ORIGINAL

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 JURISDICTION

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I
STATEMENT OF THE CASE AND FACTS

Because the Petitioner (hereinafter "Hartford") has selectively stated (and in some cases mis-stated) the facts articulated by the district court, we need to emphasize the factual context in which this proceeding arises. Unlike Hartford, we will confine ourselves strictly to the facts stated in the district court's opinion. *See Reaves v. State,* 485 So.2d 829, 830 n.3 (Fla. 1986).

As the district court noted (A. 2) and Hartford concedes, in light of the "differing medical testimony regarding the amount of money needed for future medical treatment" (A. 2), the jury's award of $1.8 million for future medical expenses is fully supported by the evidence, and is therefore beyond challenge.[1/] Indeed, Hartford filed no post-trial motion directed to that award and raised no appellate issue directed to that award. Moreover, and critical in this context, after the jury had returned its verdict, Hartford did *not* argue to the trial court that the award of $1.8 million in future medical damages was inconsistent with the jury's present-money-value calculation of $72,000 over 25 years, and therefore that the jury should be sent back to resolve the asserted inconsistency (*see* A. 3). Given that the evidence of record fully supported the jury's award of $1.8 million in future medical damages, that was the only way that Hartford could have pursued the numerous arguments which it raised in the trial court, the district court and again in this Court--all of which

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[1/] The award was not, as Hartford states (jurisdictional brief at 1), for "future medical and, other economic damages . . . ." As the verdict form states, it was for "damages for medical expenses to be sustained by Stiles Jerry Owens in future years" (A. 2).

reduce to the contention that the jury intended the $72,000 present-money-value determination, but made some mistake in calculating the $1.8 million in future medical expenses.[2/]

Instead, as the district court pointed out (A. 3), when the trial judge "called counsel to side bar" after the verdict, giving Hartford the opportunity to send the jury back to resolve any inconsistency, Hartford said nothing. It was only the plaintiffs who "requested that the present value calculation be submitted to the jury but the trial court declined to do so" (A. 3). Then Hartford did not--post-trial or on appeal--raise any challenge to the jury's finding of $1.8 million in future medical expenses. The only issue raised by either side was the plaintiffs' contention that in light of the jury's ***unchallenged*** award of $1.8 million in future medical expenses, its purported reduction to a present money value of $72,000 (obviously dividing $1.8 million by 25 years) was not supported by the evidence introduced by ***both sides*** on the issue of present money value.

As the opinion points out (A. 3), the only evidence introduced on that issue was

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[2/] For example, Hartford argues (jurisdictional brief at 8) that without the necessity of any expert testimony, the jury could have concluded that interest rates and future inflation will cancel each other out, and therefore could have intended to award the same amount for future medical expenses and for the present money value of those expenses. But in that event, given Hartford's failure to argue that the verdicts were inconsistent or to challenge the $1.8 million future-damage award, the jury's present-money-value calculation also would have to be $1.8 million. Every one of Hartford's arguments fails in the recognition that Hartford never challenged the $1.8 million award, and never asked that the jury be sent back to resolve any inconsistency.

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the testimony of the defense economist that the appropriate discount rate was 5.5%, and that of the plaintiffs' expert advocating a discount rate of 6.3% (A. 2). And "[u]nder either calculation, the resulting figure would be **much** higher than the $72,000.00 figure contained as Item 2c on the jury verdict form" (A. 3) (emphasis in original). In other words, given the jury's unchallenged $1.8 million award, there is ***no*** evidence of record which could conceivably justify its reduction to a present money value of $72,000.00.[3/]

Thus the only finding--by the trial court and by the appellate court--was that the jury's reduction of $1.8 million to a present money value of $72,000 over 25 years was not supported by the uncontradicted evidence of record. Hartford therefore would have been entitled in the ordinary case to choose between additur or a new trial on the issue of present money value only--the only issue challenged by ***either party*** on appeal. However, as the district court noted, a retrial on the issue of present

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[3/] Although Hartford indeed "took the position" (post-trial) "that the reduction of $1.8 million to $72,000 was within the evidence" (jurisdictional brief at 8), Hartford was incorrect. Indeed, as we pointed out in our brief in the district court, even in the lowest tax bracket it would require a discount rate of ***67%*** to produce a return of that magnitude over 25 years; and in higher tax brackets the required rate would range from 71% to 95%. As we also noted, this Court has made clear that present money value must be measured by such investments as "interest rates payable on government bonds, bank deposits, building and loan association deposits, insurance contracts, and other thoroughly safe investments . . . ." *Renaurt Lumber Yards, Inc. v. Levine,* 49 So.2d 97, 98 (Fla. 1950). Thus, it is not surprising that the highest number which even the defense expert could justify was 6.31%; and the plaintiffs' number was 5 1/2%. Any higher number offered by Hartford or its experts--and certainly a discount rate ranging from 67% to 95%--would have been stricken by the trial court as impermissibly speculative. In any event, there was no such evidence.

