IN THE SUPREME COURT
OF FLORIDA

ETHEL THOMPSON SWEITZER,

Petitioner,

vs.

DAWN M. THOMAS.

Respondent.
_____/

CASE NO. SC03-165
5th DCA CASE NO. 5D02-34

RESPONDENT'S ANSWER ON THE MERITS

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PREFACE

After a Brevard County jury awarded plaintiff/respondent, Dawn Thomas, $82,320.68 for injuries she suffered in an accident admittedly caused by defendant/petitioner, the Fifth District affirmed on all five issues raised on appeal. The Fifth District then summarily denied defendant's motions for rehearing, rehearing en banc, and certification. Notwithstanding the Fifth District's clear agreement with the principle of law defendant raised as conflict before this Court, defendant sought discretionary review in this Court, claiming express and direct conflict existed with the decisions of three of the four other district courts. On October 27, 2003, this Court accepted jurisdiction.

Due to the unique posture of this appeal, where defendant has simply refiled the identical brief she filed with the Fifth District, plaintiff will respond in the following way: The first part of her brief will argue that jurisdiction was improvidently granted, and will then demonstrate why on the merits, the Fifth District's opinion should be affirmed because under these distinguishable facts, there was no error. This part of the brief will also show that even if jurisdiction is proper, this Court should not review any of the other issues on appeal. In an abundance of caution, however, the second part of the brief will then specifically address point-by-point the merits of the other issues raised and summarily affirmed by the Fifth District.

The plaintiff/respondent, Dawn Thomas, will be referred to as plaintiff or by her proper name. Defendant/petitioner, Ethel Thompson Sweitzer, now deceased[1], will be referred to as defendant or by her proper name.

STATEMENT OF THE FACTS AND CASE

While plaintiff does not agree with the tone of defendant's factual rendition, she does not dispute the accuracy of the material facts in those places where record cites have been provided. However, for the purposes of the purported conflict from which this Court has accepted jurisdiction, there are important jurisdictional facts. Ethel Sweitzer admitted causing the collision at issue. *Sweitzer v. Thomas*, 834 So. 2d 283, 283 (Fla. 5th DCA 2002). The trial court instructed the jury to determine whether she also caused Ms. Thomas' shoulder injury, and if so, the amount of damages Ms. Thomas deserved. *Id.* The trial court also instructed the jury that certain non-economic damages could be recovered from the defendant even without a finding of a permanent injury. *Id.* at 283-284.

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[1]This Court should note that while counsel filed a suggestion of death regarding Ethel Thompson Sweitzer on March 21, 2003, no substitution of her estate has ever occurred in these proceedings. On June 24, 2003, this Court issued an order to show cause as to why the proceedings should not be dismissed as moot. While it would appear that this Court has accepted jurisdiction, in light of the fact that no "party" actually exists, and plaintiff/petitioner steadfastly maintains that there is no conflict, a dismissal for mootness seems proper since there is no party nor any legal issue for this Court to resolve.

Subsequent to the entry of final judgment, other districts opined on the issue of whether such a jury instruction was appropriate. *Id.* at 284. The First, Second, and Fourth Districts all concluded in opinions issued subsequent to the instant trial, that an injured plaintiff must always satisfy the threshold requirements of §627.737(2) in order to be entitled to recover non-economic damages from the tortfeasor. *Id.* The Fifth District explicitly ***agreed*** with that articulated law. *Id.*

Notwithstanding its agreement with the principle of law emanating from those other cases, the Fifth District still affirmed because the case arose out of different facts. The court noted that the jury in this case found that plaintiff **did indeed** suffer a permanent injury. *Id.* at 285. As the court wrote:

> Therefore, we conclude that in the absence of the threshold injury, as defined in section 627.737(2), there can be no recovery for any non-economic damages. Conversely, in cases involving a threshold injury, the plaintiff may recover all non-economic damages recoverable under common law. Accordingly, **because the jury in this case found that appellee did sustain a permanent injury, she was entitled to recover all of her non-economic damages, and the challenge instruction did not result in harm to appellant**. *Id.* (Emphasis added).

Any claim that this opinion conflicts with the other districts is disingenuous at best.

SUMMARY OF ARGUMENT

The Fifth District's opinion below in no way "expressly and directly" conflicts with decisions from its sister courts, and it is incredible to suggest otherwise. The Fifth District actually explicitly **agreed** with the rule of law articulated by the other districts, finding no non-economic damages are available to persons in automobile accident cases when the jury finds no permanent injury was suffered. Respectfully, plaintiff/respondent submits jurisdiction was improvidently granted.

