IN THE SUPREME COURT OF FLORIDA

CASE NO:**SC01-2430**

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

Petitioners,

vs.

THOMAS M. OWEN,

Respondent.

Application For Discretionary Review of A Decision Of
The District Court Of Appeal, Fourth District

Petitioners' Initial Brief On The Merits

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER

§627.737, Florida Statutes

16, 18, 25

§768.76, Florida Statutes

29, 30, 31

PREFACE

This is a proceeding for discretionary review of a decision of the Fourth District Court of Appeal based on conflict with a decision of this court and a decision of the

Third District Court of Appeal.

The petitioners, Chester R. Morrisey, Jr. and Laura Mrrisey, his wife, were the plaintiffs before the trial court and the appellees before the Fourth District Court of Appeal. The respondent, Thomas M. Owen, was a defendant before the trial court and the appellant before the Fourth District Court of Appeal. In this brief the parties will be referred to by name or as plaintiffs and defendant.

The following symbol will be used in this brief:

(R .

p .

) record on appeal;

(T .

) trial transcript.

STATEMENT OF THE CASE AND FACTS

This lawsuit arises out of a motor vehicle accident that occurred on November 29,1993. Joseph Paul, an employee of Jack Vogel Simulated Brick and Stone, Inc., was driving a Ford pick-up truck southbound on I-95 in West Palm Beach. As Paul drove downhill on an overpass, two right rear wheels flew off the truck. Paul pulled his vehicle partially onto the emergency lane and stopped. A portion of Paul's pick-up truck obstructed southbound traffic on I-95.

The plaintiff, Chester Morrisey, was driving a semi-tractor trailer loaded with furniture south-bound on I-95. As traffic in front of Morrisey slowed due to the disabled pick-up truck, Morrisey brought his tractor trailer to a controlled stop.

Thomas Owen, the defendant, was driving a tractor-trailer rig loaded with mulch in the center southbound lane directly behind Morrisey's rig. In order to slow down and stop his vehicle, Owen ran his tractor-trailer rig into the side of Morrisey's tractor-trailer. Chester Morrisey sustained serious low back injuries that necessitated two major surgical procedures and resulted in a failed back syndrome.

The Accident

The vehicular accident occurred around 7:00 a.m. on November 29, 1993. The plaintiff, Chester Morrisey, a truck driver and furniture mover employed by Daley and

Wanzer, reported to work in Riviera Beach on the morning of the accident at 6:15 a.m. (R.12 T.7 p.952) The truck he drove that day had arrived from Massachusetts loaded with furniture that was to be delivered to Boca Raton. (R.12 T.7 p.952) The 14-wheel tractor-trailer rig weighed 65 thousand pounds. (R.7 T.2 p.267, 294; R.12 T.7 p.946, 952) The trailer was 48 feet long. (R.12 T.7 p.946) Before departing to deliver the furniture, Morrisey checked to make sure that all of the truck lights were working and that there were no flat tires, major oil leaks or water leaks. (R.12 T.7 p.953) Morrisey's first stop was to be in Boca Raton. (R.12 T.7 p.955)

Morissey drove to Blue Heron Boulevard and headed south on I-95. As he approached the Forest Hill overpass, Morrisey observed smoke coming from a UPS tractor trailer in front of him. (R.12 T.7 p.955) Its brakes were locking. Morrisey was driving in the middle southbound lane. At 7:00 a.m. trucks are restricted from driving in the left southbound lane of I-95. (R.7 T.2 p.219) Morrisey slowed his tractor-trailer rig. (R.12 T.7 p.956)

A flat-bed truck, driven by Joseph Paul and owned by John Vogel Simulated Brick & Stone, was stopped in the right-hand southbound lane of I-95. Its right rear axle lug studs had broken and the two right rear tires had come off of the truck. (R.7 T.2 p.204) As a result of the breakdown, southbound traffic had slowed.

Thomas Owen, an independent trucker, was driving a tractor-trailer rig loaded with mulch in the center southbound lane directly behind Morrisey's vehicle. His rig weighed approximately eighty thousand pounds. (R.7 T.2 p.277) Owen reacted too late to Morrisey's slowing truck because he was following too closely, or driving at an excessive rate of speed. (R.8 T.3 p.401-405) In an attempt to avoid the collision, Owen pulled his rig into the left inside lane in order to avoid hitting Morrisey's rig. Too late, Owen noticed there was a small vehicle in the left lane. (R.16 T.11 p.1604-1605) Fearing that he would crash into that car, Owen deliberately rammed his truck into the side of Morrisey's vehicle as a means to slow down his 18 wheel truck. (R.16 T.11 p.1605)

Morrisey felt his vehicle lunge forward, looked in his mirror and saw a tractor-trailer rig running up the driver's side of his trailer. (R.12 T.7 p.956) Morrisey slammed on his brakes, fighting the steering wheel, in order to keep his rig in the lane. The weight of Owen's rig forced Morrisey's truck into the right lane. (R.12 T.7 p.956) Morrisey fought with all his strength to keep hold of the steering wheel and to control his vehicle. (R.12 T.7 p.957; 959) He had both hands on the steering wheel and was half-standing and off the seat, with his right foot on the brake and his left foot on the clutch, turning the steering wheel. (R.12 T.7 p.958) When Morrisey's vehicle stopped,

it was in between the middle lane and the right hand lane. (R.12 T.7 p.960; 1003) It took all of Morrisey's strength to keep the rig from jack-knifing and going into the right lane. (R.7 T.2 p.373-374) According to Morrisey's supervisor, Richard Mehrmann, Morrisey did a remarkable job holding the vehicle in the lane and not hitting another car. (R.7 T.2 p.281)

