IN THE SUPREME COURT OF FLORIDA

CASE NO: 1999-53

SECOND DISTRICT COURT OF APPEAL CASE NO. 97-4845

GEORGE W. GARBUTT,

Petitioner,

v.

ROSEMARY LaFARNARA,

Respondent.

On Certified Question of Great Public Importance from the
Second District Court of Appeal
for the State of Florida

Respondent's Answer Brief on the Merits

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I. STATEMENT OF THE CASE AND FACTS'

The Appellant, George Garbutt, appeals a Final Judgment arising from an eight week trial in which (i) a Pinellas County jury found Garbutt liable for having assaulted, battered, defamed and inflicted severe emotional distress upon the Appellee, Rosemary LaFarnara, and (ii) Circuit Court Judge David Demers found it necessary to issue a permanent injunction to prevent imminent, future harm to LaFarnara. (R27, 4304; R37, 5756). The jury, after deliberating in excess of seven hours, awarded LaFarnara compensatory damages totaling $1,254,359.65, (R27, 4304; R46, 7335), consisting of $1,168,000 for past and future pain and suffering, $123,800 for future medical expenses (reduced to a present value of $60,000), $16,369.65 for past medical expenses, and $10,000 for injury to LaFarnara's reputation. (R27, 4304). In the punitive damage phase of the trial, the jury awarded LaFarnara $500,001. (R27, 4306). Post trial, the court entered a 68 page Order on Defendant's Amended Motion for New Trial, or in the Alternative Remittitur, Motion for Judgment Notwithstanding the Verdict and Motion for Rehearing ("Post Trial Order") reducing the compensatory damage verdict by $9,999, because the court concluded there was insufficient evidence establishing injury to LaFarnara' s reputation. Significantly, the Post Trial Order addressed and rejected the claims which Garbutt now contends constitute a basis for this Court to award him a new trial. (R46, 7326; App. A).

A. THE FIRST TRIAL

This action was initially tried in March, 1995 before the Honorable Horace Andrews. The trial continued beyond its scheduled length and was ultimately mistried upon Garbutt's counsel's representation that he had a scheduling conflict. (R68, 2897).

'Given Garbutt's conclusory allegations of impropriety, the following detailed recitation of facts is necessary to assist this Court in evaluating the merits of such allegations.

B. THE PLEADINGS

On January 22, 1996, LaFarnara supplemented her Third Amended Complaint so as to include allegations of a series of on-going, harassing and intimidating telephone calls initiated by Garbutt since the filing of her latest complaint. (R65, 2 37 1). This Supplemental Complaint alleges: (i) that Garbutt over a period of two years repeatedly assaulted battered and emotionally abused LaFarnara; (ii) that Garbutt intentionally and repeatedly defamed LaFarnara by, *infer alia*, asserting that she was a 'whore" who had stolen Garbutt's jewelry, automobile and other possessions; and (iii) that since April, 1987, Garbutt "incessantly engaged in a campaign of conduct that is intentionally designed to intimidate, threaten, harass and otherwise inflict severe emotional harm on the Plaintiff.." The complaint further alleges: that such conduct "continues to present and includes numerous harassing and intimidating phone calls to the Plaintiffby the Defendant since November, 1995;" that "[u]nless restrained by this Court, the Defendant will continue to harass, threaten and abuse the Plaintiff [and] Plaintiff is without adequate remedy at law for the continued abuse by the Defendant . . ." (R15, 2082-88); that as a result of such conduct LaFarnara "has suffered both temporary and permanent physical injury, humiliation, embarrassment, fear, intimidation, loss of reputation, loss of ability to lead a normal life, severe and grievous mental and emotional distress, fright, anguish, shock, nervousness and anxiety;" that she "will continue to incur great physical, mental and emotional pain, distress and suffering;" and that she will require future "medical and psychiatric treatment." (Id.). Garbutt up until the eve of the second trial prosecuted a counter-claim against LaFarnara for her alleged theft of "a certain Chevrolet Camero automobile, a certain 14 inch gold rope necklace, certain travel photographs and Revere Cookware."* (R2, 8; R56,

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[2]Garbutt during the course of the litigation also asserted the following affirmative defenses: (i) "Plaintiff acted as the aggressor and provoked the facts and circumstances described in Plaintiff's complaint. Plaintiff, on numerous occasions, approached Defendant and without cause or provocations on the part of the Defendant began to willfully wontly [sic] and maliciously assault, batter, beat and strike Defendant;" (ii) "the alleged combat was

1031).

C. PRETRIAL

1. Discovery

Judge Demers ruled in the pre-trial conference conducted January 27, 1997 that discovery would be "unlimited" up until the commencement of the trial. (R2 1, 3257). Not only did the defense take advantage of such discovery extension (discussed *infra*) Garbutt also had an IME of the Plaintiff conducted five days before the trial commenced, (R68, 2977), the report of which was not produced until one business day before the trial. (R64, 2264).

2. Identical Acts

Prior to the start of the second trial, Garbutt moved to exclude a majority of the evidence that Judge Andrews had admitted in the first trial. (R14, 1995, R16, 2345). Judge Demers, reviewed the pleadings, testimony from the first trial, and the parties' memoranda and, thereafter, on February 3, entered an 18 page order finding that the evidence of Garbutt's habit of intoxication was admissible. (R2 1, 3257; App. B). The court, thereafter, found that Garbutt's identical physical and emotional abuse of Penny Morgan was sufficiently similar to be admissible. (R21, 3257; R44, 7077; App. B). In contrast, the court excluded the evidence of Earbutt's similar abuse of Nadine Tushaus and his deceased wife, Helen Garbutt. (R44, 7077; R48, 10). Judge Demers' orders analyzing these issues, like the Post Trial Order, are detailed, well reasoned, and indicative of the court's analyzes throughout the trial. (App. B).

3. Telephone Call Evidence

Prior to the second trial, Garbutt also moved to exclude all evidence of the twenty-nine

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an agreed combat between the parties such that Plaintiff assumed the risk incident to the fight;" (iii) "Plaintiff is a person whose reputation for morality, integrity and honest dealing was notoriously bad, in Pinellas County, and Plaintiff could not have been injured or damaged by an alleged slanderous or libelous statements made by the Defendant;" (iv) truth and (v) "Plaintiff was guilty of negligence . . . in that Plaintiff consumed too much alcohol and came under its influence, which resulted in Plaintiff engaging in and provoking abusive conduct.' (R2, 28-32).

"canned" maniacal laughter calls received by LaFarnara over the prior seventeen months, including audio recordings of such, asserting that "[t]here is no evidence whatsoever" that Earbuttmade the calls. (R17, 2390). The matter was heard on January 8, 1997. Given that discovery was still open LaFarnara upto and after the hearing continued to compile circumstantial evidence establishing Garbutt as the caller. Garbutt similarly continued to conduct discovery on the telephone evidence. (R65, 2345, 2410-13, 2463-68). In fact, Garbutt took the deposition of LaFarnara and her husband on January 27, 1997 for the purpose of making inquiries into the phone calls[3]. On February 3, 1997, six days after the pre-trial conference and initial discovery cut off date, the court entered an order discussing only the eight most current calls and excluding such evidence. (R2 1, 32 57, App. B, p. 14- 17). This error resulted from the court's unfamiliarity with the case and LaFarnara having filed a supplemental list of the eight most recent calls prior to the January 8, hearing. Both the court and Garbutt have acknowledged that the court's error was manifest in its Order. (R46, 7326; App. A, p. 47-48; R61, 1756-57).

D. TRIAL

1. The Diabolical Laughter Calls

The trial began on February 10, 1997, seven days after the court entered its order in limine addressing only the eight most recent calls. Prior to voir dire, LaFarnara advised the court of its error and moved for reconsideration of the order. In doing so, LaFarnara explained that all of the calls, with the exception of one, had originated from pay telephones in the St. Petersburg area and that such calls correlated with certain events in the litigation. LaFarnara also described other circumstantial evidence tying Garbutt to the calls, including Garbutt's prior

[3]During such depositions Garbutt was advised, *inter alia*, that the timing of the phone calls were tied to events in the litigation, (R61, 1759), that Garbutt had made similar calls to other persons, (R65, 24 10- 13, 2463-68), and that LaFarnara possessed a caller I.D service since November, 1995 enabling her to determine, with the assistance of the phone company, where each of the phone calls had originated. (R65, 2446).

violation of an identical restraining order involving Penny Morgan. (R48, 15-20). After hearing argument of counsel, the court ruled that it would allow LaFarnara to make a proffer of the evidence during the trial and that LaFarnara was not to mention the calls in the trial before the court ruled on the proffer. (R48, 47). Two weeks later on February, 24, the court, after hearing the proffer[4], having read the parties' memoranda on the issue, and having heard

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[4]The evidence consisted of the following: That LaFarnara had obtained a TRO prohibiting Garbutt from telephoning, harming or otherwise harassing LaFarnara; that LaFarnara received a total of 33 harassing and intimidating phone calls, the first of which was received on November 5, 1995, four months before the scheduled retrial of the action and two days after the Judge Andrews entered a Final Judgment ordering that Garbutt's insurer no longer had a duty to defend; (R25, 3877, 3970; R15, 2045; R65, 2338-39); that the call consisted of 'canned" diabolical laughter, (R65, 2340); that LaFarnara, thereafter, received identical calls on an average of 1 per week; that during the Christmas holiday the calls increased to 2 per day on December 24, 25 and 26, 1995 and 1 per day on December 27 and 28, 1995, (R65, 2363-69); that the parties proclaimed their love and became physically intimate on or about Christmas 1986 and ever since have considered Christmastime to have a special significance in their relationship; that on January 20, 1996, LaFarnara received her 2 1st such call, (R65, 2371); that on January 22, 1996, LaFarnara supplemented her complaint to include allegations of the on-going calls, (Id.); that on February 1, 1996, the trial court granted Garbutt's motion to continue the March, 1996 trial, (R 15, 2092); that, thereafter, the calls ceased for 9 months, beginning again in October, 1996, 4 months before the scheduled trial, (R65, 2373-74); that LaFarnara in March, 1996 provided Garbutt audio recordings of the laughter calls which were left on her answering machine; that when the calls commenced again in October, 1996, the caller no longer left the laughter on LaFarnara's answering machine as had been routinely done prior to production of the recordings; that, thereafter, the laughter calls were only received when Lafarnara personally answered the phone; that on the occasions that her answering machine answered, the caller hung up, (R65, 2372-74, 2414); that LaFarnara received 10 more harassing phone calls prior to the start of the trial, (R65, 2374-83); that another 2 calls were received during the trial, (R65, 2384-85); that all 33 calls originated from payphones in the Treasure Island/St. Petersburg area, with the exception of 2 from Tampa, 1 of which originated from the Tampa Airport on a day in which Garbutt's daughter was visiting from out of state, (R25, 3877, 3970; R65, 2352-90, 2380-8 1); that 2 of the calls originated from payphones located approximately a mile from Garbutt's office, (R65, 238 1, 2383), that 1 call came from a payphone located in the All Children's Hospital, on the same day that the Mayor of Treasure Island, a friend and political ally of Garbutt's, was admitted for surgery; (R65, 2393, 2428-

extensive argument of counsel, found that the telephone calls were sufficiently authenticated to present the question to the jury as to whether the calls were made by Garbutt or on his behalf. (R63, 2062-78; App. C). Garbutt then requested and obtained a 3 day continuance of the trial on the purported basis that he had relied on the court's non-final order in limine. (R63, 2084, 2091). Garbutt thereafter, took the deposition of the record custodian for GTE, subpoenaed 7 categories of documents from GTE, called the GTE representative as a witness in the trial, submitted an amended witness list which included 2 new alibi witnesses in addition to those already named in Garbutt's pre-trial witness list, and had all such alibi witnesses testify with the exception of 2 who LaFarnara stipulated would provide Garbutt an alibi for the time certain calls were made. (R46, 735 1). Garbutt also testified that he had nothing to do with the calls. (R98, 7375-8 1).

2. The Seduction

LaFarnara, an accomplished ceramics artist, moved to Florida in 1985 ,[5] obtaining

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29), that Garbutt held himself out as being involved in various events at that same hospital, (R32, p4898); that 2 calls originated from payphones located outside of the Kingfish restaurant, a place frequented by Garbutt and his daughter, (R65, 2364-66, 2400); that all of the calls were placed to LaFarnara's unlisted number, (R65, 2352-90), a number which Garbutt could and knew to obtain from ceramic oriented publications, (R65, 2336-37), that Garbutt in September, 1991, in fact, obtained LaFarnara's unlisted phone number notwithstanding her having obtained her phone under an assumed name, *infra*; that Garbutt made similar harassing calls to Penny Morgan and Lynn Rainey, (R65, 2410); and that none of the calls were made from the 30 payphones that Garbutt owned. (R65, 2386-87).

'Prior to moving, LaFarnara incurred 2 injuries. The first resulted from a 1980 lifting incident when LaFarnara, then director of the county's American Cancer Society, attempted to lift a crate during a fund raising event. (R50, 3 13). As a result of her injury, LaFarnara had a laminectomy in 198 1. (R50, 3 1 5- 16). The second injury resulted in 1984 when the car in which LaFarnara was a passenger collided with a truck. (R50, 3 17). LaFarnara suffered pain to the front of her head for a few days and was diagnosed as having frozen shoulder syndrome secondary to a cervical sprain. (R50, 319, 322; R55, 997). By the time LaFarnara moved to Florida, she had recovered entirely from the 1980 injury with the exception of experiencing occasional "drop foot." (R50, 3 16). Moreover, LaFarnara had no problems with her head, neck or cognitive abilities in 1985, (R50, 320, 359; R51, 399),

employment as a dance instructor. (R50, 306-12). In September of that year she met Garbutt, a city commissioner of Treasure Island, who had come in for dance lessons (R50, 320, 327). The two established a platonic relationship, LaFarnara being aware of Earbutt's live-in girlfriend, Penny Morgan. (R50, 325-28). Garbutt offered LaFarnara use of his kiln for her ceramic work. (R50, 324). LaFarnara accepted and as a result met Morgan. (R50, 327-28).

