IN THE FOURTH DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

PROGRESSIVE SELECT
INSURANCE COMPANY, INC., CASE NO: 4D09-127

Appellant,

vs.

MICHELLE MASON LORENZO,

Appellee.
_____/

On Final Appeal from the Fifteenth Judicial Circuit,
in and for Palm Beach County, Florida
Case No. 502007CA024147AN

ANSWER BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

Plaintiff-Appellee Michelle Lorenzo was involved in an automobile accident when the vehicle she was operating was rear-ended while stopped at a traffic light. (Vol. I, R 54; Vol. VI, T 499:14-23). The driver of the other vehicle was uninsured. (Vol. I, R 54 ¶2). Fortunately, Plaintiff had uninsured motorist coverage with Defendant-Appellant Progressive Select Insurance Company. (Vol. I, R 54 ¶3).

Although there appeared to be minimal damage to the rear of Plaintiff's vehicle, significant damage was apparent when looking underneath. (Vol. V, T 454:24-455:5; 456:4-23). The vehicle's exhaust pipe was bent, broken from the bracket; the tailpipe and muffler assembly were shoved forward, and the muffler was crammed into the drive shaft. (Vol. V, T 454:24-455:5; 456:4-23; 476:12-22). The accident also caused significant damage to the front end of the uninsured driver's vehicle in that the hood was folded and the radiator was crammed into the engine. (Vol. V, T 460:24-461:4).

Plaintiff did not seek medical treatment immediately following the accident. Although she began experiencing pain and muscle stiffness that night, (Vol. VI, T 506:23-25, 507:1-2), it was a couple of days later that she was in so much pain that she could hardly move. (Vol. V, T 462:23-463:24; Vol. VI, T 507:8-15). After pointlessly waiting three hours to be seen in an emergency room, Plaintiff first

obtained treatment after the accident in an urgent care facility where she was diagnosed with neck and back strain. (Vol. V, T 245:9-25, 246:7-9, 439:18-23; Vol. VI, T 508:19-509:7).

Subsequent to her initial complaints of back pain at the urgent care facility, Plaintiff's pain became focused in her neck and right shoulder for the next few weeks. (Vol. VI, T 515:5-14). She received physical therapy for five months, which seemed effective at treating her injuries until she concluded the therapy and the pain immediately returned. (Vol. VI, T 513:24-514:10). A few weeks after the accident, Plaintiff also began to experience pain in her right hip area, as well as spasms while sleeping on her back. (Vol. VI, T 515:5-14, 515:18-516:4, 570:13-24).

Plaintiff was diagnosed with hip bursitis, but treatment consistent with that diagnosis, including injections in her hip, did not ease her pain. (Vol. VI, T 524:21-525:3, 525:21-23). A subsequent diagnosis attributed her "hip" pain to a back injury. (Vol. V, T 407:4-7; Vol. VI, T 523:22-524:4, 525:9-23). Mistaking pain radiating from the back as hip pain is common. (Vol. IV, T 117-118; Vol. V, T 434:7-14). Dr. Harvey Montijo, an orthopedic surgeon, determined that Plaintiff has an irritated nerve root in her low back that is the cause of what Plaintiff and some of her early treating physicians believed to be hip pain. (Vol. V, T 410:25-

411:5, 435:3-5). He confirmed this diagnosis when he conducted an EMG nerve conduction study that was positive. (Vol. V, T 412:4-413:15).

Treatment consisting of cervical and lumbar injections has been the most effective treatment for minimizing Plaintiff's pain. (Vol. VI, T 530:1-19). Nevertheless, Plaintiff's abilities have been limited since the accident. (Vol. V, T 314:20-24, 451:1-6, 465:18-23). She is not supposed to push, pull, kneel, or stoop. (Vol. VI, T 536:1-11). And she is not supposed to sit or stand for more than 20 to 30 minutes at a time. (Vol. VI, T 536:1-11). Plaintiff cannot maintain her home in the same way she did before the accident because she cannot do housework that requires reaching or pulling her back. (Vol. VI, T 533:12-534:5). Perhaps most troubling to Plaintiff, she is no longer able to participate in many surgeries as part of her employment in a dermatologist's office because she cannot stand for prolonged periods of time. (Vol. V, T 315:23-316:1; Vol. VI, T 532:1-533:2). Moreover, Plaintiff has had to abandon her dream of going to nursing school for the same reasons. (Vol. VI, T 237:21-25).

Plaintiff made a demand under her uninsured motorist policy, and Defendant Progressive failed to tender. (Vol. I, R 54). So Plaintiff sued Progressive to recover under the policy. (Vol. I, R 1-7). Progressive admitted Plaintiff has uninsured motorist coverage for the accident, but it defended the action on the

ground that Plaintiff's injuries were pre-existing and not causally related to the accident. (Vol. I, R 10, 55).

The majority of the trial testimony consisted of medical opinions regarding Plaintiff's injuries. Plaintiff's doctors testified that although Plaintiff had herniated discs in her neck and back prior to the accident, the accident aggravated these pre-existing conditions, making them symptomatic for the first time.

Plaintiff's chiropractor, Dr. Michael Davis, testified that Plaintiff began treating with him eight months after the accident, at which time she reported neck pain radiating into her right shoulder and down into her thumb, intermittent back pain, and constant pain in her right hip. (Vol. IV, T 109-110, 112, 114-115, 136). His initial examination revealed Plaintiff had moderate paraspinal muscle spasms in her thoracic region and mild spasms in her lumbar region. (Vol. IV, T 121). He determined that Plaintiff's "hip" pain was at least partly radiating from her low back. (Vol. IV, T 132). It is common for patients to define pain radiating from the back as pelvis or hip pain. (Vol. IV, T 117-118). Dr. Davis also testified that injuries from an accident can get progressively worse over time or exacerbate preexisting injuries. (Vol. IV, T 117). He treated Plaintiff for nine months by administering cervical spinal decompression, thoracic and lumbar spine adjustments, and electric stimulation therapy. (Vol. IV, T 119-120, 130).

