IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF FLORIDA

CASE NO. 5D10-3188

Florida Bar No. 184170

MARK W. DARRAGH,

Appellant,

v.

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, a foreign corporation,

Appellee.

BRIEF OF APPELLANT
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
a foreign corporation

(With Appendix)

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REFERENCES

POINTS ON APPEAL

I. THE COURT ERRED IN FAILING TO GIVE FLORIDA STANDARD JURY INSTRUCTION 6.10 and VERDICT FORM 8.1, INSTRUCTING THE JURY TO REDUCE FUTURE DAMAGES TO PRESENT VALUE, AND THIS CASE SHOULD BE REVERSED FOR A NEW TRIAL OR REMITTITUR.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE FULL AMOUNT OF THE MEDICAL BILLS INTO EVIDENCE INSTEAD OF THE AMOUNTS AFTER THE INSURANCE WRITE DOWN, SO A NEW TRIAL OR REMITTITUR SHOULD BE GRANTED.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING INADMISSIBLE HEARSAY NOT SUBJECT TO CROSS-EXAMINATION, WHICH WAS REVERSIBLE ERROR AS THIS WAS THE PLAINTIFF'S ONLY OBJECTIVE EVIDENCE OF ANY LOST FUTURE EARNINGS. A NEW TRIAL OR REMITTITUR MUST BE GRANTED.

IV. THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE PLAINTIFF WHO WAS NOT AN ACCOUNTANT OR ECONOMIST TO TESTIFY FROM HIS SPREADSHEET CONCERNING FUTURE DAMAGES, AND NOT ALLOWING THE DEFENDANT TO IMPEACH THE PLAINTIFF WITH HIS DEPOSITION TESTIMONY CONCERNING THE CHANGES TO THE SPREADSHEET HE CREATED, WITH HIS INCONSISTENT TESTIMONY FROM HIS DEPOSITION, AND A NEW TRIAL OR REMITTITUR SHOULD BE GRANTED.

V. THE JURY VERDICT OF $3.99 MILLION WAS EXCESSIVE, AND ESPECIALLY WITH NO MULTIPLE ERRORS AT TRIAL A NEW TRIAL OR REMITTITUR SHOULD BE GRANTED.

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INTRODUCTION

The Appellant/Defendant, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, will be referred to as Nationwide and/or Defendant.

The Appellee/Plaintiff, MARK W. DARRAGH, will be referred to as Darragh and/or Plaintiff.

The Record on Appeal will be designated by the letter "R."

The Appendix to the Brief will be designated by the letter "A."

The Trial Transcript consisting of 788 pages, Vols. I-V, appearing in the Record will be designated by the letter "T," followed by the page number.

The Motion in Limine came on for hearing on July 14, 2009. It will be referred to as "HML," followed by the page number.

All emphasis in the Brief is that of the writer, unless otherwise indicated.

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STATEMENT OF THE FACTS AND CASE

Outline of the Trial Transcript

The **Motions in Limine** are in the Appendix to this Brief at (A 1-19), including the website. The Motion sought among other things, to preclude the use of **internet websites** to prove lost earnings. The Motion pointed out that there was no testimony to authenticate the information on the website, and no one to cross-examine.

The **plaintiff's Motion for Judicial Notice** argues that information on the website establishes entitlement to military retirement benefits. The Motion has the website printouts attached.

The **Motion in Limine** came on for hearing on July 14, 2009. It will be referred to as "HML," followed by the page number.

Counsel for the defense argued that the website was impermissible hearsay and unreliable because it did not link the numbers and figures to the Plaintiff's condition. Counsel also said that **the Plaintiff would have been discharged anyway because he had a heart attack after the incident, which was unrelated to the incident, which would have excluded him from military service anyway**.

Counsel said that Statute § 10 USCS 630.33 concerning retirement was too complicated and did not give information to the jury which was related to the Plaintiff (ML, 11). At the time of the accident, the Plaintiff had been a member of the Air Force for approximately 14 to 15 years and would have been vested

at 20 years. The Plaintiff argued that the website was a reliable source since it was a US military website.

The Court ruled that it was appropriate to allow the website evidence (HML, 52). The Court said that the prejudicial value was outweighed by the probative value and Court said the document did not require any further authentication.

