IN THE SUPREME COURT
OF FLORIDA

ETHEL THOMPSON SEIZER,

CASE NO.: SCOOP-165

Petitioner,

vs.

DAWN M. THOMAS,

Respondent.
_____/

INITIAL BRIEF OF PETITIONER ON THE MERITS

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-and-

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STATEMENT OF THE CASE AND FACTS

Dawn M. Thomas, Plaintiff/Appellee, sued Ethel Thompson Sweitzer, Defendant/Appellant, on April 28, 2000. (R. 67-68). The Complaint alleged that on or about July 13, 1999, Sweitzer struck a vehicle that the Plaintiff, Thomas was operating. The Complaint further alleged that Thomas suffered injury to her right arm and shoulder in the collision and that her medical expenses to date exceed $22,000.00.

Defendant, Sweitzer filed her Answer. (R. 69-72). The defendant alleged that despite requests that plaintiff do so, the plaintiff had refused or failed to provide documentation in support of her damages claims, and had failed or refused to sign authorizations so her medical records could be obtained on behalf of the defendant. The defendant was unable to respond to paragraph 6-9 of the Complaint.

The defendant denied, that the plaintiff sustained injury or injuries which met the "threshold" requirement of section 627.737, Florida Statutes (1999).

The defendant also set forth affirmative defenses for which the plaintiff never filed a reply. The defendant alleged as an affirmative defense that the plaintiff had a duty to mitigate her damages and that the recovery of the plaintiff, if any, should be reduced by a proportion or an amount equivalent to or reflecting any failure to mitigate damages.

The defendant filed a request for the plaintiff to submit to a compulsory examination. (R. 118-119).

The plaintiff objected, and the defendant filed a Motion to Compel attendance at compulsory medical examination. (R. 120-122; 122-125). The plaintiff objected because the examination was scheduled to take place at Dr. Uricchio's office in Winter Park, Orange County, Florida, with the expense borne by the defendant. The plaintiff objected solely because examination was to take place outside the county of the plaintiff's residence.

The defendant, Ethel Thompson Sweitzer, resided in Indianapolis, Indiana area, and was 87 years of age. When she failed to attend a scheduled mediation, the plaintiff filed a Motion for Sanctions against her. She, however, attended the mediation by telephone from the office of Attorney John Morse, who practices in Indianapolis, Indiana and who also attended the entire mediation by telephone. (R. 147-154; 145-146).

Counsel for the plaintiff then filed a Supplemental Request to Produce requesting that Ms. Sweitzer produce all documents, writings, e-mail and the like of whatsoever nature pertained to the scope of employment of her testifying expert witness related to the case, among others. The plaintiff served the Supplemental Request to Produce on February 23, 2001.

The plaintiff then filed her Second Supplemental Request to Produce requesting any and all investigation done on behalf of the defendant.

The defendant responded to the plaintiff's Second Supplemental Request to Produce stating that there were no such documents. (R. 191-192).

The defendant then responded to the plaintiff's Supplemental Request to Produce. (R. 183-216).

The defendant attached a copy of any and all correspondence from the defendant to Dr. Uricchio. In regard to Request to Produce 2, 3, and 4, the defendant objected on the grounds that the information sought was not available to the defendant and was available, if permissible, through the deposition testimony of Dr. Uricchio. The defendant objected to Supplemental Request to Produce number 2 and attached any and all correspondence to Dr. Uricchio, but, as to compensation, stated that it was handled by the defendant's insurance company. In response to Supplemental Request to Produce number 5, the defendant objected on the grounds that it sought the information is not available to the defendant, that the information was available, if permissible through deposition testimony of Dr. Uricchio, and that the information was irrelevant, immaterial and not calculated to lead to the discovery of admissible evidence relying on *Sykens v. Elkins*. The defendant responded to Supplemental Request to Produce number 6 and number 7 by attaching the

documents. The defendant filed her Response to Plaintiff's Supplemental Request to Produce on April 11, 2001.

The plaintiff then filed her trial interrogatories. (R. 227-237). Next, the plaintiff filed her expert interrogatories to the defendant. (R. 238-251). The defendant answered the trial interrogatories with objections on the grounds that the interrogatories exceeded the scope and number permissible interrogatories under the rules of civil procedure. (R. 236-237). The defendant filed her answers to the expert interrogatories by alleging that expert interrogatories 2 - A-F; 3 - A-D; 4; 5 - A-C; 6; 7 - A-D; 8; 9 - A-F; 10; 11 A-F; 12; 13; 14; by declaring that the same exceeded the scope and number permissible Interrogatories under the rules of civil procedure. (R. 249-251).

The plaintiff filed Motions in Limine to preclude the defendant from explaining her absence in the event that she did not personally appear at trial. The plaintiff further requested that any reference that she was uncooperative in a compulsory medical examination with the defendant's expert because she chose not to completely fill out the patient information sheet, chose not to have an identification photograph taken by the expert, declined photographs showing the extent of her range of motion by the defendant's expert, and declined x-rays of the cervical spine, thoracic spine and right shoulder be excluded. The plaintiff also requested that any reference of

psychological/psychiatric counseling of the plaintiff had in the past be excluded. (R. 185-187). All of the motions in limine were granted by the trial court. (Tr. Vol. 1, P. 36).

The plaintiff filed a motion to compel the responses to the request to produce, answers to interrogatories, or, in the alternative, a motion to strike expert witnesses. (R. 217-226). The trial court entered an order and granted the plaintiff's motion to compel responses to supplemental request to produce, numbers 2, 3 and 4. The order was entered on May 4, 2001, and required the responses by May 3, 2002.

The plaintiff's motion to compel response s to expert interrogatories 2 through 14 was granted over the defendants objection that the number exceeded 30 because of lateness of the defendant's response and customer usage of both expert in Trial Interrogatories. The defendant was also required to comply by May 3, 2002.

In the pre-trial hearing, the defense argued against the motion to compel by declaring that what was discoverable under the *Boucher* [*v. Allstate Ins. Co.*] case was not discoverable in the instant case because the instant case is a third party case. (Tr. Vol. 1, P. 11).

The trial court declared that it was reserving ruling on whether or not to strike Dr. Uricchio's opinion, to see how the compliance went and the relationship with State Farm, pending their compliance with his Order. (Tr. Vol. 1, P. 20).

The plaintiff argued that they did not believe the defendant or their counsel or any of their witnesses should be able to discuss the fact that the defendant was old and potentially ill, and they did not know where she was. The argument continued that it was only an attempt to elicit sympathy. (Tr. Vol. 1, P. 20).

