IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC01-2430

CHESTER R. MORRISEY, JR. and LAURA MORRISEY, his wife,

Petitioners,

v.

THOMAS M. OWEN,

Respondent.

Discretionary Proceedings to Review a Decision by the
Fourth District Court of Appeal, State of Florida
Case No.: 4D00-1773

BRIEF OF RESPONDENT ON THE MERITS

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PREFACE

This brief is submitted on behalf of the Defendant/Respondent, THOMAS M. OWEN, in response to the merits brief of Plaintiffs/Petitioners, CHESTER R. MORRISEY, JR. and LAURA MORRISEY, his wife.

The following symbols will be used in this brief:

"R." - followed by the Clerk's volume and page numbers - record on appeal
"SR." - followed by the Clerk's volume and page numbers - supplemental record
"T." - followed by the Clerk's volume and reporter's page numbers - transcript
"IB." - Plaintiffs' initial merits brief

STATEMENT OF THE CASE

Plaintiffs sued Owen and John B. Vogel, individually and Jack Vogel Simulated Brick and Stone, Inc., alleging that Mr. Morrisey was injured in a traffic accident (R.1/1-6). The Defendants stipulated that Mr. Morrisey did not contribute to causing the accident (T.19/2076). It was also clear that Mr. Morrisey had significant back problems at the time of trial and had undergone extensive medical treatment. The major issue at trial was whether his condition resulted from his well-documented prior back injuries and degenerative disease, or whether it resulted from the accident to any degree. The jury determined that Mr. Morrisey did not sustain a permanent injury as a result of the accident, but

nonetheless awarded him $1,806,043.11 in damages (R.2/377-381). Motions for new trial and/or remittitur and for setoff were timely filed and denied.

After setoff motions were determined, the trial court entered final judgment against Owen and Vogel in the amount of $1,779,247.84 (R.3/566-567). Owen timely appealed (R.3/571-574), and Plaintiffs cross-appealed the final judgment and a November 16, 1999 order regarding setoff (R.4/597-603). Vogel settled with the Plaintiffs and did not appeal.

On appeal to the Fourth District, Defendant argued that the verdict was excessive and inconsistent with the jury's finding that the accident did not cause permanent injury to the Plaintiff. The Fourth District agreed, holding that under the facts of this case, the jury's award of future economic damages was inextricably linked to the evidence of a permanent injury, and thus a finding of permanent injury was essential to establish future damages with reasonable certainty. Owen v. Morrisey, 793 So. 2d 1018, 1022, 1023 (Fla. 4th DCA 2001).

Defendant also argued that the trial court had abused its discretion in failing to grant a mistrial based on the testimony of two expert witnesses, Dr. Charles Benedict and Dr. Linda Bland, because of unfair surprise and, in the case of Dr. Benedict, lack of expertise to express certain opinions. The Fourth

District found no error on those issues. Id. at 1026. The court declined to rule on Plaintiff's cross-appeal regarding the appropriate amount of setoff for collateral sources, finding it moot because the court was reversing for a new trial on causation and damages. Id. at 1026.

STATEMENT OF THE FACTS

We must regrettably recite the evidence in considerable detail, because the decision of the Fourth District which is before this Court for review was fact-driven and resulted from that court's careful review of the specific facts of this case.

The Accident

On the morning of November 29, 1993, the Plaintiff, Chester Morrisey, was driving a semi tractor trailer loaded with household furnishings southbound on I-95 (T.7/266-267). With Mr. Morrisey in the cab of the tractor was his supervisor, Richard Mehrmann (T.7/267). Mehrmann testified that as they proceeded southbound in the center lane of I-95, they started to see brake lights come on up ahead and saw that a small truck had lost its right rear wheels (T.7/269). Traffic was almost bumper to bumper, and the Morrisey truck was slowing down with the traffic as it started coming to a halt in front of them (T.7/270).

Traveling behind the Morrisey vehicle in the center lane of I-95 was another semi owned and operated by Thomas Owen (T.16/1599, 1601). Unable to stop in time to avoid a passenger car in the left hand lane, Owen decided to use the Morrisey vehicle as an aid to slow his vehicle down. He physically moved his truck up against the side of the Morrisey trailer and was able to stop without hitting the small car (T.16/1605-1606).

Mr. Mehrmann, the passenger in the Morrisey tractor, testified that he felt no impact, and the only way that he knew that there had been any contact with the Owen vehicle was because Mr. Morrisey yelled out that he had been hit (T.7/296). Mr. Mehrmann then leaned forward, looked in the mirror, and saw the Owen truck up against their trailer (T.7/271). Mr. Morrisey at that point was half standing in his seat with one foot on the clutch and one foot on the brake, fighting the steering wheel to keep the truck in its lane (T.7/271).

After the vehicles came to a complete stop, both Mr. Owen and Mr. Morrisey got out of their vehicles to check that no one was hurt (T.12/960). Mr. Morrisey told Mr. Owen that he thought he felt fine (T.16/1607), and no one sought any medical attention (T.12/960). Tow trucks removed the Vogel pickup truck and the Owen semi, and Mr. Morrisey and Mr. Mehrmann continued on their way, completing their furniture deliveries for the day (T.7/280). The

moving company vehicle was driven from the scene, having apparently suffered only cosmetic damage to the side of the trailer and the belly boxes (T.7/298, 300).

In addition to telling Mr. Owen, the state trooper, and his supervisor that he was not hurt at the scene of the accident (T.12/1006-1007), Mr. Morrisey prepared a report for his employer within a week or two after the accident and did not report that there had been any injury (T.12/1005).

Mr. Morrisey continued to work for the following 30 days, carrying out his regular duties as a furniture mover.[1] He customarily worked 60, 80, and even 100 hours a week (T.12/995-996, 1013). His normal duties included lifting and moving pianos, appliances and other heavy objects, sometimes carrying them up and down stairs, for 12-15 hours a day (T.7/289). His supervisor noted that back stiffness and soreness was an occupational hazard (T.7/290), and Mr. Morrisey agreed, stating that he had experienced it regularly both before and after the truck accident (T.12/1015-1016). Mr. Morrisey continued in his

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[1] He had worked as a furniture mover and driver for Daley & Wanzer since 1987 (T.13/1124). Furniture moving is described by the Department of Labor Dictionary of Occupational Titles as "very heavy" duty, according to Plaintiff's vocational rehabilitation expert (T.13/1193-1194).

admittedly very strenuous activities (T.12/1022-1023) without restriction or complaining to anyone (T.12/1034), other than to his wife (T.12/963).

When he went to see his urologist on December 23, 1993, for a regularly scheduled follow up visit from a previous episode of kidney stones (T.12/1035), Mr. Morrisey told the doctor he was having no back pain (T.12/1035). The urologist, Dr. Marcol, confirmed that there was no mention of back pain in the December 23, 1993 visit, and that he would have noted it in his record if there had been (T.16/1589, 1594-1595).

