

THE SUPREME COURT  
STATE OF FLORIDA  
CASE NO.: SC08-1143

HOWARD B. WALD, JR.,

Petitioner, APPEAL CASE NO.: 1D07-2772

vs. LOWER CASE NO.: 16-2003-CA-006476

ATHENA F. GRAINGER,  
a personal representative of the  
Estate of SAM GUS FELOS,

Respondent.

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**PETITIONER'S INITIAL BRIEF  
REQUESTING THE  
FLORIDA SUPREME COURT TO  
EXERCISE DISCRETIONARY JURISDICTION**

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## **PRELIMINARY STATEMENT**

As to the parties, the petitioner here and Plaintiff below, Howard B. Wald, Jr., will be referred to by name. The respondent here and Defendant below, Sam Gus Felos, will be referred to by name.

As to the record, 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 to determine whether this Honorable Court should exercise its discretionary jurisdiction pursuant to Florida Rule of Appellant Procedure 9.030(a)(2)(A)(iv), is whether the decision of the First District Court of Appeal in the case at bar expressly and directly conflicts with opinions of other district courts of appeal or opinions of this Honorable Court.

### **PETITIONER'S STATEMENT OF THE CASE AND FACTS**

This request for this Honorable Court to exercise its discretionary jurisdiction arises from an automobile collision trial. The Defendant below, Felos, admitted liability for causing the subject collision wherein Wald, the Plaintiff below, suffered bodily injury. Following the trial, Felos died and Athena F. Grainger, as personal representative of his estate, was substituted as the proper party Defendant.

The medical evidence at trial, which was testified to by both Wald's and Felos' medical experts, was that Wald had suffered a permanent injury to the right thigh in the collision. See, TT III: 308; TT V: 578-579. Florida Statute §627.737, commonly referred to as the "no fault threshold," requires plaintiffs in automobile cases to have sustained a permanent injury in order to recovery damages in tort.

As a result of there being no conflicting evidence and pursuant to the statute, Wald moved for a directed verdict on the issue of permanency, which was granted. TT V: 693-694.

The jury returned its verdict in the amount of \$1,030,556.68, demonstrating that the jury felt Wald to be seriously and permanently injured due to not only the thigh injury but also herniated disks in the neck and back. R 87-88 and TT III: 308. Neither party disputed the permanency of the thigh injury at the trial which focused on the neck and back injuries. The verdict was appealed by Felos, arguing that it was error to grant a directed verdict on the issue of permanency and that the issue should have been submitted to the jury because juries are free to disregard even uncontradicted expert testimony. The First District Court of Appeal agreed and reversed by way of its opinion of April 10, 2008. Wald then filed his Motion for Rehearing and Motion for Rehearing En Banc and in the Alternative Motion to Certify Direct Conflict which was denied on May 16, 2008. Wald now asks this Honorable Court to exercise its discretionary jurisdiction, pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), and hear this appeal because the opinion below expressly and directly conflicts with opinions of other district courts of appeal, as well as opinions of this Honorable Court.

### **SUMMARY OF ARGUMENT**

The First District Court of Appeal reversed the trial court's granting of a directed verdict for Wald on the permanency issue, holding that juries are free to disregard even uncontradicted and unanimous expert medical opinions of both parties on the issue of the permanency of Wald's injuries. That opinion expressly and directly conflicts with decisions of the Second, Third and Fourth District Courts of Appeal, as well as this Honorable Court that have, uniformly, held that juries are free to determine issues of credibility and to disregard expert testimony, but only if there exists conflicting lay testimony or evidence, and that directed

verdicts on the issue of permanency are appropriate when there is no conflict in the evidence. As a result, the petitioner, Howard B. Wald, Jr., would respectfully request that this Court exercise its discretionary jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) to clarify this conflict.

**ISSUE**

DOES THE OPINION BELOW, HOLDING THAT JURIES ARE FREE TO DISREGARD UNCONTRADICTED AND UNANIMOUS EXPERT MEDICAL TESTIMONY OF BOTH PARTIES, EXPRESSLY AND DIRECTLY CONFLICT WITH OPINIONS OF OTHER DISTRICT COURTS OF APPEAL, AND THIS HONORABLE COURT, WHICH HAVE HELD THAT JURIES ARE NOT FREE TO REJECT UNCONTRADICTED EXPERT TESTIMONY ABSENT SOME CONFLICTING LAY TESTIMONY OR EVIDENCE?

**ARGUMENT**

In this automobile collision case, the trial court directed a verdict for Wald on the issue of the permanency of Wald's right thigh injury because the evidence concerning the permanency of this injury was completely undisputed. The only two physicians who testified concerning the right thigh injury (one on behalf of Wald and one on behalf of Felos), both testified that the right thigh injury was permanent. No other medical evidence or lay testimony or evidence was offered to contradict the unanimous opinions of both parties' physicians. Even Felos did not argue that the thigh injury was not permanent.

The First District Court of Appeal reversed citing a principle of law in direct conflict with other district courts of appeal as well as this Honorable Court, that

juries are free to disregard even uncontradicted expert testimony. Wald submits that the First District Court of Appeal was in error, and would respectfully request that this court exercise its discretionary jurisdiction due to express and direct conflict.

In the opinion in the case at bar, the First District Court of Appeal in reversing the trial judge stated that:

Permanency is a jury question. *See Frank v. Wyatt*, 869 So.2d 763, 765 (Fla. 1<sup>st</sup> DCA 2004). A jury is free to weigh the credibility of expert witnesses as it does any other witness, and reject even uncontradicted testimony. *See i.d.* (citing *Republic Servs. Of Fla. v. Poucher*, 851 So.2d 866, 871 (Fla. 1<sup>st</sup> DCA 2003); *Easkold v. Rhodes*, 614 So.2d 495 (Fla. 1993)).

