SUPREME COURT OF FLORIDA

FAITH CARR HIBBARD, ET AL,

Petitioners,

vs.

MICHAEL McGRAW, ET AL.,

Respondents.

CASE NO.: SC04-7
5th DCA Case No. 5D02-2154
L.T. No. CA–128

ON APPEAL FROM THE FLORIDA
FIFTH DISTRICT COURT OF APPEAL

AMENDED INITIAL BRIEF OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases: **Page(s)**

Statutes

Page(s)

PRELIMINARY STATEMENT

Petitioners, Faith Hibbard, individually, and as mother and guardian (i.e...power of attorney) over Amanda K. Carr, shall be referred to as "Amanda"; "Hibbard/Carr"; and "Hibbard", individually.

Respondents, Michael McGraw and Dual, Incorporated, shall be referred to collectively as "McGraw/Dual" and "McGraw", individually.

The record on appeal shall be referred to as (R. Vol. 1, p. ____); the trial transcript shall be referred to (T.T., p. _____); and the appendix shall be referred to as (App., p. _____). During the trial, several depositions were read in their entirety and instead of the court reporter re-transcribing the depositions as they were read to the jury, the Court instructed the Court Reporter that certain depositions and/or video depositions would be filed in lieu of re-transcribing the depositions as they were read. (T.T. Vol. I, p. 506). Excerpts from the depositions will be referred to as: (deposition, p. ___).

STATEMENT OF THE CASE AND OF THE FACTS

Appellant, Amanda K. Carr, a minor (hereafter "Amanda"), by and through her natural mother and guardian, Faith Carr Hibbard ("Hibbard"), filed suit against Appellees Dual Incorporated ("Dual") and its employee,

Michael McGraw ("McGraw"), alleging that McGraw's negligence caused an automobile accident in which Amanda was seriously injured. (R: Vol. I, p. 1).

McGraw owned the motor vehicle he was operating in the course and scope of his employment with Dual while traveling from a business meeting in Orlando back to Jacksonville to drop off a co-employee (Randy Molding) who lived on Pitch Pine Avenue. (R: Vol. I, p. 1) The accident occurred while he was traveling east on Fruit Cove Woods Drive near the intersection at Pitch Pine. (R: Vol. I, pp 1-3). Amanda was riding in a pick-up truck operated by her friend, Mark Brock ("Brock"), who was also traveling east on Fruit Cove Woods Drive. (R: T.T. pp 37-41). Amanda and Brock had just eaten at a barbecue restaurant and were going to meet some friends. (R: T.T. p 36; 80).

Amanda testified that she normally wore her seat belt; however, on the day of the accident when she got into Brock's pickup truck not all of the seat belt parts were there. She asked Brock about the seat belt and he told her they were going just down the road, so she shouldn't worry about it. (R: T.T. Vol I, p. 36-37). As a result, she sat on the passenger side of the pickup truck and was in that location at the time of the accident. (R: Vol. I, p. 36-37).

While traveling east on Fruit Cove Woods Drive, Brock steered his

vehicle left to pass McGraw, who was traveling at a slow speed in the same direction. (R: T.T. pp 43-45, 60, 93-95). As the two vehicles approached the intersection with Pitch Pine Avenue, McGraw turned left onto Pitch Pine without warning, directly into the pathway of Brock, who had already occupied the passing lane behind him and was in the process of passing. (R: T.T. pp 45; 93-96; 133-134). There was no evidence at trial to show whether the road was a county maintained road or state maintained. Both Brock and Amanda testified that as they approached McGraw from the rear, they never saw a left turn signal. (R: T.T. Vol. I, pp 45; 93-96; 133-134). Likewise, McGraw and his passenger both testified they could not recall the left turn signal being turned on. (R: T.T. Vol. I, p 134; Vol IV, p 413-414; Vol. VI, p 530).

McGraw began his left turn after the passing lane had already been occupied by Brock, and turning left in front of Brock caused the accident. (R: T.T. Vol. I, p 137; Vol. VI, pp 537, 538). As a result of McGraw's turn, Brock continued veering left in order to avoid a collision. (R: T.T. Vol. I, pp 137; Vol. VI, p 537, 538). Brock then proceeded onto the right shoulder, ultimately colliding with a pine tree. There were 30 feet of skid marks, confirming a deceleration of Brock's pickup truck. (R: T.T. Vol. VI, p 495). The Brock

vehicle left the shoulder at the intersection, striking a pine tree located several feet into a neighbor's yard, resulting in the pickup truck partially flipping onto its side. (R: T.T. Vol. V, p 495). In the course of the rollover, Brock landed on top of Amanda. (R: T.T. Vol. I, pp 68-70).

There were no stop signs or other traffic control devices from the point at which Brock entered Fruit Cove Woods Road until the point of the accident. (R: T.T. Vol I, p 39). The posted speed sign on State Road 13 was 45 miles per hour. (R: T.T. Vol. I, p 37). Mathematical calculations illustrate that Brock could not have been driving in excess of 30 miles per hour, notwithstanding his admission that he may have accelerated up to 40 in order to pass McGraw. (R: T.T. Vol. I, pp 89-91). Respondent's expert testified that a speed of 20 mph could have resulted in the bodies being ejected from the pickup truck, . . . which did not occur in this case. (R: T.T. Vol. V, p 495). In either event, <u>factually</u> Brock could not have been speeding.

Amanda was the only person injured in the accident. (R: T.T. Vol II, p 171; Dr. DiPasquale depo pp 14-17; T.T. Vol. III, P 227). She suffers to this day from a fractured pelvis held together by surgically placed metal screws and has a permanent and noticeable limp from asymmetry in her left

hip. (R: Dr. DiPasquale depo pp 14-17; T.T. Vol. III, p 227). Her injuries consist of fractures of the L4, L5, transverse process, and hematuria which comes with the bladder, pelvic ring fracture at multiple places, including the superior and the inferior rami, along with a fracture through the sacral body (tailbone) down the line where the nerve roots leave the spinal column and run down into her legs. (R: T.T. Vol. III, pp 170-174).