Five days later, on December 28, 1993, Mr. Morrisey called his wife and told her that he had lost sensation and movement in his right leg for a few minutes (T.14/1309, 1354). After she checked with the physician who had treated her husband's prior back injuries and found that he was too busy to see her husband, Mr. and Mrs. Morrisey went to the emergency room (T.14/1310).

Pre-Accident Back Injuries and Treatment

The emergency room visit was Mr. Morrisey's first attempt to seek medical attention after the accident. He gave a history of low back problems and three herniated disks which pre-dated the November 29, 1993 accident, and stated that he was taking medication and had a TENS unit (T.9/580; T.14/1311). The history included an incident in February of 1992, when Mr. Morrisey

suffered an injury to his lower back while reaching down on the right and lifting one end of a 1,200 lb. piano (T.16/1520, 1523). He saw a chiropractor, Dr. Gregg Rothstein, complaining of acute right lower lumbar pain, with pain in his right buttock and extending down the back of his right leg to the heel and big toe (T.16/1520). Mr. Morrisey described the pain as both "sharp" and "constant" (T.16/1521). He improved with several treatments, but still had leg pain in the back of his right thigh (T.16/1525).

Approximately 16 months later, on May 17, 1993, Mr. Morrisey was injured again, this time while changing a truck tire. He was out of work for nearly four months. He returned to Dr. Rothstein complaining of acute lumbar muscle spasm and pain (T.16/1529). When Mr. Morrisey's condition did not improve after four chiropractic treatments, Dr. Rothstein referred him out to his primary care physician for additional medical care (T.16/1533).

Dr. Robert Levy, Mr. Morrisey's family practitioner, started him on a plan of bed rest but then admitted him to the hospital the same day because of increasing pain (T.16/1560). Mr. Morrisey was complaining of excruciating pain on the right side (T.16/1569). Dr. Levy's working diagnosis was a bad lumbar strain and a possible herniated disc (T.16/1561) and possible sciatica. The patient was given injections for pain and placed in traction for five days

(T.16/1567; T.11/884). In the hospital, a CT scan was performed which revealed, among other things, a kidney stone in the left kidney (T.16/1563). The kidney stone was not symptomatic, and there was no pain on the left side (T.16/1566). At that point Mr. Morrisey requested a consultation with Dr. Mark Powers, an orthopedic surgeon (T.16/1568), who then took over his care.

When Dr. Powers first saw Mr. Morrisey in May, 1993, he diagnosed him with a sprain or strain of the lower back and some mild arthritic changes (T.10/645). He ordered an MRI in August, 1993 (T.10/661) which revealed herniated disks at three or four levels in Mr. Morrisey's back (T.11/886). On September 7, 1993, Dr. Powers placed his patient at maximum medical improvement, assigning a 3% impairment rating and releasing him to return to work (T.10/662). Dr. Powers saw Mr. Morrisey again on November 24, 1993, five days before the subject accident, noting at that time that he continued to complain of back problems that waxed and waned (T.10/647).

Post-Accident Medical Treatment

After the November 29, 1993 accident and the December 28, 1993 emergency room visit, Mr. Morrisey went back to see Dr. Powers (T.12/966; T.10/663). Dr. Powers ordered a second MRI, which was taken January 12, 1994 (T.10/665). The radiologist who compared the two films, a Dr. Weiner,

reported that there was no significant change from the pre-accident study performed on August 31, 1993 (T.10/677). Dr. Powers last saw Mr. Morrisey on March 28, 1994, when he referred him to a spine specialist, Dr. David MacMillian (T.10/675).

Dr. MacMillian, a neurosurgeon, first saw Mr. Morrisey on April 7, 1994 (T.10/682). He found that Mr. Morrisey basically had a negative examination, with the exception of some back spasm and either an inability to move or a lack of initiative to move his back (T.10/684). After reviewing the MRI study done in January, 1994, Dr. MacMillian noted that Mr. Morrisey had some diffuse disk deterioration in most levels in his back, with bulging disks at L-3, 4 and L-4, 5. Dr. MacMillian recommended against surgery because Mr. Morrisey had multiple levels of wear and tear and disease, and because he was complaining predominantly of back pain rather than sciatica (T.10/690). He also thought that the bulging disks might possibly be physiologic in nature rather than acute, and therefore less likely to respond to surgery. Moreover, Mr. Morrisey was a cigarette smoker, which reduced his chance of a good recovery from surgery (T.10/691).

When asked at trial whether he could link the November, 1993 accident with Mr. Morrisey's complaints, given the one-month interval between the

accident and the first attempt to seek medical care, as well as the fact that he worked as a furniture mover and truck driver in the interim, Dr. MacMillian stated that he would be "hard pressed" to link the accident with the complaints (T.10/710). Dr. MacMillian agreed that Mr. Morrisey has a permanent low back condition (T.10/725) and opined that although in some people such symptoms might go away, Mr. Morrisey's would not because of his arthritis and deterioration (T.10/726).

On April 15, 1994, Mr. Morrisey went to the Florida Back Institute and came under the care of Dr. Jordan Davis, a neurospine surgeon (T.9/570), and his partner, Dr. Fernyhough (T.9/571). Dr. Davis, after comparing the two MRIs, found a subtle change at the L5-S1 level (T.9/604). He conceded that this was a very subtle finding which could have been consistent with ongoing wear and tear and degenerative disease rather than an accident (T.11/883).

Dr. Davis performed a diskogram and a CAT scan on April 27, 1994, and concluded that Mr. Morrisey had degenerative disk disease at levels L2-3, 3-4, and 4-5, with probable small right lateral disk herniation at 3-4 (T.9/614). Dr. Davis opined that Mr. Morrisey had that condition since at least August of 1993, since it was present in the first MRI studies (T.11/883-884). Dr. Davis also reported that Mr. Morrisey already had severe low back pain before the accident,

with burning into his legs, and that those symptoms could get worse even without a specific event because of his occupation (T.11/885).

On June 15, 1994 Drs. Davis and Fernyhough performed a four-level fusion (T.11/853, 861). A second surgery was performed on April 5, 1995 (T.11/861) to remove the hardware and re-fuse the second and third lumbar disks (T.11/864). Dr. Davis acknowledged that it was the pre-accident condition that he and Dr. Fernyhough sought to correct through surgery (T.11/883-884). Nonetheless, he also testified that it was the accident which caused Mr. Morrisey's permanent injury, required the surgery, and would require medical treatment in the future (T.11/867-868).

On June 27, 1996, Mr. Morrisey saw another neurosurgeon, Linda Bland (T.11/747). His chief complaint was pain in the low back radiating to the right buttock and to the lateral side of the right leg, thigh, calf, foot and into the big toe (T.11/798). He reported that his symptoms began with a "devastating car accident" on November 29, 1993 (T.11/748). He denied to Dr. Bland that he had ever had any back complaints or symptoms like that before the accident (T.11/801-802), or that he had ever had chiropractic treatment (T.11/802). It was not until shortly before trial that Mr. Morrisey's lawyers sent Dr. Bland his extensive pre-accident medical records (T.11/804), and she learned that Mr.

