IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1508

Florida Bar No. 184170

ITT HARTFORD INSURANCE COMPANY OF THE SOUTHEAST,

Petitioner,

vs.

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

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS

ITT HARTFORD INSURANCE COMPANY OF THE SOUTHEAST

(With Appendix)

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REFERENCES

POINT ON APPEAL

THE DECISION IN THE PRESENT CASE, FINDING THE TRIAL JUDGE GRANTED AN ADDITUR BUT NOT ALLOWING AN OPTION OF A NEW TRIAL, CONFLICTS WITH ALL FLORIDA LAW ON POINT, AND PARTICULARLY WITH JARVIS; FOOD LION; CITY OF JACKSONVILLE; AND PINILLOS; INFRA.

CERTIFICATION OF TYPE

It is hereby certified that the size and type used in this Brief is 12 point Courier, a font that is not proportionately spaced.

STATEMENT OF THE FACTS AND CASE

Overview

The decision in this case, granting an additur of $819,000, without giving the Defendant the alternative of a new trial on damages, is contrary to all Florida law on point and must be quashed and a new trial granted or the Jury Verdict reinstated. ITT Hartford Insurance Company of the Southeast v. Owens, 760 So. 2d 210 (Fla. 3d DCA 2000)

What happened was that there was disputed medical and economic testimony as to the amount of the Plaintiff's future medical and, other economic damages, the number of years over which the Plaintiff would live and the present value of those economic damages. As in any case, the doctors and economists for both sides gave numerous alternative ways and numbers to calculate these damages, and eventually the jury entered a Verdict finding total future damages to be $1.8 million, the number of years he would live to be 25 years, and the present value to be $72,000 as follows:

> 2. What is the amount of any future damages for medical expenses to be sustained by Stiles Jerry Owens in future years?
>
> a. Total damages over future years?
>
> $1,800,000.00
>
> b. The number of years over which those

future damages are intended to provide compensation?25 years

c. What is the present value of those future damages?$72,000.00

Owens, 211.

It should be noted that $72,000 per year times 25 years yields $1.8 million dollars.

After trial, the Plaintiff moved for an additur contending that $1.8 million was the amount the jury had intended to be the correct one, and that the jury miscalculated the $72,000, whereas the Defendant contended that the $72,000 was the amount the jury intended, and that the jury miscalculated the $1.8 million. The Defendant further contended there was evidence to support the $72,000, but no evidence to support the $1.8 million.

In any event, after hearings on Post-trial Motions, the judge surmised that the jury intended to award the $1.8 million and not the $72,000, and then picked certain portions of the expert testimony to discern it should grant an additur of $819,214, and granted an additur for that amount, but refused to give the Defendant the option of a new trial.

On appeal, the Third District affirmed by two to one vote; with the dissent saying that under Florida law a trial judge clearly has to give the option of a new trial, if an additur is granted. Owens, 213.

The Motion for Rehearing and the Motion for Rehearing En Banc were filed and the Motion for Rehearing En Banc was denied by a six to five vote. Based on direct and express conflict this Court accepted jurisdiction.

Specific Facts

The Plaintiff was involved in an automobile accident on May 11, 1994, and injured his right hand and arm (R 1-6; 7-11; 20-24). Ultimately, the case went to trial against two UIM carriers, Hartford and Prudential; with the Plaintiff seeking only past and future medical expenses and past and future pain and suffering (T 20).

The first doctor to testify was Kenneth Fisher, the Plaintiff's treating neurologist who is also certified in pain management, who saw Owens two years after the accident (T 42-45). Mr. Owens was referred to Dr. Fisher by Plaintiff's counsel for pain management treatment and he saw the Plaintiff six times related to the trauma to his nerves in his arm and the severe pain that resulted (T 45-46). Dr. Fisher described how the Plaintiff could move his hand from side to side, but could not move it up and down, his arm was not paralyzed; this was due to major trauma to his right arm, which had sustained fractures, he had immobility of his wrist and immediately suffered from carpal tunnel syndrome (T 49-51). His orthopedic surgeon tried to give him relief for the carpal tunnel and ended up fusing his wrist (T 510).

Dr. Fisher next saw the Plaintiff in February of 1997. By then, Owens had developed migraine headaches due to the tension of his hand and arm problems, and by this time, a few years after the accident he had developed reflect sympathetic dystrophy (RSD) (T 51-52). There is extraordinary pain associated with this

condition and Fisher and Owens' rehabilitation doctor, Litchblau, decided to give him nerve blocks (T 54). By November of 1997, the RSD was worse (T 56). Dr. Fisher then described a nerve block, how it is done on an out patient basis; it was a very dangerous procedure; the single ones did not seem to be working well, so he recommended the overlapping ones that were done by Dr. Demeo, an expert in that field; and Mr. Owens had all the classic signs of the RSD condition (T 58-64). To the disappointment of Dr. Fisher, even after these nerve blocks, Owens was back to his original condition without significant improvement (T 65). Owens has now progressed to the second stage of RSD with more constant pain and discomfort; there was no way to tell if his condition would get better or worse (T 66-67). While there were patients who had gotten completely better from this condition, he did not think that Owens was one of them; there was the possibility that Owens could undergo a sympathetectomy, which only had a 75% success rate (T 68-69). Dr. Fisher felt however there was little chance of success with the sympathetectomy, which could cost from $10,000-$12,000 (T 71-72). He recommended no more nerve blocks since they were not successful; they had not helped him; this series of blocks cost about $13,000-$14,000 (T 73). Dr. Demeo put Owens on a sympathetic nerve block medication and Dr. Fisher put him on Paxil (T 74). Owens is also taking an anti-seizure medicine and migraine medicine to modify his symptoms (T 74). The Plaintiff's diagnosis is ulnar neuropathy and if it got worse he might require surgery; if his RSD got worse, he may have to have a

sympathetectomy; and if his RSD spread to other parts of his body, this could be very serious (T 75-76).

The doctor opined that Mr. Owens had a 100% impairment in his right arm (T 79-80). He lost any useful activity in his right arm such as carrying, lifting, pushing, pulling; he could not play tennis, golf, basketball, football, weight lift (T 80). He could not use his right arm at all because if anyone touches it, it will be uncomfortable (T 81-82).

Regarding future medical care, Owens would need an orthopedic surgeon to check on the prior surgeries; a neurologist to make sure the RSD was not progressing; a rehabilitation specialist; a psychiatrist because of the depressive effects of his injuries; and a physical therapist from time to time and medications (T 83). On cross, Dr. Fisher said he felt that his opinion on the failure of the nerve blocks, overrode that of Dr. Demeo who actually performed them (T 100). Dr. Fisher disagreed with Dr. Silverman's recommendation of nerve interruption to reduce or cure Owens' pain (T 106). Dr. Fisher admitted that he saw Owens two years after the accident and for those previous two years Owens' well-known orthopedic surgeon had not recommended he see a neurologist (T 108). Since he was not recommending any further nerve blocks, there was no additional costs to Owens in the future for those medical procedures (T 111).

Next, Owens' rehab doctor, Litchblau, testified about the fact that RSD took a chronic pain specialist to treat; and that he treated more than anybody in the United States (T 119-120).

Dr. Litchblau diagnosed Owens' RSD condition and described how Owens could have surgical procedures such as sympathectomies; chemical treatment; or combinations of blocks and aggressive therapy, which was the track chosen by Dr. Litchblau (T 123-126). The blocks can give wonderful relief even if they only last six months or two years until there is another flare up of the disease (T 126). The doctor claimed there was a 50% chance Owens would have RSD in his left arm within five years; his recommendation was for Owens to do nothing; then he recommended eight blocks, twice a year at the cost of $27,196.69; and $2,400 for physical therapy (T 128). It would cost Owens $1,000 - $3,000 a year for oral medication and $11,625 if he had the ulnar transposition surgery (T 139). If he had a procedure called a CMC joint arthroplasty, that would cost $31,625 (T 129-130). Dr. Litchblau also stated that he needed the care of a chronic pain specialist, one to three times a month for two years and once a year for the rest of his life with an initial exam of $75 - $225 and $30 - $90 for every visit (T 130). In addition, Owens would need a psychiatrist once a month for the next year and then once a year for the rest of his life; an orthopedic surgeon to operate on him one time a year and a general physician one time a year (T 130-131). Every five to ten years, he would need a neck x-ray at the cost of $112.32; a CAT scan once every five to ten years costing $1,405.94 and $244 to read it (T 131). The probability of Owens getting worse was low (T 132). Owens would have to baby his arm and protect it for the rest of his life (T 133). He too testified that surgery for the Plaintiff was <u>not</u>

a good idea and his understanding of the nerve block treatment by Dr. Demeo was that Owens had very minimal improvement (T 133).

