IN THE SUPREME COURT
OF FLORIDA

ETHEL THOMPSON SWEITZER,

Petitioner,

v. CASE NO. SC03-165

DAWN M. THOMAS,

Respondent.
_____/

REPLY BRIEF ON THE MERITS

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POINT I

THE RESPONDENT HAS CONCEDED THAT THE OPINION IN THE INSTANT CASE IS IN DIRECT CONFLICT WITH A DECISION OF THE SUPREME COURT AND ANOTHER DISTRICT COURT OF APPEAL
[RESTATED]

In her argument in Part I, Point I, the respondent has argued that this Honorable Court has improvidently exercised the discretionary jurisdiction accorded the supreme court pursuant to article V, section 3(b), Florida Constitution and rule 9.030(a)(2)(iv), Florida Rules of Appellate Procedure. In so declaring, the respondent has argued that the fifth district's opinion in the instant case is explicitly in agreement with *Loring v. Winters,* 802 So. 2d 335 (Fla. 2d DCA 2001) and *Giles v. Luckie,* 816 So. 2d 248 (Fla. 1st DCA), *rev. dismissed,* 832 So. 2d 104 (Fla. 2002). The respondent is uncertain, therefore, as to why "this Court accepted jurisdiction in the face of the Fifth District's clear agreement with prior precedent."

The respondent made no mention of this Court's decisions in *Chapman v. Dillon,* 415 So. 2d 12 (Fla. 1982) and *Lasky v. State Farm Insurance Company,* 296 So. 2d 9 (Fla. 1974) or the third district's opinion in *State Farm Mutual Automobile Insurance Company v. Gomez,* 605 So. 2d 968 (Fla. 3d DCA 1992), the cases relied

upon by the petitioner in asserting that this Honorable Court had discretionary jurisdiction over the instant case. Therefore, the petitioner respectfully submits that the respondent has conceded that this Honorable Court correctly exercised the discretionary jurisdiction afforded the Court pursuant to the Florida Constitution and the Florida Rules of Appellate Procedure.

The petitioner did not assert that the opinion in the instant case was in conflict, either directly or indirectly, with *Loring*, *Gill*, or *Giles.* Since the petitioner relied upon *Chapman*, *Lasky*, and *Gomez* in her brief on jurisdiction in declaring that the opinion rendered by the fifth district in the instant case was in direct conflict with, thus affording this Court discretionary jurisdiction over the instant case pursuant to the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a),it matters not whether the instant case is in direct conflict with the cases cited the respondent or not. This Honorable Court has discretionary jurisdiction pursuant to *Chapman*, *Lasky*, and *Gomez*. Perhaps now the respondent will have a better understanding as to why this Court accepted jurisdiction.

POINT II

THE PETITIONER RESPECTFULLY SUBMITS THAT A JURY INSTRUCTION, INSTRUCTING THE JURY ON THE LAW TO BE APPLIED IN DECIDING A JUST VERDICT, IS NOT HARMLESS ERROR WHEN THE JURY INSTRUCTION IS IN CONFLICT WITH THE LAW

ENUNCIATED BY THE SUPREME COURT OF THE STATE IN WHICH THE JURY IS EMPANELED
[RESTATED]

The Florida Supreme Court is the ultimate authority as to the law to be applied in any case decided in Florida. Hopefully, any citation for this principle of law is not necessary. When the jury in the instant case was instructed as to the law via a non-standard jury instruction that directly conflicted with the law enunciated by this Court, the error can not be harmless. To do so would render decisions by the supreme court of the state inferior to decisions of trial judges and trial attorneys. Such would, accordingly, render the Florida Constitution on this point meaningless and irrelevant. Surely, the respondent is not advocating such a position.

POINT III

BECAUSE THIS HONORABLE COURT HAS JURISDICTION AS THE OPINION RENDERED BY THE FIFTH DISTRICT COURT OF APPEAL IS IN CONFLICT WITH DECISIONS OF THE SUPREME COURT AND ANOTHER DISTRICT COURT OF APPEAL, THE COURT HAS JURISDICTION TO CONSIDER THE OTHER ISSUES PROPERLY RAISED BY THE PETITIONER IN THE FIFTH DISTRICT

The respondent's argument that since the fifth district's opinion decided that certain issues raised by the appellant were without merit, although writing an opinion as to another issue raised, this some how renders the decision analogous to a *per curiam affirmance* shows a lack of understanding of the principle of law governing

the same. Simply because the fifth district found that the other issues raised by the petitioner were without merit, does not render the other issues *per curiam affirmances* as to those issue nor does it mean that this Honorable Court should not address the same.