Morrisey had complained of the identical symptoms (pain in the low back and right buttock, radiating down the leg into the big toe) after the 1992 piano lifting incident (T.11/805). Mr. Morrisey also provided Dr. Bland with only the post-accident and not the pre-accident MRI study (T.11/806). On October 29, 1996, Dr. Bland surgically implanted a morphine pump (T.11/756). Mr. Morrisey testified at trial that he was in pain every day and had not worked since the accident (T.12/991).

Surprises At Trial

After several years of discovery, the case was set for trial in March, 1999 (R.1/112). The parties were ordered to provide information about each expert retained to formulate an expert opinion, including the substance of the facts and opinions to which each expert was expected to testify, a summary of the grounds for each opinion, and a copy of any written reports prepared by the experts regarding the case (R.1/113). This information was to have been disclosed as to initially-listed experts no later than 120 days prior to calendar call (i.e., October 22, 1998) and as to rebuttal experts, no later than 60 days prior to calendar call (i.e., December 21, 1998) (R.1/113). Although the Plaintiffs were twice ordered to comply with the trial order regarding disclosure of expert witnesses by January 24, 1999 (R.1/183-184; R.1/194-195), the Plaintiffs never

did so. The second order, dated January 15, 1999, provided that each witness listed would be held to the testimony concerning the issues divulged in the lists (R.1/194).

On the morning of trial, the court was asked to limit expert witnesses to what they said in their depositions, since the Plaintiffs' counsel did not provide the summaries of their testimony as required by the court orders. The court denied that motion as a blanket ruling but stated that if a change or surprise did occur during trial, defense counsel could bring it up at that time (T.6/34-35).

The first such instance arose the following morning during the testimony of Charles Benedict, a consulting engineer retained by Plaintiffs to testify as an expert in the fields of scientific accident reconstruction and occupant kinematics (T.8/375-376, 438-439). Dr. Benedict had not been disclosed as an expert witness on the Plaintiffs' witness list in October, 1998 as required, and he was not disclosed at all until mid-January. Defendants' motion to strike (R.2/200) had been denied (R.2/205-206), so Defendants had taken his deposition on February 17, 1999 (SR.1/785-938; T.8/414). In that deposition, Dr. Benedict testified that he had done no calculations or measurements and had no diagrams (SR.1/805). He had not calculated Mr. Owen's speed (SR.1/818). He further testified on deposition that he had no opinion regarding the vehicles' change in

momentum because he did not know how fast either vehicle was going (SR.1/862). In order to make that calculation, he would "...have to know the speeds of the two vehicles, and their direction of travel and angles between one another at the moment of impact (SR.1/863)." When asked whether he had attempted to make that calculation, Dr. Benedict replied "there is no way you can (SR.1/863)."

Dr. Benedict then went on to recite in his deposition all the factors he would need to know in order to calculate Mr. Owen's speed at impact. He admitted that there was no way he could estimate the speed of the Owen vehicle at the moment of impact and that it would be "just a wild guess (SR.1/865)." He also stated that the photographs he had of the trailer had no significance to the amount of force applied to the Morrisey vehicle (SR.1/854-855).

When Dr. Benedict testified at trial, using photographs of the vehicles and producing a new diagram which he had prepared (T.8/413), Owen's counsel objected on the basis of surprise and asked for a sidebar (T.8/414), pointing out that at the time of his deposition, Dr. Benedict had not expressed any opinions based on photographs, nor had he prepared any diagrams (T.7/418). At that point the trial court recessed the trial briefly while he read the deposition. The court concluded that Dr. Benedict had "fairly disclosed his opinions" and

overruled the Defendants' objections (T.8/421). Resuming his testimony, Dr. Benedict stated that he could calculate Mr. Owen's speed, and he offered an opinion that Mr. Owen was traveling 30 miles per hour faster than the Morrisey vehicle (T.8/428). Although Owen's counsel continued to object to these new opinions and diagrams (T.8/428, 430, 444-446, 448), the court overruled every objection (T.8/428, 430, 449, 450, 464). Thus, Dr. Benedict was able to tell the jury that although the impact was not felt by the occupants of the Morrisey truck, there was nonetheless a "very large impact" (T.8/413) and a "jolt sideways" (T.8/425) which also shoved the Morrisey truck forward (T.8/427), with the Owen vehicle traveling 30 miles an hour faster than the Morrisey vehicle (T.8/428).

Dr. Benedict also gave his opinion as to how Mr. Morrisey was injured in the accident, stating that his twisting and bending as he turned the wheel pushed down on the side of his disks (T.8/456-460), and that the forces on his back were sufficient to cause disk damage (T.8/472-475). The Defendants objected because Dr. Benedict admittedly had no medical training and was unqualified to render an opinion regarding the cause of Mr. Morrisey's injuries or to testify regarding disk damage and how it occurs. The court overruled all objections, including objections based on surprise since the witness had done no

such calculations by the time of his deposition (T.8/460). Accordingly, Dr. Benedict was permitted to give his opinion that the "loading forces" occurring on Mr. Morrisey's lumbar vertebrae were sufficient to cause damage or additional weakening of the disks (T.8/478), even though he admitted on cross-examination that he had no education regarding the medical aspects of disks (T.9/560-561). Dr. Benedict gave a lengthy explanation about the "edge-loading" of the vertebrae, stating that anywhere from 50 to 100 times more pressure is exerted along the edge of a disk when a person twists his body as Mr. Morrisey was allegedly doing in turning the steering wheel (T.8/478).

A similar instance of surprise occurred with respect to the testimony of Dr. Bland. As noted previously, Plaintiffs had not complied with the initial trial order requiring the parties to disclose all expert witnesses, and the trial court had then entered an order on January 15, 1999 requiring the parties to divulge all witnesses, with a description of the issue about which each witness would testify (R.1/194-195). The Plaintiffs' initial witness list attached to the pre-trial statement contained 57 witnesses, some of whom were designated as "expert" (although without the required summary of their proposed testimony). Dr. Bland, listed as witness #53, was not designated as an expert witness who would be giving expert opinions or testifying to anything beyond her own care and

treatment of Mr. Morrisey (R.2-219). Plaintiffs' counsel did not thereafter list Dr. Bland as an expert or provide a summary of her testimony as required by the January 15, 1999 order (R.1/194-195). Since defense counsel already had Dr. Bland's written reports and knew about her care and treatment of Mr. Morrisey, which lasted only five months, they did not consider it necessary to take her deposition (T.4/625).

At trial, however, after discussing her treatment of Mr. Morrisey between June and November of 1996 (T.11/748-767), Plaintiffs' counsel asked Dr. Bland to testify regarding the diskogram procedure, the emergency room record, and the MRIs, even though they had nothing to do with her care of her patient since Dr. Bland had none of that information at the time she treated Mr. Morrisey. Over objection, Dr. Bland was permitted to go into a lengthy explanation as to how a diskogram is performed, as well as to give opinions as to causation and permanency, even though she had not seen the patient in over two years (T.11/767-788). It turned out that Plaintiffs' counsel had furnished all of those records, including Plaintiffs' depositions, to Dr. Bland within two weeks before trial and had met with her just before the trial began (T.11/792, 806). Defense counsel's objections regarding surprise, as well as the cumulative nature of much of this testimony, were overruled (T.11/773, 777-778).