On cross-examination Dr. Litchblau testified that Owens had grade one RSD; on the average he should have 16 nerve blocks every year for the rest of his life, some years more, some years less (T 136-137). He admitted however that Owens never had even a block of eight done; just one block of six; and he never had the CAT scans Dr. Litchblau was recommending in the future(T 137).

Dr. Litchblau admitted that he was not aware that Dr. Fisher had just testified that he did not recommend any future nerve blocks for Owens; and he did not defer to Dr. Fisher regarding the nerve blocks (T 152-153).

The deposition of Dr. Hubbell was read to the jury (T 175-176). Dr. Hubbell is a Georgia physician who specializes in treating RSD (DH 3-5). He saw Owens in 1997 and diagnosed him with a cervical herniated disc, post status right wrist fusion and RSD with right shoulder hand syndrome (DH 5). The doctor described the various treatments given to Mr. Owens including rehabilitation physical therapy, nerve blocks, muscle relaxers, the various drugs he was on and then stated that the object of the nerve blocks was to get a permanent relief, but unfortunately that was not the case with Mr. Owens (DH 6-11). The nerve blocks did not work for him, it was possible his RSD would worsen; he would have to continue medication on a long-term basis; and there might be other type of therapies that could be beneficial (DH 11-12). He discussed the ulnar distribution atrophy, its cyclic

effect on the elbow and arm muscles (DH 14-16). Dr. Hubbell also did not recommend any further surgery, because it could make the RSD worse DH 17-18). RSD could be cured, but Owens' case could not be (DH 19).

On cross-examination, Dr. Hubbell deferred to the doctors in Florida regarding their diagnosis of a cervical disc, since he had never even seen Owens' MRI; and he thought that overall Owens had improved from what he had seen in the past, but he was pretty much at maximum medical improvement at this time (DH 22-26). Dr. Hubbell did not recommend a sympathectomy, as it was a radical procedure and usually had to be done more than once; and Owens was better off without it (DH 29-31).

The two video depositions of Dr. Ouelette were then showed to the jury (T 176-178). Dr. Ouelette is an orthopedic hand surgery specialist at the University of Miami and an associate professor at UM (DO 4). Owens was referred to her after the 1994 accident and had already been diagnosed with interosseous scapholunate ligament tear, he had already undergone arthroscopic surgery and the pinning of his scapholunate (DO 6). After the pins had been removed, he had gone through rehab and was still having pain and difficulty with his wrist and he came to her for a second opinion (DO 6). The first surgery had been successful as far as strengthening his hand ligaments, the bone was stable, but Owens did not have a successful result of the pinning surgery; so she recommended a whole wrist fusion (DO 12-17). She described the wrist fusion she performed, it was a definitely painful procedure and included the insertion of a metal plate

into the bones (DO 19-25). During the surgery she discovered another malfunctioning piece of his hand that was going to require a second surgery (DO 26-28). In 1996, Owens underwent the third surgery that stabilized his wrist joint, removed the metal plate to get it out of the way; she confirmed his carpal tunnel syndrome; and she did a release of the transverse carpal ligament in the same surgery (DO 28-30; 31-36).

The doctor testified there was pain associated with these surgeries, but not terrible horrific pain (DO 38-39). The doctor predicted that Owens would have ulnar nerve entrapment, that would cost approximately $12,000 to have that operated on (DO 39-41). Dr. Ouelette gave Owens a 26-27% whole body impairment, based on 20% for the wrist fusion and 3-6% related to the carpal tunnel (DO 44-45). She opined that over the next five years Owens might have to have CMC joint arthroplasty (DO2 8-11). This would cost about $12,000 (DO2 11).

On cross-examination she explained she had not diagnosed Owens with a herniated disc and last time she saw Mr. Owens he had mild carpal tunnel (DO2 24-28). Regarding the ulnar nerves he had healthy good normal nerve conduction and no muscle atrophy (DO2 30-31). Dr. Ouelette testified that the two surgeries that she thought Owens would need in the next five years were both done as outpatient procedures, with a 90% success rate (DO2 36-37). Other than any potential neck problem, the doctor did not believe Owens would have to continue seeing orthopedic surgeons for the rest of his life (DO2 38). Owens would not need a physiatrist, there was an RSD problem; again, he would not need

annual CAT scans and x-rays unless there was some disc herniation problem (DO2 38-39). Owens was left with a low-level of discomfort; he is not perfectly absolutely normal, but he had overall good function (DO2 44-45). Owens would be able to use his hand, as opposed to somebody who had complete nerve damage; it was not a devastating injury, just a constant reminder that he would have to live with (DO2 45). Her opinion was based on him having the two surgeries over the next five years (DO2 47). She considered Owens to have a significant injury; and Owens had symptoms consistent with a C6 radioculopathy (DO2 49-51). The doctor ended her testimony by stating that when she observed Owens' arm just two months before, he had no motor deficits (DO2 52-53).

Dr. Shellow, a non-treating psychiatrist, testified that Owens' is suffering from a major depressive disorder of moderate severity (T 182-185). He evaluated Owens three times, in October of 1997 and May of 1998; the first time he was diagnosed with adjustment disorder with depressed mood, but since his symptoms persisted despite good treatment, his diagnosis was changed to major depressive disorder (T 188). The cause of this depression was the disability that he suffered due to the auto accident; he had a past history of coping well with life's difficulties, but he did not have a psychiatric syndrome prior to the accident (T 189-190). His self-esteem was tied up with his ability to be financially successful and from being in competitive weight-lifting with his wife; and after his arm was injured he could not do things with his wife anymore and his job causes him to have

increased pain (T 191). His condition is treatable with relaxation, cognitive restructuring, psychotherapy and anti-depressants, which Owens was taking (T 192).

On cross, Dr. Shellow had admitted not having spoken to Owens' treating psychologist, or read his deposition (T 197-198). He admitted that Owens losing his job in Florida could have been a factor in his depression; , because that can be almost as devastating as a death in the family (T 199). In addition, he had to make a major geographical move to Atlanta which was stressful as well; but the doctor testified he handled that all fine because he got a better job making more money. He dealt with all of these stresses better than the disability in his right arm (T 199-200). The doctor opined that while these stressful events could contribute to his depression, they really did not (T 200). Regarding Owens' self-esteem, certainly the fact that Owens was a functioning, very successful salesperson was a positive thing regarding his well-being (T 205). The doctor testified that Owens' self-respect was injured by his recognition that he is not the person he used to be (T 207). The doctor found that the onset of RSD three and a half years after the accident was a corollary to his depression; but the fact that his daughter and her husband moved in with him was not stressful; nor was the tornado that blew the roof off his house (T 207-209).

