IN THE SUPREME COURT
STATE OF FLORIDA

HOWARD B. WALD, JR.,

vs.

ATHENA F. GRAINGER,
as Personal Representative of
the Estate of SAM GUS FELOS
_____/

CASE NO.: SC08-1143
Lower Tribunal No(s).: 1D07-2772

PETITIONER'S INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

The petitioner here and plaintiff below, Howard B. Wald, Jr., will be referred to by name or as the plaintiff.

The defendant below, Sam Gus Felos, will be referred to as the defendant.

The respondent, Athena F. Grainger, as personal representative of the estate of Sam Gus Felos, will be referred to as the respondent.

Citations to the record will be “R”, with the page number(s) specified, e.g., “R1" or “R1-2".

Citations to the trial transcript will be “TT” with volume number specified as a Roman numeral and the page number(s) specified as Arabic numerals, e.g. “TT I:1" or “TT II: 1-2".

STANDARD OF REVIEW

The standard of review and issue to be decided is whether there is express and direct conflict in the decision of the District Court of Appeal and decisions of other District Courts of Appeal and opinions of this Honorable Court. Florida Rule of Appellant Procedure, 9.030(a)(2)(A)(iv) and *Dodi Publishing Company v. Editorial America*, S.A. 385 So.2d 1369 (Fla. 1980).

PETITIONER'S STATEMENT OF THE CASE AND FACTS

This case arises from an automobile collision that occurred between the plaintiff below and petitioner here, Howard B. Wald, Jr., and the defendant below, Sam Gus Felos, for which Wald brought suit. R: 1-2.

The defendant admitted fault for causing the accident. The case went to trial with the only issue being Wald's claim for damages for injuries to his neck, low back, right arm, right foot and right thigh. TT III: 283. Wald's treating physician, Dr. Jackson Tan, testified that Wald had sustained permanent injuries to his neck, back and right thigh. TT III: 308. Wald sustained a nerve injury that resulted in an area of numbness on the right thigh. The defendant's expert physician agreed that the thigh injury was permanent. TT V: 578-579. There was no evidence of any kind which was contrary to Wald's claim that the injury to his right thigh was permanent. The main focus of the trial was Wald's claim for damages as a result of his neck and back injuries.

The defendant's retained expert physician, Dr. Howard Hogshead, disputed the permanency of the injuries to the neck and back, but testified in direct examination by defense counsel that Wald had sustained a permanent injury to the right thigh:

> Q. All right, sir. Do you have an opinion with respect to the meralgia paresthetica [the right thigh nerve injury] as to whether he has an impairment as a result of that finding that you made as a result of this automobile accident?
>
> A. I do have an opinion.
>
> Q. And what is that opinion?

> A. In arriving at impairment ratings there is a guidebook. It's only a guidebook, but it's about that thick. It's in the fifth edition, it's called AMA Guide to Evaluation of Permanent Impairment. And it has everything in it that you can imagine, hearing loss, psychiatric problems, et cetera, et cetera, et cetera. It does deal with meralgia paresthetica. And the listing there would be a three percent impairment of the right lower extremity, which that converts – there's a big conversion table, converts to a one percent impairment of the whole person related to the meralgia paresthetica, which I'm saying is probably casually related to the automobile accident.

TT V: 578-579.

The record shows that there was no testimony or evidence in either the plaintiff's case in chief or the defendant's case in chief which in any way disputed that the plaintiff's thigh injury was permanent. As a result of the unanimous testimony of Wald's treating physician, the defendant's physician, as well as all other evidence and testimony at the trial, Wald moved for a directed verdict on the issue of the permanency of his right thigh injury. The motion was made pursuant to Florida Statute §627.737(2)(b), which requires a plaintiff to have sustained a permanent injury within a reasonable degree of medical probability in order to recover non-economic damages. TT V: 693-694. That statute states in part:

> **627.737 Tort exemption; limitation on right to damages; punitive damage.**
>
> (2) In any action of tort brought against the owner…operator…of a motor vehicle…a plaintiff may

> recovery damages in tort for pain, suffering, mental anguish, and inconvenience because of bodily injury, sickness or disease arising out of such motor vehicle only in the event that the injury or disease consist in whole or in part of: …
>
> (b) Permanent injury within a reasonable degree of medical probability…

As the trial court was required to do based on all of the evidence presented at trial, the trial judge granted the motion stating that:

> THE COURT: Dr. Hogshead did testify that he gave him one percent whole person, three percent right lower extremity due to this meralgia paresthetica which was casually related to this accident in his opinion. Therefore, I'm going to grant the motion for directed verdict on the issue of permanency. You're certainly free to argue that none of the other injuries were permanent.

TT V: 693-694.

The record also shows that in opposing the plaintiff's Motion for Directed Verdict, defense counsel never argued or even suggested that there was any evidence whatsoever contradicting that the thigh injury was permanent. Defense counsel argued in opposition to the motion as follows:

> MS. TAYLOR: Your Honor, in response, there has been conflicting evidence on the issue definitely with respect to the neck and back. Also, with respect to that [the right thigh injury], the report itself does not relate it to it, although Dr. Hogshead's testimony has been that he does, for the benefit, relate it. We think still that a jury

> can accept or reject any testimony and any respective evidence, and we would argue that directed verdict on this issue of permanency should not be issued.

TT V: 693-694.

The jury later returned a substantial verdict for Wald showing that the jury found the painful neck and back injuries to be permanent. R: 87-88.

After the trial, the defendant died and Athena F. Grainger, as personal representative of the estate of Sam Gus Felos, was substituted as party defendant. R: 181-185.

Grainger appealed the jury's award and, in particular, the granting of Wald's Motion for Directed Verdict on the issue of the permanency of Wald's right thigh injury. R: 193-195. The First District Court of Appeal reversed by way of its opinion of April 10, 2008, holding that the trial court erred in granting the motion, and that permanency is always a jury issue even if all evidence on the issue of permanency is uncontradicted.

Wald then requested this Court to exercise its discretionary jurisdiction pursuant to Florida Rule of Appellate Procedure, 9.030 (a)(2)(A)(iv), based on conflicts between the holding in the case at bar with opinions of this Court and other district courts of appeal. This Court accepted conflict jurisdiction on February 2, 2009.

