IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1508

ITT HARTFORD INSURANCE
COMPANY OF THE SOUTHEAST,

Petitioner,

vs.

STILES JERRY OWENS and
JEAN A. OWENS, his wife,

Respondents.
_____/

ON DISCRETIONARY REVIEW FROM THE THIRD
DISTRICT COURT OF APPEAL OF FLORIDA

RESPONDENTS' BRIEF ON THE MERITS

PODHURST, ORSECK, JOSEFSBERG,
EATON, MEADOW, OLIN & PERWIN,
P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
(305) 358-2800 / Fax (305) 358-2382

By: JOEL S. PERWIN
Fla. Bar No. 316814

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I
STATEMENT OF THE CASE AND FACTS

Before anything else, we must correct a serious mis-statement of fact by Petitioner Hartford, which is critical to the central issue on review. In its overview of the case (brief at 2), in purporting to review Hartford's post-trial motion, it makes this statement: "The defendant further contended there was evidence to support the $72,000 [the jury's present-money value award], but no evidence to support the $1.8 million [the jury's award of future medical expenses]." And later in the brief (p. 37), Hartford asserts: "The Plaintiff's testimony at trial, by his economist as to future medicals, was a high of $1.2 million in total." No citation to the transcript is offered for either of these statements. Both of them are simply and flatly false. There was *no* post-trial motion challenging the evidence of future medical expenses. And the evidence of record *did* support that award.

First, for the record, the plaintiff's economist, Dr. Gary Anderson, testified that the cost of Mr. Owens' future medical expenses, based on the medical evidence of record, would range from $1.2 million to $2.1 million (Tr. 227-37). We can therefore ignore Hartford's 19-page witness-by-witness account of the testimony in this case, which is utterly irrelevant to the issue on appeal. The only facts of relevance are those concerning the issue of present money value, and we will review those facts below.

Second, when the jury returned its verdict of $1.8 million in future medical expenses, reduced to a present money value of $72,000, Hartford remained silent. It did not argue that the verdicts were inconsistent, or that the jury should be sent back

to resolve any inconsistency. Rather, it was the Plaintiff who contended that the jury had improperly calculated the present money value of $1.8 million and should be re-instructed; but the trial court denied the request (Tr. 635).

Third, the evidence to support the $1.8 million is irrelevant, because Hartford did *not* file a motion for a new trial. It was the plaintiff--and *only* the plaintiff--who filed a timely motion for new trial or additur; and that motion raised only one issue--the propriety of the jury's reduction of its $1.8 million award of medical damages to a present money value of only $72,000 (R. 370-77). The plaintiff argued that, given the *unchallenged* verdict of $1.8 million for future medical expenses, the jury's reduction to a present money value of $72,000 was unsupportable (R. 371).

It was *eight months* after that--eight months after the verdict (R. 364); six months after the entry of judgment (R. 468); and indeed, three months after Hartford had paid its policy limits and the court had entered a partial satisfaction of judgment (R. 475-76)--that Hartford finally realized its mistake and filed an untimely motion for new trial (R. 485-87). That motion of course was a legal nullity, and the trial court denied it (R. 533).

Therefore, notwithstanding Hartford's misrepresentation, at no time at the trial level (or in the district court either, *see infra*) did Hartford ever challenge the sufficiency of the evidence in support of the jury's award of $1.8 million in future medical damages. The *only* issue raised post-trial, and the *only* issue before the district court, was whether the jury had properly reduced the *unchallenged* award of

$1.8 million to a present money value of $72,000. With that critical backdrop in mind, we will review the facts in detail.

A. The Trial. Because Hartford conceded, both at trial and on appeal, that the plaintiffs' evidence is sufficient to support the jury's award of $1.8 million in future medical expenses, we will not belabor the point. The plaintiffs' economist, Dr. Gary Anderson, testified that the cost of Mr. Owens' future medical expenses, based on the medical evidence of record, would range from $1.2 million to $2.1 million (Tr. 227-37).

Dr. Anderson also explained the concept of present money value (Tr. 214, 220, 222, 225). Based on "safe, secure" investments like U.S. Treasury Securities (Tr. 225; *see* Tr. 220, 237, 241, 244), Dr. Anderson calculated the appropriate discount rate at 6.31% (Tr. 237). He then illustrated the reduction to present money value on two models, based on two different versions of the testimony on Mr. Owens' future medical needs (*see* Tr. 223-40). One model assumed future medical expenses of $1,769,485, reducing to a present money value of $635,840 (Tr. 229-33). The other assumed future medical expenses of $1,157,938, reducing to a present money value of $422,032 (Tr. 238). As Hartford notes (brief at 12-13), Dr. Anderson also gave a few variations in the calculation for each model, depending on variations in the treatment to be received (*see* Tr. 233-38). Obviously, not knowing what specific damage figure the jury would eventually choose, Dr. Anderson did not do a present-money-value calculation of the jury's precise award of $1.8 million.

Hartford's expert, Dr. David Williams, offered the identical definition of present money value (Tr. 525-26), but recommended a discount rate of 5 ½%, as opposed to Dr. Anderson's 6.31% (Tr. 540). The use of that number, Dr. Williams testified, results in a present-money-value calculation about 8% lower than the plaintiffs' (Tr. 540). Hartford has asserted (brief at 37), with no citation to the transcript, that "[t]he jury was given evidence on the history of the high rate of return in the stock market; an investment of $72,000 could easily result in $1.8 million over 25 years and this was a common sense conclusion as well as being based on the evidence at trial." There is no evidence of record for this fanciful contention. As we will point out, *infra* note 9, it would require a return of anywhere from 57% to 95%, depending on the tax bracket, to produce a return of that magnitude. Hartford says repeatedly throughout its brief that "the jury heard extensive evidence" which sustains its reduction of $1.8 million to a present money value of $72,000 (brief at 25-26; *see id.* at 35-46). No citation to the Record is offered. The assertion is simply wrong. The only evidence was that of the two experts, and they carefully prescribed a range of 5 1/2% to 6.3%

Indeed, when Hartford attempted to push its witness, Dr. Williams, to a higher number, although he acknowledged that there may be some mutual funds which pay as much as 20%-25% (Tr. 532) (even 20% is only one-third the return necessary to turn $72,000 into $1.8 million over 25 years, *see infra* n.9), Dr. Williams responded that any return above 6.3% would incur risk (Tr. 531); that treasury bills and

municipal bonds represent a prudent investment (Tr. 543); and that the stock market does not represent a prudent investment (*id.*).[1/]

In the plaintiffs' closing argument, their counsel explained to the jury that its task was to calculate the total amount of future medical expenses, and then reduce that number to present money value (Tr. 574-75). Hartford said nothing about present money value in its closing. It told the jury that the plaintiffs had proved only about $82,000 in past medical expenses (Tr. 604-05), and that the jury should adopt the same number, $82,000, for Mr. Owens' future medical expenses–*not* the present money value of those expenses: "I suggest to you that if you give him the same amount of money for future medicals, considering he is probably not going to need all of the things on this chart, if you use your common sense, he is probably not" (Tr.