Counsel for the defense also argued the Motion concerning the amount of medical bills to be introduced (HML, 52-53). The total medical bills were approximately $189,000 and the Plaintiff had auto insurance which included PIP and Med Pay, and also had health insurance. The insurance bills were reduced because of the health insurance's contract rate from $189,000 by approximately $100,000, or half (T, 64; HML, 54).

Counsel for the Plaintiff argued that the Plaintiff should be able to present the entire medical bills to the jury and the Court could adjust the amount post-trial and setoff the difference (HML, 54). Counsel for the Plaintiff argued Florida Statute § 768.761(1), as well as Goble v. Frohman, 901 So. 2d 830 (Fla. 2005). He argued it was a collateral source and should be reduced after trial.

Counsel for the defendant then argued at (HML, 62), and said that the Plaintiff should only be able to present the written-down medical bills. Counsel cited to Cooperative Leasing which held that the Plaintiff was not entitled to recover medical expenses beyond those paid by Medicare, and also Thyssenkrupp, which held the Plaintiff is not entitled to recover the amount by

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which the medical provider's charges were reduced. He said that when the hospital reduced its billing amount, the reduced bill constituted the total loss to the Plaintiff, and therefore only the reduced amount should be presented to the jury. That was the only amount that the Plaintiff ever owed and that he was only liable for that amount. The Court noted that the Goble case said that the damages fit the definition of collateral sources subject to set-off, and therefore the court ruled as the Plaintiff's counsel requested, to reduce the amount after trial (HML, 69). **The Court ruled it had granted the Plaintiff's Motion to present the full amount, and write-off after trial.**

Opening Statements began at (T 209), and counsel for the Plaintiff said that on April 12, 2004 at 4:45 in the afternoon, the Plaintiff had finished working and was on his way home, heading north on the highway. He said it is a three lane road and the plaintiff was in the left lane when a vehicle came from his right side and essentially cut him off because it was trying to make a left turn from the center lane. As a result of the accident, the Plaintiff had a blow to his left elbow and compression injury to his back from being launched into the air and then coming down on the seat (T 211). Counsel said the Plaintiff, Darragh, thought he could tough it out and went home, but the next day, he went to the family doctor.

Counsel said that Beulah Michael was the one who caused the accident, but since Michael was uninsured the Plaintiff had to sue Darragh's own insurance carrier. Counsel said that

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Nationwide admitted that Beulah was negligent and that the crash caused permanent injuries to Darragh. He said that the medical records would show that within a week the elbow pain went away, but 5½ years later the lower back has become progressively worse (T 215). An MRI was done which showed a herniated or protruding disc in his lower back, and a more painful test was performed where they stuck a prod into his back and ran an electrical current through his nerves to see if they were functioning correctly, and the test came back normal (T 217-218).

Counsel stated that Dr. Bradford had also evaluated Darragh, and gave him the option of a spinal cord **stimulator** (T 222). Surgery was planned, but then in 2007, Darragh suffered an unexpected heart attack (T 223) so they had to delay the surgery for a full year until December 2008, and when they actually did the surgery it functioned well (T 224).

Counsel said that the Plaintiff had been in the military for over 15 years, and had been deployed to Afghanistan after September 11th. Because of the surgery and the accident he was physically unable to be in the military, and therefore, he would lose out on his military retirement. According to counsel, the loss of retirement benefits alone would be $700,000 (T 228).

Opening statements for the defense began at (T 231) and **counsel said Nationwide** did not contest liability for the accident, did not contest that Darragh was blameless and injured his back in the accident, did not contest that he suffered a permanent injury, and that past medical treatment was reasonable.

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He said what was in dispute was the amount of future medical damages and future lost wages (T 232).

Counsel said that the plaintiff was a member of the National Guard Service and evidence would show that he was required to serve for 20 years in order to have a pension. He started in 1991, the accident occurred in April of 2004. In 2007, he suffered an **unrelated heart attack, when he was 36 years old**, and counsel said at that point he would have had 16 years of service.

Counsel said the Plaintiff had the burden of proof of showing that all his damages were related to the accident. He said that the Plaintiff was showing 80% or 90% improvement of the pain in December 2008 (T 234).

Dena Darragh was called to the stand at (T 235), and is the wife of Mark Darragh. She said they were active people and enjoyed scuba diving (T 237) and said that since the accident he was in a lot of pain constantly and was no longer able to scuba dive because the equipment and the boat movement jarred his back, and he could not do sports.

