first accident, the only question for the jury to decide was the extent of her damages. (T8. 817-819, 825). Defendant objecting that the issue of causation should be left for the jury. (T8. 822).

Plaintiff also moved for a directed verdict on the issue of the second accident since every doctor who testified stated that the second accident did not cause Plaintiff to need surgery. (T8. 819-820). Then, Plaintiff's attorney added:

> Now that does not prohibit Mr. Colvin from arguing that some of the medical bills were incurred as a result of the second accident. He can still do that. But the jury cannot determine that the second accident was a cause of my client's surgery or a cause of permanent impairment.

(T8. 820). In her partial concurrence, partial dissent, Judge Warner concluded that

Plaintiff's attorney was arguing that the second accident was not a proximate cause of Plaintiff's injuries, and that is the motion the trial court granted. Gross, at 1165 .

Plaintiff argued that there should be no apportionment between the first and second accidents, as had been proposed by defendant on the verdict form, because every doctor testified that "the second accident did not cause her to need surgery, did not cause a permanent impairment." (T8. 819-820). However, plaintiff conceded that this would not prohibit defendant from arguing "that some of the medical bills were incurred as a result of the second accident." (T8. 820). Defendant urged the trial court to allow the jury to apportion damages among the two accidents. (T8. 820).

In granting a directed verdict on causation, the trial court reasoned that "no reasonable man could find but that the plaintiff suffered some medical expenses as a result of the accident." (T8. 826). The court also granted a directed verdict on the issue of the second accident. (T8. 826). At the same time, the trial court advised the parties that they could argue this issue to the jury. (T8. 826-827). Then, at the charge conference, Defendant asserted that she was nonetheless entitled to separate jury instructions concerning the preexisting back condition and the second accident. (T8. 837). Agreeing with Defendant and over Plaintiff's objection, the trial court agreed to give Defendant's requested instruction concerning the second accident. (T8. 842-843, 932). Thus, the jury was instructed as follows:

> The court has determined and now instructs you as a matter of law that Mrs. Gross was negligent in the operation of a motor vehicle and that such negligence was the sole legal cause of the collision involving Rebecca Lyons on July 2, 1992.
>
> Rebecca Lyons is therefore entitled to recover from Selma Gross such loss, injury or damage as is shown by the greater weight of the evidence to have thus been caused.

(T8. 932). Additionally, in accordance with the standard jury instructions, the trial court instructed the jury that the plaintiff could recover for "any aggravation of an existing disease or physical defect" resulting from the injury. Fla. Std. Jury Instr. (Civ.) 6.2(b). (T8. 935).

> If you find that there was such an aggravation, you should determine, if you can, what portion of Ms. Lyons' condition resulted from the aggravation and make allowance in your verdict only for the aggravation; however, if you cannot make that determination, or if it cannot be said that the condition would have existed apart from the injury, you should consider and make allowance in the verdict for the entire condition.

See id.

During trial, Lyons sought recovery of the following damages: (1) past medical expenses not paid by insurance; (2) past lost wages not paid by insurance; (3) future medical expenses; (4) future loss of earning capacity; (5) past and future noneconomic

damages; and (6) loss of parental consortium for Brittany. (R3.494-96; T3. 242-52). With regard to past medical expenses, Lyons introduced evidence that she had incurred $57,569.65 in medical bills, $7,520.00 of which was paid by insurance. (T2.250; T5. 420). A large proportion of the medical bills relates to the February 1995 surgery and other treatment incurred after the second accident. (PX.2). With regard to past lost wages, Lyons testified that she earned $300.00 per week at her babysitting job. (T2. 130). Evidence was presented that insurance paid $480.00 for Lyons' lost wages. (T5. 420).

The jury returned a verdict finding that plaintiff did not sustain a permanent injury as a result of the first accident and not awarding any economic or noneconomic damages. (T8. 946-47). Post-trial, Lyons filed a motion for new trial arguing that the zero verdict was inadequate in view of the directed verdict on causation. (R3.515-23).

The trial court granted the motion, in part, ordering a new trial on past and future economic damages only. (R3.558-61). Gross appealed the order granting a new trial on economic damages and the granting of a directed verdict on causation to the Fourth District Court of Appeal. Gross also appealed the entry of the directed verdict on causation. Plaintiff cross-appealed the trial court's refusal to order a new trial on all issues of damages, including permanency and the instruction given to the jury regarding the second accident. Gross, at 1163.

The Fourth District Court of Appeal reversed the directed verdict on causation and ordered a new trial on all issues other than the Defendant's negligence for causing the accident. Gross, at 1165 . The majority found that the trial court gave a confusing and misleading instruction, which was also an incomplete statement of the law concerning a subsequent accident. The majority opinion authored by then Judge Pariente concluded that, in this case, the jury was not informed that if the injuries could not be apportioned between the two accidents, the tortfeasor causing the first accident could be held responsible for the entire condition. Id. at 1164. After considering Petitioner's motion for certification, the Fourth District Court of Appeal also certified the foregoing question of great public importance to this court. Gross, 23 Fla. L. Weekly at D2185.

SUMMARY OF THE ARGUMENT

It is undisputed that the two automobile accidents the Respondent was involved in are unrelated. These two collisions are sufficiently disconnected that in a legal sense Petitioner cannot be liable for the second impact. Petitioner cannot be held fully liable for damages caused by the subsequent accident. Therefore, the jury should have apportioned damages between the various accidents. By its verdict, the jury found that none of Respondent's injuries resulted from the first accident. Accordingly, the new trial order should be reversed and the case remanded for reinstatement of the jury's verdict.