[1/] If Hartford had attempted to introduce evidence that the plaintiffs could secure a greater return by investing in the stock market, any such evidence would have been inadmissible. This Court has made clear that present money value must be measured by reference to such investments as "interest rates payable on government bonds, bank deposits, building and loan association deposits, insurance contracts, and other thoroughly safe investments . . . ." *Renuart Lumber Yards, Inc. v. Levine,* 49 So. 2d 97, 98 (Fla. 1950). *Accord, Seaboard Coast Line R. Co. v. Garrison,* 336 So. 2d 423, 425 (Fla. 2nd DCA 1976). *See Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 538, 103 S. Ct. 2541, 76 L. Ed. 2d 768, 783 (1983) ("the safest available investments"); *Chesapeake & Ohio R. Co. v. Kelley,* 241 U.S. 485, 491, 36 S. Ct. 630, 60 L. Ed. 1117 (1916) ("the best and safest investments"); *Shaw v. United States,* 741 F. 2d 1202, 1207 n.3 (9th Cir. 1984) ("safe investments"); *Culver v. Slater Boat Co.,* 722 F. 2d 114, 118 (5th Cir.) (en banc), *cert. denied,* 467 U.S. 1252, 104 S. Ct. 3537, 8 L. Ed. 2d 842 (1984) (best and safest investments); *Hoskie v. United States,* 666 F. 2d 1353, 1355 (10th Cir. 1981) ("reasonably safe long-term investments available to the average person"); *Dullard v. Berkeley Associates,* 606 F. 2d 890, 895 n.3 (3rd Cir. 1979) (treasury notes, high-grade corporate bonds, bank certificates).

605). The jury rejected that suggestion, liquidating the future medical expenses at $1.8 million, and Hartford raised no challenge to that finding.

B. The Verdict. The trial court charged the jury to consider the various elements of damages, including past and future medical expenses (Tr. 626-27), but said nothing about present money value. When the jury's verdict awarded $1.8 million for future medical expenses, but reduced that number to a present money value of $72,000 over 25 years (Tr. 634)--thus apparently dividing $1.8 million by 25--the trial court immediately noted the error: "[O]f course, they couldn't have a present value of million, eight, down to seventy-two thousand. I think they must have meant seven hundred twenty thousand" (Tr. 635). Hartford's repeated representation (*see* brief at 41-44)--that the plaintiffs made no objection to the verdict before the jury was discharged–is incorrect. Indeed, at a hearing on the issue post-trial, the trial court rejected precisely that contention, recalling that the plaintiffs did ask to send the jury back (R. 540, 571). After the verdict, the plaintiffs immediately agreed with the trial court that "[i]t couldn't be that under [the defendant's] most optimistic result from your expert" (Tr. 635). The court then preempted any effort to recharge the jury: "I don't think we can do anything. They can make this reduction. There is no way I think I can send it back to them" (*id.*). The plaintiffs responded: "For the record, we request that, and it's denied, I guess" (*id.*). Thus, the plaintiffs both objected to the verdict and requested that the jury be sent back. Hartford did not make any such request. The jury was polled; the jurors affirmed the verdict; and the jury was excused (Tr. 636-37).

C. The Plaintiff's Post-Trial Motion. Hartford filed no post-trial motion to challenge the jury's liquidation of the future medical expenses at $1.8 million. The plaintiffs filed a timely "Motion for Rehearing and Additur, or in the Alternative for New Trial" (R. 370-77). It argued that, given the unchallenged verdict of $1.8 million for future medical expenses, the present-money-value calculation was supported by no competent evidence, because, "using either the discount rate given to the jury by Plaintiff or Defendant, the present value of $1.8 million could not be $72,000" (R. 371). The motion asked for an additur under §§ 768.043 or 768.74, Fla. Stat., or "[i]n the alternative the Court can grant the Owens a new trial solely on the issue of the present value of Mr. Owens' future medical expenses" (R. 372). The plaintiffs also filed an affidavit from Dr. Anderson, who ran the specific $1.8 million verdict against discount rates of 6.31% and 6%, yielding a present money value of $745,116 and $773,776 (R. 401-08).

The first hearing on the motion was held on July 16, 1999 (R. 510-26). The plaintiffs again presented the straightforward contention that the jury's award of $72,000 as the present money value of $1.8 million was not supported by any evidence of record (R. 516). Ordinarily, the plaintiffs acknowledged, that would create an entitlement to an additur, or in the alternative a new trial–a trial of course limited to "that one issue, reduction. The jury would be given the number which the old jury calculated and would be given the instruction and would have to follow the mathematical formula . . ." (R. 516). In the instant case, however, the plaintiffs argued, such a retrial would not be necessary, because the plaintiffs were willing to

accept the 5 ½% discount rate offered by Hartford's expert–the lowest discount rate supported by the evidence of record (R. 514-15). Hartford was certainly estopped to repudiate the present-money-value calculation which it had introduced, and the plaintiffs were willing to accept that calculation.

Forgetting that neither party had challenged the jury's finding of $1.8 million in future medical expenses, Hartford countered that the jury might have started with a present money value of $72,000, and then erroneously worked backward to the $1.8 million number (R. 518-20). As support for that hypothesis, Hartford said that it had suggested a present money value to the jury of $82,000 in closing argument (R. 521-23). That statement was incorrect; Hartford said nothing whatsoever about present money value in closing argument (*see* Tr. 604-05). The trial court asked for legal memos, and continued the hearing (R. 522-23).[2/]

The plaintiffs followed with a supplemental memorandum citing the ample evidence of record supporting the jury's finding of $1.8 million in future medical

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[2/] At the end of the transcript of the hearing (R. 522-23), there are three passages attributed to plaintiffs' counsel, "Mr. Perwin," which were obviously statements by Hartford's counsel. The arguments in those passages–that the jury may have started with the $72,000 number and then worked back; that another part of the jury's verdict "also rejected the plaintiffs' suggestions"; that "echoing Mr. Sherman [Hartford's other counsel], there is no authority that would allow the Court to order a new trial just on one portion of the damages"; and that the court should conduct "a full blown new trial on damages"–certainly were not made by the plaintiffs. Obviously the court reporter simply got the name wrong; and Hartford's contention (brief at 41; *see id.* at 26-27, 44)--that "even Plaintiffs' counsel agreed it was very clear that the jury intended a $72,000 award and used it to arrive at $1.8 million for future damages"–is wishful thinking. We have always made precisely the opposite argument.

expenses--a point which Hartford already had conceded by failing to file a post-trial motion challenging that verdict--and arguing that there is no evidentiary basis for the jury to have reduced a $1.8 million award to $72,000 over 25 years (R. 409). Without further argument, the trial court issued an order holding that "the jury's decision to reduce future medical damages of $1,800,000.00 to only $72,000.00 is not based on the law or the evidence in the case and most likely resulted from a misunderstanding of the concept of present money value" (R. 527). Rather than order a new trial on this discrete issue, "the Court will modify the verdict to conform to the jury's intent by applying a formula for the reduction to present value which is supported by the evidence in the case" (*id.*). The court scheduled a subsequent hearing to discuss the evidence which had been submitted by both sides on the present-money-value question (*id.*).

The trial court heard additional argument in early January of 1999 (R. 534-78). Hartford immediately attempted to re-argue the court's ruling, this time attributing to the plaintiffs the argument that the jury's verdict was inconsistent, and contending that the plaintiffs had waived the point by failing to request that the jury be sent back (R. 537-38). But the court recalled–and the record verifies (*see* Tr. 635)–that the plaintiffs did ask the jury to be sent back, but that the trial court denied that request (R. 540, 571). Thus the plaintiffs had not waived the point (R. 541). And the plaintiffs added that they were not arguing inconsistent verdicts, but only that the present-money-value calculation "is unsupported by the evidence," and the appellate decisions "say it's not necessary to send the jury back in that context" (R. 541).

