IN THE SUPREME COURT
STATE OF FLORIDA

HOWARD B. WALD, JR.,

Petitioner

vs.

CASE NO.: **SC08-1143**
Lower Tribunal No.: 1D07-2772

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

Respondent
_____/

RESPONDENT'S ANSWER BRIEF

O'HARA LAW FIRM
Professional Association

Susan S. Oosting
Florida Bar No. 603457
J. Stephen O'Hara, Jr.
Florida Bar No. 243371
4811 Beach Boulevard, Ste. 303
Jacksonville, Florida 32207
Telephone: (904) 346-3166
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS

Statutes

Other

PRELIMINARY STATEMENT

Respondent adopts the designations to parties and the record used in Petitioner's Preliminary Statement. In addition, citations to Petitioner's Initial Brief will be by page number, e.g., "IB:2." Reference to the opinion of the First District Court of Appeal will be by page number, e.g., "1DCA:3."

STANDARD OF REVIEW

The jurisdiction granted by Article V, Section 3(b)(3) of the Constitution of the State of Florida is that the Florida Supreme Court:

> May review any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

This Court operates within the constitutional intent of this article by "refusing to exercise our discretion where the opinion below establishes no point of law contrary to a decision of this Court or another district court." Florida Star v. B.J.F., 530 So. 2d 286, 288-289 (Fla. 1988).

Moreover, as was explained in Reaves v. State, 485 So.2d 829 (Fla. 1986), conflict jurisdiction must be established based on what is set forth in the opinions of the District Courts of Appeal, and not in the record proper. The Reaves Court elaborated:

> The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict. As we explain in the text above, we are not permitted to base our conflict jurisdiction on a review of the record or on facts recited only in dissenting opinions. Thus, it is

> pointless and misleading to include a comprehensive recitation of facts not appearing in the decision below, with citations to the record, as petitioner provided here.

Id., at 830, n. 3.

RESPONDENT'S STATEMENT OF THE CASE AND FACTS

The genesis of this case was a motor vehicle accident that occurred on September 12, 1999. [R1, 67, 230, 254] Petitioner Wald did not go from the scene of the accident to the hospital. [TT IV:451] When he did go to the emergency room later that day, he complained of neck and upper back pain, not of lower back pain or thigh numbness. [TT IV:452] His neck was x-rayed but his back was not. The diagnosis was neck sprain or strain. Petitioner Wald returned to work as a mechanic after three days. [TT IV:487]

Petitioner Wald did not seek further medical attention for eleven days, at which time he was examined by Dr. Tan. [TT III:312, IV:452] He did not tell Dr. Tan about prior work-related injuries to his back. [TT III:311] At the initial visit, Petitioner Wald contradicted the emergency room record of his initial complaints by telling Dr. Tan that he had immediate low back pain after the accident. [TT III:283; 320-21]

Dr. Tan ordered x-rays which were taken 18 days after the accident. The x-rays showed degenerative disc disease (with neural foraminal encroachment) in the low back, which pre-existed the accident. [TT III:314] Dr. Tan referred Petitioner Wald to a neurosurgeon, who opined that surgery was not indicated. [TT IV:489]

Defendant Felos admitted fault in causing the accident. [R67, 253] At the commencement of the trial, the issues for the jury to decide were causation, permanency of injury, and damages. [R67-68] Both parties put on expert testimony as to the issues of causation and permanency.

Jackson Tan, MD, Mr. Wald's treating physician, testified for the plaintiff. [TT III:266-338] Dr. Tan did not testify that Mr. Wald sustained a permanent injury to his thigh. Rather, Dr. Tan testified that Mr. Wald sustained a permanent injury to his neck, back and right elbow, and that the pain in his thigh was attributable to lumbar radiculopathy from the back injury. [TT III: 308]

Howard Hogshead, MD, an orthopedic surgeon, testified for the defendant. [TT V:527-636] Dr. Hogshead's physical examination of the plaintiff did not yield any significant accident-related findings. [TT V: 548-555] He also reviewed the radiological studies, and opined that they showed nothing more than pre-existing degenerative conditions unrelated to the accident. [TT V: 558-571] In his opinion, the plaintiff did not sustain permanent neck or back injury as a result of the accident. [TT V:576-578] Dr. Hogshead did find that the plaintiff had an area of numbness on his right thigh, which he diagnosed as "meralgia paresthetica," a condition which was due to compression of the lateral femoral cutaneous nerve. [TT V:571-573] Dr. Hogshead explained that the condition is usually not permanent, but may be. [TT V:573] It can be caused by a seat belt injury, but also can be caused in overweight men who have big stomachs and wear their belts

"down below the equator," so that the belts ride across where that nerve comes out. [TT V: 573-574] Either could explain why the plaintiff has that area of numbness. [TT V:574] Based on the history reported 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 auto accident. [TT V:574]

The testimony of Dr. Tan and Dr. Hogshead was not unanimous as to the thigh symptom - it was either a radiating pain from a lumbar injury, which one doctor said was caused by the accident and one doctor said was pre-existing, or it was a nerve numbness not related to the low back. Whether or not the thigh numbness was permanent, Dr. Hogshead's testimony as to its causation by the accident was ambivalent, because it was based on Mr. Wald's medical history.

