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 REPLY BRIEF

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REBUTTAL ARGUMENT

The Petitioner, Howard B. Wald, Jr., ("Wald") would respectfully reply to the Respondent, Athena F. Grainger, as Personal Representative of the Estate of Sam Gus Felos' (the defendant's) Answer Brief as follows:

The defendant criticizes Wald for questioning the findings of fact made on appeal by the district court when weighing evidence in the opinion below. At page 24 of the Answer Brief, the defendant states:

> Plaintiff argues to this Court that the findings in the opinion are incorrect, asking this Court to go behind the opinion as written, and re-decide the appeal below. However, there is no dispute that the opinion on its face states that the evidence was ambivalent and not unanimous.

Fundamentally, the district court in the opinion below erred by evaluating the evidence and making a finding of fact on appeal that Dr. Hogshead's testimony was ambivalent, a position that was not even urged by the defendant to the trial court in opposing Wald's Motion for Directed Verdict on the issue of the permanency to Wald's right thigh injury. The defendant's counsel stated in opposition to the motion:

> 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.

Issues not presented to the trial court are not preserved for appeal and are therefore waived. As stated by this court in *Mariani v. Schleman*, 94 So.2d 829 (Fla. 1957):

> It is a rule long standing that on appeal this Court will confine itself to a review of those questions, and only those questions, which were before the trial court.

The question of the alleged ambivalence of Dr. Hogshead's opinion of permanency was never put to the trial court. Instead, defense counsel acknowledged that Dr. Hogshead did relate Wald's thigh injury to the accident stating, ". . . Dr. Hogshead's testimony has been that he does, for the benefit, relate it." The defendant, on appeal, now takes the opposite position, for the first time, that Dr. Hogshead does not "relate it". The only ground given in opposition to Wald's Motion for Directed Verdict on the issue of permanency was that "We think still that a jury can accept or reject any testimony and any respective evidence. . ." The defendant's new arguments concerning:

a. the alleged ambivalent testimony of Dr. Hogshead;

b. claimed factual disputes concerning Wald's candor and credibility, and;

c. that Dr. Hogshead and Tan's opinions allegedly aren't unanimous were never made to the trial court. It was clearly error for the district court to become an appellate finder of fact concerning an issue that was not raised before the trial court, and for the first time make a factual determination that Dr. Hogshead's testimony was allegedly ambivalent. As stated by this court in *Westerman v. Shell's City, Inc.*, 265 So.2d 43 (Fla. 1972):

> . . .an appellate court cannot substitute its judgment by a reevaluation of the evidence.

It was further stated by this court in *Crain & Crouse, Inc. v. Palm Bay Towers Corporation*, 326 So.2d 182 (Fla. 1976):

> Petitioner suggests that the district court below substituted its judgment as to factual matters for the findings made at trial by the trier of fact. Exchange Bank, and the other cases cited for conflict, stand for the fundamental proposition that an appellate court is not free to substitute its judgment for the trier of fact, or to weight evidence and reach a different conclusion from that reached at trial.

Such is the situation concerning the opinion below. The district court became a trier of fact when weighing the testimony of Dr. Hogshead and determined, for the first time, that the opinion of Dr. Hogshead was ambivalent. The district court then used this finding of ambivalence to base its reversal of the trial court's granting of the directed verdict on permanency. Fundamentally, it was not the place of the

district court to become a fact finder concerning an issue never raised before the trial court. Secondly and as discussed below, the opinion of Dr. Hogshead was anything but ambivalent.

Without waiving Wald's position that the district court should not have engaged in first time fact finding on appeal, Wald would respond to the allegation of ambivalence as follows:

The defendant at page 4 of her Answer Brief states that:

> Based on the history report by Mr. Wald, Dr. Hogshead stated that giving plaintiff the "benefit of the doubt", the numbness "more than likely could be" from wearing the seatbelt in the automobile accident.

The argument of "benefit of the doubt" or ambivalence is an argument never made to the trial court in opposition to Wald's Motion for Directed Verdict on the issue of permanency and, once again, is therefore waived. In fact, defense trial counsel remarked to the trial court that Dr. Hogshead did "relate it [the right thigh injury]" to the subject accident. The remark concerning "benefit of the doubt" was not the testimony of Dr. Hogshead but a leading question by defense trial counsel. After Dr. Hogshead gave his opinion that due to the accident Wald had sustained a permanent injury to the right thigh (meralgia paresthetica) and assigned him a 3% permanent impairment to the lower extremity which translated to a 1% impairment to the whole person, defense counsel improperly led Dr. Hogshead stating, "You

are giving him the benefit of the doubt?" to which Dr. Hogshead stated, "Yes." There was never any ambivalence in Dr. Hogshead's actual testimony and opinions that Wald had, in fact, sustained a permanent impairment.