Alternatively, even if Respondent's argument is correct that the injuries are indivisible, Petitioner cannot be responsible for all of Respondent's injuries and damages. This court should review the instructions which the majority decision found should be given to the jury and conclude that such instructions improperly preclude the jury from considering postaccident events and unfairly makes Petitioner responsible for all of Respondent's injuries even if they were not legally caused by Petitioner. If after reviewing all the evidence presented, this court concludes that it would be impossible for the jury to apportion, even roughly, this court should find that the jury should be instructed to divide the damages equally amount various causes.

Thus, in this appeal, Petitioner asks this court to once and for all resolve the issue of the appropriate instruction to be given to a jury when the Plaintiff has been involved

in two or more successive accidents but has only sued the tortfeasor who caused the first accident and the injuries are indivisible. Since there is no Florida case addressing the precise issue raised in this case, Petitioner urges this court to adopt the equitable principles of rough apportionment or equal division among tortfeasors set forth in Loui v. Oakley, 438 P. 2d 393 (Haw. 1968), and explained in Montalvo v. Lapez, 884 P. 2d 345 (Haw. 1994).

ARGUMENT

I.

PETITIONER WAS NOT THE LEGAL CAUSE OF ALL OF RESPONDENT'S INJURIES SO THE CONCLUSION THAT THE FIRST TORTFEASOR IS RESPONSIBLE FOR ALL INJURIES IS NOT SUPPORTED BY THE RECORD, THE CASE LAW AND THE CONCEPT OF FAIRNESS IMPLICIT IN THE FAULT THEORY.

A. In finding Petitioner responsible for all the injuries suffered by Respondent, the Fourth District Court of Appeal has disregarded the legal principle that a defendant can only be responsible for injuries he or she legally caused.

Gross seeks further review from this court since she agrees with the dissenting opinion that the majority opinion has set forth a new legal theory "that in a two accident scenario where the damages cannot be apportioned, a plaintiff may recover his/her damages against either the first tortfeasor or the second tortfeasor." Gross, at 1166 (Warner, J. dissenting). As applied to this case, the majority decision finds for the first time that where apportionment of damages is not possible, the aggravation of injuries from a subsequent accident may be charged to Petitioner, the first tortfeasor. Id. The majority found the instructions given to the jury improper and warranting a new trial since

> The instruction in this case failed to inform the jury that if the injuries could not be apportioned between the two accidents, the tortfeasor causing the first accident could be held responsible for the entire condition if plaintiff has made all reasonable efforts to apportion the injuries.

Gross, at 1164.

A new trial was granted in this case once the majority concluded that the trial court found that the trial court gave a confusing and misleading instruction of the law concerning a subsequent accident. If this court concludes that the majority's opinion is incorrect with regard to the effect of a subsequent accident, this Court should either reinstate the jury's verdict or remand with directions to grant a new trial and provide guidance to the lower courts with regard to the instructions to be given to the jury. Even if this court affirms the granting of a new trial, Gross would like to have this issue regarding apportionment clarified before retrial. Gross should only be responsible for the harm caused by her own negligence.

It is a fundamental principle applicable to the law of negligence that where a plaintiff seeks to recover damages by reason of the negligence of another, the plaintiff must not only prove the extent of his injuries, but also that they were proximately caused by the negligence of the latter. Chomont v. Ward, 103 So. 2d 635, 638 (Fla. 1958) (party seeking recovery must prove extent of his injuries and that they were proximately caused by negligence of his adversary); Schultz v. Wilkes, 689 So. 2d 435 (Fla. 5th DCA 1997) (defendant's allegations that plaintiff's injuries result of second accident did not change plaintiff's burden to prove that all of his claimed injuries resulted from first accident). No Florida precedent has answered the precise issue of whether that aggravation of injuries

from a subsequent accident may be charged to a first tortfeasor where apportionment of damages is not possible. In light of the conclusion reached by the majority, a careful analysis of the facts relied upon and the cases cited by the majority is necessary to fully evaluate this issue.

Petitioner agrees with Judge Warner's dissent that the cases cited by the majority are all factually inapposite to this case. Gross, at 1166 (Warner, J. dissenting). The cases cited by the majority involve the apportionment of damages where the plaintiff was claiming damages from a first accident or injury against the second tortfeasor. Id. In concluding that "in a two accident scenario where the damages cannot be apportioned, a plaintiff may recover his/her damages against either the first tortfeasor or the second tortfeasor," the majority has created "a new legal theory for Florida which has not been recognized anywhere in the manner in which the majority applies it." Id.

In reaching this conclusion, the majority reasoned that "[i]t would be inequitable for the first tortfeasor to escape responsibility merely because the plaintiff has the misfortune of being involved in a second accident." Gross, at 1164. "Although this rule seems harsh [for the tortfeasor], it is predicated on a sound principle: the prevention of a subsequent wrongdoer from escaping responsibility where his conduct contributed to the creation of the situation in which the problems of apportionment arose. Schwab v. Tolley, 345 So.2d 747, 751 (Fla. 4th DCA 1977)." In support of its conclusion and

reasoning, the majority argued that the reasoning of cases finding that the subsequent tortfeasor may be liable for all of the injury where the second tortfeasor is being sued and the injuries attributable to a subsequent tortfeasor cannot be distinguished from injuries resulting from an earlier tort. Gross, at 1164. However, that reasoning is inapplicable to this case where the two accidents are unrelated and not naturally following one from the other. See C.F. Hamblen, Inc., 172 So. at 694; Maser v. Fioretti, 498 So. 2d 568 (Fla. 5th DCA 1986); Randle-Eastern Ambulance Service, Inc. v. Millens, 294 So. 2d 38 (Fla. 3d DCA), cert. denied, 302 So. 2d 416 (Fla. 1974); Washewich v. LaFave, 248 So. 2d 670 (Fla. 4th DCA 1971); Hollie v. Radcliffe, 200 So. 2d 616 (Fla. 1st DCA 1967); Wise v. Carter, 119 So. 2d 40 (Fla. 1st DCA 1960).

