SUPREME COURT OF FLORIDA

AMANDA K. CARR, by and through her natural mother and guardian, FAITH CARR HIBBARD,

Petitioners,

v.

MICHAEL McGRAW and DUAL, INCORPORATED,

Respondents.

CASE NO.: SC04-7
5TH DCA CASE NO.: 5DO2-214
L.T. NO.: CA-128

ON APPEAL FROM THE FLORIDA
FIFTH DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENTS

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III. PRELIMINARY STATEMENT

The Respondants, Michael McGraw and Dual, Incorporated, will utilize the same abbreviations as Petitioners in their Initial Brief: “T.T.” for reference to the trial transcript and “R. Vol. __” for reference to the record. The deposition excerpts in the Appendix will be referred to as “App.__deposition,p.__“. References to the Initial Brief will be designated as “IB”, followed by page number. The parties will be referred to by their proper names or by reference to their status in the lower court.

IV. STATEMENT OF THE CASE AND OF THE FACTS

The Respondants supplement the Statement of the Case and of the Facts as set forth in the Initial Brief as follows:

The motor vehicle accident out of which the action arises occurred on August 28,1997 in a residential area of St. Johns County, Florida. The matter eventually proceeded to trial in Circuit Cuurt in St, Johns County in November, 2001 and resulted in a jury verdict as set forth in Plaintiffs' Initial Brief at page 14. Subsequent to post-tial motions and to entry of a final judgment, an appeal was taken to the Fifth District Court of Appeal. The appellate court affirmed in part and reversed in part.

The appellate court found only two issues which invoved error: a proposal for settlement, which the court found ambiguous, and the calculation of set-offs prior to entry of judgment. The Defendants have not contested the decision below. Plaintiffs/Appellees sought jurisdiction in this Court based upon conflict with other districts on the question of the proper method of calculating set-offs from collateral sources. In an order dated September 10, 2004, this Court accepted jurisdiction, notwithstanding this Court's earlier decision in Norman v. Farrow, 880 So. 2nd 557 (Fla.

2004). Defendants/Respondents believe that the decision in Norman resolved the conflict which served as the basis for juridiction herein. Respondents conceded this point in their Jurisdictional Brief and agreed that judgment for Plaintiffs in the amount of $15,502.09 should be entered. Accordingly, there is no actual controversy as to the issue for which Petitioners sought review and Respondents submit that this case should be dismissed for lack of jurisdiction.

Mark Brock and Plaintiff Amanda Carr were both students at Nease High School at the time of this accident. (T.T. Vol. I, p. 77). After school, Mark Brock and Amanda Carr met at his house, went to a restaurant and then drove away in Brock's truck. (T.T. Vol. I, pp. 78-82). Mr. Brock entered Fruit Cove Woods Road from State Road 13 and proceeded approximately 200 yards before the accident occurred. There were no stop signs or other traffic control devices from the point at which he entered Fruit Cove Woods Road until the accident site. (T.T. Vol. I, pp. 83-85). Fruit Cove Woods Road is a two-lane residential road. (T.T. Vol. I., pp. 85-86). There is a slight curve to the right on Fruit Cove Woods Road between the entrance at State Road 13 and the accident site. Mark Brock testified that he could not see beyond the curve as he entered Fruit Cove Woods Road. (T.T. Vol. I, pp. 87-88). Mr. Brock

did not notice Defendant Michael McGraw's vehicle when he entered and began proceeding on Fruit Cove Woods Road. (T.T. Vol. I, p. 88). When he rounded the curve, the McGraw vehicle was approximately 25-30 yards ahead of him. When Brock saw the McGraw vehicle, he perceived that he was proceeding faster than Mr. McGraw and decided to pass to the left. (T.T. Vol. I, p. 93). Mark Brock knew that there was an intersection to the left and, in fact, it was when he was at the point of the intersection that Michael McGraw began his left turn. (T.T. Vol. I, pp. 95-96). Mark Brock thinks that Michael McGraw did not have a left turn signal on because he would not have passed "if I had noticed the blinker". (T.T. Vol. I, p. 106). Mark Brock made a conscious decision to pass the McGraw vehicle. (T.T. Vol. I, p. 112). Accordingly, Mark Brock was passing the McGraw vehicle at the point of the intersection. (Vol. I, pp. 96). Mark Brock looked at his speedometer as he passed the McGraw vehicle and testified that he was travelling "approximately 40 miles per hour". (T.T. Vol. I, pp. 89-91). When he saw Mr. McGraw was starting to turn left, Mr. Brock applied his brakes, swerved to the left, and left the roadway striking a tree. (T.T. Vol. I, pp. 95-99). Mark Brock did not remember whether he or Amanda Carr was wearing a seat belt. (T.T. Vol. I, p. 100). However, on impact, both he and

Ms. Carr hit and shattered the windshield directly in front of them. (T.T. Vol. I, p. 101).