The trial court granted the plaintiff's motion for directed verdict on the issue of permanency limited to the thigh injury. [TT V:693-694] Counsel for Respondent opposed the motion for directed verdict, based on Dr. Hogshead's ambivalent testimony as to causation, and the jury's right to accept or reject his testimony. [TT V:693-94]

In closing argument, the plaintiff disavowed any claim for damages for this condition:

> 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.

[TT VI:735-736]

The jury verdict does not have a finding that Wald's neck and back injury were permanent. There was no question as to permanency on the verdict form, and the jury was not given any instruction that they should not award non-economic damages for non-permanent injuries. [TT VI:803-806] The verdict form simply told the jury to enter both economic and non-economic damage awards if it found that the auto accident was "a legal cause of loss, injury or damage to the plaintiff." [TT VI: 807, l. 17-20] The jury deliberated for about 60 minutes, and returned a verdict awarding the 48 year-old plaintiff [TT V:680] over one million dollars for non-surgical soft tissue injuries to his neck and back. [TT IV:489; TT VI: 811-812]

The First District Court of Appeal reversed the verdict in favor of Petitioner, on the grounds that the trial court erred in directing a verdict as to permanency, when the evidence is ambivalent. 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."

SUMMARY OF THE ARGUMENT

Petitioner bases his argument on a holding the district court did not make, and on a characterization of the evidence not supported in the record.

Contrary to Petitioner's assertion, the testimony of Wald's treating physician and Felos' expert physician were not in agreement as to Wald's thigh symptom, and Dr. Hogshead's testimony as to causation was ambivalent, based on Wald's

reported medical history. There was evidence that Wald gave inaccurate medical histories to both Dr. Tan and Dr. Hogshead, from which the jury could have disregarded Dr. Hogshead's opinion on causation and found for Defendant on the issue of permanency.

The district court did not err in reversing the directed verdict, because there was ample evidence presented at trial from which the jury lawfully could have found that Wald's injuries were not permanent and/or not caused by the auto accident. Wald's treating physician, Dr. Tan, testified that Wald had a permanent injury to his lower back as a result of the accident. Dr. Hogshead, Defendant's retained expert, testified that Wald did not have a permanent injury to the lower back related to the accident. Dr. Tan, when asked about Wald's symptom of numbness in his upper thigh, testified that it was a radiating pain related to the lower back injury. Dr. Hogshead disagreed with Dr. Tan, opining that the numbness was separate from, and not related to any lumbar injury. Dr. Hogshead, on cross-examination, testified that the thigh numbness might have been caused by the auto accident, giving Mr. Wald the "benefit of the doubt."

Petitioner contends that the opinion of the district court conflicts with opinions of other courts and this Court which hold that a jury is not free to reject uncontroverted medical testimony absent conflicting lay testimony or evidence.

However, there cannot be a conflict between this opinion and those decisions, because, in this case, the district court found that there was conflicting and "ambivalent" expert medical testimony, and expressly based its reversal of the directed verdict on these conflicts and ambiguity. Therefore, this opinion does not conflict with any other opinion which holds that a jury verdict must be based on the evidence and inferences therefrom, and not on speculation. Nor does it conflict with any decision which holds that a directed verdict is not erroneous if there is no evidence from which a jury could find for the non-moving party. As such, the opinion in this case does not establish any point of law which conflicts with established case law of this Court and the other appellate districts that, where there is conflicting testimony and evidence concerning the permanency and causation of an injury, it is error to direct a verdict and take the question away from the jury.

The district court did not err in finding that the testimony concerning the thigh numbness was ambivalent. "Ambivalence" means "contradictory" or "uncertain." Dr. Hogshead's testimony was that the numbness could have two possible causes – a seat belt or a regular belt – and he attributed the numbness to the accident, based on Wald's history and giving him the "benefit of the doubt."

The opinion in this case does not conflict with decisions holding that juries cannot reject expert testimony absent conflicting lay testimony or other conflicting

evidence, as Petitioner claims. All the cases relied upon by Petitioner to establish conflict jurisdiction are inapposite, because, in this case, the expert testimony was not unanimous and uncontradicted. Even if it were, there was other evidence, including challenges to Wald's credibility and candor in reporting his medical history, which the jury could have considered in weighing expert testimony based on that history.