The defense argued that it was more prejudicial to not explain to the jury. The jury could get the impression that she did not come to trial because she was involved in a lawsuit. The defense wanted to explain that she was unable to attend for health reasons. (Tr. Vol. 1, P. 21). The defense argued that her health was poor, she had heart problems, she was 89 years old. That surely would not cause a problem for the plaintiff. (Tr. Vol. 1, P. 22-23).

The trial court ruled that the attorney could only say that she was not able to attend. (Tr. Vol. 1, P. 24).

Next, the plaintiff discussed their motion in limine requesting that defense counsel or any witness withhold any reference that the plaintiff was under a compulsory medical examination with the defense expert because Dr. Uricchio referenced in his report that she refused to completely fill out the patient information sheet. The plaintiff also declined x-rays of her neck, mid back or right shoulder. (Tr. Vol. 1, P.25-27). The defense argued that the x-rays were declined, history forms were not filled out, range of motion exercises were declined, as well as the

identification photograph. All of this was done at the direction of the plaintiff's attorney. (Tr. Vol. 1, P. 27-28)

The defense argued that while playing sports, the plaintiff fell, tore some ligaments in her wrist, and had to undergo physical therapy. The argument continued that Dr. Bittar, the plaintiff's expert witness, said that she had not done the physical therapy and that she may very well have required surgery. Dr. Bittar testified that the actual injury she suffered in the instant case was most consistent with someone involved in a sporting-type activity. Dr. Bittar said the wrist injury resolved, but there were two issues that were going to be made.

First, the defense had a mitigation of damages argument. After the instant incident, the plaintiff did not do all of the physical therapy, and, therefore, now she needs surgery. In the 1995 incident she fell, and interestingly, even though surgery was a suggestion, she did go to physical therapy, now she does not need the surgery.

Further, Dr. Uricchio would testify the mechanism of the injury and the fall was just as consistent with the mechanism of injury that allegedly caused the torn labrum which is in the shoulder in the instant incident. Both were consistent.

Dr. Bittar in his deposition could not tell how long the labrum had been torn, and agreed that the labrum could be a result of a sporting activity, the defense argued

that it was very relevant and that it was something the jury was going to have to hear about and decide.

As to the plaintiff's headaches which she wanted evidence of excluded at trial, the plaintiff's own expert, Dr. Bittar, testified that a long-standing history of headaches was consistent with someone with shoulder injuries when you have a shoulder injury lap/shoulders, which she had, you're using the trapezes muscles. When you use those, you put stress on the occipital part of the back of the neck which causes headaches. Dr. Bittar agreed during his deposition that someone with a long-standing history of headaches is consistent with someone with a shoulder problem, so they were both very relevant to the instant case. (Tr. Vol. 1, P. 40-43).

The defense further argued that Dr. Desai, the first orthopaedist who saw her, did x-ray her wrist because there were complaints of wrist pain after the instant accident. The trial court reserved ruling on all of them. (Tr. Vol. 1, P. 46).

The trial court ultimately ruled that he was not going to allow Dr. Uricchio to talk about the fact that the plaintiff would not have the x-rays or refused to have a picture taken. (Tr. Vol. 1, P. 58).

After opening arguments, the plaintiff presented the videotaped deposition of Shekhar Desai, M.D. (Tr. Vol. at 219). The first time Dr. Desai saw the plaintiff was on July 23, 1999. She reported to Dr. Desai that she injured her right shoulder, her

right forearm, and her right wrist. (Depo. at P. 10). Two x-rays were done of her shoulder and they were unremarkable. (Depo. at P. 13-14).

An MRI was done on her shoulder and there was a little bit of inflamation.

When Dr. Desai saw her on September 8, 1999, she was getting better, but her shoulder was still bothering her so Dr. Desai recommended she see Dr. Bittar. (Depo. at P. 19). At that time, Dr. Desai said that her shoulder was slowly but surely getting better. (Depo. at P. 20).

The MRI done on August 5, 1999 revealed that the muscles around the shoulder joint were normal in size and intensity. (Depo. at P. 27). The glenoid labrum was also in tact. (Depo. at P. 28). People that have congenitally lacks shoulders can have fluid in the joint without a traumatic event. (Depo. at P. 29).

The videotaped deposition of Dr. Bittar was published to the jury next. (Tr. Vol. 2 at 220). Dr. Bittar saw Ms. Thomas on September 9, 1999. Ms. Thomas reported that she was restrained with seatbelts when she as the driver of her own vehicle when she was struck by another vehicle. She had her hand on the gearshift, her right hand, and sustained an injury to her right upper extremity at the time of impact. (Depo. at P. 7). The MRI suggested that there was no tear of the rotator cuff or of the glenoid labrum. (Depo. at P. 10). The MRI was normal for Ms. Thomas. (Depo. at P. 11).

The plaintiff reported that she had no success with physical therapy. (Depo. at P. 16). Dr. Bittar stated that there was no question in his mind that her shoulder was loose prior to the accident; she had congenitally loose shoulder. (Depo. at P. 26).

Dr. Bittar thought that Ms. Thomas attended the physical therapy that he had prescribed, but had not restored her range of motion. (Depo. at P. 30-31).

Plaintiff's counsel asked Dr. Bittar if he had an opinion within a reasonable degree of medical probability as to the cause of Ms. Thomas' shoulder injury. Dr. Bittar thought that the shoulder problems were causally related to the motor vehicle accident. (Depo. at P. 34).

Next, the plaintiff's counsel asked Dr. Bittar if he had an opinion as to whether Ms. Thomas had a permanent injury as a result of the car wreck.

> "I think she has surgical scars. I think she will probably have some loss of range of motion, although it's minimal. And, I believe that she has restored functional range of motion. She still does have some loss of range of motion.

(Depo. at P. 35).

When Dr. Bittar saw the plaintiff back in 1995, Dr. Bittar indicated that if the plaintiff had not completed the physical therapy, or if the physical therapy didn't work, she could have actually needed a surgical procedure. (Depo. at P. 40). Dr. Bittar

began seeing the plaintiff in January of 1995, the plaintiff completed the physical therapy, in April of 1995 there was no need for the surgery. (Depo. at P. 41-42).

Being unable to write, having a difficult time writing, is not consistent with a torn labrum. (Depo. at P. 55-56). It would have to come from some sort of traumatic event, whether it be a javelin thrower, baseball player, or a car accident. (Depo. at P. 57).

Dr. Bittar stated that she probably had an impairment because of chronic pain, and probably has an impairment because of the surgical wounds. (Depo. at P. 60).

Because of her laxity in her left shoulder, it would be reasonably possible in the future that she may require the identical surgery on her left shoulder. (Depo. at P. 64).