Dr. Craig Lichtblau, a physiatrist, examined Plaintiff and reviewed x-ray and MRI films taken before and after the accident in order to develop a Continuation of Care Plan that sets forth the medical care and treatment Plaintiff will need in the future as a result of the injuries she sustained in the accident, and the costs associated with that care and treatment. (Vol. IV, T 199-200). Dr. Lichtblau determined the films confirmed Plaintiff had herniated discs before this accident in which she was rear-ended by the uninsured driver. (Vol. IV, T 218-219; 224:4-8; Vol. V, T 272:7-13). He testified the accident aggravated Plaintiff's preexisting herniations by making her asymptomatic preexisting condition symptomatic, thereby causing the frequency, duration and intensity of her pain to change. (Vol. IV, T 219-220, 224:2-8, 224:18-23, 228:4-6, 232:1-9). He opined that Plaintiff, as a 38-year old woman, had pre-existing degenerative changes that were "innocuous, insignificant, irrelevant" until she was involved in the accident. (Vol. IV, T 222:15-21, 223:1-10, 254:25-255:1). Thus, while Plaintiff did not have any pain or discomfort from her neck or low back immediately prior to the accident even though she had herniated cervical and lumbar discs, she developed symptomology, including radiating pain, numbness, and tingling, as a result of the accident. (Vol. IV, T 223:15-8; 237:1-5, 242:20-243:4). If Plaintiff had never been in the accident, she may have never needed care for her degenerative condition. (Vol. IV, T 298:14-20).

Although Plaintiff has daily pain, (Vol. V, T 466:2-24; Vol. VI, T 530:1-19), Dr. Lichtblau does not believe she is a surgical candidate now, although she may be in the future. (Vol. IV, T 219-220, 231:5-20). The surgery Plaintiff would need, a lumbar fusion, is too invasive for someone her age, so it was recommended she wait until she is in her 50s to pursue this option. (Vol. VI, T 529:3-25). Plaintiff will require chronic pain management and outpatient treatment, injections, and medication. (Vol. IV, T 219). Dr. Lichtblau testified that Plaintiff has a permanent injury because the disruption of Plaintiff's posterior longitudinal ligament and anterior thecal sac is not going to change. (Vol. IV, T 226:17-19; Vol. V, T 263:11-14). He also testified that Plaintiff had a permanent increase in the frequency, duration, and intensity of her neck and back pain as a result of the accident, and quantified that she has a 13% impairment. (Vol. IV, T 224:9-23, 226:17-19; Vol. V, T 263:11-14). And her chronic pain is permanent and will worsen as Plaintiff ages. (Vol. IV, T 226:13-16, 226:20-227:6, 231:5-20). While Plaintiff has not yet lost much time from work due to the accident, Dr. Lichtblau anticipates that as she ages and suffers the secondary effects of aging, she will have a 5-year reduction in work life expectancy. (Vol. V, T 288:5-16).

Dr. Lichtblau confirmed that Plaintiff has been experiencing consistent and continuing neck pain since the accident. He does not find it unusual that Plaintiff did not have back pain immediately after the accident—he explained that it is very

seldom that pain and discomfort manifest immediately, there is usually a gradual onset. (Vol. V, T 244:6-14). He testified that he believes Plaintiff gradually developed back pain as a result of the accident causing ongoing problems with her neck as well as causing an alteration in her gait/body mechanics. (Vol. V, T 244:15-21, 245:2-4).

When creating the Continuation of Care Plan for Plaintiff, Dr. Lichtblau predicted what future treatment Plaintiff will need and how much that treatment will cost. (Vol. V, T 251:8-10). He "bargain shopped" in order to determine the lowest possible prices for care, and excluded any future treatment or costs for hip bursitis. (Vol. V, T 250:22-24, 284:11-22). For example, while an MRI scan usually costs approximately $1,500, Dr. Lichtblau priced the MRIs in his plan at $475 to $550 because he knows of a particular business that charges that price to patients paying in cash. (Vol. V, T 250:24-251:3). He also gave a best case and worst case scenario in his plan, (Vol. V, T 257:15-18, 258:23-259:1), and testified that the most probable scenario lies somewhere in between the two. (Vol. V, T 259:1-3). Dr. Lichtblau was very specific in his plan, predicting the specific medical care Plaintiff will require in the future, such as examinations by neurosurgeons, visits to anesthesiologists, pain control treatment, x-rays, and MRI scans. (Vol. V, 251-254). Plaintiff was unable to introduce Dr. Lichtblau's plan

into evidence because Defendant's objection that the plan was cumulative was sustained. (Vol. V, T 259:4-7, 259:14-16, 262:4-9).

Defense counsel attempted to impeach Dr. Lichtblau's testimony by asking whether Plaintiff advised him that she "experienced a traumatic event that may have occurred within a year prior to the March 2006 accident" and that she "fell down some stairs" prior to the accident. (Vol. V, T 268:23-269:6). Plaintiff, however, had not fallen down some stairs within a year before the accident. Plaintiff did stumble on the stairs by missing a step and then grabbing the railing to keep herself from falling down the stairs. (Vol. V, T 449:6-8; Vol. VI, T 490:7-15). In doing so, she pulled her shoulder and was treated with an injection and six weeks of physical therapy, which was completely effective at resolving her injury. (Vol. V, T 449:12-15; Vol. VI, T 490:7-15, 497:15-18, 491:11-22, 494:18-21, 545:24-546:5). Plaintiff had no pain or discomfort or difficulty completing her daily activities after the conclusion of this treatment. (Vol. V, T 451:1-6; Vol. VI, T 497:15-18, 545:24-546:5).

Dr. Bernard Pettingill, an economist, took the Continuation of Care Plan developed by Dr. Lichtblau and used it to formulate an economic analysis in order to determine what it will take to make Plaintiff whole as a result of being injured in the accident. (Vol. V, T 336-337, 337:23-25, 342:21-22, 384:21-385:4). Dr. Pettingill took the mid range of the treatment frequency specified by Dr. Lichtblau,

the duration and cost of treatment, and added a medical inflation factor in order to determine the future cost of medical care as prescribed by the plan. (Vol. V, T 343:8-18).

Dr. Pettingill was very conservative in his calculations. (Vol. V, T 343:18-19). And he did not include in his analysis the items that Dr. Lichtblau specified would be required by Plaintiff on an as-needed basis. (Vol. V, T 364:3-24). Dr. Pettingill determined that the cost of future medical expenses under Dr. Lichtblau's best case scenario to be $514,750. (Vol. V, T 366:4-6; 366:16-19). And under the worst case scenario, he determined the cost of future medical expenses to be $745,107. (Vol. V, T 366:20-21). Dr. Pettingill found the average of the two plans is $629,928. (Vol. V, T 366:21-25).

Because Dr. Pettingill mistakenly testified to the wrong amount for Plaintiff's past medical expenses, the trial court instructed the jury that the parties had stipulated Plaintiff's total bills for past medical expenses are $53,391.48. (Vol. V, 360:2-4). The court made clear, however, that the amount was contested because the parties had not stipulated that Defendant owed that amount to Plaintiff. (Vol. V, 360:9-14).