Petitioner asserts that the directed verdict was harmless error because it did not take the issue of permanency of Wald's neck and back injuries from the jury. However, as a result of the directed verdict, there was no question of permanency on the verdict form, and no reference in the jury instructions to the permanency threshold for general damages. As the district court correctly noted in its opinion, there was no way the jury could reject the permanency of any of Wald's injuries. Further, absent instruction from the court, the jury could not know that permanency is legally required in order to award non-economic damages. The jury verdict invited jurors to award pain and suffering damages if it found that the accident was a legal cause of any injury to plaintiff.

Petitioner also contends that the district court erred in reading §627.737 to mean that a jury should not award damages for an injury that does not cause pain, suffering, mental anguish or inconvenience. However, there is no dispute that

§627.737(2) says exactly that:

> (a plaintiff may recover damages in tort for pain, suffering, mental anguish, and inconvenience because of bodily injury, sickness, or disease arising out of the ownership, maintenance, operation, or use of such motor vehicle. . . . only in the event that the injury or disease consists in whole or in part of:
> . . . . .
> (b) Permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement.

Contrary to Petitioner's argument, the opinion does not hold that, in order to qualify as a permanent injury, the injury must cause "pain, suffering, mental anguish, or inconvenience." The district court simply and correctly states that the statute permits non-economic damages to be awarded only as compensation for "pain, suffering, mental anguish, and inconvenience." Since Petitioner Wald and his attorney in closing argument expressly stated that he was not seeking damages for his thigh injury, footnote 1 is neither error nor material to the conflict jurisdiction in this case.

The trial court's directing a verdict on permanency was not harmless error. It is difficult to imagine how an erroneous directed verdict could not be reversible error. Petitioner contends that a verdict of $861,936.55 in non-economic damages means that the jury must have found that Wald's back and neck injuries were permanent. However, absent the guidance of a jury instruction on the law

regarding permanency, or a question on the verdict form as to permanency, there is no way reach that conclusion. If the jury was not instructed that the law required that Wald's neck and back injuries be permanent within a reasonable degree of medical probability, the jurors could have awarded economic damages without ever making that factual finding. In fact, the verdict form essentially required that, if the jury found Mr. Wald had injuries that were related to the accident, they were to enter monetary awards for both economic and non-economic damages, which they did.

ISSUE

DID THE DISTRICT COURT OF APPEAL ERR IN REVERSING THE TRIAL COURT FOR GRANTING A DIRECTED VERDICT ON THE ISSUE OF PERMANENCY BY HOLDING HOLDING THAT THE ISSUE OF PERMANENCY WAS A JURY QUESTION WHEN THERE IS CONFLICTING AND AMBIVALENT EXPERT TESTIMONY? (Petitioner's Issue Restated)

Answer: No. The District Court correctly ruled that, when expert testimony is conflicting and ambivalent as to permanent injury, the trial court reversibly errs in taking the question of permanency away from the jury.

ARGUMENT

The District Court did not err in reversing a directed verdict as to the permanency of Petitioner/Plaintiff Wald's injuries, because there was sufficient evidence from which the jury could have returned a verdict for Respondent on that issue.

Petitioner's characterization of the medical experts' testimony as "unanimous," and his assertion that there was no other testimony or evidence which contradicted the expert's testimony are refuted by review of the record.

Dr. Hogshead, Respondent's retained expert, testifying for the defendant, disputed that the plaintiff had incurred a neck and back injury from the accident [TT V: 577-578], but acknowledged that a complaint of numbness in his right thigh might have been caused by where the seat belt was at the time of the accident. [TT V: 572, 573].

The excerpt of Dr. Tan's testimony quoted by Petitioner in his Initial Brief shows that Dr. Tan's opinion was that Mr. Ward had suffered permanent injury to his neck and back and right elbow. [TT III:308] When Petitioner's counsel attempted to elicit an opinion about a permanent injury to Mr. Ward's right thigh, Dr. Tan, consistent with his opinions, attributed "pain going down to the right thigh which was coming from his back, the lumbar radiculopathy." [TT III: 308] Dr. Tan did not agree with Dr. Hogshead that Mr. Wald incurred meralgia

paresthetica. Pain radiating into the thigh from a back injury is entirely different from meralgia paresthetica which, according to Dr. Hogshead, is an area of numbness or lack of sensation, which is not caused by radiculopathy. [TT V: 572-573]

There was other testimony and evidence from which the jury could have concluded that Wald did not have a permanent thigh injury as a result of the accident. When asked by his attorney to describe his injuries to the jury, Wald testified that he had pain in his neck and his low back, and numbness in his hand. [TT IV: P. 464, 465] Neither Mr. Wald nor any of the witnesses in his case-in-chief claimed that he had suffered a thigh injury, separate and distinct from the alleged injury to his back.