In September, 1986, Garbutt informed LaFarnara that he had terminated his relationship with Morgan and that he had been romantically interested in LaFarnara for some time. (R50, 330-3 1). Thereafter, Garbutt routinely sent LaFarnara flowers, always acted as a gentleman and never became visibly intoxicated. (R50, 33 1-32, 363-64). LaFarnara, in turn, grew very fond of Garbutt. (R50, 333). In or about Christmas, 1986, the two proclaimed their love; agreed to date each other exclusively and developed a sexual relationship. (R50, 334, 364). In February, 1987, Garbutt asked LaFarnara to move in with him. (R50, 336). Before deciding, LaFarnara attended a political forum in which Garbutt was speaking. While Garbutt was on stage, Morgan, accompanied by two uniformed guards, entered and accused him of having beat her. Garbutt denied the allegation. (R50, 350). A few weeks later, LaFarnara read a newspaper article which prompted her to ask Garbutt if he had beat Morgan. (R50, 358). Garbutt denied the allegation and explained that Morgan was just mad because he had thrown her out of his house. (R50, 361). Days later, Garbutt posted in the American Legion post, which he commanded, a restraining order prohibiting him from contacting, harassing or harming Morgan. Garbutt told LaFarnara that Morgan had lied to the court and that he considered the restraining order "a joke." (R50, 362-63). In March, 1987, LaFarnara believing Garbutt's denials moved her and her belongings, which included a Chevrolet Camero and furniture, into Garbutt's Treasure Island home.

In addition to intentionally fostering LaFarnara's trust and emotional dependence,

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and by 1987 had recovered entirely from her 1984 injury. (R50, 323; R51, 410).

Garbutt fostered LaFarnara's financial dependence by, *inter alia*, having her give up her apartment, transfer the title of her Camaro to Garbutt for alleged insurance savings, (R5 1,439, R30 4692); and quit her job to work for Garbutt full time without compensation because "[he would] take care of everything [she] need[s]." (RS 1, 444-46). Garbutt also destroyed LaFarnara's credit card. (R5 1,473).

3. Two Years of Subjugation, Abuse and Contrition

In April, 1987, Garbutt became very controlling and exhibited a routine pattern of drunkenness and verbal and physical abuse. (R50, 366; R. 5 1, 397). On such occasions, a drunk Garbutt would demean, bully, verbally abuse and brutally beat LaFarnara. The beatings were so severe that LaFarnara suffered debilitating injuries and on at least two occasions lost consciousness. (R50, 366, 368-83; R51, 394-407, 411-13, 424, 427-31, 435, 449-452) Garbutt's physical and emotional abuse of LaFarnara lasted for two years from April 1987 to May, 1989. Garbutt would routinely strike LaFarnara in her head (R50, 369, 375, 382; R5 1, 4 11, 424-25, 449) and savagely pound her head into cement block walls, while grabbing her by her ears and hair. (R51, 401-02, 427, 429, 431). On one occasion, in June, 1987, Garbutt punched LaFarnara with such force that her body was lifted off the ground and hurled backwards landing head first on a cement sidewalk causing her to incur a concussion. (R50, 382-83). On another occasion in April, 1987, Garbutt repeatedly struck LaFarnara in her head for having taken Garbutt's dog for a ride. (R50, 366-70). In May, 1987, Garbutt savagely beat LaFarnara because "she deserved it." (R50, 375-76; R92, 7435). In September, 1987, Garbutt pounded LaFarnara's head against a cement block wall and thereafter, to prevent her attempted escape, dragged LaFarnara by her hair the length of a cement driveway as she laid prone on her back. (R5 1, 395, 401-06). In February, 1988, Garbutt beat LaFarnara so severely in her head for speaking to her daughters out of his presence that LaFarnara vomited for days and thereafter was diagnosed as having vomited up her electrolytes. (R51, 410-413; R92, 7429-31; R55, 914). In April, 1988, Garbutt repeatedly struck LaFarnara in her head for interfering while Garbutt ridiculed his daughter, and thereafter, to prevent LaFarnara's attempted escape, viciously

pounded her head against a cement block wall. (R5 1, 430-3 1). In January, 19 89, Garbutt beat LaFarnara so severely that she received bruises covering both arms and was diagnosed as having incurred a concussion by Garbutt's personal physician. (R5 1, 452, 462-64; R66, 2573). Her injuries were so *severe* on that occasion that days later neuromuscular therapist Kilmortan insisted on taking photographs and referred LaFarnara to neurologist, Dr. Greenberg, for the trauma to her head. (R5 1, 456-57). While brutally beating LaFarnara, the drunken Garbutt routinely demeaned her by, *inter alia*, laughing and calling her 'stupid,' 'whore," "slut," "asshole" and asserting that she "deserved" to be beat. (R50, 380; R5 1, 399, 485). Garbutt's control over LaFarnara was so extreme during this two year period that he would not let her associate with her family or friends outside of his presence, (R55, 955-56; R55, 914), nor would he permit her to talk on the phone in his absence. (R55, 9 14).

After each attack Garbutt: apologized profusely; nursed LaFarnara with sympathy, Ben Gay, ice, aspirin and bed rest; bought LaFarnara flowers; blamed his violence on the alcohol and/or LaFarnara; promised that he would stop drinking; promised never to beat her again; and promisedthathe wouldmaketbeincidentupto her. (R50, 376-78, 383, 386; R51, 394,413, 434, 436, 438, 458, 462, 470; R55, 913). In or about March, 1989, Garbutt even agreed, at LaFarnara and his daughter Joan's insistence, to go to abuse counseling. (R50, 470; R5 1, 492; R52, 508, 5 13, 522 ; R 100, 7628). On each occasion LaFarnara, consistent with a person suffering from spouse abuse syndrome, believed Garbutt's contrition and his intent to change, (R50, 386, R74, 3853-55, 58-59); that is until May, 1989, when Garbutt's daughter Joan revealed to LaFarnara that Garbutt 'beat all of his women," and persuaded and assisted LaFarnara into confronting Garbutt. (R5 1, 490-93; R103, 8201). It was then that LaFarnara realized that she did not cause the attacks and decided to seek counseling from CASA, a women's abuse center. (R5 1, 490-93; R103, 8201).

During the two years of abuse, Garbutt exercised dominance and control over LaFarnara by, *inter alia*, repeatedly threatening to kill her, (R5 1, 473, 476; R52, 579). LaFarnara lived in constant fear. She modified her behavior and abandoned her friendships to satisfy Garbutt.

Garbutt's control and dominance was so strong that LaFarnara at Garbutt' s insistence, *inter alia*, (a) executed a fraudulent affidavit stating that she was Garbutt's housekeeper and that she witnessed Garbutt have numerous epileptic seizures so that Garbutt could obtain social security disability benefits to which he was not entitled (R52, 554-565); and (b) falsely testified in a deposition in the 1984 car accident litigation that she did not live with Garbutt, that her headaches resulted from a fall, as opposed to Garbutt beating her, and that the headaches had ceased. (R52, 568-69, 577).

4. The "Outcry."

Contrary to the Garbutt's insinuation in his initial brief (p. 3) and his testimony in trial (R97, 6593; R98, 7298) that LaFarnara did not complain of Garbutt beating her until after their separation in May, 1989, the unrebutted evidence at trial established that LaFarnara, despite her shame, embarrassment and fear advised the following people of Garbutt's abuse in response to their inquiries: Dr. Kinsey[6], (R52, 611); Dr. Keighley, (R51, 468-69; R66, 2559-60); Sue Kilmorton, (R51, 457); Dr. Greenberg, (R51, 471-72); Joan Garbutt (R51, 490-93; R103, 8201; R96, 7089-90); Judy Grimm (R52, 603; R57, 1155-56); LaFarnara's daughters (R50, 376); John Rhoades, Garbutt's attorney and close friend; Ruth Mogle (R67, 2650-51); and

[6]In October 1987, LaFarnara, concerned about the injuries that she sustained from the abuse, advised Dr. Kinsey that she had fallen and ever since suffered severe pain in the back of her head. Dr. Kinsey referred her to neurologist, Dr. DeSousa. (R54, 857). Garbutt was present during the evaluation and, as a result, LaFarnara again misrepresented that she had "fallen" head first on concrete in June, 1987. (R54, 858, 860-62). After several more beatings, LaFarnara advised Dr. Kinsey in Spring, 1988 that she believed her incessant, debilitating head pain resulted from Garbutt's physical abuse. (R55, 892). On January 11, 1989, LaFarnara advised Dr. Kieghley, Garbutt's personal physician that was called to the house to treat LaFarnara for, *inter alia*, a concussion, that Garbutt had beat her. (R66, 2559-60; R55, 917; R66, 2573). Days later, when neuromuscular therapist Kilmorton questioned LaFarnara about her injuries, LaFarnara informed Kilmorton of the abuse. (R5 1, 457). Kilmorton took photographs and referred LaFarnara to neurologist, Dr. Greenberg, to evaluate the trauma to her head. (R5 1, 47 1-72). Dr. Greenberg prescribed medication, abuse counseling and an MRI of her head. (R89, 608 1-82).

Dave Jackson, a business associate of Garbutt. (R22, 2711-13, 2734-37). LaFarnara also advised the counselors at CASA. (RS 1,493; R52, 612). In fact, it was Garbutt's discovery that he could no longer keep LaFarnara silent which prompted him to have the police order LaFarnara out of the house and to falsely assert that LaFarnara had stolen his jewelry, automobile, and other property. (R52, 581-82, 604). Significantly, Garbutt took such action only a few days after his daughter, Joan, confronted him about abusing LaFarnara and he learned that LaFarnara had been speaking to counselors from CASA. (R52, 584). Moreover, only a few weeks earlier the Grimms similarly confronted Garbutt. (R57, 1164-66).

5. The Preemptive Strike and Damage Control

The police on May 27, 1989 ordered LaFarnara to leave Garbutt's residence because the couple were not married, the house was titled in Garbutt's name and Garbutt wanted her out. (R53, 581-82). Significantly, as LaFarnara left in her Camaro with only her toothbrush, Garbutt never advised the police that she was allegedly stealing his car. (R52, 582-83). The following day, LaFarnara requested Garbutt's attorney and close friend, John Rhoades, to assist her in obtaining, and to be present while, she obtained her clothes and other possessions from Garbutt. (R52, 583-84). Rhoades agreed. Thereafter, LaFarnara and her son arrived at the Treasure Island home to find most of her possessions in boxes or on the floor in Garbutt's garage. While LaFarnara's son retrieved the items, Rhoades, in Garbutt's presence, drafted a document that he presented to LaFarnara as "a release . . . stating that [LaFarnara] got all [her] property." (R.52, 585). When LaFarnara advised that she would not sign the document until she retrieved all of her possessions, Garbutt became infuriated stating, "if you don't sign that now you can't take anything else out of the house." LaFarnara left.[1] Contrary to Rhoades' representation, the document he drafted purported to release and discharge Garbutt of all

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[1]LaFarnara left with only the few items that she had already retrieved. When unpacking such, LaFarnara discovered that Garbutt had, erroneously or intentionally, thrown his mother's ring in one of the boxes. (R52, 599-600). Thereafter, LaFarnara, through an intermediary, immediately returned the ring. (R52, 599-600; R98, 7291).

liability for any claims that LaFarnara may have had against Garbutt. (R52, 524-35, 585-86; R30, 4685). Days later, Rhoades presented LaFarnara with a typed document which released and discharged Garbutt and his corporation Norsco of liability for "any matter, cause or thing whatsoever, from the beginning of the world to the end of these presents." (R52, 593-95). Rhoades again led LaFarnara to believe that such document merely acknowledged receipt of her property. (R5 3, 628). Notwithstanding such efforts, Joan Garbutt inadvertently permitted LaFarnara to retrieve her possessions without having signed either release. (R52, 596). In addition to such extortion efforts, Garbutt, knowing he had already been sued by Morgan for his abuse of her, attempted to discredit LaFarnara by defaming her to everyone she knew.[8]

6. The First Bout of Major Depression Requiring Hospitalization.

As a result of Garbutt's repeated verbal and physical abuse, LaFarnara developed battered spouse syndrome, (R75, 4120; R52, 617), experienced incessant: debilitating pain to the back of her head, ringing in the ears, loss of balance, dizziness, nausea, fatigue, flashbacks and loss of significant cognitive skills, resulting in short and long term memory loss and confusion.[9] (R52, 612, 618; R53, 715; R54, 839). In August, 1989, LaFarnara was admitted

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[8]For example, Garbutt, the day after LaFarnara was forced to leave her residence, told the owner of Haypenny Jewelers and friend of the parties that LaFarnara had stolen his jewelry. (R57, 1171, 1192). Garbutt in September, 198 9 also told insurance agent Nancy Jones that he had kicked LaFarnara out "because she had stolen him blind" and that LaFarnara had 'stolen a car," "the dishes out of the cabinet, the sheets off of the bed, Christmas tree decorations and anything that wasn't nailed down." (R80, 4665). Similarly, Garbutt told a business associate that LaFarnara was a 'whore," "slut," "no good," and "a thief," asserting that she had stolen his car and numerous things from his house. (R67, 2716- 17).