Both Dual and McGraw admitted to the accident and that McGraw was in the course and scope of his employment at the time of the accident. (R: Vol I, pp 4; 12). McGraw admitted in his trial testimony that he could not recall turning on his left turn signal before turning left. (R: T.T. Vol. I, pp 134; 530). McGraw's co-employee and passenger, Randy Molding, also testified that he was looking out the side window towards the right at some neighborhood houses and did not recall McGraw turning on his left turn signal. (R: T.T. Vol. IV, pp 413; 414).

Defendants raised two affirmative defenses which are the subject of this appeal. (R: Vol I, pp 4, 12). In the Third Affirmative Defense, they raised the "Seat Belt Defense", contending that Amanda failed to use an operational seat

belt, thereby causing her pelvic injuries. (R: Vol. I, pp 5; 13). In addition, Defendants raised the Fabre affirmative defense, contending that the proximate cause of Amanda's injuries was Brock's negligence in the operation of his vehicle.[1] (R: Vol. I, pp 5; 13). Defendants never raised as an affirmative defense that Brock was negligent in his failure to wear a seat belt and that his failure to wear a seat belt is what caused the injuries to Amanda's pelvis.[2] (R: Vol. I, pp 4, 5, 9, 12, 13). See also: (T.T. Vol. I, pp 4-15, 27, 28; T.T. Vol. IV, p 418; T.T. Vol. VI, pp 527, 539, 540; R. Vol VII, p 1072).

The seat belt defense was based on Amanda fracturing her pelvis when she struck the dashboard. (R: Vol. I, pp 4, 5, 13). There are NO facts in the record illustrating that Amanda's pelvis struck the dashboard. Dr. Campbell, Defendants' IME doctor, examined Amanda for less than 15 minutes, and reviewed medical records, none of which included x-rays, MRI findings or any EMGs, for approximately 45 minutes. (R: Campbell depo pp 19, 32; T.T. Vol.

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[1]Prior to filing suit, Amanda Car via her mother as appointed guardian, settled with Mark Brock for the amount of his policy limits.

[2]During the trial, the trial court even expressed some concern that Brock's negligence in failure to wear his seat belt may have caused or contributed to causing the injuries to Amanda. (R: T.T. Vol. I, pp 8, 9).

V, p 506). Dr. Campbell testified that he did not know the dimensions of the dashboard, the distance between the dashboard and the seat that Amanda was sitting in, the exact location of the seat which she was positioned in, nor the rotation of the pelvis at the time of the collision. (R: Campbell depo, p 47; T.T. Vol. V, p 506). When questioned on cross examination he even admitted "...However, she could have struck the side of the door...I mean, the issue of who shot cock robin doesn't seem to be, you know, important. ..." (emphasis added). (R: Campbell depo, p 47; T.T. Vol. V, p 506).

The testimony of Dr. Campbell on this important issue is worth reading in its context as follows:

> **Q: Okay. 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?**
>
> **<u>Mr. Bullock:</u> Object to the form of the question.**
>
> **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've explained a moment ago

would not be the expected result from a side impact; is that correct?

<u>Mr. Bullock:</u> Object to the form.

A: In my opinion, no.

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

<u>Mr. Bullock:</u> Same objection.

A: It is.

(R: Campbell depo, pp 30; 31; T.T. Vol. V, p 506)

…

Q: Doctor, you do not know sitting here today the dimensions of the dashboard; the distance between the dashboard and the seat that she

was sitting in; the exact location of the seat which she was positioned

in, nor the rotation of the pelvis at the time of the collision, do you?

A: That's correct.

…

Q: Let me rephrase it. Isn't it true, Doctor, that because you don't have other information such as the distances between the seat, the dashboard, the configuration of the dashboard, the location of where her pelvis actually was at the time of the impact, that any opinions that you have with regard to frontal impact with her hip to the dashboard is merely speculation on the part -

Mr. Brown: Objection. Move to strike question.

Q: - isn't that true? Isn't that true?

Mr. Brown: I move to strike that question.

Mr. Bullock: That's fine.

A: Based upon the scientific knowledge made available for the type of injuries that occur with this, there has been some sort of frontal impact associated with this, whether one pelvis was more tilted one direction or another. Obviously when somebody's hurdling through the woods and the truck hits a tree, the position of the individual and the position of the obstacle standing in front of them

will not be perpendicular to one another, which means that her pelvis could have been tilted to one direction or another. She could be turned to the left or turned to the right.

All I can tell you is the scientific evidence that purports to these type of injuries is usually some form of crush-type injury. That is the vector point is somewhere in the anterior or frontal part of the body.

(R: Campbell depo, pp 44-46; T.T. Vol. V, p 506)

…

Q: Okay. What I'm looking for, Doctor, I realize that you had a broad range of education in that regard. What I want to know is what specific scientific studies you have relied upon in assisting you in reaching the opinion that you've given today and that is that her pelvis struck the dashboard and that's the -

A: Well, we didn't say that -

Q: I mean, I thought that's what you said.

A. No. The probable area of impact would be that of the dashboard. However, she could have struck the side of the door.

And now when you're hurdling through the - and I've heard various speeds. I believe she told me that the person driving the car was speeding excessively - that when you hit something, you can be translated at different directions.

I mean, the issue of who shot cock robin doesn't seem to be, you know, important.. And the treatise, if you want, you know, I'll go get you a textbook. You can sit down and read it if you want to, and then you can refer to the bibliography and then you can get a mechanical engineer and you can get these studies.

But, you know, this is not something that I just pull out of the air for the sake of conversation. (Emphasis supplied) (R: Campbell depo, pp 46-47; T.T. Vol. V, p 506).

Defendants' engineer, Mr. Keifer, did not personally inspect the vehicle, and when his associate initially examined the seat belt while it was still intact in the damaged automobile, the mechanism would not operate properly. (R: T.T. Vol. V, pp 466-467). Moreover, Keifer did not examine all the medical testimony regarding the nature of Amanda's injuries. (R: T.T. Vol. V, p 478).