Gary Anderson, the Plaintiff's economist testified next (T 212). He told the jury his job was to relate the elements of future medical care based on what Dr. Litchblau had projected and to reduce those to present value (T 214). The doctor began with

loss of services and the fact that Owens' could not mow the lawn, vacuum the house, etc., which he valued as a loss of $12 a day and then he explained to the jury, in detail, how he came up with his final figure adjusting for inflation, his life expectancy, etc. (T 216). He explained to the jury how he got the present value for past lost services for four years of $17,158 and the total of future lost services was $226,000 (T 222-225). With reduction to present value, it was $25,324 (T 225). Anderson used $2,000 a year for medications and with the costs of the surgical procedures CAT scans, x-rays, etc., he came up with two models of future expenses, one with invasive pain control and one with not invasive pain control (T 226-228). He explained each of the various components, one by one, in future and present value and one suggested model was a total of $1,769,485, with a present value of $635,840 (T 229-233); and then if he got half the nerve blocks, eight instead of sixteen a year, the total would be $884,743 with a present value of $317,920 (T 233). With non-evasive therapy the future cost of medical expenses would be $156,154 with a present value of $56,112 (T 235). Using ganglion blocks, the total future amount was $975,000 with the present value of $344,309 (T 236). Then, Anderson testified that under model one, with eight nerve blocks a year and non-invasive pain therapy, the total would be $1,222,873 (T 237). Model two had invasive therapy and the total was $1,157,938, and the present value of $422,032 (T 238). Dr. Anderson explained that these numbers changed depending on the input as to what was needed and what was not; again, he explained his job was to do an economic

analysis to figure our how much was needed today, what is the present value you need, to be able to pay that amount in the future (T 239-240). The discussion continued on present value, again, the Plaintiff went over the fact that there was no future value for past lost of services and past medicals; for future loss services model one and model two were the same $226,089; model one treatment had a medical expense value of $1,222,872 and a model two value of $1,157,938 (T 242-243). The expert again explained that if the jury was going to compensate for all the costs, the figure to be awarded was the lower figure, the present value figure, so there was no confusion (T 243). Anderson continued to discuss the calculations involving inflation, interest rates and ended his testimony by stating his figures were fairly conservative (T 243-244).

Anderson testified that if certain medical treatment was not needed, or certain services were not needed, the ultimate bottom line numbers would change (T 280). Anderson again testified that if Owens' physician, Dr. Fisher was correct, that Owens would not need, nor did the doctor recommend, the stellate ganglion blocks, this entire huge number for future medical expenses would <u>come out</u> of, or be subtracted from, the bottom line figure (T 284-287).

The Plaintiff, Jerry Owens, testified about his parents being mill workers, his life growing up in Georgia, his military training, how he became a district sales manager and he too testified he was in the best health ever right before the accident (T 314-317). He described how he had always had an

interest in sports; he played high school football, baseball, tennis, which he played from the time he was 20 until the time of the car accident; he was a B-level player in the Atlanta Tennis Association; he and his wife became fitness buffs; he and his wife never had to see a marriage counselor for any problems before the accident; he still loved her very much; then, he discussed the medications he was on (T 318-322). Owens then described his trips to various doctors due to the fact that he had continued problems with his wrist and arm; continued problems during and after the surgeries; he had continued pain in his fingers, hand and arm; the fact that he screamed all the way home from the second outpatient surgery; the continued problems after his third surgery; and the new pain that started bothering him up his arm (T 322-327). He described his wrist as being completely stiff; how it will not move side to side and he cannot turn his hand over (T 328). He described his treatment with nerve blocks, the temporary relief they provided; he was totally asleep when he had them done and now he has difficulty shaving, getting dressed, tying anything, going to the bathroom; it is difficult for him to cut his own food; to start his car and after 52 years it was hard for him to start using his left hand (T 328-331). He used to be very handy around the house cooking dinner, cleaning, he is now not able to do any of these things; he is not able to physically protect his family; he can walk on a tread mill and a stair master; he cannot played tennis; he cannot weight lift; and in over his 30 years of marriage, he never had housekeepers or helpers, he and his wife did everything (T 332-335). He no

longer feels like having sex, the medication has caused him to lose all desire; he has continuous pain in his right hand and arm all the way through his neck and shoulder; he is not anxious to have surgeries and some of the doctors have told him it would be bad for his RSD (T 335-336). The heaviest thing he can lift is a small book; it is hard to travel with his injury, drive with his injury; it is awkward to use his computer; he does not sleep normally; he has severe migraine headaches three to four times a week (T 338-340). He is concerned because if he gets worse, he does not know how to pay for things, what is going to happen to his family (T 340). Regarding his depression, it is sometimes worse than at other times, but is really bad when he is hurting really bad (T 341).

After the accident when he returned to Atlanta and he began working for Shepard, driving 20,000 miles a year on business, he flew frequently, but now that has been reduced (T 343-344). His severe headaches did not start until years after the accident; he is comfortable in his job at Shepard; he testified he had good temporary relief from the one nerve injection he received in Palm Beach; and the psychologist has been very good for his condition (T 349-351). Owens told Dr. Demeo that he had some improvement and more improvement than with any other previous injections (T 353-354). He admitted that Dr. Demeo had <u>not</u> recommended the sympathectomy, but had recommended another series of nerve blocks and Dr. Demeo was very optimistic about the outcome of those (T 354-355).

In continued cross-examination, Owens admitted that being in

the sales field for thirty years was challenging; most people do not do well in that field; his job requires him to be social and upbeat; he earned more money last year than he had ever earned in any other sales job before (T 356-357). He admitted that his attorney sent him to Dr. Litchblau, Dr. Shellow and Dr. Fisher. He then testified that the longest relief from the nerve block was for two days (T 358-359). When asked if he intended to get nerve blocks every year in the future for the rest of his life, since he only got two days of relief, Owens could not answer the question (T 359). The mortality tables were then presented showing that Owens had a 25 year life expectancy and the Plaintiff rested (T 361-363).

Dr. Silverman testified for the defense as an expert in pain medicine and anesthesiology (T 363). The doctor reviewed all of the medical records of all the treating physicians of the Plaintiff, additional records, depositions MRI reports as well as psychological reports from the psychologist and psychiatrist (T 372-373). He examined Mr. Owens on March 20, 1998, and concurred that he had RSD of his hand or complex regional pain syndrome (T 373). He discussed the development of sympathetic pain syndromes, the unusual nature since they were not like achy hands; because, for instance they could be very, very sensitive to pain, sweat, turn blue, turn cold or hot, due to damage to the sympathetic nerve system as a result of an injury or surgery (T 374). The doctor found that Owens had grade one RSD and he recommended nerve blocks to desensitize the painful hand (T 376-377). The doctor opined that the problem with the series of

nerve blocks he had received before from Dr. Demeo was that it was not followed up by aggressive physical therapy (T 378-379). Dr. Silverman then described two possible treatments, when nerve blocks have had good results, even if only temporarily (T 382). The first is a sympathetic block done through the spine on an outpatient basis, which had a greater than 50% or possibly higher success rate (T 382-383). This would leave Mr. Owens essentially symptom free as far as the RSD pain (T 383). The second permanent block, called a neurolytic procedure, involves a needle inserted in the neck to block the nerve, but it is not a painful procedure and can provide permanent relief (T 383-387). Dr. Silverman recommended this procedure which would significantly reduce, if not eliminate, Owens' RSD syndrome (T 387). Based on a review of Owens' records and examining him, he believed that the first method would solve Owens' RSD problem or leave him virtually pain free (T 389). The cost of this procedure is $3,500 (T 389). The second procedure the cost was $5,000 (T 389). His potential future medical expenses would be $8,500, if he had both procedures (T 389). The doctor then went on to explain why Dr. Litchblau's recommendation of eight stellate blocks twice a year for the remainder of Owens' life made no sense, because they would simply be repeating unsuccessful blocks. This did not make sense as effective pain management (T 390-391). Dr. Silverman would not recommend $130,000 worth of drugs or any of the physical therapy for the repeated, ineffectual blocks. He also testified that the MRI reports showed no herniated disc, so there is no reason to have

repeated x-rays and CAT scans every five to ten years (T 392-393).

On cross-examination, the doctor admitted that his IME report showed Owens had mid-stage RSD (T 406). Dr. Silverman recommended his first method of a cervical catheter as an appropriate treatment, because there was low risk involved and no nerves were destroyed (T 412-415). Dr. Silverman explained that the reason that Owens' doctors thought he was getting worse was because he was not receiving the proper treatment until two months ago. The cost of each block of therapy would be $30,000 (T 425).