Prior to the accident the traffic in front of Morrisey's vehicle and in the other two traffic lanes was coming to a slow, controlled stop. (R.7 T.2 p.342) If Morrisey's rig had not been hit by the Owen vehicle, Morrisey could have stopped his vehicle without incident. (R.7 T.2 p.343)

As a result of the accident, Chester Morrisey sustained serious low back injuries that resulted in two major surgical procedures and a morphine pump implant. The second back surgery entailed installation of pedicle screws and bolts. His medical bills, which were paid by workers' compensation, were $151,962.11. (R.12 T.7 p.990)

At trial, the defendants admitted negligence in opening statement. (R.6 T.1 p.108) The defendants conceded there was no comparative negligence on plaintiff's part. (R.19 T.14 p.2075-2076) The defendants premised their entire case on the plaintiff’s longstanding, preexisting back problems and contended that those prior problems were the sole cause of his surgeries and subsequent disabilities. (R.6 T.1

p.108)

Prior Back History

In 1992 Morrisey hurt his back lifting a piano. (R.12 T.7 p.945) He saw Dr. Rothstein, a chiropractor, on four occasions for treatment of that injury. (R.12 T.7 p.945; R.15 T.10 p.1541) Morrisey did not miss any work as a result of the 1992 incident. (R.12 T.7 p.945)

In May 1993, Morrisey hurt his back while changing a tire on his tractor-trailer rig. (R.12 T.7 p.946) He once again saw Dr. Rothstein, a chiropractor, for treatment. (R.12 T.7 p.947) He later saw Dr. Levy, his family physician, who hospitalized him for 10 days of traction. (R.12 T.7 p.947) Dr. Levy subsequently referred him to Dr. Mark Powers, an orthopedic surgeon in Port St. Lucie, who became his primary treating physician for the May 1993 back injury. (R.12 T.7 p.947-948)

Morrisey missed four months time from work as a result of the tire changing incident. (R.12 T.7 p.948) In September 1993, Dr. Powers released Morrisey to return to work without limitations. (R.12 T.7 p.948) Morrisey returned to work at Daley & Wanzer doing the same type of work he had previously done. (R.12 T.7 p.949) There was no change in his level of activity on the job, and no modification in his job assignment. (R.12 T.7 p.949-950) When the November accident that gives rise to this

litigation occurred, Morrisey had been back at work without restriction for two and a half months. (R.13 T.8 p.1130)

Injuries Sustained in This Accident

Immediately folowing the accident, Morrisey felt stiff and sore, but continued to work for the rest of the day. (R.12 T.7 p.961) Later in the afternoon he complained to his supervisor about stiffness or pain. (R.7 T.1 p.280; R. 12 T.7 p.961) He complained to his wife from time to time following this incident about back problems. (R.12 T.7 p.963) He continued to work until December 28. (R.12 T.7 p.961) Morrisey continued to work following this accident because he had been out of work four months and could not afford to take any more time off. (R.12 T.7 p.962)

The pain progressively worsened. The pain was constant and differed from the past. (R.12 T.7 p.962) The pain was in a different location than his past back pain. (R.12 T.7 p.962) On December 28, 1993, Morrisey lost sensation and movement in his right foot. (R.4 T.9 p.1309) Mrs. Morrisey took him to the emergency room. (R.14 T.9 p.1310) Morrisey told the doctors about his problems and complaints since the November accident. (R.12 T.7 p.964)

Dr. Powers had treated Morrisey following the tire changing accident on May 23, 1993, at Port St. Lucie Hospital at which time he diagnosed a sprain or strain of

the lower back. (R.10 T.5 p.642; 645) Up through November 24, 1993, Dr. Powers treated Morrisey for low back complaints. (R.10 T.5 p.645) Morrisey was able to return to work in September and had no problems working. (R.10 T.5 p.665)

Following this accident, on January 10, 1994, the plaintiff saw Dr. Powers again and complained of radiating pain into both lower legs. (R.10 T.5 p.647) There was a new history of involvement in the November accident. (R.10 T.5 p.647; 663-664)

Dr. Powers referred the patient to Dr. Christopher Heller for an epidural injection. (R.10 T.5 p.667) The epidural injections were done in an effort to decrease swelling. (R.10 T.5 p.667) Prior to this motor vehicle accident, Dr. Powers did not feel there was any medical indication for epidural injection. (R.10 T.5 p.667-668)

In January 1994, the patient presented with more radiating pain down his legs. (R.10 T.5 p.673) At that time Dr. Powers was concerned that Morrisey was developing a radiculopathy, or pain going down his legs, which was a new problem. (R.10 T.5 p.673) His opinion was that the patient aggravated a pre-existing condition. (R.10 T.5 p.673) He felt that the patient was more susceptible to injury because of his previously documented disc. Because of that pre-existing condition, Morrisey had an inherent risk of further injury which exceeded that of the normal population. (R.10 T.5 p.674)

Following the accident, Dr. Powers referred the plaintiff to a spine specialist because conservative treatment had been ineffective. (R.10 T.5 p.670) The MRI's indicated problems up and down Morrisey's spine. (R.10 T.5 p.670) Referral to a spine specialist was not medically necessary prior to the November 29, 1993 accident. (R.10 T.5 p.671-672)

