IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

AMERACE CORPORATION, a Delaware corporation,	:	
Petitioner,	:	
v.	:	CASE NO. SC00-565
GARY E. STALLINGS and VERA J. STALLINGS, his wife,	:	
Respondents.	:	

ON REVIEW FROM THE DISTRICT COURT OF APPEAL,
SECOND DISTRICT, STATE OF FLORIDA

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND OF THE FACTS

This appeal stems from a jury verdict against Petitioner, Amerace Corporation, and in favor of Respondents, Gary E. Stallings and Vera J. Stallings.[1] Accordingly, all statements of fact in this brief are undisputed, or if disputed, presented in the light most favorable to the Stallings.

Amerace manufactures electrical terminators -- devices used to connect overhead power lines to underground lines -- used primarily by electric utility companies, including TECO. (V10:1988)[2] On September 25, 1992, a TECO crew led by Gary Stallings transferred three phase power lines and other devices, including Amerace terminators, from an old pole to a new pole. (V13:T190) Following the transfer of the "A" Phase, the terminator separated. (V10:1988) Because power was still flowing

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[1]Petitioner, Amerace Corporation -- which does business under the trade name Elastimold -- was the appellant/cross-appellee in the Second District Court of Appeal, and will be referred to in this brief as "Amerace." Respondents, Gary E. Stallings and Vera J. Stallings, were the appellees/cross-appellants in the Second District, and will be referred to collectively as "the Stallings" and individually by name. Gary Stallings' employer, Tampa Electric Company, will be referred to as "TECO." All other individuals and entities will be referred to by name.

[2]Citations to the record on appeal, including the trial transcript (whose page numbers are preceded by a "T"), are indicated by a "V," followed by the volume and page number of the record to which each citation refers.

to the terminator, the separation caused an electrical arc, which in turn injured Stallings. (V10:1988)

On August 17, 1994, the Stallings sued Amerace. (V1:1-6) The Stallings exclusively pursued a theory of strict liability. (V7:1465) The Stallings' theory alleged that the terminator was defectively designed because it:

> was not completely covered, permitting its exposed metal to corrode and making it more likely to disintegrate, separate and arc.

(V2:272-73)

On June 8, 1998, almost six years after the accident, the case proceeded to a jury trial. (V12:T1) Much of the four-year trial delay was due to the Stallings' inability to secure an expert to testify that the terminator was defective. (V7:1451-55) During trial, the Stallings elicited opinion testimony from their most recent expert, Albert Darlington, a former TECO employee and part-time consultant in electrical engineering. (V13:T239-T351) Darlington testified that, under his theory, galvanic corrosion caused the terminator to notch and separate. (V13:T327) Darlington then opined that, if the terminator rain cap had been designed differently, galvanic corrosion would not have caused the terminated to notch and separate. (V13:T328)

Both before and during trial, Amerace objected to Darlington's testimony. Amerace argued, in part, that Darlington was unable to provide expert evidence under section

90.702, Florida Statutes, because Darlington admitted his lack of expertise on pertinent matters. Darlington admitted that his opinion was based upon a science in which he had no expertise:

> Q: [Counsel for Amerace] And the opinions that you're prepared to express today do not involve electricity; is that correct?
>
> A: [Darlington] That is correct.
>
> Q: The opinions you plan to express today involve chemistry, do they not?
>
> A: Yes, sir.
>
> Q: You do not claim to be an expert in chemistry, do you?
>
> * * *
>
> A: I do not claim to be an expert in chemistry.
>
> Q: The opinions that you plan to express today also involve metallurgy, specifically as it may apply to dissimilar metals; is that correct?
>
> A: The interaction of dissimilar metals in the presence of a liquid, yes.
>
> * * *
>
> Q: You do not claim to be a metallurgist, do you?
>
> A: I am not.
>
> * * *
>
> Q: Your opinion is based purely on a metallurgical or chemical issue?
>
> A: That is correct.

Q: You are not an expert in corrosion, are you?

A: No, sir.

Q: You are not an expert in galvanic corrosion, are you?

A: No, sir.