If Plaintiff has to stop working five years sooner than she would normally, as Dr. Lichtblau testified, she will lose $135,300, according to Dr. Pettingill. (Vol. V, T 367:16-17). The reduction in her vocational capacity due to the accident can

result in a loss of $115,667. (Vol. V, T 367:19-368:1). Dr. Pettingill testified that none of these numbers can be 100% accurate because no one knows what is going to happen in the future. (Vol. V, T 368:17-21).

At the conclusion of Dr. Pettingill's testimony, one of the jurors asked him the following sophisticated financial question—"[W]hat is the actual rate used to calculate P.V., present value, and what was the actual inflation rate used?" (Vol. V, T 388:15-17). Dr. Pettingill explained:

> I used a discount rate on U.S. Treasury bonds and notes in today's marketplace, which is four percent. . . . And the reason for that is since the market has crashed, most people who have liquid money have been putting their money in treasuries. And as the price goes up on treasuries – because it's bid up, the yield comes down. And the yield has dropped tremendously in the last three weeks. And I believe if in fact this case ends, that will be the rate that Ms. Lorenzo will earn on her money over the next thirty years.

(Vol. V, T 388:21-389:12). He used a 3% growth rate for wages, explaining, "Social Security is going up five and a half this year. I used the historic rate of inflation going back twenty to thirty years." (Vol. V, T 389:25-390:5).

Plaintiff attempted to introduce Dr. Pettingill's Quantitative Economic Loss Summary into evidence, which would have allowed the jury to review his economic analysis and numbers during deliberation, but the trial court sustained Defendant's objection that the summary was cumulative of the expert's testimony. (Vol. V, T 354:1-2, 369:6-8, 369:9-10, 369:15-19, 370:14-19).

Defendant Progressive presented the testimony of two witnesses—Drs. Livingston (via video deposition) and Zeide. Dr. Livingston, a radiologist, has never met Plaintiff and testified as to his opinions formed solely as a result of reviewing her x-ray and MRI films taken before and after the accident. (Supplemental Record ("SR") 5:18-19, 17:5-7, 30:6-8). Dr. Livingston interpreted those films to reveal that Plaintiff had multiple herniations in her neck and back one or more years prior to the accident, and that her condition was not made worse by the accident. (SR 25:3-17, 25-43:1, 33:16-20, 37:21-25, 38:20-25, 42:3-1-7, 45:14-24, 49:8-21, 50:21-25, 59:5-16, 69:25-70:7, 72:8-19). But he admitted that he is not in a position to comment whether Plaintiff's underlying degenerative disease was exacerbated by the accident or became symptomatic as a result of the accident as only Plaintiff's treating doctors can make that determination. (SR 79:3-10; 79:22-24).

Dr. Michael Zeide, an orthopedic surgeon who conducted a compulsory medical examination of Plaintiff, testified that Plaintiff did not sustain any permanent injury, aggravation, or new injury or impairment as a result of the accident. (Vol. VI, T 644:17-24). At most, according to Zeide, she might have suffered a temporary exacerbation of preexisting conditions from the accident, but not a permanent aggravation or new injury, and certainly not an aggravation to the degeneration in her lumbar spine. (Vol. VI, T 645:7-12, 646:14, 647:19-21, 648:3-

5). Dr. Zeide's opinions were based on Plaintiff's medical records, MRI studies, and prior history, including his mistaken belief that Plaintiff did not have any lumbar complaints until 17 months after the accident. (Vol. VI, T 644:17-24, 649:19-650:9, 650:19-22). Dr. Zeide overlooked Plaintiff's initial complaint of back pain made just two days after the accident, the finding of Dr. Davis made just months after the accident that Plaintiff had lumbar spasms, as well as Plaintiff's complaint of sciatica made to Dr. Nunez six months after the accident and her complaint of low back pain made to Dr. Norris 8 months after the accident. (Vol. VI, T 699:4-13, 704:18-22, 705:1-7). In Dr. Zeide's opinion, Plaintiff does not need any ongoing or future medical treatment for injuries sustained in the accident. (Vol. VI, T 655:13-22).

On cross-examination of Dr. Zeide, the following exchange occurred:

> Q: Now, when you do your dictations, do you still send your dictations to India because of the breadth and scope of them?
>
> A: We send them to India so that there is a timely return on the product. In other words, if I see a patient this afternoon and I dictate on my recorder, it's downloaded now to India. And tomorrow morning, while I'm sleeping and my staff is sleeping, the transcription is being typed by doctors in India and then emailed back to us for review. So, we use it not for purposes of anything else but efficiency of timeliness of medical records.
>
> Q: So, there is nobody in your office or in town you could send it to? You feel compelled to send it over to India to have it transcribed?

> A: We had nine transcriptionists at our practice for twelve doctors and we couldn't get it timely done so that we could fax it off to the person who requested the examination, the treating physician or the insurance company or Workers' Compensation. We found the timeliness of being able to get it back the next morning is outstanding. And we had a department of nine people for thirty years or twenty-five years until we went to this system for efficiency.

(Vol. VI, T 666:25-668:1). Defendant never objected to this line of questioning. And it was only Defendant, not Plaintiff, who brought the subject up during closing argument. (Vol. VII, T 857:19-858:2).

Much of Plaintiff's questioning of Dr. Zeide focused on his bias as an expert witness for Defendant Progressive. Plaintiff questioned Dr. Zeide about his reference to Plaintiff as his "patient," resulting in Dr. Zeide explaining that he was under court order not to refer to his examination of the Plaintiff as "independent" and that Plaintiff could more properly be called an "examinee." (Vol. VI, 658-659, 660:3-8, 663:18-21, 663:24-25).

The court order referred to by Dr. Zeide was entered on Plaintiff's motion for protective order regarding Defendant's request for physical examination of Plaintiff by Dr. Zeide. (Vol. I, R 28-31). The trial court granted the motion in part and ordered, *inter alia*, that "[n]either Dr. Zeide nor the exam shall be referred to as independent" and "Dr. Zeide shall not be permitted to ask the Plaintiff to completely disrobe. Plaintiff is not required to remove any undergarments." (I R

32-34, ¶¶ 5 & 7). Plaintiff continued questioning regarding Dr. Zeide's bias as follows:

> Q. Ninety-five percent of the litigation support work that you do is on behalf of the insurance companies, correct?
>
> A. Yes.
>
> Q. Now, when you see individuals that come to you for independent medical examinations, they come into an examination room, I assume, correct?
>
> A. Yes.
>
> * * * * *
>
> Q. It's your standard protocol, is it not, to ask these individuals who were involved in litigation to strip and put on a very thin piece of paper cloth over their body, isn't that correct?
>
> A. No. My practice is – depending on the body party – to wear a medical gown that is used for all our patients to leave their underwear and under garments on. And to wear – to open this gown to open from behind. They're blue. They're fire resistant. And we routinely use them. They're not thin. They're disposable. Previously we used to use rayon gowns and send them out for dry-cleaning. But OSHA said we can't do that because of body contamination. So the past – six years went back to using paper gowns.
>
> Q. So if an individual comes to you with just a shoulder problem, you still insist on independent medical examinations to have the individual take their clothes off except for their under garments, correct?