After finding no difference between finding an initial tortfeasor responsible for everything and the subsequent tortfeasor responsible for everything, the majority concluded that the rationale of C. F. Hamblen, Inc., 172 So. at 694, and Washewich, 248 So. 2d at 670, should be applicable where the first tortfeasor was a proximate cause of the plaintiff's damages, but a subsequent accident occurs before plaintiff's condition has stabilized. Gross, at 1164. However, the majority's conclusion that where apportionment of damages is not possible, the aggravation of injuries from a subsequent accident may be charged to a first tortfeasor, is not supported by the case law. Gross, at 1165-66 (Warner, J. dissenting). In reaching this conclusion, the Fourth District Court of Appeal

has allowed a plaintiff to "choose to sue the most solvent tortfeasor and obtain all of the damages from one, even where the injuries are indivisible." Gross, at 1166 (Warner, J. dissenting).

In C. F. Hamblen, Inc., a hardware clerk brought an action against his employer for injuries received in a fall from a stepladder. 172 So. at 694. At the time of the accident, the clerk was taking stock and climbed up on a ladder, resting his left foot on the step next to the top. 172 So. at 695. A nut came off the ladder and caused the ladder to become unsteady and fall against the shelving. Id. Plaintiff claimed that as a result, his left leg was strained and bruised, and an infection set in requiring that it be amputated. 172 So. at 695. On appeal, Defendant argued that the trial court erred in preventing it from arguing that the proximate cause of the injury and damage to the plaintiff which resulted in the amputation and loss of plaintiff's left leg was the reactivation of a germ or germs harbored in the tissues of the plaintiff's left leg or in his body over a period of years dating back to a previous injury in April, 1919. Id. In responding to this alleged error, this court held:

> It is settled law that where injuries aggravate an existing ailment or develop a latent one the person whose negligence caused the injury is required to respond in damages for the results of the disease as well as the original injury. In such cases the injury is the prime cause which opens the way to and sets in motion the other cause and the latter cannot be regarded as an independent cause of injury, nor can the

> wrongdoer be allowed to apportion the measure of responsibility to the initial cause. The defendant must respond in damages for such part of the diseased condition as his negligence has caused and if there can be no apportionment, or it cannot be said that the disease would have existed [127 Fla. 96] apart from the injury, then he is responsible for the diseased condition.

172 So. at 696. In reaching this result, the court reasoned, "[i]f there had been any positive evidence showing that plaintiff's injury resulted from a reactivation of the osteomyelitis germ independent of his fall from the stepladder, such a charge might have been improper, but there is no such evidence in this case." Id.

It is this last fact, that distinguishes C.F. Hamblen from the instant case. In this case, there was evidence that the second accident caused additional, separate injuries not caused by the first accident. Plaintiff had a preexisting Pars defect, Plaintiff had suffered back pain prior to the first accident, and after the first accident Plaintiff only sought treatment for neck pain.

In Washewich, 248 So.2d at 670, the issue presented to the court was whether or not the defendant may be held liable for an injury to the plaintiff which resulted from two successive accidents where the defendant was responsible only for the second accident and an apportionment or division of the injury as between the two accidents was not reasonably possible under the facts of the case. The court held that where the plaintiff was thrown from her car upon collision and was struck by defendant's approaching car as

she lay in roadway, the defendant could be held liable for negligence notwithstanding that she was responsible only for the second accident and that apportionment or division of the injury as between two accidents was not reasonably possible. 248 So. 2d at 672-73. The court found that the burden was on the plaintiff to prove to the extent reasonably possible what injuries were proximately caused by each accident:

> The jury should be instructed to make an apportionment of the damages between the two accidents insofar as it may be reasonably possible to do so, but if an apportionment is impossible, the jury may be authorized to charge the defendant with all damages flowing from the entire injury.

Id. at 672-73 (emphasis supplied). The court in Washewich explained that the requirement that a plaintiff prove that his or her damages is proximately caused by the negligence of the tortfeasor is

> somewhat relaxed where the evidence indicates that the defendant's negligence has proximately resulted in an aggravation of a pre-existing injury and the entire consequence cannot reasonably be divided as between several independent causes.

Id. at 672. Contrary to the majority's opinion, the trial court in Washewich did not consider the issue of apportionment when only the first tortfeasor was sued. 248 So. 2d at 673.

The majority also reasoned that this court had implicitly recognized that tortfeasors who contribute to cause an indivisible injury, incapable of apportionment, are both

responsible for the entire injury. See Hethcox v. Lawrence, 283 So. 2d 41 (Fla.1973). However, the issue resolved by this court in Hethcox was whether joinder of two tortfeasors was proper.