There was no evidence of any injuries to Amanda's chest, nor bruising

on her abdomen. (R: T.T. Vol V, p 468). Nor was there any evidence of injuries to Brock's chest or abdomen. (R: T.T. Vol V, p 495). Admittedly, both Amanda and Brock struck the windshield, however, Keifer testified that the starring effect on the windshield was evidence of only a ten (10) mile per hour collision. (R: T.T. Vol. V, p 495). A speed of twenty (20) miles per hour would have resulted in the bodies being ejected, which did not occur in this case. (R: T.T. Vol. V, p 495).

Most startling is Keifer's admission that because of the location of the starring on the windshield caused by Amanda's head, she would have struck the windshield <u>while</u> <u>she</u> <u>was</u> <u>over</u> <u>the</u> <u>dashboard</u>. (R: T.T. Vol. V, p 505).

Dr. DiPasquale testified that the anatomy of Amanda's injury was from "a lateral compression." (R: DiPasquale depo, pp 14-17; T.T. Vol. III, p 227). Factually, the treating physicians found the fracture to the pelvis was caused by a lateral impact. (R: T.T. Vol II, p 171; DiPasquale depo, pp 14-17; T.T. Vol. III, p 227).

Brock was not wearing his seat belt and Amanda testified that although she recalls striking the windshield, she does not recall any part of her body

coming into contact with the dashboard; rather, as the truck rolled over on its side, Brock fell on top of her. (R: T.T. Vol. I, pp 68-70).

Defendants used the broken front superior ramus of Amanda's pelvis in their attempt to argue a frontal impact. The broken bone in the front of the pelvis does not equate to a frontal impact. Dr. Agnew, who bolted Amanda's pelvis together the night of her accident, stated (R: T.T. Vol. II, p 171):

> **"A: Well, as I stated in her admission record when she came in, that her injury pattern and fatigue pattern about her pelvis was consistent with that from a blow from the left side, or left anterior side, in-folding in her left hemi-pelvis, and then paginating (sic) over to the right side, terminating with an injury to the ligaments in her right SI joint." (Emphasis supplied).**

Defendants jointly submitted a proposal for settlement that was directed solely to "Amanda K. Carr", however, at that time the Plaintiff identified in the style of the pleadings was "Amanda K. Carr, by and through her natural mother and guardian, Faith Carr Hibbard". (R: Vol. VII, p 1078). In response, Plaintiffs moved to strike the proposal for settlement. That motion was denied. (R: Vol. VII, p 1106).

Plaintiffs filed a Motion in Limine and Memorandum of Law regarding the testimony of Defendants' experts on the use of safety restraints. (R: T.T. Vol. I, pp 4-16). The trial court denied the motion. (R: T.T. Vol. I, pp 27, 28). At the close of Plaintiffs' case and again at the close of the evidence, Plaintiffs moved for a directed verdict on the seat belt issue; both motions were denied. (R: T.T. Vol, VII, p 1072).

The case proceeded to a jury trial which, after an interim bomb threat vacating the courthouse, concluded in a jury verdict. (R: Vol. VII, p 1069). The jury verdict form submitted to the jury requested tham tofind was there legal negligence on the part of Brock which was a contributing legal cause of damage to Amanda, and the jury instruction on legal cause of damage was defined as that which is direct and in natural and continues sequence produces or contributes substantially to producing such damage ...etc. (T.T. Vol VI, pp 639, 647). As a result, Brock's failure to wear his seat belt to became convoluted into the Fabre defense.

The trial court also, over Plaintiffs' objections, gave jury instructions premised on Florida Statute Section 316.087, regarding passing at an intersection, Florida Statute Section 316.614(5), the seat belt law, Florida

Statute Section 316.185, regarding special hazards, and Florida Statute Section 316.183(2), regarding unlawful speed. (R: T.T. Vol. VI, pp 640-643).

The jury's verdict findings (R: Vol. VII, p 1054) were:

A) Negligence

(1) Michael McGraw, Dual Inc.	**5%**
(2) Mark Brock	**70%**
(3) Amanda Carr	**25%**

B) Damages

Economic

(1) Past	**$104,766**
Future	**100,000**
	$204,766

(2) Non-economic

(1) Amanda Carr past pain & suffering	**100,000**
(2) Amanda Carr future pain & suffering	**50,000**
(3) Faith Hibbard consortium	**10,000**
	$160,000

Total Damages

$365,766.00

There were collateral source setoffs for PIP benefits in the amount of $72,966.09. (R: Vol. VII, p 1105).

Following the jury verdict, Plaintiffs filed a Motion for New Trial and/or

in the Alternative Motion for Directed Verdict and/or Motion for Judgment Notwithstanding the Verdict. (R: Vol. VII, p 1072). Both Plaintiffs and Defendants filed Motions for Entry of Final Judgment. (R: Vol. VII, pp 1078, 1083). Defendants filed a Motion for Attorney's Fees and Costs based upon their proposal for settlement. (R: Vol. VII, p 1085). Plaintiffs asserted that the collateral source offsets should be calculated in the manner set forth in Norman v Farrow, 832 So. 2d 158 (Fla. 1st DCA 2002), approved, 880 So. 2d 557 (Fla. 2004), and in Aetna Casualty & Surety Co. v Langel, 587 So. 2d 1370 (Fla. 4th DCA 1991), which would first reduce the set-off amount by Amanda's comparative negligence, then that amount would be used to reduce the economic damages, which would then be multiplied by Defendants' comparative negligence, resulting in an economic damages award in favor of Amanda in the amount of $7,502.09. The economic damages of $7,502.09, plus the non-economic damages of $8,000, would then result in a final judgment of $15,502.09 in favor of Amanda. Defendants argued that setoffs should be calculated as set forth in Assi vs. Florida Auto Action of Orlando, 717 So. 2d 588 (Fla. 5th DCA 1998), disapproved, Norman v Farrow, 880 So. 2d 557 (Fla.

2004)[3] applying the entire $72,966.09 PIP collateral source payments as a set-off against the percentage of the Defendants' liability calculated against the economic damages. The trial court adopted the calculation method espoused by the Defendants.

After conducting post trial hearings, the trial court ultimately entered an Order granting a Final Judgment for the defense, an Order granting attorney's fees and costs in favor of Defendants, and an Order Denying the Motion for New Trial. (R: Vol. VII, pp 1105, 1106, 1108).