(Vol. VI, T 668:2-669:10).

Defense counsel objected the questioning was argumentative, inappropriate, and highly inflammatory. (Vol. VI, T 669:15-17). Plaintiff's counsel argued, "Your

Honor, I just want to get out that this gentleman does all of this – independent examinations, he does it so that he can make the litigant feel extremely uncomfortable in the process. And even when, for examine, there is just a shoulder injury, he still has the individual strip down totally. Totally. And I have – I think it goes to his bias. I think it goes to the fact that he attempts purposely and consciously to make these individuals feel uncomfortable in this process. And that is one of his goals. And that goes to the fact that he is not an unbiased witness." (Vol. VI, T 670:6-20). The trial court sustained the objection, but denied Defendant's request for a curative instruction, thereby avoiding drawing more attention to the questioning. (Vol. III, R 483, p. 47:16-20; Vol. VI, T 670:21-23, 671:9-12). Defendant's motion for mistrial on the issue was also denied. (Vol. VI, T 680:7-19, 20-21). Plaintiff's counsel never again broached the issue. (Appellee's Appendix ("AA"), Order Denying Motion for New Trial, p. 1). Defendant renewed the motion for mistrial prior to closing argument. (Vol. VII, T 761:18-25, 762:1-3).

Although Defendant argued in closing that the jury should award absolutely no damages for future medical expenses, (Vol. VII, T 866:24-867:1, 867:10-12), the jury demonstrated its rejection of this position early on when it asked the court for: 1) "the documentation from Dr. Lichtblau's Continuation of Care document" and 2) "Dr. Pettingill's documentation on his calculations." (Vol. I, R 192; Vol.

VII, T 908:19-21, 908:22-24). Because Defendant continued to object to allowing the jury to refer to these documents during deliberations, the trial court denied the jury's request. (Vol. VII, T 910:21-911:23, 912:7-15, 912:20-913:5).

The jury found Plaintiff was injured in the accident and returned the verdict form with the following determinations:

Past Medical Expenses……..$53,391

Future Medical Expenses……..$514,750

Future Loss of Earnings…….$ 0

Past Pain and Suffering……..$ 0

Future Pain and Suffering……...$ 0

(Vol. I, R 194-195; Vol. VII, T 917, 925:16-18, 23-25). The jury also found that Plaintiff did not suffer a permanent injury as a result of the accident. (Vol. VII, T 926:1-4).

The trial judge sent the jury back to the jury room and discussed the verdict with counsel, asking for their understanding of the verdict. (Vol. VII, T 918). Plaintiff's counsel stated only that he believed the jury was permitted under the law to find future medicals without also finding a permanent injury. (Vol. VII, T 918:15-22). The judge believed the only problem with the verdict was the fact that the jury failed to total the damages. (Vol. VII, T 918:23-24). The trial judge specifically asked defense counsel for his understanding of the verdict, and defense

counsel stated that he had the same understanding. (Vol. VII, T 919:10-12). The judge instructed the jury to total the damages, (Vol. VII, T 920:2-3), and asked the parties whether there were any irregularities with the verdict. (Vol. VII, T 920:7-10, 920:12-14). Both sides advised the court that there were no such irregularities. (Vol. VII, T 920). Defense counsel advised the court that he had an issue with the verdict from an evidentiary standpoint, but said that "argument is for another day." (Vol. VII, T 920).

The trial court believed the jury completed the verdict form correctly. (Vol. VII, T 921:1-6). Defense counsel stated that he did not disagree, but advised the court that he wanted the verdict to be clear and requested that the jury be polled "as to what element of damage they awarded the approximate five hundred thousand dollar figure for." (Vol. VII, T 921-922, 922:23-923:1). The court denied that request. (Vol. VII, T 924:4-6).

In a post trial motion, Defendant moved for a new trial arguing, *inter alia*, that the verdict is excessive because it awarded lifetime future medical expenses without a finding of permanency, and that Plaintiff's questioning of Dr. Zeide prejudiced the jury. (Vol. I, R 197-Vol. II, R 204; Vol. III, R 473-478). Defendant also requested, in the alternative, remittitur of the future medical expenses award to zero. (Vol. II, R 202-204; Vol. III, R 470:26:16-22). The trial court denied the motion for new trial and motion for remittitur, finding the questioning of Dr. Zeide

did not deprive Defendant Progressive of a fair trial or cause a miscarriage of justice. (AA, p. 2). It also found the jury's verdict in awarding Plaintiff $514,750 for future medical expenses without a finding of permanent injury resulted in an inconsistent verdict. (AA, pp. 2-3). But because the trial court would have resubmitted the verdict form to the jury if Defendant had raised this objection during trial, the court found the inconsistency did not warrant a new trial when raised for the first time in a post trial motion. (AA, p. 3). It is from this order that Defendant Progressive appeals. (Vol. III, R 496-500).[1]

[1] On January 8, 2009, Defendant Progressive filed its notice of appeal from the order denying its motion for new trial, which is not a final order appealable under Florida Rule of Appellate Procedure 9.030(a)(1) or 9.110. On January 12, 2009, the trial court rendered the final judgment. (A 1). Although Defendant's notice of appeal was filed prematurely, it appears the Court has jurisdiction pursuant to 9.110(l) ("If a final order is rendered before dismissal of the premature appeal, the premature notice of appeal shall be considered effective to vest jurisdiction in the court to review the final order.").

SUMMARY OF ARGUMENT

The trial court acted within its discretion when denying Defendant's motion for new trial on the ground that Plaintiff's questioning of Dr. Zeide was prejudicial. Defendant failed to preserve for appellate review its argument that Plaintiff's questioning of Dr. Zeide regarding the outsourcing of his transcription service was prejudicial error because it did not lodge a contemporaneous objection below. And, Plaintiff's attempt to demonstrate the bias of Dr. Zeide regarding his practice of making the plaintiffs he examines feel uncomfortable and intimidated by undressing for their compulsory medical examinations was not so prejudicial as to create a miscarriage of justice. Plaintiff's questioning was brief, reasonably responded to by Dr. Zeide, and never again mentioned once the trial court sustained defense counsel's objection. The trial court, therefore, was within its discretion to deny Defendant's motion for new trial on this ground.