Similarly, in Maser v. Fioretti, 498 So .2d 568, 570 (Fla. 5th DCA 1986), also relied upon by the majority, the court once again considered the apportionment issue in an action against only the second tortfeasor and concluded that if the injuries sustained as a result of second accident are inseparable from those sustained in the earlier accident, the second tortfeasor may be held liable for all injuries. The trial court instructed the jury concerning two accidents that

> if it could apportion damages between the two accidents it should make allowance in the verdict only for the new or aggravated injuries. If the jury was unable to apportion damages, they were instructed to consider and make allowances in the verdict for the entire condition.

498 So. 2d at 570. The majority finds that this is the correct instruction in this case. Gross, at 1164. The majority stated that:

> First, the jury should be instructed to apportion damages between the two accidents if it is reasonably possible to do so. Second, the jury should be instructed that if the injuries sustained as a result of two accidents are inseparable and cannot be apportioned, it may return a verdict for the entire medical condition shown, by the greater weight of the evidence, to have been sustained by plaintiff.

Gross, at 1164.

By reaching the foregoing conclusions, the majority opinion finds that Gross, the tortfeasor in the first accident, is liable, not only for the damage she caused, but also for injuries subsequently suffered by Lyons in an unrelated accident. The majority's opinion eliminates the requirement that the plaintiff establish that the damages she seeks were proximately caused by the negligence of the defendant. See C. F. Hamblen, Inc., 172 So. at 696 (tortfeasor liable only for subsequent injury that is caused by or the proximate result of the original injury). Moreover, the majority opinion disregards case law finding that a tortfeasor is not liable for subsequent injuries that were not caused by, or the result of, the first accident. See Braunstein v. McKenney, 73 So. 2d 852 (Fla. 1954) (held that evidence was insufficient to show that injury received was proximate cause of second accident nine months later); Ellingson v. Willis, 170 So. 2d 311, 313-15 (Fla. 1st DCA 1964) (held that evidence raised jury question as to whether defendant's negligence was one of proximate causes of second accident occurring when approaching automobile ran into plaintiff's and defendant's automobiles, which had collided two to four minutes before, and killed plaintiff's wife and child), disapproved, on other grounds, Devlin v. McMannis, 231 So. 2d 194 (Fla. 1970).

Further, fundamental fairness requires that a defendant compensate a plaintiff for his or her losses, but the fairness principles require that the defendant be responsible for only those losses caused by his or her tortious conduct caused. Gerald W. Boston,

Apportionment of Harm in Tort Law: A Proposed Restatement, 21 U. Dayton L. Rev. 267, 370 (Winter 1996)[2]. Such principles are sound because a tortfeasor is liable for damages resulting from a subsequent accident only if that accident constitutes a foreseeable intervening cause of the loss to the plaintiff. See Ellingson, 170 So. 2d at 313-15.

In this case, the second accident in this case was not a foreseeable intervening cause of the loss to the plaintiff. See id. The second accident was unrelated to and not a foreseeable natural consequence of the first accident. See id. There was no evidence in the record of this cause from which the jury could lawfully find that Gross's negligence was one of the proximate causes of the second collision and the injuries suffered by Lyons after the second accident. Id. at 315. Moreover, the record reveals that the harm resulting from the second accident for which Plaintiff sought treatment and required surgery were not caused by, or the result of, the first accident. Id.; see also Braunstein, 73 So. 2d at 852.

In reaching its conclusion, the majority opinion also disregards the fact that the second accident was not reasonably foreseeable to Gross and, therefore, there was no causal link between Lyons' injuries after the second accident and the first accident.

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[2]This comprehensive article is authored by Gerald W. Boston, a member of the American Law Institute and member of the consultative group on Restatement (Third) of Torts, Apportionment Topics.

Emory v. Florida Freedom Newspapers, 687 So. 2d 846 (Fla. 4th DCA 1997) (held that admission of testimony regarding allegedly unnecessary nature of personal injury plaintiff's postaccident medical treatment, in absence of intervening cause instruction addressing issue of effect of actions taken by third party following original negligence, created reasonable possibility that jury was misled into concluding that surgery was substantial cause of plaintiff's injuries which served to sever causal link between injuries and accident).

However, as urged by the dissent, the standard jury instruction on aggravation of a pre-existing injury or defect is a damage instruction based on the theory that a tortfeasor takes the plaintiff "as is," injuries and all. Gross, at 1165 (Warner, J. dissenting). This instruction was never intended to apply to determinations of apportionment for damages from a subsequent accident. Id. Standard Jury Instruction 5.1(c) does, however, explain how we treat intervening events:

> [In order to be regarded as a legal cause of ... [injury] ..., negligence need not be its only cause.] Negligence may also be a legal cause of ... [injury] [or] [damage] even though it operates in combination with [the act of another] ... [or] some other cause occurring after the negligence occurs if [such other cause was itself reasonably foreseeable and the negligence contributes substantially to producing such ... [injury] [or] [damage]] [or] [the resulting ... [injury][or][damage] was a reasonably foreseeable consequence of the negligence and the negligence contributes substantially to producing it].(brackets in original).

Id.

This foreseeability analysis has been applied in most jurisdictions. In D. Richard Joslyn, Annotation, *Proximate Cause: Liability of Tortfeasor for Injured Person's Subsequent Injury or Reinjury*, 31 A. L. R.3d 1000 (1971), the author summarizes the rule:

> Although the basic principle of liability has been stated in various terms, the courts uniformly recognize that a tortfeasor whose negligence has caused injury to another is also liable for any subsequent injury or reinjury that is the proximate result of the original injury, except where the subsequent injury or reinjury was caused by either the negligence of the injured person, or by an independent or intervening act of the injured person, or by an independent or intervening act of a third person.... [T]ortfeasors have not been held liable for subsequent injuries or reinjuries that were not caused by, or the result of, the first injury.