(V13:T298-T305) Despite these admissions, the trial court qualified Darlington as an expert to theorize that the terminator was defectively designed because it allowed galvanic corrosion to occur and create a notch. (V13:T326) No other witness opined that the design of the rain cap rendered the terminator defective. (V2:369, 392; V15:T657-58, T662) Other experts testified that overvoltage, not galvanic corrosion, caused any notching. (V2:369; V15:T657-58)

In addition to his lack of metallurgy and chemistry expertise, Darlington admitted that he was not qualified to design terminators. (V13:T342) Darlington did not know whether the rain cap could be designed, as he said it should have been designed, to avoid galvanic corrosion; he merely assumed that it could be. (V13:T342) In fact, Darlington admitted:

Q: Sir, have you ever tested what effect extending the rain cap would have on the electrical stresses that this terminator is designed to manage?

A: I have not done such test [sic]. I've already testified I have no knowledge of the design of terminators.

Q: So it's fair to say you don't know if you can extend the rain cap or not from an electrical perspective; is that right?

A: That is correct.

(V13:T342)

* * *

BY MR FRASER [Counsel for the Stallings]:

Q: Is there any reason why the rain cap can't be extended to cover the entire exposed metal -- the aluminum on the bottom and then the copper as well?

A: Well, as already pointed out, I'm not an expert in the design of terminators, but it doesn't appear to me that it would be a very difficult job to extend the rain cap to include the total amount of aluminum.

(V13:T330) After admitting to his lack of terminator design expertise, Darlington's theory about design alternatives was stricken by the trial court on Amerace's motion. (V14:T33) The Stallings presented no other expert testimony to prove a design defect.

Even if the rain cap had been designed as Darlington urged, he did not know whether this design would have prevented notching because Darlington did not conduct any experiments using a differently designed rain cap. (V13:T253-54) Darlington explained that to do an experiment that would demonstrate his theory on the cause of the problem would take at least five

years and "we didn't have that much time." (V13:T254) Darlington then admitted:

> Q: You have performed no test to prove your theory; is that right?
>
> A: That is correct.
>
> Q: In fact, you have not tested any of the opinions that you are prepared to give today; is that correct?
>
> A: That is correct.
>
> Q: You have not published any of your opinions in peer review journals, have you?
>
> A: I have not.
>
> Q: You do not know whether your opinions are generally accepted by the scientific community pertaining to chemistry and metallurgy; is that correct?
>
> A: As far as scientific community, that's correct.

(V13:T300-01) Rather than perform an experiment to prove his theory, Darlington assumed that galvanic corrosion created a notch. (V13:T330, T343) Amerace objected to Darlington's testimony on the grounds that Darlington's theory did not satisfy the standards set forth in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), because Darlington failed to test his theory, as required by Frye. (V13:T315) The trial court overruled this objection. (V13:T326)

After the jury rendered a verdict for the Stallings, Amerace moved for judgment in accordance with its earlier motion for directed verdict and, alternatively, for a new trial. (V10:2022-31) With the exception of a remittitur not relevant here, the trial court denied both motions. (V11:2216) The trial court then entered a judgment in favor of the Stallings. (V11:2217) In an amended judgment, the trial court denied the Stallings pre-judgment interest from the date of the verdict. (V11:2220-21)

Amerace appealed the final judgment to the Second District Court of Appeal. (V11:2231-33) Amerace challenged the jury verdict because it was premised upon inadmissible expert testimony. (2d DCA Initial Br., at 26-33) The Stallings, citing a newly issued opinion from the Fourth District, countered that Darlington's theory was admissible as "pure opinion" evidence. According to the Stallings:

> Pure opinion testimony is based solely on the expert's training and experience, not [studies and tests] .

(2d DCA Answer Br., at 26) The Stallings did not elaborate what experience or training provided Darlington with the basis for his "pure opinion." Amerace responded that Darlington never testified that his theory was based upon his experience at TECO. (2d DCA Reply Br., at 14) Nonetheless, the Second District, presumably accepting the Stallings' pure opinion argument,

affirmed the jury verdict. See Amerace Corp. v. Stallings, 753 So. 2d 592 (Fla. 2d DCA 2000).