Even if this Court finds jurisdiction were proper, a review of the issue demonstrates that the facts of this case were distinguishable. Because the jury found the plaintiff indeed suffered a permanent injury in this case, contrary to the finding made by the juries in the other cases, any error in the lower court's having given the non-standard jury instruction regarding non-economic damages was harmless, and this Court should affirm.

Finally, because the Fifth District summarily affirmed all of the other issues raised by the defendant below without any discussion, this Court should not in its discretion re-review those issues *de novo*. In the event this Court chooses to consider those issues however, plaintiff has responded to those arguments on the merits with arguments that are now buttressed by the Fifth District's ruling.

ARGUMENT - PART I

I. THIS COURT HAS ACCEPTED JURISDICTION IN A CASE WHERE THE DISTRICT COURT EXPRESSLY ALIGNED ITSELF WITH THE PRECEDENT ARTICULATED BY THE OTHER DISTRICTS, SIMPLY AFFIRMING THE TRIAL COURT'S RULING BASED ON DISTINGUISHABLE FACTS, AND THUS, THERE WAS NO BASIS FOR THIS HONORABLE COURT TO ACCEPT JURISDICTION BASED ON EXPRESS AND DIRECT CONFLICT.

In *Florida Power and Light Co. v. Bell*, 113 So. 2d 697, 699 (Fla. 1959), this Court explained that its primary function in the area of conflicts is to "stabilize the law by a review of decisions which form **patently irreconcilable precedents**" (Emphasis added). This Court has consistently reiterated that principle. *See, e.g., Nielsen v. City of Sarasota*, 117 So. 2d 731, 734 (Fla. 1960)(Acknowledging that one of the principle situations justifying the invocation of this Court's jurisdiction to review decisions of the courts of appeal based on alleged conflict, involves the application of a rule of law to produce a different result in a case involving almost the same controlling facts as a prior case disposed of by this Court); *Chrysler Corp. v. Wolmer*, 499 So. 2d 823, 827-829 (Fla. 1986)(Barkett, J., dissenting)(In dissent, Justice Barkett questioned whether jurisdiction existed because the case below did not involve the same controlling facts). As the *Nielsen* court wrote:

> [T]he **controlling facts become vital** and our jurisdiction may be asserted only where the court of appeal has applied a recognized rule of law to reach a conflicting conclusion in a case involving **substantially the same controlling facts** as were involved in allegedly conflicting prior decisions of this Court.

Nielsen, 117 So. 2d at 734 (Emphasis added).

In this case, the Fifth District **explicitly agreed** with the rule of law articulated by the courts in *Loring v. Winters*, 802 So. 2d 335 (Fla. 2nd DCA 2001), *Gill v. McGuire*, 806 So. 2d 629 (Fla. 4th DCA 2002) and *Giles v. Luckie*, 816 So. 2d 248 (Fla. 1st DCA), *rev. dismissed*, 832 So. 2d 104 (Fla. 2002), which all held that an injured plaintiff cannot collect non-economic damages unless she meets the threshold permanent injury requirements of §627.737(2). *Sweitzer*, 834 So. 2d at 284. Because the jury in this case did indeed find that the plaintiff met the threshold, and suffered a permanent injury, the court found she was entitled to recover all of her non-economic damages recoverable under the common law. Therefore, while the Fifth District agreed with the rule of law articulated by its sister courts, it simply did not believe the rule applied under the facts of **this** case.

Respectfully, plaintiff/respondent is uncertain as to why this Court accepted jurisdiction in the face of the Fifth District's clear agreement with prior precedent. Here, the controlling facts are materially different, and there can be no "express and

direct conflict" with the decisions of the other district courts. As plaintiff/respondent emphatically asserted in her jurisdictional brief, it is incongruous for the petitioner to argue otherwise. There is simply no "express and direct conflict" for this Court to resolve. As such, plaintiff respectfully asks this Court to vacate its original October 27, 2003 order accepting jurisdiction.

II. ASSUMING THAT THIS COURT STANDS BY ITS DECISION ACCEPTING JURISDICTION OF THIS CASE, ANY ERROR IN THE TRIAL COURT'S HAVING GIVEN THE NON-STANDARD JURY INSTRUCTION REGARDING NON-ECONOMIC DAMAGES WAS HARMLESS IN LIGHT OF THE JURY'S FINDING OF PERMANENCY.