The district court did not err in reversing the directed verdict. Petitioner challenges the district court's holding that "because juries are free to weigh the credibility of experts as it [sic] does any other witness, juries can reject even uncontradicted testimony." However, this is a correct statement of the law in Florida, as announced by this Court. Easkold v. Rhodes, 614 So.2d 495 (Fla. 1993); Fla. Standard Jury Instruction, 2.2(b).

Contrary to Petitioner's hypothetical assumption, this opinion does not allow a jury to base its verdict on "no evidence at all."[IB:13] In this case, if the trial court had not directed a verdict, there was ample evidence of record from which

the jury could have found that Mr. Wald did not sustain a permanent injury. First, Dr. Tan did not testify that Mr. Wald had any thigh injury or numbness at all, but that "the pain going down to the right thigh which was coming from his back, the lumbar radiculopathy." Dr. Hogshead testified that Mr. Wald had an area of numbness on his thigh, which was not caused by radiculopathy. Dr. Hogshead diagnosed the thigh numbness as meralgia paresthetica, and testified that "there are two possibilities that might explain why he has this meralgia paresthetica." [TT V: 574] It could have been caused by the seat belt pinching the nerve, or, in someone obese, by a low-riding belt buckle. Mr. Wald was obese. Dr. Hogshead also testified that meralgia paresthetica is not usually permanent. Based upon the medical history given by Mr. Wald that he was wearing a seat belt, Dr. Hogshead felt that the numbness "more than likely could be" related to the accident. [TT V: 574]

The jury heard diametrically contradicting testimony about the nature and cause of the thigh symptom - Dr. Tan said that it was radiating pain from his lower back injury; Dr. Hogshead said that it was numbness from a pinched nerve unrelated to the back. If the jury accepted Dr. Tan's diagnosis for the thigh symptom, and also accepted Dr. Hogshead's opinion that the low back injury was not causally related to the accident, the jury lawfully could have held that Mr.

Wald did not have a permanent injury as a result of the auto accident.

In addition, Dr. Hogshead thought the numbness "probably" was related to the auto accident, giving Mr. Wald the "benefit of the doubt." However, his opinion as to causation was based on Mr. Wald's reported medical history. The jury could have discounted Dr. Hogshead's opinion that the thigh numbness was "probably" caused by the accident, because there was evidence that Mr. Wald had not been completely candid in providing his medical history his doctors. For example, Dr. Tan testified that Mr. Wald did not tell him about a prior, work-related injury to his neck [TT IV: 312]; similarly, Dr. Hogshead testified that Mr. Wald denied any prior neck or back problems [TT V: 545].

In addition, Mr. Wald testified that, about an hour after the accident, he felt pain in his head, back and neck, and his hands were numb. [TT IV: 452] The record of his emergency room treatment on the day of the accident did not note any thigh injury. This evidence is inconsistent with the history of thigh numbness and tingling since the accident which Wald gave to Dr. Tan and Dr. Hogshead.

Therefore, the district court's opinion is fully supported by this Court's holding in Weygant v. Fort Myers Lincoln Mercury, Inc., 640 So.2d 1092, 1093 (Fla.1994), that, if expert testimony is based on an inaccurate predicate and is controverted by other evidence, it is within the province of the jury to weigh the

evidence and determine the credibility of the witnesses.

Respondent argues that defense counsel did not suggest any contradictory evidence to the trial court in opposition to the motion for directed verdict. [IB: p.15] However, the quoted portion of the argument shows that Respondent's counsel highlighted for the judge that Dr. Hogshead's testimony concerning the thigh injury was different than his examination report, that Dr. Hogshead's testimony concerning causation was less than medical certainty, and that the jury was entitled to accept or reject Dr. Hogshead's testimony. [TT V: 693]

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

Respondent's dramatic characterization of the district court opinion as rendering obsolete all motions which seek resolution of an issue as a matter of law is overstated.

The opinion in this case does not eviscerate the legal principle that verdicts must be based upon evidence. As more fully discussed in this brief at pages 13-14; 26-27, *infra*, there was ample evidence from which the jury could have returned a verdict of no permanency for Mr. Wald.

The opinion Petitioner challenges in this appeal is not the opinion that the First District wrote. Petitioner's entire argument is based upon the premise that the opinion expressly holds "that juries can disregard the opinions of experts, even if

uncontroverted by any other evidence." [IB: 14] However, the word "uncontroverted" does not appear anywhere in the opinion.

A fair reading of the opinion shows the exact opposite – that the district court held that the evidence was not uncontroverted, but "ambivalent." As actually written, the opinion is just another in a long line of legal authority from this Court and other district courts holding that a directed verdict is error when there is conflicting and ambiguous evidence, and that a jury is free to accept or reject expert testimony.