Plaintiffs state that the accident occurred "near the intersection" of Fruit Cove Woods Drive and Pitch Pine Avenue in St. Johns County, Florida. (IB-p. 2). This is technically true in that Mark Brock's vehicle passed Michael McGraw at the intersection and struck a pine tree which was about 59 feet from the intersection. (T.T. Vol. V, p. 451). The statement omits, however, that Mark Brock, the driver of the car in which Plaintiff was a passenger, was accelerating and passing Defendant's vehicle in the intersection. (T.T. Vol. I, p. 62; Vol. IV, pp. 405-406).

Michael McGraw testified that prior to the accident he was proceeding at about 22 to 24 miles per hour and that he periodically checked his rear-view mirror. (T.T. Vol. VI, p. 517). He did not see any vehicles behind him. Plaintiffs claim that Mr. McGraw made a left turn without warning and that he admitted in his trial testimony that he could not recall turning on his left turn signal. (IB-p.3). This statement is an incomplete recital of the testimony. In fact, Mr. McGraw testified that he believed he did activate his left turn signal (T.T. Vol. 1, p. 134 and Vol. VI, p. 518).

In preparing to make his left turn, Mr. McGraw believes he

put his turn signal on and he slowed to about 12-15 miles per hour. Mr. McGraw made his turn while at the intersection. (T.T. Vol. VI, p. 519). As Mr. McGraw started a gradual turn he heard the loud sound of a truck engine, and he could see Brock's truck in his side-view mirror, approaching very fast. He estimated Brock's speed at 45-55 miles per hour. (T.T. Vol. VI, pp. 519-522).

Amanda Carr was not wearing a seat belt and shoulder harness at the time of this accident. (T.T. Vol. I, pp. 37-37, 55-56). According to Mark Brock, the seat belt and shoulder harness on the passenger side of his vehicle were functional. (T.T. Vol. I, p. 116).

Expert testimony regarding seat belts and body mechanics was presented on behalf of the Defendants by Orion Keifer. Mr. Kiefer is a mechanical engineer with specialized training related to bio-mechanics including “M.S. Bio-mechanical Training, Lynn University, 2000” and “Bio-mechanics (graduate course), University of Central Florida, 1997”. Since 1989, he has worked as a consultant in mechanical engineering. Mr. Keifer has previously been qualified to testify in Florida courts as an expert in engineering and bio-mechanics. (T.T. Vol. V, pp. 436-440).

Mr. Keifer reviewed extensive information concerning this

accident including police report, repair estimates, discovery, depositions of parties and witnesses, and photographs of the Brock vehicle in which plaintiff was a passenger and medical records. (T.T. Vol. V, p. 443) Mr. Keifer's staff took a video tape of the inspection of the Brock vehicle and removed the seat belts from that vehicle which were examined by Mr. Keifer. (T.T. Vol. V, pp. 442-443). Mr. Keifer personally inspected the seatbelt and determined that it was functional. (T.T. Vol. V, p. 447). Mr. Kiefer testified that the Brock vehicle struck a tree with its left front fender. (T.T. Vol. V, p. 452). As an engineer, Orion Keifer determined the movement of Ms. Carr post-impact in the vehicle. (T.T. Vol. V, pp. 455-458). At impact, the Brock truck moved counter-clockwise and, due to the laws of physics, both of the occupants went straight. (T.T. Vol. V, p. 457) The starring pattern of breakage of the windshield on the left front and center was consistent with Mr. Brock and Ms. Carr, both unbelted, moving forward and to their left at the time of impact. Amanda Carr's hair was imbedded in a star pattern in the middle of the windshield. (T.T. Vol. V, p. 455).

William N. Campbell, M.D. has practiced orthopedic surgery for over 20 years and is the Chief of Orthopedic Surgery at St. Vincent's Hospital in Jacksonville. He has treated fractured pelvises similar to the injuries sustained by Amanda Carr. (App.

Campbell, deposition, pp. 4-6). As to the seatbelt issue, Dr. Campbell testified as follows commencing on page 10 (App. Campbell deposition, pp. 10, 28-30):

> A: . . . The patient when she sustained her injury had a compression-type injury . . . when she had the accident because she had no seat belt, her pelvis was translated into the dashboard in front of the -- inside of the car . . . .