[9] LaFarnara's pain was so severe and cognitive abilities so impaired that a friend of the parties testified that "between the middle of 1988 to the end of the relationship" "[LaFarnara] could not — many times she would start a sentence and then totally lose a thought . . . I saw that myself many times. And she was clumsy at times. She would trip because of her equilibrium." (R57, 1187). Nancy Jones similarly testified that during such period "[LaFarnara] couldn't continue a train of thought; she would start to say something, and just in the middle of a sentence or in the middle of a word, she would stop and she'd say, 'I've lost it. I don't know what I was saying," (R80, 4673). Third parties also witnessed a

for in-patient psychiatric treatment at the Medfield Psychiatric Hospital. (R52, 609). In addition to suffering from physical and cognitive injuries, LaFarnara experienced severe feelings of depression, guilt, shame, feelings of being "dirty" and an inability to eat, sleep, trust and stop crying. (RS2, 609, 617; R55, 899). LaFarnara was diagnosed and treated at Medfield for major depression and released ten days later. (R52, 6 14; R74, 3964).

7. The Lawsuit

After her release from Medfield, LaFarnara concealed her whereabouts from Garbutt, obtained an unlisted phone number under an assumed name and attempted to put the pieces of her life back together. (R.53, 640-41). Thereafter, LaFarnara learned of Morgan's virtual identical experience with Garbutt.[10] The Medfield counseling, Morgan's disclosure, and the

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dramatic change in LaFarnara's personality from an 'outgoing, bubbly", "very upbeat, lively person" in or about March, 1987 to an intimidated, fearful, guarded, depressed individual in April 1989. (RS7, 1145-46).

[10]The following evidence was presented to the jury: Morgan met Garbutt in 1984 while working at the American Legion. (R58, 1407- 1410). Garbutt took her out for meals, routinely bought her flowers and other presents and became active in Morgan's gardening. (R58, 1411-15). Garbutt was "charming." (R58, 1415). Garbutt proclaimed his love, discussed marriage, and convinced Morgan to move in with him. (R58, 1415, 1419). Though Morgan had previously been paid a salary by the American Legion, it ceased shortly after moving in. (R58, 1417- 18). Garbutt explained that he would provide her what she needed. (R58, 14 18). Garbutt bought Morgan a car which he kept titled in his name. (R58, 1419, R92, 6548). Shortly, after moving in, Garbutt started to drink excessively and became controlling and violent. (R58, 1416, 1420-22). Garbutt would not permit Morgan to associate with her friends in his absence and routinely beat her in the head with his fists, and pounded her head against walls, (R58, 1416, 142 1, 1433). "If you didn't want to get hurt, you did what you were told to do." (R58, 1432). The morning after each beating, Garbutt routinely apologized with flowers and gifts. (R58, 1443, 1422-23). Garbutt's brutal beatings of Morgan were not witnessed by third persons with two exceptions: In August, 1986, a security guard at the Bilmar Hotel witnessed a drunken Garbutt holding Morgan against a car while he repeatedly beat her with his fists (R58, 1429-33); On another occasion, Morgan's mother heard Garbutt brutally beating Morgan over the telephone line and called the police. (R58, 1440). In October, 1986, a drunken Garbutt beat Morgan so severely that she was forced to flee by jumping into a canal behind Garbutt's house and

fact that LaFarnara's physical injuries and cognitive deficits did not diminish with time, forced LaFarnara to realize that she was suffering debilitating, potentially permanent, physical and emotional injuries as a result of a routine pattern of intentional conduct by Garbutt. This realization prompted LaFarnara in November, 198 9 to file suit against Garbutt in an effort to compel him to pay for needed medical and psychological treatment which she could not afford. (R52, 619; R54, 737). In the years to follow LaFarnara sought and received on-going emotional counseling through her church (R82, 5029), on-going chiropractic care and physical therapy through Dr. Farkas (R70, 3277-78) and medical treatment from Dr. Stolley for her head injuries (R70, 3322).

8. The Manifesto of Garbutt's False Defense.

Upon learning of LaFarnara's suit, Garbutt began sending her a series of cards and letters that oscillated from threatening to endearing. (R53, 634-35; R30, 4694; R53, 636; R30, 4698). One such four page document bearing the post mark July 10, 1990, constituted Garbutt's manifesto of his false defense to LaFarnara's claims. (App. D). Such document contained a series of defamatory lies about LaFarnara which were intended to intimidate LaFarnara into abandoning her suit. That document, *inter alia*: falsely depicted LaFarnara as a

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swimming away. (R58, 1423-26). Morgan only returned to retrieve her belongings and Garbutt took the car back. (R58, 1427, 1465). Thereafter, Garbutt began to stalk Morgan by, *inter alia*, following her, staking out Morgan's mother's house, and trespassing on Morgan's property in violation of police orders. (R58, 1444, 1468, 145 1). On November 15, 1986, Morgan filed a civil suit against Garbutt seeking damages and injunctive relief. (R58, 1447-48). Thereafter, Morgan out of fear of reprisals moved to St. Augustine Florida. (R58, 1446-47). In February, 1987, the suit against Garbutt was settled though a stipulated reciprocal permanent injunction. (R58, 1455-57). In 1991, Garbutt brazenly violated the injunction upon discovering that Morgan had been listed as a witness for LaFarnara: Garbutt drove back and forth in front of Morgan's house, ultimately approaching the unsuspecting Morgan when she was in her yard. (R58, 1466). Morgan, terrified, called the police. (R58, 1466-67). During the first trial, Garbutt again stalked Morgan in effort to intimidate her into not testifying. (R58, 1468-69).

money hungry, deceitful, vulgar, violent, promiscuous, dishonest, jealous, thieving, litigious, drunken adulterer who was kicked out of Garbutt's house by the police after she admitted to stealing all the jewelry from Garbutt's safe. The letter further falsely asserted: that LaFarnara was hiding from Garbutt as she hid from other men; that Garbutt had to physically restrain LaFarnara to prevent her physical abuse; that Garbutt did not hit LaFarnara though she deserved to be hit; that had Garbutt hit LaFarnara 'there would be one hell of a mark, and broken face, head , or wherever I hit;" that LaFarnara got her bruises from being intoxicated and falling down; that, at LaFarnara's insistence, Garbutt paid to have LaFarnara's breasts enlarged; that Garbutt supported LaFarnara and her family; that LaFarnara prior to moving out took "everything of monetary value"; that LaFarnara had stolen Garbutt's car and robbed his mail; that LaFarnara 'cleaned out the house" while under a 'restraining order;" that LaFarnara only dated married men; that LaFarnara advised Garbutt in June, 1987 that she had a relationship with "Mr. Bigger and Better" and would leave Garbutt when she got money from her most recent law suit; and that "when the appropriate time comes, [Garbutt will] send all of [LaFarnara's] witnesses and [their] friends a copy of such letter [the Manifesto]. . . " Significantly, Garbutt admitted in trial to having made the statements contained in the Manifesto to various friends of LaFarnara, as well as witnesses in the trial because "it was [his] only defense." (R98, 7416). Garbutt also admitted to showing the contents of such letter to "a lot of people." (R98, 7416- 17). The Manifesto Letter constituted the virtual verbatim script of Garbutt's defense in both trials.

9. Incessant Threats, Seduction and Stalking

Another document that Garbutt sent to LaFarnara threatened "If I ever hold you again, I promise I'll do it much better, and forever." (R53, 699). Upon reading such statement and knowing Garbutt as well as she did, the terrorized LaFarnara immediately called the Police. (R53, 699). LaFarnara was so afraid of Garbutt that she even had her part-time employer, conceal her vehicle while she worked. (R53, 82 1). When the threats, lies and intimidation did not result in LaFarnara abandoning the suit, Garbutt resorted back to seduction. For example

Garbutt wrote:

> "I have written over 400 more notes, trying to tell you my desire to talk with you . . . . It's obvious you want to talk, also but when you ask your attorney, he tells you the same as mine tells me. Stay away. They only have to worry about the legal aspects, but we also have to consider our desires and the rest of our lives. . . . Its possible you should check who your advice comes from. When I've checked with people who deal with family counseling and such, they advise very strongly for a meeting to take place betweenus. . . . Rusty and I are keeping house, waiting for you and Tasha to open your heart and mind to an open invitation. I have never loved anyone as I have you, and my intentions are honorable. . . , I sincerely wish to meet with you . . . You just have to overcome good legal advice, I guess, and listen to your and my desire to go the extra inch for the most important part of our lives. I sincerely love you, and I'm willing to go wholeheartedly into our lives to make all this worthwhile.

(R53, 699-700). In addition to other correspondence, Garbutt sent cards and/or letters to LaFarnara on Christmas, Valentines and LaFarnara's birthday. (R30, 4694-96, 4698-710). In 1991, Garbutt either followed LaFarnara to, or staked out, LaFarnara's son's house so that he could confront LaFarnara. On such occasion, Garbutt became violent when LaFarnara refused to provide him her phone number and refused to approach him. (R53, 707-08). Thereafter, notwithstanding the fact that LaFarnara had obtained an unlisted phone number under an assumed name, Garbutt called LaFarnara's residence and left a message 'just returning your call." (R65, 2336). LaFarnara, having never called Garbutt, knew that the message was his way of taunting and threatening her. (Id.). In February, 1992, notwithstanding LaFarnara's efforts to keep her residence undisclosed, Garbutt drove repeatedly back and forth in front of LaFarnara's apartment, came to the door and left pink roses. (R53, 710- 11). LaFarnara, knowing Garbutt as well as she did, knew that his actions constituted a disguised threat that he would always find her. LaFarnara again called the police. (R53, 7 12). On March 11, 1992, a terrified LaFarnara, obtained a temporary restraining order (TRO) prohibiting Garbutt from contacting, harassing, harming or otherwise interfering in her life. (R2, 60; R56, 1088-89).

Notwithstanding the existence of the TRO, Garbutt, knowing LaFarnara's emotional vulnerability, initiated a series of telephone calls to her that were designed to inflict further

emotional harm and to frighten and intimidate LaFarnara into abandoning her suit. Garbutt, or persons at his direction, made a total of 33 such calls, most of which consisted of maniacal canned laughter. (R65, 2385, See, footnote 2 for discussion of calls.) Each call caused LaFarnara to become terrorized which was manifested by incessant shaking, nausea and an inability to eat and sleep. (R65, 2385, 2373). LaFarnara repeatedly reported the calls to the Police and the phone company. (R65, 2387-88; 2349, 2339).

In addition to the phone calls before and during the trial, Garbutt, knowing LaFarnara's emotionally fragile state and her debilitating fear of him, waited on two occasions during the trial in a vacant courthouse hallway so as to surprise, shock and terrorize LaFarnara when she unsuspectingly exited the women's room. On each occasion Garbutt just stood and glared at the terrorized LaFarnara. (R 103, 8 18 9 -9 1). Such action coupled with the phone calls and the trauma of seeing Garbutt everyday for several weeks caused LaFarnara to suffer a second bout of major depression and require hospitalization during the trial. Discussed *supra*.

10. The 1997 Cervical Films

During the first week of the eight week trial, Garbutt's counsel requested and obtained LaFarnara's consent to call Dr. O'Connor, LaFarnara's treating physician in 1987, as a witness. Dr. O'Connor had never previously been listed as a witness in the case. In preparing for Dr. O'Connor's surprise testimony during the February 18-20 break in the trial, LaFarnara's counsel concluded that notwithstanding the fact that Dr. O'Connor's records referenced a series of X-Rays taken between 1984- 1987 which depicted a static mild degenerative condition in LaFarnara's cervical spine over the three year period, Garbutt's only purpose in having Dr. O'Connor testify would be to present the false proposition that LaFarnara's current condition predated her relationship with Garbutt and was reflected on the series of X-Rays referenced in Dr. O'Connor's reports. (R64, 2232-2234). In an effort to rebut such contention, LaFarnara's counsel contacted Dr. O'Connor to obtain copies of the X-Rays and to schedule his deposition. Dr. O'Connor's office, however, advised that all of the X-Rays had been destroyed and that Dr. O'Connor would not be available for deposition. (R64, 2189-90, 2232-33; R66, 2498-99;

R61, 1774-75). Thereafter, LaFarnara's attorney had LaFarnara submit to an X-Ray examination in an effort to challenge and rebut the anticipated surprise testimony of Dr. O'Connor. (R64, 2189-90, 2232-33; R66, 2498-99; R61, 1843). The X-Ray corroborated the cervical spine injury that Dr. Wassel had diagnosed in 1989 using a cinefluoroscopy (a moving X-Ray) taken the same year. (R61, 1796). When Dr. Wassel was advised by LaFarnara's counsel that he had a current X-Ray taken to rebut Dr. O'Connor's anticipated surprise testimony, Dr. Wassel asked to review such. (R61, 1843). Based on the X-ray, Dr. Wassel recommended that LaFarnara have an MRI of her brain conducted to determine the extent of the injury to her brain. (R64, 2189-90, 2232-33). LaFarnara's counsel agreed, believing that such evidence could rebut the psychological IME report that Garbutt provided to LaFarnara one business day before the second trial opining that LaFarnara was malingering for secondary gain. (R64, 2264-65, 2268, 2191-92; R61, 1838). Unknown to LaFarnara's counsel, MRIs of the cervical and lumbar portions of the spine were taken as well. (R63, 2 122). LaFarnara's counsel immediately advised defense counsel on or before February 20 of the existence of the films and similarly advised the court when it reconvened on February 2 1, 1997 (R61, 1773-82). Given that the MRI of LaFarnara's brain depicted objective evidence of significant brain damage, the court suggested that it might mistry the case. (R6 1, 18 56; R62, 1882-83). Garbuttrejected such proposition citing the expense of another trial. (R61, 1857). Given the defense's opposition to the court's entry of mistrial on its own motion, and neither party's desire to move for a mistrial, the court ruled that the 1997 films would be excluded until such time as the defense had sufficient opportunity to have their experts examine the films, depose LaFarnara's experts on such issue and, conduct an IME of LaFarnara. (R62, 1875). After LaFarnara's counsel advised the court that such a ruling effectively prevented LaFarnara from putting on any further evidence, the court ruled that it had no option other than to exclude all evidence of the 1997 films. (R62, 1876, 201 1- 12). The court then advised the parties that it was conducting its own research on the mistrial issue and discussed potential scheduling issues for retrying the case. (R62, 2026-27). Garbutt again opposed a mistrial.