SUMMARY OF ARGUMENT

The District Court of Appeal reversed the trial court for granting a directed verdict on the issue of the permanency of Wald's injuries in this automobile accident case, where both Wald's treating physician and the defendant's retained expert physician testified that Wald had sustained a permanent nerve injury

resulting in numbness to the right thigh due to the accident, and additionally there was no other testimony or evidence that contradicted these unanimous opinions. Florida Statute §627.737(2)(b) requires a plaintiff in an automobile accident case to have sustained a permanent injury within a reasonable degree of medical probability in order to recover non-economic damages. Wald's motion was directed to this statute. The District Court of Appeal erred in reversing because fundamentally, verdicts must be based upon evidence, and there was no evidence to support a potential jury verdict of no permanency. Wald's treating physician, Dr. Jackson Tan, testified to the permanency of Wald's injuries. The defendant's physician, Dr. Howard Hogshead, confirmed that Wald had sustained a three percent permanent partial impairment to the lower extremity which translated into a one percent whole body impairment based upon the American Medical Association Guidelines. No other evidence or testimony contradicted these unanimous opinions. As a result, the trial court granted Wald's Motion for Directed Verdict on the issue of the permanency of Wald's injuries, and the District Court reversed.

The District Court of Appeal erred because its holding would allow a jury to base a verdict upon no evidence at all. If the issue of the permanency of Wald's injuries had of been submitted to the jury in the case at bar, and if the jury had found that Wald had not sustained a permanent injury, such a finding would literally have been based upon no evidence.

The holdings of the District Court conflicts with holdings of this Court that require verdicts to be based upon real substance and not predicated on conjecture, fancy, caprice or speculation. The holding of the District Court of Appeal below, if left to stand, confuses, if not renders obsolete, directed verdicts, judgments not

withstanding the verdict, motions for summary judgment, additur, remittitur and motions for new trial where verdicts are against the manifest weight of the evidence. All of the above share a common principle of law, more particularly, that verdicts must be based upon evidence, and if there is no evidence to support a particular issue, that issue should not be submitted to a jury. The opinion of the District Court further would allow juries to reach verdicts that are against the unanimous testimony and evidence of both parties, such as in the case at bar.

The District Court erred by finding that the testimony of the defendant's physician, Dr. Howard Hogshead, was ambivalent, thus creating a factual dispute concerning the issue of permanency. The alleged ambivalence of Dr. Hoghead's testimony was never raised to the trial court as a basis for submitting the issue of permanency to the jury and therefore is waived. Further, the testimony of Dr. Hogshead was not ambivalent as Dr. Hogshead testified within a reasonable degree of medical probability that Wald had, in fact, sustained a permanent injury from the accident in question.

The decision of the District Court conflicts with decisions of this Court that uniformly hold that while juries are free to determine the credibility of expert medical opinions, if a jury is going to reject that opinion, the jury's decision must be based upon conflicting lay testimony or some other conflicting evidence introduced at trial.

The decision of the District Court conflicts with decisions of other district courts of appeal who have uniformly held that a directed verdict on the issue of permanency is appropriate where there is no other evidence to contradict medical opinions that a plaintiff has sustained a permanent injury.

The District Court in its opinion states that the trial court reversibly errred by granting a directed verdict for Wald on the issue of the permanency of Wald's right thigh injury because the ruling ". . .took from the jury's consideration the issue of the permanency of plaintiff's neck and back injuries. . ." This is simply not true. The issue of the permanency of Wald's neck and back injuries was thoroughly litigated at trial through the testimony of defense experts, as well as argument of defense counsel during closing arguments.

The District Court erred in misconstruing Florida's no-fault threshold statute, Florida Statute §672.737 when stating in footnote 1 of the opinion that:

> Significantly, based on a plain reading of the statute, it appears the jury would be precluded from awarding damages based on the permanency of the thigh injury, because that injury did not cause "pain, suffering, mental anguish or inconvenience." *See* §627.737 (2), Fla. Stat.

The District Court's holding that the requirement of a permanent injury must also cause "pain, suffering, mental anguish or inconvenience" is inconsistent with the statute. The express language of the statute makes it clear that a plaintiff may recover ". . .for pain, suffering, mental anguish, and inconvenience. . ." if the plaintiff's injury "…consists in whole or in part of" an injury that is a "permanent injury within a reasonable degree of medical probability." The requirement of a permanent injury is simply a threshold. Further, the District Court erred because

Wald's right thigh injury, in fact, does cause him mental anguish and inconvenience as testified by the defendant's physician, Dr. Hogshead.

If any error was committed by the trial court, that error was harmless. The jury awarded Wald $861,936.55 in non-economic damages for his injuries to his neck and back. Based upon the size of the verdict, the jury found Wald's neck and back to be permanently injured, an issue that was thoroughly litigated at trial as its central issue.

ISSUE

DID THE DISTRICT COURT OF APPEAL ERR IN REVERSING THE TRIAL COURT FOR GRANTING A DIRECTED VERDICT ON THE ISSUE OF THE PERMANENCY OF WALD'S RIGHT THIGH INJURY BY HOLDING THAT THE ISSUE OF PERMANENCY IS ALWAYS A JURY QUESTION AND THAT ANY JURY IS FREE TO REJECT ALL THE UNCONTRADICTED AND UNANIMOUS EVIDENCE OF BOTH PARTIES?

ANSWER: Yes. The District Court of Appeal erred in holding that juries are free to decide the issue of permanency even in the face of uncontradicted and unanimous expert testimony of both parties as well as all other evidence in the case.

ARGUMENT

The District Court of Appeal reversed the trial court for granting a directed verdict on the issue of the permanency of Wald's injuries in this automobile

accident case, where both Wald's treating physician and the defendant's physician testified that Wald had sustained a permanent right thigh injury and, additionally, there was no other testimony or evidence that contradicted these unanimous opinions.

The District Court of Appeal erred because fundamentally, verdicts must be based upon evidence and there was no evidece to support a potential jury verdict of no permanency. The evidence in the case at bar was unanimous from both Wald's and the defendant's presentation of expert testimony and all other evidence, that Wald had sustained a permanent nerve injury that caused numbness to an area of his right thigh.

In that regard, Wald's treating physician, Dr. Jackson Tan, testified that:

> Q. Doctor, do you have an opinion within a reasonable degree of medical probability, and I think I've asked you this, but just to make sure, as to whether Mr. Wald has suffered a permanent injury as a result of this collision?
>
> A. Yes.
>
> Q. An those injuries would be to what part of his body, sir?
>
> A. To his neck and to his back, as well as – as well as his right elbow.
>
> Q. Okay. How about his right thigh?
>
> A. And the pain going down to the right thigh which was coming from his back, the lumbar radiculopathy.

TT III: 308.