Hartford's lawyer then retreated to its "second point"–"it can't be corrected by the Court, that this is a jury function" (Tr. 541). The plaintiffs countered that the evidence of record supported only two discount rates; that the plaintiffs were willing to accept the lower rate proposed by Hartford; that Hartford certainly was estopped to deny the propriety of that rate; that the calculation based on that rate is entirely mathematical; and thus there would be nothing for a second jury to try (R. 542-44, 560, 566-67, 569). Indeed, the plaintiffs were willing to allow Hartford to do the calculation, based on the discount rate offered by its witness (R. 547).

The court agreed that if the parties were limited to "what the evidence was at trial . . . the rest of it just might be calculations, just mathematical calculations" (R. 544). At most, the trial court said, a new trial would be limited to the discrete issue of reducing the jury's award of $1.8 million to present money value (R. 574). Thus, given that neither side's expert had calculated present money value based on the precise award of $1.8 million, the trial court instructed both sides to utilize the lower discount rate proposed by Hartford's expert, 5 ½%–the lowest rate supported by the evidence–and provide the court with a present-money valuation of $1.8 million at that rate, over 25 years (R. 550-53, 555, 575).[3/]

[3/] Thus, there is no truth to Hartford's repeated claim that the trial judge decided to "pick and choose" from the evidence (brief at 32), taking "bits and pieces" (brief at 30), and "substituted her calculation" of present money value (brief at 41). The court simply accepted both Hartford's evidence of the appropriate discount rate, and Hartford's calculation of present money value.

That day, the plaintiff filed a letter from its economist, Dr. Anderson, liquidating the present money value of the jury's finding of future medical expenses, at the time of trial, at $871,847.59 (R. 477). Hartford subsequently submitted a memo from its economist, Dr. Williams, which calculated the same number at $819,214 (*see* R. 480). The trial court accepted the lower number, ordering an additur of $819,214, plus interest (R. 531). Hartford followed with its first motion for a new trial–filed eight months after the jury's verdict–arguing that it was entitled to a new trial as an alternative to additur, under § 768.043, Fla. Stat. (1997). The trial court denied the motion (R. 533).

D. The District Court's Decision. Hartford's brief on appeal raised three and only three arguments: 1) that the jury could have properly reduced an award of $1.8 million to a present money value of $72,000 (Brief of Appellant at 29-40); 2) that the trial court erred in accepting Hartford's measure of present money value and calculating the additur on that basis, instead of ordering a retrial on that issue (*id.* at 40-47); and 3) that under §§768.043(1) and 768.74(3), Fla. Stat. (1987), the retrial must also encompass all of the other, uncontested damage issues--not just the single contested issue of present money value (*id.* at 47-49). Despite an occasional snipe at the jury's $1.8 million award of future medicals, Hartford made no issue of the sufficiency of the evidence to support that award. It therefore waived the point at the appellate level as well as the trial level. *See infra* notes 5, 6.

In a 2-1 decision authored by Judge Cope and joined by Judge Sorondo, the district court addressed only those issues raised by Hartford in its brief, and "entirely

agree[d] with the trial court's conclusion that the jury intended to award $1.8 million for future medical expenses. The error was in the present value calculation which the jury did not understand. Therefore, the court was correct in determining that appellee was entitled to an additur" (A. 3).[4/] The district court acknowledged that "[n]ormally, defendant would have the option of refusing the additur and obtaining a new trial on the issue of damages" (*id.*). But "the only issue to be tried here if a new trial were granted would be the reduction of future medical expenses to present money value. Plaintiffs accepted defendant's discount rate for the reduction to present value. That concession by plaintiffs left no issue to be tried" (*id.*).

In reaching this conclusion, the district court disagreed with the two decisions relied upon in dissent by Judge Gersten--*Jarvis v. Tenet Health Systems Hospital, Inc.,* 743 So.2d 1218 (Fla. 4th DCA 1999) and *Food Lion v. Jackson,* 712 So.2d 800 (Fla. 5th DCA 1998). Both cases address an unrelated question--"whether, once an additur was rejected by the defendant, the trial court should have ordered a new trial on damages only, or on damages and liability. . . . Both courts concluded that, under the circumstances, a new trial was required on damages but not liability" (A. 3). Neither case addressed the question of whether the new trial on damages should encompass damage issues which have never been challenged. And neither addressed the question of whether a new trial is required when the plaintiff is willing to stipulate to the defendant's measure of damages.

[4/] "A." refers to the Appendix filed with Hartford's brief.

The district court noted that §768.043(1) calls for a new trial "on the issue of damages only," but does not interpret that phrase (A. 3). Clearly "in the case of a general verdict, there would be a new trial on all damages" (*id.*). But when the verdict is itemized, the Court said, the statutory phrase "issue of damages" "logically means the interrogatory affected by the excessiveness or inadequacy. There is no reason to disturb other items in the jury's verdict which are not implicated in the excessiveness or inadequacy" (*id.*). The court noted that the only decisions to address the issue have all agreed with this common-sense construction of the statute (A. 3-4). *See Astigarraga v. Green,* 712 So.2d 1183 (Fla. 2nd DCA 1998); *Altilio v. Gemperline,* 637 So.2d 299, 302 (Fla. 1st DCA 1994); *Dyes v. Spick,* 606 So.2d 700, 703-04 (Fla. 1st DCA 1992) (A. 3-4).

In the instant case, the court held, "there is a facial error in the present value calculation for future medical expenses, but this problem logically has no effect on any of the other itemized damages" (A. 4). And here "the plaintiffs accepted defendant's present value calculation, leaving no issue to be tried" (*id.*). Thus, the district court affirmed the judgment.

Judge Gersten dissented, arguing that the plain language of the statute required a new trial on all damage issues, even if all but one of them were wholly undisputed by the defendant. The dissent gave no reason why the Legislature would require a new trial on the undisputed issues of damages.

Hartford sought review by this Court on one and only one ground--that the trial court had erred in utilizing Hartford's discount rate to calculate present money value,

and thus the additur, rather than submitting that issue to a jury (*see* Brief of Petitioner on Jurisdiction). Hartford did *not* seek review on the ground that any new trial should include all of the damage issues. In an order dated February 16, 2001, this Court accepted jurisdiction and dispensed with oral argument.

II
ISSUES ON APPEAL

A. WHETHER THE TRIAL COURT ERRED IN RULING THAT THE JURY'S PRESENT-MONEY-VALUE DETERMINATION WAS NOT SUPPORTED BY THE EVIDENCE OF RECORD.

B. WHETHER THE TRIAL COURT ERRED IN ACCEPTING THE LOWEST MEASURE OF PRESENT MONEY VALUE SUPPORTED BY THE EVIDENCE, IN LIEU OF ORDERING A NEW TRIAL ON THAT ISSUE ALONE.

III
SUMMARY OF THE ARGUMENT

At the outset, we need to emphasize again the posture in which this appeal arises. The jury awarded $1.8 million for future medical expenses, and Hartford at no time challenged the sufficiency of the evidence to support that ruling, thus waiving any such contention both at trial[5/] and on appeal.[6/] Nor did Hartford argue after the

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[5/] *See 6551 Collins Ave. Corp. v. Miller,* 104 So. 2d 337 (Fla. 1958); *Wagner v. Nottingham Associates,* 464 So. 2d 166, 169 (Fla. 3rd DCA), *review denied,* 475 So. 2d 696 (Fla. 1985); *Laird v. Potter,* 367 So. 2d 642 (Fla. 3rd DCA 1979), *cert. denied,* 378 So. 2d 347 (Fla. 1979).