After the jury reached its verdict in this case, two decisions came out which held that non-economic damages may not be awarded to a plaintiff unless the permanency threshold set forth in the PIP statute is met. *See*, *Loring v. Winters*, 802 So. 2d 335 (Fla. 2nd DCA 2001) and *Smiley v. Nelson*, 805 So. 2d 870 (Fla. 2nd DCA 2001). Shortly thereafter, both the Fourth and First Districts ruled similarly. *See*, *Gill v. McGuire*, 806 So. 2d 629 (Fla. 4th DCA 2002) and *Giles v. Luckie,* 816 So. 2d 248 (Fla. 1st DCA), *rev. dismissed*, 832 So. 2d 104 (Fla. 2002).

When the Fifth District addressed this legal issue in this case, it explicitly endorsed the decisions in *Loring*, *Gill*, and *Giles*. *See, Sweitzer v. Thomas*, 834 So.

2d 283, 284 (Fla. 5th DCA 2002). The court below acknowledged that the trial court did not have the guidance of the subsequently published decisions of the other district courts, then discussed those decisions, and expressly concluded: "**We agree with this interpretation**," explicitly agreeing with the rulings made by the *Loring*, *Gill* and *Giles* courts[2].

Once the Fifth District voiced its agreement with the principle of law currently before this Honorable Court, it then importantly held:

> Therefore, we conclude in the absence of a threshold injury, as defined in §627.737(2), there can be no recovery for any non-economic damages. Conversely, in cases involving a threshold injury, the plaintiff may recover all non-economic damages recoverable under common law. Accordingly, because the jury in this case found that appellee did sustain a permanent injury, she was entitled to recover all of her non-economic damages, and the challenged instruction did not result in harm to appellant. *Id.* at 285.

As the Fifth District found, any error in giving this instruction was clearly harmless.

In this case, while the jury was allowed to assess intangible damages in a piecemeal fashion on two different lines on the verdict form, there was no overlap of

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[2]Once the Fifth District aligned itself with the decisions of the First, Second, and Fourth Districts, instead of creating conflict, it actually created harmony. In the undersigned's humble opinion, jurisdiction would only be appropriate before this Court on this issue if the Third District--the only district not to have addressed this issue--decided in a manner which conflicted with the decisions of all the other district courts.

damages in its award. On the first line where intangible damages were addressed, the jury awarded $15,000 in the past and $10,000 in the future for "physical impairment, disfigurement and loss of capacity for the enjoyment of life" (T 548). It was then asked to assess damages for "pain, suffering and inconvenience," where the jury awarded an additional $15,000 in the past and $10,000 in the future (T 548).

While defendant has attempted to use the coincidence of the numbers to suggest that the jury intended to award $15,000 in the past and $10,000 in the future as a total for these intangible damages, there is simply no evidence in the record to support any nefarious basis for the coincidence. Plaintiff reminds this court that in closing argument, her attorneys asked the jury for a total of $150,000 for the "human," (i.e., non-economic) damages (T 498). The $50,000 ultimately awarded was obviously only a fraction of this amount; i.e., one third of what was sought.

Further buttressing the jury's full understanding of the instructions and intent to award a total of $50,000 in human damages, was its award for almost the full amount of economic damages plaintiff sought (T 548).[3] The jury obviously believed the plaintiff's position to be credible and worthy of its award. It awarded Ms. Thomas almost her full amount requested for economic damages, and simply broke down its

[3]The jury awarded $30,640.68 in economic damages which was approximately $5,000 less than what was asked for by plaintiff's counsel.

total award for intangible damages pursuant to the separate lines seeking the damages amounts on the verdict form. While it was admittedly error for the jury to have two lines in which to assess these non-economic damages on the verdict form, it is obvious that the error in this case was harmless pursuant to §59.041, as the Fifth District found[4].

III. EVEN IF THIS COURT BELIEVES "EXPRESS AND DIRECT" CONFLICT EXISTS TO SUPPORT JURISDICTION OF THE QUESTION BEFORE THE COURT, IT LACKS JURISDICTION TO CONSIDER THE OTHER ISSUES RAISED BELOW WHERE THE FIFTH DISTRICT SUMMARILY AFFIRMED WITHOUT ANY DISCUSSION.