Christopher Wright was called to the stand at (T 254) and is Darragh's brother. He testified that he and his brother played lots of sports together and were very active, and now could not do things because he could not pull his own load (T 264).

Shane Brode was called to the stand at (T 284), and taught Mark Darragh and his wife how to scuba dive in 1999. He and Darragh also played tennis together, but had not since the accident.

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Dr. Nnamdi Nwaogwugwu was called to the stand at (T 304), and said he is a board certified physiatrist and treated Darragh. He first saw Darragh on January 19, 2005 and an MRI revealed that he had a central disc protrusion at L-5/S-1, and he complained of low back pain with radiculopathy traveling down both lower extremities, so he performed an electro diagnostic test.

He said that the MRI revealed that there was a disc bulge and he also had a disc contusion. To help the lower back pains, he prescribed anti-inflammatories and Vicodin. The range of motion tests showed that Darragh was not 100% in any particular direction.

He diagnosed Darragh with a lumbar strain and bilateral pinched nerves and said that typically a spinal cord **stimulator** is a next to the last resort, and a fusion is the last resort. The doctor testified that he would recommend that patients with a spinal **stimulator** refrain from participating in contact sports (T 351).

The Deposition of **Joseph Roberson** was played to the jury at (T 354), and will be referred to a "JR," followed by the page number. He is a first lieutenant in the Alabama Air National Guard and testified he and Darragh planned to stay in the military until the point of retirement (JR, 33).

The Plaintiff read the life expectancy into the Record, which said that a 38 year old male is expected to live another 41.3 years (T 360).

The video-taped deposition of **Dr. Thomas Menke** was shown to

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the jury at (T 360), and will be referred to as "TM," followed by the page number. He is an orthopedic surgeon and treated Darragh after the accident and testified that he was told by Darragh that he had gone to 12 physical therapy visits, but did not receive lasting relief. He learned that Darragh received epidural injections in April of 2004, but relief only lasted two weeks.

He testified that the EMG confirmed that Darragh had nerve root irritations, and after the epidurals the numbness in Darragh's leg appeared to be gone (TM, 25). He then recommended a conservative approach and referred Darragh to Marcee Hopper for physical therapy. Darragh told him that he felt like he had been making progress, but when they stopped the visits and he regressed back. Dr. Menke recommended that he have a follow-up MRI because his pain would not go away and recommended he see a pain management doctor (TM, 31). He assigned Darragh a 5% to 8% impairment rating.

In his notes, he noted that after the first 12 sessions of physical therapy Darragh told him he felt 80% better and by that time it had been six months since he had physical therapy (TM, 48). He stated that when Darragh came to him on December 6, 2005, he determined that Darragh was not a candidate for a discectomy or a fusion.

The Plaintiff then published a stipulation which said that the medical bills to-date incurred totaled $189,995.81; that Nationwide Mutual Fire Insurance Company was obligated to pay the bills that were determined to be reasonable, related, and

necessary as a result of the subject accident; that Nationwide had paid out between $1,060 and $11,006.21 towards medical bills (T 363); that the amount of bills claimed by Darragh and the amount of payment received by him were necessary and related to the collision of 2004; and that Florida law does not allow a person to receive a double recovery for payments by his own insurance company.

The video-deposition of the physical therapist, **Marcee Hopper**, was shown to the jury at (T 372), and will be referred to as "MH," followed by the page number. She believed that Darragh would have reached the normal range of motion if he had continued with therapy. Throughout his 12 visits his range of motion had improved and overall, he was making improvements.

The video-deposition of **Dr. David Bosomworth** was shown to the jury at (T 381), and will be referred to as "DB," followed by the page number. He is an interventional pain physician and Darragh was referred to him for pain management by Dr. Menke (DB, 21). Dr. Bosomworth performed a bilateral lumbar facet injection with fluoroscopy two times, and testified that as a result of the accident Darragh has undergone degenerative joint disease (DB, 25). On May 9, 2006, he did the right side lumbar radiofrequency thermo coagulation, which is also called a rhizotomy. In June 6, 2006, he did the rhizotomy procedure on the left side (DB, 43).