[6/] *See Dober v. Worrell,* 401 So. 2d 1322 (Fla.1981); *Gifford v. Galaxie Homes of Tampa, Inc.,* 204 So. 2d 1 (Fla. 1967); *Lynch v. Tennyson,* 443 So. 2d 1017 (Fla. 5th

verdict that the jury's liquidation of the $1.8 million future medical expenses was inconsistent with the jury's reduction of those expenses to a present money value of $72,000. Any such contention must be raised before the jury is discharged, or it is waived.[7/]

In the absence of any challenge by Hartford to the jury's determination of the future medicals at $1.8 million, either at trial or on appeal; and in the absence of any challenge by Hartford that the two verdicts were inconsistent, either at trial or on appeal, the propriety of the jury's $1.8 million verdict has never been at issue. The only question properly raised at trial, in the district court, and in this Court, is whether the jury's finding that future costs of $1.8 million reduce to a present money value of $72,000 is supported by the evidence of record.

That is the only relevant question, regardless of how the jury calculated either the gross award of $1.8 million or the present-money award of $72,000.00. We could speculate indefinitely about the jury's internal thought processes–matters which are immune from judicial inquisition. Did the jury follow the trial court's instruction, liquidate the amount of future medicals, and then err in its present-money-value

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DCA 1983); *Lesperance v. Lesperance,* 257 So. 2d 66 (Fla. 3rd DCA 1972).

[7/] *See Gould v. National Bank of Florida,* 421 So.2d 798, 802 (Fla. 3rd DCA 1982); *Wiggs & Maale Construction Co. v. Harris,* 348 So. 2d 914 (Fla. 1st DCA 1977); *Lindquist v. Covert,* 279 So. 2d 44 (Fla. 4th DCA 1973). In contrast, as the trial court noted (R. 540, 571), the plaintiff did request that the jury be sent back to resolve an asserted inconsistency between the $1.8 million future medicals and the $72,000 reduction to present money value; but the trial court declined (Tr. 635).

reduction?[8/] Did it decide the $1.8 million number and then divide by 25, which comes out to exactly $72,000? Did it, as Hartford suggests, disobey the trial court's instruction and decide first that the present money value of the future medicals was $72,000, and then make a mistake in working backwards to $1.8 million? Or did it, as Hartford also suggests, decide that by choosing some wildly-speculative investment, the plaintiffs could turn $72,000 into $1.8 million over 25 years? This kind of speculation, invading the jury's province, would be inappropriate in any case. In this case, given that Hartford did not challenge the jury's verdict of $1.8 million in future medical expenses, it is also irrelevant. The only issue preserved for appellate review is the sufficiency of the evidence to sustain the jury's decision that $1.8 million over 25 years reduces to a present money value of $72,000.

On that issue, the answer is obvious. No view of the evidence could remotely sustain such a verdict. The plaintiff's expert used a discount rate of 6.31%. The defendant's expert used a discount rate of 5 ½%. Those are the parameters of the evidence in this case. Hartford's suggestion–that the jury could have picked a discount rate of at least *67%*--which is the number necessary, even in the lowest tax bracket, to turn $72,000 into $1.8 million over 25 years (*see infra* n.9)--is fanciful. Not only is there no evidence of record on which the jury could base such a finding (contrary to Hartford's representation, its expert testified that investing in mutual funds or the

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[8/] The jury is presumed to have followed the trial court's instructions. *See Putnam Lumber Co. v. Berry,* 146 Fla. 595, 2 So.2d 133 (1941); *Lapidus v. Citizens Federal Savings & Loan Ass'n,* 389 So.2d 1057 (Fla. 3rd DCA 1980).

stock market is not a prudent investment (Tr. 543)); in addition, the Florida decisions flatly forbid the introduction of any evidence counseling such a speculative investment (*see supra* note 1). Only evidence of the most conservative investments is permissible on the issue of present money value. And these points are not forestalled by the general rule that a jury may disbelieve expert testimony, if the other evidence of record permits it to draw a conclusion contrary to that testimony. Here, there is no other evidence of record. Therefore, given the jury's unchallenged gross damage award of $1.8 million, there is no competent evidence of record supporting a reduction over 25 years to a present money value of $72,000.

That leaves one final point. Ordinarily, as Hartford points out, the insufficiency of the evidence on this issue would require the option of an additur or a new trial. Under §768.74(3) and §768.043(1), Fla. Stat. (1997), as common sense dictates and every decision on the issue holds, that new trial would concern only the discrete issue of reducing the future medicals to present money value. No other damages have been challenged, and the issue of present money value is a discrete, severable issue.

In this particular case, however, it was not necessary for the trial court to order a new trial in the alternative, because the plaintiffs agreed to accept Hartford's evidence on this issue. They agreed to accept the defense expert's use of a 5 1/2% discount rate, and thus the lowest present-money-value number supported by the evidence. Hartford was clearly estopped to repudiate that evidence, having introduced it, and thus there was nothing left to try. When challenged directly and repeatedly to declare whether it wants a trial on present money value only, Hartford repeatedly has

ducked the question. That silence speaks volumes. Hartford's plea for a new trial was motivated by the hope of retrying all the issues of damages. Once that contention is rejected, then even Hartford will not, and cannot, insist on a new trial restricted to the single question of present money value. The district court's decision should be approved.

IV
ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN RULING THAT THE JURY'S PRESENT-MONEY-VALUE DETERMINATION WAS NOT SUPPORTED BY THE EVIDENCE OF RECORD.

1. The Jury's Present-Money-Value Determination Is Not Supported by Any Evidence of Record.

In reviewing the plaintiffs' motion for additur or new trial on the issue of present money value, the trial court's task, as it is in reviewing any motion for new trial, was to determine whether the jury's award was contrary to the manifest weight of the evidence. *See generally Smith v. Vining,* 407 So. 2d 1048 (Fla. 1981); *Mini-Hospital, Inc. v. J.P. Realty, Inc.,* 431 So. 2d 323 (Fla. 3rd DCA 1983). The same rule applies on the issue of damages, *see Warner v. Integrated Health Services of Green Briar, Inc.,* 618 So. 2d 298 (Fla. 3rd DCA 1993); *Salazar v. Santos (Harry) & Co.,* 537 So. 2d 1048 (Fla. 3rd DCA), *review dismissed,* 544 So. 2d 200 (Fla.), *review denied,* 545 So. 2d 1367 (Fla. 1989). And the same rule applies on the issue of present money value--an issue "for determination by the jury", but only "within reasonable limits." *Seaboard Coast Line R. Co. v. Garrison,* 336 So. 2d 423, 425 (Fla. 2nd DCA 1976).

The court in *Garrison*, *id.* at 426, quoted the holding of *United States v. English,* 521 F. 2d 63, 76 (9th Cir.1975) that the jury's determination must be "based on sound and substantial economic evidence . . . as can be postulated with some reliability." *See supra* note 1.