The case was appealed to the Fifth District Court of Appeal, which rendered its decision finding in part that the proposal for settlement was insufficient to support an award of sanctions against Plaintiffs and which followed its prior decision in Assi vs. Florida Auto Action of Orlando, supra, applying the entire $72,966.09 PIP collateral source payments as a set-off against the percentage of the Defendants' liability calculated against the economic damages (Defendants' 5% of economic damages multiplied against the jury verdict of $204,766.44, resulting in $10,238.32 against Defendants);

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[3]In fairness to the District Court, we note that this Court's decision in Norman v Farrow was released after the District Court decision in the instant case.

the Fifth District then found no economic damages awarded to Amanda. See Hibbard v McGraw, 862 So. 2d 816 (Fla. 5th DCA 2003). In essence, the Fifth District took the entire collateral source payment and used it as a set-off against the mathematical comparative negligence calculations without any reduction, resulting in a zero award for economic damages.

Plaintiffs filed a Notice Invoking Discretionary Jurisdiction. Following submission of jurisdictional briefs, this Court accepted jurisdiction and established a briefing schedule.

SUMMARY OF ARGUMENT

The Fifth District in the instant case incorrectly applied the collateral source setoff by following the method set forth in Assi vs. Florida Auto Action of Orlando, rather than the method of calculation set forth by this Court in Norman v Farrow, 880 So. 2d 557 (Fla. 2004). Rather than the setoff completely eliminating economic damages, as the Fifth District held, it should have reduced those damages to $6,590. Additionally, however, this case presents a further issue not present in Norman v Farrow: the impact on the collateral source setoffs of the presence of a Fabre entity. In that situation, the setoff for settlement with the Fabre entity should be allocated between the

economic and non-economic elements in accordance with the jury's allocation, and both the resulting amount and the amount of the PIP setoff subtracted from the jury's award of economic damages in order to reach the economic damage liability of the Defendants. Alternatively, the court should reduce the collateral source payments by the comparative fault percentage, plus the Fabre percentage, then subtract this amount from the jury's economic damage award, then apply the applicable percentage of fault to reach the amount of the economic damages to be included in the judgment.

The decision below also erroneously applied the seat belt defense by including the non-party driver's failure to use his own seat belt as part of the comparative fault to be attributed to him, and thus to further reduce Amanda's recovery—even though Defendants did not plead such a theory and specifically disavowed it during the trial. Here, it was not simply the extent of injuries caused by the plaintiff's failure to wear a seat belt that the jury was requested to address, but also whether the non-party driver's failure to wear a seat belt constituted comparative negligence that should be included in the allocation of fault under Fabre. The failure of someone other than the plaintiff to use an available and operational seat belt should not be held to be comparative

negligence on the part of that person for purposes of a Fabre allocation of fault, resulting in plaintiff recovering less simply because some other party failed to exercise due care for their own safety. The negligence involved in a seat belt defense situation is the person's negligent failure to take steps to avoid injury to himself or herself. It is not a negligent failure to take steps to avoid injury to someone else who is in the car. In the circumstances of the instant case, the lower court's error in allowing the jury to consider this unplead theory likely led to jury confusion and an improper result.

Moreover, the evidence adduced in the instant case was simply too speculative and conjectural to permit the jury to consider the seat belt defense even as it applied to Amanda's own failure to use a seat belt. Not only was there a failure of evidence to establish that Amanda's seat belt was operational, there was also no competent evidence to establish any causal connection between the non-use of a seat belt and Amanda's injuries.

The lower tribunal also erred in not granting the motion for new trial, since the overwhelming weight of the evidence demonstrated that the jury's allocation of only 5% of the fault to Defendants and 70% to the driver was not a decision that reasonable persons could make in this case.

Finally, the lower tribunal erred in instructing the jury that the violation of several Florida Statutes could be considered by them as evidence of negligence, since the evidence adduced at trial clearly demonstrated that none of the statutes had, in fact, been violated.

ARGUMENT

I. The Proper Analysis of the Jury Verdict With the Applicable Offsets Should Have Resulted in a Verdict for Plaintiffs.

The applicable standard of review as to this issue is de novo, since the question is solely an issue of law: whether either of the lower courts correctly applied the setoffs in this cause.

In this case, the District Court correctly recognized that, under the version of Florida Statutes Section 768.81 in effect at the time of the accident, Defendants did not have any joint and several liability in this case, and that they were liable for 5% of the economic damages ($10,238.32) and 5% of the non-economic damages ($8,000); it further correctly recognized that Defendants were accordingly not entitled to any offset for the settlement with Brock, and

that any offset was to be applied solely against the economic damage award. Where the District Court erred was in deducting the full amount of the allowable collateral source offset from the economic damage liability of the Defendants, resulting in an award of only the $8,000 in non-economic damages.

In Norman v Farrow, 880 So. 2d 557 (Fla. 2004), this Court set forth the correct method of approaching the setoff issue where no Fabre parties are involved. First, the total economic damages are to be reduced by the amount of the PIP offset; next, the total non-economic damages are to be added to this amount; finally, the resulting number is to be reduced to account for the plaintiff's comparative fault. Applying that methodology to the instant case, the total economic damages of $204,766 are to be reduced by the offset amount of $72,966.09, resulting in a figure of $131,799.91. Adding the non-economic damages of $160,000 yields a total amount of $291,799.91. Multiplying that figure by the Defendants' 5% liability percentage yields a judgment amount of $14,590.

Unlike the present case, Norman v Farrow did not involve a Fabre defendant. In Norman, the defendant was found 10% at fault and plaintiff 90%

at fault. Here, in contrast, Plaintiff was found 25% at fault, Defendants 5% at fault, and the non-party (Brock) 70% at fault.