Next, Gary Stern, a physical therapist seen by the plaintiff, testified. (Tr. Vol. 2 at 221). Mr. Stern was the therapist who worked with Ms. Thomas after she had her shoulder surgery. (Tr. Vol. 3 at 224). Mr. Stern was never made aware of the memo of 10/12/99 to Dr. Bittar from Advanced Physical Therapy indicating that she had demonstrated and reported consistent improvement and progression. (*Id.* at P. 233).

Next, Teresa Thomas, the plaintiff' mother testified. (*Id.* at P. 242). Theresa Thomas, Dawn Thomas' mother, testified for the plaintiff. (Tr. Vol. at 242).

Dawn Thomas testified next. (*Id.* at P. 268).

Prior to Dr. Uricchio testifying, defense counsel declared that they had been able to provide the plaintiff with a number of $616,000.00. The problem, however, was that it was a 1099 and there was no breakdown as to whether it was for depositions, medical care and treatment, IME's, depositions involving IME's. (*Id.* at P. 344).

The defendant then called Bruce Wills, advance physical therapist. (*Id.* at P. 355). Mr. Wills treated Dawn Thomas when Dr. Bittar referred Ms. Thomas to Advanced Physical Therapy in September of 1999. (*Id.* at P. 356).

On each visit, the plaintiff had indicated she was feeling better overall and that she was steadily improving. (*Id.* at P. 362-364). She had a total of nine visits.

On 10/28/99 the Advanced Physical Therapy called to leave a message to get her to come to the appointment. There was no indication that she ever returned the phone call. Again, on 11/9/99 Advanced Physical Therapy left a message that she needed to return. (*Id.* at P. 365). She never returned the call. (*Id.* at p. 366).

Mr. Wills wrote a letter to Dr. Bittar on 10/12/99 reporting that Ms. Thomas was demonstrating and reporting to him consistent improvement and progression. Mr. Wills mentioned to Dr. Bittar that there were still plans to establish a ehabilitation program, but Ms. Thomas never returned except for the one visit she made from that point on. (*Id.* at P. 366-367).

Dr. Uricchio saw Dawn Thomas on March 12, 2001. At that time, he had no medical records. Dr. Uricchio testified that he never looked at records until he talked to the patient. (*Id.* at P. 380). Dr. Uricchio liked to get it directly from the patient rather than having the history retained in a run through somebody else's opinion. (*Id.* at P. 381). When Dr. Uricchio went through the medical records and reviewed the MRI, he agreed that it was benign. He did not see any sign of a torn rotator cuff or torn glenoid labrum. Genital laxity is not an unusual findings. It is fairly common. (*Id.* at P. 386). Dr. Uricchio reviewed the x-rays done both at the emergency room and by Dr. Desai a few weeks later. The x-rays were all within normal limits. (*Id.* at P. 388-389).

Dr. Uricchio found it difficult to reconcile the mechanism of injury allegedly caused by her hand on the gearshift to what was found in surgery. Therefore, he found it difficult to relate it specifically to the instant accident. (*Id.* at P. 395).

Defense counsel asked Dr. Uricchio a hypothetical question. "If hypothetically at the time of the incident Dawn Thomas' had was on the gearshift, we have a frontal impact, and hypothetically the arm goes back. Do you have an opinion as to the location of the tear of the labrum? (Tr. Vol. 3 at P. 427-428). Dr. Uricchio stated that you would anticipate that it would tear the posterior, the back part of the labrum. (*Id.* at P. 428). Ms. Thomas' front part of her labrum was injured. With a force driving

the. If someone is playing soccer and falls forward and someone falls on their arm, that is consistent with a posterior tear. (*Id.* at P. 430).

Next the plaintiff moved for a directed verdict on liability. (*Id.* at P. 447). The trial court reserved. (*Id.* at P. 452).

The defendant then moved for a directed verdict on lack of permanency and lack of any future economic damages. (*Id.* at P. 453).

The trial court denied both. (*Id.* at P. 459).

The plaintiff moved for directed verdict on the issue of mitigation of damages. (*Id.* at P. 459-460). The trial court ruled that mitigation of damages was fair game for the jury. (*Id.* at P. 462). However, the trial court refused to instruct the jury as to mitigation of damages. (*Id.* at P. 472-474).

Closing arguments followed.

In final closing argument, plaintiff's counsel argued that Mr. Turner went out and hired Dr. Uricchio, a doctor he has paid over the last 3½ years $650,000.00 to testify that people aren't hurt. (*Id.*at P. 529).

The court then instructed the jury. (*Id.* at P. 535).

The jury returned a verdict finding that the damages sustained by Ms. Thomas for medical expenses and lost wages in the past to be $30,640.68, the present value of any future damages for medical expenses is $1,680.00; the amount of damages

sustained by Dawn Thomas for physical impairment, disfigurement, and loss of capacity for the enjoyment of life in the past $15,000.00 and in the future, $10,000.00. (*Id.* at P. 548). Next, the jury determined that Dawn Thomas sustained a permanent injury and that she sustained $15,000.00 for pain, suffering and inconvenience in the past and $10,000.00 for pain, suffering and inconvenience in the future. (*Id.*) The total damages of Dawn Thomas was $82,320.68. (*Id.* at P. 548-490).

The defendant timely appealed to the Fifth District Court of Appeal. (R.404-409). The fifth district held that none of the five (5) issues merited reversal; however, the court was of the opinion that the challenge to the jury instructions given by the trial court merited discussion. (Appendix). The court, after discussion, affirmed the trial court in all respects.

The defendant timely invoked the discretionary jurisdiction of this Honorable Court. The Court accepted jurisdiction and ordered the parties to file briefs on the merits.

SUMMARY OF THE ARGUMENT

Section 627.737(2), Florida Statutes, Florida's no-fault statute, requires that before a plaintiff can recover damages from a driver that is sufficiently secured by

insurance, the plaintiff must meet a threshold of permanent injury within a reasonable degree of medical probability. Such must be established by expert testimony. The plaintiff failed to meet this threshold. Therefore, the trial court reversibly erred in failing to direct a verdict in the defendant's favor.

The trial court erred in instructing the jury regarding "common law noneconomic damages" and allowing the jury to assess those damages prior to a finding of a permanent injury. Section 627.737(2) sets a threshold to the recovery of noneconomic damages. The instruction and jury verdict are contrary to Florida law.