In its case in chief, the defense offered the testimony of its physician, Dr. Howard Hogshead, orthopedic surgeon. Dr. Hogshead opined, concerning the right thigh injury, under direct examination by defendant's trial counsel, as follows:

> Q. All right, sir. Do you have an opinion with respect to the meralgia paresthetica [the right thigh nerve injury] as to whether he has an impairment as a result of that finding that you made as a result of this automobile accident?
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> A. I do have an opinion.
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> Q. And what is that opinion?
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> A. In arriving at impairment ratings there is a guidebook. It's only a guidebook, but it's about that thick. It's in the fifth edition, it's called AMA Guide to Evaluation of Permanent Impairment. And it has everything in it that you can imagine, hearing loss, psychiatric problems, et cetera, et cetera, et cetera. It does deal with meralgia paresthetica. And the listing there would be a three percent impairment of the right lower extremity, which that coverts – there's a big conversion table, converts to a one percent impairment of the whole person related to the meralgia paresthetica, which I'm saying is probably casually related to the automobile accident.

TT V: 578-579.

There was no lay testimony or any other evidence of any kind which in any way disputed the testimony of the expert doctors presented by both Wald and the defendant. All of the evidence in the case, the expert testimony, the lay testimony, the documentary evidence - all the evidence - showed that the thigh injury to Wald was permanent in nature.

Based upon the uncontroverted opinions of both parties' doctors that the thigh injury (meralgia paresthetica) was permanent, and since there was no lay evidence or inference to the contrary, Wald's trial counsel moved for directed verdict on the issue of permanency concerning the requirements of Florida Statute §627.737(2)(b). The trial court granted the motion and stated that:

> THE COURT: Dr. Hogshead did testify that he gave him one percent whole person, three percent right lower extremity due to this meralgia paresthetica which was casually related to this accident in his opinion. Therefore, I'm going to grant the motion for directed verdict on the issue of permanency. You're certainly free to argue that none of the other injuries were permanent.

TT V: 693-694.

The District Court of Appeal found this to be error and reversed, holding that permanency is a jury question, and that because juries are free to weigh the credibility of experts as it does any other witness, juries can reject even uncontradicted testimony. It is the latter part of this ruling that is error.

The error of this holding lies in that it would hypothetically allow the jury in the case at bar (or any jury, for that matter) to base its verdict on no evidence at all, because here the testimony and evidence of <u>both</u> parties was unanimous that Wald has a permanently injured right thigh. This fundamental principle that verdicts must be based on evidence is the very foundation of our system of justice. As stated by this Court in *Cudahy Packing Co. v. Ellis*, 140 So. 918 (Fla. 1932):

> The jury must rest its verdict on considerations of real substance. It cannot be predicated on conjecture, fancy, caprice or speculation, . . .

Such is the situation in the case at bar. Wald introduced the testimony of his treating physician, Dr. Jackson Tan, who testified as to the permanency of Wald's injuries including the right thigh. The defendant, in his case in chief on direct examination, offered the testimony of his expert physician, who also testified that Wald's right thigh injury, which was caused by the accident in question, was permanent, and that Wald had sustained a three percent impairment to the lower extremity, which translated into a one percent impairment to the body as a whole based upon AMA [American Medical Association] Guidelines. No lay testimony or other evidence of any kind disputed the unanimous opinions of both parties' experts as to the permanency of the right thigh injury. Therefore, the jury should not have been given the issue of permanency to decide because there was no issue to decide, since jury verdicts must be based upon "real substance". In fact, it would have been error under the evidence adduced at this trial for the trial court not to have granted the plaintiff's Motion for Directed Verdict on the issue of permanency.

It has long been the law from this Honorable Court as well as the other district courts of appeal in the state of Florida that jury verdicts must be based on evidence. This is precisely why there are an established procedures for motions for summary judgment, directed verdicts, judgment not withstanding the verdict, additur, remittitur and motions for new trial. Accordingly, the holding of the District Court of Appeal that juries can disregard the opinions of experts, even if uncontroverted by any other evidence, is contrary to the holdings of this Court and violates the most fundamental principles of justice.

The holdings of the District Court of Appeal below is further in conflict with this Court's decision in *Kenney v. Langston*, 182 So. 430 (Fla. 1938), wherein this Court stated:

> The legal sufficiency of the evidence is a matter of law for the Court to determine; and where as here the evidence would not in law support a verdict for the plaintiff, there can legally be no recovery and the court should direct a verdict for the defendant.

Assuming hypothetically that the trial court had submitted to the jury the issue of the permanency of Wald's injuries, and assuming further that the jury had found that Wald was not permanently injured, that verdict would not only have been against the manifest weight of the evidence, it would have been based upon no evidence. Both parties' unanimous and uncontradicted evidence on this issue was very simply that Wald sustained a permanent injury to the right thigh. Those uncontradicted expert opinions were not challenged in any way by the defendant. In fact, the defendant's trial counsel, in opposing the plaintiff's Motion for Directed Verdict, did not even suggest to the trial court that there existed any evidence or testimony which in any way contradicted all of the evidence in the case which showed that the injury to the right thigh was permanent. The defendant's counsel argued:

> Your honor, in response, there has been conflicting evidence on the issue definitely with respect to the neck and back. Also with respect to that [the right thigh injury], the report itself does not relate it to it, although Dr. Hogshead's testimony has been that he does, for the benefit, relate it. We think still that a jury can accept or

> reject any testimony and any respective evidence, and we would argue that directed verdict on the issue of permanency should not be issued.

TT V: 693.

IMPACT ON DIRECTED VERDICTS, SUMMARY JUDGMENTS, JNOV, REMITTITUR AND ADDITUR

The holding of the District Court of Appeal below, if left to stand, confuses, (if not renders completely obsolete), directed verdicts, judgments notwithstanding the verdict, motions for summary judgment, additur, remittitur and motions for new trial where verdicts are against the manifest weight of the evidence. This Court dealt with the issue of judgments notwithstanding the verdict in the case of *Irven v. Department of Health and Rehabilitative Services*, 790 So.2d 403 (Fla. 2001), wherein this Court stated:

> When presented with a motion for judgment notwithstanding the verdict, the trial court must view all of the evidence in a light most favorable to the non-movant, and, in the face of evidence which is at odds or contradictory, all conflicts must be resolved in favor of the party against whom the motion has been made…Only where there is no evidence upon which a jury could properly rely, in finding for the plaintiff, should a directed verdict be granted.

Concerning motions for directed verdict, the case of *Rosa v. Department of Children & Families*, 915 So.2d 210 (Fla. 1st DCA 2005) sets forth the standard that:

> A trial court should consider a motion for directed verdict under the following standard:

> Granting a motion for directed verdict is proper only if there is no evidence upon which a jury could find, against the party for whom the verdict is directed.