Dr. David McMillan, a neurosurgeon, saw Morrisey as a patient on April 7, 1994. (R.10 T.5 p.682) According to Dr. McMillan, sudden twisting and torquing of the back can aggravate a pre-existing back problem so that it becomes symptomatic and requires medical attention. (R.10 T.5 p.718-719)

Eventually the plaintiff came under the care of Dr. Jordan Davis and Dr. Fernyhough. (R.9 T.4 p.571) Dr. Davis examined Morrisey on April 15, 1994. (R.9 T.4 p.576) The patient's main complaint was low back pain. According to Dr. Davis, there were specific changes in the January 1994 MRI at the L5-S1 level. (R.9 T.4 p.586) At level 3-4 the radiologist observed changes--a right sided herniation (which was also present in August 1993) that was slightly indenting the thecal sac. The August 1993 MRI report made no specific mention of impingement. (R.9 T.4 p.587) At levels 3-4 there were changes in the January 1994 MRI, as compared with the August 1993 MRI, and at level L5-S1 there was a new finding altogether. (R.9 T.4

p.588)

There were changes between the August 1993 MRI and the January 1994 MRI. (R.9 T.4 p.590; 595) According to Dr. Davis, a new finding at a level like L5-S1, with a history of recent trauma, indicates that something new has happened. (R.9 T.4 p.596)

Dr. Davis testified that in August 1993 the plaintiff had sick discs. Drs. Davis and Fernyhough did surgery in June 1994 to correct this condition. (R.9 T.4 p.599) Prior to June 1994, the plaintiff was not a surgical candidate. (R.11 T.6 p.884) According to Dr. Davis, the pre-existing condition in Morrisey's back could predispose him to additional problems. (R.11 T.6 p.885)

Surgery was indicated because the patient had already undergone extensive conservative care and still had intractable, persistent pain that precluded a normal life. (R.9 T.4 p.608; R.12 T.7 p.950) Before he saw Dr. Davis and Dr. Fernyhough, no doctor had ever told the plaintiff that he needed surgery on his lower back. (R.12 T.7 p.950-951)

Dr. Fernyhough performed a second surgery on April 5, 1995, to remove the hardware and to correct a non-union at the L2-3 level. (R.11 T.6 p.861-864) Following the second surgery, Morrisey progressed for a while. (R.11 T.6 p.865) On

November 7, 1995, he was again in intractable pain. (R.11 T.6 p.865)

In Dr. Davis' opinion, Morrisey sustained a permanent impairment and permanent injury as a result of the November 29, 1993 collision. (R.11 T.6 p.867) According to Dr. Davis, the trauma of November 29, 1993, aggravated or caused the condition that led him and Dr. Fernyhough to operate on the patient. (R.11 T.6 p.868)

Dr. Linda Bland, a board certified neurosurgeon, saw the plaintiff on a referral from the workers' compensation carrier on June 27, 1996. (R.11 T.6 p.741-742; 747) His chief complaint on the first visit was very severe low back pain that radiated into right hip and down his right leg, which was consistent with sciatica or sharp pain. (R.11 T.6 p.748) The patient had tried every kind of conservative care and non-surgical treatment. (R.11 T.6 p.764-765) Dr. Bland found an area on clinical examination where the fusion did not unite. The non-union was at the L2-3 level. (R.11 T.6 p.765) Dr. Bland performed surgery to implant a morphine pump. (R.11 T.6 p.756) The decision to implant a morphine pump was based on Morrisey's clinical presentation and his intractable, disabling pain. (R.11 T.6 p.822) Prior to this accident, Morrisey's condition did not require a morphine pump implant.

The morphine pump has an average life expectancy of 3 to 5 years on average. (R.11 T.6 p.788) Morphine pumps tend to kink or become infected and the

computerized mechanism needs to be replaced frequently. (R.11 T.6 p.788) The replacement cost is $30,000. (R.11 T.6 p.788) Morphine pumps require periodic maintenance. (R.11 T.6 p.788) They need continuous computer telemetry to change dose frequency and refill pumps. (R.11 T.6 p.789) Nurses and doctors must take care of them, as often as twice a week. (R.11 T.6 p.789)

According to Dr. Bland, degenerative discs are more prone to injury. (R.11 T.6 p.823) In her opinion, the November 1993 accident was the major contributing cause of plaintiff's back problems and the need for surgery. (R.11 T.6 p.850)

In Dr. Bland's opinion, the trauma of November 29, 1993 aggravated or caused the medical condition in plaintiff's lower back. (R.11 T.6 p.778) Her opinion was that the November injury was either the causal factor or the aggravating factor of plaintiff's symptoms of back pain and sciatica, and the subsequent surgical intervention. (R.11 T.6 p.779) According to Dr. Bland, the condition she treated Morrisey for is a permanent condition. (R.11 T.6 p.788)

Sharon Griffin, a rehabilitation consultant and counselor, evaluated Morrisey's employment potential. (R.13 T.8 p.1109) In 1992, Mr. Morrisey earned $41,108. (R.13 T.8 p.1126) According to Ms. Griffin, the May 1993 tire changing incident did not impact on his earning ability because he was released to go back to work by Dr.