As this Court stated in *Savoie v. State*, 422 So. 2d 308, 312 (Fla. 1982), once this Court accepts jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised in the appellate process, as though the case had originally come to the court on appeal. However, the authority to consider such issues other than those upon which jurisdiction was based is discretionary with this Court, and should be exercised only when those issues have been properly briefed and argued, and are **dispositive of the case**. *Id.* (Emphasis added). In *Savona v. Prudential Insurance*

[4]This error certainly did not result in a "miscarriage of justice." Further, the plain language of the statute requires that harmless error be "liberally construed."

Co. of America, 648 So. 2d 705, 707 (Fla. 1995), this Court refused to conduct a *de novo* review of a claim the defendant had raised, because the argument had been rejected without discussion by both the federal district court and the circuit court. As this Court explained:

> In particular, Prudential alleges that Savona's insurance policy was an employee benefit plan as defined in 29 USC §1002(1) and, therefore, should be regulated by ERISA rather than Florida law. **However, neither the federal district court nor circuit court addressed this issue, and we decline to address it in this proceeding.** We have held that we have the authority to consider issues other than those upon which jurisdiction is based, but this authority is discretionary and **should be exercised only when these other issues have been properly briefed and argued, and are dispositive of the case**. *Savoie v. State*, 422 So. 2d 308 (Fla. 1982). Such is not the case here, and we, therefore, limit our review to the certified question. *Id.* at 707 (Emphasis added).

In *Gandy v. State*, 846 So. 2d 1141 (Fla. 2003), this Court recently held that its jurisdiction extends only to a narrow class of cases enumerated in the Constitution, and that it lacks jurisdiction to review per curiam decisions of district courts of appeal that merely affirm with citations to cases not pending before it. *Id.* at 1143-1144. This Court admonished that a district court decision must contain some statement, indicating that it has expressly addressed a question of law in the four corners of the opinion itself, which could hypothetically create conflict if there were another opinion

reaching a contrary result, for this Court to have subject matter jurisdiction. Citing to its other recent decision in *Stallworth v. Moore*, 827 So. 2d 974 (Fla. 2002), where the court discussed jurisdictional jurisprudence relative to per curiam affirmances without written opinions, ultimately holding that it lacks discretionary jurisdiction to review such decisions, this Court expressed its belief in the constitutional limitation that only those decisions which expressly "address a question of law within the four corners of opinion itself" should serve as a basis for jurisdiction. *Id.* at 1145.

While this case is neither a per curiam affirmance nor a per curiam affirmance with citation, it is important for this Court to remember how Fifth District's opinion began:

> This appeal of a final judgment arises from appellee's negligence action for injuries sustained in an automobile accident. **None of appellant's five issues on appeal merit reversal**; however, appellant's challenge to the jury instructions given by the trial court, and the damages awarded pursuant to those instructions, **merit discussion**. *Sweitzer v. Thomas*, 834 So. 2d 283, 283 (Fla. 5th DCA 2002)(Emphasis added).

The Fifth District's summary dismissal of the other issues raised on appeal is analogous to a per curiam affirmance, in that there is no discussion of the facts of the case nor any expressly addressed question of law found within the opinion's four corners on those issues.

In light of this defendant's attempt to have this Court simply re-review the identical brief she filed before the Fifth District, this Court may wish to remember the dissent in *Foley v. Weaver Drugs, Inc.*, 177 So. 2d 221 (Fla. 1965), where Justice Thornal sought to enforce the amendment made to Article 5 of our State Constitution, limiting this Court's discretionary review[5]. Justice Thornal's palpable despair emphasizes why this Court should not review any of the other issues raised by the defendant in this appeal, because as Justice Thornal explained:

> All of this simply means that the district court decisions are *no longer final* under any circumstances. It appears to me that the majority view is an open invitation to every litigant who loses in the District Court, to come on up to the Supreme Court and be granted a second appeal--the very thing that many feared would happen--and the very thing which we assure the people of this State would *not* happen when the judiciary article was amended in 1956.
>
> * * *
>
> I would never again accept with finality a decision of the District Court. Under the majority decision today, there is always that potential opportunity to obtain another examination of the record by the Supreme Court with the hope that it will in someway differ with the District Court. *Id.* at 234 (Thornal, J., dissenting)(Emphasis in original).