(R62, 2030). The court adjourned for the weekend stating that it was considering entering a mistrial on his own motion since neither party had made such a motion. (R62, 2056). Significantly, LaFarnara could not move for a mistrial because she feared that such would be construed as a voluntary dismissal. (R46, 7342).

On Monday morning, February 24, 1997, the court ruled that LaFarnara's proffer was sufficient to admit the phone calls evidence discussed above. Thereafter, the defense requested a three day continuance of the trial. (R63, 2084, 2091). The trial court granted the motion and ordered that the defense also use the time to do what it considered necessary to defend against the 1997 films. (R63, 2096, 2 100). Significantly, LaFarnara's counsel advised the court and Garbutt, that notwithstanding his protestations of procedural prejudice he was waiving any right to claim prejudice on appeal if he did not move for a mistrial. (R. 63, p. 2086, App. E).

During the scheduled break, LaFarnara submitted to a neurological IME by new defense expert, Dr. Greenberg, (R63, 2 113) and provided the defense all relevant documents, including a brain MRI not favorable to LaFarnara and the results of two computerized brain mapping tests that were performed by Dr. Afield during the break and which confirmed organic brain damage. (R63, 2 123-24). LaFarnara also proffered her experts for deposition. (R63, 2 124-26). Garbutt during the break again requested the court on February 26th to exclude all evidence of telephone calls and the 1997 films. (R63, 2 110-2 161). During that hearing the court again ruled that the telephone evidence was admissible finding, *inter alia*, that Garbutt had not requested the information, i.e., the phone numbers from where the calls originated, which he argued to the court as the basis for excluding the evidence. (R64, 2 155, 2272-74). The court heard argument on the 1997 films continuing such until the following day. (R63, 2 156-61). The following day, February 27th, the court recognized a distinction between the alleged procedural prejudice to the defense resulting from the cervical spine films and the MRI of the brain. Thereafter, the court applying a Binger v. King Pest Control, 401 So.2d 1310 (Fla. 198 1), analysis, ruled that all evidence of the brain MRI and Dr. Afield's testimony was inadmissable notwithstanding the court's finding that such did not result from trickery or bad

faith. (R64, 2247, 2258-64). The court, however, reserved ruling on the cervical films until the conclusion of Dr. Wassel's deposition scheduled for 4 o'clock that afternoon, so that the court could better evaluate the prejudicial impact of such evidence. (R64, 2258-59, 77). Significantly, Garbutt's counsel admitted during argument on the issue that the cervical films would not cause the defense to alter its strategy in the case. (R64, 2244). Garbutt's counsel also twice acknowledged the court's offer to mistry the case on a motion from either party and argued adamantly against the court's suggestion that it declare a mistrial on its own motion, (R64, 2178, 2211-12, 2223-25, 2281). As a result, the court ruled: "I think the defense is absolutely right. Whatever I do if the plaintiff wants to move forward and the defense wants to move forward that we will go forward." (R64, 2241).

The next day, February 28th, the court found that admission of the 1997 cervical films did not procedurally prejudice Garbutt, given that he had already fully deposed Dr. Wassell on such issue, had consulted his existing expert, Dr. West, and secured additional experts, including Dr. Katz and Greenberg, and obtained opinions from at least two such experts that the 1997 cervical films depicted only a degenerative disk disease consistent with LaFarnara's age and not any traumatic injury. (R66, 2489-90; R66, 25 13-24). The defense took full advantage of the opportunity to supplement their expert witness list. For example, the defense strategically retained Dr. Katz, the radiologist who drafted the 1985 MRI report and who theretofore was not listed as a defense witness. By retaining Dr. Katz, the defense not only retained an expert, but also a fact witness who could credibly assert that his 1985 MRI report and the 1997 films unequivocally established that LaFarnara's cervical spine, with the exception of natural degenerative changes from aging, had not changed. Garbutt's retaining of Dr. Greenberg, a prior treating physician of LaFarnara, as a defense expert was also clearly calculated to and did, in fact, create another super witness/expert, akin to Dr. Katz.

As it turned out, LaFarnara's emergency hospitalization (discussed *infra*) resulted in another continuance of the trial and precluded the admission of any cervical film evidence until a weeklater on March 6, 1997. (R69, 3070). The court's determination that Garbutt was not

procedurally prejudiced is demonstrated by, *inter alia*: the fact that the defense had three experts, Dr. West, Dr. Greenberg and Dr. Katz testify extensively concerning the 1997 cervical films and opining that such conclusively established the defense's theory that Garbutt did not cause any injury to LaFarnara's neck." Significantly Garbutt's new super witness/experts, Drs. Katz and Greenburg, not only testified concerning the 1997 films, but also all other evidence in the case, including but not limited to the 1989 cineflouroscopy, the 1985-87 X-ray reports, the 1985 MRI report and numerous medical records. (R46, 7338; R86, 5621-66; R89, 5993-6050; R115, 7732-7767). Dr. Greenberg even opined that LaFarnara was not suffering from post traumatic head injury syndrome. (R89, 6068).

11. The Second Bout of Major Depression Requiring Hospitalization

As stated above, in addition to the phone calls before and during the trial, Garbutt, knowing LaFarnara's emotionally fragile state and her debilitating fear of him, waited on two occasions during the trial in a vacant courthouse hallway so as to surprise, shock and terrorize LaFarnara when she unsuspectingly exited the women's room. (R103, 8 189-91). Such threatening and intimidating action coupled with the phone calls and the trauma of seeing her abuser of two years and tormentor of nine years on a daily basis caused LaFarnara to experience, *in ter alia*, an intensification of the debilitating pain in the back of her head, hand tremors, shaking, terror, crying spells, sleeplessness, loss of appetite, chest pains and suicidal ideations. (R75, 4014-4027; R103, 8191). The court excused LaFarnara from the trial on

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[11]Dr. West, testified that the 1997 cervical films, like the 1989 fluoroscopy and the 1985 MRI: (i) depicted "mild" degenerative changes consistent with LaFarnara's age (R86, 5673, 5656); (ii) depicted bone spurs resulting from mild arthritis (R86, 5658); (iii) were consistent with the reports relating to the 1984, 1985 and 1987 X-Rays (R. 86, 5673-75); depicted no impingement of the spinal cord or any nerves (R. 5662, 5667-70); and (iv) depicted no appreciable impairment inconsistent with LaFarnara's age, and therefore taking all factors, including his prior examination of her, into account he would not assign her any impairment rating (R86, 5671). Radiologist Dr. Katz, testified similarly, (R96, 7042; R115, 7749-7767), as did Neurologist, Dr. Greenberg. (R. 89, 6046-49).

February 28th because of her deteriorating condition. On March 1, 1997, LaFarnara was admitted to the Psychiatric Unit of St. Joseph's Hospital. Dr. Walker, LaFarnara's treating psychiatrist, though initially suspicious given LaFarnara's involvement in litigation, determined that her hospitalization was medically necessary. (R75, 4020-2 1, 405 3). LaFarnara's counsel immediately notified the defense and the court of LaFarnara's hospitalization. (R68, 2876). When the court reconvened on March 3, 1997, it granted a three day continuance of the trial. In doing so, the court advised the defense that it believed that evidence of the hospitalization was admissible and offered the defense on three occasions to mistry the case. (R68, 292 1, 2924, 2932-34). The defense refused to accept the court's offers and, thereafter, the court ordered the parties to submit memoranda on the issue. (R68, 2937). On March Sth, a hearing was held on Garbutt's motion to exclude all evidence relating to the hospitalization. Garbutt adamantly opposed the court's entry of a mistrial on its own motion and argued that LaFarnara should voluntarily dismiss the action. (R68, 2970). Significantly, the court found, and the defense agreed, that the hospitalization did not violate any court order and was presumptively in good faith. (R68, 2963, 2965-66). Thereafter, the court stated it was inclined to admit the evidence and granted Garbutt's motion to have LaFarnara submit to a third psychological IME during her hospitalization. (R68, 2995). Significantly, the court again invited the defense to move for a mistrial, stating:

> I don't understand this, but if everybody's excited about going forward on this, no matter how I rule, then we'll go ahead and go forward. That's the bottom line. It certainly isn't for me to make a decision that each party has to make, If I rule for them or against them its their decision to make.

(R68, 2886). The defense again refused to accept the offer. The following day, March 6th, the court ruled that evidence regarding the hospitalization of LaFarnara was properly admissible provided LaFarnara proffered evidence outside of the presence of the jury establishing that the

hospitalization was medically necessary.[12] Garbutt, knowing the court's willingness to enter a mistrial, never made such a motion. LaFarnara was released from the hospital on or about March 7th, after one week of in-patient treatment. (R75, 4023).

12. Medical Testimony in the Trial

After the court ruled on the hospitalization issue, LaFarnara on March 6th, first made reference to the 1997 cervical films through the testimony of Dr. Witek, (R69, 3059-3 118). Thereafter, IaFarnara read the pre-trial deposition testimony of Dr. Musella to the jury. Dr. Musella opined that IaFarnara suffered a permanent brain injury, termed post-traumatic head injury syndrome, which is consistent with, her having suffered repeated blows to the head and multiple concussions. (R69, 3 119- 191). On March 7th, Dr. Wassell testified concerning, *inter alia*, the 1997 cervical films. (R72, 3601-3750).

On March 10th, Garbutt, several days after having conducted another psychiatric IME of LaFarnara, after having conducted a discovery deposition of her treating psychiatrist, Dr. Walker, and after having reviewed the hospital records, disingenuously moved for "a mistrial contingent on the court reserving until the verdict is returned." (R74, 3827). Garbutt

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[12]In so determining, the court specifically found that: (i) such evidence was consistent with LaFarnara's theory of the case that she was suffering from and would continue to suffer from severe, psychological trauma, as well as Garbutt's theory of the case that LaFarnara's alleged emotional injuries were all subjective; (ii) such hospitalization and treatment was foreseeable and at issue in that IaFarnara had consistently asserted that future professional psychological treatment of LaFarnara was necessary; (iii) such evidence could not have been generated prior to trial; (iv) evidence of facts transpiring after the suit was instituted and before verdict, which would have a legitimate bearing upon the amount of damages properly recoverable, may be admitted into evidence; (v) the generation of such evidence did not violate any discovery order or rule of procedure; (vi) Garbutt was not prejudiced by such evidence; and (vii) even assuming arguendo that Garbutt was prejudiced, such prejudice could be cured by a third psychological IME of LaFarnara scheduled for the following day and Garbutt having the opportunity to take the deposition of the treating psychiatrist and review all relevant medical records prior to the entry of such evidence. (R69, 3004-14, 3028).

curiously made this motion immediately after LaFarnara's council stipulated that (a) Garbutt's proffered line of cross examination of Dr. Walker concerning Dr. Afield would not open the door to Dr. Afield's testimony concerning brain damage, (b) LaFarnara would not call Dr. Afield as a witness even if the proffered questions were asked of Dr. Walker concerning Dr. Afield and (c) Garbutt could call Dr. Afield if they believed such was necessary. (R75, 4026-27). Significantly, when the court advised Garbutt that it had the discretion to rule on Garbutt's motion for mistrial immediately, as opposed to waiting three more weeks for a verdict to be rendered, Garbutt immediately withdrew the motion. (R74, 3833). The following day on March 11th, Dr. Walker testified that he treated LaFarnara and diagnosed her as suffering from "major depressive disorder, recurring, somewhere between moderate and severe, with non-psychotic features" coupled with further attested that given LaFarnara's prior hospitalization for major depression, it was both foreseeable and probable that LaFarnara would have experienced a relapse of the disease, since major depression is a "neurological disease, progressive" having a 75 to 80 percent relapse rate after five years and that external factors triggering a relapse generally include the patient "find[ing] themselves in life situations where they feel trapped or backed into a corner or are in situations where they have no control over what's happening or perceive that they have no control over what's happening to them." (R75, 4026-27). Garbutt cross-examined Dr. Walker extensively without ever moving for a mistrial. (R. 75, p. 4033-4099).