The Stallings cross-appealed the final judgment to the extent that the trial court denied an award of pre-judgment from the date of the jury verdict. See id. at 592. The Second District held that the trial court should have allowed pre-judgment interest to accrue from the date of the jury verdict, reversing the final judgment to that limited extent. See id. at 593. Amerace sought review in this Court based on the conflict among the district courts of appeal on the pre-judgment interest issue. (Petitioner's Jurisdictional Br., at 5-9) This Court accepted jurisdiction. See Amerace Corp. v. Stallings, ___ So. 2d ___ (Fla. Nov. 13, 2000) (table).[3]

[3]Having accepted jurisdiction over this case, this Court has jurisdiction over all issues on appeal. See, e.g., Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So. 2d 911 (Fla. 1995) (having accepted jurisdiction over a question certified to be of great public importance, the court may review the district court's decision for any error); Jacobson v. State, 476 So. 2d 1282, 1285 (Fla. 1985) (having accepted jurisdiction because of facial conflict between two decisions from district courts of appeal, the court may dispose of the case on grounds other than the conflict grounds).

POINTS ON APPEAL

I.

WHETHER A PARTY MAY RELY UPON PURE OPINION TESTIMONY TO PROVE HIS OR HER CASE WHEN THE WITNESS PRESENTING THE PURE OPINION HAS NO PERSONAL EXPERIENCE OR TRAINING TO SUPPORT THE PROFFERED OPINION.

II.

WHETHER PRE-JUDGMENT INTEREST SHOULD ACCRUE FROM THE DATE OF A JURY VERDICT, EVEN THOUGH IT IS THE SUBSEQUENTLY ENTERED JUDGMENT, AND NOT THE VERDICT ITSELF, THAT LEGALLY ENTITLES A PARTY TO COLLECT THE AWARD.

SUMMARY OF THE ARGUMENT

This Court recently explained that pure opinion testimony does not have to satisfy the Frye test. However, lower courts have inconsistently applied this holding, presumably due to a misunderstanding as to what constitutes "pure opinion" testimony. This case therefore presents a unique opportunity for this Court more clearly to define "pure opinion."

The general rule is that pure opinion testimony is testimony based upon a witness's "experience and training." An expert witness, during years of experience in a particular field, may encounter proof to support an opinion now espoused. For instance, if a doctor routinely observes that patients who had chemicals fall into their eyes often developed cataracts, the doctor's years of empirical observations might help a jury resolve whether the spill of a chemical into the eye caused cataracts in a particular case. Encountering the same type of result in the same environment over a period of time provides empirical indicia of reliability, which, in turn, ensures the reliability of the jury verdict.

This definition of "pure opinion" testimony carries an important corollary: If, in his or her years of experience, the witness has **not** encountered empirical validation of the theory now espoused, the indicia of reliability vanishes.

Part of the confusion courts have in applying this analysis appears to originate in the meaning of "experience or training." This Court has expressly held that "experience or training" means that the opinion should be personally developed through clinical experience. Lower courts have apparently loosened this Court's definition of "experience or training" to mean merely that the expert is involvement in the field upon which his opinion is based. Under this looser definition, an expert's "opinions" need not be premised upon actual observations of the subject phenomena. Rather, the proffered expert could simply state years of experience and training generally in the field provide the basis for opinion testimony. The obvious difficulty with this scenario lies in the lack of any actual observations or real science to provide the mandated indicia of reliability justifying the use of expert testimony in the first place.

This overly loose definition of "pure opinion" had drastic consequences in this case. Darlington, a TECO worker, **never** testified that, in all his years of experience, he observed that galvanic corrosion caused terminators to notch. Likewise, he **never** testified that, if the terminator had been differently designed, his years of experience showed that galvanic corrosion would not have occurred. Despite his lack of expertise designing terminators, Darlington was allowed to theorize that, in his opinion, notching on the terminator was caused by

galvanic corrosion, which was, in turn, caused by a design defect. At bottom, then, the trial court permitted a witness to testify about a theory which he had never developed through clinical experience. The Second District erred when it implicitly concluded that Darlington's opinion was admissible as pure opinion.

The reliability of expert testimony is crucial to the underpinning of our judicial system. As a matter of public policy, this Court should clarify what does and -- perhaps more importantly -- what does **not** constitute acceptable pure opinion evidence. Amerace respectfully requests this Court to reiterate its definition of pure opinion evidence to require the witness propounding a theory to actually observe or encounter proof of the proposed theory. In so doing, this Court will ensure that trial judges fulfill their gatekeeper obligations, and that jury verdicts are premised upon reliable evidence.