In accordance with Wells v. Tallahassee Memorial Regional Medical Center, Inc., 659 So. 2d 249 (Fla. 1995), the Court has discussed some of the issues of set-offs, Fabre defenses, and comparative negligence in assessing both economic and non-economic damages set forth by a jury. The Court in Wells concluded that the fairest solution was an allocation of settlement amounts based on the jury verdict and held that settlement proceeds should be divided between economic and non-economic damages in the same proportion as the jury award. The Court further indicated that collateral sources (PIP/collateral insurance) should also be considered as an additional set-off, but only as to economic damages as set forth in Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993). With regard to the percentage of fault against the defendants, that percentage should be allocated only against the non-economic damages. Therefore, applying the analysis in Wells and Fabre, the jury verdict in this case should have been reduced to a Final Judgment in the amount of $83,663.91, as follows:

The total amount of economic damages, $204,766, compared to the total award of $364,766, is equal to 56.136 percent. The settlement received

from Brock (Fabre tortfeasor) was $100,000. The amount of the Fabre settlement multiplied by the percent of allocation (56.136%) is $56,136. That amount is then subtracted from the total economic jury verdict of $204,766, resulting in a net amount of $148,630. From that amount the trial court should have subtracted the collateral source of approximately $72,966.09[4] which should have resulted in the net economic damages amount of $75,663.91.

The non-economic damages of $160,000 is then multiplied by the percentage of fault found by the jury against Defendants of five percent (5%), resulting in the net amount of $8,000. The non-economic damages of $8,000 should then have been added to the net economic damages of $75,663.91 (after set-off) for a total of $83,663.91.

An alternative approach to recognizing the Fabre defendant reduction of 70%, which should also be part of the equation for reducing the collateral source, would be to reduce the collateral source payments by the comparative fault percentage of 25%, plus the Fabre percentage of 70%. Under this approach, the Defendants' liability would be: collateral source ($72,966.09)

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[4]The $72,966.09 collateral offset could have been adjusted upon further analyzing the medical bills and insurance payments.

multiplied by 95% (Amanda and Brock), resulting in $69,317.78, which then would equate to a net collateral source of $3,648.30 minus the economic damages of $204,766.04, resulting in a reduced jury verdict for economic damages of $201,117.74. The reduced jury verdict of $201,117.74 would then be multiplied by Defendants' 5% comparative fault resulting in an award of $10,055.88 to Amanda for economic damages. The economic damages of $10,055.88 would then be added to $8,000 non-economic damages, resulting in a judgment of $18,055.88.

Since this Court allowed the interjection of a non-party's negligence into a pending civil matter between a plaintiff and defendant, thereby reducing a jury verdict award, many legal questions remain unanswered, causing much confusion in the trial courts. See Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993). This case presents the opportunity to address and resolve the proper application and interaction of setoffs, collateral sources, and Fabre defendants so as to provide needed guidance to the Bench and Bar of this State.

Some of those questions revolve around the application of the set-off statutes, Sections 45.015(2), 768.041(2) and 768.31(5), Florida Statutes (1991); the joint and several liability statute, Section 768.81, Florida Statutes (1999);

and the collateral source statute, Section 672.736(3), Florida Statutes (1999). Although there have been many decisions attempting to clarify and explain Fabre's application in conjunction with the set-off statutes (See, for instance, Wells v. Tallahassee Memorial Regional Medical Center, 695 So. 2d 249 (Fla. 1995), and Gouty v. Schnepel, 795 So. 2d 959 (Fla. 2001)), there remains the need for additional guidance from the Court regarding the correct application of the collateral source statute, Section 672.736(3), Florida Statutes (1999), as it applies to comparative negligence cases and Fabre defendant calculations.

II. The Trial Court Erred in Failing to Instruct the Jury that the Driver's Failure to Wear a Seat Belt was not Comparative Negligence and in Submitting to the Jury the Seat Belt Defense.

The standard of review applicable to the decision to give or withhold a particular jury instruction is that of abuse of discretion. See Barbour v. Brinker Florida, Inc, 801 So. 2d 953 (Fla. 5th DCA 2001); Barton Protective Services, Inc. v Faber, 745 So. 2d 968 (Fla. 4th DCA 1999). The trial court's decision to give or not to give a particular instruction will not be reversed unless the error complained of resulted in a miscarriage of justice or the instruction was reasonably calculated to confuse or mislead the jury. See Reyka v Halifax

Hospital District, 657 So. 2d 967 (Fla. 5th DCA 1995). However, it is reversible error to instruct the jury that a violation of law is evidence of negligence if the statute was inapplicable under the evidence. See Eaton Construction Company v. Edwards, 617 So. 2d 858 (Fla. 5th DCA 1993), review denied, 626 So. 2d 205 (Fla. 1993). As pronounced in Eaton, at 860: "Jury instructions must be supported by facts in evidence, and an instruction not founded upon evidence adduced at trial constitutes error."

Initially, the trial court erred in not instructing the jury that Brock's failure to use a seat belt could not be considered as comparative negligence. Brock's own damages were not an issue in this case; he was not a plaintiff, and indeed had settled with Amanda as to her claims against him. Here, unlike the normal case, it was not simply the extent of injuries caused by the plaintiff's failure to wear a seat belt that the jury was requested to address, but also whether the non-party driver's failure to wear a seat belt constituted comparative negligence that should be included in the allocation of fault under Fabre.

When the seat belt defense was first incorporated into Florida law in Insurance Co. of N. America vs. Pasakarnis, 451 So. 2d 447 (Fla. 1984), this

Court stated that the defense should be considered to be one in mitigation of damages, rather than one of comparative negligence. 451 So. 2d at 453-454. In Ridley v Safety Kleen Corp., 693 So. 2d 934 (Fla. 1996), the Court addressed the statutory provision (Section 316.614, Florida Statutes (1995)) that required that the seat belt defense be considered as comparative negligence, rather than in mitigation of damages. In both cases, however, the focus was consistently on how the plaintiff's failure to use an available and operational seat belt contributed to the extent of plaintiff's own injuries. Indeed, the focus of the Court's opinion in Ridley was to ensure that the seat belt defense was used only once, not twice, in arriving at the extent of plaintiff's recoverable damages.