PRACTICAL APPLICATIONS

The District Court's opinion in this case, as written, does not create any problem for Florida trial courts, because it does not say that "juries are free to disregard expert testimony, even if uncontradicted." In the hypothetical scenarios presented by Petitioner, an attorney would be ill-advised to use this opinion as authority to support a verdict against the manifest weight of the evidence. First, this case is procedurally distinguishable from cases where the issue went to the jury. In this case, the issue of permanency was taken from the jury erroneously. Second, this opinion is factually distinguishable, because it does not hold that a jury is free to disregard uncontradicted expert testimony in the absence of any other evidence or lay testimony to the contrary. A hypothetical judge would have

no problem rejecting this as authority for that proposition, because this opinion is inapposite and not controlling of the stated hypothetical facts.

DR. HOGSHEAD'S NON-AMBIVALENT TESTIMONY

Dr. Hogshead's testimony speaks for itself, and has been repeatedly quoted to this Court. *See, e.g.*, IB: 21-24 The phrase "benefit of the doubt" connotes something less than "within a reasonable degree of medical probability." As the Second District Court of Appeal recently noted in Fell v. Carlin, 2009 Fla. App. LEXIS 3250 (Fla. Dist. Ct. App. 2d Dist. Apr. 17, 2009)

> Here, the jury heard testimony that would have provided it with a reasonable basis to reject the medical experts' opinions that Fell had an injury caused by the accident. The medical opinions regarding Fell's injury were based on his subjective complaints of pain. Accordingly, the validity of those opinions depended on Fell's candor in reporting his complaints. In particular, the Carlins' medical expert testified that while he believed Fell had sustained a soft tissue injury that was not permanent, his opinion was a "benefit of the doubt" diagnosis. He explained that this meant he based his opinion on Fell's subjective complaints of pain which he assumed were truthful; however, if they were not truthful, his opinion would not be valid. Thus, if the jury had a reasonable basis to conclude Fell was not candid with his doctors, it also had a basis to reject their opinions regarding whether he was injured as a result of the accident.

Further, the Merriam-Webster Online Dictionary defines "ambivalence" as:

> 1**:** simultaneous and contradictory attitudes or feelings (as attraction and repulsion) toward an object, person, or action
> 2 a**:** continual fluctuation (as between one thing and its opposite)
> b**:** uncertainty as to which approach to follow

Dr. Hogshead testified that Wald's thigh numbness could have been caused by a seat belt or regular belt. Dr. Hogshead attributed the numbness to the seat belt, based on history and giving plaintiff the benefit of the doubt. The district court correctly described this testimony as "ambivalent," requiring the issue of permanency to go to the jury.

WAIVER

Petitioner implicitly acknowledges that ambiguous evidence creates a jury question when he attempts to summarily dismiss the finding of the district court by asserting, "The testimony of Dr. Hogshead was anything but 'ambiguous' on the issue of permanence of Wald's right thigh injury. . . ." [IB: 21] Petitioner again asks this Court to go behind the opinion of the district court, and made a contrary finding as to the evidence, to create a conflict which does not exist on the face of the opinion.

Even if this Court were inclined to return to the trial transcript and review the evidence again, and re-decide the district court's findings concerning the evidence of permanency, Respondent respectfully contends that this Court would reach the same factual conclusion – that the evidence as to the thigh injury was ambiguous, and did present a jury question.

Petitioner's entire argument essentially requires this Court to overturn an opinion

that was not written and does not exist – an opinion which says that the evidence of thigh injury was unanimous and unambiguous. But that is not the opinion of the district court which was written in this case. By holding that conflicting evidence as to permanency creates a jury question, this opinion is neither erroneous nor in conflict with Florida law. Therefore, Respondent respectfully urges this Court to dismiss or deny Respondent's petition.

THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THE FLORIDA SUPREME COURT

Respondent maintains that there is no conflict between the appellate decision in this case and any other reported opinion in Florida law, because the district court expressly held that the medical testimony concerning the thigh symptom was ambivalent. This finding is supported by the record below, showing a direct conflict between Dr. Tan's opinion that the thigh symptom was a radiculopathy of the low back injury, and Dr. Hogshead's opinion that the thigh symptom was not a radiculopathy and not related to the back. It also is supported by Dr. Hogshead's testimony that the numbness could have been caused in either of two ways, but, based upon history, and giving plaintiff the benefit of the doubt, it likely was related to the accident. Accordingly, there is no conflict with any of the cases cited by Petitioner in which the expert testimony was unanimous or uncontroverted. However, even if the doctors' testimony was unanimous, which it was not, there

was ample evidence from which the jury could have discounted the testimony, weighing the credibility of Wald, on whose reporting the opinions were based. This Court affirmed the jury's right and obligation to reject expert testimony in similar circumstances.