Powers in September 1993, and was engaging in all work activities at the time of the accident. (R.13 T.8 p.1130) That picture changed after the November 29 accident. (R.13 T.8 p.1132) Following the November accident, the plaintiff worked for about a month and then was taken off work completely. He has not been back to work since. (R.13 T.8 p.1132)

Morrisey has a failed back syndrome and is totally unemployable. (R.13 T.8 p.1133; 1164; 1167) The plaintiff's treating physician at the time of trial, Dr. Ordia, was of the opinion that Morrisey is totally disabled and has zero work capacity. (R.13 T.8 p.1137) According to Ms. Griffin, patients on morphine pumps do not return to work. (R.13 T.8 p.1133)

Dr. Benedict's Testimony

Dr. Benedict is a consulting engineer with expertise in kinematics, dynamics and machine design. (R.8 T.3 p.376) Kinematics is the motion or path that something follows, and the forces that act on a body to make a body move, stop, or change direction. (R.8 T.3 p.376)

Dr. Benedict testified that the defendant Jack Vogel did not follow good maintenance practices. (R.8 T.3 p.395) If it had followed acceptable maintenance practices, the tire would not have come off the truck. (R.8 T.3 p.395) According to Dr.

Benedict, there was plenty of time for Joseph Paul to get his truck off the road. (R.8 T.3 p.401)

Dr. Benedict testified that defendant Thomas Owen over-drove his vehicle. (R.8 T.3 p.401) Owen's speed was excessive, in view of the conditions present. (R.8 T.3 p.403) His decisions were inappropriate, especially since his truck weighed 80 thousand pounds. (R.8 T.3 p.403) With a heavy load the driver must leave enough room to make corrections and to avoid accidents. (R.8 T.3 p.403) One of the first rules taught to commercial truck drivers is to scan far enough ahead to make sure there is enough distance, room and clearance if something happens. (R.8 T.3 p.403) It takes longer for a truck to stop or slow down. (R.8 T.3 p.404) According to Dr. Benedict, Owen was following too closely, or he was not paying adequate attention. (R.8 T.3 p.404) According to Dr. Benedict, Owen could have stopped if he were traveling a safe distance behind Mr. Morrisey and paying attention. (R.8 T.3 p.518) If Owen were driving properly, he would never have been in a position where he had to change lanes in order to miss hitting the end of the truck. (R.8 T.3 p.520)

Because of the angle of the Owen vehicle, it shoved Morrisey's vehicle forward, pushing and accelerating the Morrisey truck. (R.8 T.3 p.423) Owen's 80 thousand pound truck was traveling faster than Morrisey's 60 thousand pound truck. That

accelerated and pushed Morrisey's truck forward and sideways. (R.8 T.3 p.423) Owens' vehicle would have imparted a force of magnitude into the Morrisey vehicle and started accelerating it. (R.8 T.3 p.424) The instant the force was applied laterally by Owen, and started moving Morrisey's trailer sideways, it started to form an angle, resulting in a jack-knife maneuver on the Morrisey tractor. (R.8 T.3 p.431)

According to Dr. Benedict, the $18,580 repair estimates on the Owen vehicle reflect a significant amount of damage to the Owen vehicle. It was a measure of how much force there was between the two vehicles when they collided. (R.8 T.3 p.429)

Morrisey jammed on his brakes and put on the clutch and was standing on the brake pedal, partially out of his seat, hanging on to the steering wheel and turning it to the left. According to Dr. Benedict, this is a counter-steer to a jack-knife. One wants to get the tractor going faster than the trailer. (R.8 T.3 p.433)

According to Dr. Benedict, if Morrisey had done nothing, his truck would have jack-knifed over into the right hand lane and been shoved into that lane and collided with whatever vehicles were in the right hand lane. (R.8 T.3 p.435) Morrisey's vehicle ended up partially in the right hand lane and still in the center lane. Morrisey was able, by his steering, to prevent the vehicle from being shoved all the way over and colliding with other vehicles. (R.8 T.3 p.435)

When the plaintiff jammed on the brakes and pushed in the clutch, his buttocks came off the seat. (R.8 T.3 p.453) Because Morrisey was holding on to the steering wheel, there was a downward force through his shoulders into his spine from the neck and the shoulders down. Morrisey's spine twisted and he rotated counter-clockwise, pushing up with his legs and pulling down with his shoulders. (R.8 T.3 p.456) As he twisted, Morrisey's shoulder and body went to the right. (R.8 T.3 p.456) His vertebral column compressed and rotated so that it bent over to the right. (R.8 T.3 p.457) His vertebrae were then out of alignment. The disc had to twist and he unloaded the left side and compressed the right side. (R.8 T.3 p.457) The big load on the right side weakened the disc. (R.8 T.3 p.460)

Dr. Benedict testified that the worst kind of pressure to exert on a vertebral column is twisting and bending at the same time, with axial loading (coming up from the bottom and down through the top). (R.8 T.3 p.462) In Dr. Benedict's opinion, the loading force that occurred to Mr. Morrisey's lumbar vertebrae was sufficient to cause damage. (R.8 T.3 p.477) His opinion was that the loading was sufficient to cause damage or additional weakening, if not direct damage to the discs in the lumbar region. (R.8 T.3 p.478)

The Trial

The Morriseys sued Thomas Owen and Jack Vogel Simulated Brick and Stone. The jury was instructed in accordance with the standard jury instructions regarding aggravation of a pre-existing injury and intervening cause. (R.21 T.16 p.2340, 2342-2343) The jury returned a special interrogatory verdict finding Owen 45% at fault, Jack Vogel Simulated Brick and Stone 35% at fault, and Joseph Paul 20% at fault. The jury awarded past medical expenses ($151,962.11); past lost earnings ($160,081); future medical expenses for 30 years reduced to present value ($488,000); future lost earning ability over a 20 year work life expectancy reduced to present value ($1,006,000). The jury found that Chester Morrisey did not sustain a permanent injury within a reasonable degree of medical probability as a result of this accident. The jury did not award non-economic damages to plaintiffs. (R.2 p.377-381)

The defendants filed post-trial motions that were denied by the trial judge. (R.3 p.415-427; 428-430, 432) Thereafter, plaintiffs settled their claims against Jack Vogel Simulated Brick and Stone.