Evidence Of Causation And Damages

Plaintiffs presented the testimony of Sharon Griffin, a rehabilitation consultant, who offered the opinion that Mr. Morrisey was not employable (T.13/1134-1135). Ms. Griffin also went through the various medications that Mr. Morrisey was taking (T.13/1158-1160), the cost of replacing the morphine pump every five years (T.13/1160-1161), future routine follow up visits, physical therapy, and diagnostic tests (T.13/1162-1163). Ms. Griffin could not testify, however, that any of those expenses were related to the accident (T.13/1167).

Plaintiffs also called an economist, Bernard F. Pettingill, who testified that Mr. Morrisey's work life expectancy would be approximately 20 years and that his life expectancy itself would be approximately 30 years (T.14/1243). Dr. Pettingill opined that Mr. Morrisey had lost $167,081.00 in wages from December 28, 1993 (the date he stopped working, one month after the accident) to the time of trial (T.14/1254). His past medical bills were $151,962.11 (T.14/1255). Dr. Pettingill calculated that the present value of Mr. Morrisey's future lost wages over the next 20 years would be $870,564.00, and that the present value of his future fringe benefits would be $130,584.00 (T.14/1257-1258).

Dr. Pettingill also opined that the present value of future medical costs for Mr. Morrisey, based on Ms. Griffin's information (T.14/1258) and a 30-year life expectancy, would be $487,133 (T.14/1260). He made it clear that he was not testifying about the need for any of these medical expenses and that he relied exclusively on Ms. Griffin as the basis for his figures (T.14/1272). He did not independently evaluate the need for the medical treatment or whether Mr. Morrisey's loss of work was related to the accident of November 29, 1993 (T.14/1273), nor did he take into account the likelihood that Mr. Morrisey might have been out of work and needed medical care for reasons other than that accident (T.14/1275-1276). Dr. Pettingill had also not taken into account any of the injuries sustained by Mr. Morrisey before the November 29, 1993 accident (T.14/1280-1281).

On Mr. Owen's side of the case, his counsel presented testimony by the doctors who treated Mr. Morrisey's pre-accident back condition, Drs. Rothstein (T.16/1512-1552), Levy (T.16/1555-1569) and Marcol (T.16/1575-1594), whose testimony has already been outlined. Mr. Owen's counsel also presented three examining physicians, Dr. Sidney Cole (T.17/1679-1790), Dr. Robert Kagan (T.18/1816-1919) and Dr. Fred Cohen (T.18/1925-T.19/2057).

Dr. Cole took a history from Mr. Morrisey and performed a clinical evaluation on November 12, 1996 and April 17, 1997 (T.17/1685, 1687). Among other things, Dr. Cole opined that the history given him by Mr. Morrisey was not consistent with the pre-accident medical records (T.17/1692). After reviewing the medical records from February, 1992 through the date of the accident, Dr. Cole concluded that Mr. Morrisey was suffering from severe degenerative disk disease, with symptomatology beginning in 1992 when he lifted the piano (T.17/1696). Dr. Cole was also of the opinion that someone with a back condition such as Mr. Morrisey had would know within a short period of time after receiving some insult or injury to the back that he had been injured (T.17/1700). Dr. Cole further opined that had Mr. Morrisey injured his back in the November 29, 1993 accident, it would not have been possible for him to continue to work 80 hours a week (T.17/1704). Dr. Cole concluded that, within a reasonable medical probability, the November 29, 1993 accident did not cause a permanent injury, nor did it cause any disability or need for further medical care (T.17/1706). The surgical procedures Mr. Morrisey underwent were totally unrelated to the accident (T.17/1704-1705).

Dr. Kagan, director of a MRI scan center, compared the August, 1993 pre-accident and January, 1994 post-accident MRI studies (T.18/1832) and

concluded that they revealed no differences. According to Dr. Kagan, the only difference was that the photographer in the second MRI had increased the contrast so that it photographed brighter, but that the physical findings were the same (T.18/1862-1863). The degree of herniation of the disks was the same in both, and the height of the disks remained the same (T.18/1865). As a result of his comparison of the two MRI films, he saw no objective evidence of any injury resulting from the November 29, 1993 accident (T.18/1922).

Dr. Cohen, a neurological surgeon, examined Mr. Morrisey on April 11, 1997 and reviewed his extensive medical records (T.18/1934). Dr. Cohen also examined the two MRI films and found no significant change (T.18/1981-1983). Dr. Cohen concluded that the November, 1993 accident did not cause Mr. Morrisey to sustain any injury or to require the medical care and treatment that he received (T.19/2057); moreover, it was his opinion that if there had been an exacerbation of Mr. Morrisey's back condition as a result of the accident, he would have complained shortly after the accident (T.18/1987).

Jury Questions And Verdict

After the jurors retired to deliberate, they returned with several questions (T.21/2348). The first was:

> If we, as a jury, come up with the conclusion that only one percent or more of the accident may have caused the position Mr. Morrisey is in now, as well as <u>other</u> causes, do we still mark yes for Question Number 1?

(emphasis in original, T.21/2351). All three attorneys and the court agreed that the legally correct answer to the first question was "yes" (T.21/2349). The next question was:

> What, outside of negligence, is regarded as a legal cause of loss, injury or damage? In other words, a complete definition of Jury Instruction Number13, part five, point 1B.

(T.21/2348).[2] The instruction the jury was referring to in the second question was the standard concurring cause instruction, which had been read to the jury as part of the entire charge (T.21/2340). The court noted that the jury had underlined the word "other" in the first question and interpreted that as meaning that the jury wanted to know what "other" meant in the concurring cause instruction (T.21/2351). Plaintiffs' counsel suggested that the court give some examples of what other causes might be (T.21/2352), but the judge was reluctant to do so because it might sound like he was telling the jurors what he thinks (T.21/2352). Defense counsel leaned toward simply telling the jury to reread the instructions (T.21/2353).

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[2] The jury also asked for the trial transcript and a report by Dr. Pettingill. They were told there were not available (T.21/2355).

The jurors were brought back into the courtroom, and the court answered their first question in the affirmative (T.21/2359). With regard to the second question, the court explained that the jurors should put the written jury instructions back in their original order (they had removed the staple and had rearranged the pages), and read them all again. The court told the jurors that it could not give an answer to their exact question (T.21/2359).

Later, the jurors returned with yet another question:

> What is reasonable degree of medical probability? Is Question 7 asking whether or not this accident was the sole part of his permanent disability, or is it asking whether or not it played a part of his permanent disability? If it is asking for part, does this mean we have to weigh what part it played in his disability?