Id. at 1003 (emphasis supplied)(footnotes omitted).

The foregoing annotation cites Braunstein, 73 So. 2d at 852, as one case supporting this principle. In that case, McKenney was injured in an automobile accident. Id. at 853. Nine months later he lost control of his motorcycle, and in his suit against the automobile owner in the first accident, he claimed that the subsequent accident was the result of injuries sustained in the first accident. Id. The supreme court held that a directed verdict should have been granted on causation as the evidence was insufficient to show that the injury received in the first accident was the proximate cause of the second accident. Id.

"Under such circumstances, the trial court should have determined, as a matter of law, that the defendants were not liable for the injuries sustained in the second accident...." Id.

Although Braunstein is not directly on point, as there is no indication that the second accident was caused by the first accident or that the second accident aggravated the injuries suffered in the first accident, it is indicative that courts look to causation principles in evaluating whether a first tortfeasor can be liable for injuries in a second accident. Gross, at 1165 (Warner J. dissenting).

B. In finding Petitioner responsible for all the injuries suffered by Respondent, the Fourth District Court of Appeal has disregarded the facts presented to the jury regarding the preexisting Pars defect and prior back pain suffered by Respondent.

In concluding that apportionment would be impossible in this case, the majority relied on the following facts. Gross, at 1163. Plaintiff claimed that she did not suffer any additional injuries as a result of this second accident and that her damages resulted from the first accident. Id. The majority also relies on the testimony of Dr. G. Clay Baynham, plaintiff's treating doctor and expert. Id. Dr. Baynham attributed plaintiff's injuries to the first accident and assigned plaintiff a 15% permanent impairment to her body as a whole as a result of the first accident. Id. Dr. Baynham also stated that because the second accident occurred within a few months of the first accident, there was not enough time to get a good idea about whether plaintiff was getting better or worse with regard to the

first accident. Id. He stated he could not apportion responsibility between the two accidents. Id. On cross-examination, Dr. Stroop, one of defendant's experts, stated that he was not testifying with regard to causation; that is, whether it was the first accident, the second accident, or a combination of both that ultimately led to plaintiff's surgery. Id.

However, Defendant's experts testified that the first accident did not lead to the surgery. (T3. 218; T7. 728-31). There was evidence that either her preexisting Pars defect or the September 1992 accident resulted in an injury which required surgery independently of the July 1992 accident. (T4. 332, 388-89; T5. 467-68, 493; T6. 621, 631-32; T7. 731; T8. 914). Defendant presented sufficient, competent evidence from which the jury could have concluded that any of plaintiff's medical problems, including her back surgery, resulted from either the preexisting back condition or from the second accident. Id. There was other evidence before the jury which undermined the plaintiff's credibility concerning her noneconomic damages. (T2. 103, 111, 140; T4. 382; T6. 621; T7. 784; DX. 13, 31). Therefore, as further argued below, in light of the conflicting testimony presented by the witnesses, the jury could have disregarded whichever testimony it wanted. But, in light of all the testimony presented, the jury heard testimony which supports its verdict.

The jury apparently concluded that medical treatment was not required as a result

of the first accident. However, there was abundant evidence from which the jury could have determined that the majority of plaintiff's damages, including the surgery, were attributable to the second accident. The jury should have been allowed to apportion damages between the two accidents. Thus, the jury's verdict is supported by competent substantial evidence. Specifically, in this case, there was sufficient evidence presented to the jury to allow it to determine that the second accident did not cause a permanent injury. Based upon the conflicting medical testimony and the Plaintiff's own testimony, the jury could have viewed these injuries as distinct impacts which injured a separate area of Plaintiff's body and thus caused distinct harm. Alternatively, based upon the evidence, the jury could have concluded that the accidents were "sufficiently disconnected and unrelated in a legal sense that the principles of proximate cause would preclude the first tortfeasor from bearing liability for the second impact." See 21 Univ. of Dayton L.Rev. at 335; see also Bruckman v. Pena, 487 P. 2d 566, 568 (Colo.Ct. App.1971) (holding that defendants could not be held liable for plaintiff's subsequent injury whether or not such damage could be apportioned between the two injuries); Restatement (Second) Torts § 433A (finding that damages can be apportioned where there are distinct harms or reasonable basis for determining contribution).

C. In finding Petitioner responsible for all the injuries suffered by Respondent, the Fourth District Court of Appeal has disregarded fairness principles and found Petitioner liable for damages she did not cause.

Alternatively, if this court finds that the injuries suffered by Plaintiff from each accident were incapable of apportionment, Petitioner cannot equitably be liable for the subsequent negligence of the subsequent tortfeasor. The conclusion that Petitioner is not liable for the injuries caused by the second accident is further bolstered by the case law of numerous other jurisdictions that have addressed this precise issue. See, e.g., Montalvo v. Lapez, 884 P. 2d 345 (Haw. 1994); Hashimoto v. Marathon Pipe Line Co., 767 P. 2d 158 (Wyo.1989); Bruckman v. Pena, 487 P. 2d at 566; Loui v. Oakley, 438 P. 2d 393 (Haw. 1968).