Concerning motions for summary judgment, Florida Rule of Civil Procedure, 1.510 provides that summary judgment should be granted if "…there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Motions for new trial should be granted if the verdict is against the manifest weight of the evidence. This Court dealt with that issue in the cases of *Brown v. Estate of A. P. Stuckey, Sr.*, 749 So. 2d 490 (Fla. 1999), and *Wackenhut Corp. v. Conty*, 359 So. 2d 430 (Fla. 1978), and in *Brown* stated:

> In Grand Assembly, the district court, in attempting to define "manifest weight of the evidence," determined that "manifest means clearly evident, clear, plain, indisputable." (quoting *Schneiderman v. Interstate Transit Lines*, 331 Ill. App. 143, 72 N.E. 2d 705, 706 (1947), *aff'd,* 401 Ill. 172, 81 N.E. 2d 861 (1948).

All of the above cited cases and rule of civil procedure share a common principle of law, that verdicts must be based upon evidence, and if there is no evidence to support a particular issue, then that issue should not be submitted to the jury. Nor can a jury's verdict on a particular issue be valid if there is no evidence to support it. In the case at bar, assuming the trial judge let the issue of permanency go to the jury, there would have been no evidence to support a verdict that Wald did not sustain a permanent injury. Such a decision by the jury would

have been against the manifest weight of the evidence. The directed verdict was appropriate by the trial court. In fact, it was required.

PRACTICAL APPLICATIONS

The district court's opinion now creates significant problems for the trial courts of Florida, especially the First District. For example, assume in a personal injury case that the plaintiff's economist testifies that the plaintiff's economic losses are $1.2 million. The defendant's expert testifies that the plaintiff's economic losses are only $800,000, and there is no other evidence or testimony as to that issue. Assume further that the jury then returns a verdict of no economic losses. Under the opinion of the district court in the case at bar, this would be an appropriate verdict, since juries are free to disregard expert testimony, even if uncontradicted. While the hypothetical verdict would be against the manifest weight of the evidence because there was absolutely no testimony or evidence that the plaintiff's economic losses were zero, the decision below would leave the unjust result in place.

Another example of the problems created by the opinion below is as follows: Florida Statute §768.36(2)(a) and (b) states that:

> In any civil action, a plaintiff may not recover any damages for loss or injury to his or her person or property if the trier of fact finds that, at the time the plaintiff was injured:
>
> The plaintiff was under the influence of any alcoholic beverage or drug to the extent that the plaintiff's normal faculties were impaired or the plaintiff has a blood or breath alcohol level of 0.08 percent or higher; and

> As a result of the influence of such alcoholic beverage or drug the plaintiff was more than 50 percent at fault for his or her own harm.

Assume hypothetically in a automobile accident case that both the plaintiff's toxicology expert and the defense toxicology expert testify that the plaintiff's blood alcohol level at the time of the accident was 0.12, and no other evidence contradicted this blood alcohol level. Should the plaintiff's blood alcohol level be submitted to the jury for their determination? If the jury determined the blood alcohol level to be 0.00, would this be a valid verdict? While that verdict would obviously be against all the evidence adduced at trial, the unjust verdict would be required to stand based upon the flawed decision below.

DR. HOGSHEAD'S NON-AMBIVALENT TESTIMONY

The defendant argued on appeal for the first time and the district court found that the opinion of the defendant's physician, Dr. Howard Hogshead, was "ambivalent" on the issue of the permanency of Wald's right thigh injury, and thereby created an issue of fact on the issue of permanency. Dr. Hogshead, however, was not ambivalent in his testimony. When Wald moved for directed verdict on the issue of permanency, the issue of the alleged ambivalence of Dr. Hogshead's opinion was never even raised to the trial court by the defendant's trial counsel. In opposition to the motion, defense counsel stated only as follows:

> Your honor, in response, there has been conflicting evidence on the issue definitely with respect to the neck and back. Also with respect to that [the right thigh

> injury], the report itself does not relate it to it, although Dr. Hogshead's testimony has been that he does, for the benefit, relate it. We think still that a jury can accept or reject any testimony and any respective evidence, and we would argue that directed verdict on the issue of permanency should not be issued.

TT V: 693.

WAIVER

At no time did defense trial counsel during the trial argue or suggest that there was any factual dispute as to the issue of permanency due to any alleged ambivalent testimony of Dr. Hogshead, their own expert. As a result of this argument not being raised before the trial court (because Dr. Hogshead's testimony was not ambivalent), the argument is waived on appeal. As stated in *Alliance for Conservation of Natural Resources in Pinellas County v. Furen*, 122 So.2d 51 (Fla. 2d DCA 1960):

> It is a rule of long standing, and so fundamental that citations are not necessary in support thereof, that on appeal this or any other appellate court will confine itself to a review of those questions, and only those questions, which were before the trial court. Matters not presented to the trial court by the pleadings and evidence will not be considered by this court on appeal. Mariani v. Schleman, Fla. 1957, 94 So.2d 829. It is the duty of a party to bring to the attention of the trial court his contentions relating to his claim for relief, and when he fails to do so, he certainly cannot assert that the trial judge was in error for failure to anticipate his desires. (Emphasis added.)

See also, *Tillman v. State*, 471 So.2d 32 (Fla. 1985), which holds that an issue must be presented to the lower court and with specific legal argument to be preserved on appeal. The defendant claimed, for the first time on appeal, and the district court agreed, that trial court committed reversible error because there was a factual dispute created by the alleged ambiguity in Dr. Hogshead's testimony. This argument of the alleged ambiguity of Dr. Hogshead's opinion very simply was never made to the trial court and therefore is waived. The trial court was never asked to submit the issue of permanency to the jury based upon any factual dispute. The defendant's total opposition to the motion for directed verdict was simply that "a jury can accept or reject any testimony." That is an inaccurate and incomplete statement of the law. While juries can accept or reject the testimony of any witness, juries are not free to reject the entire uncontroverted evidence in the case.

The testimony of Dr. Hogshead was anything but "ambiguous" on the issue of the permanency of Wald's right thigh injury, a nerve injury, referred to as meralgia paresthetica. Dr. Hogshead testified as follows concerning the right thigh injury:

> A. Since the accident, he [Wald] reports a constant numbness in his anterolateral right thigh, extending from the hip to the knee. The area is sensitive and he says he doesn't allow children to sit on his lap on that side.

TT V: 542

A. The same thing can happen in the area of the right thigh. This particular nerve is called the lateral femoral cutaneous nerve. It's a purely sensory nerve. It has no motor function. It doesn't make paralysis. It's a motor - - it's a sensory nerve that supplies this area. It comes out through the deep fascia. Usually - - the textbook explanation is it comes out an inch lateral and an inch distal to the anterior superior spinal, which is part of the pelvis.