Defendant failed to preserve for appellate review the question of whether the jury's award to Plaintiff for future medical expenses was excessive because it failed to object at a time when the purported error could have been corrected by the jury. Furthermore, Defendant's arguments as to both its request for a new trial and its request for remittitur fail on the merits because the jury's award to Plaintiff for future medical expenses, as well as the jury's total award to Plaintiff, is supported by the evidence and is not so great that it should have been a shock to the judicial

conscience. The trial court, therefore, acted within its discretion when denying both Defendant's motion for new trial and motion for remittitur.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DENIED DEFENDANT'S MOTION FOR NEW TRIAL.

"[T]rial courts enjoy broad discretion in considering motions for new trial." *Tormey v. Trout,* 748 So. 2d 303, 305 (Fla. 4th DCA 1999) (citing *Baptist Mem'l Hosp., Inc. v. Bell*, 384 So. 2d 145 (Fla. 1980)). "A decision will not be overturned absent a showing that the trial court abused its discretion." *Id*. at 306 (citing *Cloud v. Fallis*, 110 So. 2d 669 (Fla. 1959)); *see also Izquierdo v. Gyroscope, Inc.*, 946 So. 2d 115, 117 (Fla. 4th DCA 2007). A trial court abuses its discretion only when its "judicial action is arbitrary, fanciful, or unreasonable, [such that] no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980) (quoting *Delno v. Market Street Railway Co.*, 124 F.2d 965, 967 (9th Cir. 1942)).

A. PLAINTIFF'S CROSS-EXAMINATION OF DR. ZEIDE DID NOT CREATE REVERSIBLE ERROR.

The trial court acted within its discretion when denying Defendant's motion for new trial on the ground that Plaintiff's questioning of Dr. Zeide was prejudicial. Defendant failed to preserve for appellate review its argument that Plaintiff's questioning of Dr. Zeide regarding the outsourcing of his transcription service was

prejudicial error because it did not lodge a contemporaneous objection below. And, although Defendant objected to the questioning of Dr. Zeide regarding his practice of making plaintiffs submitting to him for compulsory medical examinations undress in their entirety, the trial court acted within its discretion when determining this limited questioning did not amount to harmful error warranting a new trial.

1. Defendant Failed To Preserve Any Argument Regarding The Prejudice Of Plaintiff's Questioning Regarding Dr. Zeide's Transcription Service.

Defense counsel did not make a contemporaneous objection when Plaintiff's counsel questioned Dr. Zeide regarding the outsourcing of his transcription service. Defendant, therefore, failed to preserve this issue for appellate review. *Farinas v. State*, 569 So. 2d 425, 429 (Fla. 1990) ("Because defense counsel in the present case failed to make a contemporaneous objection to this improper line of questioning impeaching the defense witness, the issue is not properly preserved for appeal.") (citations omitted).

"Absent fundamental error, an issue will not be considered for the first time on appeal." *Id*. (citing *Clark v. State*, 363 So. 2d 331 (Fla. 1978)). "'Fundamental error,' for purposes of granting a new trial, means an error which deprives a party of a fair trial or an error which objection or a curative instruction could not correct; such error gravely impairs the dispassionate and calm consideration of the

evidence and merits by the jury." *Cordoba v. Rodriguez*, 939 So. 2d 319, 322 (Fla. 4th DCA 2006).

Defendant does not argue on appeal that Plaintiff's questioning of Dr. Zeide regarding the outsourcing of his transcription service constituted fundamental error. Defendant glosses over the fact that he made no objection to this testimony during trial. And after the limited exchange with Dr. Zeide on the issue, consisting of two questions to which Dr. Zeide gave very reasonable answers, Plaintiff never again addressed the matter. The only time the topic resurfaced was when defense counsel discussed the questioning in closing argument, attempting to strategically use the questioning to intimate Plaintiff's counsel treated Dr. Zeide unfairly by attempting to "impugn the integrity [of this] lieutenant colonel in the United States Army because he has the unpatriotic audacity to send his dictation to India." (Vol. VII, T 857:19-858:2). This limited questioning regarding Dr. Zeide's practice of outsourcing his transcription service was not so prejudicial as to amount to fundamental error. *See Stanton v. State*, 349 So. 2d 761 (Fla. 3d DCA 1977) (finding no fundamental error when single highly prejudicial and improper question was asked of witness).

2. Plaintiff's Questioning regarding Dr. Zeide's Treatment of Examinees during Compulsory Medical Examinations was Relevant to the Issue of Dr. Zeide's Bias and Did Not Result in Reversible Error.

Plaintiff's attempt to demonstrate the bias of Dr. Zeide regarding his practice of making the plaintiffs he examines feel uncomfortable and intimidated by undressing for their compulsory medical examinations was not so prejudicial as to create a miscarriage of justice. Plaintiff's questioning was brief, reasonably responded to by Dr. Zeide, and never again mentioned once the trial court sustained defense counsel's objection. The trial court, therefore, was within its discretion to deny Defendant's motion for new trial on this ground.

"An expert witness' credibility may be impeached by showing bias, partiality, improper relationships or motives." *Sanchez v. Nerys*, 954 So. 2d 630, 631 (Fla. 3d DCA 2007) (citing § 90.608, Fla. Stat.). "Evidence of bias, prejudice or interest is admissible as long as it tends to establish that a witness is appearing for any reason other than just to tell the truth." *Tomengo v. State*, 864 So. 2d 525, 530 (Fla. 5th DCA 2004) (citing *Hannah v. State*, 432 So. 2d 631 (Fla. 3d DCA 1983)). "[M]atters relating to examination of witnesses are within the trial court's sound discretion." *Tormey*, 748 So. 2d at 306 (citing *Metropolitan Dade County v. Zapata*, 601 So. 2d 239, 243 (Fla. 3d DCA 1992)).

Defendant Progressive presented Dr. Zeide as its sole live witness. Dr. Zeide testified that he determined after examining Plaintiff, whom he referred to as

his "patient," and reviewing her medical records and films that Plaintiff was not permanently injured in the accident and did not suffer a permanent exacerbation of her preexisting conditions in the accident. (Vol. VI, T 644:17-24). On cross-examination, Plaintiff's counsel set out to demonstrate to the jury that Dr. Zeide was a biased witness.