This Court should also reverse the Second District's opinion to the extent that it concluded that the Stallings were entitled to pre-judgment interest from the date of the jury verdict. The purpose of **all** interest is to compensate an individual for the lost use of money or other property for some period of time. Thus, the right to interest depends on the idea that the individual had a right to the money or property in the first place. In a contractual setting, that right is conferred by the

contract itself. Thus, pre-judgment interest in a breach of contract case compensates the non-breaching party for lost use beginning on the date of the breach.

A jury verdict, on the other hand, is not a legally enforceable obligation. Instead, it is the judgment that gives a plaintiff a right to the award. Thus, interest on a judgment should compensate a plaintiff for lost use beginning on the date of the judgment. The Second and Fourth Districts have erroneously reached a contrary conclusion.

ARGUMENT

I.

A PARTY MAY NOT RELY UPON PURE OPINION TESTIMONY TO PROVE HIS CASE WHEN THE WITNESS PRESENTING THE PURE OPINION HAS NO PERSONAL EXPERIENCE OR TRAINING THAT PROVES THE PROFFERED OPINION.

The Stallings' belated reliance upon pure opinion testimony to support their novel theory in the Second District is flawed. Darlington's testimony simply was not proper pure opinion testimony.

As an initial matter, it is important to recall that pure opinion testimony is an **exception** to the Frye standard for the admissibility of new theories. It presupposes a qualified expert whose theory is premised, not upon peer review and generally accepted testing methods, but rather upon personal observation and clinical experience.

Authority from this Court recognizes pure opinion as the exception to Frye. In Flanagan v. State, 625 So. 2d 827 (Fla. 1993), this Court recognized that pure opinion testimony does not have to meet Frye because that type of testimony is based on the expert's personal experience and training. Later, in Hadden v. State, 690 So. 2d 573 (Fla. 1997), this Court reiterated its holding in Flanagan:

> We did point out in Flanagan that the Frye standard for admissibility of scientific evidence is not applicable to an expert's

> pure opinion testimony which is based solely on the expert's training and experience. See 625 So. 2d at 828. While an expert's pure opinion testimony comes cloaked with the expert's credibility, the jury can evaluate this testimony in the same way that it evaluates other opinion or factual testimony. Id.

Id. at 579-80. Significantly, this Court then defined pure opinion evidence:

> When determining the admissibility of this kind of expert-opinion testimony **which is personally developed through clinical experience**, the trial court must determine admissibility on the qualifications of the expert and the applicable provisions of the evidence code. We differentiate pure opinion testimony based upon clinical experience from profile and syndrome evidence because profile and syndrome evidence rely on conclusions based upon studies and tests.

Id. at 580 (emphasis added). Thus, under this Court's Hadden definition, the witness providing the theory must have "personally developed" this theory through "clinical experience."

Clinical experience necessarily means something more than that the witness is "experienced" in a particular area. Clinical experience, as used by this Court in Hadden court, implies that the phenomena about which the witness is about to testify is something routinely encountered by the proffered expert. Cf. Random House College Dictionary 252 (rev. ed. 1980) (defining "clinical," in part, as "based on actual observation

. . . rather than artificial experimentation or theory"). The routineness lends reliability and trustworthiness to the opinion.

Although this Court defined pure opinion evidence to be that which is personally developed through clinical experience, the application of this standard has been anything but clear in the district courts.[4] In Irving v. State, 705 So. 2d 1021 (Fla. 1st DCA 1998), the First District reiterated that Hadden requires an examination of whether expert testimony is pure opinion testimony or scientific expert testimony. The court then recognized that, although the expert carefully testified that his opinion was based upon his experience, the reviewing court must look at the expert's entire testimony to determine whether the testimony constituted pure opinion. See id. at 1022-23. Irving does not discuss, however, what this "experience" must entail.