Dr. Hogshead, in his testimony, was anything but ambivalence concerning Wald's permanently injured right thigh and the meralgia paresthetica. Dr. Hogshead began his testimony with a general discussion of meralgia paresthetica, including:

a. that it involves a constant numbness to the anterior lateral right thigh, extending from the hip to the knee;

b. that the affected nerve exits approximately an inch lateral and an inch distal to the anterior superior spinal;

c. that some people get this injury from wearing a seatbelt in an accident;

d. that sometimes the injury is permanent and sometimes it's not;

e. that sometimes the injury is seen in people who are overweight because their belt will pinch the nerve;

f. that the injury to this nerve can result in radiculopathy when the nerve is compressed at the spine, which is a serious condition. TT V: 573-575.

After giving this general discussion of meralgia paresthetica, Dr. Hogshead then testified, within a reasonable degree of medical probability, as to Wald himself, that:

> 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.

Although defense trial counsel acknowledged to the trial court that Dr. Hogshead did "relate it [the right thigh injury] " to the accident, the defendant, on appeal, argues that Dr. Hogshead's opinion is, in fact, "ambivalent" because this nerve injury, meralgia paresthetica, has two potential causes, one being the automobile accident and the other being Wald's weight. If this were Dr. Hogshead's ultimate opinion, then logic would follow that Dr. Hogshead would have no opinion as to the cause of Wald's meralgia paresthetica. Dr. Hogshead's ultimate opinion is just the opposite. Dr. Hogshead clearly testifies that he has an opinion within a reasonable degree of medical probability that Wald's meralgia paresthetica ". . . is probably casually related to the automobile accident" and further opined that the injury was permanent. The defendants "two potential cause" theory is inconsistent with their own doctor's testimony as well as their position

urged to the trial judge when defense trial counsel acknowledged that Dr. Hogshead did "relate it."

The defendant at page 4 of their Answer Brief states, "Counsel for Respondent opposed the motion for direct verdict, based on Dr. Hogshead's ambivalent testimony as to causation, and the jury's right to accept or reject his testimony." This assertion by the defendant is very simply absent from any record evidence and inconsistent with defense trial counsel's admission to the trial court that Dr. Hogshead, as to Wald's right thigh injury, did "relate it". The opposition to the directed verdict never mentioned any alleged ambivalence of Dr. Hogshead's testimony, only that, "We think still that a jury can accept or reject any testimony and any respective evidence. . ."

The defendant at page 11 of the Answer Brief argues that Dr. Tan and Dr. Hogshead actually testified about two different injuries that coincidentally both caused Wald's right thigh numbness. Wald would respectfully disagree that the record evidence contains two different medical opinions of two different injuries that coincidentally both cause right thigh numbness in the exact same area. Both doctors described injury to the same nerve resulting in the same area of numbness to Wald's right thigh. The only difference is that Dr. Tan felt the injury to the nerve occurred at the spine resulting in radiculopathy. As stated by Dr. Tan:

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?

. . .

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.

Dr. Hogshead discussed how the nerve could be injured at the spine resulting in radiculopathy, a serious condition, but felt that the nerve was actually injured by Wald's seatbelt. As stated by Dr. Hogshead, "He does not have any of the signs that look like radiculopathy. Radiculopathy would be the serious thing, which would be compression of the nerve root up in the spine." Therefore, the defendant's position on appeal that meralgia paresthetica cannot be the result of radiculopathy is incorrect based on their own doctor's explanation of the condition. Both doctors found the same nerve to be permanently injured resulting in the same symptom of right thigh numbness but differed only on the exact location of the injury to the nerve. Dr. Tan believed the nerve to be injured at the spine. Dr. Hogshead believed the nerve to be injured by the seatbelt slightly forward of the spine.

The defendant at page 3 of their Answer Brief states that, "Dr. Tan did not testify that Mr. Wald sustained a permanent injury to his thigh." The defendant's assertions are not supported by the record nor was such an argument ever made to the trial court in opposition to Wald's Motion for Directed Verdict on permanency. Dr. Tan's testimony on the issue of permanency of the thigh injury states as follows:

> 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?
>
> . . .
>
> 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.

The allegation that Dr. Tan did not testify that Wald had sustained a permanent injury to the right thigh is simply not supported by record evidence.

The defendant, in their Answer Brief, repeatedly states that Wald has misconstrued the holding of the First District Court of Appeal. At page 5 of the defendant's Answer Brief, it states, "The district court opinion does not state that 'permanency is always a jury issue even if all evidence on the issue of permanency

is uncontradicted.'" The essence of the opinion of the district court is clear when the district court stated:

> Permanency is a jury question. . . A jury is free to weigh the credibility of expert witnesses as it does any other witness, and reject even uncontradicted testimony. . . Likewise, a jury is entitled to weigh the credibility of a medical expert and a lay witness, reject the expert testimony and base its verdict solely on conflicting lay testimony, or reject the plaintiff's claim entirely. . . However, the jury was free to reject *any* testimony regarding permanency including uncontradicted testimony. . .Because the issue of permanency is a jury question, the trial court erred as a matter of law by directing a verdict on that issue.