It can be compressed. It gets compressed in a number of different ways. First of all, it can be injured by a seat belt. The seat belt comes across - - for the driver, comes across the shoulder and anchors down here. If you're thrown forward, it can cause an injury to that nerve. And it may - - it usually is not permanent, but it may be permanent.

The other way in which you can get the meralgia paresthetica is with people who are very overweight, they have a big stomach and so they - - thank you - - big stomach, so they wear their seat belt down below the equator and it rides right across where that nerve comes out. So there are two possibilities that might explain why he has this meralgia paresthetica.

He does not have any of the signs that look like a radiculopathy. Radiculopathy would be the serious thing, which would be compression of the nerve root up in the spine.

Q. All right, sir. And the history that Mr. Wald gave you was that he was wearing a seat belt. Do you have an opinion within a reasonable degree of medical probability as to whether the finding you were just talking about, the meralgia paresthetica, is causally related to the automobile accident?

A. It more than likely could be.

Q. All right, sir. And what significance - - what would you expect that to cause in and of itself?

A. Well, it's very annoying. It isn't crippling or disabling. It - - it usually is not a permanent thing. It can be permanent. But it - - usually people accommodate to this and proceed pretty much with a full life.

Q. All right, sir. Do you expect that it's something that would cause a problem with a person's activities, walking, being active in a physical capacity, getting about, that type of thing?

A. No, I do not. This is not a motor nerve. It is not a nerve that supplies muscles. It does not have anything to do with weakness that might make you limp.

Q. Is there medical treatment that you would recommend in the future for that condition?

A. Try to change where you wear your belt might be helpful. I've also seen this in barbers who are constantly leaning up against the arm of the barber chair. I'll just mention that.

We don't have a good treatment for this. Surgery is not very helpful. Occasionally a cortisone shot right at the spot where the nerve comes through, if you can find it, but it's so variable that you almost have to do that in a special technique that has an electrode on the needle that tells you when you're getting near the nerve.

Q. Dr. Hogshead, in this case do you have any recommendations that Mr. Wald will need any future medical care related to the meralgiz paresthetica?

A. Not really, no. Just - - most people are somewhat- -

TT V: 573 – 575.

> Q. All right, sir. Do you have an opinion with respect to the meralgia paresthetica as to whether he has an impairment as a result of that finding that you made as a result of this automobile accident?
>
> A. I do have an opinion.
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> Q. And what is that opinion?
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> A. In arriving at impairment ratings there is a guidebook. It's only a guidebook, but it's about that thick. It's in the fifth edition, it's called AMA Guide to Evaluation of Permanent Impairment. And it has everything in it that you can imagine, hearing loss, psychiatric problems, et cetera, et cetera, et cetera. It does deal with meralgia paresthetica. And the listing there would be a three percent impairment of the right lower extremity, which that coverts – there's a big conversion table, converts to a one percent impairment of the whole person related to the meralgia paresthetica, which I'm saying is probably casually related to the automobile accident.

TT V: 578 – 579.

This was the testimony of the defendant's retained expert on direct examination by the defendant's trial counsel. The claimed "ambiguity" in Dr. Hogshead's opinion appears in the record at TT V: 579 wherein defense counsel improperly leads his own witness by stating to the doctor, "You are giving him the benefit of the doubt?" Dr. Hogshead stated in response, "Yes." There is no ambiguity that was

ever testified to by Dr. Hogshead. His opinions were testified to within a reasonable degree of medical probability that Wald had, in fact, sustained a permanent injury to the right thigh. Dr. Hogshead assigned Wald an impairment rating based upon the AMA Guidelines of three percent to the lower extremity and one percent to the body as a whole as a result. It was only an improper leading question from defense counsel that the district court based its finding of "ambiguity."

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE FLORIDA SUPREME COURT

The holding of the district court directly conflicts with a number of cases from this Honorable Court including, but not limited to, *Chomont v. Ward*, 103 So.2d 635 (Fla. 1958); *Easkold v. Rhodes*, 614 So.2d 495 (Fla. 1993); and *Weygant v. Fort Myers Lincoln Mercury, Inc.*, 640 So.2d 1092 (Fla. 1994). *Chomont v. Ward* states that:

> The rule is well established that the matter of credibility of witnesses is peculiarly one for jury determination...This does not mean that a jury is at liberty to disregard completely testimony which is not open to doubt from any reasonable point of view. (Emphasis added.)

Easkold v. Rhodes held that:

> . . .the jury was still free to determine their credibility [expert medical opinions] and to decide the weight to be

> ascribed to them in the face of conflicting lay evidence. (Emphasis added.)

Weygant v. Fort Myers Lincoln Mercury, Inc. held that:

> We affirm our holding in *Easkold* that the jury may reject expert medical testimony when there exists relevant conflicting lay testimony and disapprove *Morey* as being in direct conflict therewith. (Emphasis added.)

The opinion of the district court in the case at bar is inconsistent with these three Florida Supreme Court cases. All three cases stand for the proposition that juries are free to disregard expert testimony, but only where there is conflicting lay testimony upon which to base its verdict. As previously argued, ultimately and fundamentally, verdicts must be based upon evidence. The evidence in the case at bar from both Drs. Tan, as well as Hogshead, was that Wald sustained a permanent injury to his right thigh. No other evidence was to the contrary. Therefore, the only appropriate decision on the issue of permanency could be that Wald had sustained a permanent injury in the accident in question, and the trial court ruled appropriately in granting a direct verdict on this issue. To have ruled otherwise would have been error. The district court erred in holding that juries are free to disregard the unanimous expert testimony of both parties and submit the issue of permanency to the jury when there was no conflicting lay evidence.

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER DISTRICT COURTS OF APPEAL

Wald would respectfully suggest to this Honorable Court that the better reasoned opinions on the issue of when the issue of permanency should, or should not, be submitted to the jury are found in the cases of *Vega v. Travelers Indemnity Company,* 520 So.2d 73 (Fla. 3d DCA 1988); *Williamson v. Superior Insurance*

Company, 746 So.2d 483 (Fla. 2d DCA 1999); *Evans v. Montenego*, 728 So.2d 270 (Fla. 3d DCA 1999); and *State Farm Mutual Automobile Insurance Company v. Orr*, 660 So.2d 1061 (Fla. 4th DCA 1995), all of which conflict with the opinion below. *Vega v. Travelers* dealt with the issue of whether the Plaintiff had sustained a permanent injury in an automobile accident. There, the court stated:

> While the credibility of an expert witness and the weight of his testimony are for the jury to determine, the fact finder must be guided by the greater weight of the evidence. Although a jury may award a lower amount of damages than that suggested by expert testimony, it may not totally ignore the only evidence presented on that issue. A zero verdict in Florida will be upheld only in the face of conflicting evidence regarding whether the Plaintiff was in fact injured. Although her disability rating varied from physician to physician, the fact of Mrs. Vega's permanent partial disability was uncontroverted. (Citations omitted and emphasis added.)