Dr. David, a neurologist, stated that he had reviewed all the Plaintiff's medical records from all of the doctors involved in Owens' treatment and he examined Owens himself in May 1997, three years after the accident (T 451-453). Owens described the accident to the doctor in that his right upper arm and shoulder went against the seat belt and he had immediate pain in his right shoulder and right wrist, but had no head injury, nor was he knocked unconscious; he was taken to Memorial Hospital; and the x-rays there were negative (T 454). He was given a collar and five days later he began treating with Dr. Chaplin at the Orthopedic Care Center, complaining of neck and right shoulder pain with the symptoms into his hand and finger (T 454-455). Dr. Chaplin though he might have a hairline fracture in his wrist; he casted his hand and wrist; ordered electric studies which showed no nerve damage in the right hand; the doctor then ordered an MRI which was negative; he went to Dr. Eastwick for

right wrist problems, he did the first operation which was arthroscopic surgery in 1994; Owens did not receive relief from the first surgery, then Dr. Ouelette operated on him twice, then he went to Dr. Litchblau; the chronic nerve studies were normal of his right shoulder and arm; Dr. David felt that all of Owens' pain was related to the original injury to the ligament in his wrist and hand and the appearance of the secondary sympathetic disorder (T 455-459).

David did not understand how Dr. Fisher found nerve root compression due to a cervical disc in the spine, since there was no anatomical evidence for that, nor any EMG studies that confirmed it or MRI studies that confirmed it (T 460). Owens told him that the nerve block he received just two days before he saw Dr. David gave him better relief than he had had in his recent memory, he was much more comfortable and the doctor was glad he responded well to that therapy (T 461). Based on Dr. Fisher's finding of ulnar nerve damage, Dr. David incorporated those findings and there might be a basis to transpose that to relax it (T 464-465). Dr. David concluded that Owens had a serious orthopedic problem in his right hand and wrist; surgical attempts to make him better, were actually followed by more pain and more impairment, which was caused either by the accident, or by the surgery after the accident and that Owens had RSD, but Dr. David did not feel there was a need for an ulnar transposition, because the chances of making any difference were small (T 468-469). He described Owens' pain as impressive, his objective changes were incontrovertible in spite

of the fact that he had a nerve block, therefore, he had stage one RSD, not involving any major nerves; he had developed a great deal of pain prior to the nerve block than after (T 469). Dr. David said continued nerve blocks were unrealistic and he had never seen anyone receive the amount of nerve blocks Dr. Litchblau was testifying Owens needed, which was sixteen a year for 25 years, which was 400 injections; Dr. Litchblau's assessment of $130,000 worth of drugs was high and that Owens would not need all these drugs; in regards to the $1.5 million dollars for future medical expenses, Dr. David said the math was right on present value, but usually patients like Owens, when treated vigorously, got better over time and much of this medical plan would not be necessary in the future (T 476-482). He reviewed Dr. Demeo's records after the six stellate ganglion blocks, which had noted that Owens was doing remarkably well, but that Owens symptomology waxed and waned (T 484-485).

On cross-examination, Dr. David confirmed that even the doctors who disagreed with Dr. David's diagnosis, all agreed Owens should not have surgery (T 507-508; 512). Again, Dr. David reiterated the lack of need of repeat CAT scans and x-rays; but he clearly saw a need for psychiatric help since Owens was a normal individual who suffered a problem, therefore, the suggestion for future psychiatric care was reasonable (T 512-513). Similarly, Owens would need orthopedic follow-up and then if there was some problem he might need an x-ray; he also agreed that $2,000 a year was not extraordinary or out of line for someone in Owens' condition (T 514). So, the real issue was the

nerve blocks, at 16 a year; especially where the doctor felt that it would be hard for Owens to have even 8 a year forever; unless he was getting some remarkable benefits from them (T 514-515). Dr. David opined that it would be vastly preferable if a more lasting procedure was undertaken to improve him (T 515).

The last witness at trial was the Defendant's economist David Williams. Dr. Williams testified that Dr. Litchblau had changed his life care plans for the Plaintiff from 1996 to 1997 and 1998 (T 520). He testified that the pricing used by Dr. Anderson, the Plaintiff's economist, based on these life care plans had changed dramatically, with large fluctuation in prices over time (T 520-521). For example, in May of 1997, Anderson had two huge medical scenarios, one for $77,000 and one for $134,000 which rose the following year to $770,000; now the latest one was down to $450,000 (T 521). He noted that even a small error in a medical plan could result in hundreds of thousands of dollars of difference in the projections (T 521-522).

Dr. Williams went to the Atlanta area in order to arrive at an analysis of the type of people who needed to provide services for Mr. Owens and their hourly pay and arrived at a $7 figure; instead of the $12 used by Anderson (T 523-524). This difference would reduce the bottom line figure of the medical plan by a third (T 524). He too explained to the jury about the price of future medical care and its reduction to present value (T 525-526). He explained to the jury how spiraling medical costs, as described by Dr. Anderson was an overstatement and that things like managed health care brought down the rate of medical

inflation (T 526-527). He also testified that the final number in the medical plans, as suggested by the Plaintiff, would have to be redone if all the proper numbers had not been used to do the direct economic forecast and analysis, or if the items simply really were not necessary; again, that these variables could result in hundreds of thousands of dollars difference (T 527-528). For example, changing the number of blocks a year from 16 to 8 reduced Dr. Anderson's medical plan for Owens by close to $300,000 (T 528-529). If there was no need for any of that, the present value of the medical care for Owens would be $152,000 or a little less (T 529-530). If other items were removed from the medical plan, for example if Owens had a permanent block that reduced his requirement for some of the treatment, it would reduce the $130,000 present value figure even more (T 530-531). As the interest rate went up, the present value would be lower (T 531). The present value of $250,000 invested at a rate of return of 6.3% would yield $1.2 million dollars in 25 years (T 533). This rate of return number varied very little from Dr. Anderson's.

On cross-examination, Dr. Williams explained that medical inflation since 1990 had dropped like a brick, it was less than overall inflation (T 538). It was possible that prices could go up or stay current or come down (T 539). Dr. Williams testified that a safe investment for Owens to make with his future medical care award would be municipal bonds (T 543). At that point the Defendant rested (T 544).

The jury then returned with a Verdict that could not have

properly been added, so the judge reinstructed the jury on how to add it. Ultimately, the Verdict was $82,000 for past medicals; $1,800,000 for future medicals over 25 years reduced to a present value of $72,000; $150,000 for past pain and suffering; $637,500 for future pain and suffering for a total award of $941,500 for Mr. Owens and $216,500 for Mrs. Owens (T 633-634). The court then questioned the $1.8 million number, with the present value of $72,000; with defense counsel pointing out that was a fair present value; Plaintiff's counsel disagreed; and the court stated "I don't think we can do anything. They can make this reduction. There is no way I think I could send it back to them" (T 635). The court observed that the jury could have bought the argument that this money could have been invested in the stock market; Plaintiff's counsel said it was blatant error and the foreman should be asked if they really meant that the present value was $72,000 (T 635-636). The judge was not going to interrogate the jury but could poll them; Plaintiff's counsel agreed; the jury was polled and all agreed it was their Verdict (T 636-637).

The Plaintiff filed a Motion for Rehearing and Additur and in the Alternative the Motion for New Trial, claiming the jury made a mistake in reducing the award of future medicals to the present value of $72,000; while admitting that the Defendant told the jury for future medicals should only be a present value of $82,000. In the alternative, the Plaintiff asked for a new trial and cited numerous cases in the additur situation where the courts had granted a new trial; but the Plaintiff wanted a new

trial only on present value and not on total future medical expenses (T 370-377). Attached to the Plaintiff's Motion for Rehearing was a copy of the chart Dr. Anderson used during trial showing the Plaintiff's request for future medicals under model one for $122,872 reduced to a present value of $452,741; and model two asking for future medicals of $1,157,938 reduced to a present value of $422,320.