Wald would respectfully suggest to this Honorable Court that Wald has correctly construed and characterized the holding of the First District Court of Appeal in the opinion below. It is clearly the holding of the district court that a ". . . jury is free to weigh the credibility of expert witnesses as it does any other witness, and reject even uncontradicted testimony" and that permanency is always a jury issue and that juries can reject "any testimony regarding permanency including uncontradicted testimony." The problem with the district court's holding is that it would allow a jury to reject all testimony of both parties, even unanimous and uncontradicted testimony, on the issue of permanency (or any other issue) and base their verdict on no evidence at all. If juries can reject even the uncontradicted testimony of both parties, and base their decisions on no evidence, then

rhetorically, when would summary judgment, judgment not withstanding the verdict, motions for new trial where the verdict is against the manifest weight of the evidence, additur, or remittitur ever be appropriate? The trial court was correct in granting a directed verdict on the issue of permanency because both Wald's treating physician and the defendant's physician testified Wald's thigh injury was permanent and caused by the accident.

The defendant argues that there is no conflict between the opinion below and opinions of this court or other district courts. This court in *Chomont v. Ward*, 103 So.2d 635 (Fla. 1958) stated:

> 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.)

This court in *Easkold v. Rhodes*, 614 So.2d 495 (Fla. 1993) 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.)

Further, this court in *Weygant v. Fort Myers Lincoln Mercury, Inc.*, 640 So.2d 1092 (Fla. 1994) 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 conflict between the opinion below and the three opinions of this court is obvious. The district court expressed the view that juries are free to disregard uncontradicted expert testimony or any testimony as to permanency. This court has held that juries can disregard expert medical testimony but only where there exists relevant conflicting lay testimony. There is no conflicting lay evidence in this case as to Wald's permanently injured right thigh and certainly none was ever pointed out to the trial court when opposing Wald's Motion for Directed Verdict on the issue of permanency. The argument advanced by defense trial counsel to the trial court, and the only argument preserved for appeal, is the argument that juries can ". . . accept or reject and testimony and any respective evidence." The district court is in conflict with this court's holdings that "the jury may reject expert medical testimony when there exists relevant conflicting lay testimony. . ." At trial, defense counsel never even attempted to advance the argument that there was conflicting lay testimony. Instead, defense counsel acknowledged to the trial court that Dr. Hogshead "related it [Wald's permanently injured right thigh]" to the accident. The defense argument at trial was that the jury could "accept or reject any testimony or respective evidence." Although a jury can accept or reject expert

testimony (Drs. Tan and Hogshead's opinions of permanency), a jury verdict must be based on conflicting lay testimony (none cited here).

The conflicts between the opinion below and holdings of other district courts of appeal is also just as obvious. *Vega v. Travelers Indemnity Company,* 520 So.2d 73 (Fla. 3d DCA 1988), states:

> 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.

Williamson v. Superior Insurance Company, 746 So.2d 483 (Fla. 2d DCA 1999), held that:

> 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.)

Evans v. Montenego, 728 So.2d 270 (Fla. 3d DCA 1999) held that:

> 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. (Emphasis added.)

State Farm Mutual Automobile Insurance Company v. Orr, 660 So.2d 1061 (Fla. 4th DCA 1995), held that:

> 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.

The conflict between the opinion below and holdings of other district courts of appeal is apparent from the above quotes. The First District holds that juries can disbelieve unrebutted and uncontradicted expert testimony or any testimony on the issue of permanency (or any other issue), and base their opinions on no evidence at all if they chose to do so. This simply is not the law nor a well reasoned holding. Verdicts should fundamentally be based on evidence.

The defendant argues that the district court's discussion of footnote 1 is consistent with Florida Statute §672.737(2)(b). In the opinion below, the district court at footnote 1 states:

> 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.

Florida Statute §627.737(2)(b) states:

> **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 holding of the district court and statute are inconsistent. The statute clearly states that if a plaintiff's injury consists in whole or in part of any permanent injury, then the plaintiff can recover damages for all injuries regardless of permanency. There is no requirement in the statute that the permanently injured body part must cause either pain, suffering, mental anguish or inconvenience. In the case at bar, Wald's evidence satisfied this requirement anyway, Dr. Hogshead testified that Wald's thigh injury caused Wald mental anguish and inconvenience because he was unable to have children sit on his lap because of the discomfort that it caused. TT V: 542. Thus the holding of the district court is in error as to its construction of Florida Statute §627.737(2)(b) and as to its application to the specific facts of the case.

CONCLUSION

In conclusion, Wald respectfully request this Court reverse the First District Court of Appeal concerning the opinion below and reinstate the trial court's verdict and enter final judgment accordingly.

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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 11th day of June, 2009.

ATTORNEY

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fla. R. App. P. 210(a)(2) and is formatted with Times New Roman 14 point font.

_____

ATTORNEY