Chomont v. Ward, 103 So.2d 635 (Fla. 1958), was an appeal of a jury verdict in favor of defendant Ward in an auto negligence case. Chomont contended that he had proved liability and property damage of $34, and that the jury completely disregarded the evidence in reaching its verdict. Chomont did not move for a directed verdict, but did move for a new trial as to damages, or, alternatively, as to all issues. This Court held that the jury did not lack a reasonable basis for doubting Chomont's testimony regarding his injuries, and noted that the doctors' testimony concerning Chomont's injuries was based upon the history related by the patient. In addition, the investigating police officers testified that, immediately after the accident, Chomont made no complaint of injury. This Court held:

> Finding as we do that in view of its authority to evaluate the credibility of the witnesses and in view of the fact that the jury had a reasonable basis on which to arrive at its conclusion, we are therefore led to hold that the trial judge committed no error in denying the motion for a new trial and entering the judgment as he did.

Id., at 638.

This opinion is consistent with Chomont's holding that a jury may disregard

medical experts' testimony if it is based upon the history provided by plaintiff, which had been called in question by discrepancies, as Wald's testimony was in this case.

Easkold v. Rhodes , 614 Sol.2d 495 (Fla. 1993), resolved a conflict between district appellate courts and a prior opinion of this Court as to a jury's ability to accept or reject the testimony of a medical expert. Although doctors testified that Ms. Easkold had sustained a permanent injury as a result of the auto accident, there also was evidence that she had failed to advise the doctors of prior similar complaints, and had given contradictory testimony concerning her medical history in deposition. The jury found that Ms. Easkold had not sustained a permanent injury as a result of the accident. The First District reversed, holding that when expert testimony of permanency is uncontroverted, a verdict of no permanency is against the manifest weight of the evidence. This Court disagreed, holding that a jury is free to determine the credibility of medical experts and weigh their testimony in light of conflicting lay evidence, citing Shaw v. Puleo, 159 So.2d 641 (Fla. 1964).

In this case, the district court specifically relied on the authority of Easkold in stating, "A jury is free to weigh the credibility of expert witnesses as it does any other witness, and reject even uncontradicted testimony." [1DCA: 3] Petitioner

apparently believes that this conflicts with Easkold because, in Petitioner's view, there was no conflicting lay evidence at trial. However, in context with the rest of the opinion, it is clear that the First District found that there was conflicting evidence. Therefore, the opinion is consistent with, not in conflict with, this Court's holding in Easkold.

Nor is there any conflict between the opinion in this case and Weygant v. Fort Myers Lincoln Mercury, Inc., 640 So.2d 1092 (Fla.1994), in which this Court reaffirmed the holding in Easkold that a jury may determine the credibility of a medical expert and reject his or her opinion when there is relevant conflicting lay testimony. Notably, in Weygant, the conflicting lay testimony came from prior depositions in a workers compensation proceeding, and there was evidence that she had given an incomplete medical history to her doctors concerning prior injuries.

THE DECISION DOES NOT CONFLICT WITH THE DECISIONS OF OTHER DISTRICT COURTS OF APPEAL

In Vega v. Travelers Indemnity Co., 520 So.2d 73 (Fla. 3d DCA 1988), the Third District reversed a final judgment awarding no damages to the Vegas for her uninsured motorist and PIP claims, finding it was against the manifest weight of the evidence. Vega is distinguishable from this case because the Vega court expressly and repeatedly states that the evidence was "unrebutted," "uncontradicted," and "undisputed," and that Travelers presented "no testimony,

expert or otherwise, in rebuttal." Id., at 74-75. First, in this case, the jury did not have the opportunity to consider the issue of permanency. This is an appeal from a directed verdict, not an order denying a motion for new trial. Second, the district court expressly found that there was ambivalence in the testimony concerning the thigh injury. Nowhere in this opinion is there a suggestion that the evidence was uncontradicted or undisputed. Third, a zero verdict for PIP damages, when there is an admitted injury, is not the equivalent of a verdict of no permanency in a liability case. If the jury in this case found that Mr. Wald did not suffer a permanent injury, it could have awarded economic damages for medical expenses (there was no lost wage claim). It would not have resulted in a zero verdict, as occurred in Vega.

Williamson v. Superior Insurance Company, 746 So.2d 483 (Fla. 2d DCA 1999), was a reversal of the denial of a motion for directed verdict and for new trial on the issue of permanent injury. Unlike this case, the opinion in Williamson expressly states, "there is no evidence to refute Mr. Williamson's claim of permanent injury." In this case, the opinion states that Mr. Wald sought damages "only for his neck and back injuries," and did not seek damages for his thigh injury. The opinion correctly found that the medical testimony as to causation and permanency of the neck and low back injuries was totally contradictory. The

district court also found that the doctor who noted a permanent thigh numbness, related it to the accident giving Wald "the benefit of the doubt." The district court expressly found that the evidence concerning the thigh injury was "ambivalent."

Petitioner 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 Therefore, there is no conflict with any of the cases cited by Petitioner in the Initial Brief.