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money value was made unnecessary because the "plaintiffs stated that they would accept the defense figure and abandon the higher figure (6.3%) which had been supported by plaintiffs' expert"; and "[t]he trial court used the *defense figure* and granted an additur of $819,214" (A. 3-4) (emphasis added). Only under those circumstances--that there was nothing to try because the plaintiffs were willing to accept the defense discount rate--did the trial court properly rule that a new trial on the issue of present money value was unnecessary.[4/]

On that limited point, the district court "entirely agree[d]" that the jury's unchallenged $1.8 million award reflected its intention and was supported by the evidence; that "[t]he error was in the present value calculation"; that "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"; and that because the "[p]laintiffs accepted defendant's discount rate for the reduction to present money value," "[t]hat concession by plaintiffs left no issue to be tried" (A. 4). The district court held that under §768.043(1), Fla. Stat. (1997)--which provides that when the opposing party

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[4/] Hartford says repeatedly throughout its brief that the trial court took "bits and pieces of various economic testimony to come up with the court's own number" for present money value (jurisdictional brief at 3; *see id.* at 7, 8). The trial court did no such thing. Given the jury's unchallenged award of $1.8 million in future medical expenses, the trial court simply asked both sides to calculate the present money value of that unchallenged award using the same discount rate which each side had offered at trial (and therefore was clearly estopped to repudiate). That produced two different numbers, and the plaintiffs then agreed to accept the lower number. The trial court did no calculation, and no factfinding, of its own.

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will not agree to remittitur or additur, "the court shall order a new trial in the cause on the issue of damages only"--the phrase "issue of damages" logically refers to the element of damages which is affected by the new-trial order (A. 5). Three district-court decisions explicitly support that holding (*see* A. 6, discussed *infra*), and there is no decision--of this Court or any district court--which remotely contradicts it. To the contrary, the district court noted, the cases cited by the dissent (resurrected in Hartford's jurisdictional brief) have nothing to do with the unique situation presented when the moving party is willing to accept the other side's best evidence on the point in question (A. 4-5). In that context, as in any other context in which one side is willing to concede the other side's factual position, there is simply nothing to try. Against this background, there is no conceivable conflict justifying intervention by this Court.

II
ISSUE ON REVIEW

WHETHER THE DISTRICT COURT'S DECISION CONFLICTS WITH ANY OTHER DECISIONS IN HOLDING 1) THAT §768.043 REQUIRES A NEW TRIAL ONLY ON THE ELEMENT OF DAMAGES WHICH HAS BEEN CHALLENGED BY THE PARTY MOVING FOR A NEW TRIAL--NOT ON ELEMENTS OF DAMAGES ON WHICH THERE IS NO DISPUTE; AND 2) THAT A NEW TRIAL IS NOT NECESSARY IF THE MOVING PARTY IS WILLING TO STIPULATE TO THE OTHER SIDE'S POSITION.

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III
SUMMARY OF THE ARGUMENT

As the district court noted, "under the unusual circumstances of this case" (A. 2), its decision is not at all controversial, nor does it conflict with any decision of this or any other court. There are two holdings. First, when the moving party is entitled to a new trial on "the issue of damages" under §768.043, Fla. Stat. (1997), the new trial is limited to "the issue of damages" which is in controversy--that is, the issue on which the trial court has ordered an additur or remittitur. If neither party has challenged two or three other elements of damages, it makes no sense at all to require that those elements be retried. And on this point, it is critical to note that Hartford has offered no authority at all which assertedly contradicts the district court's holding. None of the decisions cited by Hartford addresses the question of whether the new trial ordered has to include all of the elements of damages even when some of them have not been challenged, and are not the subject of the additur or remittitur ordered. Hartford has not even alleged conflict on this point. Therefore, it has conceded for the purposes of this proceeding that if a new trial were to be ordered in this case, it would be limited to the issue of present money value--that is, how to reduce the ***unchallenged*** award of $1.8 million in future medical expenses to present money value. That is the only new trial which Hartford is even asking for in this proceeding.