In the instant case, the uncontradicted evidence, from both sides, is that a "safe, secure" investment (Tr. 225), like U.S. Treasury Securities or municipal bonds (Tr. 220, 225, 237, 241, 244, 543), would assure the plaintiffs 100% of their future economic damages, including medical expenses, over the next 25 years, at a rate of anywhere from 5 ½% (Hartford's expert, Tr. 525-26) to 6.31% (plaintiffs' expert, Tr. 237). Contrary to Hartford's contention (*see* brief at 35-40), there is no competing evidence of record. The defense expert, Dr. Williams, acknowledged that some mutual funds pay as much as 20%-25% (Tr. 532); but he said that any return above 6.3% would incur risk (Tr. 531); that treasury bills and municipal bonds represent a prudent investment (Tr. 543); and that the stock market does not represent a prudent investment (*id.*). And as we have noted, *supra* note 1, if Dr. Williams or any other witness had attempted to calculate present money value through such risky investments, any such testimony would have been flatly forbidden by Florida law. In any event, there was none.

Therefore, the jury's determination–that an award of $72,000 represents the present money value of $1.8 million–is supported by the evidence only if such an award could produce a total recovery of $1.8 million over 25 years, at a discount rate of 6.31% to 5 ½%. Clearly, that would be impossible. Even in the lowest tax bracket,

it would require a rate of around 67% to accomplish that result, and any investment producing such a rate would be wildly speculative.[9/] Therefore, given the unchallenged jury determination of $1.8 million in future medical expenses, the trial court did not err in finding that the jury's present-money-value determination was not supported by the evidence of record.

2. Hartford's Arguments Are Unavailing.

a. The Jury's Present-Money-Value Determination of $72,000 Cannot be Defended by Attributing It to Any Calculation of Future Medical Expenses Other than the Jury's Unchallenged Calculation of $1.8 Million. Throughout its brief (*see* pp. 35-38), Hartford attempts to defend the $72,000 present-money-value determination as a reflection of some determination by the jury of future damages other than $1.8 million. It tells us at length that there is no one methodology in Florida for computing present money value (*see* brief at 39); indeed, the jury is free to adopt a "total offset" methodology, assuming that inflation and discount rates will cancel each other out, and therefore make no reduction to present money value (brief at 35-37). It tells us that the jury could have first picked the present-money-value number out of thin air, and then multiplied it by 25 (brief at 37-38). It tells us that the jury might have picked

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[9/] This number is based on Dr. Anderson's methodology–the same methodology which produced the calculations which are of record, about which Dr. Anderson testified. Even if there were no federal taxes, it would require a return of about 57% to turn $72,000 into $1.8 million over 25 years. As noted above, in a 15% tax bracket, it would require a return of 67.5% to net that amount. In a 20% tax bracket, a 71% return; in a 28% tax bracket, 79%; in a 31% tax bracket, 83%; and in the highest bracket of 39.6%, 95%! There is obviously no evidence of record supporting such a wildly speculative investment.

out two of the many subcategories of medical expenses in this case, and reduced only those two to present money value, producing an award of $72,000 (brief at 36-37).

But all of these arguments forget the fundamental starting point: no party has raised any challenge to the jury's finding of $1.8 million in future medical expenses, either at trial or on appeal; and thus the $1.8 million finding is the predicate upon which the present-money-value determination must be appraised. Therefore, it is impossible that the jury adopted a "total offset" calculation of present money value, which by definition requires that the amount of damages and the present money value of those damages be the same number. And it is impossible that the jury merely picked two small elements of damage whose present money value is $72,000, because the jury awarded total future damages of $1.8 million. As the district court made clear, the only issue preserved for review was the jury's reduction of the unchallenged $1.8 million damage award to a present money value of $72,000 over 25 years is. If Hartford had any argument directed to the $1.8 million finding, it was required to raise that argument at trial, and it was required to raise that argument on appeal. It did neither.

b. The Jury Was Not Free to Reject the Consensus of Both Sides' Experts–That the Appropriate Discount Rate Ranged from 5 ½% to 6.31%–Because There is No Other Evidence of Record on the Issue. The trial court's ruling is not forestalled, as Hartford contends (brief at 35, 38, 40-46), by the unremarkable proposition that neither expert testimony nor even a jury instruction is required--and the jury can use its own common sense--in the computation of present money value,

citing Seaboard Coast Line R. Co. v. Burdi, 427 So.2d 1048 (Fla. 3rd DCA), *review dismissed,* 431 So.2d 988 (Fla. 1983); and that a jury is free to reject expert testimony if it is based on evidence of record which the jury can find to be false. *See Easkold v. Rhodes,* 614 So. 2d 495, 498 (Fla. 1993), *quoting Rhodes v. Easkold,* 588 So. 2d 267, 269 (Fla. 1st DCA 1991) (Wolf, J., dissenting) (jury was "justified in determining that the [medical] opinion testimony was flawed by reason of the materially untruthful [medical] history given [to the expert] by the claimant"). The expert testimony in *Easkold* was thoroughly undermined by the evidentiary challenge to its underlying factual assumptions. Therefore, the jury's verdict in *Easkold* was supported by the evidence of record–and that, as always, is the controlling criterion.

That is the unanimous post-*Easkold* statement of Florida law. In *Weygant v. Fort Myers Lincoln Mercury, Inc.,* 640 So. 2d 1092, 1094 (Fla. 1994), the Court attributed to *Easkold* the holding that "a jury may reject expert medical testimony when there exists relevant conflicting lay testimony . . . ."[10/] Even post-*Easkold*, as this Court reaffirmed in *Allstate Ins. Co. v. Thomas,* 637 So. 2d 1008 (Fla. 1994), a jury is not free to disbelieve expert testimony if it is unimpeached or uncontradicted by other evidence of record.[11/] That has always been the rule in Florida; the factfinder

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[10/] *Accord, Allstate Ins. Co. v. Thomas,* 637 So. 2d 1008, 1009 (Fla. 1994); *Kimmins Recycling Corp. v. Rogers,* 704 So. 2d 600, 601 (Fla. 4th DCA 1997); *Katz v. Ghodsi,* 682 So. 2d 586, 588 (Fla. 3rd DCA 1996), *review denied,* 690 So. 2d 1299 (Fla. 1997); *Rice v. Everett,* 630 So. 2d 1184, 1185 (Fla. 5th DCA 1994); *Ullman v. City of Tampa Parks Department,* 625 So. 2d 868, 872 (Fla. 1st DCA 1993).

[11/] *See, e.g., Williamson v. Superior Ins. Co.,* 746 So.2d 483 (Fla. 2nd DCA 1999); *Evans v. Montenegro,* 728 So. 2d 270, 271 (Fla. 3rd DCA), *review denied,* 741 So.2d

is not free to ignore uncontradicted testimony–expert or otherwise–unless it is "essentially illegal, inherently improbable or unreasonable, contrary to natural laws, opposed to common knowledge, or contradictory within itself . . . ." *Vilas v. Vilas*, 153 Fla. 102, 13 So. 2d 807, 808 (1943).[12/]

As we have noted, *supra* n.1 and *supra* p. 19, these principles are no less applicable to the issue of present money value, notwithstanding that expert testimony is not required and that the jury can use its own common sense in arriving at a number. It is inherent in the evidentiary boundaries of the issue, which is limited to "thoroughly safe investments," *Renuart Lumber Yards, Inc. v. Levine,* 49 So.2d 97, 98 (Fla. 1950) (*see* case cited *supra* note 1) that the jury's determination must be "within reasonable limits," *Seaboard Coast Line R. Co. v. Garrison,* 336 So.2d 423, 425 (Fla. 2nd DCA 1976), "based on sound and substantial economic evidence . . . as can be postulated with some reliability." *United States v. English,* 521 F.2d 63, 76 (9th Cir. 1975).