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[5]If this Court reviews defendant's brief filed in the Fifth District Court of Appeal and her brief filed here, it will see that the two are **identical**, with the only exception being that in her brief before this Court, defendant incorporate the procedural aspects of what occurred below on page 15 of her Statement of the Case and Facts.

Notwithstanding this Court's ultimate decision about whether it does have jurisdiction to review a case where all of the district courts agree on the applicable principle of law, but one court distinguishes the facts of the case, there is simply no basis for this Court, even in its discretion, to accept any further review of the remaining issues which were summarily affirmed by the Fifth District below.

ARGUMENT - PART II

The defendant's filing of her identical brief filed in the Fifth District below, painfully illustrates defendant's unabashed attempt for a second *de novo* review, and should not be tolerated. However, in the event that this Court is inclined to review those merits, plaintiff furnishes this Court with her response to the other arguments on the merits that she too filed below.

I. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR NEW TRIAL BASED UPON HER PRIOR MOTION FOR DIRECTED VERDICT WHEN THE RECORD CLEARLY CONTAINED EXPERT MEDICAL TESTIMONY THAT PLAINTIFF SUFFERED A PERMANENT INJURY.

§627.737(2) provides in pertinent part:

> In any action of tort...a plaintiff may recover damages in tort for pain, suffering, mental anguish, and inconvenience because of bodily injury, sickness, or disease arising out of the ownership, maintenance, operation, or use of such

> motor vehicle only in the event that the injury or disease consists in whole or in part of:
>
> (b) Permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement.
>
> (c) Significant and permanent scarring or disfigurement.

According to this court in *Cecile Resort, Ltd. v. Hokanson*, 729 So. 2d 446 (Fla. 5th DCA 1999), in considering a motion for directed verdict by the defendant, a trial court must evaluate testimony in a light most favorable to the plaintiff, deducing every reasonable inference from the evidence in the plaintiff's favor. *Id.* at 447. This court then applies that same standard for review on appeal. *Id.*

While the defendant complains that the trial court should have granted her a new trial because there was allegedly no expert medical testimony that plaintiff suffered a permanent injury, her argument not only ignores the standard of review set forth in *Cecile Resort*, but also misconstrues the applicable law regarding a plaintiff's burden to meet the permanent injury threshold. The inquiry begins with the testimony of plaintiff's treating surgeon, Dr. Bittar, who opined as follows:

> Q: Do you have an opinion as to whether Ms. Thomas has a permanent injury as a result of the car wreck?
>
> A: I think she has surgical scars. I think she will probably have some loss in range of motion, although it's minimal. And I believe that she's

> restored functional range of motion. She still does have some loss of range of motion.
>
> (Deposition of Edward S. Bittar, M.D., April 17, 2001, p. 35).
>
> * * *
>
> Q: And although the car wreck as described to you by Ms. Thomas isn't the most likely scenario for a torn labrum, is it your opinion that it was this wreck of July of 1999 that caused the injury, the torn labrum, and then the ultimate surgery for Ms. Thomas?
>
> A: Yes.
>
> (Deposition of Edward S. Bittar, M.D., April 17, 2001, pp. 67-68).

Plaintiff fully acknowledges that she had the burden of demonstrating a permanent injury in order to overcome the threshold requirement set forth in §627.737. Defendant's entire argument rests upon the notion that because Dr. Bittar did not actually use the words "within a reasonable degree of medical probability," then his opinion fails to provide the evidentiary foundation Ms. Thomas needed to overcome the threshold. Under the law, that argument fails.

In *City of Tampa v. Long*, 638 So. 2d 35 (Fla. 1994) cited by the defendant, the supreme court found a jury instruction to be erroneous when it advised the jury that permanent injury within a reasonable degree of medical probability could include

permanent subjective complaints of pain. *Id.* at 38-39. However, the portion of that case pertinent to this court's inquiry found that subjective evidence of pain may properly be used to prove the existence and permanency of an injury, provided that expert medical testimony is presented to establish its existence and permanency within a reasonable degree of medical probability. *Id.* at 38. There, the plaintiff's physician had noted the plaintiff's subjective complaints of pain, and testified according to the court, "that he had observed evidence of her injuries and that, in his opinion, the pain was of a permanent nature." *Id.* at 37.