As is contemplated above, if the jury in the case at bar would have been permitted to decide the issue of permanency and found none, then their finding of no permanency would have resulted in a zero verdict for all non-economic damages in spite of the unanimous evidence of permanency. The case at bar is precisely on point with *Vega*.

Williamson v. Superior Insurance Company, dealt with the issue of directed verdicts concerning the issue of permanency of a plaintiff's injuries from an automobile accident. There the court stated:

> A party moving for a directed verdict admits the truth of all facts in evidence and every reasonable conclusion or

inference which can be drawn from such evidence favorable to the non-moving party. A motion for directed verdict should only be denied and the case submitted to the jury if conflicting evidence has been presented by the parties. When a plaintiff presents expert testimony to support a claim of a permanent injury, the defense, in order to survive a motion for a directed verdict, must come forward with either countervailing evidence on the permanency issue or must severely impeach the proponents experts. A jury is free to determine the credibility of expert testimony and decide what weight should be ascribed to such testimony in light of conflicting evidence-including lay testimony. However, a jury is not free to reject uncontroverted medical testimony indicating a permanent injury. (Citations omitted.)

In the instant case, the medical experts testifying on behalf of Mr. Williamson stated that he had sustained a permanent injury as a result of this accident. While the two experts offered by Superior took issue with certain aspects of Mr. Williamson's experts' testimony, neither Dr. Greenberg nor Dr. Slomka said there was no permanent injury caused by this accident. In fact, both agreed that an aggravation of a non-symptomatic arthritis would be considered a permanent exacerbation.

This is no evidence to refute Mr. Williamson's claim of a permanent injury. Therefore, the jury's verdict finding no permanent injury was against the manifest weight of the evidence. The jury was not free to reject the uncontroverted medical testimony indicating permanent injury. The Williamsons were entitled to a directed verdict on the issue of permanency. (Citations omitted and emphasis added.)

Therefore, *Williamson* is also directly on point with the case at bar, and the trial court would have erred by not granting the motion for directed verdict based upon the undisputed and unanimous evidence of permanency in the case at bar.

Evans v. Montenegro, also dealt with the issue of directed verdicts concerning the issue of permanency of injuries in an automobile accident case. This case is directly on point with the case at bar, requiring the opposite result of the decision of the district court. Therefore, there is clearly direct conflict which must be resolved between the districts. In *Evans*, the court stated:

> The plaintiff's medical expert testified that the plaintiff sustained a permanent injury resulting in a nine to ten percent permanent impairment rating. The defendant countered with her own expert who testified that the plaintiff sustained a permanent injury, but assigned only a one percent permanent impairment rating.
>
> Because there was no conflict in the expert testimony regarding whether the plaintiff sustained a permanent injury, the trial court directed a verdict in favor of the plaintiff on the issue of permanency. The issues of liability and degree of damages were then submitted to the jury, which returned a verdict in favor of the plaintiff.
>
> On appeal, the defendant challenges the propriety of the directed verdict on the permanency issue. She argues that, although there was not direct evidence contradicting the experts' testimony, the jury was free to disregard such testimony…We disagree. (Citations omitted.)
>
> Permanency determinations are generally made by juries. Nonetheless, where the evidence of injury and causation is such that no reasonable inference could support a jury

> verdict for the defendant, it is not improper to direct a verdict on the permanency issue for the plaintiff.
>
> A plaintiff can establish a prima facie case of permanency by presenting expert testimony of permanency. Once this is done, the burden shifts to the defendant to: (1) present countervailing expert testimony; (2) severely impeach the proponent's expert; or (3) present other evidence which creates a direct conflict with the proponent's evidence. If the defendant succeeds in this endeavor, a jury question is presented; if not, a directed verdict on permanency is appropriate. (Citations omitted.)
>
> Here, the defendant clearly failed to meet her burden. Although the defendant did put on expert testimony, that testimony also established that the plaintiff's injury was permanent.

In the case at bar, it is uncontradicted that the defendant did not (1) present countervailing expert testimony; (2) severely impeach the proponent's expert; or (3) present other evidence which creates a direct conflict with the proponent's evidence. Instead, the defendant introduced into evidence his own expert's opinion that Wald has sustained "a three percent impairment to the right lower extremity" that "converts to a one percent impairment of the whole person" which the doctor stated was "probably casually related to the automobile accident."

The case of *State Farm Mutual Automobile Insurance Company v. Orr* also dealt with this issue of permanency and directed verdicts. There the court stated:

> To the contrary, putting on its [the defense] best case, it offered only expert medical testimony *corroborating* that offered by the plaintiff concerning the permanency of her

> injury. Thus, at the close of the evidence, both plaintiff and defendant had offered evidence fully supporting plaintiff's claim of permanent injury.
>
> We know no reason why the law as it pertains to a grant or denial of a motion for directed verdict in cases involving personal injury arising out of automobile accidents should be treated differently than other cases, i.e., when there is not evidence in the record upon which a jury could lawfully return a verdict for the non-moving party. Discerning when that standard has been met is, by the very nature of the evidence involved, more difficult in cases involving soft tissue injury. We adhere to the view expressed in *Colvin* that in such cases the existence of permanent injury, vel non, is generally a jury question. Nonetheless, where the evidence on the issue of permanency of injury and causation is such that no reasonable inference to be drawn from it would support a jury verdict for the defendant, it is not error to direct a verdict for petitioner on those issues. For reasons stated above, we think this case is clearly within the category, and affirm.

Orr is also directly on point with the case at bar. The same laws that apply to cases in general should also apply to automobile accident cases. The above cases stand for the simple proposition that while the issue of permanency is generally a jury question, if there is no evidence to the contrary, the issue of permanency should not be submitted to the jury because juries are not allowed to base their verdicts on non-existent evidence. The above cases are consistent with the age old principle that verdicts must be based upon evidence. As is provided for in Florida Standard Jury Instruction 7.1, verdicts can not be based on prejudice or sympathy but must be "based on the evidence that has been received."