The trial court compelled the defendant to produce documents, etc., concerning the defendant's expert, Dr. Uricchio, and requested the same information from Dr. Uricchio based on this Court's decision in *West v. Springer*. The defendant submits that the decision in *West* is not necessary because the Florida supreme court has addressed how a plaintiff may procure documents from a medical expert in a first party lawsuit and a third party lawsuit against an insurer. This Court's decision in *West* led to the instant plaintiff being able to request the same information from both the expert and the defendant. Therefore, the defendant respectfully submits that this Honorable Court should rule that the decision is, in fact, not necessary and withdraw *West.*

Defendants and plaintiffs are supposed to be allowed to try their cases in the light. The defendant, however, was forced to try her case in the dark because of the motions in limine filed by the plaintiff and granted by the trial court. One set of rules should apply to both parties. Two separate rules were applied in the instant case. The set of rules applied to the defendant resulted in a manifest injustice which requires reversal by this Honorable Court. The different set of rules applied to the defendant kept important issues from being presented to the jury and the jury not being instructed according to the defendant's affirmative defense of mitigation of damages.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL WHEN THERE WAS NO EXPERT MEDICAL TESTIMONY THAT THE PLAINTIFF HAD SUFFERED A PERMANENT INJURY

Section 627.737,Florida Statutes**,** is a provision of the Florida Automobile Reparations Reform Act (the "no fault" insurance law)**.** Section 627.737 provides for tort immunity to all automobile owners or registrants of a motor vehicle if those owners and registrants have the security (insurance) required in Section 627.733. In other words, every owner or registrant of a motor vehicle who carries automobile insurance is exempted from any tort liability (damages) unless the injured party has a permanent injury. Section 627.737 limits damages recoverable in a tort action for personal injury by denying recovery for pain and suffering and similar tangible items of damage unless certain conditions are met. *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9, 13 (Fla. 1974). Conversely, if an owner of a motor vehicle to which security is required does not have such security in effect at the time of an accident has no tort immunity, but is personally liable for the payments for personal injury and has all of the obligations of an insurer under the no-fault insurance act. *Id.*

As exclaimed by the court in *Lasky*, the owner of a motor vehicle is **required** to maintain security (either by insurance or otherwise) for payment of the no-fault benefits, and has no tort immunity if he fails to meet this requirement.

> This provides a reasonable alternative to the traditional action in torts. An exchange for his previous right to damages for pain and suffering (in the limited class of cases where recovery of these elements of damage is barred by Section 627.737), with recovery limited to those situations where he can prove that the other party was at fault, the injured party is assured of recovery of his own and salient economic losses from his own insured.

Id. at 13-14.

The injured party, in exchange for his former right to damages for pain and suffering in the limited category of cases where such items are preempt by the act, he receives not only a prompt recovery of his major, salient out-of-pocket losses, even where he is at fault, but also an immunity from being held liable for the pain and suffering of the other parties to the accident if those parties should fall within the limited class for such items are not recoverable (the parties did not sustain a permanent injury). If the injured party does not have a permanent injury, then he looks to his own insurance company, whether he or someone else is at fault, from his own insurance carrier.

Protections are afforded the accident victim by Florida's no-fault insurance in the speedy payment by his own insurer of medical costs, lost wages, etc., while foregoing the right to recover in tort for the same benefits and (a limited category cases) the right to recovery for intangible damages to the extent covered by the required insurance. *Id.* at 14.

Thus, the injured party will receive such benefits as payment of his medical expenses and compensation for any loss of income and loss of earning capacity under the insurance policy he was required by law to maintain, up to the applicable policy limits. All persons who own or who have a registered automobile and have the required automobile insurance, are exempted from tort liability for intangible damages (pain and suffering, mental anguish and inconvenience) unless that person is at fault in causing an automobile accident that results in permanent injuries to another person.

Section 627.737(2) sets forth the limitation an insured person in Florida has on the right to damages. Said section provides that 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, or operation, or use of a motor vehicle only in the event that the injury or disease consists in whole or in part of:

(a) Significant and permanent loss of an important bodily function.

(b) Permanent injury within a reasonable degree of medical probability; other than scarring or disfigurement;

(c) Significant and permanent scarring or disfigurement;

(d) Death.

As it relates to the instant case, the plaintiff could only recover damages in tort for intangible damages if the plaintiff sustained an injury that is permanent. *State Farm Insurance Mutual Automobile Ins. Co. v. Dixon*, 732 So. 2d 1 (Fla. 3d DCA 1999).

2. The plaintiff is required to prove that an injury that resulted from an automobile accident that was caused by the defendant is permanent as a threshold to recovering non-economic damages in a tort suit. *Id.* Section 627.737 completely eliminates any right of recovery for intangible damages for non-permanent injuries. *Id.* at 19.

To be discussed under Point II, the plaintiff was allowed to recover intangible damages without determining first whether there was a permanent injury. That is in direct conflict with the Florida Supreme Court and Section 627.737. If the tortfeasor motorist has provided the security required by the no-fault law, then the injured plaintiff must prove that she sustained a permanent injury in order to recover for non-tangible damages.[1]

A "permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement" is a condition precedent or a threshold requirement to

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[1] If a tortfeasor motorist has failed to provide the security provided by the no-fault law, then the injured plaintiff may obtain pain and suffering damages without satisfying the threshold. *Newton v. Auto-Owners Insurance Co.*, 560 So. 2d 1310, 1311-12 (Fla. 1st DCA) *rev. den.*, 574 So. 2d 139 (Fla. 1990).

the plaintiff's right to recover damages for her personal injuries in this case. *Estate of Wallace v. Fisher*, 567 So.2d 505, 508 (Fla. 5th DCA 1990). The plaintiff must prove that she sustained a permanent injury within a reasonable degree of medical probability other than scarring or disfigurement by a preponderance of the evidence. *Id.* at 509).

In order for a defendant to be subjected to a tort action, the plaintiff must prove by a preponderance of the evidence that she sustained an injury causally related to the motor vehicle accident **and** the injury is permanent. Section 627.737 requires that the plaintiff establish existence of a physical injury and prove that this injury is permanent. Both elements must be proven "within a reasonable degree of medical probability." *City of Tampa v. Long*, 638 So. 2d 35, 37 (Fla. 1994). The statute provides a check on the evidence with its requirements that the existence and permanency of the injury be established "within a reasonable degree of medical probability." *Id*. at 38. The plaintiff must present expert medical testimony to establish the existence and permanency of the alleged injury within a reasonable degree of medical probability. *Id*. These words are not merely for window dressing. It is a requirement that the plaintiff prove the existence and permanency of the injury within a reasonable degree of medical probability.

The very best that the plaintiff could prove was that, within a reasonable degree of probability, her shoulder problems were causally related to the motor vehicle accident. He was only asked if it was probable.

Further devastation to the plaintiff's case occurred when Dr. Bittar stated the following when asked if he had an opinion as to whether Ms. Thomas had a permanent injury as a result of the car wreck:

> "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 has restored functional range of motion, but she still does have some loss of range of motion."