The law governing a *per curiam affirmance without decision* and the jurisdiction of this Court speaks to the opinion of the district court, not to individual issues in a case wherein the opinion is not a *per curiam affirmance* . In *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980), this Court held that it does not have jurisdiction to review a per curiam affirmed decision without a written opinion where the basis for review is an alleged conflict between that decision and an opinion issued by either this Court or another district court of appeal. *See also St. Paul Title Ins. Corp. v. Davis*, 392 So. 2d 1304, 1304-05 (Fla. 1980)(a petitioner could not utilize the Court's "all writs" jurisdiction to seek discretionary review of a per curiam affirmance without opinion).

Both *Jenkins* and *Davis* speak to the requirement that the **decision** of the district court not be a *per curiam affirmance* without a written opinion. There is nothing analogous about a district court written opinion which forms the basis for conflict review and issues properly preserved in the trial court which the district court improperly decides that the issues are without merit. The petitioner respectfully

submits that it is the written decision which is mandated in order to allege a conflict between that decision and an opinion issued by either this Court or another district court of appeal. The opinion in the instant case meets that mandate. It matters not what the district court decides is without merit if the petitioner can properly show that what the district court does discuss is in conflict with a decision of either this Court or another district court of appeal. The petitioner has met her burden. This Honorable Court properly exercised the discretionary jurisdiction accorded the Court pursuant to the Florida Constitution and the Florida Rules of Appellate Procedure. Perhaps a review of said provisions, as well as the case law decided under those provisions, would be of benefit to the respondent.

Once this Court has reviewed the opinion "within the four corners of the opinion itself" and determined that the decision expressly conflicted with a decision of this Court or another district court of appeal on a question of law, the Court then has jurisdiction over the entire cause. The respondent's reliance on *Savona v. Prudential Insurance Co. Of America,* 648 So. 2d 705 (Fla. 1995),is not only misplaced, but *Savona* supports the petitioner's position that this Court has jurisdiction to review all issues properly preserved in the trial court and, therefore, properly before the appellate court.

In *Savona*, the issue the defendant sought to be reviewed by this Court had

neither been addressed by the trial court or the appellate court. This holding is consistent with a long-standing principle of appellate law that an appellate will only review issues presented to and ruled upon by the lower court. If the lower court has not ruled on the issue, then there is no error for the appellate court to review. That simply has no application to the instant case.

In the instant case, the issues raised by the petitioner in her initial brief on the merits are questions of law. Rulings of lower courts that are purely questions of law are subject to *de novo* review. *See generally Armstrong v. Harris,* 773 So. 2d 7, 11 (Fla. 2000)("[T] he standard of review for a pure question of law is de novo."); *Morton Roofing Inc. v. Prather,* 29 Fla. L. Weekly D37a (5th DCA Dec. 19, 2003)(a trial court's ruling on how a jury is to reconsider an inconsistent verdict is a pure question of law subject to *de novo* review).

The respondent has not alleged that the issues presented are not pure questions of law, but rather is complaining that the same issues presented to the fifth district are now being presented to this Court. The respondent should perhaps likewise review *de novo* review. A reviewing court reviews a trial court's findings of fact for substantial competent evidence and its conclusions of law de novo. *City of Gainesville v. State,* 28 Fla. L. Weekly S665a (Sept.4, 2003). The petitioner is requesting a *de novo* review of pure questions of law for issues. The petitioner has not

alleged that the issues raised were abuses of discretion. More importantly, the respondent has alleged that only one issue involves an abuse of discretion standard, which the petitioner denies. However, the respondent has not alleged that the one issue she alleges involves an abuse of discretion standard is not entitled to a *de novo* review. She did not allege the issue was not entitled to a *de novo* review in the fifth district and is precluded from so alleging in this Court. Therefore, any discussion of *de novo* review is irrelevant.