The above cited cases are also consistent with the requirements for directed verdicts, judgments notwithstanding the verdict, summary judgments and motions for new trial based upon verdicts being against the manifest weight of the evidence. If the issue of permanency, or any other issue, is going to be submitted to the jury, there must be evidence that would support a verdict for either party. In the case at bar, both parties' direct testimony from their respective medical experts was that Wald's right thigh injury was, in fact, permanent. No lay evidence was offered by either party that conflicted with those opinions. The trial court was correct in granting a directed verdict in favor of Wald on the issue of permanency. Assume that in the case below, the issue of permanency were given to the jury to decide, and assume that the jury had returned a verdict of no permanency. Based upon the record, including all testimony and evidence, such a verdict on the issue of permanency would be based on no evidence, at all. Such a verdict would be against not only the manifest weight of the evidence, but against all of the evidence in the case.

The decision below not only brings about an unjust result in this case, but perhaps even more importantly, can now be used as the foundation in every automobile personal injury trial in the First District for the proposition that directed verdicts on the issue of permanency do not exist, because juries are free to reject even the entire evidence in a trial. Such a notion obviously invites further unjust results, especially as the issue pertains to non-economic damages, a subject well-known to be greatly debated in society today. Jurors predisposed to disfavor non-economic damages are obviously much more likely to find no permanency, even when all of the evidence in the case proves that the plaintiff did in fact suffer a permanent injury. Accordingly, the flawed opinion below will clearly be used by

defendants to argue that the issue of permanency must always be submitted to the jury, even when there is simply no evidence whatsoever to the contrary.

PERMANENCY OF THE NECK AND BACK INJURIES THOROUGHLY LITIGATED

The District Court of Appeal in its opinion states that the trial court reversibly erred by granting a directed verdict for Wald on the issue of the permanency of Wald's right thigh injury, because the ruling "…took from the jury's consideration the issue of the permanency of plaintiff's neck and back injuries…" Respectfully, the district court erred in so holding. In granting the directed verdict, the trial court stated:

> Dr. Hogshead did testify that he gave him [Wald] one percent whole person, three percent right lower extremity due to this meralgia paresthetica which was casually related to this accident in his opinion. Therefore, I am going to grant the motion for directed verdict on this issue of permanency. You're certainly free to argue that none of the other injuries were permanent. (Emphasis added.)

TT V: 693-694.

Consistent with the trial court's ruling, the defendant offered evidence and argument that Wald's neck and back injuries were not permanent. As referenced above, the defendant's expert, Dr. Hogshead, testified at length that:

a) The plaintiff's obesity could be the cause of his back problems. TTV: 547.

b) The Plaintiff had not sustained a permanent injury to his neck that he, in fact, had normal degenerative changes, as well as normal range of motion. TT V: 571.

d) The plaintiff's low back injuries pre-existed the automobile accident in question. TT V: 564-565.

Dr. Hogshead testified as follows:

Q. All right, sir. Dr. Hogshead, based upon your examination of Mr. Wald and your review of the records do you have an opinion as to whether Mr. Wald suffered a permanent injury or a permanent impairment as a - - to his neck as a result of this automobile accident in September 1999?

A. Yes, I have an opinion.

Q. What is that opinion?

A. The opinion is that there is no impairment really to his neck. He has ordinary degenerative change. He has nearly normal range of motion. In his pain drawing to me, he did not indicate pain in the neck. He indicated pain in the area between the shoulder blades in the upper back.

Q. All right, sir. Do you have an opinion, within a reasonable degree of medical probability, based upon your examination and review of the records as to whether Mr. Wald suffered a permanent injury to his low back as a result of this automobile accident in 1999?

A. Yes, I have an opinion.

Q. What is that opinion?

A. I feel there is no impairment related to his lower back related to the automobile accident.

Q. Now, the findings that you noted are objective findings on the MRI; is that right?

A. Yes.

Q. And, again, those objective findings, do you have an opinion as to whether they are casually related to this automobile accident in 1999?

A. I do have an opinion.

Q. And what is that opinion?

A. The opinion is that these are preexisting the automobile accident, probably unrelated.

TT V: 577-578.

The defendant also offered the testimony of Dr. Joseph Utz, a radiologist. Dr. Utz testified that Wald's disc problems in the neck, as well as the low back, were degenerative in nature and pre-existed the accident in question. TT V: 663-671.

The defendant was allowed to fully defend his case and introduced into evidence a surveillance video tape of Wald. TT V: 651. The video depicted Wald going into a Sprint telephone store. Inside the store, Wald is seen leaning over a counter rubbing and stretching his obviously painful back. The video was so favorable to Wald's claim that Wald's trial counsel played those portions of the video during final arguments. TT VI: 789-790. In any event, the video showed nothing to disprove in any way that Wald suffers permanent numbness in the right

thigh. The video was completely consistent with the type of thigh injury described by both Dr. Hogshead and Dr. Tan. When Wald's trial counsel moved for directed verdict, defense counsel never even mentioned the surveillance video as a basis for denying the motion obviously because the tape showed nothing that in any way disproved the permanent numbness of the thigh. Instead, defense counsel argued that the jury should be allowed to accept or reject Dr. Hogshead's testimony or any other evidence. TT V: 693.

Further, the defendant's trial counsel, in closing arguments, expressly attacked Wald's claims that the neck and back were permanently injured. As stated in closing:

> Amount of future meds. Well, Dr. Hogshead said - - you heard testimony from Dr. Hogshead that there was no permanent impairment because of the automobile accident in this case to his neck. No permanent injury to his lower back. Give him the benefit of the doubt. Said, yeah, numb thigh.
>
> We think it's reasonable that you could determine there is no future medical care. I ask you take that into account and consideration when you decide these things.
>
> . . .
> Let's talk about the future. What did Dr. - - what was Dr. Hogshead's opinion? Zero percent for the neck, zero percent for the back, one percent for the numbness.

TT V: 778-779.

The record shows that in the defendant's closing argument, while attacking the permanency of the neck and back, the defendant did not even suggest that the

right thigh injury was not permanent. Because the defendant failed to make such an argument or at least preserve the record by proffering argument or evidence that the thigh injury was not permanent, the issue has been waived. The statement by the district court that the directed verdict "took from the jury's consideration the issue of permanency of plaintiff's neck and back injuries" is just not accurate. The jury was never instructed that the neck and back injuries were, or were not, permanent. That issue was intentionally and specifically left for the jury to decide. Each party presented its best evidence and the jury made a decision after hearing conflicting evidence concerning the neck and back injuries. The trial court appropriately granted the plaintiff's motion for directed verdict as to the issue of the permanency of the right thigh injury, because this was not a disputed issue. Both parties' doctors opined the injury to the right thigh was permanent. There was no contradictory evidence. Therefore, the plaintiff satisfied the requirements of Florida Statute §627.737(2)(b) and a directed verdict was not only correct, but required.