Florida Power & Light Co. v. Tursi, 729 So. 2d 995 (Fla. 4th DCA 1999), does not clearly define pure opinion, although the court's analysis can be gleaned from the opinion. In Tursi, an

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[4]In Berry v. CSX Transportation, Inc., 709 So. 2d 552 (Fla. 1st DCA), review denied, 718 So. 2d 167 (Fla. 1998), the First District mentioned that pure opinion testimony is testimony which is personally developed through clinical experience, but did not apply this specific rule to the facts of this case, instead focusing upon whether the plaintiffs' expert opinion testimony had to be Frye tested.

ophthalmologist testified that a drop of PCB which accidentally dripped into the plaintiff's eye caused a cataract to form. See id. at 996. The defendant argued that the ophthalmologist's testimony did not meet the Frye standard for admissibility. See id. The Fourth District rejected that contention because the testimony constituted pure opinion. See id. at 997. The ophthalmologist had treated thousands of cataract patients. See id. at 996. The Fourth District noted that the doctor's opinion did not rely upon a scientific principle or test. See id. at 997. Rather, citing Flanagan, the Fourth District noted that pure opinion testimony was an exception to Frye, based upon an expert's personal experience and training. See id.

Unlike the expert in Tursi, Darlington clearly stated that his opinion was not personally developed through clinical experience. Darlington never testified that he had encountered even one terminator (much less thousands of terminators) that had been notched because of galvanic corrosion due to a design defect. Darlington had encountered galvanic corrosion only in the connections between overhead wires and the meter pole or meter sockets in a customer's house. (V13:T251)

Nor did Darlington testify that terminators with the design he proposed did not suffer from galvanic corrosion. In fact, Darlington had neither tested a terminator nor seen one fail in his thirty-seven years of experience. (V13:T247, 302) If

Darlington had never observed galvanic corrosion causing a terminator to fail in his thirty-seven years with TECO, then he certainly could not satisfy this Court's requirement that his opinion be personally developed through clinical observations.

The Stallings could have retained an expert who, within the Frye framework, might provide expert scientific testimony to support their theory that galvanic corrosion caused notching on the terminator. However, Darlington himself could not satisfy the Frye standard. Darlington's theory was not tested (due, in part, to the fact that Darlington possessed no experience designing terminators). Thus, as Darlington admitted at trial, he did not know if his proposed rain cap could be extended. In other words, he could not test his theory that galvanic corrosion would not have occurred if the rain cap had been extended because he could not design a terminator with an extended rain cap.

Even if he had designed a terminator with an extended rain cap, Darlington claimed that he could not test his theory due to a lack of time. Darlington explained that he believed that it would take at least five years to test his theory, and that he was not given that much time. Darlington was retained five years after the incident occurred. By that time, the Stallings had already consumed the time an expert needed to test their theory. The result: Darlington performed no test to support

his theory. Frye requires the use of generally accepted testing procedures. See Ramirez v. State, 651 So. 2d 1165, 1168 (Fla. 1995). An expert who has followed **no** testing procedures cannot hope to satisfy Frye.

To avoid Frye testing, the Stallings argued in the trial court that Darlington did not offer a new or novel scientific theory. Even if this were somehow true, section 90.702, Florida Statutes, permits an expert witness to render an opinion only in an area in which the expert demonstrates experience. "It is not enough, then, that a witness be qualified in some general way ... the witness must be possessed of special knowledge about the discrete subject upon which he is called to testify." United Techs. Communications Co. v. Industrial Rick Insurers, 501 So. 2d 46, 49 (Fla. 3d DCA 1987); see also Flanagan v. State, 586 So. 2d 1085, 1111, n. 23 (Fla. 1st DCA 1991) (en banc) (Ervin, J., concurring in part and dissenting in part) ("If a witness is not qualified as an expert in the relevant field to which the person's opinion is directed, he or she should not be permitted to express an opinion.")

The Stallings could not satisfy section 90.702 because Darlington admitted (1) that he was not an expert in designing rain caps; and (2) that Darlington premised his galvanic corrosion/notching opinion upon fields of science in which he possessed no expertise. Darlington plainly testified that his

galvanic corrosion/notching opinion was based upon metallurgy and chemistry, but that he was neither a metallurgist nor a chemist.

Brito v. County of Palm Beach, 753 So. 2d 109 (Fla. 4th DCA 1998), review denied, 735 So. 2d 1283 (Fla. 1999) (Anstead, Pariente, Quince, JJ., dissenting), confirms this point. In Brito, the plaintiff sued a jeep manufacturer, arguing that the manufacturer breached a duty to warn that oversized wheels could not be used on the jeep. See id. at 111. The manufacturer moved to exclude the testimony of the plaintiff's expert engineer. See id. The expert testified that equipping the jeep with oversized wheels resulted in oversteering and that the danger of oversteering was not apparent. See id. The manufacturer moved to exclude the expert under Frye, arguing that the expert's testimony had not been accepted in the relevant scientific community. See id. The trial court agreed, and excluded the testimony. See id.