Id.

Since the plaintiff did not prove she suffered a permanent injury within a reasonable degree of medical probability, the defendant/appellant has complete immunity for any intangible damages that the plaintiff/appellee may have sustained. See *Mattek v. White*, 695 So. 2d 942 (Fla. 4th DCA 1997) (it is well established that expert medical testimony is required to prove that a plaintiff has suffered a permanent injury under our no-fault insurance law).Accord, *Holmes v. State Farm Mutual Automobile Ins. Co.*, 624 So. 2d 824 (Fla. 2d DCA 1993) (Ms. Holmes' expert witness has opined that, based on a reasonable degree of medical probability, the accident caused her TMJ injury and that the injury was permanent.)

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GIVING A NONSTANDARD JURY INSTRUCTION THAT ALLOWED THE JURY TO ASSESS NON-ECONOMIC DAMAGES IF THE PLAINTIFF DID NOT SUSTAIN A PERMANENT INJURY

Florida's no-fault threshold statute, section 627.737, Florida Statutes (1999)declares that when an injured party sues another person allegedly at fault in causing an automobile accident for no-fault insurance coverage, the injured party may

be entitled to certain damages if the injured first proves that he or she has suffered a permanent injury.

Section 626.737 provides in pertinent part:

> (1) Every owner, registrant, operator, or occupant of a motor vehicle with respect to which security has been provided as required by ss. 627.730-627.7405, and every person or organization legally responsible for his acts or omissions, is hereby exempted form tort liability for damages because of bodily injury, sickness, or disease arising out of the ownerships, operation, maintenance, or use of such motor vehicle in this state to the extent that the benefits described in s. 627-736(1) are payable for such injury, or would be payable but for any exclusion authorized by ss. 627.730-627.7405, under any insurance policy or other method of security complying with the requirements of s. 627.733, or by an owner personally liable under s. 627.733 for the payment of such benefits, unless a person is entitled to maintain an action for pain, suffering, mental anguish, and inconvenience for such injury under the provisions of subsection (2).
>
> (2) In any action of tort brought against the owner, registrant, operator, or occupant of a motor vehicle with respect to which security has been provided as required by ss. 627.730-627.7405, or against any person or organization legally responsible for his acts or omissions, 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 <u>only</u> 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.

The non-economic damages under section 627.737 for which an injured party has sustained a permanent injury are damages for pain and suffering, mental anguish, and inconvenience. The jury instruction given by the trial court resulted in the plaintiff being awarded damages for which she was not entitled. The defendant objected to the verdict form because it allowed the jury to assess damages physical impairment, disfigurement and loss of capacity for the enjoyment of life prior to a finding of permanency. (R. 338-339).

The plaintiff had no case law for support for the their proposition regarding non-economic damages. The defendant, on the other hand, submitted supplemental authority on point with her argument. *Loring v. Winters,* 26 Fla. L. Weekly D1841 (2d DCA July 25, 2001). At the hearing held on August 9, 2001on the defendant's motion for new trial, the defendant relied on *Loring.* (Tr. Aug. 9, 2001, at p. 13). In *Loring*, the second district was presented a personal injury lawsuit wherein the plaintiff appealed a final judgment in which the defendant was awarded $8,612.99 after setoff. The defendant obtained the final judgment as a result of proposals for settlement and offers of judgment.

Although the Court affirmed, the Court wrote an opinion to address the plaintiff's challenge to a jury instruction given by the trial court. At trial, Loring argued

to the trial court that under section 627.737, Florida Statutes (1993), he was entitled to a jury instruction that he could recover damages for disability, disfigurement, and loss of capacity of enjoyment of life. Loring argued that these damages were available at common law prior to the enactment of the no-fault legislation and that, therefore, he was still entitled to have the jury instructed on these damages. "We disagree and can find no cases in Florida that support Loring's position. Section 627.737 plainly intends to exempt owners, registrants, operators, or occupants from tort liability or all non-economic damages except those damages "for pain, suffering, mental anguish, and inconvenience for such injury under the provisions of subsection (2).' Because Loring was not entitled to recover damages for disability, disfigurement, and loss of capacity of enjoyment of life, the trial court did not err in refusing to instruct the jury on those damages."

The trial court in the instant case instructed the jury:

> If the greater weight of the evidence does not support the claim of the plaintiff Dawn Thomas on the issue of permanency, you award Dawn Thomas an amount of money which the greater weight of evidence shows will fairly and adequately compensate Dawn Thomas for loss, injury or damages caused by the incident in question, including any such loss or injury or damages that Dawn Thomas is reasonably certain to experience or incur in the future.

> You shall consider the following elements of damage, disability or physical impairment, disfigurement, loss of capacity for enjoyment of life experienced in the past or to be experienced in the future, and a reasonable expense of hospitalization, medical care and treatment necessary and reasonably obtained by Dawn Thomas in the past will be so obtained in the future.

(Tr. 539-540). The trial court then instructed the jury as to the issue of permanency. (Tr. 540-541). In so instructing the jury, the trial court committed reversible error.

In *Smiley v. Nelson,* 805 So. 2d 871 (Fla. 2d DCA 2001), the second district was presented with the issue of whether a trial court errs in instructing the jury that it could award non-economic damages for disability, physical impairment, and loss of capacity for the enjoyment of life even in Mr. Nelson failed to meet the permanency threshold of the Florida Motor Vehicle No Fault Law, sections 627.730-627.705, Florida Statutes (1993). The second district held that the trial court erred. *Accord Gill v. McGuire*, 27 Fla. L. Weekly D346 (4th DCA Feb. 6, 2002)(relying on *Gill* for reversing non-economic damages when the trial court instructed the jury the The *Comments*, Personal Injury and Property Damages, 6.1(d), Motor Vehicle No Fault Threshold Instruction, declares that the committee placed the threshold instruction after instructions on negligence "because the statute sets a threshold to the recovery of noneconomic damages only. If claimant does not establish permanency, claimant may still be entitled to recover economic damages that exceed personal injury

protection benefits. [cite omitted] Therefore, negligence will still be an issue for the jury to decide where there are recoverable economic damages even in cases where no permanency is found." Clearly, the only time a plaintiff may be awarded noneconomic damages is if it is first proved that she has suffered a permanent injury if the plaintiff is suing a driver of an automobile and the driver has adequate insurance. The plaintiff must first prove a permanent injury *before* a jury may assess noneconomic damages of any sort. In the instant case, the jury was instructed that they could assess noneconomic damages if the jury found any injury had occurred. Then the jury was further instructed that if they subsequently found that the plaintiff

suffered a permanent injury, the jury could assess more noneconomic damages. Such flies in the face of the no fault statute as well as the law as espoused through the Florida standard jury instructions,

The trial court erred in giving the nonstandard jury instruction as the instruction was not an accurate statement of Florida law. Therefore, a new trial is warranted.