Additionally, the decisions of several other states which at first glance seem to be inapposite, when you realize that those rulings are explicitly limited to accidents closely related in time or space and do not apply to accidents, such as the accidents in this case, which are unrelated and far apart in time. See 21 Univ. of Dayton L.Rev. at 378 n.392 (citing Mathews v. Mills, 178 N. W. 2d 841 (Minn. 1970); Holtz v. Holder, 418 P. 2d 584 (Ariz. 1966) (en banc); Rudd v. Grimm, 110 N. W. 2d 321, 324 (Iowa 1961)).

In Bruckman, a similar case to the instant one, the court examined in detail, the rationale to be followed in trying to apportion damages in successive, unrelated accident cases. 487 P. 2d at 566. In that case, the court acknowledged the general principal of liability of a tortfeasor for aggravation of a pre-existing condition, but noted that "it is quite another thing to say that a tort-feasor is liable, not only for the damage which he

caused, but also for injuries subsequently suffered by the injured person." Id. at 568. The plaintiff was injured in two automobile accidents occurring less than a year apart. Id. at 567. The defendant in the case was the owner and driver of the automobile in the first accident. Id. The plaintiff claimed that the second accident aggravated the injuries which he had incurred during the first accident. Id. The court reasoned that:

> [O]ne injured by the negligence of another is entitled to recover the damages proximately caused by the act of the tort-feasor, and the burden of proof is upon the plaintiff to establish that the damages he seeks were proximately caused by the negligence of the defendant.

Id. at 568. Then, applying the facts of the case to the law, the court held that the instruction stating that if evidence did not permit apportionment of damages between two accidents, the defendants were liable for the entire liability was erroneous as placing the burden of proof on the defendants and permitting recovery for an injury for which the defendants were not responsible. Id.

Similarly, in Hashimoto v. Marathon Pipe Line Co., 767 P. 2d 158 (Wyo.1989), the plaintiff contended that where damages resulting from injuries suffered in two accidents are claimed but cannot be apportioned between the two accidents, the tortfeasor in the first accident must be responsible for all damages. Aligning itself with Bruckman, the Wyoming Supreme Court held that the tortfeasor in the first accident was not liable for injuries suffered in the second accident. See id. at 161.

The rule enunciated in Bruckman and Hashimoto has been followed by a number of jurisdictions finding that where there is no correlation between the two accidents, the first injuries cannot be the proximate cause of all the damages suffered by the plaintiff. See 21 Univ. of Dayton L.Rev. at 336-344.

There is some contrary authority across the country. For instance, in both Phennah v. Whalen, 621 P. 2d 1304, 1307-09 (Wash. Ct. App.1980) and Pang v. Minch, 559 N. E. 2d 1313, 1322-23 (Ohio 1990), the courts relied on the Restatement (Second) of Torts, section 433B, to shift the burden of proof on the issue of apportionment of harm between unrelated accidents to the defendants. However, in Phennah the court also suggested that if a jury deadlocked over apportionment, the trial court should consider the application of joint and several liability principles. See 621 P. 2d at 1309.

In Loui, the court attempted to facilitate apportionment. 438 P. 2d at 396. In that case, the plaintiff sued the tortfeasor in the first accident but sought to hold the tortfeasor liable for injuries from three unrelated subsequent accidents. The court held that it was error to instruct the jury that if it could not apportion the damages, the defendant (the driver in the first accident) would be liable for the damages from all four accidents. Id. at 394-95. The court held:

> that the proper procedure is for the trial court to instruct the jury that if it is unable to determine by a preponderance of the evidence how much of the plaintiff's damages can be

> attributed to the defendant's negligence, it may make a rough apportionment. Heretofore, this court has recognized that the law never insists upon a higher degree of certainty as to the amount of damages than the nature of the case admits, and that where, as here, the fact of damage is established, a more liberal rule is allowed in determining the amount. Coney v. Lihue Plantation Co., Limited, 39 Haw. 129, 139 (1951) [additional citation omitted][footnote omitted].
>
> The trial court should instruct the jury that if it is unable to make even a rough apportionment, it must apportion the damages equally among the various accidents [citing Prosser, Torts 253 (3d ed.1964)]. We recognize that this resolution is arbitrary. It is, however, no less arbitrary than placing the entire loss on one defendant.

Id. at 396-97. Loui was reaffirmed by the Hawaii Supreme Court in Montalvo v. Lapez, 884 P. 2d 345 (Haw. 1994).

Then, the court in Montalvo applied the holding in Loui to an even more complex case, similar to the situation raised in this case, involving a plaintiff with a pre-existing back condition who was also injured in unrelated accidents and incurred post-accident incidents of aggravation. 844 P. 2d at 347-48. The Montalvo court specifically found that the tortfeasor being sued could not be held fully liable for damages caused by a subsequent incident unless the first accident was the legal cause of the subsequent incident. Id. at 362. The court also rejected the argument that if apportionment is impossible, the tortfeasor is liable for all the damages including the preexisting condition. Id.

In his comprehensive article addressing the apportionment of harm issue and urging the adoption of the rough approximation theory, Boston opines that because of the competing interest of, on the one hand, making the plaintiff whole again, and on the other hand, holding each defendant liable only for the harm that that particular defendant caused, the law should create incentives for plaintiffs to sue all potentially responsible parties in one proceeding. See 21 Univ. of Dayton L.Rev. at 341. He urges the rough approximation theory or the equal division theory stating:

> Montalvo supports the black letter rule so long as the equal shares approach is a "reasonable basis" for an apportionment. Prosser has referred to an equal division among tortfeasors as a "last resort" [where] in the absence of anything to the contrary, it may be presumed that the defendants are equally responsible. Montalvo represents modern authority that is driven by a sense of fairness to all the parties and a preference for a single proceeding in which all responsible parties are joined.