The holding of the First District Court of Appeal that juries are free to disregard even uncontradicted expert testimony directly conflicts with a host of opinions of other district courts of appeal, including, *Evans v. Montenegro*, 728 So.2d 270 (Fla. 3d DCA 1999); *Williamson v. Superior Insurance Company*, 746 So.2d 483 (Fla. 2d DCA 1999); *Campbell v. Griffith*, 971 So.2d 232 (Fla. 2d DCA 2008) and *State Farm Mutual Automobile Insurance Company v. Orr*, 660 So.2d 1061 (Fla. 4<sup>th</sup> DCA 1995).

In *Evans*, the Third District Court of Appeal held that a directed verdict on the issue of permanency was proper and affirmed the trial court's granting of such stating:

Permanency determinations are generally made by juries. *See State Farm Mut. Auto. Ins. Co. v. Orr*, 660 So.2d 1061 (Fla. 4<sup>th</sup> DCA 1995). 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. *See State Farm Mut. Auto. Ins. Co. v. Orr*, 660 So.2d at 1063.

*Williamson v. Superior Insurance Company* was also an automobile collision case. In *Williamson*, the Second District Court of Appeal reversed a jury verdict for the defendant and held that a directed verdict on the issue of permanency should have been granted for the plaintiff stating:

There 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 a permanent injury. See *Vega v. Travelers Indem. Co.* The Williamsons were entitled to a directed verdict on the issue of permanency.

The First District Court of Appeal recognized conflict with *Williamson* in its case of *Frank v. Wyatt*, 869 So.2d 763, at 765 (Fla. 1<sup>st</sup> DCA 2004).

*Campbell v. Griffith* was also an automobile collision case with the issue being the amount of damages awarded. The court stated:

. . . when medical evidence on permanence or causation is undisputed, unimpeached, or not otherwise subject to question based on other evidence presented at trial, the jury is not free to simply ignore or arbitrarily reject that evidence and render a verdict in conflict with it. See, e.g., *Holmes v. State Farm Mut. Auto. Ins. Co.*, 624 So.2d 824, 825 (Fla. 2d DCA 1993); *Jarrell v. Churm*, 611 So.2d 69, 70 (Fla. 4<sup>th</sup> DCA 1992).

*State Farm Mutual Automobile Insurance Company v. Orr*, 660 So.2d 1061 (Fla. 4<sup>th</sup> DCA 1995), is factually and procedurally identical to the case at bar. In this automobile collision case, both parties' physicians testified that the plaintiff was permanently injured and the trial court granted a directed verdict in favor of the plaintiff on the permanency issue. In affirming, the court stated:

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 no evidence in the record upon which a jury could lawfully return a verdict for the non-moving party.

...

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 plaintiff on those issues.

The holding in the case at bar also expressly and directly conflicts with holdings of the Florida Supreme Court, more particularly the cases of *Easkold v. Rhodes*, 614 So.2d 495 (Fla. 1993), *Weygant v. Fort Myers Lincoln Mercury, Inc.*, 640 So.2d 1092 (Fla. 1994), and *Chomont v. Ward*, 103 So.2d 635 (Fla. 1958). The cited Florida Supreme Court cases hold that juries are free to decide issues of credibility including the credibility of expert testimony, but all its cases hold that if juries are going to reject expert testimony, their verdicts must be based upon some conflicting lay testimony or evidence. As stated by this court in *Easkold*:  
...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.”

The opinion below cited as authority, *Weygant v. Fort Myers Lincoln Mercury, Inc.*, 640 So.2d 1092 (Fla. 1994). However, the ultimate holding in that case actually supports Wald on the issue:

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.)

To hold otherwise, the jury would be basing its verdict on a complete and total absence of evidence. Also in conflict with the opinion below is *Chomont v. Ward*, 103 So.2d 635 (Fla. 1958) which holds that:

The rule is well established that 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.

The holding of the First District Court of Appeal in the case at bar expressly and directly conflicts with the three above cited cases of this Honorable Court. The opinions of this Honorable Court hold that although juries are free to decide issues of credibility, juries' decisions must ultimately be based upon some evidence. The First District reversed the directed verdict on the issue of permanency where both Wald's and Felos' physicians testified that Wald sustained a permanent injury to the right thigh, and there was a complete absence of any conflicting evidence on this issue. The First District's holding that the issue of permanency should always be submitted to the jury even absent any conflicting evidence directly and expressly conflicts with the opinions of other District Courts of Appeal and this Honorable Court.

At the least, the opinion of the First District confuses the standard for directed verdicts. At most, the opinion renders obsolete in automobile cases, if not all cases, not only directed verdicts, but also summary judgments, judgments notwithstanding the verdict, additures, remittitures, and even evidentiary stipulations, because juries would be free to disregard even uncontradicted and unanimous testimony or evidence from both parties. Wald would respectfully request this Honorable Court to exercise its discretionary jurisdiction and clarify this area of the law.

**CONCLUSION**

The petitioner, Howard B. Wald, Jr. would respectfully request that this Court take discretionary jurisdiction to resolve the conflicts that exist between the opinion in the case at bar and opinions of other district courts of appeal, as well as opinions of this Honorable Court as cited above.

**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 \_\_\_\_\_ day of June, 2008.

**S. PERRY PENLAND, JR., P.A.**

\_\_\_\_\_  
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