There is obviously no requirement that the actual "magic" words "within a reasonable degree of medical probability" be used, as long as the physician offers an opinion within a reasonable degree of medical probability that more probably than not, the pain is of a permanent nature. *Compare, Caldwell v. Halifax Convalescent Center*, 566 So. 2d 311, 313 (Fla. 1st DCA 1999)(In rejecting the defendant employer's argument in a workers' compensation case that the physician's opinions were not competent evidence of a causal connection, because they were not framed in terms of "reasonable medical probability," the court found that "it is not necessary for a physician to utter the magic words 'reasonable medical probability' to support a finding of causal relationship if the evidence provides competent substantial evidence of a causal relationship"). As evidenced from the question reprinted from page 35 of

his deposition, Dr. Bittar obviously opined within a reasonable degree of medical probability that plaintiff will have some loss of range of motion. Simply because he did not include the exact verbiage, does not mean that his "more probable than not" opinion did not meet the proper standard. *Accord, Caldwell*, 566 So. 2d at 313.

Additionally, Dr. Bittar further opined that Dawn Thomas has suffered surgical scars which also meets the standard for permanency set forth in §627.737(2)(c). It is interesting to note that the language "within a reasonable degree of medical probability" does not even appear in §627.737(2)(c), most likely, because scarring is an objective sign of permanency.

Defendant misleadingly cites *Estate of Wallace v. Fisher*, 567 So. 2d 505 (Fla. 5th DCA 1990) in an attempt to convince this court that a permanent injury can only be defined as that "other than scarring or disfigurement." (Initial Brief, p. 22). However, the *Estate of Wallace* case was dealing specifically with a jury instruction which tracked the language of §627.737(2)(b) only, presumably because there was no evidence of scarring under the facts of that case. In the face of the full paragraph of §627.737(2), it is intellectually dishonest to suggest the threshold requirement in every case excludes scarring. Obviously, that is one out of four possible methods used to demonstrate a permanent injury pursuant to the no-fault statute, and the *Estate of Wallace* case focused only upon one of the four methods.

Whether a plaintiff has suffered a permanent injury required to meet the no-fault threshold is a question of fact for the jury to decide. *See, Cohen v. Pollack*, 674 So. 2d 805, 806 (Fla. 3rd DCA 1996). In reviewing Dr. Bittar's testimony in a light most favorable to the plaintiff, indulging every reasonable inference deduced from the evidence in Plaintiff's favor, it is indisputable that evidence in the record presented a jury question and ultimately supported the jury's permanency finding. Dr. Bittar stated his opinion within a reasonable degree of medical probability regarding her loss of range of motion which fits within §627.737(2)(b). He further opined that she has surgical scars, which has been held to be a factor satisfying the permanent injury threshold. *See, Scarfone v. Magaldi*, 522 So. 2d 902 (Fla. 3rd DCA), *rev. denied*, 531 So. 2d 1353 (Fla. 1988)(Surgical scars held to constitute permanent injury). Ironically, had the trial court actually agreed with defendant, and granted her motion for directed verdict, that ruling would have been reversible error. This court must affirm under Point I.

II. *THE CERTIFIED ISSUE.* WHILE THE TRIAL COURT'S GIVING OF THE NON-STANDARD JURY INSTRUCTION REGARDING NON-ECONOMIC DAMAGES HAS NOW BEEN DETERMINED TO HAVE BEEN LEGALLY INCORRECT, ANY ERROR IN GIVING THAT INSTRUCTION WAS HARMLESS IN LIGHT OF THE JURY'S

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ENCY.

This point is addressed above under Argument - Part I, Section II, and is noted here simply for purposes of symmetry.

III. AS THE TRIAL COURT FOLLOWED RECENT PRECEDENT OF THIS COURT, IT IS DISINGENUOUS FOR DEFENDANT TO ARGUE THAT THE COURT ERRED IN COMPELLING HER TO RESPOND TO INTERROGATORIES AND A REQUEST TO PRODUCE.

In *Springer v. West*, 769 So. 2d 1068, 1069 (Fla. 5th DCA 2000), this court held:

> Where an insurer provides a defense for its insured and is acting as the insured's agent, the insurer's relationship to an expert is discoverable from the insured. To hold otherwise would render *Boecher* meaningless in all but a similar class of classes. Similarly, a defendant may question a plaintiff about any relationship between his or her attorney and the plaintiff's trial expert. In both cases, the information sought is relevant to the witness' bias and will enhance the truth-seeking function and fairness of the trial, as intended by *Boecher*. 733 So. 2d at 998.