Hartford's contrary position (offered with no supporting authority)--that the jury can essentially pick whatever number it wants--reduces to the absurdity (represented

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1135 (Fla. 1999); *State Farm Mutual Automobile Ins. Co. v. Brooks,* 657 So.2d 17, 18 (Fla. 3rd DCA 1995); *Holmes v. State Farm Mutual Automobile Ins. Co.,* 624 So.2d 824 (Fla. 2nd DCA 1993); *Vega v. Travelers Indemnity Co.,* 520 So.2d 73 (Fla. 3rd DCA), *review denied,* 531 So.2d 169 (Fla. 1988); *Short v. Ehrler,* 510 So.2d 1110 (Fla. 4th DCA 1987).

[12/] *Accord, Chomont v. Ward,* 103 So. 2d 635, 637 (Fla. 1958); *Catlett v. Chestnut,* 107 Fla. 498, 146 So. 241, 246 (Fla. 1933); *Garcia v. Jarvis Corp.,* 368 So. 2d 945 (Fla. 3rd DCA 1979).

by this case) that a jury could translate a huge damage award to a present money value of $10,000, or $1,000, or even $1. *See* (by analogy) *Smith v. Department of Insurance,* 507 So.2d 1080, 1088-89 (Fla. 1987) (striking down $450,000 damage cap in part because otherwise "there is no discernible reason why [the Legislature] could not cap [at] $50,000 or $1,000, or even $1"). Hartford's position cannot be the law. The jury's present-money-value calculation must be measured by the test of "reasonable limits."

Here the range of acceptable investments defined by the experts reflected a discount rate of 5½% to 6.31%; and their testimony was not challenged or undermined by any of the other evidence of record. The jury was not free to ignore the uncontradicted evidence of record in calculating present money value.

c. The Jury's Present-Money-Value Determination Required Reversal Because It Is Not Supported by the Record, Even if the Jury's Total Damage Award Might Theoretically Have Been Supportable Based on the Evidence of the Other Elements of Damages, if the Jury Had Rendered a General Verdict. Hartford argues (brief at 38-39) that if the *total* award of damages made by the jury is "supported by evidence at trial" (brief at 38), then the appellate court must affirm the judgment even if the damages awarded in one specific category are unsupported by any evidence of record, and thus are erroneous as a matter of law. In other words, even though the jury in this case made specific findings on the other elements of damages (past and future pain and suffering)--findings which have not been challenged at trial or on appeal--Hartford argues that the district court should have ignored those findings;

ignored the error in reducing the medical expenses to present money value; pretended that the jury had rendered a general verdict; and affirmed if the invented general verdict was supported by the overall damage evidence (which of course would be the *defendant*'s damage evidence, yielding the lower number). In other words, the jury's unchallenged special verdicts for past and future pain and suffering should have been vacated, and the money assigned by the jury to those categories should have been thrown into a pot of undifferentiated damages, and then affirmed because the overall damage evidence (obviously the best evidence for the defendant) supported the reconstituted general verdict.

Obviously that argument is nonsense, and none of the decisions cited by Hartford (brief at 38-39) remotely supports it. They stand instead for the reasonable proposition that where the damages caused by various allegations of wrongdoing *overlap*, and the jury divides the total damages among the various counts of a complaint–for example, some to the fraud count, some to the tortious-interference count, some to the count claiming breach of fiduciary duty–the integrity of the verdict is not affected *by the allocation*, so long as the total amount of damages is supported by the evidence of record. So long as the jury is not awarding more than the evidence permits, then its division of the total damages among various overlapping counts is not erroneous.

In the primary case cited by Hartford (brief at 38)--*Phillips v. Ostrer,* 481 So. 2d 1241 (Fla. 3rd DCA 1985), *review denied,* 492 So. 2d 1334 (Fla. 1986)--the plaintiff alleged fraud, negligence, and breach of fiduciary duty. The trial court

instructed the jury that if it found liability, it should *first* compute the *total* amount of damages caused by all wrongdoing, and then divide the total damages among the counts in question. On appeal, the defendant challenged the apportionment, but because the total award of damages was supported by the evidence–and thus there was no duplicative recovery–the integrity of the verdict was not affected by the apportionment. *Id.* at 1246.

Hartford also cites *R.W. King Construction Co. v. City of Melbourne,* 384 So. 2d 654 (Fla. 5th DCA 1980) (brief at 38), in which the plaintiff's overall damages were caused by two separate breaches of a contract; it was impossible to determine what damages were allocable to each breach; the total damage award was supported by the evidence of record; and in that context the jury's allocation of those damages to the two counts did not undermine the integrity of the verdict, nor affect the substantial rights of the plaintiffs. *Id.* at 655. The same is true in *Richard Swaebe, Inc. v. Sears World Trade, Inc.,* 639 So. 2d 1120 (Fla. 3rd DCA 1994) (Hartford's brief at 38), in which it was impossible to differentiate the precise damages caused by four different breaches of contract, but the total damage award for the four breaches was supported by the evidence of record. Again, any error in allocation among the four counts did not affect the integrity of the verdict.

Hartford also cites *Capital Bank v. MVB, Inc.,* 644 So. 2d 515 (Fla. 3rd DCA), *review denied,* 659 So. 2d 1086 (Fla. 1994) (brief at 38), which makes the same point in a slightly different way. There were three plaintiffs in the lawsuit, all represented by the same counsel. On one count, the uncontradicted evidence was that only one

of the three plaintiffs had suffered the damage; and in closing argument, the plaintiffs' attorney argued for an award only to that plaintiff, in the amount of $571,139. The jury awarded almost that exact amount, but it divided the award among the three plaintiffs. This district court held that the trial court should have conformed the verdict to the evidence, by reallocating all of the damages to the only plaintiff injured, citing the principle that the jury's erroneous allocation did not affect the integrity of its overall verdict, which was supported by the evidence of record.

The principle of *Phillips v. Osterer,* as the court noted in *Trend Setter Villas of Deer Creek v. Villas of the Green, Inc.,* 569 So. 2d 766, 767 (Fla. 4th DCA 1999), is that where separate counts of a complaint overlap, yielding the same damages, then the jury should determine the total amount of damages supported by the evidence; and then apportion among the various counts; and so long as the overall award is supported by the evidence, the integrity of the verdict is not affected by the allocation. As the court put it in *Delva v. Value Rent-A-Car,* 693 So. 2d 574, 577 (Fla. 3rd DCA 1997), the *Phillips* rationale applies whenever "[t]he manner in which the jury itself allocated the awards to the various elements of damages made no legal difference to the bottom line . . . ." If the damages in each of the various counts are the same, then obviously, when the jury's total award is supported by the evidence, the apportionment of that award makes "no legal difference to the bottom line . . . ." That can only happen where the counts in question overlap, so that the allocation is essentially irrelevant to the integrity of the verdict.

But when the various elements of damage do not overlap, then any shortfall in one itemized category clearly is not rendered harmless merely because the overall award is within the range of damages subsumed by both parties' testimony. In such circumstances, application of the *Phillips* principle would utterly frustrate the jury's intentions, because it would require effectively transforming the jury's damage awards in specific categories into lower awards, in order to compensate for (and thus assertedly render "harmless") the jury's admitted error in awarding inadequate damages in the category in question. That would clearly make an enormous "difference to the bottom line." Any such slight of hand unquestionably would affect the integrity of the jury's verdict, and the plaintiff's rights in the process.