The defendant, Thomas M. Owen, filed a timely notice of appeal seeking review of the final summary judgment entered in favor of the plaintiffs. (R.3 p.571-574)

The Decision of The Fourth District

The Fourth District Court of Appeal affirmed in part and reversed in part, and remanded the case to the trial court for a retrial to determine what damages, permanent or non-permanent, were caused by the negligence of Thomas Owen. The plaintiffs filed timely motions for rehearing, rehearing en banc and certification of a question of great public importance. The Fourth District Court of Appeal denied those motions.

The plaintiffs filed a timely notice to invoke the discretionary jurisdiction of this court. This court granted the petition for discretionary review of the decision of the Fourth District Court of Appeal and directed the parties to file briefs on the merits. This brief is filed in accordance with that order.

QUESTIONS PRESENTED

I. Whether a finding of a permanent injury is required under *Auto-Owners Ins. Co. v. Tompkins,* 651 So. 2d 89 (Fla. 1995) and § 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.

I I . Whether the trial court erred in granting defendants a set-off from the verdict for past social security disability payments paid to plaintiff, but in denying an off-set from collateral source benefits of the amounts paid into the social security system by plaintiff's employers on his behalf.

SUMMARY OF ARGUMENT

The decision of the Fourth District Court of Appeal in *Owen v. Morrisey,* 793 So. 2d 1018 (Fla. 4th DCA 2001), conflicts with this court's decision in *Auto-Owners Ins. Co. v. Tompkins,* 651 So. 2d 89 (Fla. 1995), and with the decision of the Third District Court of Appeal in *Hamilton v. Melbourne Sand Transport, Inc*., 687 So. 2d 27 (Fla. 5th DCA 1997). Because of the conflict between these decisions, this court has jurisdiction to hear this cause on the merits.

This court should clarify that under its decision in *Auto-Owners Ins. Co. v. Tompkins,* it is not necessary for the jury to find that plaintiff sustained a permanent injury as a result of the accident where, as here, the accident aggravated a pre-existing

condition and caused the future economic damages that will last for the balance of the plaintiff's life.

The evidence in this case established the plaintiff's future economic damages with reasonable certainty. The jury was properly instructed regarding aggravation of a pre-existing condition. The jury obviously could not apportion the damages. The jury was justified in awarding damages for the entire condition. The decision of the Fourth District Court of Appeal should be reversed and remanded with instructions to reinstate the jury verdict and judgment entered thereon.

This court should address the second issue regarding plaintiff's right to an offset from collateral source benefits of the amounts paid into the Social Security system by plaintiff's employers on his behalf. Alternatively, this issue should be remanded to the Fourth District Court of Appeal for consideration.

ARGUMENT

I. Whether a finding of a permanent injury is required under *Auto-Owners Ins. Co. v. Tompkins,* 651 So. 2d 89 (Fla. 1995) and § 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.

The jury awarded the plaintiff all of his future economic damages, while at the same time finding that he did not sustain a permanent injury as a result of the incident in question. (R.2 p. 380) The evidence presented in this case established these future damages with reasonable certainty. This result is proper under the standard jury instruction regarding permanency that was given by the trial court. (R.21 T. 16 p. 2341-2342) Pursuant to the provisions of §627.737(2), Florida Statutes, the jury is entitled to award 100% of economic damages, both past and future, incurred or to be incurred, by an injured plaintiff, where, as in this case, the evidence shows an aggravation of a pre-existing injury and the jury is unable to make an apportionment.

The finding of permanency simply entitles the jury additionally to award damages for pain and suffering. Future economic damages need only be predicated upon a finding that future medical expenses and lost earnings are established with reasonable certainty. There is no requirement that the evidence show a permanent

injury.

This court addressed this issue in *Auto-Owners Ins. Co. v. Tompkins,* 651 So. 2d 89 (Fla. 1995). In *Auto-Owners,* the plaintiff was injured in an automobile accident involving an underinsured motorist. Plaintiff settled with the tortfeasor for his $25,000 policy limits and then sued his uninsured motorists carrier for the balance of his damages. The insurer admitted liability and the case proceeded to trial on causation and damages. The parties presented evidence regarding the permanent nature of plaintiff's injuries.

The plaintiff asked the trial judge to use a verdict form that allowed the jury to award future economic damages, even if it failed to find a permanent injury. The trial court denied the requested verdict form and instructed the jury, over objection, in a manner that required the jury to find a permanent injury in order to award future economic damages. The jury found no permanent injury and awarded only past economic damages. Plaintiff appealed to the Second District Court of Appeal which reversed, holding that the trial court erred in instructing the jury that future economic damages were recoverable only if plaintiff had sustained a permanent injury.