POINT III

THE TRIAL COURT ERRED IN COMPELLING THE DEFENDANT TO RESPOND TO ANSWERS TO INTERROGATORIES AND REQUESTS TO PRODUCE

In this third party lawsuit, defendant Sweitzer was compelled to produce voluminous documents regarding her medical expert. Sweitzer objected upon the grounds that the information was not available to her, was available from the expert, if permissible, through deposition. She also objected that request number 5 was irrelevant. Immaterial and not calculated to lead to the discovery of admissible

evidence. Further, Sweitzer stated that the request was broad beyond the boundaries of *Sykens v. Elkins*, 672 So. 2d 517 (Fla. 1996). She also objected based on the number exceeding 30.

Sweitzer respectfully submits that a mere perusal of the expert interrogatories reveal that the interrogatories violate both the intent and spirit of not only the Florida Supreme Court decision in *Elkins v. Sykens*, but the spirit and intent for which the rules of discovery were promulgated. As declared by the *Elkins* court, it is essential that Courts keep in mind the purpose of discovery. Pretrial discovery was implemented to simplify the issues in the case, to eliminate the element of surprise, to encourage the settlement of cases, to avoid costly litigation, and to achieve a balance search for the truth to ensure a fair trial. *Id*. at 522.

The expert interrogatories in the instant case do precisely what the Florida supreme court declared discovery was not intended to be. Discovery is not to be used as a tactical tool to harass an adversary in a manner that actually chills availability of information by non-party witnesses; nor was it intended to make discovery process so expensive that it could effectively deny access to information and witnesses are forced parties to resolve their disputes unjustly.

> To allow discovery that is overly burdensome and that harasses, embarrasses, and annoys ones adversary would lead to a lack of public confidence and the credibility of the

> civil court process. The right to a jury trial in the Constitution means nothing if the public has no faith in the process and if the cost and expense are so great, that access is basically denied to all but the few that can afford it. In essence, an overly burdensome, expensive discovery process will cause many qualified experts, including those who testify only on an occasional basis, to refrain from participating in the process, particularly if they have the perception that the process could invade their personal privacy. To adopt Petitioner's arguments, could have a chilling effect on the ability to obtain doctors willing to testify and could cause future trials to consist of many days of questioning on the collateral issue of expert bias rather than on the true issues of liability and damages.

Id. That is precisely what has occurred in the instant case.

In *Elkins*, the third district was presented with the appropriate scope of discovery necessary to impeach the testimony of an opponent's expert medical witness. In a unanimous en banc decision, the district court reversed the trial court orders, finding that the requested information was overly burdensome and provided little useful information. The District Court then set forth specific criteria to assist trial judges in addressing the expanding problem. The Third District certified that its decision conflicted with the District Court decisions in *Abdel-Fattah v. Taub*, 617 So. 2d 429 (Fla. 4th DCA 1993) (non-party expert required to compile information regarding defense-required examinations for past year), *Bissell Bros., Inc. v. Fares*, 611 So. 2d 620 (Fla. 2d DCA 1993) (IRS form 1099's subject to discovery), and

Young v. Santos, 611 So. 2d 586 (Fla. 4th DCA 1993) (tax returns and independent medical examinations (IME's) (discoverable). The Florida supreme court approved the well-reasoned decision of the third district, and adopted in full the Court's criteria governing the discovery of financial information from expert witnesses.

In explaining the need for these criteria, the third district stated:

> We have adopted the foregoing criteria... In an effort to prevent the annoyance, embarrassment, oppression, undue burden, or expense, claimed on behalf of medical experts. Within the limits of permitted discovery, medical experts are obligated to testify on a reasonable basis, truthfully, fully and freely. When it is disclosed or made apparent to the trial court that such a witness has falsified, misrepresented, or obfuscated the required data, the grief party may move to exclude the witness from testifying or move to strike that witness' testimony and/or further, move for the imposition of costs and attorney's fees in gathering the information necessary to expose the miscreant expert.

Notably, the supreme court declared, the third district's opinion in *Elkins* ruled that:

> Decisions in this field have gone too far in permitting burdensome inquiry into the financial affairs of physicians, providing information which "serves only to emphasize in unnecessary detail that which would be apparent to the jury on the simplest cross examination: That certain doctors are consistently chosen by a particular side in personal injury cases to testify on its respective behalf."
>
> The production of the information ordered in the cases before us causes annoyance and embarrassment, while

> providing little useful information. In *Sykens*, the court ordered additional discovery which, in light of the doctor's affidavit, is only duplicative, annoying and oppressive. In *Plaza*, the information necessary to demonstrate the basis for a claim of bias is most likely readily available through oral or written deposition without intrusive and improper examination of the doctor's 1099 forms and federal income tax returns. The least burdensome route of discovery, through oral or written deposition, was simply not followed.

Id. at 522, *Sykens v. Elkins*, 644 So. 2d 539, 545 (Fla. 3d DCA 1994).

The supreme court found that the district court's opinion struck a reasonable balance between a party's need for information concerning an expert witness' potential bias and the witness' right to be free from burdensome and intrusive production requests. Sweitzer respectfully submits that the least burdensome route of discovery, through oral or written deposition, was simply not followed in the instant case and was nothing more than an attempt to cause annoyance and embarrassment, while providing little useful information. The *Elkins* decision applies to the facts of the instant case.

Not only does the expert interrogatories compelled by the trial court violate the spirit and intent of *Elkins* as well as the Florida rules of procedures governing discovery, it also violates the supreme court decision in *Allstate Insurance Co. v. Boecher*, 733 So. 2d 933 (Fla. 1999) in requiring Sweitzer to produce discovery requests that could not have been answered by Sweitzer, who was the real party in the case. Sweitzer did not have the information available to her to answer the Request to

Produce which, amazingly, was information that could have been elicited by to obtain the information through the route of oral or written deposition to the expert witness, Dr. Uricchio.

In *Boecher*, the Supreme Court was presented with the issue of whether or not the court's decision in *Elkins* or Florida Rule of Civil Procedure 1.280(b)(4)(A)(iii) prevented discovery requests from being propounded directly to a party regarding the extent of that party's use of and payment to a particular expert. The court concluded that neither its decision in *Elkins* or rule 1.280 prevented the type of discovery sought in *Boecher* because the case was a first party lawsuit by an insured against its insured. and therefore proved the result in *Allstate Ins. Co. v. Boecher*, 705 So. 2d 106 (Fla. 4th DCA 1998).