Plaintiff's counsel first questioned Dr. Zeide about his use of the term "patient" to describe Plaintiff. A "patient" is a person under medical care or treatment. *See* Blacks Law Dictionary, 8th ed.; Merriam-Webster's Medical Dictionary, 2002 ed. Plaintiff's counsel elicited testimony from Dr. Zeide that not only is Plaintiff *not* Dr. Zeide's patient, but Dr. Zeide was under a court order not to describe his examination of Plaintiff as independent (as opposed to compulsory on the part of Plaintiff). (Vol. I, R 28-31; Vol. VI, 658-659, 660:3-8, 663:18-21, 663:24-25).

What Plaintiff's counsel did not elicit from Dr. Zeide on cross-examination is that the same court order also prohibited "Dr. Zeide [from asking] the Plaintiff to completely disrobe [and specified] Plaintiff is not required to remove any undergarments" during the examination. (Vol. I, R 32-34, ¶¶ 5 & 7). Plaintiff's counsel did question Dr. Zeide regarding his treatment of compulsory examinees in an effort to demonstrate Dr. Zeide's bias—that he conducts these examinations as an agent of his defendant employers with a mind towards making the examinee-

plaintiffs feel uncomfortable and intimidated. Thus, after establishing that Dr. Zeide performs 95% of his litigation support work for defendants, Plaintiff's counsel asked:

> Q. It's your standard protocol, is it not, to ask these individuals who were involved in litigation to strip and put on a very thin piece of paper cloth over their body, isn't that correct?

Dr. Zeide responded with the following reasonable explanation:

> A. No. My practice is – depending on the body party – to wear a medical gown that is used for all our patients to leave their underwear and under garments on. And to wear – to open this gown to open from behind. They're blue. They're fire resistant. And we routinely use them. They're not thin. They're disposable. Previously we used to use rayon gowns and send them out for dry-cleaning. But OSHA said we can't do that because of body contamination. So the past – six years went back to using paper gowns.

Plaintiff then asked:

> Q. So if an individual comes to you with just a shoulder problem, you still insist on independent medical examinations to have the individual take their clothes off except for their under garments, correct?

(Vol. VI, T 668:2-669:10). It was after this short exchange that defense counsel objected to this line of questioning. (Vol. VI, T 669:15-17). After the trial court sustained Defendant's objection, Plaintiff's counsel never again broached this subject.

In cases where improper questioning is not pervasive, this Court has affirmed the decision of the trial court to deny a motion for mistrial. *See Tormey v. Trout*, 748 So. 2d 303 (Fla. 4th DCA 1999) (holding improper question concerning

disciplinary action against expert witness was harmless because it was not pervasive); *Sudderth v. Ebasco Services, Inc.*, 510 So. 2d 320 (Fla. 4th DCA 1987) (holding improper questions regarding witness's involvement with drugs were harmless). The trial judge, who was in the best position to determine whether the questioning of Dr. Zeide created harmful error, *see State Farm Mut. Auto. Ins. Co. v. Rindner*, 996 So. 2d 932, 934 (Fla. 4th DCA 2008), found the questioning did not result in a miscarriage of justice. (AA 2). *See* § 59.041, Fla. Stat. ("No . . . new trial [shall be] granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice.").

Defendant argues that the jury's award of future medical expenses demonstrates the jury was prejudiced against Dr. Zeide who testified that Plaintiff would not need any future medical care or treatment as a result of the accident. The fact that the jury found Plaintiff did not suffer a permanent injury, however, demonstrates that it did not discount Dr. Zeide's testimony. Dr. Zeide was the only

defense witness to testify that Plaintiff did not suffer a permanent injury.[2] The jury thus took the evidence presented by Dr. Zeide on the issue of permanency over the evidence presented by Plaintiff's experts that Plaintiff was permanently injured in the accident.

Furthermore, all the cases cited by Defendant are distinguishable from the instant case in that they involve repeated improper questioning, evidence, and argument that pervaded trial. *See Sanchez v. Nerys*, 54 So. 2d 630, 632 (Fla. 3d DCA 2007) (holding repeated questioning and argument during cross-examination of expert, combined with improper arguments made in closing and personal attacks on opposing counsel warranted a new trial); *MCI Exp., Inc. v. Ford Motor Co.*, 832 So. 2d 795, 801-02 (Fla. 3d DCA 2002) (holding repeated use of ethnic slur warranted new trial, and specifically noting that the prevalent use of the improper evidence is what made it harmful); *Manhardt v. Tamton*, 832 So. 2d 129, 132-33 (Fla. 2d DCA 2002) (holding improper questioning combined with improper closing argument and other errors warranted new trial); *Little Bridge Marina, Inc. v. Jones Boat Yard, Inc.*, 673 So. 2d 77 (Fla. 3d DCA 1996) (holding improper questioning of main witness, the credibility of whom the case hinged on, regarding his past career as criminal defense attorney was highly prejudicial); *Simmons v.*

[2] Defendant claims in its Initial Brief that both Drs. Zeide and Livingston testified on the issue of permanency. But a review Dr. Livingston's deposition testimony reveals that he never even said the word "permanent" or any variation thereof.

Baptist Hosp. of Miami, Inc., 454 So. 2d 681 (Fla. 3d DCA 1984) (holding improper questioning of two of plaintiff's essential medical witnesses—that one was an arsonist and the other a racist—was so prejudicial that a new trial was warranted); *Al-Site Corp. v. Della Croce*, 647 So. 2d 296 (Fla. 3d DCA 1994) (holding "character attacks, name calling, and grossly inappropriate language" made in closing argument warranted new trial). And the only cases Defendant cites from this Court are opinions affirming the decision of a trial court to *grant* a new trial—not finding an abuse of discretion where the trial court denied a motion for new trial, which is the issue here. *See Liberty Mut. Ins. Co. v. Wolfson*, 773 So. 2d 1272 (Fla. 4th DCA 2000); *Cardinal v. Wendy's of South Florida, Inc.*, 529 So. 2d 335 (Fla. 4th DCA 1988).

As it cannot be said that no reasonable person would have made the same decision as the trial court in denying the motion for new trial because the questioning of Dr. Zeide was not harmful or pervasive enough to result in a miscarriage of justice, the trial court acted within its discretion when denying Defendant's motion.

B. THE JURY'S AWARD TO PLAINTIFF FOR FUTURE MEDICAL EXPENSES WAS NOT EXCESSIVE.

Defendant failed to preserve for appellate review the question of whether they jury's award to Plaintiff for future medical expenses was excessive because it failed to object at a time when the purported error could have been corrected by the jury. But even if the Court considers this issue on the merits, Defendant's argument fails because the jury's award to Plaintiff for future medical expenses, as well as the jury's total award to Plaintiff, is supported by the evidence and is not so great that it should have been a shock to the judicial conscience. The trial court, therefore, acted within its discretion when denying Defendant's motion for new trial.