This court granted review due to a conflict between the district courts on this issue. This court rejected the contention that future economic damages are not

recoverable in the absence of a finding of permanent injury caused by the accident. This court held that a claimant can recover prospective economic damages where the future damages are established with reasonable certainty. This court stated:

> We reject the mandatory permanent injury threshold test for future economic damages and find the appropriate test is to permit the recovery of future economic damages when such damages are established with reasonable certainty. Although a permanent injury is not a prerequisite to recovering future economic damages, it is a significant factor in establishing the reasonable certainty of the future damages. We note that our decision appears to be fully consistent with the note following the standard jury instructions on damages. *See Standard Jury Instructions—Civil Cases,* 613 So. 2d 1316, 1317 (Fla. 1993) (notes on use) (limiting the recovery of future medical expenses or loss of earnings to damages the claimant is "reasonably certain to [incur] [experience] in the future").
>
> We reject Auto-Owners' contention that future economic damages for non-permanent injuries should be denied because of the difficulty in establishing the certainty of such damages. We find that a per se rule requiring a permanent injury may unjustly prevent a claimant from recovering for post-trial damages that result from non-permanent injuries that can be established with reasonable certainty. 651 So. 2d at 91.

The district courts have followed this rule until the Fourth District engrafted its exception in this case that a plaintiff may not recover ***all*** of his future economic damages, in the event there is no finding of a permanent injury.

Hamilton v. Melbourne Sand Transport, Inc., 687 So. 2d 27 (Fla. 5th 1997),

involved facts that are similar to those in this case. There, the jury awarded $150,000 for future medical expenses and future lost earning ability for a 43 year period. The jury found that the plaintiff did not sustain a permanent injury. The trial court granted defendant's motion for remittitur, because it reasoned that the jury award of $150,000 for future medical expenses and lost earning ability was inconsistent with a determination of no permanency.

The plaintiff appealed the order. There, as here, there was no question about liability. On appeal, the plaintiff argued that he was not required to prove that he was permanently injured, but only that future damages were reasonably certain to occur. There, as here, the plaintiff presented proof of future lost earnings. The Third District Court of Appeal reversed the order of remittitur and reinstated the jury verdict, citing this court's decision in *Auto-Owners*.

In *Garriga v. Guerra,* 753 So. 2d 146 (Fla. 3d DCA 2000), the court recognized that under *Auto-Owners Ins. Co. v. Tompkins,* this court rejected the mandatory rule that a jury must find that plaintiff suffered a permanent injury before it can award future economic damages. All that plaintiff must establish is that future economic damages are reasonably certain to occur. In this case, plaintiff established that future medical care is necessary because the surgeries necessitated by this accident failed,

and that failure caused the plaintiff to be unemployable.

In *Kent v. Bucholc,* 714 So. 2d 671 (Fla. 4th DCA 1998), the Fourth District affirmed an award of future medical expenses where the jury found that plaintiff did not sustain a permanent injury.

In *Metrolimo, Inc. v. Lamm,* 666 So. 2d 552 (Fla. 3d DCA 1995), citing *Auto-Owners,* the court affirmed a jury verdict awarding plaintiff $150,000 for future medical expenses and nursing care. On appeal the defendant argued that this award covered all, or substantially all, of the remainder of plaintiff's life expectancy and thus was excessive. This issue was not raised at the trial level. Accordingly, the Third District declined to consider this issue and the extent to which the decision in *Ludwig v. Ladner,* 637 So. 2d 308 (Fla. 2d DCA 1994), remains viable after the decision in *Auto-Owners*.

In *Stephenson-Nolan v. Nadd,* 670 So. 2d 1197 (Fla. 5th DCA 1996), the court followed this court's decision in *Auto-Owners,* and held that there was sufficient evidence on which the jury could have made some award of future economic damages. In reversing and remanding for a new trial on future damages only, the court observed:

> We doubt that the maximum medical improvement limitation of *Ludwig v. Ladner,* 637 So. 2d 308 (Fla. 2d DCA 1994), relied upon by appellee, has survived the supreme court's opinion in

> *Tompkins.* Even if not permanently injured, it is possible that a person who has achieved "MMI" can be reasonably certain to incur economic damages beyond the date of trial. 670 So. 2d at 1198

In *Ludwig v. Ladner,* the plaintiff was injured in a motor vehicle accident. At trial plaintiff and defendants presented evidence regarding whether plaintiff sustained a permanent injury as a result of the accident. The jury was instructed, in accordance with the standard jury instructions, that it could award past and future lost wages and past and future medical expenses, even if plaintiff did not pass the no-fault threshold. The jury returned a verdict finding no permanent injury and awarding future medical expenses of $24,000 and future lost wages of $70,000, as well as past medical expenses of $20,000 and $225,000 in past lost earnings. In that case, unlike this one, during closing argument plaintiff's counsel conceded that the jury should award past medical expenses of $620 and that the only quantifiable lost past earnings were $900.

The Second District Court of Appeal reversed the award of damages, finding that the award of past medical expenses exceeded the damages established by the evidence, and that the past lost earnings were contrary to the manifest weight of the evidence. The Second District Court of Appeal concluded that the award of future damages were excessive if the jury, in fact, determined that plaintiff did not sustain

a permanent injury.

In this case, the Fourth District found *Ludwig v. Ladner* to be "instructive" and relied on that decision in reversing and remanding for a new trial regarding causation and damages. The Fourth District Court of Appeal's reliance on *Ludwig* is misplaced. In this case, unlike *Ludwig,* there was ample evidence to support the awards of past and future medicals and past and future damages for lost income. Moreover, as set forth in the fact statement, the evidence uncontradictedly established that plaintiff has not been able to work since a month following this accident and that he will never work again.