That approach makes eminently good sense in the normal situation, where the issue is whether the plaintiff's failure to use her seat belt contributed to the extent of the plaintiff's injuries. In the present case, however, because of the medical evidence illustrating Amanda's crushed pelvis came from a lateral blow, and because Brock fell against her as the truck rolled on its side, and because Brock failed to wear his seat belt and his negligence was interjected under Fabre into the case, then the jury was left unbridled to conclude that

Brock's failure to use a seat belt contributed to Amanda's injuries. So far as we are aware, no other Florida case has presented this precise issue. We submit that the failure of someone other than the plaintiff to use an available and operational seat belt should not be held to be comparative negligence on the part of that person for purposes of a Fabre allocation of fault, resulting in plaintiff recovering less simply because some other party failed to exercise due care for their own safety.

The negligence involved in a seat belt defense situation is the person's negligent failure to take steps to avoid injury to himself or herself. It is not a negligent failure to take steps to avoid injury to someone else who is in the car. While it may be reasonably foreseeable that failure to wear a seat belt will increase that person's own injuries in the event of an accident, it is not reasonably foreseeable that failure to use a seat belt will increase the injury to someone else. Negligence presupposes the existence of a duty that has been breached, resulting in injury. But there is no duty to other persons in a car to use seat belts—that duty, if owed to anyone, is owed to the person who has the option to use a seat belt and does not do so.

The very reason that the seat belt defense was first accepted in this State was that it was foreseeable that the plaintiff's failure to use a seat belt would result in plaintiff having a "second impact" with the interior of the car, exacerbating the injuries plaintiff sustained. The use of a seat belt will, in many cases, result in plaintiff either avoiding that second impact or in lessening its severity. Thus, the theoretical justification for the defense is that the plaintiff failed to exercise reasonable care for his or her own safety, resulting in plaintiff sustaining additional injury that would not have been sustained if plaintiff had worn a seat belt. In the present case, however, Defendants not only got the benefit of a seat belt defense based on Amanda's failure to use a seat belt, but by way of the back door Fabre defense were also were able to reduce her recovery further because Brock, the driver, was not wearing his seat belt. That, we submit, is improper.

Plaintiffs' evidence in this case may very well have won the battle but lost the war because of the presentation of the jury instructions and verdict form regarding the Fabre defense concerning the conduct of Brock. The jury could easily have concluded that Brock was not only negligent in the operation of his vehicle but also in failing to wear his seat belt, and that it was his failure to

wear a seat belt that caused him to fall against Amanda, causing her the pelvic fracture. This theory of causation was supported to some extent by the testimony of Amanda's treating physicians, who found the fracture to the pelvis caused by a lateral impact (which could also have been an impact with the door of the car). The Defendants never presented that issue in this case, yet had the jury reached that conclusion because of the jury instructions, it clearly results in an unfair trial.

While a motion for new trial is addressed to the judicial discretion of the trial judge, it is the court's duty to grant a new trial if the jury was deceived as to the credibility of the evidence or had been influenced by considerations outside the record. See Learner v. Cothron, 142 So. 2d 757 (Fla. 3rd DCA 1962), cert. denied, 155 So. 2d 152 (Fla. 1963). Here, with all the discussion about failure to wear a seat belt, the doctor's testimony regarding lateral impact causing Amanda's pelvic fractures, and the testimony regarding Brock falling against Amanda during the collision, the jury very well could have concluded Brock's Fabre negligence was, in whole or in part, his failure to wear a seat belt, not the way in which he operated the vehicle. This is exactly the kind of "complete overshadowing" Justice Shaw warned against in seat

belt defense cases. Pasakarnis, supra.

Importantly, Defendants never raised an affirmative defense that the driver, Brock, was negligent in his failure to wear a seat belt and that his failure to wear a seat belt is what caused Amanda's injuries to her pelvis.[5] Nonetheless, that theory went to the jury. That was error, and should result in the Final Judgment being reversed and the cause remanded for a new trial on allocation of fault.

Even apart from the danger of jury confusion as to Brock's failure to wear a seat belt, the trial court erred in submitting the seat belt defense to the jury in this case because the evidence simply did not support that defense. The standard of review applicable to this point is whether there was competent substantial evidence that Amanda's failure to use an available and operational seat belt caused or substantially contributed to causing her injuries. See Zurline v Levesque, 642 So. 2d 1169 (Fla. 4th DCA 1994). This standard requires a defendant to introduce evidence of the causal relationship between the injury and the failure to use a seat belt that is not uncertain, speculative, or

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[5]During the trial, the trial court expressed some concern that Brock's negligence in failure to wear his seat belt may have caused or contributed to causing the injuries to Amanda. (R: T.T. Vol. 1, pp 8-9).

conjectural. See State Farm Mutual Automobile Insurance Co. v. Smith, 565 So. 2d 751 (Fla. 5th DCA 1990), review dismissed, 570 So. 2d 1306 (Fla. 1990). Defendant was required to present competent evidence that Amanda was not wearing an available and operational seatbelt and that her injuries resulted from impact with the interior of the vehicle. See Houghton v. Bond, 680 So. 2d 514, 523 (Fla. 1st DCA 1996), review denied, 682 So. 2d 1099 (Fla. 1996). As pointed out in Zurline, supra, this requirement is all the more important when a side impact, rather than a frontal impact, is involved.

A directed verdict should not be granted unless the evidence and all reasonable inferences, taken in the light most favorable to the non-moving party, demonstrates that no reasonable jury could render a verdict for the non-moving party. See Houghton v Bond, 680 So. 2d 514 (Fla. 1st DCA 1996), review denied, 682 So. 2d 1099 (Fla. 1996). In the present case, the evidence and reasonable inferences as to the seat belt defense, taken most favorably to Defendants, would not support a verdict on that issue in favor of the Defendants.

Initially, Defendants did not prove that there was an available and operational seat belt for Amanda to use. Amanda did not utilize her seat belt

because not all of the parts were present. Defendants' engineer, Kiefer, admitted that when his associate inspected the vehicle post-accident, the seat belt initially was not functional. Nor did Defendants adduce non-speculative testimony as to any causal relationship between Amanda's lack of a seat belt and her injuries. As Brock began passing McGraw, McGraw turned left into the occupied passing lane, causing Brock to turn further to the left to avoid a collision. There were 30 feet of skid marks confirming a deceleration of Brock's pickup truck. The Brock vehicle left the shoulder, striking a pine tree and partially flipping onto its side. The starring effect on the windshield indicated that the speed at the time of impact was in the range of ten miles per hour.