Second, the district court agreed with the trial court in holding, in the unique context of this case, that a new trial limited to the single issue of present money value would be a waste of time, because the plaintiffs agreed below to accept both

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Hartford's discount rate and Hartford's calculation of the present money value of the jury's unchallenged award of $1.8 million in future medical damages. This is simply one of a variety of different contexts in which one side's stipulation obviates the necessity of a jury trial on what would otherwise be a triable factual issue. Sometimes there are simply no factual issues to try. That is why we have summary judgments; that is why we have directed verdicts; and that is why the parties are always free to narrow the issues by stipulation. Here the plaintiffs agreed to stipulate to Hartford's discount rate--a figure which Hartford was obviously estopped to retract. Since the plaintiffs were willing to give Hartford its own number, Hartford had no basis for complaint. And Hartford still has no basis for complaint.

IV
ARGUMENT

THE DISTRICT COURT'S DECISION DOES NOT CONFLICT WITH ANY OTHER DECISION IN HOLDING 1) THAT §768.043 REQUIRES A NEW TRIAL ONLY ON THE ELEMENT OF DAMAGES WHICH HAS BEEN CHALLENGED BY THE PARTY MOVING FOR A NEW TRIAL--NOT ON ELEMENTS OF DAMAGES ON WHICH THERE IS NO DISPUTE; AND 2) THAT A NEW TRIAL IS NOT NECESSARY IF THE MOVING PARTY IS WILLING TO STIPULATE TO THE OTHER SIDE'S POSITION.

It is critical to note at the outset that of the district court's two holdings, Hartford has purported to find conflict on only one of them--on its asserted right to a new trial on the issue of present money value only. Hartford has ***not*** identified any

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asserted conflict with the district court's holding that any new trial granted to Hartford would be limited to the issue of present money value alone--that is, to the sole question of how to reduce the unchallenged award of $1.8 million to present money value over 25 years. Unlike the dissent, Hartford has not even argued that any of the decisions cited by Hartford in its jurisdictional brief addresses that question. Hartford attributes to its citations only the argument that a trial on the single issue of present money value is required notwithstanding the plaintiffs' willingness to accept both Hartford's discount rate and Hartford's calculation of present money value according to that rate.

On that question, although Hartford has cited a number of decisions, not one of them involves a situation in which the plaintiff is willing to accept the defendant's best evidence on the point at issue. As the district court noted (A. 4-5), *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) (*see* jurisdictional brief at 5-6) merely state the general rule that §768.043 requires a new trial in the alternative, in the course of holding that the statute requires only a new trial on damages--not liability. Neither case involves the propriety of a new trial when the moving party is willing to stipulate to the other side's measure of damages (nor, as we have noted, does either discuss the propriety of a new trial on any sub-elements of damages which are not contested).

Hartford also cites *City of Jacksonville v. Baker,* 456 So.2d 1274 (Fla. 1st DCA

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1984), *review denied,* 464 So.2d 554 (Fla. 1985) (jurisdictional brief at 6-7), also holding that the new trial ordered should be on "damages only"--without discussing either the unchallenged sub-elements of damages or the issue of what happens when the moving party is willing to stipulate to the other side's numbers. Again, therefore, no conceivable conflict.

Hartford cites *Poole v. Veterans Auto Sales and Leasing Co.,* 668 So.2d 189 (Fla. 1996) (jurisdictional brief at 10), in which this Court upheld the constitutionality of §768.74, and in the process noted that because the defendant had rejected the additur and appealed the new-trial order, the district court should not have addressed at all the propriety of the additur. That holding has no conceivable relevance to the issues in this proceeding.

Finally (jurisdictional brief at 10), Hartford cites *Pinellos v. Cedars of Lebanon Hospital Corp.,* 403 So.2d 365 (Fla. 1981), in which 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 itself accepted the post-trial recalculation of a defense expert over the plaintiffs' 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. *Pinellos* therefore perfectly illustrates the point which we are

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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 offer 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. There is no conflict.

V
CONCLUSION

It is respectfully submitted that Hartford's petition should be denied.

Respectfully submitted,

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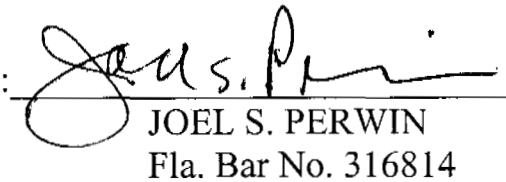
By: 
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 26th day of July, 2000, to: RICHARD A. SHERMAN, ESQ., Richard Sherman, P.A., 1777 So. Andrews Avenue, Suite 302, Ft. Lauderdale, Florida 33316; ANDREW L. ELLENBERG, ESQ., 1401 Brickell Avenue, Miami, Florida 33131; PHILIP FREIDIN, ESQ., Freidin & Brown, P.A., One Biscayne Tower, Suite 3100, 2 South Biscayne Blvd., Miami, Florida 33131; and MICHAEL BALDUCCI, ESQ., 5900 N. Andrews Avenue, Suite 925, Ft. Lauderdale, Florida 33309.

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