Then, continuing on p. 28:

> Q: Doctor: The patient, as documented by your notes, described the mechanism of injury in terms of the impact and the – what occurred with the vehicle and also was quite candid in acknowledging as she has been throughout this case that she was not wearing a seatbelt and shoulder harness. Are you familiar with the mechanism of injury for this type of injury?
>
> A: Yes. This would be frontal transmission of forces. In other words, in order to have the fractures that she did, the impact would have to come straight, forward or anterior to her body.
>
> Q: Anterior is another word for forward.
>
> A: In other words, the front of her. In other words, she would have to be impacted at the waist level in that

area from the front in order to cause the type of injuries that she had.

Dr. Campbell then explained that he is familiar with the medical literature concerning the direction of force applied to cause various types and patterns of pelvic injuries. Dr. Campbell then testified as follows at page 30:

Q: Based upon her description of the accident, do you have an opinion as to what portion of the vehicle she struck that would have caused this frontal impact and the resulting injury?

A: I would suspect that she probably hit the dashboard. Because she was not restrained, her being hurdled forward would be – she wouldn’t be hurdled forward as if she were in the seat. In other words, she would kind of be lifted off the seat and translated forward into the dashboard

Q: The injuries that she sustained as you have explained a moment ago would not be the expected result from a side impact; is that correct?

A: In my opinion, no.

Q: Is that opinion given within a reasonable degree of medical probability?

A: It is.

Samuel G. Agnew, M.D., was plaintiff's treating orthopedic physician who performed the initial surgical repair and visualized plaintiff's fracture. Dr. Agnew is highly qualified in the field of orthopedics and specifically in trauma. (App. Agnew deposition, pp. 4-6). As to the direction of force causing Plaintiff's injury, Dr. Agnew testified as follows at pages 21 and 22 (App. Agnew deposition, pp. 21, 22):

> Q: . . . from the pattern of the injury which you have described and showed the jury with a model, as I understand it, it is your opinion that this injury occurred from a blow or force exerted to the left front of the patient; is that correct?
>
> A: Yes.

V. SUMMARY OF ARGUMENT

IV. SUMMARY OF THE ARGUMENT

The trial court was correct in its rulings at trial, jury instructions and denial of Plaintiffs' post-trial motions. The trial court was substantially correct in the entry of final judgment. There was error in the calculation of damages, as conceded by Respondents in their Jurisdictional Brief, and this

action should be remanded for entry of a corrected judgment in favor of Plaintiffs.

The issues of the negligence of Defendants McGraw and Dual, Inc. and non-party Mark Brock, as well as the comparative negligence of Plaintiff Amanda Carr for failure to utilize an available and operational seat belt were contested at trial. The jury returned a verdict which apportioned the negligence as: 70% for Brock; 25% for Plaintiff Carr; and 5% for Defendant McGraw.

Plaintiffs contend that the seat belt issue should not have been submitted to the jury because the evidence did not support the defense. They argue, in effect, that the trial court should have directed a verdict in their favor on the seat belt defense.

It was undisputed that Plaintiff Carr did not utilize a seat belt, that the seat belt was available and operational, and that the vehicle in which she was a passenger struck a tree, propelling her forward into the windshield and dashboard.

As established by the facts of the accident, the seat belt issue arguably would have been a jury issue even without expert testimony. The expert testimony regarding Plaintiff's non-use of a seat belt and the causal relation to her injuries was fully "competent", i.e., both relevant and material.

Under the facts as shown in the record, the qualifications

of the experts and their testimony, the trial court was correct in allowing Defendants' expert testimony. Certainly, the trial court did not abuse its discretion in submitting the issue to the jury and in declining to grant a new trial based upon this issue.

Plaintiffs contend that the verdict was against the manifest weight of the evidence, and that the trial judge abused his discretion in failing to grant a new trial. The grant of a new trial is discretionary and an appellate court will apply the reasonableness test to determine whether an abuse of discretion has occurred. Close examination of Plaintiffs' contentions suggest that their primary complaint is that the allocation of negligence was unsatisfactory to them. They apparently believe the jury assigned too much negligence to non-party Brock and not enough negligence to Defendant McGraw. The apportionment of negligence is absolutely within the province of the jury. Plaintiffs have failed to show that the trial judge abused his discretion in denying Plaintiffs' motion for new trial because they have not shown that reasonable persons could not differ on the issue.