(T.21/2364). The "Question 7" to which the note referred was the question on the verdict form asking, "Did Chester Morrisey sustain a permanent injury within a reasonable degree of medical probability, as a result of the incident in question?"

Plaintiffs' counsel suggested re-reading the jury instructions on permanency and aggravation. Owen's counsel was concerned that the law would require re-reading all of the instructions in such a case. However, he agreed with Plaintiffs' counsel that the jurors were obviously confused and didn't know if they were supposed to apportion damages or not (T.21/2365-

2366). After considerable discussion, Plaintiffs' counsel suggested that the court answer the definition of reasonable degree of medical probability based on the case law, and then tell the jurors to trust their recollection of the medical testimony (T.21/2372-2373). Owen's counsel strenuously objected to that solution (T.21/2373).

Ultimately, the court thanked counsel for their suggestions and comments but refused to tell them how he was going to instruct the jury (T.21/2373-2374). When the jurors returned to the courtroom, the trial court instructed them in such a confusing manner (T.21/2375-2377) that counsel for the Plaintiffs objected (T.21/2378), joined by the defense, who also requested a mistrial (T.21/2380). However, Plaintiffs' counsel stated that he did not want a mistrial, and the court denied it (T.21/2381).

Just as the court was about to recess for the evening (it was 6:45 p.m.) (T.21/2388), the jurors sent back yet another note asking "If one person is in disagreement with the rest of the group with one question, what should we do?" (T.21/2386). The lawyers agreed that the court should give the Allen charge. Instead, the court summoned the jurors and told them to return on Monday. At that point, one of the jurors asked "Are we allowed whatsoever to get, as far as trying to explain the law, advice? Not advice as to – not advice as to what it

means, but to actually tell us what it means?" (T.21/2387). The court responded that the jurors could continue to ask him questions when they resumed on Monday morning (T.21/2388).

The following Monday there were apparently no additional questions, and the jury returned a verdict as follows:

The jurors answered "yes" to the first question on the verdict form, finding there was negligence on the part of each of the Defendants which was the legal cause of loss, injury or damage to the Plaintiff (T.22/2403). The jurors assigned 45% to Mr. Owen, and a total of 55% to the Vogel Defendants (35% to the corporation and 20% to its driver).

Past medical expenses were found to be $151,962.11 (the amount requested by Plaintiffs); past lost earnings were $160,081.00 (the amount requested by Plaintiffs); and future damages for medical expenses were $1,234,640.00, which when reduced to present value over 30 years, were found to be $488,000.00 (the amount requested by Plaintiffs). Future damages for lost earning ability, $1,550,000.00, when reduced to present value over 20 years, were found to be $1,006,000.00 (the approximate amount requested by Plaintiffs) (T.22/2406). Total damages of Chester Morrisey were $1,806,043.11 (T.22/2406).

Question number 7, however, which asked "Did Mr. Morrisey sustain a permanent injury, within a reasonable degree of medical probability, as a result of the incident in question?" was answered "No" (T.22/2406).

The jury was temporarily excused, and Owen's counsel objected to the verdict as rendered, since it was obvious that it was a product of confusion. He argued that the confusion lay in the apportionment of aggravation or damages and asked the court to reinstruct the jurors as to the law in its entirety and to ask them to reconsider their entire verdict (T.22/2407). Vogel's counsel joined in that motion (T.22/2408). Plaintiffs' counsel responded that there was no confusion. The court denied Defendants' request (T.22/2408) and excused the jury (T.22/2410).

SUMMARY OF ARGUMENT

In reversing the judgment below, the Fourth District was expressly guided by this Court's decision in Auto-Owners v. Tompkins. It found the verdict inconsistent and excessive not because there was no finding of permanency *per se*, but because *in this case* there was insufficient evidence of any injury independent of the claimed permanent injury which would support an award of future economic damages. In so doing, the Fourth District followed Tompkins' requirement that future economic damages be awarded only "...when such

damages are established with reasonable certainty." Tompkins, 651 So. 2d at 91.

As to the setoff issue, Plaintiffs' novel reading of the collateral source statute is without supporting authority and should be rejected.

Should this Court exercise its discretion to consider the remaining two issues considered by the Fourth District, we submit this Court should find that Defendants were denied a fair trial because of the trial court's refusal to enforce its pre-trial orders which were supposed to restrict expert witnesses to those opinions disclosed prior to trial, and because one of those witnesses was permitted to express opinions for which he was unqualified.

POINT I

(As stated by Plaintiffs)

WHETHER A FINDING OF A PERMANENT INJURY IS REQUIRED UNDER AUTO-OWNERS INS. CO. V. TOMPKINS, 651 SO. 2D 89 (FLA. 1995) AND SECTION 627.737(2), FLA.STAT. (1993), IN ORDER FOR A JURY TO AWARD ECONOMIC DAMAGES FOR LOST WAGES FOR THE BALANCE OF PLAINTIFF'S WORK LIFE AND TO AWARD FUTURE MEDICAL DAMAGES FOR PLAINTIFF'S LIFE EXPECTANCY.

(As restated by Defendant)

WHETHER TOMPKINS MANDATES AFFIRMANCE OF A LIFETIME AWARD OF ECONOMIC DAMAGES DESPITE

(1) A JURY FINDING THAT THE ACCIDENT CAUSED NO PERMANENT INJURY, (2) THE ABSENCE OF EVIDENCE OF ANY NON-PERMANENT INJURY REQUIRING FUTURE MEDICAL CARE, AND (3) AN APPELLATE COURT'S CONCLUSION THAT THE FUTURE DAMAGES WERE NOT ESTABLISHED WITH REASONABLE CERTAINTY.

We have restated the issue because, as phrased by the Plaintiffs, it suggests that the Fourth District established a bright-line rule that a finding of permanent injury is required in order to award economic damages for an injured party's lifetime in every case. On the contrary, the court held that in *this case* the evidence would not support the lifetime award of future damages. It was a fact-specific decision, which we believe to be in harmony with Tompkins, and one which should be upheld by this Court.

In the present case, the Fourth District clearly recognized that a finding of a permanent injury is not a prerequisite for an award of future economic losses. Owen v. Morrisey, 793 So. 2d 1018, 1023 (Fla. 4th DCA 2001). However, the Fourth District found that the evidence did not meet this Court's requirement that such damages be established with reasonable certainty. Tompkins, 651 So. 2d at 91. The Fourth District explained that the jury's award of future economic damages in the present case was inextricably linked to the

evidence of a permanent injury, but that the jury found that the accident did not cause a permanent injury to Mr. Morrisey. Owen, 793 So. 2d at 1023.

It was for the same reason that the Third District reversed a future damages award in Garriga v. Guerra, 753 So. 2d 146, 147-148 (Fla. 3rd DCA), rev. dismissed, 767 So. 2d 457 (Fla. 2000). In Garriga, as in the present case, plaintiff suffered from herniated disks and degenerative disease before being injured in an automobile accident. As in the present case, the parties presented conflicting evidence as to whether the plaintiff's continuing problems were the result of the accident, as plaintiff claimed, or resulted from a prior accident and degenerative changes. In both cases, the jury found that the plaintiff had not sustained a permanent injury as a result of the accident, but it nonetheless awarded substantial future damages.