On March 12th, Dr. O'Connor testified, *inter alia*, that he had no independent recollection of treating LaFarnara and immediately thereafter, purporting to read from his 1985 medical records asserting that LaFarnara complained of headaches during his 1985 evaluation of her. (R78, 4499). On cross-examination it was pointed out that there was no such reference to headaches in Dr. O'Connor's 1985 medical records and that Dr. O'Connor while purporting to read the 1985 records verbatim inexplicably omitted the sentence stating that LaFarnara had not lost consciousness in the accident. (R78, 4513, 4518). On March 14, 1997 Dr. Forman,

the Chief of Psychiatry of St. Joseph's Hospital, testified that: he had conducted two IME's of LaFarnara, one of which while LaFarnara was in St. Joseph's psychiatric unit; that he had listened to a recording of LaFarnara talking to her former employer; and that he had reviewed (i) the deposition of Dr. Walker, as well as LaFarnara's medical records from the mid-trial hospitalization, (ii) the report of defense expert Dr. Filscov concerning the IME she conducted five days before the trial, (iii) Dr. Merin's report,[13] and (iv) the results of various psychological tests conducted by Drs. Filscov and Merin. Dr. Forman opined based on such information and evaluations that, *inter alia*, LaFarnara suffered a pre-existing dysthymic disorder (depression), that LaFarnara was "very motivated by secondary gain mechanisms," that "she was extremely angry" and 'extremely interested in monetary gain." (R8 1, 4863-89). Dr. Filscov, testified similarly for the defense on March 25. (R93, 6672-6760). See *supra* for discussion of Dr.s West, Greenberg and Katz' testimony, which occurred on March 20, 2 1 and 26 1997, respectively.

13. I Am "a Gentle Man;" I Never Hit LaFarnara "[o]r Any Other Woman;""or Anybody Else."

On March 24, 1997, Garbutt during his direct examination gratuitously testified that he was "a gentle man," that he never hit LaFarnara "[o]r any other woman," and that he did not hit LaFarnara *or anybody else." (R92, 6574, 6576, 6590). As a result of these gratuitous statements concerning Garbutt's gentle nature, LaFarnara was able to put on very limited testimony concerning the following: (i) an occasion when a drunk Garbutt at a party grabbed his wife Helen by her hair and head and proceeded to shake her ferociously until he was restrained from behind by two men, (R103, 1034-36); an occasion when a drunk Garbutt while at the American Legion grabbed Susan Jacobs against her will, jerked her towards him while stating 'come back here bitch" and then demanded to know what her and Garbutt's then

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[13]Dr. Merin was an expert for the Plaintiff on battered spouse syndrome who testified concerning LaFarnara's psychological injuries. (R74)

girlfriend were talking about in the women's restroom, (R 104, 8 2 9 1-9 3) ; an occasion when Garbutt smashed a hamburger into Patricia Wall's chest during a dispute over Wall's smoking in his presence; (R102, 8110-11); and an incident wherein Garbutt battered a police officer during a traffic stop. (R100, 762526).

14. The Court Ruled In Garbutt's Favor So He Moved For A Mistrial.

On March 28th the defense in its case in chief called LaFarnara as a witness. (R101,. 7777). Garbutt's direct examination of LaFarnara continued until March 3 1 th (R 102, 8037). On that day, three weeks after LaFarnara put forth evidence of the hospitalization and 1997 cervical films and four weeks after the phone call evidence was admitted, two days before closing argument and two days after Garbutt decided he wanted a mistrial,[14] Garbutt moved for a mistrial because the court ruled that the defense's proffered direct-examination of LaFarnara was permissible and did not open the door to the admission of the brain MRI, brain mapping or Dr. Afield's testimony. (R102, 8041-67). The court made this ruling despite the defenses' repeated questions specifically inquiring into LaFarnara's knowledge of her brain damage. The court also ruled that since the proffered cross examination by LaFarnara repeatedly referenced LaFarnara's brain damage and was clearly intended to create the inference that LaFarnara's hospitalization was staged because it resulted from LaFarnara's counsel's unsubstantiated representations of brain damage to the court, that LaFarnara's counsel in cross-examination

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[14]On March 26, Garbutt's daughter, Joan, recanted her assertion in direct examination that LaFarnara had not told her of the physical abuse in 1989. (R96, 7089-90). LaFarnara was thereafter permitted to cross-examine Joan concerning, *inter alia*, her assertion that she did not believe LaFarnara when she advised Joan of the abuse by inquiring whether Joan had any knowledge of Garbutt beating other people prior to LaFarnara's allegation. Joan responded that two other people had similarly accused Garbutt of such abuse and gratuitously stated that one such person was her mother. Garbutt then, without opposition from LaFarnara, moved to strike the gratuitous portion of Joan's answer. Garbutt then for the first time moved for a mistrial without thereafter withdrawing such. (R96, 7117-24). The motion was denied.

could elicit the fact that she learned of her brain damage from Dr. Afield. (Id.). Thereafter, Garbutt stated that he intended to ask only certain questions that did not specifically reference LaFarnara's brain damage. The court ruled that such questions were permissible and would not open the door to anything:

> I'm going to allow those questions without opening the door. But I'll tell you one thing that worries me is, this — this ruling is couched in the assumption that she going to say the same thing that she did, and I want you to understand this. . . . Now if she gives some other answer I don't know where that's going to lead.

(R102, 8065). Thereafter, Garbutt moved for a mistrial which the court denied. (R 102, 8066-67).

15. Closing Argument

Closing argument in the compensatory damage phase of the trial began on April 2nd, and lasted two days. During its course, LaFarnara demonstrated to the jury through reference to specific record evidence, that various propositions which Garbutt presented to the jury (either through evidence or argument) were false and/or implausible. The Manifesto letter drafted by Garbutt in July, 1990 falsely depicting LaFarnara as, *inter alia*, a money hungry, deceitful, vulgar, violent, promiscuous, dishonest, jealous, thieving, litigious, drunken adulterer who was kicked out of Garbutt's house by the police after she admitted to stealing all the jewelry from Garbutt's safe, was one such challenged proposition. Not only did the Manifesto letter constitute the virtual verbatim script of the "accuse the abused" defense that Garbutt presented to the jury during the course of the eight week trial,[15] it also constituted *the resgestae*

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[15]Such tact began as early as voir dire when Garbutt's counsel compared LaFarnara to (a) Susan Smith, the South Carolina woman who murdered her children and gained the sympathy of the country when she asserted that they were abducted, (b) a woman with a motive to lie and (c) a woman scorned (R49, p. 18 2, 15 1, 15 3). It continued throughout the trial, and formed the theme of Garbutt's closing argument (e.g., R108, p. 8885). In closing, Garbutt went so far as to compare LaFarnara's greed and motivation for revenge to "People [who] will hire people to murder children because they beat their daughter out in a

of two of LaFarnara's claims; defamation and infliction of severe emotional distress. It was for this reason that Garbutt aggressively argued to the jury that various allegations and characterizations in the Manifesto were true and corroborated by the defense's evidence. (R108, p. 8955-8965). It was also for this reason that LaFarnara's counsel, pursuant to his professional and ethical responsibilities, aggressively argued and demonstrated to the jury, through specific reference to the record evidence, that the allegations in the Manifesto letter and alleged corroborating evidence, were both false and implausible. In doing so, LaFarnara repeatedly explained that Garbutt's false defense was "conceived in the mind of the defendant" and not his counsel and that Lafarnara's comments were not intended to any way disparage Garbutt's counsel. (R109, 9005, 9008, 9012).

During the two days of argument Garbutt made 7 contemporaneous objections. Such objections related to the following comments of LaFarnara's counsel: (i) a statement as to why, based on the evidence, the jury should find LaFarnara's daughters' testimony truthful (R107, p. 8767); (ii) a statement that LaFarnara was not claiming any injury to her "lower spine," (8808); (iii) a statement that the calls may have been made for Garbutt (88 14); (iv) a statement concerning the standard to be applied to determine if punitive damages are justified (R108, 8984); (v) a statement that "tinititus is a permanent injury[;] It's not treatable." (9025); (vi) a comment questioning why Garbutt had not called Kathy Ritter as a witness (9039); and (vii) a comment that a letter allegedly written by Morgan was not introduced in the first trial. (9045) All such comments, with the exception of the Morgan letter[16], were determined by the trial

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beauty contest," (Id); and argued that allegations in the Manifesto were true. (R108, p. 8955-8965). Notably, Garbutt used the same tact of accusing the abused against Morgan by portraying her as a lying, thieving, drug addicted, prostitute. (R50, 291, R108, 8919).

[16]Notably, this comment was properl yinferable from the evidence since Morgan's testimony from the first trial was read to the jury and the defense at no time during that testimony presented the letter to Morgan. [R58, 1407- 15 1 9]

court to be proper and supported by the evidence.[17] Moreover, Garbutt never asserted any of these comments as a basis for a mistrial.

On the afternoon of April, 2, during LaFarnara's rebuttal argument, Garbutt made the fourth contemporaneous objection described above concerning the punitive damage standard comment. (R108, 8984). It was during a bench conference on this issue that Garbutt also asserted an untimely objection to an earlier "blowing smoke" comment made by LaFarnara's counsel. Such earlier comment was in response to (a) Garbutt's counsel's assertions in argument tbat LaFarnara's counsel ("they") presented evidence concerning Garbutt striking Pat Wall with a hamburger and Garbutt's similar beatings of Morgan so as to prejudice the jurors into believing Garbutt "is a really lousy person" because "we [Lafarnara's counsel] don't have any evidence that Garbutt beat this woman [LaFarnara]," (R108, 8840); and (b) Earbutt's counsel's assertions relating to the Manifesto letter, (R108, p. 8955-8965). Significantly, "blowing smoke" were Garbutt's own words that he used to justify his actions against Pat Wall. (R 105, 8466-67; 106, 8515, 8524). Moreover, the blowing smoke comment was made on page 898 1 of the trial transcript and it was not until four pages later, while Garbutt's counsel contemporaneously, albeit erroneously, objected to the punitive damage standard statement, that Garbutt's counsel raised an untimely objection to the blowing smoke comment."

"For example, the tinnitus statement was supported by the testimony of LaFarnara and Dr. Musella, (R54, 856, R69, 3 125, 3 129); Garbutt in opening statement represented that he would call Ritter as a witness (as well as Dr. DeSousa), but failed to do so (R50, 282, 287); the court ruled throughout the trial that the telephone call evidence was admissible because, *inter alia*, a jury could reasonably infer that either Garbutt or someone on his behalf made the calls (R63, 2068, 2070); the court found that the LaFarnara daughter comment "was merely suggesting reasonable inference for the jury to consider" (R46, 736, App. A, 45) and the court post trial found that the comment on the punitive damage standard was proper. (R46, 7369-70, App. A, 45-46).

[18]Garbutt's recitation of the record on page 5-6 of his Initial Brief is inaccurate and very misleading. Garbutt after quoting the blowing smoke comment falsely asserts to this

Notably, Garbutt did not even bother to obtain a ruling on his objection to the blowing smoke comment. Rather, LaFarnara's rebuttal argument resumed without objection. When LaFarnara's counsel, at the time designated by the court, ceased his argument, the court excused a juror from the remainder of the trial, awarded her a certificate, addressed the issue of whether the substitute alternate juror was sleeping during argument, returned case law to counsel and recessed for the evening. (R108, 8976, 8985-89).

When the court convened the following day it *sua sponte* sustained Garbutt's objection to the blowing smoke comment. (R109, 8994). Thereafter, Garbutt, having had an opportunity to comb the record over night, moved for a mistrial based on ten comments made the previous day by LaFarnara during her initial and rebuttal arguments which Garbutt cited out of context and mischaracterized from the previous day's argument. Significantly, Garbutt never asserted a contemporaneous objection to any of the ten comments. In contrast, Garbutt had no hesitancy to contemporaneously, albeit erroneously, object to the seven comments discussed above .[19] (R109, 8997-8998). Notwithstanding, Garbutt argued that the ten comments were

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court that:

> "At this point, defense counsel objected and brought to the court's attention that it is improper to belittle the defense with such comments as "blowing smoke. (R 108, p . 8 984-8 5). The court did not rule on this objection at this time, and counsel continued:"

Garbutt thereafter quotes to this court three additional comments, including a second reference to blowing smoke, each of which occurred before Garbutt ever made his belated objection. This misstatement of the record appears to be designed to mislead this Court into believing that Garbutt's objection to the blowing smoke comment was contemporaneous, that the trial judge was utterly non-responsive, and that LaFarnara was contemptuous to Garbutt's objection, Unfortunately, this is just one example of Garbutt's misstatement of the record. E.g. Footnotes 19 and 23.

[19]Significantly, Garbutt in Petitioner's Response to Motion to Dismiss for Lack of Jurisdiction and Mootness falsely implies to this Court that his objections related to the ten comments asserted as the basis for Garbutt's Motion for Mistrial. For example on page 3 of Petitioner's Response Garbutt represents:

improper because they allegedly ('belittled the defense" and 'voiced a personal opinion as to the truthfulness of the testimony." (Id). The ten comments that formed the basis of the mistrial motion but to which Garbutt did not object are set forth below."

(1) Consider the bad jokes in this case, Joanie Garbutt testified, "oh, yeah, she had bruises on her all the time. We joked about it."[R 79, 4473] Garbutt testifies, "Oh Rosemary got drunk all the time. We joked about it. We had fun. Her head hanging in the toilet bowl. [R92, 6586]" Dr. Kiefer [Kieghley], "oh yeah, [he] told me here that "he said he didn't hit her that hard, but there was levity in the room. I thought they were joking. I didn't take it seriously." [R66, 2541] Mr. Garbutt testifying, sure he's responsible when he pushed his wife; 'just horseplaying." . . , Dr. Forman testifying, 'sure I told the plaintiff," sitting in a hospital that, "I asked her if a doctor hit her just a joke on my part." [R 82, 5 116-17] "The only defense" [R98, 74 16]— the only joke in this case is the defense. That's the joke in this case. And its not funny, This is a key; this letter [the Manifesto][App. D.]. Mr. Garbutt, you recall testified that he wrote this letter [the Manifesto] because in his words quote "his only defense."[Id.] Now let's take a look . . .