> Because the discovery in question was directed to Allstate, a party, and not to the expert, the trial court found analogous *Elkins v. Sykens*, 672 So. 2d 517 (Fla. 1996), in which the supreme court approved a district court's decision quashing, as overly burdensome, an order requiring expert witness physicians to produce tax records and information regarding patients examined for litigation purposes. The trial court reasoned that requiring such discovery from a party was not as "invasive" as requiring it directly from an expert.

Boecher, 705 So. 2d at 106 to 107.

The supreme court cited to the seminal case of *Surf Drugs, Inc. v. Vermette*, 236 So. 2d 108, 111 (Fla. 1970), which declared "[a] primary purpose in the adoption of the Florida Rules of Civil Procedure is to prevent the use of surprise, trickery, bluff and legal gymnastics. The court also cited to *Schlagenhauf v. Holder*, 379 U.S. 104, 114-115 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964) wherein the court held that rules of discovery should be afforded a broad and liberal treatment to effectuate their purpose at trial should not be carried on in the dark. The discovery order in the instant case allowed trickery and legal gymnastics and went far beyond the purpose of discovery rules at trial should not be carried on in the dark.

Sweitzer acknowledges this court's decision in *Springer v. West*, 769 So. 2d 1068 (Fla. 5th DCA 2000). With all due respect, this Honorable Court's decision in *Springer* is not necessary due to the supreme court decision in *Elkins*. In *Elkins*, the supreme court set forth the criteria in order to obtain relevant evidence of bias from an expert. Because there is no reason to attempt to obtain that information from an insured since there is a remedy of seeking the same information from the expert, this Court's decision in *Springer* conflicts with the supreme court's decision in *Elkins*.

An example of the conflict between this court's decision and *Springer* and the supreme court's decision in *Elkins* is made apparent by what occurred in the instant case. The plaintiff sought the same information from both the insured, Sweitzer an the

expert, Dr. Uricchio. Because a procedure was already in place for obtaining the information sought in the Request to Produce, to allow a plaintiff to "double-dip" serves no useful purpose. Sweitzer further respectfully submits that the rules of civil procedure are in place in order to allow a party to know in advance what it is required to produce and what it is not. This court's decision in *Springer* changed the rules mid-stream. Requiring Sweitzer to produce documents that could be obtained through the expert via *Elkins'* criteria does nothing to promote the truth-seeking function and fairness of a trial.

In a third party lawsuit and especially when the expert is a medical expert, then *Elkins* applies. In the instant case, the request to produce sought the same information from the insured that it sought from the medical expert. The trial court, therefore, reversibly erred when it ordered Sweitzer to produce documents wherein the information was simultaneously being sought for the medical expert. The information, however, sought from the medical expert, went way beyond anything reasonable that would show a basis for bias. The trial court also, therefore, reversibly erred in overruling the objections to the expert interrogatories.

POINT IV

THE TRIAL COURT REVERSIBLY ERRED AND DENIED THE DEFENDANT A FAIR TRIAL IN GRANTING THE PLAINTIFF'S MOTIONS IN LIMINE EXCLUDING THE EXPLANATION OF THE DEFENDANT SWEITZER'S ABSENCE FROM TRIAL AND EXCLUDING DR. URICCHIO FROM TESTIFYING AT TRIAL ABOUT THE PLAINTIFF'S FAILURE TO TAKE AN X-RAY, FAILURE TO FILL OUT THE CLIENT HISTORY FORM, AND FAILURE TO ALLOW THE IME TO TAKE A POLAROID PICTURE OF THE PLAINTIFF'S RANGE OF MOTION

The defendant requested a jury instruction on mitigation of damages. The physical therapist testified that physical therapy would avoid the surgery. Dr. Bittar testified that he thought that the plaintiff had attended all the physical therapy. (Tr. Vol. III at 461-62). The defendant submitted the standard jury instructions 3.5, 3.6, 3.7, and 3.8. The defendant, however, modified the last paragraph and addressed the

failure to mitigate the damages. (*Id*. at 470). The trial court ruled that there was no case that allowed for the modification of jury instructions and denied the requested instruction. (*Id.* at 472-74).

The Florida supreme court has declared that it has not shrunk from condemning any practice that "undermines the integrity of the jury system which exists to fairly resolve actual disputes between our citizens. [cites omitted]. Only when *all* relevant facts are before the judge and jury can the 'search for truth and justice' be accomplished. [cite omitted]." *Allstate Ins. Co. v. Boecher, supra,* 733 So. 2d 995. Sweitzer respectfully submits that this principle of the search for truth and justice should be applied equally to plaintiffs ***and*** defendants. But such was not so in the case before this Honorable Court.

To prevent defense counsel from giving a brief explanation as to why the defendant was not present was prejudicial to the defendant ant would not have caused any legal harm to the plaintiff. Without the explanation, the jury was left to assume that the defendant did not care enough to attend the trial. Without question, this prejudiced the jury against the defendant. There was no good and sufficient reason to exclude this explanation from being giving to the jury.

This is especially true in light of the fact that the trial court kept the jury from hearing relevant and material evidence concerning the plaintiff's total lack of

cooperation at her IME, and at the direction of her attorney. If light is to shed on a trial so that a trial will not be tried in the dark, then surely this light must shine on both parties. The rules that applied to the defendant did not apply to the plaintiff. The Florida rules of civil procedure do not distinguish between defendant and plaintiff. The trial court in the instant case did.

When a trial court prevents one party from presenting relevant and material, this leads to trickery and legal gymnastics by the opposing party. As so eloquently declared by this Honorable Court, an order in limine should be used only as a shield and never to gag the truth and permit other evidence to mislead the jury. *Iowa Nat. Mit. Ins. Co. v. Worthy*, 447 So. 2d 998 (Fla. 5th DCA 1984). If the order in limine is used as a gag, as was done in the instant case, it permits other evidence to mislead the jury because the limine order prevents such evidence from being rebutted.

The purpose of a motion in limine is to prevent the introduction of improper evidence, the mere mention of which at trial would be prejudicial. *Chadwick v. Corbin*, 476 So. 2d 1366 (Fla. 1st DCA), *reviewed denied*, 488 So. 2d 67 (1985). The motion in limine to prevent any explanation of the defendant's absence at trial, did The defendant respectfully submits that the mention of an explanation of the defendant's absence from trial does not fit within the ambit of a motion in limine. The motion is facially insufficient and should have been denied by the trial court. . It must

be remembered that Mrs. Sweitzer was 89 years old and had heart problems. The fact that she was 89 years is a valid reason for her not to be able to travel to Florida and should have been made known to the jury.