Plaintiffs contend that the trial judge should not have charged the jury concerning four Florida traffic statutes. The decision to give an instruction is within the discretion of the

trial judge. A party is entitled to have the jury instructed on the law applicable to their case, where that theory is supported by evidence at trial. As to each of the four statutes, the record contains ample evidence of their applicability. Plaintiffs have failed to show an abuse of discretion in the charging of the jury.

Finally, Plaintiffs contend that the trial court erred in its entry of the Final Judgment, because the applicable set-offs and percentages of negligence were incorrectly calculated. Because joint and several liability did not apply, Michael McGraw was liable only for his percentage of negligence for both economic and non-economic damages. The appellate court followed existing Fifth D.C.A. precedent in setting off collateral sources and calculating the amount of the final judgment. The subsequent decision of this Court in Norman v. Farrow, 880 So. 2nd 557 (Fla. 2004) overruled that precedent. Defendants have conceded that the amount of damages for which Defendants are responsible was incorrectly calculated and given said concession, there are no issues for this Court to consider.

The appellate court below found no error other than with a proposal for settlement, which is not at issue here, and the calculation of a set-off for collateral souces in the ultimate calculation of damages. Defendants/Respondents have conceded

that Norman controls the calculations and that Plaintiffs should have received a total award of $15,507.09. Accordingly, the case should be remanded for entry of judgment in favor of Plaintiffs in that amount.

VI. ARGUMENT

POINT I

THE ENTRY OF FINAL JUDGMENT WAS SUBSTANTIALLY CORRECT.

A. Standard of Review. The standard of review for a pure question of law is de novo. Richey v. Hurst, 798 So.2d 841 (Fla. 5th DCA 2001); Fox v. Professional Wrecker Operators of Florida, Inc., 801 So.2d 175 (Fla. 5th DCA 2001).

B. Argument:

The jury apportioned liability as follows: 70% to non-party Mark Brock; 25% to Plaintiff Amanda Carr; and 5% to

Defendant Michael McGraw. The jury determined that economic damages were $204,766.00, and non-economic damages were $160,000.00.

Prior to October 1, 1999, Section 768.81(3), stated the following:

> **(3) Apportionment of Damages.** -- In cases to which this section applies, the court shall enter judgment against each party on the basis of such party's percentage of fault and not on the basis of joint and severable liability; provided that with respect to any party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic damages against that party on the basis of the doctrine of joint and several liability.

After October 1, 1999, Section 768.81(3) stated:

> **(3) Apportionment of Damages**.-- In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability, except as provided in paragraphs (a), (b) and (c):
>
> (a) Where a plaintiff is found to be at fault, the following shall apply:
>
> (1.) Any defendant found 10 percent or less at fault

> shall not be subject to joint and several liability.

The appellate decision below held that the 1999 amendment was prospective and applied the earlier version. Since McGraw's negligence (5%) was less than Carr's (25%), the doctrine of joint and several liability did not apply and the judgment against McGraw was properly entered based only on his percentage of fault. Wells v. Tallahassee Memorial Regional Medical Center, 659 So.2d 249 (Fla. 1995); Metropolitan Dade County v. Frederic, 698 So.2d 291 (Fla. 3rd DCA 1997), rev. denied, 705 So.2nd 9 (Fla.1997). (Actually, there would be no joint and several under either version of the statute.)

Prior to trial, Mark Brock settled with the Plaintiffs for his policy limits of $100,000.00 (IB-P.22). The appellate court held, and Petitoners have conceded, that no set-off for the Brock settlement was applicable as to any of the damages awarded by the jury in this case because there was no joint and several liability (IB - p.20). Accordingly, Michael McGraw is liable for five percent of the non-economic damages of $160,000, that is, $8,000.

The $72,966.09 paid by collateral sources including PIP and med-pay is available as a set-off and reduces the economic damage award. Wells.

The collateral sources should be reduced by 25%, the percentage of negligence the jury attributed to the Plaintiff, Amanda Carr, and then deducted from the economic damage award. Norman v. Farrow, 880 So.2d 557 (Fla. 2004). Five percent of the resultant amount is the Defendant's share of the economic damages. The calculation therefore is:

Economic Damages:	$204,766.00
Less Collateral Source Set-off ($72,966.00 reduced by 25%)	-54,724.55
	150,041.45
x .05	7,502.09

The total judgment as to these Defendants would be $8,000.00 + 7,502.09 = $15,502.09. This is the calculation as mandated by this Court in Norman.