On August 4, 2006, his notes indicated that the rhizotomy procedure provided seven weeks of 90% relief from the pain but

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it gradually returned (DB, 44). On September 12, 2007, two thoracic facet injection procedures were done and the Plaintiff had no pain from the injections. On November 8, 20077, they did a trial spinal stimulator and the follow-up visit indicated there was 80% pain relief for the week that he had it. They scheduled a permanent implant surgery for December 2007 and subsequently, Darragh suffered a mild heart attack, and the procedure was delayed for a year (DB, 53-54). On December 21, 2008, the doctor performed the spinal stimulator implantation. The doctor testified that Darragh seemed very satisfied with this and it has lessened his pain.

Dr. Bosomworth testified that the battery was F.D.A. approved for 9 or 10 years, but typically the whole unit had to be replaced every 9 years (DB, 65). He said he would likely have to perform the procedure on Darragh four more times in his life in order to keep the pain relieved. The doctor said his cost for doing the stimulator was $100,000 and said that the quarterly visits would cost $100, and Darragh's prescriptions would typically cost $60 to $80 every couple of months. The best case scenario would be $190 per quarter, and then $60 to $80 every couple of months. The doctor said the worse case scenario would be $15,000 to $20,000 a year, which would not include any equipment costs; so that would include revision of the stimulator, professional fees and surgical procedures (DB, 72). The doctor said there was a 7% to 13% impairment rating, because of the back pain associated with the accident.

At (T 387), the defendant objected in advance to any internet printouts coming into evidence during the plaintiff's testimony, concerning his National Guard service and his future lost earnings from the reserve service. Counsel for the Plaintiff argued the probative value was substantially outweighed by the prejudicial impact of the jury seeing hearsay internet data from a government website, under Fla. Stat. § 90.403. Counsel said the fact that it was a U.S. Government website would mislead the jury to rely heavily on the data when **the site itself disclaimed reliance on the data given by the site (T 389).** The website specifically **stated that the data were assumptions and estimates based upon such assumptions, and should not be relied upon.**

The website further stated that the economy and future career decisions would affect the amount of retirement benefits. Counsel cited to Saint Lukes Cataract and Laser Institute v. Sanderson from the Middle District of Florida, which held that Rule 901 of the Federal Rules of Evidence require authentication of evidence as a condition precedent to admissibility, and that the website printouts were not self-authenticating. Counsel also cited to Sun Protection Factory, Inc. V. Tender Corp., which is a U.S. District case out of the Middle District of Florida, which held that to authenticate a printout from a website the party proffering the evidence must produce some statement or affidavit, with someone with knowledge of the website.

Counsel for the defense pointed out that there would be no

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one to cross-examine about the information on the website, or the people who generated it (T 391). The court denied the motion and ruled that since there was a government website, it was public record (T 409).

Counsel stated that the Excel Spreadsheet created by the plaintiff was hearsay and not within any exception, and that the prejudicial effect outweighed the probative value (T 414). The court ruled that it would allow the speadsheet into evidence (T 422).

The plaintiff, **Mark Darragh**, was called to the stand at (T 424) and described the physical exertions required of him during his stay in the military and stated that he received 16 different commendations while in the military (T 441-442).

Darragh testified that he did not have any pain in his lower back prior to April of 2004 (T 455). He explained how the accident occurred (T 458) and said he went to see his fammily doctor the next day on April 13, 2004. At the time, he weighed 218 pounds, and was 32 years old and he was prescribed pain-killers and physical therapy. He had six visits of physical therapy for his lower back and that immediately following the physical therapy his pain would return.

He was referred to Dr. N who is a back specialist. After the procedure of the epidural he felt good but the improvement did not last, and he had 12 sessions of physical therapy and felt 80% better, but gradually deteriorated (T 484).

He also had an epidural facet injection or nerve block

performed by Dr. Bosomworth and in total, 39 different injections were done. He decided he should have a permanent implant in his spine, and he was scheduled to do so in December of 2007, but he had a heart attack. In December of 2008, he had the spine procedure performed which cost $103,000 in hospital costs alone (T 504). Since surgery he has begun to walk for exercise but has not done anything like running, scuba diving, or playing sports (T 509).

Counsel for the defendant objected to the entry of the medical bills and argued that the reduced amount of bills should be introduced and not the full pre-write down amount because the Plaintiff was never responsible for the full amount (T 511). The court denied the objection.