This court has already directly addressed this issue. Still, defendant asks this court to reverse itself, and to revisit the evolution of six years of prior precedent from the district and supreme courts to arrive at the conclusion that the trial court abused its

discretion in compelling Dr. Urrichio simply to reveal the total amount of fees Mrs. Sweitzer's insurer, State Farm, paid him in the three years prior to trial. This point on appeal is baseless in light of this court's direct precedent in *Springer*. Even more importantly perhaps, the issue was not preserved and defendant has completely ignored the standard of review.

Approximately one week before trial, the lower court orally granted plaintiff's Motion to Compel regarding information she was seeking from Dr. Urrichio. Defendant did not file a petition for writ of certiorari from that ruling. Instead, the issue was brought up again on the first day of trial in the form of a motion in limine (T 4-20). Plaintiff sought the information and in the alternative, moved to strike Dr. Urrichio in light of defendant's failure to have provided it (T 9). The court ordered defendant to produce the information sought or risk having Dr. Urrichio stricken (T 14-15).

Ultimately, defendant did produce the information. However, when it came up during Dr. Urrichio's testimony, defendant did not renew her objection (T 434-435). As this court has held, the failure to object contemporaneously to evidence when it is offered, notwithstanding a motion in limine, waives the issue for appellate review. *See, Parry v. Nationwide Mut. Fire Ins. Co.*, 407 So. 2d 936, 937 (Fla. 5th DCA 1981).

Even if the production of this information and its subsequent admission into evidence were somehow erroneous, defendant provides no authority or even any argument for why this ruling constituted reversible error. As this court wrote in *National Sec. Fire and Cas. Co. v. Dunn*, 751 So. 2d 777, 778 (Fla. 5th DCA 2000):

> Trial courts have broad discretion in discovery matters, and discovery orders will only be overturned where the court has abused that discretion.

Even if the error were preserved, because the trial court followed controlling precedent of this court (T 13), and the admission of the information could not be a miscarriage of justice, the trial court in no way abused its very broad discretion. As such, this decision must be affirmed.

IV. THE TRIAL COURT DID NOT ABUSE ITS SOUND JUDICIAL DISCRETION IN GRANTING THE PLAINTIFF'S MOTION IN LIMINE TO EXCLUDE THE EXPLANATION OF THE DEFENDANT'S ABSENCE FROM TRIAL AND EXCLUDING THE DEFENDANT'S EXPERT PHYSICIAN FROM TESTIFYING ABOUT PLAINTIFF'S FAILURE TO PERFORM TASKS NOT SPECIFICALLY ALLOWED BY THE RULE ON COMPULSORY PHYSICAL EXAMINATIONS.

This court recently wrote in *Stewart & Stevenson Services, Inc. v. Westchester Fire Ins. Co.*, 804 So. 2d 584, 587 (Fla. 5th DCA 2002):

> A trial court's decision to admit or exclude evidence is reviewed by utilizing the abuse of discretion standard of review. '[T]he admission of evidence is within the sound judicial discretion of the trial judge, whose decision in such regard must be viewed in the context of the entire trial.' Absent an abuse of discretion, the trial court's ruling on evidentiary matters will not be overturned. See, LaMarr v. Lang, 796 So. 2d 1208, 1209 (Fla. 5th DCA 2001).

Defendant argues to this court that the trial court prevented her from presenting relevant and material evidence which led to "trickery" and "legal gymnastics" by the plaintiff. (Initial Brief, p. 41). Defendant's brief is replete with criticism that the failure to admit this evidence has undermined the whole jury system, and that plaintiff and the trial court unwittingly conspired to actively mislead the jurors, by keeping them in the proverbial dark about the truth. Not only does defendant's brief completely ignore the standard of review, as well as the tangential, collateral nature of the evidence she is complaining about, defendant seems convinced that her indignation alone about the grave injustices she perceives these evidentiary rulings caused, should provide enough basis for this court's reversal. That is simply not the case.