Plaintiffs argue for three different damage amounts: $14,590.00, $83,663.91 or $18, 055.88. Only the first amount is arrived at by application of this Court's method of calculation as set forth in Norman. The slight difference in Plaintiffs' calculation versus Defendants' calculation results from not deducting Plaintiffs' comparative negligence

percentage from the collateral source setoff. Otherwise, the calculations comport.

Plaintiffs' other damage calculations arise from an effort to decide how to allocate the settlement of $100,000.00 from non-party Brock. Because the Defendants are not jointly and severally liable, they do not receive any setoff from the Brock settlement, and there is no need to make any Wells calculations to allocate the settlement.

Plaintiffs suggest that the presence of Brock on the verdict form and the fact that the jury found him at fault creates confusion and the need for the Court to clarify the confusion. In fact, this Court's decision in Norman makes clear how the damages herein should be calculated, and there is no confusion.

Plaintiffs further suggest that the application of the set-off statutes, Sections 45.015(2), 768.041(2) and 768.31(5), F.S. (1991); the joint and several liability statute, Section 768.81 F.S. (1999) and the collateral source statute, Section 672.766 (3), F.S. (1999), present questions for the Court to resolve. The set-off statutes presuppose multiple defendants who are jointly and severally liable for the same damages. The subsequent enactment of Section 768.81 eliminated or limited joint and several liability. D'Angelo

v. Fitzmaurice, 863 So. 2d 311 (Fla. 2003). In the circumstances of the instant case, where joint and several liablility does not exist, there are no questions not addressed and answered in Norman.

POINT II

THE SEAT BELT ISSUE WAS PROPERLY SUBMITTED TO THE JURY

A. Standard of Review:

The standard of review with respect to submission of an issue to the jury, i.e., the denial of a motion for a directed verdict on an issue is the same as for the trial court. In considering the motion for a directed verdict the court is required to evaluate the evidence in the light most favorable to the non-moving party and indulge every reasonable inference in the non-movant's favor. Tenny v. Allen, 858 So. 2nd 1192 (Fla. 5th DCA 2003)

The standard of review to be applied to a decision to give or withhold a jury instruction is abuse of discretion. Barbour v. Brinker of Florida, inc., 801 So. 2d 953 (Fla. 5th DCA 2001).

B. Argument:

Plaintiffs contend that the seat belt issue should not have been submitted to the jury because the evidence did not support that defense. In effect, they argue that the trial court should have granted their motion for a directed verdict on the issue.

Motions for a directed verdict are rarely appropriate in negligence cases. It is only when reasonable persons could come to but one possible conclusion that issues of negligence become issues of law and should not be submitted to the jury. Scott v. TPI Restaurants, Inc., 798 So.2nd 907 (Fla. 5th DCA 2001).

Initially, it should be noted that it is undisputed that Plaintiff Amanda Carr was not utilizing a seat belt at the time of the accident (T.T. Vol. 1, pp. 34, 36-37, 55-56). The owner of the truck, Mark Brock, testified that the seat belt and shoulder harness on the passenger side were functional.(T.T. Vol. I, p. 116). It is also undisputed that the vehicle in which Ms. Carr was a passenger struck a tree (IB-p.2) and that Ms. Carr was propelled forward and her head struck the windshield, breaking it (T.T. Vol. 1, pp. 45-47, 143). In the accident Ms. Carr suffered a fractured pelvis (IB, p. 2). Defendants' seat belt defense was premised on the

proposition that Ms. Carr fractured her pelvis when she struck the dashboard.

The Defendants made a prima facie showing that Miss Carr had an operational seat belt available to her. Bulldog Leasing Company, Inc. v. Curtis, 630 So. 2nd 1060 (Fla. 1994).

Plaintiffs claim that the defense failed to present "competent evidence" to support the seat belt defense (IB-pp. 30,31). The "competent evidence" standard requires a defendant to introduce evidence of a causal relationship between the injury and the failure to use a seat belt that is not uncertain, speculative or conjectural. Zurline v. Levesque, 642 So.2d 1169 (Fla. 4th DCA 1994). "Competent evidence" is defined as evidence that is relevant and material to the issues presented for determination. Gainesville Bonded Warehouse, Inc. v. Carter, 123 So.2d 336 (Fla. 1960).