21 U. Dayton L. Rev. at 341. As stated by the dissent: "the rule adopted by the majority here would not serve that interest. In fact, it completely ignores the fairness issue to the defendants who may be held liable for harm far in excess of what they may have caused." Gross, at 1165 (Warner, J. dissenting).

Gross asks this court to adopt the rule enunciated by the dissent that would require apportionment and would adopt the "rough apportionment" or equal division principles of Loui and Montalvo as the "next best" solution where a jury cannot apportion. This

alternative theory would prevent defendants from being liable for harm they did not actually cause.

II.

A NEW TRIAL IS NOT WARRANTED IN THIS CASE WHERE THE VERDICT WAS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

If this court chooses to exercise its discretion and review all issues considered by the Fourth District Court of Appeal, Petitioner would like to reiterate, that although a new trial has been ordered by both the majority and the dissent, the jury's verdict was supported by competent, substantial evidence. There was evidence that Lyons' preexisting Pars defect was symptomatic prior to the July 1992 accident and required surgery independently of that accident. (T5. 478-83). Lyons may not have known about her Pars defect. However, it was undisputed that the Pars defect existed prior to the accident and was unchanged as a result of the accident. (T4. 332, 366, 388-89; T5. 467-68, 478; T7. 731). Even Dr. Baynham, Plaintiff's treating doctor, agreed that the preexisting spondylolisthesis did not change as a result of the accident. (T4. 366).

Lyons did not begin physical therapy until September 18, 1992, three months after the first accident and three days after the second accident. (T3. 218). There was evidence that the September 1992 accident resulted in an injury which required surgery independently of the July 1992 accident. (T4. 332, 388-89; T5. 467-68, 493; T6. 621, 31-32; T7. 731).

Gross presented the testimony of a biomechanical expert, Dr. Hyde, who testified

that the accident involved a very minor impact which could not have produced any musculoskeletal displacement. (T7. 649-54). Dr. Hyde stated that his conclusion was supported by the diagnostic films which all experts agreed showed an absence of any change in the spondylolisthesis as a result of the accident. (T7. 649-54). Dr. Hyde opined that, at most, the accident could possibly have caused a temporary soft tissue injury, such as a muscle sprain. (T6. 610-11; T7. 649-54, 688). Dr. Hyde had a definite opinion about whether the July 2, 1992 accident caused a permanent impairment. That definite opinion was absolutely and categorically that the accident did not cause a permanent impairment. (T6. 610-11; T7. 649, 651-53). This evidence was sufficient to allow the jury to infer that the Pars defect, and not the July 1992 accident, caused the need for surgery.

Additionally, Defendant established that all of the expert medical testimony presented by Plaintiff's medical experts was based on the history provided by the Plaintiff that her injuries resulted from the first accident and that she had no preexisting back problems. However, Plaintiff proved to be an unreliable historian. The ER records showed no complaints of lower pain following the accident. However, Plaintiff had complained and been treated for lower back pain before the first accident. It was revealed that Lyons had reported back pain to a chiropractor with whom she treated in February 1992. (T2. 103, 111; T7. 784; DX.31). In addition, Lyons admitted during

cross-examination that she had experienced back pain, as well as neck pain, prior to the July 1992 accident. (T2.140; T7. 784). In October 1992, she reported to a treating physician that her major back injuries occurred in the second accident. (T6. 621). In addition, there was evidence that physical therapy was being prescribed for "cervical sprain" prior to the second accident, and for lower back complaints after the second accident. (DX.13; T4. 382).

The jury was asked to determine if all the medical treatment including the surgery was related to the accident. The jury was asked to award damages related to this accident that were not paid by the insurance. It was reasonable for the jury to conclude that the amount of the plaintiff's expenses attributable to the accident was the $7,520.00 paid by insurance. Therefore, the jury properly awarded nothing more to the plaintiff. The jury was also entitled to disbelieve that the surgery was necessitated by the July 2 accident in light of the evidence of the Pars defect, the second accident and the relatively minor impact caused by the July 2 accident.

In the instant case, the evidence shows that the verdict in favor of Defendant is supported by the evidence presented during the trial. The verdict indicates that the jury did not believe Plaintiff's case. It is well-settled that a jury is free to "accept or reject the testimony of a medical expert just as it may accept or reject that of any other expert." Easkold v. Rhodes, 614 So. 2d 495 (Fla. 1993). The jury is also free to disbelieve and

reject a plaintiff's testimony and medical evidence as to the extent, effect and cause of his injuries. See Weygant v. Ft. Myers Lincoln Mercury, Inc., 640 So. 2d 1092, 1093-94 (Fla. 1994); Shaw v. Puleo, 159 So. 2d 641, 644 (Fla. 1964); Chomont v. Ward, 103 So. 2d 635 (Fla. 1958); Travieso v. Golden, 643 So. 2d 1134, 1135 (Fla. 4th DCA 1994); Rice v. Everett, 630 So. 2d 1184, 1185 - 86 (Fla. 5th DCA 1994); Daigneault v. Gache, 624 So. 2d 818, 819 (Fla. 4th DCA), rev. denied, 631 So. 2d 623 (Fla. 1993); United States Fidelity & Guar. Co. v. Perez, 622 So. 2d 486 (Fla. 3d DCA 1993); State Farm Mut. Auto. Ins. Co. v. Garcia, 621 So. 2d 475 (Fla. 4th DCA 1993); Frye v. Suttles, 568 So. 2d 983, 985 (Fla. 1st DCA 1990); Fitzgerald v. Molle-Teeters, 520 So. 2d 645, 648 (Fla. 2d DCA), rev. denied, 529 So. 694 (Fla. 1988); Crutcher Resources Corp. v. Rainer, 283 So. 2d 392, 393 (Fla. 2d DCA 1973); Bailey v. Sympson, 148 So. 2d 729 (Fla. 3d DCA 1963).