Hartford's arguments cannot forestall the district court's conclusion that the jury's calculation of present money value is not supported by the evidence of record. This is not a close question. No amount of latitude can defend a reduction of $1.8 million over 25 years to a present money value of $72,000. It is simply indefensible.

B. THE TRIAL COURT DID NOT ERR IN ADOPTING THE LOWEST MEASURE OF PRESENT MONEY VALUE PERMITTED BY THE EVIDENCE--EVIDENCE WHICH HARTFORD OFFERED AND IS ESTOPPED TO REPUDIATE--RATHER THAN SUBMITTING TO A NEW JURY THE SINGLE TASK OF REDUCING $1.8 MILLION TO PRESENT MONEY VALUE OVER 25 YEARS.

1. The Plaintiffs Timely Objected to the Jury's Present-Money-Value Determination, Both Before and After the Jury was Excused. Hartford argues (brief at 27, 41-44) that the issue here is one of inconsistent verdicts; that the plaintiffs

interposed no objection, nor asked that the jury be sent back, before the jury was discharged; and that their failure to do so waived any assertion of inconsistency. As we have noted, the factual premise of this contention is wrong. Immediately after the verdict was returned, the trial court commented that the $72,000 present-value number could not represent the present money value of $1.8 million, and the plaintiffs immediately agreed: "It couldn't be that under [the defendant's] most optimistic result from your expert" (Tr. 635). The trial court then preempted any request that the jury be sent back: "I don't think we can do anything. They can make this reduction. There is no way I think I can send it back to them" (*id.*). The plaintiffs responded: "For the record, we request that, and it's denied, I guess" (*id.*). During post-trial argument, the trial court specifically ruled that the plaintiff had requested that the jury be sent back (Tr. 540, 571). Thus, the factual premise of Hartford's elaborate argument is simply wrong. The plaintiffs immediately objected to the verdict; they requested that the jury be sent back; and the trial court denied that request. In contrast, Hartford was silent throughout.

Moreover, Hartford is incorrect in asserting that the problem presented here is a problem of inconsistent verdicts. We agree with Hartford that when two of the jury's findings are inherently inconsistent, the failure to object contemporaneously cannot be cured by challenging the sufficiency of the evidence post-trial. But these verdicts were not facially inconsistent. Without examining the evidence and the jury charge, it cannot be said that a finding of $1.8 million in future medical expenses is inconsistent with a reduction of that number to a present money value of $75,000 over

25 years. The propriety of the present-money-value determination depends instead upon the economic evidence introduced at the trial, any expert testimony on the determination of present money value, and any instructions by the trial court on that question. The issue, therefore, is whether the present-money-value determination is supported by the evidence of record–not whether it conflicts with some other part of the verdict. As the court held in *Cowart v. Kendall United Methodist Church,* 476 So. 2d 289, 290 (Fla. 3rd DCA 1985), in such circumstances the relevant question is whether the assertedly-offending parts of the verdict are supported by the evidence of record--a matter properly raised in a timely post-trial motion.[13/]

2. We Agree that the Trial Court Only Has the Discretion to Amend a Verdict in Order to Achieve the Jury's Obvious Purpose, by Correcting Mathematical Errors or Obvious Inversions or Transpositions in the Verdict; But the Trial Court's Ruling Is Not Based on that Principle. Hartford also argues (brief at 45) that while the trial courts do have discretion to amend a verdict, they may do so only to achieve the jury's obvious intention. In the instant case--although the probability is strong that the jury simply divided $1.8 million by 25--the jury's "real" intention cannot be determined. Thus, Hartford is correct that the trial court could not have amended the

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[13/] *Accord, Stein v. Cigna Ins. Co.,* 744 So.2d 462 (Fla. 4th DCA 1997); *Avakian v. Burger King Corp.,* 719 So. 2d 342, 344 (Fla. 4th DCA 1998); *Simpson v. Stone,* 662 So. 2d 959, 961 (Fla. 5th DCA 1995); *Kirkland v. Allstate Ins. Co.,* 655 So. 2d 106, 107 (Fla. 1st DCA 1995); *Steinbauer Associates, Inc. v. Smith,* 599 So. 2d 746, 748 (Fla. 3rd DCA), *review denied,* 606 So. 2d 1166 (Fla. 1992); *Surety Mortgage Inc. v. Equitable Mortgage Resources, Inc.,* 534 So. 2d 780, 782 (Fla. 2nd DCA 1988); *Massey v. Netschke,* 504 So. 2d 1376, 1377 (Fla. 4th DCA 1987).

verdict to "conform" to the jury's obvious intention on the issue of present money value. The jury's intention on that particular issue cannot be determined.

But that is not what the trial court did. The trial court found that the jury's present-money-value determination "is not based on the law or the evidence in the case and most likely resulted from a misunderstanding of the concept of present money value" (R. 527). The trial court properly ruled on the sufficiency of the evidence--nothing more.

3. The Trial Court Did Not Err in Denying Hartford the Option of a New Trial on All Issues of Damages, Because §§768.043(1) and 768.74(3), Fla. Stat., Do Not Require a New Trial on Any Issue Other than Reduction to Present Money Value. We agree that as a general principle, both § 768.043(1) and § 768.74(4), Fla. Stat. (1997) require that the adverse party be given the option of a new trial as an alternative to any remittitur or additur ordered by the trial court. But neither Hartford nor the dissenting opinion cited any authority that the new trial must always include all of the damage issues in the case, even if only one element of the damages has been contested, and it is entirely severable from all the others.

Hartford's contention, echoed by the dissent, simply does not make sense; and not surprisingly, the one appellate decision on the issue rejects it. In *Astigarraga v. Green,* 712 So. 2d 1183 (Fla. 2nd DCA 1998), the jury made individual awards of past medical expenses, future medical expenses, past non-economic damages, and future non-economic damages. The defendant successfully argued that the award of future medical expenses was excessive; but none of the other elements of damage was

challenged; and the appellate court held that the trial court abused its discretion in ordering a new trial on all issues of damages, *id.* at 1184:

> Because the remaining damages were supported by the evidence, they are not subject to remittitur.
>
> Accordingly, we reverse the order granting a new trial on all damages. We remand for reinstatement of the damage awards except the award for future medical expenses.

The same reasoning is found, by analogy, in appellate decisions remanding for a new trial or a remittitur of only one element of the damages awarded by the jury, leaving the other damage awards undisturbed. *See, e.g., Altilio v. Gemperline,* 637 So. 2d 299, 302 (Fla. 1st DCA 1994); *Dyes v. Spick,* 606 So. 2d 700, 704 (Fla. 1st DCA 1992); *K.C. v. A.P.,* 577 So. 2d 669 (Fla. 3rd DCA), *review denied,* 589 So. 2d 289 (Fla. 1991).

This is simply a matter of common sense; and neither Hartford nor the dissent cited any authority to the contrary. The dissenting opinion relied upon *Jarvis v. Tenet Health Systems Hospital, Inc.,* 743 So.2d 1218 (Fla. 4th DCA 1999) and *Food Lion v. Jackson,* 712 So.2d 800 (Fla. 5th DCA 1998) (A. 3). Hartford cites these cases (brief at 31-33) and adds *City of Jacksonville v. Baker,* 456 So.2d 1274 (Fla. 1st DCA 1984), *review denied,* 464 So.2d 554 (Fla. 1985) (brief at 34). But these cases have nothing to do with the specific question of whether all of the damages must be retried, even if only one element is contested; and none of them involved a stipulation by the plaintiff to the defendant's suggested damages. They all hold only that §§768.043(1)

and 768.74(4) requires only a new trial on "damages"--not liability. None of them specifically addresses the issue before this Court.