Under the facts herein, the seat belt defense would arguably go to the jury, even absent any expert witness testimony. (See for instance, State Farm Mutual Automobile Insurance Company v. Smith, 565 So.2d 751 (Fla. 5th DCA 1990) cause dismissed, 570 So.2d 1306 (Fla. 1990) and Burns v. Smith, 476 So.2d 278 (Fla. 2nd DCA 1985)). Nevertheless, Defendants presented the testimony of an engineer and an

orthopedic surgeon to support its defense.

The two expert witnesses presented by the Defendants in support of the seat belt defense were found by the trial judge to be qualified. Such determination is peculiarly within the discretion of the trial judge and will not be disturbed on appeal absent a showing of gross abuse of discretion. Guy v. Kight, 431 So.2d 653 (Fla. 5th DCA 1983),pet. for rev den., 440 So. 2nd 352 (Fla. 1983). It is for the trial court to determine the qualifications of an expert witness and the decision of the trial court is conclusive unless it appears from the transcript to have been erroneous. Harvey v. State, 176 So.439 (Fla. 1937).

Dr. William Campbell testified that Plaintiff's injury occurred as a result of a frontal impact caused by Plaintiff's failure to wear a seatbelt. Plaintiff's treating physician, Dr. Agnew, confirmed that the injury occurred due to a frontal impact.

Plaintiffs' arguments regarding the expert witnesses would be more appropriately directed to the weight to be given the testimony, not its admissibility. Florida Water Service Corp. v. Ulilities Commission, 790 So. 2nd 501 (Fla. 5th DCA 2001).

The defendants presented extensive evidence on the seat

belt defense, and the facts of the accident were such that the issue would properly go the jury, even without the expert testimony.

Plaintiffs also argue that the trial court erred in not giving a jury instruction stating that Mark Brock's failure to use a seat belt should not be considered as negligence. There was no reason for the trial judge to so instruct the jury because neither party contended that Brock was negligent in failing to use a seat belt. Counsel for the Defendants specifically disavowed that argument (T.T. Vol. IV pp. 284-5) and review of the record fails to show any instance in which the Defendants' counsel advanced that argument.

Plaintiffs do not cite to the record to show any request for an instruction on Brock's failure to use his seatbelt. Absent a showing in the record of a specific request for an instruction, Plaintiffs cannot complain of error. Middelveen v. Sibson Realty, Inc., 417 So. 2d 275 (Fla. 5th DCA 1982).

Plaintiffs contend that the jury "...very well could have concluded..." that Brock's negligence consisted, at least in part, of his failure to use a seat belt (IB - p.29). They state that "...Brock's failure to wear his seatbelt...became convoluted into the Fabre defense" (IB - p. 13). They advance the thought that allowing the jury to consider this "unpled

theory" likely lead to jury confusion (IB - p. 19). Plaintiffs provide no references to the record to support any of this speculation about what the jury "could" have considered or "could" have concluded. Not only was this theory unpled, it was never argued or even suggested at trial by the defense.

The difficulty with Plaintiffs' position with respect to the possibility that Brock's failure to use a seatbelt was the cause of Carr's injury is that, as they state: "The Defendants never presented that issue in this case..." (IB - p. 29). That is absolutely correct.

Having themselves raised the possibility that Miss Carr's injuries might have been caused by Brock falling on her, Plaintiffs cannot now complain that the jury may have considered such evidence or could have been misled by such evidence. Allstate Insurance Company v. Hinchey, 701 So. 2d 1263 (Fla. 3rd DCA 1997).

POINT III.

THE TRIAL COURT CORRECTLY DENIED THE MOTION FOR NEW TRIAL

A. Standard of Review:

The standard of review on an order for a new trial is

abuse of discretion. In reviewing the trial court's order, the appellate court should apply the reasonableness test to determine whether the trial court abused its discretion. Baptist Memorial Hospital, Inc. v. Bell, 384 So.2d 145 (Fla. 1980).

There can be no finding of an abuse of discretion if reasonable persons could differ as to the propriety of the action taken by the trial court. Brown v. Estate of Stuckey, 749 So.2d 490 (Fla. 1999).

Brown succinctly explains the standard to be applied by an appellate court in reviewing the trial court's order:

> When reviewing the order granting a new trial, an appellate court must recognize the broad discretionary authority of the trial judge and apply the reasonableness test to determine whether the trial judge committed an abuse of discretion. If an appellate court determines that reasonable persons could differ as to the propriety of the action taken by the trial court, there can be no finding of an abuse of discretion.

Brown, 749, So.2d at p. 497-498.

B. Argument:

The trial court correctly denied the motion for a new trial on the ground that the verdict was against the manifest weight of the evidence. The appellate court found no error on

this issue.