On appeal, the Fourth District affirmed the order excluding plaintiff's expert engineer under both Frye and section 90.702, stating:

> [the experts'] opinion was not based upon any methodology, literature or studies, and the only record evidence to support his opinion is his testimony itself. An expert cannot simply assume the facts which form the basis of his opinion.

Id. at 114.

Like the expert in Brito, Darlington's theory cannot be saved by application of Frye or section 90.702. Darlington's opinion was not based upon any methodology, literature or studies. The only record evidence to support Darlington's opinion is his testimony.

On remand, this Court should instruct the lower courts to enter a final judgment in favor of Amerace and against the Stallings. When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict. See Weisgram v. Marley Co., 120 S. Ct. 1011 (2000). This Court has the authority to direct the entry of judgment as a matter of law. Cf. id. at 1022; Dugan v. Delaware Harness Racing Comm'n, 752 A.2d 529 (Del. 2000). The authority an appellate court to direct the entry of judgment as a matter of law extends to cases in which, after exclusion of testimony erroneously omitted, there remains insufficient evidence to support the jury's verdict. See Weisgram, 120 S. Ct. at 1022. As noted by the United States Supreme Court:

> We therefore find unconvincing Weisgram's fears that allowing courts of appeals to direct the entry of judgment for defendants will punish plaintiffs who could have shored up their cases by other means had they known

> their expert testimony would be found inadmissible. See Brief for Petitioner 18, 25. In this case, for example, although Weisgram was on notice every step of the way that Marley was challenging his experts, he made no attempt to add or substitute other evidence. See Lujan v. National Wildlife Federation, 497 U.S. 871, 897, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990) ("[A] litigant's failure to buttress its position because of confidence in the strength of that position is always indulged in at the litigant's own risk.").

Id. at 1021. After running through numerous experts, the Stallings, knowing the risk, placed all their confidence in Darlington. Once the erroneously admitted testimony -- Darlington's scientific "theory" -- is removed, there remains insufficient evidence to support the jury's verdict.

II.

PRE-JUDGMENT INTEREST SHOULD NOT ACCRUE FROM THE DATE OF A JURY VERDICT, BECAUSE IT IS THE SUBSEQUENTLY ENTERED JUDGMENT, AND NOT THE VERDICT ITSELF, THAT LEGALLY ENTITLES A PARTY TO COLLECT THE AWARD.[5]

In their cross-appeal to the Second District, the Stallings' argued that the trial court should have awarded pre-judgment interest for the period between the date of the verdict and the entry of final judgment. The Second District agreed, holding that, once the jury, through its verdict, has fixed the amount

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[5]If this Court quashes the Second District's affirmance of the final judgment based on Point I, this point on appeal becomes moot.

of a plaintiff's damages, the plaintiff is entitled to interest on that amount; and that that interest should be included in the final judgment. See Amerace Corp. v. Stallings, 753 So. 2d 592, 593 (Fla. 2d DCA 2000) (citing Leigh M. Fisher, P.A. v. Ackerman, 744 So. 2d 582 (Fla. 2d DCA 1999)).

There is currently a conflict as to whether prejudgment interest is available in a personal injury case. Distinguishing longstanding case law to the contrary, the Fourth District has concluded that it is. See Palm Beach County School Bd. v. Montgomery, 641 So. 2d 183 (Fla. 4th DCA 1994); Budget Rent-A-Car v. Castellano, 764 So. 2d 889 (Fla. 4th DCA 2000). Montgomery notwithstanding, the First District Court of Appeal continues to follow the general rule that it is error to award interest from the date of a jury verdict in a personal injury case. See Rockman v. Barnes, 672 So. 2d 890 (Fla. 1st DCA 1996) (citing Easkold v. Rhodes, 632 So. 2d 146 (Fla. 1st DCA 1994)); cf. § 55.03, Fla. Stat. (mandating that interest accrue "from the date of the **judgment** until payment") (emphasis added).