Hartford moved for a collateral source set-off and to reduce any judgment against it to its policy limits of $1,000,000, as did Prudential and those Motions were granted (R 366-367; 368-369; 380-384; 466; 467; 468). The first hearing on the Plaintiff's Motion for Additur was held on July 16, 1999 (R 510-526). The court noted that even if it was uncontradicted what the future medical expenses were, there was different evidence presented on how to reduce it to present value and that was a different animal than merely a calculation (R 516-517). The judge inquired about what happened in cases where they did not even present an economist to talk about present value and it was simply left up to the jury, based on the standard jury instruction and they come up with something; and counsel for the Plaintiff said the plaintiff was just taking a risk because there was no evidence (R 519).

After much argument back and forth about what to do, the judge asked for memos; with the defense counsel stating that everyone was just speculating about what the jury did; it could have just worked backwards from the reasonable present value of $72,000, then multiplied it by 25 years to get the $1.8 million;

and because the jury is directed to put in the total future medical value, even though it is not the actual award that goes to the Plaintiff. The Plaintiff argued that the jury misunderstood the jury instruction on present value and it was a math mistake the judge could correct using the $1.8 million (R 513-516). The Defendants noted that any new trial had to be on all damages not just on present value, because that was what was required under the remittitur/additur statute (R 524).

The Plaintiff filed a supplemental Memo arguing the jury could not have found a present value of $72,000 and then worked backwards because that was not common sense; it was contrary to the instruction that told the jury they had to "reduce" to present value; and the Plaintiff detailed evidence of future medical expenses and present values, including a total of almost $78,000; which in and of itself would support the jury's award of $72,000 for present value (R 409-465). Attached to this Memo was an Affidavit from the Plaintiff's expert explaining a third model; which of course the jury did not see; which suggested a present value of a $1.8 million dollar award to be $745,116, using the Plaintiff's discount rate (R 409-465). The Defendant's Memorandum pointed out the inconsistencies that the Plaintiff was arguing, since the Plaintiff had never asked for more than a maximum of $1.2 million; Owens presented extensive calculations showing a present value of only $400,000; it was completely improper for the court to be considering new evidence of a totally different present value award; none of these new figures were given to the jury, or argued to them in closing, or in the

Plaintiff's Motion for New Trial; there was nothing to say that the present value had to be some exact precise mathematical number; the jury heard extensive evidence on inflation, interest rates, how they went up and down, spiraling medical costs, non-spiraling medical costs, stable costs, unstable costs; the jury was free to accept or reject any portion of this testimony; and where defense counsel argued that $82,000 was the correct present value for future medical expenses for Owens, certainly there was a basis to support the $72,000 figure.

The judge then entered an Order on the Plaintiff's Motion for Additur; finding the jury misunderstood the concept of present money value, so the judge was going to do the calculation herself, based on a formula supported by the evidence; therefore, set it for an evidentiary hearing, where the experts could tell the court how to reduce to present value, based on the exact same testimony that the experts had given to the jury, but the jury misunderstood (R 527-528). In the meantime, a Partial Final Judgment was entered against Hartford in favor of the Plaintiffs and the Plaintiffs were paid the $1,000,000 policy limits by Hartford (R 529-530; 475-476). The court agreed that the Verdict issue was problematic and again the defense reminded the court that it was the jury's function to evaluate the evidence and it could reject even undisputed expert testimony; and the judge again found that it was problematic; she understood the Defendants' objections, but she was going to just make a calculation and leave it up to the Third District to solve the problem (R 542). The Plaintiffs said they just thought that both

sides would come in with a number and the judge would chose one (R 546-547). Again, Plaintiff's counsel said that it was impossible to say whether the jury intended $1.8 million, instead of $72,000, or vice versa (R 549). The judge wanted to resolve the issue so it could be addressed on appeal, the judge understood the Plaintiff was going to do the calculation and the Defendants really were not going to agree to it; the trial judge announced she was going to use the $1.8 million, which she understood the Defendants were objecting to and she would have each side's expert use that number, to come up with a present value; there would be another hearing and the court would choose (R 549-551).

The additur/remittitur statute was read to the court; and Plaintiff's counsel argued that the jury agreed on the total $1.8 million awarded (R 564-565). The Plaintiff was willing to use the Defendant's discount rate; and defense counsel reminded the court that if it was really just a simple matter of correcting one item, the appropriate thing would have been to send the jury back to redo the whole Verdict, because that is what the case law required (R 569-571). The judge then announced she was correcting an obvious mistake in the jury's calculations, it did not make sense to send it back for a new trial on anything; and based on what the economists submitted she would reduce the $1.8 million reward (R 573).

The judge then entered an Order granting an Additur in the amount of $819,214, plus interest from the date of trial (R 531-531). On March 16, 1999, the judge entered an Order denying the

Defendants a new trial under the additur statute and case law that the Defendant was entitled to one; the court said this was not a simple additur statute situation, but that the jury misconstrued the evidence, it made a mistake; and she thought she already denied the Motion for New Trial, recognizing the situation was "a little tricky" and the court was interested to see what the Third District did (R 504-509; 533). Hartford appealed (R 485-487; 531-532; 488-496) and the Third District affirmed, agreeing the error was on the $1.8 million in future medicals and found the Additur appropriate. Owens, 212. The majority found error in only one calculation so a new trial on damages was not warranted. Owens, 212-213. The court also decided that the judge's ruling had to be affirmed under the abuse of discretion standard in Brown v. Estate of Stuckey, 749 So. 2d 490, 498 (Fla. 1999). Owens, 213. This Court accepted jurisdiction on the basis of direct and express conflict; as expressed in the dissent in Owens, 213:

> GERSTEN, J. (dissenting).
>
> I respectfully dissent. Though the majority's pragmatic approach has great cache', it violates both statute and caselaw. Section 768.043(1) details a clear and simple procedure in remittitur and additur actions arising out of the operation of motor vehicles stating: "If the party adversely affected by such remittitur or additur does not agree, the court *shall* order a new trial in the cause on the issue of damages only." § 768.043(1), Fla. Stat. (1997)(emphasis added). A fortiori, once the trial court grants the plaintiff's motion for additur, and, as here, the adversely affected party does not agree, the trial court must order a new trial. *See* § 768.043(1), Fla. Stat. (1997); *Jarvis v. Tenet Health Systems Hosp.,*

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).

My views in this regard, are summarized and far better expressed in the recent concurring opinion of Judge Hazouri in *Jarvis v. Tenet Health Systems Hosp., Inc.,* 743 So.2d at 1220 (Hazouri, J., concurring specially). Judge Hazouri noted that the language of Section 768.043(1) is virtually identical to Section 768.74, and that the operative word in both statutes is "shall."

Thus Judge Hazouri concluded that the statutes' mandatory language entitles the adversely affected party to a new trial upon request, once a trial court grants an additur or a remittitur. *See Jarvis v. Tenet Health Systems Hosp., Inc.,* 743 So.2d at 1221 (Hazouri, J., concurring specially). I agree with Judge Hazouri's definitive analysis. This case should be reversed and remanded with instructions to grant the defendant's motion for a new trial on damages pursuant to the clear additur statute and existing caselaw.

Owens, 213.

SUMMARY OF ARGUMENT

The decision in the present case conflicts with all Florida law and the relevant Florida statutes which hold that when an additur is granted, that the Defendant must be given the alternative of a new trial on damages.

In the present case, the trial judge granted an Additur of $819,214 without the alternative of a new trial on damages, and this is clearly in conflict with Florida law.

As the Opinion of the Third District concedes, both parties presented expert testimony that had contrasting and opposing figures of future medical damages and also conflicting economic calculations. It is clearly contrary to Florida law for the trial judge to surmise what the jury had intended to do, and take bits and pieces of various economic testimony to come up with the court's own number, and not give an alternative of a new trial. If the judge had taken different bits and pieces of economic testimony, she would have come up with a completely different number, and if she had found the $72,000 was the number the jury had intended and that it had miscalculated the $1.8 million dollars, that would have been a totally different number. This was clearly an Additur, as the decision expressly held, and it is in conflict with all Florida law not to allow the alternative of a new trial on damages. Owens must be quashed and the original Verdict for the Plaintiff reinstated, or a new trial on damages ordered as mandated by the Additur statute and existing case law.