Plaintiffs contend that the “overwhelming evidence in the record” shows that Mr. McGraw violated section 316.155, F.S. by failing to signal his left turn (IB-23). A review of the record shows that this is simply not so. Although Mark Brock and Amanda Carr both testified that they saw no left turn signal by McGraw, Plaintiffs’ contention with respect to the opposing evidence is incomplete. Defendant McGraw testified that he believed that he utilized his left turn signal (T.T. Vol. VI, p. 518). Plaintiffs contend that: “the jury could only conclude from this evidence that McGraw negligently turned left in violation of Fla. Statute. 316.155.” (IB-p.23) The record shows there was conflicting evidence on the point, leaving it as an issue for the jury to resolve.

Plaintiffs also contend that “the greater weight of the evidence clearly showed that McGraw began his left turn after the passing lane had been occupied…by Brock,” and that therefore, Brock, “as a matter of law” had the right-of-way. (IB-p.23). Again, Plaintiffs disregard the conflicting testimony at trial that Michael McGraw slowed as he approached the intersection, thinks that he activated his turn signal and commenced a gradual turn. Mark Brock observed Michael McGraw and consciously decided to pass travelling, according to his

own testimony, at approximately 40 miles per hour in an intersection in a residential area.

Even assuming, arguendo, that Mr. McGraw did not signal a left turn, that Mr. Brock had the right-of-way, and that Mr. McGraw was negligent in starting to turn left when Mr. Brock occupied the passing lane, all as claimed by Plaintiffs and denied by Defendant, there was ample evidence from which the jury could conclude that Mr. Brock was proceeding at an excessive speed under the existing conditions, or was being otherwise negligent, pursuant to the reasonable man standard included in the jury instruction on negligence. (T.T. Vol. VI, pp. 638-639).

Ultimately, the jury found both Brock and McGraw negligent. It appears that Plaintiffs' argument is not so much that Mark Brock was not negligent, as that the percentage of negligence the jury assigned to him was too high and that the percentage assigned to Mr. McGraw was too low. The question of apportionment of negligence is absolutely within the province of the jury. Tyus v. Appalachicola Northern Railroad Company, 130 So.2d 580 (Fla. 1961); South Florida Beverage Corp. v. San Pedro, 499 So.2d 915 (Fla. 3rd DCA 1986). Plaintiffs' assume that "…the jury was confused…" and assigned an increased percentage of negligence to Mr. Brock because of his failure

to utilize a seat belt. (IB-p.24). The problem with Plaintiffs' argument is that it is premised entirely upon their assumption that the jury was confused, and is pure speculation.

By their verdict, the jury found that both Mr. Brock and Mr. McGraw were negligent and their finding has ample support in the record. Determining the percentages was the jury's province.

Plaintiffs have failed to show that the trial judge abused his discretion in denying the motion for a new trial based upon the verdict being against the greater weight of the evidence. Plaintiffs have specifically failed to show that reasonable persons could not differ as to the propriety of the actions taken by the trial judge.

POINT IV

THE JURY INSTRUCTIONS WERE APPROPRIATE

A. Standard of Review:

The standard of review to be applied to a decision to give or withhold a jury instruction is abuse of discretion. Barbour v. Brinker Florida, Inc., 801 So.2d 953 (Fla. 5th DCA 2001).

B. Argument:

The trial judge's instructions to the jury were appropriate and were based upon the evidence at trial. A party is entitled to have the jury instructed on the law applicable to their theory of the case, where that theory is supported by competent evidence. Schreiber v. Walt Disney World Co., 389 So. 2d 1040 (Fla. 5th DCA 1980). Plaintiffs complain specifically of the instructions based upon possible violation of four statutes: Section 316.614 (5); 316.087; 316.183 and 316.185. (IB-p.28).

Section 316.614(5), F.S., is the seatbelt law. Plaintiffs argument is simply that the seatbelt defense ought not to have been submitted to the jury, and that therefore this instruction should not have been given. The seat belt defense was raised in this case, and was properly submitted to the jury. Submission to the jury was warranted by the evidence presented at trial regarding Plaintiff Amanda Carr's failure to utilize an available and operational seatbelt and the effect of that failure in causing her injuries. Given the evidence presented, the instruction was appropriate.

The trial court properly instructed the jury that violation of § 316.185, F.S., "Special Hazards" was evidence of negligence. The statute specifically addresses the duty of a driver to decrease speed ". . . when approaching and

crossing an intersection . . . or when special hazards exist with respect to . . . other traffic . . . .."