PERMANENT INJURY, IN WHOLE OR PART,
IS ALL THAT IS REQUIRED

The district court erred in misconstruing Florida's no-fault threshold statute, Florida Statute §627.737, when stating in footnote 1 of the opinion that:

> Significantly, based on a plain reading of the statute, it appears the jury would be precluded from awarding damages based on the permanency of the thigh injury, because that injury did not cause "pain, suffering, mental anguish or inconvenience." *See* §627.737 (2), Fla. Stat.

This is in response to Wald's trial counsel who, in closing argument, argued to the jury that:

> All right. We showed you the calendar that shows before this collision as to his low back. And there's two things you-all need to talk about in the jury room. One is his neck and the other is his low back.
>
> Let me tell you something. The thigh, the numb thigh problem for which Dr. Hogshead says is a permanent condition caused by this collision, we're not even asking for reimbursement for that. It doesn't cause him any ongoing daily chronic pain.

The district court seems to be coupling the requirements of a permanent injury, and a new requirement that the permanent injury must also cause pain, suffering, mental anguish or inconvenience in order for Wald to have satisfied the requirement of Florida Statute §627.737(2)(b), and therefore be able to claim damages for any of his injuries, including non-economic damages. Such a construction is inconsistent with the statute, as well as the evidence in the case. Florida Statute §627.737(2)(b) states in part:

> **627.737 Tort exemption; limitation on right to damages; punitive damage.**
>
> (2) In any action of tort brought against the owner…operator…of a motor vehicle…a plaintiff may recovery damages in tort for pain, suffering, mental anguish, and inconvenience because of bodily injury, sickness or disease arising out of such motor vehicle only in the event that the injury or disease consist in whole or in part of;

(b) Permanent injury within a reasonable degree of medical probability . . .

The express language of the statute makes it clear that a plaintiff may recover "... for pain, suffering, mental anguish, and inconvenience. . ." if the plaintiff's injury "consists in whole or in part of" an injury that is a "permanent injury within a reasonable degree of medical probability." The district court's new requirement that damages are only recoverable if the permanent injury also causes pain, suffering, mental anguish or inconvenience is very simply not in the statute. Instead, the statute only requires the proof of any permanent injury, in whole or part, in order to be able to recover the non-economic damages of pain, suffering, mental anguish and/or inconvenience for all injuries, regardless of permanency. This statute is a threshold. The district court's mandatory requirement of the permanent injury causing pain, suffering, mental anguish or inconvenience is not present in the statute and to so hold was error. The fact that Wald's trial counsel, as a trial strategy, did not ask for reimbursement for the permanently injured (and numb) right thigh, does not change the fact of the permanency of this nerve injury that causes numbness to an area of the right thigh.

Assuming arguendo, the district court's mandatory requirement of coupling elements of damage to the permanent injury is correct, record evidence shows that Wald's permanent right thigh injury, although not cause ongoing daily pain, did cause mental anguish and inconvenience. The elements of damage of mental anguish and inconvenience are also specified in Florida Statute §627.737(2)(b). Dr. Hogshead, as referenced earlier, testified as to Wald's complaints of constant right thigh numbness and sensitivity that made children sitting on the right side of his lap uncomfortable. Dr. Hogshead testified:

> A. Since the accident, he [Wald] reports a constant numbness in his anterolateral right thigh, extending from the hip to the knee. The area is sensitive and he says he doesn't allow children to sit on his lap on that side.

TT V: 542

Dr. Hogshead's testimony regarding the discomfort and sensitivity of the right thigh depriving Wald of the ability for his children to sit on his lap is the very essence of mental anguish, and could also be the basis for an award for inconvenience. Therefore, even if Wald's trial counsel told the jury that no award for pain from the right thigh injury was being sought, there certainly was ample record evidence of other elements of damages for mental anguish and inconvenience from the permanently injured right thigh. Therefore, record evidence shows that the district court's new requirement of requiring that a permanent injury also result in either pain, suffering, mental anguish or inconvenience has in fact been met. As reflected above, the district court was in error in holding that, ". . . the jury would be precluded from awarding damages based on the permanency of the right thigh injury, because that injury did not cause 'pain, suffering, mental anguish or inconvenience.' " The injury, in fact, did cause mental anguish and inconvenience. All Wald actually needed to prove, as he did prove, was a permanent injury, in whole or part, in order to recover both non-economic and economic damages, for all his injuries.

The standard verdict form and jury instructions for automobile cases would be greatly changed if the opinion below is left to stand. Juries would first have to choose from a list of affected body parts as to which are, or are not, permanently

injured. The jury would then have to specify if any permanently injured body part causes pain, suffering, mental anguish, and/or inconvenience. Only if a certain permanently injured body part causes one of these elements of damage, could a jury then award non-economic damages for all injuries. Such a burdensome requirement would render trials unduly complicated. Such a holding by the court below is simply error.

HARMLESS ERROR

The record clearly shows that the most severe and painful of Wald's injuries were to his neck and back. Indeed, precisely because the permancy of the thigh injury was undisputed, almost the entire trial was centered around the disputed claim for damages resulting from the injuries to the neck and back. The record shows that Wald was not even seeking money for damages caused by the right thigh. He was seeking substantial damages only for the neck and back. Common sense shows that by the size of the verdict alone, over one million dollars, that had the jury been allowed to expressly decide the issue of permanency, that issue would have been decided in favor of Wald. We know this because the size of the verdict sought by Wald was based upon the injuries to the neck and back being permanent. Wald's trial counsel argued to the jury to award damages, as a result of the permanent neck and back injuries, on an hourly basis for the rest of Wald's life. The jury awarded Wald $861,936.55 in non-economic damages for injuries to his neck and back. The jury could not have awarded this amount of money without finding that the neck and back were permanently injured. Otherwise the numbers simply would not have added up to anything close to the amount of the verdict. Therefore, if there was any error by the trial court in directing a verdict as to permanency, that error was harmless. After the issue of the permanency of the neck

and back injuries was thoroughly litigated by this parties, the jury clearly agreed that Wald sustained permanent injuries to his neck and back, based on the size of the verdict itself.

CONCLUSION

The petitioner, Howard B. Wald, Jr., would respectfully request this Honorable Court to reverse the District Court of Appeal and reinstate the jury's verdict.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to J. Stephen O'Hara, Jr., Esquire, 4811 Beach Boulevard, Suite 303, Jacksonville, Florida 32207; Reginald Estell, Esquire, 505 North Liberty Street, Jacksonville, Florida 32202 and to Don Detky, Esquire and Debra Carter Taylor, Esquire, Tyson & Associates, 1200 Riverplace Boulevard, Suite 640, Jacksonville, Florida 32207, by mail, this 18h day of March, 2009.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this answer brief complies with the font requirements of 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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