In Evans v. Montenegro, 728 So.2d 270 (Fla. 3d DCA 1999), the appellate court upheld a directed verdict in favor of plaintiff as to permanency. In Evans, the court stated that "there was no conflict in the expert testimony regarding whether the plaintiff sustained a permanent injury." Id., at 271. Petitioner argues that, in this case, Respondent did not sustain the burden announced in Evans. However, Evans restricts the holdings of this Court in Easkold and Weygant. *See, e.g.*, Republic Services of Florida v. Poucher, 851 So.2d 866 (Fla. 1st DCA 2003). In Florida Department of Highway Safety and Motor Vehicles v. Schnurer, 627 So.2d 611 (Fla. 1st DCA 1993), the First District correctly declined to limit this Court's holding in Easkold by restricting the permissible reasons for a jury's rejecting an expert opinion to the "three grounds set out in Jarrell and quoted in

Holmes." [1] These are the same three bases the Evans court relied on in affirming the directed verdict. If there is any conflict between this opinion and Evans, which Respondent denies, it is this opinion, not Evans, which should be affirmed.

In State Farm Mutual Automobile Insurance Company v. Orr, 660 So.2d 1061 (Fla. 4th DCA 1995), the Fourth District affirmed a directed verdict on the issue of permanency. In Orr the court expressly found that there was no conflicting or contradictory medical evidence as to plaintiff's complaints of pain. Even so, the court noted that Florida law recognizes that a jury may reject expert medical testimony if there is a reasonable basis to disbelieve it. The court also distinguished Orr from Easkold and other cases where there was some fact basis for a jury to disbelieve the claim of permanent injury, including where the evidence was "ambiguous" or "could be perceived as being in conflict." Orr is inapposite to this case because the opinion expressly states that the evidence of permanency is ambivalent.

In this case, by describing the evidence of the thigh injury as "ambivalent,"

---

[1] "When the proponent of permanency supports that hypothesis with expert testimony, the opponent of permanency, in order to carry the issue to the jury, must either: (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. Jarrell v. Churm, 611 So.2d 69, 70 (Fla. 4th DCA 1992)" Holmes v. State Farm Mutual Automobile Insurance Company, 624 So.2d 824, 825 (Fla. 2d DCA 1992).

the district court held that it was contradictory and capable of being understood in more than one way, and that it could support more than one reasonable inference. This is the standard for allowing the issue to go to the jury. Accordingly, the opinion in this case is not comparable to any case cited by Petitioner which bases its holding on a lack of divergent medical testimony.

This case does not conflict with the proposition postulated by Petitioner 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." [IB: 31]

In his Initial Brief, Petitioner raises the unfounded spectre of an unjust result if the directed verdict had not been granted and the jury had returned a verdict of no permanency. No one knows at this point what decision the jurors might have made as to permanency, if the issue had not been taken away from them by directed verdict. There was evidence from which they could have found that Mr. Wald's back injury was permanent and related to the accident.

However, despite Petitioner's repeated assertions to the contrary, there also was evidence from which a jury could have found that Mr. Wald did not incur a permanent injury as a result of this auto accident. The jurors could have found that the thigh symptom was a radiculapathy from the lower back, as Dr. Tan

testified, and then found that the lower back was not a permanent injury related to the accident, as Dr. Hogshead testified. The jury could have accepted Dr. Hogshead's testimony that the thigh symptom was separate from the lower back, but could have discounted the relation to the accident, not giving Mr. Wald the benefit of the doubt, because of his lack of disclosure of prior injuries.

There is nothing in the First District's opinion in this case that reasonably can be used as precedent for an argument that directed verdicts as to permanency no longer exist, as Petitioner claims. Any attorney attempting to cite this case in opposition to a motion for directed verdict, where the evidence actually was unanimous and uncontroverted, would be rebuffed by the well-founded argument that this case is distinguishable, and not controlling, because in this case, the evidence of permanency was "ambiguous." *See also*, Fell, supra; Tripp v. Killam, 492 So.2d 472 (Fla. 4th DCA 1986) (much of the evidence was ambiguous and uncertain as to the lasting effects).

PERMANENCY OF THE NECK AND BACK INJURIES THOROUGHLY LITIGATED

The district court did not err in holding that the directed verdict took the issue of permanency of Mr. Wald's neck and back injuries away from the jury. Petitioner acknowledges that there was ample conflicting evidence on these issues; in fact, the entire trial was about permanence and causation of the claimed injuries.

However, because the trial court granted a directed verdict, there were no jury instructions as to permanency and no question on the verdict form. The jury had no way to know that, if it did not believe the neck and back injury were permanent, no non-economic damages should be awarded for those claims.

Plaintiff's argument is the same as saying that a directed verdict as to liability does not take the issue of liability from the jury, because they can still address the question by not awarding any damages to the plaintiff. Plaintiff's harmless error argument is unavailing because the jury is not required to, or even capable of, correcting errors made by the trial court.