The Third District in Garriga and the Fourth District in the present case both reversed, recognizing that the lack of a finding of permanency did not preclude an award of future damages under Tompkins, but that reversal was required because the only evidence of the need for future medical expenses was inextricably linked to a permanent injury. Garriga, 753 So. 2d at 147; Owen, 793 So. 2d at 1023. In both Garriga and the present case, the medical testimony presented by the plaintiff was based on the need for future medical treatment to

alleviate the pain caused by a permanent condition, i.e., the herniated disks which preexisted the accident in each case. In neither Garriga nor the present case did the plaintiff present any evidence of a need for any type of medical treatment required by any non-permanent injury, and there was thus no evidence to establish future economic damages with any reasonable certainty. Under those circumstances, there was no way to reconcile the jury's finding of no permanency with its award of future economic damages, and reversal was required. Garriga, 753 So. 2d at 148; Owen, 793 So. 2d at 1023.

The Plaintiffs argue in their brief that the evidence presented established Mr. Morrisey's lifetime future economic damages with reasonable certainty (IB at 18, 23-24). While the evidence may have established that Mr. Morrisey would not be able to work and that he would require future medical care in a certain amount, the evidence did *not* establish with reasonable certainty that the damages calculated by his experts were caused by the accident. For example, although Sharon Griffin testified as to the various medications and costs of future medical care, she could not testify that any of those expenses related to the accident (T.13/1167). Bernard Pettingill, Plaintiffs' economist, based his opinions on Ms. Griffin's information and did not independently evaluate the need for such treatment or whether Mr. Morrisey's inability to work was related

to the accident (T.14/1273). Dr. Pettingill made it clear that he was not testifying about the need for any medical expenses, and that he had not taken into account the likelihood that Mr. Morrisey might have been out of work and needed medical care for reasons other than the most recent accident (T.14/1275-1276, 1280-1281).

Dr. Davis, who performed the failed surgeries on Mr. Morrisey's back, acknowledged that the condition he was seeking to correct through surgery was the pre-accident condition (T.11/883-884). The Plaintiff's treating neurosurgeon, Dr. McMillan, testified that he could not link the accident with Mr. Morrisey's complaints (T.10/710), and that the patient should not have surgery (T.10/690- 691, 712-713). The jury also heard testimony by the Defendant's examining physicians that Mr. Morrisey was suffering from severe degenerative disk disease which predated the accident, and that the surgical procedures he underwent were totally unrelated to the accident (T.17/1696, 1704-1705; T.19/2057). While Dr. Davis also testified that it was the accident which caused Mr. Morrisey's permanent injury, required the surgery, and would require medical treatment in the future (T.11/867-868), the jury did not credit that testimony, instead finding that the accident did *not* cause Mr. Morrisey's permanent injury.

Plaintiffs attempt to minimize the importance of the jury's finding of no permanency by arguing that a finding of permanency "...simply entitles the jury additionally to award damages for pain and suffering (IB at 18)." But it is more than that. A finding of permanency is not simply a vehicle to allow an award of non-economic damages – it is a finding by the jury that the injury is permanent within a reasonable degree of medical probability. In the present case, the finding of no permanency meant that the jury agreed with the medical testimony that Mr. Morrisey's condition, while permanent, was not caused by this accident.

Plaintiffs further claim that it was the last accident which caused Mr. Morrisey's condition to deteriorate to the point that he required surgery, and that the failed back surgery and morphine pump in turn caused him to be totally disabled and to require all of the future medical care for which the jury awarded damages (IB at 27). The problem with that scenario is that the jury simply did not believe that the minor impact in this case caused such extensive damages. There was overwhelming evidence regarding the extent of Mr. Morrisey's pre-existing back problems, evidence from his treating physicians that MRIs taken both before and after the accident showed no significant change in his condition (T.10/655, 677), and testimony that Mr. Morrisey was still complaining of back

problems five days before the accident (T.10/647). In finding that the accident did not cause the Plaintiff to be permanently injued, the jury could well have placed more credence on the fact that he continued his strenuous job for thirty days without seeking medical assistance or notifying his employer (T.12/1034), and in fact reported to his employer within a week or two after the accident that he had no injury (T.12/1005).

The jury's finding that the accident did not cause Mr. Morrisey's permanent injury was a conclusion fully supported by the evidence. The jury obviously concluded, supported by the evidence discussed above, that the failed surgeries were not the proximate result of the accident. As is evident from their questions, the jurors were persuaded by that evidence to conclude that the accident had little effect on Mr. Morrisey's physical condition, and that the permanent disability which Mr. Morrisey now suffers was the natural progression of his degenerative condition.

Having reached that conclusion, however, the jury could not also require the Defendant to pay 100% of the cost of the Plaintiff's medical treatment in the past and for the next 30 years, nor hold the Defendant responsible for the Plaintiff's inability to work for the next 20 years – and that is why the Fourth District concluded that the evidence of future economic damages was not

supported by the evidence and not established with reasonable certainty as required by this Court in Tompkins.

The Fourth District's decision is fully consistent with Tompkins. It did not "engraft" any exception to the Tompkins rule and certainly did not hold that "a plaintiff may not recover ***all*** of his future economic damages, in the event there is no finding of permanent injury" [emphasis supplied by Plaintiffs] (IB at 20). What the Fourth District held was that evidence in this case did not establish with a reasonable certainty that the Plaintiff's inability to work and need for future medical care for the rest of his life were caused by the November 29, 1993 accident as opposed to the prior accidents, degenerative changes, and Plaintiff's continuing strenuous labor.

The Fourth District's decision in the present case may also be reconciled with Hamilton v. Melbourne Sand Transport, Inc., 687 So. 2d 27 (Fla. 5th DCA 1997) because of the significant factual distinction between the two cases. Hamilton raised no issue of whether the claimed injuries resulted from the accident or some other cause. It involved only a straightforward issue as to whether the plaintiff established entitlement to future damages independent of a permanent injury, and the Fifth District held that he did. Id. at 28. In the present case, there was no evidence of any injury "independent of a permanent

injury", and the Plaintiff did *not* establish a reasonable basis for the jury's award of future damages as a result of this minor accident.

The Fourth District's decision in the present case in no way departs from this Court's rule in Tompkins, nor does it conflict with the Fifth District's decision in Hamilton. If we read Tompkins correctly, it does not require an appellate court to affirm a judgment for future economic damages where that court finds that there was no evidence to establish future damages independent of a permanent injury, and the jury found no permanent injury. Tompkins rejected a *per se* rule requiring a finding of permanency in order to award future economic damages, because it would be unfair to prevent a plaintiff from recovering such damages resulting from non-permanent injuries as long as they were established with a reasonable certainty. Tompkins, 651 So. 2d at 91. It would be equally unfair, however, to require a defendant to pay damages for a plaintiff's permanent disability when the jury has found that the permanent disability was not caused by the accident.