Darragh, referring to his Excel spreadsheet, said that the surgical procedure cost $103,000 just for the hospital bills, along with $31,274 for Dr. Bosomworth's fee, as well as for the treatment of all injections and rhizotomies over the last three years. He also said on average he was spending between $60 and $80 a month on prescriptions (T 514).

Counsel for the defendant requested its Jury Instructions, which included Florida Standard Jury Instruction 6.10, regarding reduction of present value (T 523). Counsel cited Seaboard Coastline Railroad v. Burdi, 427 So. 2d 1048. Counsel for the plaintiff argued that the total offset method should be applied, in which the inflation offsets the amount of the investment. The court denied the Defendant's Motion at (T 551).

Counsel objected to the admission of the website documents, but the court overruled the objection at (T 582). Darragh said that lost military pay up until the moment of trial totaled $25,686.25, as well as $13,550.74 through November of 2011 when he would have retired (T 597). Through the beginning of age 60, he would receive $13,970.52; and then for the rest of his life after retirement, he would receive $718,775.38 (T 605). He calculated his life to age 90 because he said there was longevity in his family since his grandfather lived to 94 years old, and two grandmothers who were in their 80's, and his other grandfather who is 81 years old.

Counsel pointed out that the plaintiff began the National Guard in October 1991, and that his accident occurred on April 12, 2004. **The plaintiff testified that he served in the National Guard for well over a year after the accident** (T 611). In **December of 2007**, when he was 36 **he had a heart attack**, which was around the time he had been in the National Guard for 16 years (T 611), and his discharge came in 2005 (T 614).

The court ruled it would not allow the defense to cross-examine Darragh on the previous charts which were not in evidence (T 625-626):

> THE COURT: As for the first issue that we were talking about, yes, I'm going to sustain the objection, and I'm going to give a curative instruction. It's necessary.
>
> * * *
>
> THE COURT: If it is, indeed, involving a different chart - if he's talking about a

> different chart that we're not using, then I don't think that is a proper subject that you can impeach him on. So, I will sustain that objection, as well.
>
> (T 625-626).

Counsel then proffered the testimony that he would have elicited from Darragh concerning the change in the charts Darragh had produced (T 628). The court would not allow the proffer, as to what the different numbers were about his retirement benefits (T 628).

He testified that his father had had a heart attack at 37 years old (T 641-642), and it was pointed out that he was 36 at the time of his heart attack. He testified that **no doctor had told him that the heart attack was a result of the accident.**

The defense moved for a **Directed Verdict** at (T 654). The court denied the motion.

The defense then called **Dr. Stephen Goll**, and his testimony was given by video-tape deposition, which will be referred to as "SG," followed by the page number. Dr. Goll is an orthopedic surgeon and said he is familiar with spinal stimulators and had prescribed them in his practice. He said that he does them for 10 to 12 patients a year.

Dr. Goll testified that he agreed the injury was caused by the accident and that it was a permanent injury. He also agreed that the past treatment was reasonable, related and necessary for the treatment of injuries caused by the accident. He testified that in terms of medical care, the average life of batteries on

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the stimulators was 9 years, and that it would cost $20,000 for a rechargeable battery. Some people prefer to use non-chargeable batteries that cost $10,000, every three to five years (SG, 16).

He testified that if he had to replace part of the system, it would cost $30,000 to $50,000. He said roughly one out of five patients would need a system revision of the whole system, or of the stimulator itself (SG, 17).

The doctor testified that in his experience he had heard from pain management colleagues that other than routine follow-ups on the stimulator, patients tend not to follow their regular basis for treatment because stimulators work well. He also testified that since December 2008, it did not appear that Darragh was undergoing any regular treatment other than the routine follow-up visit for the stimulator (SG, 18). He indicated that the worse case scenario had not occurred.

Dr. Goll testified that despite Bosomworth's testimony that the entire stimulator had to be replaced every 9 to 10 years, the battery itself could be replaced, and the existing stimulator could be left alone (SG, 37). He also said Darragh would not be in a condition to go to the Middle East and hike through the mountains if required to do so. Goll testified that depending on the severity of the heart attack it could keep someone out of the military as well (SG, 48).

Closing Arguments began on (T 679) and counsel for the plaintiff said the plaintiff was seeking a legal remedy; was prescribed physical therapy but his post-accident pain continued

(T 696). He said that Dr. Madison did an EMG test which showed there was damage in both legs (T 698; 703).