REPLY ARGUMENT - PART II

The petitioner readily admits that she has unabashedly filed with this Court the identical brief that was filed in the fifth district. The reason being is quite simple: neither the facts nor has the law have not changed. The petitioner respectfully submits that this Court would not have jurisdiction to review issues not properly raised and briefed in the fifth district. The petitioner would then, indeed, be requesting a *de novo* review. However, the petitioner's position before this Court is that the fifth district incorrectly decided that the issues properly raised in said court were without merit. Not only did the properly raised issues have merit, the issues raised were reversibly errors. Therefore, the petitioner will respond to the arguments by the respondent for affirmance of the trial court's rulings.

POINT I

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

The respondent has failed to address this Court's opinion in *Lasky, supra,* 296 So. 2d 9. *Lasky* was a case relied upon for the petitioner asserting that this Court had jurisdiction to review the instant case. The petitioner, therefore, will rely on her argument set forth in her initial brief. The petitioner will note that *Lasky* held that 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.

The respondent accurately sets forth the definition of a permanent injury pursuant to section 627.737(2), Florida Statutes, but she fails to set forth the evidence which would render her permanently injured. The reason being is that there was no competent substantial evidence which would bring the plaintiff's injury within the preview of section 627.737(2)(b). Section 626.737(2)(b) defines a permanent injury as a permanent injury within a reasonable degree of medical probability, other than scarring. Subsection (c) declares that a significant permanent scarring or disfigurement would be a permanent injury.

The only testimony that the respondent can point to in the record was the

plaintiff's treating surgeon, Dr. Bitter. Dr. Bitter's opinion was that she had surgical scars and probably some loss in range of motion, although it was minimal. "Surgical scars" and minimal range of motion fall well short of permanent injury without testimony that the scars and minimal range of motion rendered the plaintiff permanently injured "within a reasonable degree of medical probability."

The respondent, in alleging that surgical scars meets the standard of a permanent injury, has failed to acknowledge subsection c. Section 627.737(2)(c) requires that any scarring must be significant and permanent scarring or disfigurement. The most that Dr. Bitter could declare was that the plaintiff had surgical scars. The record is devoid of any competent substantial evidence that the plaintiff suffered a permanent injury. A jury verdict finding that the plaintiff did suffer a permanent injury is not supported by the evidence; therefore, the defendant's motion for new trial should have been granted.

The plaintiff argued below that whether or not she suffered a permanent injury required to meet the no-fault threshold was a question of fact for the jury to decide. However, the plaintiff then cites to *Scarfone v. Magaldi*, 522 So. 2d 902 (Fla. 3d DCA), *rev. denied*, 531 So. 2d 1353 (Fla. 1988), which reverses a jury verdict which had found that the plaintiff had not met the no-fault threshold. This Court in *Scarfone* held that the jury verdict was against the manifest weight of the evidence. The Court

declared that the medical evidence showed that the plaintiff sustained a permanent injury within a reasonable degree of medical probability, and significant and permanent scarring.

The evidence in *Scarfone* showed that, among other things, the plaintiff suffered permanently broken teeth, fractured forearm requiring surgery which left three permanent stainless steel screws in his bone and a 4-inch long, 3/8-inch wide surgical scar on his forearm as a result of the surgery. The petitioner submits that it is readily apparent on the face of *Scarfone* and the facts of the instant case that the instant case does not rise to the level necessary to show a permanent injury. Just as this Court held that the jury verdict was against the manifest weight of the evidence in *Scarfing*, this Honorable Court should hold likewise in the instant case. In both cases, the trial court erred in denying a motion for new trial.

POINT II

THE TRIAL COURT REVERSIBLY ERRED IN GIVING THE NON-STANDARD JURY INSTRUCTIONS REGARDING NON-ECONOMIC DAMAGES SINCE THE NON-STANDARD JURY INSTRUCTION WAS IN CONFLICT WITH DECISIONS OF THIS COURT

As made apparent by Point I, the respondent's "harmless error" argument is without merit. The jury verdict finding of a permanent injury is not supported by competent substantial evidence and, therefore, can not support a harmless error

argument regarding the non-standard jury instruction.