(R107, 8735-36).

(2) And remember I told you in voir dire the reason we don't have jury schools and the reason we don't pay experts to sit on juries is because it is the honesty, it is the independence, it is the impartiality, and above all the common sense of individuals who come from diverse walks of life that ensure the search for truth is not detoured, is not hidden in the fog, and there has been a lot of fog thrown at you in this defense. Famous author, now deceased, P.K. Chester, once observed, 'Common sense is the instinct for the probable,' the instinct for the probable. . . . Let me ask you this. Just consider some of the improbabilities here. Is it probable, as Mr. Lewis told you in his opening

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Perhaps more importantly, however, Nixon is not dispositive of the issues in this case. That case involved a complete absence of objection on the part of the complaining party. Nixon, 572 So.2d at 1340. To the contrary, the record in this case clearly demonstrates that the Petitioner did object to the improper comments and did move for a mistrial. The record is clear that the Petitioner objected six times during the closing argument.

[20]Citations to the evidence referenced in the comments are included for this Court's benefit.

statement, after you have heard the evidence, . . . that its true as he said, that Rosemary's head injury was from a car accident ? Is it probable, as he said, that Dr. Babcock treated her for headaches [R50, 295]? Is it probable when now we have in evidence Dr. Babcock's report? You read it. There is not a mention of headache anywhere, not a mention, and yet Mr. Lewis told you he was going to prove that Dr. Babcock treated her for headache [Id].

(R107, 8739-40). .

(3) I asked her [defense expert Dr. Filscov] if Rosemary LaFarnara is the greedy, grasping lady that Mr. Garbutt postulated in his manifesto of what the defense in this case would be, which manifesto has now been carried out in elaborate and expensive extreme before you, if she were that type of person don't you think she would have tried to get a few bucks from the head pain out of the car accident. She didn't. [R94, 6808-17]

(R107, 8742).

(4) Well, common sense, ladies and gentleman is the only thing that counts. Now, so the problem with the defense is that it's so carefully constructed that it collapses in the face of common sense and it collapses in the face of evidence.

(R107, 8744-45).

(5) How about Penny Morgan, the beating in the parking lot at the Bilmar [R58, 1423-26]. A security guard came in here with no ax to grind against anybody and said without a doubt Mr. Garbutt is the man he saw beating on Penny Morgan. And he showed you how that beating was going on, like this with his fists on her head, to the point where he tried to get him to stop and Garbutt ignored him. And when he got up on Garbutt, Garbutt rolled around and said, "Do you know who I am?" [Id.] That man was telling you what he saw with no ax to grind in this case. What is Mr. Garbutt's version of that? Does this make sense? "Oh, I helped her to the car. She didn't want to leave. Then she said OK I will leave. Then for some reason I opened the car and she sat down and she tried to kick me in the groin. I swing at her head. I missed. Then I got in my car and drove away. She followed me out and I guess," he says, "she must have turned around and gone back and gotten beaten up my somebody else. I didn't ask her," he says [R92, 65 18- 193. Now folks you want to buy that story? How about the attack on Penny Morgan testified to by both Penny Morgan and Penny Morgan's mother, where Garbutt almost killed Penny Morgan? [r 58, 1423-27]. . . And what does Garbutt tell you? Well it seems that the philosophy of the defendant in this case is the greater the imagination, the greater the departure from common sense and reality, the more likely you are going

to buy it, the more likely, I, George Garbutt, am going to fool one or more of you jurors. Here is the story about that [then discusses Garbutt's testimony regarding such events [R92, 6526-33; R99, 7451-54, 7461-64]]

(R107, 8775).

(6, 7)[21]

You know Mr. Lewis is a very excellent advocate, really is, and he has made a lot of astounding statements to you. And I think in sum and substance, he has proven my point. He stated to you, at least three or four times, that Rosemary had complained of suboccipital pain to every doctor she had ever been treated by since the auto accident [R108, 8890; 8852]. And this ofcourse, is the linchpin of the defense in this case, that her pain in the back of her head was caused by the auto accident. Now you know, folks, he also said that the X-ray report of Dr. Auterburn clearly showed degeneration of the upper cervical spine [R108, 8896-96]. Now folks, if a used car salesman tries to sell me a car that doesn't have an engine in it, I am not going to by a car from that person ever. If I want to go hunting and I buy a hunting dog and that dog won't hunt, I am not going to buy a dog from whoever sold it to me ever. When Mr. Lewis tells you that this X-ray report says what it doesn't say — he says "It clearly says" were his words . . . "Degeneration of the upper cervical spine. Its nowhere in there. He said Dr. O'Connor said the same thing, Dr. O'Connor's report said the same thing [R108, 8899]. This is Dr. O'Connor's report in 1985 [holding up the report]. . . . There is no statement in there that there is any degeneration of the upper cervical spine. . . . So now counsel's statement to you that these report clearly showed degeneration of the upper cervical spine is hogwash. He is selling you a car without an engine. [LaFarnara then addressed the defense's contention that LaFarnara complained of occipital head pain to every doctor after the car accident [R108, 8852], demonstrating to the jury using medical records that such assertion was inaccurate. LaFarnara also reminded the jury of Dr. O'Connor's testimony wherein he appeared to read the medical report verbatim and, in doing so, included an allegation of headaches that was nowhere in the report. [R78, 4499] LaFarnara then concluded:] "So folks, that dog don't hunt."

(R107, 8977-79).

(8) And what has he been doing? He wanted to talk to you about 'blowing smoke"[see

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[21]Two such comments (relating to 'cars without an engine" and to"dogs that don't hunt") are inextricably intertwined and are therefor cited in their context in the first transcript excerpt below.

R108, 8840], "blowing smoke"[22]; he is "blowing smoke" at you.

(R108, 898 1)

(9) it is the apotheosis, if you will, the culmination, the fulfillment of what was designed by his client in 1990, "his only defense," every single point, every single argument that is made here by Mr. Lewis, takes that seed and causes it to grow into a huge blossoming weed. And it is the ultimate insult to your intelligence to suggest, as he has done, that her hospitalization in the middle of this trial is a sham, that Dr. Walker is a liar or Dr. Walker was fooled, that she really didn't have to go into the hospital [R108, 8934]. Not only did she not have to go into the hospital, why she has been calling herself [R 108, 8942, 8948]. I mean, my goodness gracious, if we now have a women who not only is lying about what his client did to her, but now she is the one that is assaulting him [R99, 7547]. She is assaulting him.

(R107, 8982).

(10) And need I remind you, there is a claim of self-defense here, and this gentleman over here testified under oath in deposition that there were many occasions when the plaintiff attacked him viciously and physically — biting, kicking, scratching, swinging at him with her fists — such as to require him to hold her against the wall to restrain her [R99, 7547]. Anddo you remember me asking him on cross-examination, this gentleman who had total recall of all of these incidents that she testified to for the proposition that they were merely arguments. Of course, he couldn't recall the arguments were about on the most part, but this gentleman who had all this recall, he couldn't come up with a single, single incident where he had to pin her against the wall or where she swung at him or where she hit him, or where she bit him [R99, 7544, 7548]. That represents, seems to me, ladies and gentleman, another smoking gun to you of the fraudulent nature of this defense in this case, that Rosemary LaFarnara, the slut, the whore, the thief, the temperamental italian, attacked me, George Garbutt, so viciously and violently I had to hold her against the wall. But, excuse me, ladies and gentleman, I can't remember, why when or how?

(R108, 8982-83). As previously stated, Garbutt failed to assert a contemporaneous objection to any of these ten comments; the first five of which occurred in LaFarnara's initial closing

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[22]Garbutt testified repeatedly that Pat Wall, the women who accused him of smashing a hamburger in her chest, was blowing smoke in his face. (R105, 8466-67, R106, 85 15, 8524).

argument and the last five occurred in rebuttal. In response to Garbutt's the motion for mistrial made the day following such comments, LaFarnara, not having the benefit of the matter being raised contemporaneous with the comments, argued, *inter alia*:

> The fact of the matter is, is that — my comments have been directed to the defendant creating and orchestrating a defense, which is perfectly apropos in the evidence in this case, as evidenced by the July, 1990 letter [the Manifesto].

(R109, 9002). The court denied the motion for mistrial. (R109, 9003). Garbutt never claimed error with any comments of counsel other than those discussed above until post-trial.[23]

16. The Jury Found Garhutt Liable and the Court Entered An Injunction.

As stated above the jury deliberated for seven hours and returned a verdict fmding Garbutt liable on all claims. Judge Demers based on his own independent findings issued a Permanent Injunction restraining Garbutt from contacting, harming or otherwise interfering in LaFarnara's life. (R.116, p. 9767, App. F).

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[23]Garbutt post trial, after having had another opportunity to comb the record, claimed error with 32 of LaFarnara's counsel's comments, only 7 of which, discussed above, did Garbutt raise a timely objection. The court's Post Trial Order found that Garbutt had failed to make the requisite timely objections to 25 of the comments and that such comments considered individually and collectively did not amount to fundamental error. On appeal the district court initially issued a unanimous per curiam affirmance without opinion. (App G). Garbutt, thereafter, filed a motion for rehearing reasserting the identical arguments raised in the appeal. The appellate panel, over LaFarnara's objection, thereafter, granted the rehearing and contemporaneously issued a new opinion affirming the verdict and certifying the following question to this court:

> To preserve error, is a contemporaneous objection required for each instance of improper argument or can the issue be preserved by motion for mistrial before the case is submitted to the jury?

App. H.

17. The Fruitless Fishing Expedition for Jury Misconduct Revealed Additional Evidence Tying Garbutt to the Calls.

Post trial Garbutt engaged in discovery in an effort to find juror misconduct. Significantly, such discovery revealed that Garbutt had access to and control over a device that produced canned diabolical laughter identical to that at issue in the case. (R38, 5859, 5933). Because of Garbutt's allegations that alternate juror, Thomas Workman, who never deliberated in the case, knew someone who knew and disliked Garbutt, the court granted juror interviews of the entire panel, including the alternates. Every such juror testified in the trial court's presence that they never discussed the case with any other juror, particularly Workman, prior to the being instructed to deliberate by the court that Workman never expressed any hostility towards Garbutt, and that none of the other juror's were aware that Workman knew anyone who knew Garbutt. (R45, 7226-82; App. I).

II. SUMMARY OF LEGAL ARGUMENT

This was an important abuse case. As the factual statement reflects and the trial judge carefully found, the evidence clearly supported the verdict rendered and was not the result of prejudice or sympathy. Garbutt employed the classic abuser defense of "accuse the abused." His strategy backfired. He now now asks this Court to grant him a third bite at the litigation apple based on his unfounded assertion that the trial was not fair. In support of Garbutt's proposition that this Court should set aside the jury's verdict and the trial court's independent findings, Garbutt first contends that it was "unscrupulous" and 'unethical" for LaFarnara's counsel in closing argument to advise and demonstrate to the jury through reference to specific record evidence, that certain propositions which Garbutt presented to the jury were false and implausible. Secondly, Garbutt suggests out of necessity that this Court abandon the common law doctrine requiring contemporaneous objections and overturn, *inter alia*, this Court's opinions in Craig v. State, 510 So. 2d 857,864 (Fla. 1987) and Nixon v. State, 572 So. 2d 1336 (Fla. 1990). With respect to Garbutt's first contention, the absurdity of such is obfuscated by,

inter alia, the following: Garbutt quotes LaFarnara's counsel's comments out of context mischaracterizing such as improperly "belittling the defense" and Garbutt omits material language in quoting purported improper comments contained in certain legal authority. The ten comments which form the basis of Garbutt's motion for mistrial and to which Garbutt did not contemporaneously object are quoted in the fact section of this brief and when read in context specifically refer to and are supported by the evidence in this cause. Such statements are proper and entirely consistent with this Court's holding in Davis v. State, 698 So. 2d 1182, 1190 (Fla. 1997). Their substance is occasioned by the nature of evidence. In contrast, LaFarnara's statements bear no resemblance to the comments found objectionable in the opinions cited by Garbutt. Such opinions generally involved an attorney's asserted personal knowledge of nefarious activities supposedly engaged in by either the defendant or his attorneys which was not in evidence and did not, in fact, exist.

Not only were the comments of LaFarnara's counsel proper, Garbutt's belated motion for a mistrial asserting as a basis ten comments made the previous day to which Garbutt did not contemporaneously object, was insufficient to preserve such matters for appellate review. Garbutt and the district court concurrence, however, appear to suggest that a motion for mistrial based on specific grounds made prior to the end of closing argument will preserve for appellate review any and all comments made during the course of closing argument, regardless of the movant's failure to raise a contemporaneous objection and regardless of whether such comment was even asserted as a basis for the motion for mistrial. This court, based on sound policy reasons, has repeatedly and unequivocally rejected such a proposition. To now abandon the contemporaneous objection rule in favor of a belated motion for mistrial lodged prior to the end of closing argument as suggested by Garbutt would create harmful precedent for depriving the trial court of an opportunity to have fresh in its mind the context of the comment and its affect on the jury; for depriving the offending party of the opportunity to correct and restate the offending comment; and for depriving the trial court of the opportunity to cure any alleged error early in the proceedings before its cumulative affect arguably necessitates a new trial or

appellate reversal.

III. LEGAL ARGUMENT

A. It was not "Unscrupulous" or "Unethical" for LaFarnara's Counsel in Closing Argument to Advise and Demonstrate to the Jury through Reference to Specific Record Evidence that Certain Propositions Presented to the Jury were False and Implausible.