1. Defendant Failed to Preserve its Challenge to the Jury's Award of Future Medical Expenses by Failing to Raise the Issue When it Could be Corrected.

Upon first reviewing the verdict, Judge Cox asked the parties to review it outside the presence of the jury and specifically asked whether either side believed there was a problem with the verdict. It was at this time that defense counsel should have alerted the Court that he took issue with the jury's award of future medical expenses to Plaintiff without a finding that Plaintiff suffered a permanent injury. "[I]f appellant had informed the trial court of the jury's error before the court dismissed the jury, the jury's intent could have been ascertained and the verdict corrected." *Hendelman v. Lion Country Safari, Inc.*, 609 So. 2d 766, 766

(Fla. 4th DCA 1992) (Dell, J., concurring), *review dismissedby* 618 So. 2d 209 (Fla. 1993). By failing to timely assert an objection to this purported error at the time it was correctable, Defendant Progressive has waived the issue. *See Delva v. Value Rent-A-Car*, 693 So. 2d 574, 577 (Fla. 3d DCA 1997).

Defendant claims that it was required to lodge an objection only to the *inconsistency* of the verdict prior to the trial court accepting the jury's verdict. Defendant claims that because it is actually challenging the verdict as *excessive* on appeal, that it preserved this argument in its motion for new trial. This Court rejected this proposition in *Florida Department of Transportation v. Stewart*, 844 So. 2d 773, 774-75 (Fla. 4th DCA 2003):

> To preserve the issue of an inconsistent verdict, the party claiming inconsistency must raise the issue before the jury is discharged. If the trial court agrees, the trial court may reinstruct the jury and send it back for further deliberations. *See Cocca v. Smith*, 821 So. 2d 328, 330 (Fla. 2d DCA 2002). This procedure allows the jury an opportunity to "correct" the inconsistency. *See id*. This procedure is in contrast to what is needed to challenge an inadequate verdict, which a party may raise for the first time in a post-trial motion. *See id*. This court has consistently held that a party's failure to object or otherwise inform the court of an inconsistent verdict before the jury is dismissed waives the inconsistency in the verdict as a point on appeal. *See Hendelman v. Lion Country Safari, Inc.*, 609 So. 2d 766, 766-67 (Fla. 4th DCA 1992)(Dell, J., concurring specially), *review dismissed*, 618 So. 2d 209 (Fla. 1993). **It follows that a party may not circumvent these cases by later arguing the verdict is inadequate or contrary to the manifest weight of the evidence.** *See id*. at 767. **It logically follows that most inconsistent verdicts, in some respect, would be either inadequate or contrary to the manifest weight of the evidence.** *See id*.; *see also C.G. Chase Constr. Co. v. Colon*, 725 So. 2d 1144, 1145 (Fla. 3d DCA 1998), *review denied*, 740 So. 2d 527

> (Fla. 1999). However, where the thrust of DOT's objection to the verdict was based on the inconsistency between an award for future economic damages and no finding of permanent injury, the DOT waived any error by not raising this issue before the jury was discharged.

(Emphasis added). *See also C.G. Chase Const. Co. v. Colon*, 725 So. 2d 1144, 1145-46 (Fla. 3d DCA 1998) (holding verdict that was both inadequate as to some damages and excessive as to others could not be challenged for the first time in a post trial motion). Here, the thrust of Defendant Progressive's argument is that the verdict was inconsistent because the jury awarded future economic damages and made no finding of permanent injury, which is demonstrated by Defendant asking the trial court to remit those damages to zero. Defendant should not be permitted to circumvent its duty to raise this argument below at a time when the jury could have corrected any error by now arguing on appeal that the jury's verdict was not inconsistent, but excessive.

In *Stewart*, this Court also rejected the argument raised by Defendant that *Owen v. Morrisey*, 793 So. 2d 1018 (Fla. 4th DCA 2001), permits its current challenge to the jury's verdict. This Court specifically determined that there was no discussion in *Owen* "as to when the trial court was apprised of the inconsistent verdict." *Stewart*, 844 So. 2d at 774. *Owen*, therefore, does not speak to the issue of what constitutes proper preservation for appellate review.

2. The Jury's Award of Future Medical Expenses is Supported by the Evidence.

Even if the Court determines Defendant Progressive has properly preserved this issue for review, Defendant's argument fails on the merits because the jury's award, as to future medical expenses and in its entirety, is supported by the evidence and is not so great that it should have been a shock to the judicial conscience.

A trial "court should not order a new trial unless it believes that the amount awarded is so great 'as to indicate that the jury must have found it while under the influence of passion, prejudice or gross mistake.'" *State Farm Mut. Auto. Ins. Co. v. Rindner*, 996 So. 2d 932, 934-35 (Fla. 4th DCA 2008) (quoting *Glabman v. De La Cruz*, 954 So. 2d 60, 62 (Fla. 3d DCA 2007)). A case will not be reversed "for a new trial on the ground that the verdict is excessive, unless it appears upon a consideration of all the testimony that the verdict was so much greater than it should have been as to shock the judicial conscience." *Bartholf v. Baker*, 71 So. 2d 480, 484 (Fla. 1954). "[T]he burden is upon the appellant to establish the fact that the verdict is wholly unsupported by the evidence or was the result of passion, prejudice or other improper motive." *Id.* (citing *First Federal Savings & Loan Ass'n v. Wylie*, 46 So. 2d 396 (Fla. 1950)).

The jury's award of $514,750 for Plaintiff's future medical expenses is fair and fully supported by the evidence. Dr. Lichtblau testified that he used a very

conservative approach in his Continuation of Care Plan for Plaintiff by "bargain shopping" for her future treatment costs. (Vol. V, T 250:22-24, 284:11-22). Thus, he priced at about $475 an MRI that typically costs $1,500. (Vol. V, T 250:24-251:3). Dr. Lichtblau also gave both a best case and worst case scenario for Plaintiff's future treatment in his plan and explained to the jury that the actual case will fall somewhere in-between. (Vol. V, T 259:1-3). Dr. Pettingill then took this plan developed under Dr. Lichtblau's conservative approach and applied his own conservative approach to determine the present value cost of these future medical expenses. Dr. Pettingill excluded certain treatment that Dr. Lichtblau determined would be needed by Plaintiff on an as-needed basis and took the mid range frequency of the treatments specified by Dr. Lichtblau. (Vol. V, T 343:8-18; 364:3-24). Under Dr. Pettingill's calculations, Plaintiff's cost of future medical expenses will be $514,750 under Dr. Lichtblau's best case plan, or $745,107 under the worst case plan, for an average of $629,928.