Judge Maxwell carefully considered each of these motions in limine. On the issue of the defendant's absence from trial, for example, the trial court carefully weighed the prejudice to the respective parties (T 20-25). While the defendant is 89 years old and in poor health, defense counsel himself admitted that they were unable

to locate her (T 23). The trial court gave defense counsel an opportunity to articulate any purported prejudice which would occur to the defendant, if the court remained silent on the issue (T 22). The trial court then ruled that nothing would be said, but that defense counsel could inquire in voir dire as to whether or not attendance would be prejudicial to the jurors (T 22-24). The court explained that the fact that there had been no communication with the defendant prohibited him from allowing defense counsel to discuss health (T 25). Obviously, Judge Maxwell carefully considered this ruling--a ruling about which reasonable people could differ--therefore defeating an abuse of discretion argument.[6]

Similarly, defendant argues this verdict should be reversed because the trial court refused to allow the physician hired by the defendant to counter the medical allegations from taking additional x-rays, failing to fill out a client history form, and failing to allow the doctor to take a Polaroid picture of her. Because the trial court found that the lack of a Polaroid picture did not impede the physician's ability to evaluate Ms. Thomas' medical condition, and further ruled that patient history forms

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[6]Pursuant to the supreme court's opinion in *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980), discretion is abused when judicial action is arbitrary or unreasonable, or where no reasonable person could take the view adopted by the trial court. However, if reasonable people could differ as to the propriety of the action taken by the trial court, it cannot be said that the trial court abused its discretion.

often seek an abundance of irrelevant information, the court determined that it was not going to allow the defendant to admit evidence on those two points (T 30-33).

The court struggled with the issue of the x-rays (T 33). However, upon learning that the doctor gave the plaintiff a choice about whether she wanted to have x-rays taken--i.e., it was not a mandatory requirement--the court ultimately ruled that because it was merely suggested by the doctor, it was not going to allow defendant to introduce the fact that plaintiff refused the x-rays (T 36-38; 58).

Defendant's brief fails to include any reference of the court's careful consideration of these issues. Nor does it address the standard of review. Instead, defendant simply clamors that her trial was unfair. Once again, defendant has fallen far short of demonstrating a basis for reversal.

V. THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE THE JURY AN INSTRUCTION ON MITIGATION OF DAMAGES.

A party presenting the failure to give a jury instruction as an error on appeal must show the requested instruction accurately stated the applicable law, that the facts of the case supported giving the instruction, and that the instruction was necessary in order to allow the jury to properly resolve all the issues in the case. *Reyka v. Halifax Hosp. Dist.*, 657 So. 2d 967, 969 (Fla. 5th DCA 1995). Even if the instruction should

have been given, trial courts are accorded broad discretion in formulating appropriate jury instructions, and appellate courts do not find reversible error unless the error complained of resulted in a miscarriage of justice, or the failure to give the instruction was reasonably calculated to confuse or mislead the jury. *Id.*

Assuming that this instruction stated the applicable law correctly, and the facts of the case supported the instruction, it certainly was not necessary to allow the jury an opportunity to properly resolve all issues in the case. While plaintiff's research has revealed no case discussing a mitigation of damages jury instruction in a tort setting specifically, and the standard jury instructions certainly do not address the issue, she does wish to present this court the case of *Smyer v. Gaines*, 332 So. 2d 655 (Fla. 1st DCA 1976) by analogy.

In *Smyer*, a wrongful death case, defendant argued that the trial court should have given an instruction that the jury should consider the evidence of plaintiff's remarriage in the mitigation of his loss of support and services of his deceased wife. The trial court had refused to give such an instruction, and the First District affirmed that decision. While the court noted that evidence of remarriage of the decedent's spouse was admissible so that the whole truth could be known, it could not be considered a mitigation of the elements of damage recoverable under the wrongful death act by the surviving spouse. *Id.* at 659.

Similarly, here, the defendant was free to present, and did present, evidence of plaintiff's purported failure to mitigate her damages. In considering its award of damages, the jury certainly had the allegedly "mitigating" evidence before it, without the need to have a specific jury instruction on the issue. Like this court said in *Reyka*, even if this court should have given that instruction--a fact with which plaintiff steadfastly disagrees--there is certainly no showing that there was a miscarriage of justice or that the failure to give the requested instruction was reasonably calculated to confuse or mislead the jury. Once again, defendant has wholly omitted any reference to the standard of review, which would reveal that there was no error in the trial court's refusal to give this instruction.

CONCLUSION

Because the Fifth District agreed with the rule of law set forth by the other district courts of appeal and has explicitly distinguished the facts of this case from the facts in those cases, there is no express and direct conflict pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), and this Court lacks the constitutional

authority to accept jurisdiction of this case. If jurisdiction were proper, this Court should affirm on all issues.

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I HEREBY CERTIFY that a copy of the foregoing has been forwarded by U.S.

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Respondent's Answer on the Merits has been typed using the 14 point Times New Roman font.

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