> Now folks, if a used car salesman tries to sell me a car that doesn't have an engine in it, I am not going to by a car from that person ever. If I want to go hunting and I buy a hunting dog and that dog won't hunt, I am not going to buy a dog from whoever sold it to me ever.
>
> Robert W. Merkle

Garbutt, in an effort to evade the ramifications of his 'accuse the abused" litigation strategy, his incredible and inconsistent trial testimony, and his reprehensible tortious conduct, argues to this court that he should be given a third bite at the litigation apple because he alleges, *inter alia*, that various comments made by LaFarnara's counsel, to which Garbutt failed to assert any timely objections, were so egregious and prejudicial as to require this Court to set aside the jury's verdict and trial court's independent findings. In support of such proposition, Garbutt contends that it was "unscrupulous" and "unethical" for Lafarnara's counsel in closing argument to advise and demonstrate to the jury through reference to specific record evidence, that certain propositions which Garbutt presented to the jury (through evidence and/or argument) were false and implausible. The utter absurdity of such sophism, including its detrimental effect on the judicial system, however, has been obfuscated by the following: (a) LaFarnara's counsel's statements are quoted out of context and mischaracterized by Garbutt as improperly "belittling the defense," (b) Garbutt's description of the record is inaccurate and contains numerous omissions of material facts [24] (c) Earbutt's characterization of the holdings of certain legal

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[24] One egregious example of this appears on page 5-6 of Garbutt's Initial Brief. (See footnote 18 for discussion. See also footnote 19.) Another similar mistatement occurs on page 25 of the Initial Brief wherein Garbutt asserts:

precedents is similarly inaccurate and misleading;[25] and (d) Garbutt's numerous vague and conclusory claims of error.

In Florida and other jurisdictions, the law is well settled that:

> [w]ide latitude is permitted in arguing to a jury[:] Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments. The control of comments is within the trial court's discretion, and an appellate court will not interfere unless an abuse of such discretion is shown. . . . Each case, however, must be considered on its own merits, however, and within circumstances surrounding the complained of remarks.

Breedlove v. State, 413 So.2d 1, 8 (Fla. 1982). **Accord**, Spencer **v. State**, 133 So.2d 729, 731 (Fla. 1961); Hagan v. Sun Bank of Mid-Florida, N.A., 666 So.2d 580, 585 (Fla. 2d DCA 1996).

> 'Counsel for Ms. LaFarnara also made several comments in his closing argument and rebuttal which were not supported by any record evidence. . . Impermissible comments in this area included comments that someone other than George Garbutt made the harassing calls for him, that tinnitus was incurable . . . The trial court agreed that these comments were outside of the evidence ."

In contrast, the trial court actually ruled: "There was, in fact, no direct evidence on either one of these things, but there was sufficient circumstantial evidence to permit the inference. Such arguments are proper. *Carlton v. Johns*, 194 So.2d 670 (Fla. 4th DCA 1967)." Moreover, as Garbutt should know from LaFarnara's citation to the record in the district court, there was, in fact, direct evidence that tinnitus was a permanent injury. (R54, 856,("There is nothing you can do about ringing in your ears. There is no treatment for it."); R69, 3125, 3129).

Of course, under Garbutt's proposed theory of improper argument, the undersigned by pointing out these inaccuracies has "unethically" and "unscrupulously" 'belittled the defense ."

[25]For example, Garbutt cites Public Health Trust of Dade County v. Geter, 613 So.2d 127 (Fla. 3d DCA 1993), for the proposition that "It is improper to ask the jury to place a monetary value on Ms. LaFanara's damages just as a monetary value is placed on inanimate commodities." The authority cited as a basis for that opinion e.g., *inter alia*, **Russell. Inc. v. Trento**, 445 So.2d 390, 392 (Fla. 3d DCA 1984), however, makes it clear that the impropriety was counsel's effort to have the jury include an inappropriate element of damages, i.e., the value of a human life, in its verdict. Similar mischaracteriztions of legal precedent are discussed *infra*.

In other words,

> weightless is the defendant's argument that a lawyer in final argument may not traverse, deny, denounce, and otherwise try to establish in the minds of the jury that the position of opposing counsel is not supported by the record. This is the precise objective and purpose of oral argument.

Hartman v. Shell Oil Co., 137 Cal. Rptr. 244, 251 (Ct. 3 App. 1977). This fundamental precept is best exemplified in this Court's opinion in Craig v. State, 510 So.2d 857, 865 (Fla. 1987), *cert denied, 484* U.S. 1020 (1988):

> Appellant argues that the prosecution made repeated references to defendant's testimony as being untruthful and to the defendant himself as a "liar." It may be true that the prosecutor used language that was somewhat intemperate but we do not believe he exceeded the bounds of proper argument *in view of* the *evidence*. When counsel refers to a witness or a defendant as being a 'liar," and it is understood from the context that the charge is made with reference to testimony given by the person thus characterized, the prosecutor is merely submitting to the jury a conclusion that he is arguing can be drawn from the evidence. It was for the jury to decide what evidence and testimony was worthy of belief and the prosecutor was merely submitting his view of the evidence to them for consideration. There was no impropriety.

(emphasis added). Accord, Shellito v. State, 701 So. 2d 837, 841 (Fla. 1997)(assertion that witness was "either an extremely distraught concerned mother or . . a blatant liar" not improper given evidence); Forman v. Wallshein, 671 So.2d 872 (Fla. 3d DCA 1996)(not improper to refer to party as a "liar" when their is an evidentiary basis); Fravel v. Haughey, 727 So.2d 1033, 1042, n. 6 (Fla. 5th DCA 1999)(Judge Harris dissent)("Forceful argument, even colorful argument, is not necessarily improper. It is not improper, for example, to suggest that the defendant is less than truthful or that the claimant is faking or exaggerating an injury if there is record support for such argument."); Goutis v. Express Transport, Inc., 699 So.2d 757, 764 (Fla. 4th DCA 1997)("telling the jury that the opinions [of an expert witness] were based upon groundless speculation was simply commenting on the evidence provided.") United States v. Windom, 510 F2d 989 (5th Cir. 1975)("unflattering characterizations of a defendant will not provoke a reversal when such descriptions are supported by the record."). In short, "[w]hen

it is understood from the context of the argument that the charge [asserted improper comment] is made with reference to the evidence, the [attorney] is merely submitting to the jury a conclusion that he or she is arguing can be drawn from the evidence." Davis v. State, 698 So.2d 1182, 1190 (Fla. 1997).

The ten comments which formed the basis of Garbutt's motion for mistrial and to which Garbutt did not contemporaneously object are quoted in context in the fact section of this brief.[26] Such comments when read in context specifically advised and demonstrated to the jury through reference to specific record evidence, that certain propositions which Garbutt presented to the jury (through evidence and argument) were false and/or implausible and for that reason should not be believed. For example, the joke comment when read in context specifically relates to the implausibility of the testimony of numerous witnesses who when confronted by LaFarnara with damaging admitted facts or their own implausible explanations of events attempted to explain the matter away as joke. Numerous other comments specifically related to the Manifesto letter (App. D); a document drafted by Garbutt seven years earlier which constituted both the *res gestea* of two of LaFarnara's claims and the manifesto of Garbutt's 'accuse the abused" defense which was presented to the jury during the course of the eight week trial. In fact, LaFarana counsel's specifically referred to Garbutt's Manifesto letter in comments (1), (3) and (9), quoted in this brief. LaFarnara also repeatedly advised the jury that the accuse the abused defense set forth in the Manifesto and presented to the jury was "conceived in the mind of the defendant" and not his counsel and that Lafarnara's comments were not intended to any way disparage Garbutt's counsel. (R109, 9005, 9008, 9012). Similarly, LaFaranara's counsel, in specifically addressing the self defense allegations set forth

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[26]Even if space allowed, LaFarnara need not address the other comments to which Garbutt did not object and did not assert as a basis for a motion for mistrial because they are not properly before this Court, Sims v. State, 68 1, So.2d 1112, 1116- 17 (Fla. 1996), and have been determined by the trial court and district court to not constitute fundamental error either individually or collectively.

in the Manifesto letter and pleadings, pointed out that a 'smoking gun of the fraudulent nature of this defense" was Garbutt's inability in cross examination to recall when, why or how LaFarnara had allegedly provoked him.

The 'greater the imagination" comment also specifically related to the evidence: In so stating, LaFarnara's counsel expressly referred to Earbutt's wholly implausible and ridiculous attempts to explain away eye witness testimony of his beating Penny Morgan. Similarly, the car with no engine and dog that doesn't hunt analogy, when read in context, refers to Garbutt's counsel's erroneous description of the evidence and clearly conveyed to the jury that Garbutt's counsel told you X was in the medical records, review the records and if X is not in there then you should not believe other defense assertions. This is a typical "false in one, false in all" argument and is eminently proper. Moreover, this comment is a two edged sword: if the jury determined that the medical records contained what Garbutt said they did, then the jury would not buy another car or another dog from LaFarnara.

As stated above the blowing smoke comment was a response to Garbutt's counsel's assertions in argument: (a) that LaFarnara's counsel ("they") presented evidence concerning Garbutt striking a women with a hamburger for smoking in Garbutt's presence and Garbutt's similar beatings of Morgan so as to prejudice the jurors into believing Garbutt "is a really lousy person" because "we [Lafarnara's counsel] don't have any evidence that Garbutt beat this women [LaFarnara], (R108, 8840); and (b) Garbutt's counsel's representations concerning the Manifesto letter, (R108, p. 8955-8965). Significantly, "blowing smoke" were Garbutt's own words that he used to justify his actions against Pat Wall. (e.g., R 10.5, 8846-47). Less innocuous comments having no relation to the evidence have been held not to be improper by Florida courts. See e.g., Crump v. State, 622 So.2d 963 (Fla. 1993)(characterization of the defense as an "octopus" clouding the water in order to "slither away"); Williams v. State, 441 So.2d 1157 (Fla. 3d DCA 1983)(prosecutor compared defense counsel's argument in closing to that of a "squid" attempting to cloud the water); Wasden v. Seaboard Coast Line R. Co., 474 So.2d 825, *rev. denied, 484* So.2d 9 (Fla. 2d DCA 1985)(use of the phrase "I say baloney," in

commenting on the evidence held not to be inflammatory, sinister or the result of counsel's misconduct.).

In short, LaFarnara's statements were clearly supported by and made in specific reference to the record evidence and bear no similarity whatsoever to the comments found objectionable in the opinions cited by Garbutt. For example, Borden. Inc. v. Young, 479 So.2d 850, 851 (Fla. 3d DCA 1985), involved an attorney's asserted "personal knowledge of nefarious activities supposedly engaged in by the large corporate defendant which were not only not in evidence but did not in fact exist." Similarly, Carnival Cruise Lines. Inc. v. Rosania, 546 So.2d 736 (Fla. 3d DCA 1989), a case expressly decided on the authority of Borden. Inc., also involved similar misconduct. Garbutt, however, in quoting to this Court the purported improper comment in Carnival inexplicably omits the offending statement: i.e., "There are certain companies and organizations that look for a way to taint. Some of you might have families working for these companies."[27] Id. at 737, n. 1. The attorney in Carnival, like the counsel in Borden. Inc,, thereafter proceeded to point to the evidence in the case, implying that such was all part of the larger scheme of non-record nefarious conduct to thwart injured victim's efforts to recover. See also, Bloch v. Addis, 493 So.2d 539 (Fla. 3d DCA 198 6)(argument that an experts' testimony was deceitful and born at some imagined conspiratorial country club meeting to which the attorney asserted he had personal knowledge); Maercks v. Birchanskv, 549 So.2d 199 (Fla. 3d DCA 1989)(decided based on the authority of Borden, Carnival and Bloch); Vennine v. Roe, 616 So.2d 604 (Fla. 2d DCA 1993)(comments included, *inter alia*, that their was a "special relationship" between plaintiff's counsel and plaintiff's expert, that defense counsel had been involved in seven other cases involving the same attorney and expert, and that expert was unqualified doctor who prostituted himself for the benefit of lawyers); Riley v, State, 560 So.2d 279 (Fla. 3d DCA 1990)(argument that included,

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[27]Of course, under Carbutt's proposed theory of improper argument, the undersigned by pointing out this material omission has 'unethically" and "unscrupulously" "belittled the defense."

inter alia, "Why would I charge him with first degree murder? . . . Because he's guilty of first-degree premeditated murder. I am prosecuting him for it gladly. . . I don't prosecute people who have legitimate self defense claims.") Airport Rent-A-Car, Inc. v. Lewis, 701 So.2d 893 (Fla. 4th DCA 1997)(comments included, *inter alia*, Appellee's attorney's father was a preacher so he "know[s] what the truth is" made in contravention to court ruling and comments that the appellant was crazy and had improperly turned the appellee into the IRS, absent anything in the record to support such. Kendall Skating Centers, Inc. v. Martin, 448 So.2d 1137 (Fla. 3d DCA 1984)(decided based on line of cases, including dissent in Metropolitan Dade County v. Dillon, 305 So.2d 36 (Fla. 3d DCA 1974), finding a gratuitous attack on opposing counsel that "was in no way a comment on the evidence presented to the jury."). Accordingly, the cases relied upon by Garbutt are clearly inapposite and in no way dispositive of the issues before this court.