The jury heard plenty of testimony which supported its verdict. Therefore, the jury's verdict is not against the manifest weight of the evidence. In fact, the jury's finding is supported by the evidence in the record.

In light of the ruling on the directed verdict issue, Lyons had the burden of proving the amount of damages caused by the accident. Based on the evidence, the jury could have concluded that the July 2, 1992 accident caused only a temporary soft tissue injury requiring, at most, the trip to the emergency room and a few visits with Dr. Baynham.

All of the subsequent treatment, including the surgery, could have been related to other causes, such as the second accident, a preexisting condition or normal life activities. Therefore, the verdict was adequate and was supported by the evidence.

A verdict is clothed with a presumption of regularity and is not to be disturbed if it is supported by the evidence. Higbee v. Dorigo, 66 So. 2d 684, 686 (Fla. 1953); Sweet Paper Sales Corp. v. Feldman, 603 So. 2d 109, 110 (Fla. 3d DCA 1992); Gould v. National Bank of Fla., 421 So. 2d 798, 802 (Fla. 3d DCA 1982). The question is not whether the trial judge would have decided the case the same way had he or she tried the case, but whether it can be said that the jurors as reasonable persons could not have reached the verdict that they did. Shaw v. Puleo, 159 So. 2d at 644; Leister v. Jablonski, 629 So. 2d 981 (Fla. 5th DCA 1993); Fitzgerald v. Molle-Teeters, 520 So. 2d at 648. Therefore, a trial judge may not sit as a seventh juror with veto power and may not substitute his judgment on liability or damages. Laskey v. Smith, 239 So. 2d 13 (Fla. 1970); Hawk v. Seaboard System R.R., Inc., 547 So. 2d 669, 671 (Fla. 2d DCA 1989); Odoms v. Travelers Ins. Co., 339 So. 2d 196 (Fla. 1976). Where the evidence is conflicting, the weight to be given to that evidence is in the province of the jury, and to allow the trial judge to invade this province would violate the right to a jury trial. Hawk, 547 So. 2d at 671. As long as there was sufficient, competent evidence before the jury from whence the jurors could have reached the findings of fact inherent in the verdict, an

appellate court will not disturb the result. Thompson v. Jacobs, 314 So. 2d 797 (Fla.1st DCA 1975). Accordingly, this court should affirm the jury's verdict in favor of Defendant.

III.

THE DIRECTED VERDICT ON CAUSATION WAS IMPROPER.

The Fourth District Court of Appeal's decision on this issue was proper. Petitioner would reiterate that:

> While defendant admitted that her negligence caused the first accident, the issue of whether her negligence was a legal cause of plaintiff's damages was properly for the jury to decide, based on conflicting evidence. See Easkold v. Rhodes, 614 So. 2d 495 (Fla.1993); State Farm Mut. Auto. Ins. Co. v. Orr, 660 So. 2d 1061 (Fla. 4th DCA 1995); cf. Bach v. Murray, 658 So. 2d 546 (Fla. 3d DCA 1995).
>
> Accordingly, we agree with defendant that it was improper for the court to direct a verdict on causation of damages. The jury could have found that any expenses incurred after the first accident were offset by her personal injury protection benefits and that she sustained no permanent injury as a result of the first accident. See Colvin v. Williams, 564 So. 2d 1249 (Fla. 4th DCA 1990); see also Emanuele v. Perdue, 693 So. 2d 1071 (Fla. 4th DCA 1997). It was error for the trial court to grant the a directed verdict in favor of the plaintiff on the issue of causation in view of evidence which suggested that even the initial emergency room treatment was unrelated to the accident and/or unwarranted. Lyons had a preexisting Pars defect and preexisting back pains. There was evidence that she appeared uninjured after the minor impact collision and later went to the hospital. The issue of causation clearly was for the jury.

> The appellate court has instructed the trial judge that on retrial he should not grant a directed verdict on the issue of causation in view of the conflicting evidence on that issue.

Gross, at 1165.

Petitioner is not seeking further review by this court on this issue. In support of Petitioner's argument that the trial court erred in granting a directed verdict on causation Petitioner incorporates herein the argument raised in on pages 12-13 of her initial brief, on pages 9-10 of her reply/cross-answer brief, and the analysis quoted above from the Fourth District Court of Appeal decision.

CONCLUSION

It is respectfully submitted that the new trial order should be reversed and the case remanded for reinstatement of the jury's verdict; alternatively, this court should review the instructions the majority decision found should be given to the jury and conclude that such instructions improperly preclude the jury from considering postaccident events and unfairly makes Petitioner responsible for all of Respondent's injuries even if they were not legally caused by Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this ___ day of December, 1998 to all counsel on the service list below.

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