ARGUMENT

THE DECISION IN THE PRESENT CASE, FINDING THE TRIAL JUDGE GRANTED AN ADDITUR BUT NOT ALLOWING AN OPTION OF A NEW TRIAL, CONFLICTS WITH ALL FLORIDA LAW ON POINT, AND PARTICULARLY WITH JARVIS; FOOD LION; CITY OF JACKSONVILLE; AND PINILLOS; INFRA.

The Court of Appeal expressly found that the trial court granted an Additur, but nonetheless ruled that the Defendant was not entitled to the option of a new trial. This ruling in granting an Additur of $819,214, but not giving the Defendant the option of a new trial, conflicts with all Florida law on point, and specifically conflicts with Jarvis v. Tenent 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).

Owens is clear that the trial judge granted an additur:

> ITT Hartford Insurance Company of the Southeast appeals an order granting an additur in a personal injury case. Defendant-appellant Hartford contends that it is entitled to reject the additur and be given a new trial. See § 768.043, Fla. Stat. (1997). Because under the unusual circumstances of this case there was no disputed issue for retrial, the defendant's request for a new trial was properly denied and we affirm the additur....
>
> Therefore, the court was correct in determining that appellee was entitled to an additur.
>
> Owens, 211, 212 (emphasis added).

Furthermore, both § 768.043, Fla. Stat. (1997) and § 768.74, Fla. Stat. (1997) are clear that when an additur is granted, the alternative of a new trial "shall" be given. Section 768.043(1), Fla. Stat. (1997) provides:

> "...If the party adversely affected by such remittitur or additur does not agree, the court shall order a new trial in the cause on the issue of damages only." (emphasis added).

Section 768.74(4), Fla. Stat (1997) has the identical language:

> "...If the party adversely affected by such remittitur or additur does not agree, the court shall order a new trial in the cause on the issue of damages only." (emphasis added).

Clearly Owens is in express and direct conflict with existing Florida law, by allowing trial judges to pick and choose medical and expert testimony and grant an Additur, but then not to give the party the alternative of a new trial on damages.

What occurred in Jarvis, supra, was that after a large verdict, the trial judge granted a new trial on both liability and damages, and this was appealed to the Fourth District. The central issue was whether the new trial must be on damages only, or whether the trial judge could grant a new trial on liability as well as damages. The decision discussed the fact that the relevant statute, § 768.74(4) mandatorily provides that the party "shall" be given the alternative of a new trial on damages:

> ...The statute further provides that "[i]f the party adversely affected by such remittitur or additur does not agree, the court shall order a new trial in the cause **on the issues of damages only."**

Jarvis, 1219.

The court held that "shall" was mandatory language and the new trial must be on damages only. Jarvis, 1219-1220. Owens tried to distinguish Jarvis on the basis that the only legal

issue was a new trial on liability, as well as damages. However, the point is that Jarvis found the statute mandatory in its language, so the judge had no discretion to order a new trial on liability. Similarly, the judge below had no discretion to find the mandatory new trial on damages could be ignored and she could adjust the Verdict herself, with a huge Additur.

The trial judge can not grant an Additur without an alternative grant of a new trial, if the Additur is rejected. Jarvis, holds that "shall" is mandatory language and that when an additur is granted, the defendant must have the alternative of a new trial on damages and there is no discretion on this legal issue.

Food Lion, supra, was also cited by the dissent in Owens as being in conflict with the Owens decision. The facts in Food Lion were that a customer slipped and fell on a wet floor, and the jury returned a verdict for the plaintiff. On post-trial motions, the trial judge granted an additur of $5,000 and gave the defendant the alternative of a new trial on damages only. On appeal, the issue again was whether the § 768.74, Fla. Stat. (1997), which states that after an additur is granted the party must be given the alternative of a new trial on damages only, precludes the court from granting a new trial on both damages and liability where it was a compromise verdict. The opinion in Food Lion holds that a new trial can be on liability and damages, but the dissent in Food Lion urged that the mandatory language requires that the new trial be on damages alone. However, both the majority and dissent make clear, that there must be the

alternative of a new trial given, and therefore, this is in express and direct conflict with Owens.

The facts in City of Jacksonville v. Baker, 456 So. 2d 1274 (Fla. 1st DCA 1984), rev. den., 464 So. 2d 554 (Fla. 1985) were that Baker was injured in an intersectional collision between an automobile, and a motorcycle on which he was riding as a passenger. After trial, the jury returned a verdict for $400,000 and the trial judge granted an additur and gave the defendant the alternative of a new trial on damages. The defendant appealed urging that the new trial should be on both liability and damages. The court discussed the mandatory language of § 768.74, and quoted the language that "the court shall order a new trial in the cause on the issue of damages only," and ruled that the alternative to the additur would be a new trial on damages only. The conflict between Jarvis, Food Lion and City of Jackson has not been addressed by this Court, but it does not change the ultimate holding that a new trial on damages is mandatory. To date, no case has ever held that under the additur statute, the judge has the discretion to deny the adversely affected party the right to a new trial on damages.

Further, Owens points out that there was conflicting medical testimony and expert testimony from both sides about future medical care and about the present value of future damages:

> At trial there was differing medical testimony regarding the amount of money needed for future medical treatment. Both sides also presented expert economists who testified about calculating the present value of future damages.
>
> Owens, 211.

It certainly is contrary to Florida law for the trial judge to weigh conflicting medical testimony and conflicting expert testimony, and pick and choose different calculations to surmise what the jury truly intended, and change the Verdict by adding $819,000. Certainly, this was an Additur, as the Third District specifically held, and a new trial on damages must be awarded.

An additional consideration is that the jury does not even have to be provided expert testimony in order to reduce damages to present value. Seaboard Coast Line Railroad Company v. Burdi, 427 So. 2d 1048 (Fla. 3d DCA 1983). Therefore, it is a conflict of law to hold that the jury was bound by portions of the medical and economic testimony presented, but not by other portions.

Also, as the Owens majority noted, the defense took the position that the reduction of $1.8 million to $72,000 was within the evidence, and therefore, it was error for the trial judge to disregard part of the evidence in creating her own present value, which was not a number the jury had arrived at, especially without giving the alternative of a new trial. Owens, 211.

The jury could have found that, having seen its money shrink due to inflation over the years, that interest rates and inflation would cancel out, and this would be a basis for the present verdict. Further, the jury could have easily found that $72,000 was the amount it wanted to award, and it miscalculated the total number. There are so many numbers and alternatives it is totally incredulous for a trial judge to try to surmise what the jury intended, and grant an additur without the alternative

of a new trial. The numbers for present value ranged from $8,500 to $68,000 on the defense side, and from $52,000 to $400,000 on the Plaintiff's side. Awarding expenses for one temporary procedure, plus one permanent procedure, plus aggressive physical therapy, totalled $68,500. The Plaintiff's expert, Anderson, testified that non-evasive therapy had a present value of $56,112 (T 235). That therapy, coupled with psychiatric visits, would have a present value of $72,000. It was not within the trial court's discretion to veto the Jury Verdict and arrive at its own and Brown does not allow such discretion.

There was no case law cited by the Third District in its opinion, which allows a court to grant an almost million dollar Additur, without giving the Defendant the option of a new trial on damages. Owens, supra. The court only cited cases where a retrial can be limited to a certain item of damages, but none of the cases involves a statutory Additur of almost a million dollars to the Verdict, by the trial court. In Astigarraga v. Green, 712 So. 2d 1183 (Fla. 2d DCA 1998), the party was given the option of a new trial and no Additur was involved.

The jury returned a Verdict finding future medical expenses to be $1.8 million, over a 25 year period; and finding the present value to be $72,000. The Plaintiffs decided that the jury must have determined the $1.8 million dollar figure first, then used the expert discount rate of 6% and therefore, the $72,000 was an error; and the trial court should just grant an Additur of $819,00. It was more probable however, that the jury considered both the present value and the future value at the

same time, as well as inflation and interest rates, in making its calculations. It found the present value to be $72,000, multiplied that times 25 to get $1.8 million; and Plaintiffs' counsel agreed that is what happened. There is no case law prohibiting this.