Dr. Bernard Pettingill was the only economist to testify in this case. He testified regarding both the plaintiff's past damages for medical expenses and lost wages, and the present value of future damages for medical expenses and lost income. Dr. Pettingill testified that the plaintiff's past medical bills were $151,962.11. (R.14 T.9 p.1255-1256) The jury returned a special interrogatory verdict determining that the amount of medical expenses sustained in the past was precisely this amount. (R.2 p.378)

Dr. Pettingill testified that the amount of lost earnings sustained by the plaintiff from December 28, 1993, through the time of trial was $167,081. (R.14 T.9 p.1254)

The jury awarded $160,081.00 as damages for lost earnings sustained in the past. (R.2 p.378) Sharon Griffin testified regarding a life-care plan for the plaintiff and regarding his employability. (R.13 T.8 p.1110 *et seq.*) Based on Mrs. Griffin's life-care plan, Dr. Pettingill testified that the plaintiff's future medical care will cost $1,558,825.00. (R.14 T.9 p.1259) He testified that the present money value of that sum is $487,133.00. (R.14T.9 p.1260) The jury determined that the future damages for future medical expenses are $1,234,640.00. (R.2 p.378) It awarded a present value for those future medical damages of $488,000.00. (R.2 p.378-379)

Dr. Pettingill testified that the claimant's future economic loss of earning capacity, unreduced, is $1,276832.00 and that reduced to present value, the sum is $870,564.00 (R.14 T.9 p.1257) In addition, according to Dr. Pettingill, if the plaintiff is unable to work he will also lose future fringe benefits that have a present money value of $130,584.00 and a future value of $191,958.00 (R.14 T.9 p.1258) The jury found that the total future damages for lost earning ability, which would include income as well as fringe benefits, is $1,555,000.00 and that the present money value of that sum is $1,006,000.00. (R.2 p.378-379)

The jury awarded almost precisely the amount of past and future damages for medical expenses and lost wages and earning ability which was proven by the

evidence. In that respect this case differs substantially from *Ludwig v. Ladner.*

The decision of the Fourth District Court on its face collides with this court's decision in *Auto-Owners v. Tompkins.* Moreover, its decision conflicts with the decision in *Hamilton v. Melbourne Sand Transport,* because the Fourth District Court of Appeal has applied a rule of law in this case to produce a different result than was reached in *Hamilton,* a case involving substantially the same controlling facts as this case.

In *Auto-Owners* this court rejected the mandatory rule that a jury must find that a plaintiff suffered a permanent injury before it can award future economic damages. All that a plaintiff must establish is that future economic damages are reasonably certain to occur. In this case the plaintiff conclusively established that future economic damages are certain to occur.

In this case the Fourth District Court of Appeal interpreted *Auto-Owners* as requiring a finding of permanency in order for a jury to award economic damages for lost wages for the balance of a plaintiff's work life and in order for a jury to award future medical expenses for the balance of the plaintiff's life. This court's decision in *Auto-Owners* did not go that far. This is an issue that this court should address. Such awards are permitted under §627.737(2), Florida Statutes, when there is no finding of

a permanent injury.

In this case, the Fourth District Court of Appeal discussed *Hamilton,* but failed to distinguish the decision. Instead, the Fourth District Court of Appeal said:

> Since it is unclear to us how the *Hamilton* court arrived at its decision, we find it unpersuasive. 793 So. 2d at 1026.

Hamilton is factually very similar to this case. In applying this court's decision in *Auto-Owners v. Tompkins,* the Fourth District Court of Appeal applied a rule of law in such manner as to produce a different result than was reached by the court in *Hamilton,* a case involving substantially the same controlling facts as this case.

In this case, nothing in the record demonstrates that the jury was deceived as to the force and credibility of the evidence, or that it was influenced by considerations outside the record. There is simply no showing that the trial judge abused his discretion in denying a new trial. Since reasonable persons could differ as to the propriety of the action taken by the trial court, there can be no finding of an abuse of discretion. *Brown v. Estate of Stuckey,* 749 So. 2d 490 (Fla. 1999).

Owen took the position at trial and before the Fourth District that the accident, at most, aggravated a pre-existing condition; therefore, it was improper for the jury to award the plaintiff all past and future economic damages. This conclusion is wrong.

The back condition that Drs. Davis and Fernyhough operated on may have existed prior to the accident; however, the evidence showed that the plaintiff's back condition was under control and not disabling just prior to the accident. The condition had not progressed to the point where it required surgery.

This accident caused the plaintiff's condition to deteriorate to the point that he required surgery. Prior to this accident his condition did not require surgery. The back surgeries were a failure and ultimately required a morphine pump implant. The failed back surgery and morphine pump caused the plaintiff to be totally disabled and completely incapable of working. The morphine pump and failed back surgeries necessitated all of the future medical care for which the jury awarded future medical expenses. Thus, it is apparent that the past and future economic losses were all necessitated by this accident. This accident was the proverbial "straw that broke the camel's back."

It is basic that the defendant "takes the plaintiff as he finds him." If a plaintiff has a preexisting, non-debilitating condition, and defendant's negligence causes that condition to become symptomatic and to require surgery, the defendant has to account for that damage. Where there can be no apportionment made by the jury, then the defendant is responsible for the results of the pre-existing condition, as well as the

injury caused by the accident. *C.F. Hamblen, Inc. v. Owens,* 127 Fla. 91, 172 So. 694 (Fla. 1937); *Winn-Dixie Stores, Inc. v. Nafe,* 222 So. 2d 765 (Fla. 3d DCA 1969); *Hollie v. Radcliffe,* 200 So. 2d 616 (Fla. 1st DCA 1967).