Further, a jury may not be instructed to apply an erroneous standard of law to the facts of the case. The purpose of jury instructions is to instruct a jury as to the applicable law to be applied to the facts of the case. *See Post, Buckley, Schuh & Jernigan, Inc. V. Monroe County,* 851 So. 2d 908 (Fla.3d DCA 2003)(jury instruction improperly removed from jury's consideration the defendant's duty owed to plaintiff); *Griffin v. KIA Motors Corp.,* 813 So. 2d 336 (Fla. 4th DCA 2003)(trial court erred in refusing to instruct the jury on plaintiff's theory of strict liability of failure to warn). When a jury is instructed to apply law that is in direct conflict with the dictates from the supreme court, it defies logic to argue that the error can be harmless. An improper jury instruction on law not applicable to the case is reversible and a new trial mandated. *Florida Municipal Ins.Trust v. Village of Golf,* 28 Fla. L. Weekly D1826 Aug. 6, 2003)

The fact that the jury subsequently found a permanent injury, without competent substantial evidence to support the finding, does not remedy the error committed by the trial court in instructing the jury that the jury could award non-economic damages prior to a finding of a permanent injury. The petitioner submits that a new trial is required with instructions to the trial court that the court may not instruct the jury as to the non-standard jury instruction regarding non-economic damages. The plaintiff's

argument that the jury would have awarded $30,000.00 in damages any way is without basis in fact as there is nothing in the record that would support a verdict for $30,000.00. A new trial is the only remedy for the petitioner.

POINT III

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

The petitioner argued in her initial brief on the merits that the ruling of the trial court was broad beyond the boundaries set forth by this Court in *Sykens v. Elkins,* 672 So. 2d 517 (Fla. 1996) as well as *Allstate Insurance Co. v. Boecher*, 733 So. 2d 933 (Fla. 1999). Initial Brief on the Merits, pp. 32-37. The petitioner did acknowledge to the fifth district that court's decision in *Springer v. West,* 769 So. 2d 1068 (Fla. 5th DCA 2000). The petitioner argued that the fifth district's opinion in *Springer* was not necessary due to this Court's opinion *Elkins.*

The petitioner further alleged that the fifth district's opinion in *Springer* was in conflict with this Court's decision in *Elkins.* Although the conflict does not appear on the face of the fifth district's opinion, it is imperative that this Court hold that the trial court's ruling is in conflict with *Elkins* if this Court reverses and the case is remanded to the trial court for a new trial.

The respondent's argument that the issue was not preserved for appellate review

is without merit. Initially, the petitioner submits that the failure to file a petition for a writ of certiorari with the fifth district does not preclude a review of the issue on direct appeal.

Secondly, the petitioner filed written objections to the discovery requests, which objections are a part of the record on appeal. The respondent argues the law regarding motions in limine and the legal requirement that there must be an objection at trial to the admission of the evidence that was the subject of the motion in limine. What the respondent fails to understand, however, is that the petitioner has not alleged as error a denial of a motion in limine. Therefore, the respondent's argument is irrelevant and without any merit regarding the issue raised.

The petitioner objected to the trial court's compelling the defendant to respond to answers to interrogatories and request to produce. There is no legal requirement that the defendant renew her objection during the expert's testimony as answers to interrogatories and requests to produce as most answers and documents produced thereto are not introduced at trial.

The petitioner's argument is that it is beyond comprehension how the compelling of expert interrogatories that exceeded thirty (30) interrogatories, to produce all documents pertaining to the general litigation experience of the defendant's testifying expert witness, to identify any other cases in which the defendant's expert

witness had testified by deposition or at trial during the three (3) years preceding the request, and to produce documents pertaining to expert witnesses based on the number of hours, percentage of hours, percentage of hours, percentage of earned income derived from his serving as an expert can stand in light of this Court's decisions in *Elkins* and *Boecher*.

The petitioner acknowledges that she did refer to "this court" in her initial brief when referring to the fifth district and apologizes therefore. Initial Brief on the Merits, at p. 38. Said inadvertence does not alter the thrust of the argument being made to this Court. The petitioner is requesting that this Court hold that the interrogatories and requests to produce in the instant case and the fifth district's holding in *Springer*, *supra*, 769 So. 2d 1068, to be in direct conflict with *Elkins* and *Boecher*. The orders entered by the trial court fell outside the realm of what is reasonable and what should be discoverable. The orders did not strike a reasonable balance between a party's need for information concerning an expert witness's potential bias and the witness's right to be free from burdensome and intrusive production requests, the standard of law to be utilized by trial courts when presented with objections to motions to compel as in the instant case. The petitioner submits that the least burdensome route of discovery, through oral or written deposition, was not followed in the instant case and was nothing more than an attempt to cause annoyance and embarrassment, while

providing little useful information. This practice should not be tolerated by this Honorable Court.