The courts have held that juries are certainly aware of inflation and have seen their own dollars shrink; and similarly, are aware of interest rates; and are free to hold that these would negate each other. The jury was given evidence on the history of the then 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.

The law is clear that juries are free to make their own assessment on expert testimony of all types, medical, reconstruction experts, economists, etc.; and can accept or reject expert testimony, and can reach their own assessment.

As this Honorable Court knows, generally when a jury returns a verdict, the present value is generally not a precise mathematical calculation of the future value, but courts do not grant a new trial, whenever this happens, because the assessment of damages is in the province of the jury.

The Plaintiff's testimony at trial, by his economist as to future medicals, was a high of $1.2 million in total. In closing, counsel for Hartford argued that the jury should award $82,000 for the present value of future medical expenses, based on Owens' past medical expenses when his conditions were more

acute. Therefore, there was Record basis to support the $72,000 awarded as present value, but not to support the $1.8 million dollar figure.

It is common knowledge that juries frequently determine the bottom line amount they wish to award first and then work backwards. The jury awarded a total Verdict to the Plaintiffs of $1.158 million, and it is apparent this is the amount the jury wished to award. This total amount was supported by evidence at trial and should have been affirmed. Phillips v. Ostrer, 481 So. 2d 1241 (Fla. 3d DCA 1985)(when the total award is supported by substantial, competent evidence, the jury's apportionment of damages does not affect the integrity of the Verdict, which must be affirmed); R.W. King Construction Company, Inc. v. City of Melbourne, 384 So. 2d 654 (Fla. 5th DCA 1980); Richard Swaebe, Inc. v. Sears World Trade, Inc., 639 So. 2d 1120 (Fla. 3d DCA 1994); Capital Bank v. MVB, Inc., 644 So. 2d 515 (Fla. 3d DCA 1994)(where aggregate award is supported by the evidence and is close to amount counsel requests in closing, it indicated the intent to follow the amount suggested to determine damages and the jury's apportionment of damages does not affect the integrity of the verdict).

In Burdi, supra, the trial court granted a new trial on damages, finding that it had erroneously instructed the jury on reduction of present value for damages for future medical expenses or for future loss of earning capacity. The trial court had determined that it had erroneously instructed the jury to reduce the future damages to present value, because the defendant

had not introduced any expert evidence on that issue. Burdi, 1050.

In Burdi, the court found that there was no question that Florida Standard Jury Instruction 6.10 correctly represented Florida law. Burdi, 1050, citing, Braddock v. Seaboard Air Line Railroad Company, 80 So. 2d 662 (Fla. 1955).

The Third District also stated that evidence regarding the mathematical calculation to present value is admissible on the part of either party; it is not, however, a prerequisite to the jury instruction that the defendant introduce sworn testimony as to the mathematical matter in which reduction to present value is calculated. Burdi, 1050. The court noted that jurors, as persons of common knowledge, generally know that one needs to invest less than dollar today to ensure the return of a dollar in the future. Burdi, 1050. Therefore, expert testimony, while helpful, could hardly be considered indispensable to the consideration of the question of present value. Burdi, 1050.

In fact, in the Notes on use and Comment to Instruction 6.10, this Court observed that there are several different methods used to arrive at present value determination, but until the legislature adopts one approach to the exclusion of others, the committee assumed that the present value of economic damages was to be found by the jury based on the evidence; or if the parties offered no evidence to control that finding, the jury properly resorts to its own common knowledge, as guided by the Standard Jury Instruction 6.10 and argument, citing the decision in Burdi.

It is important to note that in Norman v. Mullin, 249 So. 2d 733 (Fla. 3d DCA 1971) a new trial was ordered on all damages and not simply on what the present value of the future damages awarded would be. Therefore, the trial judge and the Plaintiffs were both wrong when they thought that any new trial would be restricted to just what the reduction to present value equaled. Norman, supra. In a later Second District case, Seaboard Coast Line Railroad Company v. Garrison, 336 So. 2d 423 (Fla. 2d DCA 1976), the court noted that it was proper to present expert testimony concerning future inflationary trends as the basis for the jury to determine the present value of future damages. Of course, before the advent of experts testifying on how to calculate reduction to present value, juries routinely just used the age and life expectancy. Renuart Lumber Yards, Inc. v. Levine, 49 So. 2d 97 (Fla. 1950). In some cases, the legal rate of interest is used, but the better rule leaves it to the jury to decide. Renuart, supra.

The Fifth District in Florida Crushed Stone Company v. Johnson, 546 So. 2d 1102 (Fla. 5th DCA 1989) noted, relying on Burdi, that the Third District had held that the only recoverable element of a plaintiff's claim to future monetary loss is the present value and that the defendant did not have the burden to present testimony as to the manner in which a reduction to present value is calculated. Therefore, the jury at the Owens trial was free to reject the Plaintiffs' experts, accept the Defendant's, or any portion of their testimony, or all of it, to arrive at the $72,000 present value.

The trial judge granted an Additur on the basis that the jury had miscalculated the amount of total future medical expenses by simply taking the present value and multiplying it by the number of years in the Plaintiff's life expectancy. The judge then held an evidentiary hearing, accepting new evidence, not presented to the jury, from the Plaintiff's expert on what the present value of $1.8 million dollars would be. In other words, the judge substituted her calculation for what the jury was charged with at trial and what was a major focal point of the entire case - the huge demand for future medical expenses and the present value of that award. In spite of the fact that two experts testified for hours on present value calculations, the stock market, treasury bonds, etc., the judge just decided the jury made a mathematical mistake and she "corrected" it with an $819,000 Additur. Moreover, 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. The judge vetoed the jury, deciding it really wanted to award $1.8 million and simply did not reduce it to the correct present value, therefore, $819,000 had to be added. This number was never argued at trial, just as the amount of $1.8 million was never argued to the jury. A new trial on damages is clearly required in this case, even if there was no conflict with Florida additur law.

Another error made by the Owens majority is the assertion that the Plaintiff asked to have the jury redo present value. Rather the following is what was said:

THE COURT:

The question I have is, of 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.

MR. RICE:

That's a present, fair present value, Judge, with all due respect.

MR. FREIDIN:
It couldn't be that under your most optimistic result from your expert. It couldn't be seventy thousand dollars for the present value.

THE COURT:
I don't think we can do anything. They can make this reduction. There is no way I think I could send it back to them.

MR. FREIDIN:
For the record, we request that, and it's denied, I guess. I appreciate if you would say it was denied instead of me.

THE COURT:
What is it you are requesting? What would you be requesting? I mean, well, this, of course, will be a matter of record. Set fourth[sic] all the other figures with the appropriate --

MR. FREIDIN:
That's only ones that they reduced to present value. I don't think anyone could realistically argue one million, eight hundred thousand dollars could be seventy thousand dollars in present money value.

THE COURT:
What if they bought the argument that they should invest in the stock market? That was argued.

MR. FREIDIN:
I feel like it's a blatant error. I am beginning to think what the right thing to do is -- I understand it's not that simple to just -- for my opinion, I would like to ask them, ask the foreman if seventy -- I would like to ask the foreman if they felt that

that accurately reflects their reduction to present value of seventy thousand dollars.

THE COURT:
I am not going to do that; but if you want the jury polled, I would ask them what the verdict -- I just mentioned was the verdict, they each agreed.

MR. FREIDIN:
Well, they are going to be polled, so --

THE COURT:
That's what I'll do.

MR. FREIDIN:
Since --

THE COURT:
I am not going to ask them about that specific figure.

MR. FREIDIN:
Okay.

(T 635-636).