This court should quash the decision of the Fourth District Court of Appeal in this case and remand with instructions to reinstate the jury verdict and judgment entered thereon. The verdict is entirely consistent with this court's decision in *Auto-Owners.* The future economic damages were proven with reasonable certainty and should be sustained.

I I .
Whether The Trial Court Erred In Granting Defendants A Set-Off From The Verdict For Past Social Security Disability Payments Paid To Plaintiff, But In Denying An Off-Set From Collateral Source Benefits Of The Amounts Paid Into The Social Security System By Plaintiff's Employers On His Behalf.[1]

The plaintiffs asked the trial court to offset the collateral source set-off for past social security disability payments by the Social Security deductions taken from claimant's wages throughout his life and by the contributions to Social Security made

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The Fourth District declined to address this issue. 793 So.2d at 1026. In the event that this court quashes the decision of the Fourth District and remands the case with instructions to reinstate the jury verdict, this court should address this issue, or alternatively remand this issue to the Fourth District.

by plaintiff's employers throughout his life. (R.3 p.436 *et seq.*) The trial judge refused. (R.3 p.448)

Under the common law collateral source rule, a defendant was not permitted to reduce damages for which he would otherwise be liable by showing that the plaintiff received compensation from a collateral source, such as benefits received from welfare or pension funds. *O'Neal v. Ray,* 213 So. 2d 1 (Fla. 1st DCA 1968). The common law collateral source rule has been modified by statute in Florida, thereby allowing admission of evidence and reduction of damages based on receipt of certain collateral source benefits.The statutory modifications to the collateral source rule have been interpreted as applying to past collateral source benefits and not to future collateral source benefits. *Florida Physicians Insurance Reciprocal v. Stanley,* 452 So. 2d 514, 515 (Fla. 1984); *Swamy v. Hodges,* 583 So. 2d 1095, 1096-1097 (Fla. 1st DCA 1991), *review denied* 593 So. 2d 1053 (Fla. 1991).

This accident occurred on November 29, 1993. Effective October 1, 1993, the collateral source statute pertaining to automobile accidents, §627.7372, was repealed. For accidents occurring after October 1, 1993, the applicable collateral source statute is §768.76. *Barberena v. Gonzalez,* 706 So. 2d 60 (Fla. 3d DCA 1998). The 1993 version of §768.76 that was in effect when this accident occurred and that applies to

this case provides in pertinent part:

> (1)
> In any action to which this part applies in which liability is admitted or is determined by the trier of fact and in which damages are awarded to compensate the claimant for losses sustained, the court shall reduce the amount of such award by the total of all amounts which have been paid for the benefit of the claimant, or which are otherwise available to him, from all collateral sources; however, there shall be no reduction for collateral sources for which a subrogation or reimbursement right exists. ***Such reduction shall be offset 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.***
>
> (2)
> For purposes of this section:
>
> (a)
> "Collateral sources" means any payments made to the claimant, or made on his behalf, by or pursuant to:

1. The United States Social Security Act, except Title XVIII and Title XIX; any federal, state, or local income disability act; or any other public programs providing medical expenses, disability payments, or other similar benefits, except those prohibited by federal law and those expressly excluded by law as collateral sources. [emphasis supplied]

Under this statute, collateral sources include payments made to the claimant pursuant to the Social Security Act (except Titles XVIII and XIX).

Statutory provisions that alter common law principles must be narrowly construed.

Ady v. American Honda Fin. Corp., 675 So. 2d 577, 581 (Fla. 1996). The common law collateral source rule prohibiting both the introduction and set-off of collateral source benefits is both a rule of damages and a rule of evidence.

The trial judge erroneously granted an off-set solely for the amounts contributed to the social security system by Chester Mr. Morrisey. (R.4 p.448) The court did not allow an off-set for the amounts paid into social security on plaintiff's behalf by his employers. This is clearly contrary to the provisions of §768.76(1) which specifies that the off-set shall be for any amount contributed on behalf of the claimant in order to secure his right to the collateral sources. The reduction in damages due to collateral sources should be offset, as provided by §768.76(1), by the amounts contributed to the Social Security system by Chester Mr. Morrisey ***and his employers*** throughout the course of Mr. Morrisey's work life.

CONCLUSION

The decision of the Fourth District should be quashed and remanded with instructions to reinstate the verdict and judgment thereon. The case should also be remanded with instructions to award plaintiffs an off-set for contributions to social security made on plaintiff's behalf by his employers. Alternatively, this second issue should be remanded to the Fourth District Court of Appeal to consider and address the issue.

Respectfully submitted,

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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 this **14th** day of **May, 2002** to: **Lorenzo Williams,** Gary Williams et al., Post Office Box 3390, Ft. Pierce, FL 34948-3390 (counsel for plaintiffs); **Douglas deAlmeida,** Neale & deAlmeida, 221 W. Oakland Park Boulevard, Third Floor, Fort Lauderdale, FL 33311 (counsel for defendant Owen); and **Nancy Little Hoffmann,** 440 East Sample Road, Suite 200, Pompano Beach, FL 33064 (appellate counsel for defendant Owen).

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is written in 14 point "Times New Roman" font.

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Marjorie Gadarian Graham

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