The result in this case (and in Ackerman, Montgomery, and Castellano) is incorrect. The Fourth District held that, "[w]hen a jury returns a verdict in a personal injury case that remains undisturbed throughout future proceedings in the case, the sum so fixed should be treated exactly the same as a liquidated breach of contract claim." Montgomery, 641 So. 2d at

184. With all due respect to the Fourth District, a verdict and a breach of contract are not exactly the same.

The purpose of **all** interest is to compensate an individual for the lost use of money or other property for some period of time. Thus, the right to interest presupposes that the individual had a right to the money or property in the first place. In a contractual setting, that right is conferred by the contract itself. Thus, pre-judgment interest in a breach of contract case compensates the non-breaching party for lost use beginning on the date of the breach.

A jury verdict, on the other hand, is not a legally enforceable obligation. Rather, the **judgment** on the verdict gives a plaintiff a right to receive money. In Lumberman Mut. Cas. Co. v. Percefull, 653 So. 2d 389 (Fla. 1995), this court recognized the difference between contract and tort damages, noting that "tort claims are generally excepted from the rule allowing prejudgment interest, primarily because tort damages are generally too speculative to liquidate before **final judgment**." Id. at 390 (emphasis added). Thus, interest on a judgment should compensate a plaintiff for lost use of money beginning on the date of the judgment, the first date on which the plaintiff was entitled to receive money from the defendant. Montgomery is at odds with this reasoning.

This argument is easily understood by resort to an example. In a breach of contract action, the contract likely provided that, on a date certain, A owed B a sum certain. So, on that date, A knew exactly the amount he owed B. If A did not pay that amount to B, then B was deprived of the interest he could have earned as of that date. But if, on the date the debt was due, A paid B, B received everything to which he was entitled.

The same cannot be said in the personal injury context. If A injures B in an automobile accident, A is not legally obligated to pay one penny to B until B obtains a judgment against. B did not lose the opportunity to make money because, under Florida law, he was not entitled to receive any money from A until the judgment was entered. If the Stallings' position were correct, a jury verdict would be the document that a plaintiff uses to enforce his right to receive money. This is plainly not the case.

As noted by the First District in Rockman, the rule that judgments, not verdicts, accrue interest has a statutory basis. See 672 So. 2d at 891-92 (citing § 55.03, Fla. Stat.). There is a valid reason why the Legislature would focus upon the judgment as the document triggering the accrual of interest. When a verdict is first rendered, many additional issues must often be resolved to determine the exact amount owed the plaintiff. Issues regarding set-offs, comparative negligence and Fabre

defendants might affect the amount owed. Until these amounts are resolved, the judgment cannot be entered because, until that time, the exact amount the defendant owes the plaintiff remains unknown.

If the rule is as the Stallings claim, then a defendant must pay the verdict amount to avoid the accrual of pre-judgment interest. Notably, however, the Stallings' rule does not provide that, if a defendant overpays a plaintiff (because the verdict amount was later reduced by set-offs, comparative negligence, and/or Fabre defendants), the plaintiff will return that money to the defendant with interest. Both fairness and logic dictate that the rule adopted by the Second and Fourth Districts should be rejected.

CONCLUSION

The Second District implicitly concluded that the jury verdict in this case was supported by Darlington's testimony. It could not be, however, because Darlington's testimony was inadmissible. Darlington's theory was not pure opinion because he did not personally develop it through clinical experience. Nor did Darlington's theory satisfy the requirements of Frye or section 90.702.

The Second District expressly concluded that the Stallings were entitled to interest as of the date of the verdict. The Second District's conclusion was incorrect. The verdict entitled the Stallings to nothing more than right to have a final judgment entered. Only the final judgment entitled the Stallings to receive money. Therefore, the Stallings could not have lost the use of that money -- the basis for all interest -- until the final judgment was entered.

For the foregoing reasons, Amerace asks that this Court quash the decision of the Second District Court of Appeal and direct the lower courts to enter judgment in favor of Amerace. Alternatively, Amerace asks that this Court quash the Second District's decision

to the extent it directs the trial court to award the Stallings interest from the date of the verdict.

Respectfully submitted,

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By _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to **ROBERT FRASER, Esquire**, Post Office Box 3470, Brandon, Florida 33509, on this the 15th day of December, 2000.

By _____
Charles Tyler Cone, Esquire

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Petitioner, Amerace Corporation, certify that this brief is printed in Courier New 12-point font, a monospaced typeface with 10 characters per inch.

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