The preventing of Dr. Urrichio from telling the jury that the plaintiff refused to completely fill out the patient information sheet, refused to have an identification photo taken by the expert, declined to have photos showing the extent of her range of motion by the defendant's expert, and refused to have x-rays taken of the cervical spine, thoracic spine and right shoulder left the plaintiff's evidence of the severity of her injury, the limited range of motion in her shoulder, and the limited remaining effect of her prior injury unrebutted. The granting of the motion in limine prevented the defense from fully presenting her case. It was used as a gag, not a shield.

The defendant respectfully submits that it is inconceivable how the mere mention of the plaintiff being uncooperative with the IME could be prejudicial. What the orders did was to gut the defendant's case.

POINT V

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON MITIGATION OF DAMAGES

Failure of the plaintiff to mitigate her damages was an essential issue for the defense. When the plaintiff was injured while playing sports, approximately four (4) years prior to the instant accident, it was recommended that she undergo physical therapy. Because she did not do the physical therapy as recommended, Dr. Bittar testified that she may very well require surgery. The plaintiff had suffered some torn ligaments in her wrist.

In the accident at bar, it was likewise recommended that she undergo physical therapy, but she failed to complete all of the physical therapy. She now needs surgery. The defense argued that this failure to mitigate damages entitled the defense to a

mitigation of damages jury instruction. (Tr. V. III, 471). Defense counsel argued that, although there was no standard jury instruction speaking to mitigation specifically, the jury instruction dealing with comparative negligence allowed for a mitigation of damages instruction. The trial court disallowed the jury instruction because it was not a standard jury instruction. (*Id.* At 472-473). The trial court had allowed the plaintiff her non-standard jury instruction regarding non-economic damages.

The trial court reversibly erred in denying the defendant's requested jury instruction. Comparative negligence is a defense to a negligence action. *Jacobs v. Westgate,* 766 So. 2d 1175 (Fla. 3d DCA 2000). Under comparative fault principles, a plaintiff may have his/her judgment against any of the parties who wronged him, and if a single defendant is shown to have negligently caused injury, a directed verdict against him is proper. The law is clear that where a plaintiff is free of fault, he may move for a directed verdict in addition to the issue of the defendant's liability. *See Valdes v. Faby Enters., Inc.,* 483 So. 2d 65 (Fla. 3d DCA 1986).

Regarding the defense of comparative negligence, however, the doctrine of comparative negligence subsumes the concept of mitigation. *See Ridley v. Safety Kleen Corp.,*693 So. 2d 934 (Fla. 1996). The defendant has the burden of proving the defense of comparative negligence. *See Florida Ass'n of Workers for the Blind, Inc. v. Guilluame, supra,* 618 So. 2d 275. Consequently, if the defendant proves

comparative negligence or, as in the instant case, mitigation of damages, he is entitled to a jury instruction on his theory of defense. The trial court ruled that mitigation of damages was not an affirmative defense. The trial court erred and erred further in failing to give the defendant's requested jury instruction.

An appropriate jury instruction may be found in *City of Clearwater v. McClury*, 157 So. 2d 545, 546-47:

> I instruct you that an injured person has the duty to use ordinary care and reasonable diligence in securing medical aid and to submit to reasonable treatment and to follow the advice of a competent physician. If you find for the plaintiffs no damages may be included in your verdict which might have been cured or alleviated by submitting to treatment which a reasonably prudent person would have submitted to on the advice of a physician to improve his or her condition, but you must first of all find by a preponderance of the evidence that such treatment as so prescribed [would] have alleviated the injury or effected a cure.

In the instant case, in her 1995 incident she falls, she failed to undergo all the physical and, therefore, she needed surgery. Dr, Uricchio testified that the mechanism of the injury that allegedly caused the torn labrum in the instant incident is consistent with the mechanism of injury of the fall in 1995. In a memo to Dr. Bittar dated 10/12/99 from Advance Physical Therapy it was indicated that the plaintiff had demonstrated and reported consistent improvement and progression. (Tr. Vol. II,

233). She missed visits between the surgery and manipulation. *(Id.* 235-36). She discontinued her therapy. The physical therapist suggested to Dr. Bittar that they needed manipulation under anesthesia because of the pain she stated she was having. (*Id.* 237).

On 10/19/99, the physical therapist's notes indicated that she was improving steadily. (*Id.* 364). That was her last visit. The record stated that she had "no new complaints." She was instructed to continue physical therapy. However, the last time she appeared at Advanced Physical Therapy for a total of nine (9) visits. On 10/28/99 and again on 11/9/99, they called the plaintiff and left messages that she needed to return, but she never returned the calls. (*Id.* at 365). The physical therapist reported to Dr. Bittar on 10/12/99 that she was demonstrating and reporting consistent improvement and progression, but there were still plans to establish a rehabilitation program. She never returned except for one visit. (*Id.* at 366-67).

The plaintiff reported to Dr. Uricchio, however, that she had no progress in physical therapy. (*Id.* at 384). She reported that she had trouble even holding her arm out, and flipping magazines. The diagnostic testing did not reveal any sign of a torn rotator cuff or torn glenoid labrum. The MRI done on 8/6/99 showed no evidence of a tear of the rotator cuff and no evidence of a tear of the glenoid labrum. (*Id.* 385).

Physical therapy was recommended so that the plaintiff would not have to under go surgery. The plaintiff had a duty to herself, she breached that duty, and such breach was the proximate cause of the damages (the surgery) the plaintiff sustained. *Florida Ass'n of Workers for the Blind v. Guillaume, supra,* 618 So. 2d at 276. Accordingly, the plaintiff was comparatively negligent when she failed to mitigate her damages. When the trial court refused to instruct the jury regarding the duty of the plaintiff to mitigate her damages (comparative fault), the denial deprived the defendant of having the jury instructed on her right to have the jury not award the plaintiff for damages that the plaintiff could have avoided. Because there was evidence of the plaintiff's comparative fault, the issue was properly presented to the jury. The jury should have been so instructed. The failure of the trial court to instruct the jury on the defendant's theory of defense resulted in a manifest injustice and a new trial is required.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, the appellant respectfully requests that this Honorable Court reverse the final judgment entered by the trial court, enter a judgment for the defendant and/or reverse and remand for a new trial.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, this 21st day of November, 2004 to: Julie Littky-Ruben, Lytal, Reiter, Clark, Fountain & Williams, LLP, 515 N. Flagler Drive, Suite 1000, West Palm Beach, Florida 3340; Karla T. Torpy, Esq, Graham, Moleteire & Torpy, P.A., 10 Suntree Place, Melbourne, Florida 32940.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the petitioner's brief on the merits has been typed using 14 Point New Roman font.

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