We disagree with Plaintiffs' suggestion that this Court should address the question of whether a finding of permanency is necessary in every case in order for a jury to award lifetime economic damages (IB. at 25). As this Court has already established in Tompkins, an award of future economic damages depends

upon whether there is evidence to support it to a reasonable certainty, and a "bright-line" rule would be inappropriate and unnecessary. Trial courts and appellate courts are perfectly capable of determining on a case-by-case basis whether the evidence in any given trial supports such a verdict, as the Fourth District did in this case. Its decision should be affirmed.

POINT II

WHETHER THE TRIAL COURT ERRED IN GRANTING DEFENDANTS A SETOFF FROM THE VERDICT FOR PAST SOCIAL SECURITY DISABILITY PAYMENTS PAID TO PLAINTIFF, BUT IN DENYING AN OFFSET FROM COLLATERAL SOURCE BENEFITS OF THE AMOUNTS PAID INTO THE SOCIAL SECURITY SYSTEM ON PLAINTIFF'S BEHALF BY HIS EMPLOYERS.

We agree with Plaintiffs that the collateral source statute applicable to this accident is §768.76, Florida Statutes (1993). We further agree that the statute calls for the verdict to be reduced by the Social Security benefits paid to Mr. Morrisey, and that it provides for an offset against that reduction

> ...to the extent of any amount which has been paid, contributed, or forfeited by, or on behalf of, the claimant or members of his immediate family to secure his right to any collateral source benefit which he is receiving as a result of his injury.

§768.76(1), Fla.Stats. (1993). Where we part company is the interpretation of that quoted passage. Plaintiffs claim that it entitles them to receive additional money from the Defendant reflecting the amount which the federal government required Mr. Morrisey's employer to pay in Social Security taxes. Plaintiffs have, however, submitted no legal authority to support this argument, and we respectfully submit that it is unfounded.

The legislature's intent in enacting this provision seems rather straightforward. Since the purpose of a setoff in the first place is to prevent a plaintiff from obtaining a double recovery, such as receiving damages for which insurance benefits or other similar sources have paid, then it seems only fair that the Plaintiff receive a credit for the amount it cost him to purchase that insurance or other source of funds. McKenna v. Carlson, 771 So. 2d 555, 558 (Fla. 5th DCA 2000). A plain reading of the statute reveals that such was the only purpose for enacting that provision, and that the language was broadened to include "the claimant or members of his immediate family" so that the plaintiff would receive the benefit of premiums paid not only by himself but by a spouse or parent. Nothing in the statute would require the trial court, after having already credited the Plaintiff for the amount he paid into the Social Security fund (R.4/448), to also require Defendant to pay an additional amount based on the employer's Social Security obligations.

The only fair interpretation of the "or on behalf of" language upon which Plaintiffs rely would be to grant an offset to a person other than the claimant or an immediate family member who paid the amount which the claimant himself would otherwise have been required to pay. In other words, suppose an employer or friend had agreed to pay the Plaintiff's insurance premiums because

the Plaintiff had no money. In such a case, that amount would properly be offset from the collateral source reduction because the party was making those payments "on behalf of" (and instead of) the Plaintiff. Under the statute, the Plaintiff would benefit from that payment, whether he paid the premium himself or another paid it on his behalf. However, there is no reasonable basis for interpreting the statute so as to require the Defendant to pay not only the amount that Mr. Morrisey contributed to Social Security, but also the additional amount which the government required his employer to pay as part of the Social Security program.

The Plaintiffs having advanced no legal authority in support of this novel interpretation of the statute, we respectfully request this Court to decline to adopt that position.

POINT III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT A MISTRIAL BASED ON THE TESTIMONY OF DR. CHARLES BENEDICT, WHO (1) UNFAIRLY SURPRISED THE DEFENSE BY EXPRESSING NEW OPINIONS AT TRIAL AND (2) EXPRESSED OPINIONS FOR WHICH HE LACKED THE NECESSARY EXPERTISE.

Since this Court has determined that decisional conflict exists which vests it with jurisdiction to consider this case, this Court has the authority to consider

the entire case on its merits and decide those points passed upon by the Fourth District as completely as though the case had come originally to this Court on appeal. Bankers Multiple Line Insurance Company v. Farish, 464 So. 2d 530, 531 (Fla. 1985); Bould v. Touchette, 349 So. 2d 1181, 1183 (Fla. 1997). This Court thus may, in its discretion, address this point on appeal as well as the one which follows, both of which involve rulings during the trial which Defendant contends deprived him of a fair trial, but which the Fourth District found did not constitute error by the trial court. Owen, 793 So. 2d at 1026. While the unfair surprise issues in Points III and IV will be moot if the Court affirms the Fourth District's decision to order a new trial, the issue of Dr. Benedict's qualifications will arise on retrial, and we would urge this Court to address that issue.

As set forth in the statement of the facts, Dr. Charles Benedict, a consulting engineer, was retained by the Plaintiffs to testify as an expert in the field of scientific accident reconstruction and occupant kinematics. His testimony was crucial because, given the minor nature of the impact, which was imperceptible to the vehicle's occupants, as well as the fact that Mr. Morrisey kept working for a month thereafter, Plaintiffs' counsel needed Dr. Benedict's opinion to support their theory that the accident caused or aggravated Mr. Morrisey's condition. Virtually all of the medical testimony acknowledged that

Mr. Morrisey had a serious permanent back condition before the accident, and Dr. Benedict was the only expert to offer a theory as to how this seemingly minor impact could cause a devastating injury to Mr. Morrisey's back.

There are two reasons why a new trial was required as a result of the denial of Defendants' motions for mistrial during Dr. Benedict's testimony. The first is that Defendants were unfairly surprised by some of the opinions and diagrams presented by Dr. Benedict at trial, after having conceded in his deposition shortly before trial that he had not made any calculations and would not be able to do so based on the evidence. Without repeating all the contradictory statements made by Dr. Benedict in his deposition and at trial, we would remind the Court that the witness had stated during deposition that he had performed no calculations and would be unable to determine the speed of the Owen vehicle. At trial, however, he stated that he could in fact do so, and opined that the Owen vehicle was traveling 30 mph faster than the Morrisey vehicle (T.8/428). The witness also produced new diagrams as to how he thought the accident occurred, and he analyzed the force and angle of the impact from photographs, after having testified on deposition that the damage photographs were meaningless. This testimony prejudiced the Defendants, since they were not prepared to meet or counter these new opinions.