Defendants admitted in the trial court that their seat belt defense was premised on the proposition that Amanda fractured her pelvis when she struck the dashboard. They contended that the testimony by Kiefer and Dr. Campbell supported this position. But there was absolutely <u>no</u> <u>testimony</u> from either of these witnesses regarding any inspection of the dashboard, calculation of measures between Amanda's seat and the dashboard, nor any specific connection between what portion of Amanda's pelvis struck what

portion of the dashboard. The speculation was abundantly clear in the testimony of Dr. Campbell when he testified that: "...she could have struck the side door", and quite frankly, "...I mean, the issue of who shot cock robin doesn't seem to be, you know, important"!....

Unfortunately for Defendants, it does matter under Florida law, and Dr. Campbell's testimony was based on conjecture and pure speculation and should not have been permitted. See State Farm Mutual Automobile Insurance Company v. Penland, 668 So. 2d 200 (Fla. 4th DCA 1995).

Long ago, Justice Shaw in his dissenting opinion in Pasakarnis cautioned that since the seat belt defense requires the defendant to offer expert testimony to establish the causal connection between the non-use of the seat belt and aggravation of the injury, the results will "completely overshadow" the defendant's conduct in causing the accident. . . which is exactly what occurred in this case.[6] The only evidence presented to the jury on the seat belt defense was conclusory testimony from Dr. Campbell, who examined Amanda for less than 15 minutes, and who reviewed medical records, none of which included x-

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[6] Insurance Co. of N. America vs. Pasakarnis, 451 So. 2d 447 (Fla. 1984).

rays, MRI findings or any EMGs, for approximately 45 minutes. The conclusory testimony of Dr. Campbell was simply that Amanda's pelvic fracture was caused by her striking the dashboard of the vehicle. When asked on cross-examination specifically to comment on what portion of her pelvis struck what portion of the dashboard, Dr. Campbell could not give a response other than to say it doesn't matter "...who shot cock robin...". In fact, Dr. Campbell went so far as to state regardless of whether she struck the dashboard or struck the side door, it was his testimony that Amanda's pelvis fracture occurred from not wearing the seat belt.

The testimony of Dr. Campbell was then used to pyramid the testimony of Keifer, who simply stated that Amanda's pelvic injuries were the result of her not wearing the seat belt and striking the dashboard. The testimony was impermissibly based on conjecture and pure speculation. See State Farm Mut. Auto Ins. Co. v. Penland, 668 So. 2d 200 (Fla. 4th DCA 1995).

The necessity of a competent expert witness in establishing a seat belt defense is shown throughout the history of seat belt defense cases. Originally, the causal connection between injury and failure to use a seat belt was left to the common sense of the jury. The first of the seat belt defense cases, Ins. Co.

of N. America v. Pasakarnis, 451 So. 2d 447 (Fla. 1984), held that "we do not believe it was beyond the province of the jury from its common knowledge to conclude that 'the failure to use an available and operational seat belt produced or contributed substantially to producing at least a portion of plaintiff's damages." This view was quickly abandoned. The problem with allowing the jury to use only common sense to establish the connection between injury and failure to use a seat belt was emphasized in State Farm Mut. Auto. Ins. Co. v. Smith, supra, when the Fifth District Court held (at 754) that "here [as in the instant case] plaintiff's injuries may have resulted from the initial impact or from a secondary impact resulting from the absence of a seat belt - or, in part, from both. Candidly, our concern is that in a case like the one presented here, no one, expert or layman, can truly apportion causation and degree of injury between the initial impact and the failure to use the seat belt."

In the instant case, the nature of the injury is such that it is possible that Amanda's pelvic fractures were caused by the driver (Brock) colliding with her as the pick-up truck rolled onto the passenger side door, and it is also possible that they were caused by her colliding with the door or some other part of the

interior of the car (a "second collision" that may or may not have occurred if she had been wearing a fully operational seat belt). The treating trauma surgeon who saw her the night of the accident testified that "...her injury pattern and fatigue pattern about her pelvis was consistent with that from a blow from the left side or left anterior side infolding in her left hemipelvis and then propagating over to the right side terminating with an injury to the ligaments in her right SI joint." Dr. DiPasquale, a Board certified trauma surgeon from Tampa General, testified that the anatomy of Amanda Carr's injury was from "...lateral compression." Thus, from the record evidence it is impossible to tell which collision caused her injury and therefore it was impossible for the jury to really apportion the damages, especially without clear and competent expert testimony.

Dr. Campbell failed to provide that testimony. Dr. Campbell did not know: the dimensions of the dashboard; the distance between the dashboard and the seat Amanda was in; the location of the seat; nor the rotation of her pelvis at the time of the collision. The pure speculation of his testimony was further revealed when he stated..."however, she could have struck the side door."

Defendants' seat belt expert, Keifer, never read the doctor's deposition regarding Amanda's injuries; he never even inspected the truck; and in fact admitted that Amanda could have been over the dashboard to hit her head on the windshield.

One possible side collision was the collision of Brock with Amanda.[7] Dr. Campbell's testimony confirms the second possible side collision when he testified that Amanda's injury resulted from not wearing a seat belt *regardless of whether she struck the dashboard or the side door.* Evidence of whether Amanda's injury was the result of a side or frontal collision was essential to the jury's understanding of the case and to deciding the Defendants' burden regarding competent evidence.

As in Zurline, supra, "there was no competent evidence that [Plaintiff's] failure to wear the seat belt caused or substantially contributed to her injuries and for that reason the seat belt defense should not have been submitted..." Accordingly, as in Zurline, the seat belt defense should not have been submitted

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[7] Dr. Campbell admitted that he understood Brock fell against Amanda during the collision, but would not admit that blow would cause her injuries (Dr. Campbell deposition, p. 51). (Even Defendants' seat belt expert, Mr. Keifer, avoided giving an opinion to the obvious conclusion. (T.T. p. 8).

to the jury in this case. In conclusion, the seat belt defense as applied to Amanda should never have been submitted to the jury. Further, the Fabre defense of negligence on the part of Brock in not using a seat belt should never have been submitted to the jury since it is highly probable that the jury considered his failure to wear a seat belt, rather than his negligent handling of his vehicle, as the proximate cause of injuries to Amanda.