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

The district court's statement in footnote 1 of the opinion does not misstate §627.737, Florida Statutes, which states in pertinent part:

> 2 plaintiff may recover damages in tort for pain, suffering, mental anguish, and inconvenience because of bodily injury, sickness, or disease arising out of the ownership, maintenance, operation, or use of such motor vehicle. . . . only in the event that the injury or disease consists in whole or in part of:
>
> . . . .
>
> (b) Permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement.

The statute says that a plaintiff may recover may award damages for pain and suffering only if the injury is permanent within a reasonable degree of medical

probability. The district court did not add a new requirement that an injury must be painful to be permanent. In so arguing, Petitioner confuses the issue of permanency with the question of damages.

It seems to be Petitioner's position in this section that the statute permitted the jury to award over $800,000.00 in general damages for the remainder of plaintiff's life for a non-permanent back injury, if plaintiff had a permanent, non-symptomatic thigh numbness for which he was not seeking compensation. Whether or not this unjust result is warranted, because of the directed verdict, the jury was not instructed on §627.727 at all, therefore, their verdict could not have been based on the law, and correctly was reversed.

Petitioner's argument in this section contradicts the argument in the next section, where he attempts to justify the directed verdict as harmless error. By saying that Respondent was free to argue that the back and neck injuries were not permanent, Petitioner suggests that, if the jury believed Respondent, it would not have awarded over a million dollars in damages, and Respondent would suffer no legal harm from the directed verdict.

These inconsistent arguments and unjust results illustrate the inherent impossibility of Petitioner's position that the directed verdict as to the thigh did not take the issue of permanency of the neck and back injury from the jury.

HARMLESS ERROR

Petitioner seems to be saying that the directed verdict was harmless error because, judging from the size of the verdict, the jury would have found permanency anyway. Notably, Petitioner cites no legal authority for the proposition that a directed verdict as to permanency can ever be harmless error.

Petitioner contends that a jury could not have awarded over $850,000.00 in non-economic damages without finding that Mr. Wald's neck and back were permanently injured. This argument overlooks the effect of the directed verdict, which eliminated the jury instruction as to the effect of §627.767.

The jury verdict does not show that the jury found Wald's neck and back injury was permanent. There was no question as to permanency on the verdict form, and the jury was not given any instruction that they should not award non-economic damages for non-permanent injuries. [TT VI:803-806] The verdict form simply told the jury to enter both economic and non-economic damage awards if it found that the auto accident was "a legal cause of loss, injury or damage to the plaintiff." [TT VI: 807, l. 17-20] The jury deliberated for about 60 minutes, and returned a verdict awarding the 48 year-old plaintiff [TT V:680] over one million dollars for non-surgical soft tissue injuries to his neck and back. [TT IV:48]

CONCLUSION

Petitioner's entire argument is based on incorrect premises, resulting in flawed conclusions. The first incorrect premise is that the opinion in this case holds that a jury is free to reject uncontroverted medical testimony, even in the absence of any other conflicting evidence. This is incorrect, because, on the face of it, the opinion does not stand for that proposition.

Second, Petitioner argues that, even if the district court did not find that the evidence of permanency was unanimous, it should have. This is incorrect, because the evidence at trial was not unanimous, but contradictory and ambivalent, as the district court found.

Third, Petitioner claims that, even if the evidence was conflicting and the trial court erred, the directed verdict was harmless error. This is incorrect, because the jury was never instructed on the legal requirement of permanency for an award of non-economic damages, and the question of permanency was never presented to them. As a result, the jury awarded economic and non-economic damages based only on the finding that the accident was a cause of the injury.

Respondent respectfully requests that this Court deny Petitioner's request for review and dismiss this appeal, or, alternatively, enter an opinion upholding the district court's decision in this case as not in conflict with Florida law.

CERTIFICATE OF TYPE SIZE AND STYLE

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing has been furnished to Eric S. Block, Esquire, 3127 Atlantic Blvd, Suite 3, Jacksonville, Florida 32207; Reginald Estell, Esquire, 505 N. Liberty Street, Jacksonville, Florida 32202; and Don Detky, Esquire, Debra Carter Taylor, Esquire, Tyson & Associates, 1200 Riverplace Boulevard, Suite 640, Jacksonville, Florida 32207; S. Perry Penland, Jr., Esquire, 233 East Bay Street, Suite 310, Jacksonville, Florida 32202, this ___ day of April, 2009.

O'HARA LAW FIRM
Professional Association

Susan S. Oosting
Florida Bar No. 603457
J. Stephen O'Hara, Jr.
Florida Bar No. 243371
4811 Beach Boulevard, Ste. 303
Jacksonville, Florida 32207
Telephone: (904) 346-3166
Attorneys for Respondent