The courts of this state ordinarily will not tolerate "trial by ambush", and an expert witness will not be permitted to offer a new opinion not disclosed during his pre-trial deposition. See Belmont v. North Broward Hospital District, 727 So. 2d 992, 994 (Fla. 4th DCA), rev. denied, 740 So. 2d 528 (Fla. 1999) [reversing for new trial based on expert's change in opinion]; Garcia v. Emerson Electric Company, 677 So. 2d 20, 21 (Fla. 3rd DCA), rev. denied, 686 So. 2d 577 (Fla. 1996) [reversing for new trial because of expert testimony regarding additional tests performed after his deposition had been taken]; Office Depot, Inc. v. Miller, 584 So. 2d 587, 590 (Fla. 4th DCA 1991) [affirming new trial because of expert's changed opinion]; Grau v. Branham, 626 So. 2d 1059, 1061 (Fla. 4th DCA 1993) [reversing for new trial because of last-minute examination of plaintiff, resulting in changed opinion]; Department of Health & Rehabilitative Services v. Spivak, 675 So. 2d 241, 243 (Fla. 4th DCA 1996) [reversing for new trial because court permitted testimony regarding information obtained after discovery deadline].

This Court will recall that Plaintiffs failed to timely disclose Dr. Benedict as a witness at all, contrary to the trial court's pre-trial order, and they specifically failed to provide a summary of his expert opinion once he was designated as an expert, again contrary to the court's specific order. As was

observed in Spivak, the purpose of a discovery cut-off date is to avoid surprise to either side. Civil trials are not to be ambushes for one side or the other.

Where, as here, the surprise at trial resulted in prejudice to the complaining party, the "playing field" was not level, and a new trial should have been granted on that basis. Spivak, 675 So. 2d at 244. Defense counsel repeatedly objected to the opinions offered by Dr. Benedict at trial, which had not been disclosed to them at the deposition, reminding the trial court that the predecessor judge in this case had specifically held that expert witnesses would be held to the testimony as set forth in the witness list summary (R.1/194) – which the Plaintiffs never provided at all. The trial court, after reviewing Dr. Benedict's deposition, denied Defendants' motions because he found that Dr. Benedict had fairly answered the questions put to him. As outlined earlier in this brief, however, an examination of the deposition and the trial testimony shows that Dr. Benedict reached many of his new opinions after giving his deposition, much to the surprise and prejudice of the Defendants.

The second problem with Dr. Benedict's testimony was his offering of opinions regarding Mr. Morrisey's medical conditions, without having the least bit of medical training. While Defendants did not challenge Dr. Benedict's qualifications to testify regarding the accident from an engineering standpoint,

they did object to his offering opinions on the medical side. Nonetheless, the trial court allowed Dr. Benedict to testify regarding his review of the medical records, the manner in which Mr. Morrisey's disks would have been affected by the accident, the nature of disk injuries, and how they occur (T.8/460-473). The witness admitted that he had no medical training, had not even taken an anatomy course in college, and had no education regarding the medical aspects of disks at all (T.8/465; T.9/560-561). This testimony was prejudicial to the Defendants because it went to the crucial issue in this trial, namely the extent to which, if at all, Mr. Morrisey's herniated disks and other back problems were affected by the accident in question.

As was held in Mattek v. White, 695 So. 2d 942, 943 (Fla. 4th DCA 1999), on remarkably similar facts, an expert on accident reconstruction and biomechanics is not qualified to testify as to whether a plaintiff has suffered disk injury as the result of accident. In that case, the witness was a physicist, whereas Dr. Benedict is an engineer, but both purported to testify as experts on accident reconstruction and biomechanics. In Mattek, the witness opined that the plaintiff had not suffered herniated cervical disks as a result of the injury because no one could be injured, based on literature he had studied, in an impact of less than 12 mph. Like Dr. Benedict, the witness in Mattek had no medical

training. Because of the importance of the issue on which he testified, without adequate training, the Fourth District reversed and remanded for a new trial. Mattek, 695 So 2d at 944. The same result was required here.

POINT IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT A MISTRIAL BASED ON THE TESTIMONY OF DR. LINDA BLAND, A TREATING PHYSICIAN WHO WAS NOT DESIGNATED AS AN EXPERT OPINION WITNESS BUT NEVERTHELESS WAS ALLOWED TO OFFER OPINIONS REGARDING PERMANENCY AND CAUSATION.

Dr. Bland, the neurosurgeon who saw Mr. Morrisey for five months in 1996 and inserted his morphine pump, was not designated by Plaintiffs as an expert witness who would be giving expert opinions or testifying to anything beyond her own care and treatment of Mr. Morrisey. Defense counsel already had Dr. Bland's written reports and knew about her care and treatment of Mr. Morrisey, and thus they did not take her deposition.

At trial, however, Plaintiffs' counsel were permitted to use Dr. Bland as an additional expert and as a conduit for placing before the jury additional opinions regarding permanency and causation, the critical issues in this trial. Dr. Bland's opinions were particularly important in this case, because there was very slim medical evidence connecting Mr. Morrisey's condition to the accident.

At the risk of repetition, we would remind the Court that a specific pre-trial order had been entered in this case, restricting experts to the opinions that were summarized on the Plaintiffs' pre-trial witness list. In the case of Dr. Bland, she was not listed as an expert at all, and her testimony should thus have been strictly limited to her care and treatment of Mr. Morrisey. It will be remembered that Dr. Bland had not seen Mr. Morrisey for several years prior to trial.

Nonetheless, shortly before trial, Plaintiffs' counsel had delivered to Dr. Bland various medical records and test results which she had never had while treating Mr. Morrisey, and which thus could have not been relied upon in her care and treatment of that patient (T.11/806). Moreover, she was sent depositions and other records with the obvious purpose of educating her so that she could testify as a causation and permanency expert – despite never having been identified as such.

The same case authority relied upon in Point III of this brief will suffice to support Owen's arguments with respect to Dr. Bland. Although she never gave a pre-trial deposition, because Defendants were misled into believing that she would not be a permanency and causation expert, the fact remains that Defendants were surprised and prejudiced by her unexpected testimony. This

is the same type of ambush which the courts have decried in those cases discussed earlier in this brief, and it requires the same result: reversal and remand for a new trial.

CONCLUSION

For the reasons set forth above, this Court should affirm the Fourth District's conclusion that the inconsistent and excessive verdict requires a new trial. Should this Court consider the remaining points, it should hold that the trial court's setoff calculations were correct, but that the trial court abused its discretion in its trial rulings regarding the expert witnesses.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served by U.S. mail this 10th day of June, 2002, to: **MARJORIE GADARIAN GRAHAM, ESQUIRE**, Marjorie Gadarian Graham, P.A., Oakpark, Suite D-129, 11211 Prosperity Farms Road, Palm Beach Gardens, Florida 33410, Co-Counsel for Petitioners; **LORENZO WILLIAMS, ESQUIRE**, Gary, Williams, Parenti, et al., Post Office Box 3390, Fort Pierce, Florida 34948-3390, Co-Counsel for Petitioners; and **DOUGLAS DeALMEIDA, ESQUIRE**, Neale & DeAlmeida, P.A., 221 West Oakland Park Boulevard, Third Floor, Fort Lauderdale, Florida 33311, Co-Counsel for Respondent.

By_____
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing appellate brief was prepared using Times New Roman 14, in compliance with the font requirements set forth in rule 9.210(a)(2), Fla.R.App.P.

By_____
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