The jury was not satisfied with just the outcome of Dr. Pettingill's calculations. One of jurors asked Dr. Pettingill a very sophisticated financial question—"[W]hat is the actual rate used to calculate P.V., present value, and what was the actual inflation rate used?" (Vol. V, T 388:15-17). The jury was then forced to deliberate and come up with a number for Plaintiff's damages without the benefit of reviewing either Dr. Lichtblau's Continuation of Care Plan or the

detailed numbers put forth by Dr. Pettingill, even though they specifically asked for this documentation, because Defendant objected to the jury having this information. And Defendant did not suggest to the jury an alternate amount to award for Plaintiff's future medical expenses other than $0. The jury was, therefore, justified in finding Plaintiff was entitled to future medical expenses in the amount of the smallest estimation presented under the conservative analyses of by Drs. Pettingill and Lichtblau.

Furthermore, when reviewing the jury's award to Plaintiff in its entirety, the verdict is fair and reasonable. As in *KMart Corp. v. Bracho*, 776 So. 2d 342, 343 (Fla. 3d DCA 2001), "If at all, the jury was arguably mistaken only by assigning the awards to past and (in an excessive amount) future medical expenses, while giving nothing at all for past and future pain and suffering, though the evidence required at least some amount for these elements." (Footnotes omitted). The jury awarded $53,391 for past medicals and $514,750 for future medicals, but it awarded Plaintiff absolutely nothing for past or future pain and suffering.

The evidence that Plaintiff experienced pain and suffering in the past and will continue to experience pain and suffering into the future was compelling. After the accident, Plaintiff was in physical therapy for five months and treated by Dr. Davis for nine months, undergoing cervical spinal decompression, thoracic and lumbar spine adjustments, and electric stimulation therapy. (Vol. IV, T 119-120,

130; Vol. VI, T 513:24-514:10). She has daily pain, is not supposed to push, pull, kneel, or stoop, and is not supposed to sit or stand for more than 20 minutes at a time. (Vol. V, T 314:20-24, 451:1-6, 465:18-23, 466:2-24; Vol. VI, T 530:1-19, 536:1-11). Thus, by awarding Plaintiff no damages for past or future pain and suffering, it appears the jury awarded "too much for the medicals and too little for the intangibles." *Bracho*, 776 So. 2d at 343. Because the total verdict amount is reasonable and supported by the evidence, any error in the jury's misallocation of the amounts is harmless. *Id*. *See also C.G. Chase Const. Co. v. Colon*, 725 So. 2d 1144, 1145-46 (Fla. 3d DCA 1998) (reversing order granting new trial after finding verdict that was grossly inadequate as to future and past economic and non-economic damages and grossly excessive as to lost net accumulations was, taken as a whole, a sustainable gross amount); *Delva v. Value Rent-A-Car*, 693 So. 2d 574, 577 (Fla. 3d DCA 1997) (holding any error in allocation of damages by jury was harmless because it "made no legal difference to the bottom line—the clearly sustainable gross amount which the defendant must pay the plaintiff for the injuries it caused").

The jury's award of a total of $568,141 to Plaintiff is fair and reasonable because it is supported by the evidence presented at trial. As it cannot be said that the jury's award is so much greater than it should have been as to shock the

judicial conscience, the trial court acted within its discretion when denying Defendant's motion for new trial.

II. THE TRIAL COURT CORRECTLY DENIED DEFENDANT'S MOTION FOR REMITTITUR.

"'Remittitur cannot be granted unless the amount of damages is so excessive that it shocks the judicial conscience and indicates that the jury has been influenced by passion or prejudice.'" *City of Hollywood v. Hogan*, 986 So. 2d 634, 647 (Fla. 4th DCA 2008) (quoting *Weinstein Design Group, Inc. v. Fielder*, 884 So. 2d 990, 1002 (Fla. 4th DCA 2004)). An order denying a motion for remittitur is also reviewed for an abuse of discretion. *Id*.

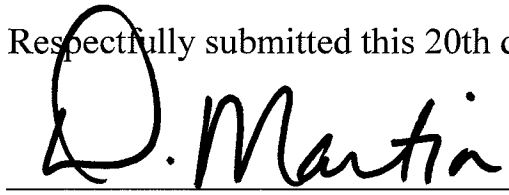
"[T]he amount of damages rests solely within the jury's sound discretion, and the jury's decision must be given great credence." *Tobias v. Osorio*, 681 So. 2d 905, 906 (Fla. 4th DCA 1996) (citations omitted). Only "if the jury's verdict is so extravagant that it shocks the judicial conscience, is manifestly unsupported by the evidence, or otherwise affirmatively indicates that the jury has been unduly influenced by passion, prejudice, or other matters outside the record, . . . may the court, in its discretion, strike down the verdict." *Id*. (citing *Allred v. Chittenden Pool Supply, Inc.*, 298 So. 2d 361 (Fla. 1974)). As discussed above, the jury's verdict is supported by the evidence in the record and is not so extravagant that it

shocks the judicial conscience. The trial court, therefore, acted within its discretion when denying Defendant's motion for remittitur.

CONCLUSION

The trial court acted within its discretion when denying Defendant's motion for new trial and motion for remittitur. The Court should therefore affirm the trial court's order and uphold the final judgment entered below.[3]

Respectfully submitted this 20th day of August, 2009.



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[3] In the event the Court reverses and remands for a new trial, it should remand for retrial of issues of economic and non-economic damages, as well as the issue of permanency. Any error in the jury's verdict is likely a result of confusion in its overall assessment of Plaintiff's damage claim, warranting retrial of each of these intertwined issues. *See Sears, Roebuck & Co. v. Genovese*, 568 So. 2d 466, 468 (Fla. 4th DCA 1990) (holding "new trial should encompass all aspects of the claimed damages [partly due to] the irreconcilable fact that the jury awarded [Plaintiff] future medical expenses without apparent consideration of attendant pain and suffering"); *see also Casper v. Melville Corp.*, 656 So. 2d 1354, 1356 (Fla. 4th DCA 1995) (reversing and remanding on both liability and damage issues where jury's verdict was suggestive that the issues were intertwined); *Watson v. Builders Square, Inc.*, 563 So. 2d 721 (Fla. 4th DCA 1990) (same).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing Answer Brief were served by US Mail, postage prepaid, this 20th day of August, 2009, upon:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Appellee's Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) in that the Initial Brief being submitted is in Times New Roman 14-point font.

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