The trial court properly instructed the jury that violation of § 316.183, F.S., "Unlawful speed", was evidence of negligence. The statute specifically addresses the duty of a driver to proceed at a speed which is reasonable and prudent under the existing conditions, to control speed so as to avoid colliding with any vehicle and to drive at an appropriately reduced speed when approaching and crossing an intersection.

In this case, there was evidence that Mark Brock was travelling at an excessive speed when he approached and entered the intersection where the accident occurred and as he approached and attempted to pass the vehicle driven by Defendant McGraw. (T.T. Vol. 1, pp. 134-135; Vol. 4, pp. 405-407; Vol. 6, pp. 521-522). Accordingly, the trial court properly instructed the jury on both statutes. Sotuyo v. Williams, 587 So.2d 612 (Fla. 1st DCA 1991).

Once evidence is presented that a vehicle was driven at a speed greater than was reasonable and prudent under the conditions, an instruction on unlawful speed is justified. That there was conflicting evidence as to speed would not justify a refusal to give the instruction. Robinson v. Gerard, 611 So.2d 605 (Fla. 1st DCA 1993).

The trial court properly instructed the jury that violation of § 316.087, F.S., "Further limitations on driving to left of center of roadway", is evidence of negligence. This statute addresses the duty of a driver to refrain from driving to the left of the center of the roadway when " . . . approaching within 100 feet of or traversing any intersection . . . ". Plaintiffs contend that the instruction should not have been given because there was no evidence regarding the exception in the statute for state or county maintained roads.

The record shows that in the course of the charge conference there was considerable discussion regarding the charge on this statute. (T.T. Vol. 4, pp. 291-295). It is not cler from the record that Plaintiffs' counsel made a specific objection to this charge. Absent a showing of a specific objection to an instruction, the issue is not preserved for appeal. A general objection is not sufficient. Feliciano v. School Board of Palm Beach County, 776 So. 2d 306 (Fla. 4th DCA 2000).

There is ample evidence in the record to support the jury's finding that Mark Brock was negligent in violating applicable statutes and negligent in terms of the definition of negligence as provided in the standard jury instructions.

The Plaintiffs have not shown that any error in

instructing the jury on any of these statutes was prejudicial, that is, that had the jury not been so instructed, the trial result would have been different. Allstate Insurance Company v. Vanater, 279 So.2d 293 (Fla. 1974).

Decisions regarding jury instructions are within the sound discretion of the trial court, and should not be disturbed on appeal absent prejudicial error. Prejudicial error requiring a new trial occurs only where the error complained of has resulted in a miscarriage of justice. A miscarriage of justice arises only where instructions are reasonably calculated to confuse or mislead the jury. Goldschmidt v. Holman, 571 So.2d 422 (Fla. 1990). The decision of the trial court has the presumption of correctness. Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979).

All instructions given by the trial court should be considered in the light of all the evidence to determine if reversible error has occurred. If the jury does not appear to have been misled or confused, and no other prejudice or harm has resulted, the trial court's judgment must be affirmed. To obtain reversal of the trial judge's denial of a motion for new trial, it is incumbent upon an appellant to clearly demonstrate an abuse of discretion. Matalon v. Greifman, 509

So.2d 985 (Fla. 3rd DCA 1987).

Plaintiffs have failed to carry their burden of clearly demonstrating an abuse of discretion, prejudicial error, and a miscarriage of justice.

VII. CONCLUSION

Petitioners sought review of the appellate court's decision on the ground that there was conflict amongst the districts with respect to the proper method of deducting collateral source benefits and the ultimate calculation of damages. This Court, by its decision in Norman, resolved all such conflicts. Defendants/Respondents conceded in their jurisdictional brief, and have conceded herein, that Norman has resolved all the issues presented in this appeal.

The remaining issues raised by the Plaintiffs were thought to have no merit by the trial court, and the appellate court affirmed the findings of the trial judge. Because of this, and for the reasons set forth above, the decision of the Fifth District Court
of Appeal should be affirmed and judgment for the Plaintiffs in the amount of $15,502.08 should be entered.

VII. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Stephen C. Bullock, Esquire, P.O. Box 1029, Lake City, Florida 32056-1029, by U.S. Mail, this 30th day of November, 2004.

CERTIFICATE OF COMPLIANCE

This brief has been printed in Courier New 12 Point, as required by Rule 9.210 (a)(2), Fla. R. App. P.

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