Hartford has shown no error by the trial court in ruling that any new trial would be limited to the issue of present money value (R. 574). Therefore, the final question is whether the trial court erred in denying Hartford the option of a new trial on the discrete issue of how to reduce $1.8 million to present money value over 25 years.

4. After the Plaintiffs Agreed to Accept Hartford's Evidence on the Question of Present Money Value, Hartford was Not Entitled to a New Trial on that Issue Either. On that question, we submit that the trial court did not abuse its discretion in light of the plaintiff's willingness to accept the lowest measure of present money value presented by the evidence. Hartford's sweeping contention--that the trial court's acceptance of Hartford's calculation of present money value, instead of ordering a new trial on the issue--"is contrary to all Florida law on point" (brief at 1)--"conflicts with all Florida law" (brief at 30)--is pure bravado. Neither Hartford nor the dissenting opinion cited a single case which holds that a new trial is required under §768.043(1) or §768.74(4) when there is no factual dispute because the plaintiff is willing to accept the defendant's measure of the damages. Neither the three cases discussed earlier (Hartford's brief at 31-34)[14/], nor the additional cases cited by Hartford (brief at 47)

[14/] *Jarvis v. Tenet Health Systems Hospital, Inc.,* 743 So.2d 1218 (Fla. 4th DCA 1999); *Food Lion v. Jackson,* 712 So.2d 800 (Fla. 5th DCA 1998); *City of Jacksonville v. Baker,* 456 So.2d 1274 (Fla. 1st DCA 1984), *review denied,* 464 So.2d 554 (Fla. 1985).

(all holding that a trial court which orders a remittitur must also order a new trial[15/]) are cases in which the plaintiff was willing to stipulate to the defendant's proposed measure of damages. Obviously that makes all the difference.

Nor is there any barrier to the trial court's disposition in the two final cases cited by Hartford (brief at 48)--*Pinillos v. Cedars of Lebanon Hospital Corp.,* 403 So.2d 365 (Fla. 1981) and *Poole v. Veterans Auto Sales and Leasing Co., Inc.,* 668 So.2d 189 (Fla. 1996). In *Poole*, this Court upheld the constitutionality of §768.74--in the process noting that because the defendant had rejected the additur and had appealed the new-trial order, the district court should not have addressed at all the propriety of the additur. Hartford draws from that holding the implication that "once the Additur is rejected, the only issue is whether the trial court must reinstate the Jury's Verdict, or grant a new trial on damages only" (brief at 48). But here again, the context changes entirely if the plaintiff is willing to accept the defendant's evidence on the issue in question. *Poole* says nothing to forestall that conclusion.

Finally, the Court's decision in *Pinillos v. Cedars of Lebanon* overwhelmingly supports the plaintiff's position. There the trial court accepted the defendants' post-trial argument that the jury had employed an incorrect formula in calculating present money value, but the trial court then accepted the post-trial recalculation of a defense

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[15/] *See St. Pierre v. Public Gas Co.,* 423 So.2d 949, 950 n.1 (Fla. 3rd DCA 1982); *Gould v. National Bank of Florida,* 421 So.2d 798, 802 (Fla. 3rd DCA 1982); *Lewis v. Evans,* 406 So.2d 489, 491 (Fla. 2nd DCA 1981); *Ellis v. Golconda Corp.,* 352 So.2d 1221, 1227 (Fla. 1st DCA 1977), *cert. denied,* 365 So.2d 714 (Fla. 1978); *Dura Corp. v. Wallace,* 297 So.2d 619, 621 (Fla. 3rd DCA 1974).

expert over the plaintiff's strenuous objection. Please note--this was over the plaintiff's strenuous objection. This Court properly held that because the plaintiffs had "expressly requested that the jury make the appropriate reductions" and "did not agree to the use of the [post-trial] formula," "the trial court erred in making the reductions predicated upon a formula established post-trial. Rather, upon motion of counsel, it should have granted a new trial on damages." *Id.* at 368.

Pinillos therefore perfectly illustrates the point which we are making, and which the district court made. Where the parties are in *disagreement* about the appropriate discount rate, then the issue of present money value obviously has to be retried (note the strong implication in *Pinellos* that *only* the issue of present money value needs to be retried). But where the plaintiff is willing to accept the discount rate offered by the defendant, and indeed is willing to accept the defendant's calculation of present money value according to that rate, there is simply nothing to try. Under these circumstances, as in any other context in which there are no disputed issues of fact, the trial court may properly enter judgment according to the undisputed facts. That is all that happened in this case.

It was Hartford's expert who posited a discount rate of 5½% (Tr. 540). As we have noted, *supra* p. 4, Hartford's protestations--about wildly speculative investments "in the stock market" (brief at 37), which "easily" could have turned $72,000 into $1.8 million in 25 years (*id.*)--are pure fantasy. There was no such evidence of any kind; it would have been inadmissible (*see supra* note 1); and even Hartford's expert said that 6.3% was the limit (Tr. 531). Hartford is certainly estopped to challenge the

propriety of its own number.[16/] Given that the plaintiffs were willing to accept Hartford's measure of present money value, there is simply nothing left to try.

At the least, on the assumption that a new trial would be limited to the issue of present money value, we think that Hartford has the responsibility to tell the Court what possible purpose would be served by such a trial. We believe that Hartford would acknowledge in reply (if forced to answer the question) that if a new trial would be limited to the issue of present money value, no purpose would be served.

V
CONCLUSION

It is respectfully submitted that the decision of the district court should be approved. In the alternative, any new trial ordered should be limited to the issue of present money value alone.

VI
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 30th day of May, 2001, to all counsel of record on the attached service list.

Respectfully submitted,

PODHURST, ORSECK, JOSEFSBERG,

[16/] *See generally Warner Cable Communications, Inc. v. City of Niceville,* 581 So. 2d 1352 (Fla. 1st DCA 1991); *Wooten v. Rhodus,* 470 So. 2d 844 (Fla. 5th DCA 1985); *Heimer v. Travelers Ins. Co.,* 400 So. 2d 771 (Fla. 3rd DCA 1981); *Salcedo v. Asociacion Cubana, Inc.,* 368 So. 2d 1337 (Fla. 3rd DCA), *cert. denied,* 378 So. 2d 342 (Fla. 1979); *Federated Mutual Implement & Hardware Ins. Co. v. Griffin,* 237 So. 2d 38 (Fla. 1st DCA), *cert. denied,* 240 So. 2d 641 (Fla. 1970); *United Contractors, Inc. v. United Construction Corp.,* 187 So. 2d 695 (Fla. 2nd DCA 1966).

EATON, MEADOW, OLIN & PERWIN, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
(305) 358-2800

By:_____
JOEL S. PERWIN
Fla. Bar No. 316814

SERVICE LIST

Richard A. Sherman, Esq.
Richard A. Sherman, P.A.
1777 South Andrews Avenue
Suite 302
Ft. Lauderdale, FL 33316

Philip Freidin, Esq.
Freidin & Brown, P.A.
One Biscayne Tower
Suite 3100, 2 South Biscayne Blvd.
Miami, FL 33131

Andrew Ellenberg, Esq.
1401 Brickell Avenue
Suite 900
Miami, FL 33131

Michael Balducci, Esq.
Attorney for Deft.
5900 N. Andrews Ave.
Suite 925
Ft. Lauderdale, FL 33309

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