One of the issues raised below was the fact that this Verdict was patent on its face; the Plaintiff made no real objection to it at trial; the Plaintiff did request that the jury be polled and it was; therefore, any issue regarding any impropriety in the Verdict was waived. If not waived, it certainly was not correctable by the judge going back through the trial, re-examining the testimony of the two economists who testified at trial; looking at the two economic models presented by the Plaintiff, which were argued to the jury for future and present value of medical expenses; accepting a new Affidavit, with new calculations on amounts never presented to the jury; and then making her own evidentiary determination. In this situation, which the judge described as a difficult one, she

should have affirmed the total Jury Verdict, which was based on competent evidence at trial, or granted a new trial on damages. Having done neither of these things, it was clear legal error to grant an $819,000 Additur, without giving the Defendant the option of a new trial.

Whether the problem with the Verdict form was that there was some mathematical miscalculation, or the Verdict was inconsistent; the bottom line is that any such alleged error was patent on the face of the Verdict, and the Plaintiffs' failure to object at trial waived any such error, especially where the jury was polled and discharged without an objection by the Plaintiffs. In the absence of fundamental error, or error that goes to the merits because of action, even if the Verdict is considered a mathematical miscalculation, as opposed to being inconsistent or contrary to common sense, as the Plaintiffs argued, a timely objection was still required, as a matter of established Florida law. Burgess v. Mid-Florida Service, 609 So. 2d 637 (Fla. 4th DCA 1992); Moorman v. American Safety Equipment, 594 So. 2d 795 (Fla. 4th DCA 1992); Robbins v. Graham, 404 So. 2d 769 (Fla. 4th DCA 1981); Hendelman v. Lion Country Safari, Inc., 609 So. 2d 766 (Fla. 4th DCA 1992); McDonough Power Equipment, Inc. v. Brown, 486 So. 2d 609 (Fla. 4th DCA 1986); Lindquist v. Covert, 279 So. 2d 44 (Fla. 4th DCA 1973); State Department of Transportation v. Denmark, 366 So. 2d 476 (Fla. 4th DCA 1979); Keller Industries, Inc. v. Morgart, 412 So. 2d 950 (Fla. 5th DCA 1982); Southeastern Income Properties v. Terrell, 587 So. 2d 670 (Fla. 5th DCA 1991); Sweet Paper Sales Corp. v. Feldman, 603 So. 2d 109

(Fla. 3d DCA 1992).

In the absence of a timely objection to the Verdict as rendered and where the Plaintiffs agreed below the jury worked backwards, it cannot be said that everyone agreed that the total $1.2 million dollar Verdict for the Plaintiffs was just a mathematical miscalculation. But that speculation, like any other, would be just that, and not supported under Florida law sufficient to allow the judge to increase the Verdict by $819,000. It has long been held that the judge does have the power to correct an obvious mathematical error of the jury, when it is recognized as a mathematical error by all the parties to the litigation, but short of that, if the Verdict is supported by the manifest weight of the evidence, the Plaintiffs were clearly not entitled to have the judge increase his Verdict by $819,000. Sarvis v. Folsom, 114 So. 2d 490 (Fla. 1st DCA 1959); Laskey, supra. Tejon v. Broome, 261 So. 2d 197 (Fla. 2d DCA 1972).

The jury should have been reinstructed, if the Plaintiffs thought there was something wrong with the calculations, then the jury would be free to change its entire Verdict; something the Plaintiffs obviously did not want to risk.

In Cory v. Greyhound Lines, Inc., 257 So. 2d 36 (Fla. 1971), the Supreme Court noted that the judge cannot invade the exclusive province of the jury under the guise of amending the verdict, unless the actual intent of the jury is clear. In Cory, it was undisputed that the verdict amounts were simply transposed and when the jury was sent back after proper objection, they again changed the verdict indicating what they really meant by

the first verdict; so it was clear they intended to award a greater amount in the wrongful death action, than what the plaintiffs were entitled to recover, under the statute in the consolidated survival action. Balsera v. A.B.D.M. & P. Corp., 511 So. 2d 679 (Fla. 3d DCA 1987); Delva v. Value Rent-A-Car, 693 So. 2d 574 (Fla. 3d DCA 1997).

None of these mathematical "correction" cases stand for the proposition that the judge, under the guise of amending or correcting the Verdict, can increase it by some $819,000.

There was no clear agreed-to mathematical error in the present case and the correction of the Jury Verdict was simply the judge substituting her judgment for that of the jury, which is impermissible. Either the Jury's Verdict should be reinstated, or a new trial granted, as mandated by the additur statute.

This case does not involve a simple addition error, but complex and conflicting medical and economic testimony. As this Court is well aware, the jury can arrive at a present value determination, based on its own common sense, or based on expert testimony. Experts testified at trial regarding present value determinations, discount rates, inflation, etc; which were explained to the jury; as well as investments in the stock market.

Similarly, none of the cases cited by the majority below dealt with an issue where an Additur was granted, but a new trial on damages was denied. Astigarraga, supra; Altilio v Gemperline, 637 So. 2d 299 (Fla. 1st DCA 1994); Dyes v. Spick, 606 So. 2d 700

(Fla. 1st DCA 1992). The very fact that not a single case in Florida exists that holds that an additur, or remittitur, can be granted without the adversely effected party being given an option of a new trial on damages, substantiates the fact that the decision in this case involves a question of great public importance; as well as being in direct and express conflict with Florida law.

Numerous cases stand for the same principle advocated by Hartford, that when a remittitur has been granted under the same statute, it requires that the alternative of a new trial on damages be given. Gould v. National Bank of Florida, 421 So. 2d 798 (Fla. 3d DCA 1982); St. Pierre v. Public Gas Company, 423 So. 2d 949 (Fla. 3d DCA 1982); Ellis v. Golconda Corporation, 352 So. 2d 1221 (Fla. 1st DCA 1977)(a trial court is not permitted to reduce the jury by ordering a remittitur, without permitting the adversely effected party to have the option of a new trial); Dura Corporation v. Wallace, 297 So. 2d 619 (Fla. 3d DCA 1974)(a trial court erred in entering an order of remittitur of original verdict, where the order was silent as to the grounds upon which it was based and where the trial judge failed to permit the plaintiff the alternative of electing a new trial); Lewis v. Evans, 406 So. 2d 489 (Fla. 2d DCA 1981)(the granting of a remittitur is error unless it is accompanied by the alternative grant of a new trial).

The unambiguous additur statute does not permit the Third District to find that an Additur of almost $1 million can be granted; but hold a new trial would be a waste of time, because

the jury would reach the same evidentiary finding that the judge reached post-verdict. There is a 99% chance the jury would not reach that result, so the province of the jury was invaded by the trial judge, who impermissibly vetoed the Verdict. Adams v. Wright, 403 So. 2d 391 (Fla. 1981); Wackenhut Corporation v. Canty, 359 So. 2d 430 (Fla. 1978); Laskey v. Smith, 239 So. 2d 13 (Fla. 1970).

Owens is also in conflict with the Supreme Court's decision in Pinillos v. Cedars of Lebanon Hospital Corporation, 403 So. 2d 365 (Fla. 1981) where at a post-trial hearing the trial judge took evidence on future damages, on the theory that the jury had improperly reduced the future damages to present money value, based on an erroneous instruction given to the jury. The court held it was reversible error for the trial court to make reductions in present value. This Court ruled the trial judge should have "granted a new trial on damages." Pinillos, 368.

Furthermore, the decision in this case is also in conflict with this Court's decision in Poole v. Veterans Auto Sales and Leasing Company, Inc., 668 So. 2d 189 (Fla. 1996). In that case, the Court held when an additur had been rejected, the only issue for the appellate court was the propriety of the court refusing to grant a new trial on damages, under the remittitur/additur statute. In other words, 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. The judge did neither and Owens must be quashed, the Verdict for the Plaintiff

reinstated, or at least a new trial on damages ordered, under the express terms of the additur statute.

CONCLUSION

The Third District Opinion must be quashed, as the trial court erred, as a matter of law, in granting an $819,000 Additur. The Verdict for the Plaintiff was substantiated by competent evidence and the original Jury Verdict must be reinstated; or in the alternative a new trial granted on all elements of damages, as mandated by the additur statute. Owens is in direct and express conflict with existing Florida law and must be quashed to resolve the conflict and the unambiguous additur statute must be applied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 12th day of April, 2001 to:

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