Given the foregoing, the ten statements, to which Garbutt failed to contemporaneously object but which formed the basis for his motion for mistrial, when read in context were proper comments on the evidence and were not in any way similar to the conduct at issue in the cases cited by Garbutt. Notably, the disingenuous nature of Garbutt's protestations of impropriety is further evidenced by the fact that Earbutt's counsel made similar comments to those which he now contends are so prejudicial". Accordingly, Garbutt's assertion that it was "unscrupulous" and "unethical" for LaFarnara's counsel in closing argument to have advised and demonstrated to the jury, through reference to specific record evidence, that various propositions presented to the jury were either false and/or implausible, is a car without an

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[28]Garbutt's counsel during closing argument (a) five times asserted that LaFarnara's and/or her witnesses' assertions were "nonsense" (R. 108, p. 8857, 8897, 8911, 8938, 8954); (b) asserted that LaFarnara's and/or her witnesses' assertions were "a bunch of hokum" "a bunch of malarkey" and didn't "amount[] to a hill of beans" (R108, 8913-14, 8929); (c) asserted that the jury would have to be insane to believe that LaFarnara stayed with Garbutt after being beat. (R108, 8906); and (d) accused LaFarnara's counsel of intentionally "misleading"and "tr[ying] to trick" the jury and of intentionally telling the jury things that are "not true." (R116, 9735, 9733).

engine; a dog that doesn't hunt.

B. A BELATED MOTION FOR MISTRIAL, ABSENT A CONTEMPORANEOUS OBJECTION, DOES NOT PRESERVE FOR APPELLATE REVIEW ASSERTED CLAIMS OF ERROR.

Not only were the comments of LaFarnara's counsel proper, Garbutt's belated motion for a mistrial asserting as a basis ten comments made the previous day to which Garbutt did not contemporaneously object, was insufficient to preserve such matters for appellate review. Nixonv. State, 572 So.2d 1336 (Fla 1990), *cert. denied, 502* U.S. 854 (1991). See also, Craig v. State, 510 So.2d 857 (Fla. 1987). Garbutt and the district court concurrence appear to suggest that a motion for mistrial based on specific grounds made prior to the end of closing argument will preserve for appellate review any and all comments made during the course of the closing argument, regardless of the party's failure to raise a contemporaneous objection and regardless of whether such comment was even asserted as a basis for the motion for mistrial. This court has repeatedly and unequivocally rejected such a proposition. For example, in Craig, this court held:

> A motion for mistrial based on certain grounds cannot operate to preserve for appellate review other issues not raised by specific objection at trial. Thus, defense counsel's attempt, when he objected on the ground of repeated references to the defendant as having lied in his testimony, to have his motion apply to the whole argument, thus preserving for review objections not specifically made to the trial court, must fail with the result that most objections argued are being raised for the first time on appeal.

510 So.2d at 864. Similarly, this Court in Nixon v. State, 572 So.2d 1336 (Fla 1990), *cert. denied,* 502 U.S. 854 (1991), expressly and unequivocally held that a motion for mistrial made before the case is submitted to the jury, absent a contemporaneous objection to the alleged improper comment, is insufficient to preserve the claimed error for appellate review. 572 So.2d at 134 1. This court explained:

> Nixon argues that under *Czzmbie* his motion for mistrial at the close of argument, absent a contemporaneous objection, was sufficient to preserve this issue [of an alleged golden rule comment] for appeal. We do not construe *Cumbie* to obviate the need for a contemporaneous objection. The requirement of a contemporaneous objection is based

> on practical necessity and basic fairness in the operation of the judicial system. A contemporaneous objection places the trial judge on notice that an error may have been committed and thus, provides the opportunity to correct the error at an early stage of the proceedings, *Castor v. State, 365* So.2d 701, 703 (Fla. 1978). While the motion for mistrial may be made as late as the end of closing argument, a timely objection must be made in order to allow curative instructions or admonishment to counsel. As noted by defense counsel in this case, in many instances curative instruction at the end of closing would be of no avail. Accordingly, defense counsel's motion for mistrial at the end of closing argument, absent a contemporaneous objection, was insufficient to preserve this claim under our decision *in Cumbie.*

Id. Accord, 14B Fla. Jur. 2d, *Criminal* Law, §1888 (Law. Coop. 1993)("Absent a contemporaneous objection, a motion for mistrial at the end of closing argument is insufficient to preserve an issue for appeal."); Walker v. State, 707 So.2d 300, 302, n. 8 (Fla. 1997)("So long as defendant makes a timely specific objection and moves for mistrial . . A curative instruction need not be requested."); Spencer v. State, 645 So.2d 377, 383 (Fla. 1994)("The issue [of improper argument] is preserved if the defendant makes a timely specific objection and moves for a mistrial."); Gutierrez v. State, 731 So.2d 94, 95 (Fla. 4th DCA 1999)("While a motion for mistrial may be made as late as the end of closing argument, a timely objection must be made in order to allow a curative instruction or admonishment to counsel."); James v. State, 741 So.2d 546, 549 (Fla. 4th DCA 1999)(rejecting discretion of court to permit party to 'defer making a contemporaneous objection to objectionable matters in prosecutor's closing argument until its conclusion [:] . . .There must be an objection at the time objectionable remarks are made... This is to allow the court to immediately cure any error . . . objectionable material must be excised from the juror's consideration immediately."); Horn v. Atchison, 394 P.2d 561 (Cal. 1964), *cert. denied,* 380 U.S. 909 (1965)(holding counsel's belated motion for mistrial absent contemporaneous objection waived claimed error); Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (Cal Ct. App. 1981)("Misconduct of counsel during argument may not be raised on appeal where the complaining party's counsel sat silently by during the argument, allowed the improprieties to accumulate without objection, and simply made a motion for

mistrial at the conclusion of the argument."). See also Kilgore v. State, 688 So.2d 895 (Fla. 1996)("We have held that allegedly improper prosecutorial comments cannot be appealed unless a contemporaneous objection is recorded.") This Court in Norton v. State, 709 So.2d 87 (Fla. 1997), again reiterated its holding in Nixon and the policy reasons underlying the contemporaneous objection requirement:

> defense counsel's failure to raise a contemporaneous objection to the comment at the time it was made waived his right to argue this issue on appeal. The purpose of the contemporaneous objection rule is to place the trial judge on notice that an error may have occurred and provide him or her with the opportunity to correct the error at an early stage in the proceedings. "[A] timely objection must be made in order to allow curative instructions or admonishment to counsel." *Nixon v. State, 572* So.2d 1336, 1341 (Fla. 1990). Thus, despite appellant's motion for mistrial at the close of the witness' testimony, his failure to raise an appropriate objection at the time of the impermissible comment failed to adequately preserve the issue for appellate review.

709 So.2d at 94. In short, this Court, based on sound policy reasons, has, particularly in the context of allegations of improper comment, consistently required adherence to the contemporaneous objection rule absent a finding that the alleged error was fundamental, i.e. : (a) was "so pervasive, inflammatory and prejudicial as to preclude rational consideration of the case;" (b) was "so extreme that it could not have been corrected by an instruction if an objection had been lodged" and (c) "so damaged the fairness of the trial that the public's interest in our system ofjustice justifies a new trial even when no lawyer took steps necessary to give a party the right to demand a new trial."[29] See Hagan v. Sun Bank of Mid-Florida, 666 So.2d 580 (Fla. 2d DCA 1996); Tyus v. Analachicola Northern R.R., 130 So.2d 580 (Fla. 1961). To now abandon this precept in favor of a belated motion for mistrial lodged prior to the end of closing argument would create precedent harmful to our system of justice. The absence of a contemporaneous objection deprives the trial court an opportunity to have fresh in its mind the

[29] In the instant case, the trial court, though erroneously believing certain of LaFarnara's counsel's comments to be improper, expressly concluded that such comments considered individually and collectively did not rise to this level.

context of the comment and its purported prejudicial affect on the jury. It also deprives the offending party the opportunity to correct and/or restate the offending comment[30] and deprives the trial court of the opportunity to cure any alleged error early in the proceedings before its cumulative effect arguably necessitates a new trial or appellate reversal. It also fosters a trial strategy of silence to perceived improper conduct for the intended purpose of creating an additional basis to argue for reversal at the trial and appellate levels in the event that party does not prevail In contrast, the justifications espoused for abandoning the contemporaneous objection rule are fundamentally flawed. For example, not all improper comments result from either ignorance or duplicity. As can be gleaned from this appeal alone, reasonable persons and jurists can and do disagree as to the propriety of certain comments[31]. This is underscored by the fact that the propriety of a given comment is dependant in large part on the evidence in the record and the context of the statement. Furthermore, there is no reasonable justification for the taxpayers and the judicial system of this state to bear the burden and expense of review and repeat trials when opposing counsel did not think so much of the purported transgression to contemporaneously object and provide the trial court a timely opportunity to assess the comment in its context and its purported prejudicial influence. Accordingly, this Court should answer the certified question by reaffirming its holdings in Nixon and Craig.

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[30]Carried to its logical conclusion, a party could during an opponent's direct examination of a witness create a list of all leading and otherwise inappropriate questions that were asked and after conclusion of the direct motion the court to strike the offending questions and answers and/or move for mistrial.

[31]See *also*, *Honorable L.A. Klien*, Allowine Improper Argument of Counsel To Be Raised For the First Time on Anneal as Fundamental Error, 26 F.S.U. Law. Rev. 97, 122 (Fall 1998)("In any event, whether it is experience or something else, judges have widely divergent views on what is improper argument); Norman v. Gloria Farms, Inc., 668 So.2d 1016, 1032 (Fla. 4th DCA 1996)(dissent)("The personal views of judges on what constitutes improper argument are as boundless among judges as they are among lawyers in general. It will be very rare to find two judges whose unique sense of propriety is less tolerant than others.")

C. GARBUTT'S REMAINING CLAIMS OF ERROR LACK MERIT: VERDICT SUPPORTED BY OVERWHELMING EVIDENCE.

The trial court and the district court have each rejected Garbutt's other asserted claims of error. Because of space limitations and the need to adequately address the issue certified to this Court, LaFarnara refers this court to the detailed fact statement above and incorporates by reference the legal arguments contained in Lafanara's Answer Brief filed with the district court. Such brief is included as item J of LaFarnara's Appendix. Significantly, the trial court in a careful opinion warranted by the significance of this case rejected Garbutt's other claims of error and expressly found that the verdict was not excessive and was, in fact, supported by the evidence in the case:

> **There was sufficient evidence for the jury to conclude that the Plaintiff has suffered severe emotional damages . . .the jury could reasonably have believed that the Plaintiff has suffered two bouts of major depression for which she was hospitalized and experienced a change in her personality, an inability to sleep, a fear of being alone, loss of appetite, feelings of being dirty, fear that persons will believe statements that the Defendant published about her, muscular tremors, weight loss, a distrust of men, and an inability to maintain a normal relationship with her husband which is detrimentally affecting her marriage, The jury could further have reasonably concluded that the Plaintiff has been forced to resort to years of psychiatric counseling and medication.**
>
> **The evidence permitted the conclusion that as a result of the Defendant's conduct, the Plaintiff has suffered a 50% permanent disability of her body, post-traumatic stress disorder and substantial loss of her cognitive abilities evidencing brain damage. Further the Plaintiff's permanent disability rating will likely increase in the future. Accordingly, the jury could reasonably have concluded that the Plaintiff constantly worries about her physical injuries including the realistic prospect of further brain damage and further cognitive deficiencies, rendering her dependant on others for the remainder of her life.**

(R46, 7332-33; App A, p. 7-8). The trial court also found that the verdict did not result from passion or prejudice and was, in fact, the result of careful deliberation:

> **Other factors support this conclusion [that the jury's verdict was not arbitrary and was not the result of passion and prejudice] . . . The jury did not make a hasty decision. To the contrary, the jury deliberated for about seven hours before reaching its verdict on compensatory damages. Furthermore, as to punitive damages, it was obvious that the jury was careful in determining the proper award. There was evidence that the**

> **Defendant had practically no assets to over $4,000,000 in assets. The jury set punitive damages precisely at $501,000. In doing so, it is clear that the jurors took their job seriously and deliberated carefully.**

(R46, 7335, App. B, 10). Accordingly, even if Garbutt's position is accepted with respect to the propriety of the comments and preservation of the issue for appellate review, any alleged error relating to such comments was harmless. See § 59.401, Fla. Stat. (1994)(providing that a civil judgment shall not be reversed, unless "after examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice."); Hagan 666 So.2d at 585 (explaining that the legal standard for new trial based upon preserved error is whether the comments were "highly prejudicial and inflammatory," i.e. an analysis "similar to [that] used to decide whether the jury's verdict is defective because it is excessive, inadequate, or contrary t the manifest weight of the evidence."), Cleveland Clinic Florida v. Wilson, 685 So.2d 15 (Fla. 4th DCA 1996)(*en banc*)(affirming harmless error as to preserved alleged golden rule argument).

IV. CONCLUSION

This is an important abuse case. As the factual statement reflects and the trial judge carefully found, the verdict and the judge's independent findings were supported by the evidence and were not the result of passion or prejudice. In short, Garbutt's classic abuser defense of "accuse the abused" backfired. Accordingly, this Court should reject Garbutt's contention that it was "unscrupulous" and 'unethical" for LaFarnara's counsel in closing argument to advise and demonstrate to the jury through reference to specific record evidence, that certain propositions which Garbutt presented to the jury (either through evidence or argument) were false and implausible. This Court should also reject Garbutt and the concurrence's apparent suggestion that Florida abandon the contemporaneous objection rule and overturn this Court's opinions *in, inter alia*, Craig and Nixon.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to David B. Krouk, Piper, Esteva, Green, Karvonen & Lewis, 3637 Fourth Street, North, Suite 410, St. Petersburg, Florida 33704, this 9 day of February, 2000.

David J. Plante, Esquire