III. The Trial Court Erred in Not Granting a New Trial, Since the Greater Weight of the Evidence Did Not Support the Jury's Allocation of Fault.

The applicable standard of review as to this issue is whether the trial court abused its discretion in denying the motion for new trial; if reasonable persons could differ as to the propriety of the trial court's action, there is no abuse of discretion. See Reid v. Medical and Professional Management Consultants, 744 So. 2d 1116 (Fla. 1st DCA 1999); Placido Gardens Condominium Assoc. v. Johnson, 563 So. 2d 826 (Fla. 2nd DCA 1990). The trial court's ruling should not be reversed in the absence of a clear showing of abuse of discretion. See Cloud v Fallis, 110 So. 2d 669 (Fla. 1959); Learner v Cothron, 142 So. 2d 757 (Fla. 3rd DCA 1962), cert. discharged, 155 So. 2d 152 (Fla. 1963).

In the present case, that difficult test has been met. The overwhelming evidence clearly illustrated that McGraw violated Florida Statute § 316.155 in failing to turn on his left turn signal before turning his vehicle left onto Pitch Pine Avenue into the path of the pickup in which Amanda was riding. Both Brock and Amanda testified that as they approached McGraw from the rear, they never saw a left turn signal. Likewise McGraw and his passenger both testified they could not recall the left turn signal being turned on. Therefore, the jury could only conclude from this evidence that McGraw negligently turned left in violation of Fla. Stat. § 316.155, causing this accident.

Further, the greater weight of the evidence clearly showed that McGraw began his left hand turn after the passing lane had already been occupied by the vehicle driven by Brock. The passing lane having been occupied, Brock, as a matter of law pursuant to Florida Statute § 316.083, had the right-of-way, which McGraw just as clearly violated in turning left in front of Brock, thereby causing the accident. The verdict against Defendants, under these facts, of only five percent of the fault was against the overwhelming weight of the evidence.

The jury finding of seventy percent negligence against Brock was likewise against the manifest weight of the evidence. Brock could not have been driving his vehicle in excess of 30 miles an hour at the time he passed McGraw. There was no posted speed sign on Fruit Cove Woods Drive. Since the evidence showed that Brock was proceeding in a normal and lawful fashion when McGraw, without warning, turned left in front of him, the allocation of 70% of all fault to Brock was plainly contrary to the overwhelming weight of the evidence, and the trial judge should have granted a new trial.

IV. The Trial Court Should Not Have Submitted Certain Jury Instructions to the Jury.

The standard of review applicable to the decision to give or withhold a particular jury instruction is that of abuse of discretion. See Barbour v. Brinker Florida, Inc, 801 So. 2d 953 (Fla. 5th DCA 2001); Barton Protective Services, Inc. v Faber, 745 So. 2d 968 (Fla. 4th DCA 1999). The trial court's decision to give or not to give a particular instruction will not be reversed unless the error complained of resulted in a miscarriage of justice or the instruction was reasonably calculated to confuse or mislead the jury. See Reyka v Halifax Hospital District, 657 So. 2d 967 (Fla. 5th DCA 1995).

However, it is reversible error to instruct the jury that a violation of law is evidence of negligence if the statute was inapplicable under the evidence. See Eaton Construction Company v. Edwards, 617 So. 2d 858 (Fla. 5th DCA 1993), review denied, 626 So. 2d 205 (Fla. 1993). As pronounced in Eaton, at 860: "Jury instructions must be supported by facts in evidence, and an instruction not founded upon evidence adduced at trial constitutes error." It is reversible error to instruct a jury that violation of a law is evidence of negligence if the statute is inapplicable under the facts in evidence, and the improper instruction affected the jury's deliberations by misleading or confusing the jury. See Riley v Willis, 585 So. 2d 1024 (Fla. 5th DCA 1991). Here, several of the jury instructions stated that violations of specific statutes were evidence of negligence, when in fact the statutes were inapplicable under the facts in evidence and the instructions created jury confusion.

Since the seat belt defense should not have been submitted to the jury, as shown above, then the instruction concerning Fla. Stat. § 316.614(5) clearly should not have been given.

Likewise, the instruction concerning Fla. Stat. § 316.087(1)(c) should not have been given. That statute, which prohibits driving to the left within

100 feet of an intersection, does not apply to intersections outside city limits unless marked by an official traffic control device placed at least 100 feet before the intersection. There simply is no evidence to support the application of this statute in this case.

Finally, the evidence revealed that there was no posted speed sign between State Road 13 and the site of the accident. State Road 13's posted speed sign was 45 miles per hour. If anything, the speed limit would have continued to be 45 miles per hour and there was no testimony that Brock was exceeding 45 miles per hour at the time of the accident. Defendants were impermissibly allowed to argue, due to the jury instruction concerning F. S. § 316.183, what the speed limit should have been under F. S. § 316.183(2). Again, the facts needed to support a violation of Fla. Stat. § 316.183 were not in the record.

The erroneous giving of these jury instructions requires that the Final Judgment be reversed, and the cause remanded for a new trial.

CONCLUSION

For all the reasons set forth above, the Final Judgment in this cause should be reversed, and the case remanded for a new trial. At a minimum, the

Final Judgment should be vacated and the case remanded for entry of a new Final Judgment correctly calculating the collateral source offset.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via regular U.S. Mail to: Francis J. Milon, Esquire and Harris Brown, Esquire, Brown, Obringer, DeCandio & Oosting, P.A., 12 East Bay Street, Jacksonville, Florida 32202, this _____ day of October, 2004.

BRANNON, BROWN, HALEY, ROBINSON & BULLOCK, P.A.

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I HEREBY CERTIFY that this document complies with the font standards required by Florida Rule of Appellate Procedure 9.210 for computer-generated documents.

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Stephen C. Bullock