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'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 respondent alleges that the trial court, in not allowing the defendant from telling the jury that she was unable to attend the trial due to her illness and age and in not allowing the IME doctor from testifying that the plaintiff was uncooperative and was prevented by her attorney from completing specific tests at the IME examination were not abuses of discretion. The defendant submits, however, that what the trial court prevented from being presented by the defendant must be weighed against what the plaintiff was allowed to present to the jury.

This Honorable Court can review the record on appeal which includes the transcripts and determine that the defendant did not receive a fair trial in light of the rulings made in favor of the plaintiff. The non-standard jury instruction and the

compelling of the interrogatories and request to produce are only the tip of the iceberg. While the plaintiff was allowed to fully present her case, the defendant was precluded from presenting her defense. Was occurred was a grave miscarriage of justice which misled the jury as the jury did not hear all of the material facts; the jury only heard the plaintiff's facts and some of the defendant's facts. The rulings of the trial court rendered the instant trial one-sided; the scales of justice require an equality. When the scales of justice tip in favor of one party due to the actions of a trial judge, then the party not receiving the tip in her favor does not receive a fair trial.

The petitioner submits that had the jury been properly instructed, had the IME doctor been allowed to testify that the plaintiff refused to have an X-ray done and that she refused to fill out the questionnaire, had the defense been allowed to explain to the jury that the 89 year old defendant was unable to attend the trial due to illness, and had the jury been instructed regarding mitigation of damages, the verdict in the case would have been different. To say that the jury verdict would not have been different files in the face of common sense. The defendant should be permitted a new trial with all of the relevant evidence admitted and irrelevant and immaterial omitted.

POINT V

THE TRIAL COURT REVERSIBLY ERRED IN FAILING TO

INSTRUCT THE JURY ON MITIGATION OF DAMAGES.

The respondent makes the argument that assuming the instruction stated the applicable law correctly, and the facts of the case supported the instruction, it was not necessary to allow the jury an opportunity to resolve all issues of the case. The respondent's argument is that a jury is to resolve all issues that may be resolved in favor of the plaintiff, but it is not necessary that the jury resolve the defendant's defense. The respondent can not cite to any case law or rules to support such an outlandish argument. Hopefully, no plaintiff will ever be allowed to cite to any support for such an argument.

However, while there is no support for the respondent's position, there is support for the petitioner's. In *Reyka v. Halifax Hospital Dist.*, 657 So. 2d 967, 969 (Fla. 5th DCA 1995), the court held that the failure to give the jury an instruction on mitigation of damages was, in essence, a failure to instruct as to the defendant's defense. The court declared that such failure can only result in a miscarriage of justice and/or confuse or mislead the jury. The petitioner respectfully submits that is precisely what transpired in the instant case: a miscarriage of justice.

The standard of law to be applied by trial courts when presented with a proposed jury instruction is to determine whether or not the instruction correctly states the applicable law and whether the facts support the instruction. *See e.g. Florida*

Mutual Ins. Trust v. Village of Golf, supra, 28 Fla. L. Weekly D900 (4th April 9, 2003); *Griffin, supra,* 851 So. 2d 336; *Monroe County, supra,* 851 So. 2d 908. If the answer to both questions are in the affirmative, then the trial court must give the requested jury instruction. The failure to so instruct a jury accordingly results in a new trial being ordered with instructions that the jury be properly instructed.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, the petitioner respectfully requests that this Honorable Court quashed the decision of the fifth district with instructions that the petitioner be afforded a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished via U.S. mail this 2d day of February 2004 to: Julie H. Littky-Rubin, Esq., Post Office Box 4056, West Palm Beach, Florida 33402-4056; Karla Torpy, Esq., 10 Suntree Place, Melbourne, Florida 32940-6121.

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NOTICE OF COMPLIANCE

The petitioner hereby certifies that the reply brief is submitted in Times New Roman point 14.

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