Counsel said after a spinal cord stimulator was implanted on November 14, 2007 there was 80% relief (T 706). Although the defense showed that he had a heart attack, it was not a severe heart attack and it did not disable him (T 707-708). He admitted no one presented a specialist to say that the accident caused the heart attack (T 709-710).

The medical bills totaled nearly $190,000 and counsel said not included in the $190,000 was the actual cost associated with prescriptions, many of which they did not have any receipts to prove. Calculating in those unproven prescriptions, this came to $200,000 (T 715).

Counsel said that the spreadsheet which the plaintiff created shows that he sustained a total of $225,686 in total past damages for economic losses. Counsel said according to the government, the plaintiff will live another 41.3 years.

Counsel said that it would cost another $103,000 in the future to have the same procedure to replace his back equipment (T 723), and that his cost, including past medical along with future prescriptions and doctor visits would cost $460,000. In the worst case scenario, he would need another $15,000 or $20,000 per year for additional treatments for pain management (T 724). Additionally, he suffered $13,550.74 for loss of income because he was dismissed from the reserves, which would amount to $178,000 over the rest of his life.

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Closing Argument for the defense began at (T 738). Counsel said that the testimony of the orthopedic surgeon, Dr. Goll, was that the spinal stimulator in Darragh is not complex (T 739). He testified that $190 every three months for office visits, along with $60 to $80 every couple of months for medications, and $34 per month would be sufficient to cover the cost of future medical expenses. He also pointed out that the spinal stimulator was designed to make almost all other types of treatment unnecessary and therefore, Darragh would not need epidural shots in the future (T 740). Over Darragh's life the cost of office visits would be $31,388 and medications would be $15,000 to $20,000; and he agreed that every nine years or so the spinal stimulator would need a new battery replacement which would be $20,000 every nine years, or $10,000 every three to five years (T 740). Therefore, his future medicals would be $130,000. In the worse case scenario, he might need a replacement of the stimulator which would amount to $250,000 in future medical damages (T 741).

Counsel said that in order to receive the military benefits, he would have had to serve 20 years. Darragh began service in 1991, the accident occurred in 2004, but then he had an unrelated heart attack in 2007 at the age of 36, and therefore not have been able to complete the military service anyway (T 742).

Counsel requested that the jury award nothing for future lost wages and earnings. Past wages were calculated to be $14,000 since the heart attack occurred two years after the accident (T 746).

Since December 2, 2008, the plaintiff's pain and suffering had diminished and continued to be less, and yet he was asking for an extraordinary amount of future pain and suffering. Counsel said that $90,000 should be awarded for past pain and suffering, and $100,000 for the future.

The court then read the Jury Instructions, and **counsel for the defense maintained his objection to the lack of inclusion of Jury Instruction 6.10 on the reduction of economic future damages to the present value; and the related Verdict question in Form 8.1 regarding the reduction of future economic damages to present value (T 772). The court again denied that request.**

Counsel also renewed his objection to the inclusion in the evidence of Plaintiff's Exhibits 17, 22, 23, 24, and 25, but the court overruled the objection (T 776).

The jury returned a Verdict which is on the next page.

SUMMARY OF ARGUMENT

The uninsured driver tried to make a turn from the middle lane and cut the Plaintiff Darragh off, causing an accident. Darragh had a spinal cord stimulator implanted, and filed suit against his uninsured motorist carrier, who admitted liability and tried the case on damages, which resulted in a Verdict of $3.99 million dollars. The breakdown of the Verdict was as follows:

Past medical expenses:	$ 200,000.00
Past lost earnings:	$ 25,686.25
Future medical expenses:	$ 800,000.00
Future lost earning ability:	$ 718,775.38
Past pain and suffering:	$ 500,000.00
Future pain and suffering:	$1,750,000.00
Total Damages:	$3,994,461.63

I. There were multiple errors at trial. First of all, the Defendant several times moved for Standard Jury Instruction 6.10 regarding reduction to present value to be given, and for Standard Verdict Form 8.1(c) regarding reduction to present value to be used, but the trial court denied this. **There are numerous Florida cases which hold that it is reversible error for the trial court to deny a motion to give instruction 6.10.**

With future medical expenses awarded of $800,000, future lost wages awarded of $718,755.38, and future pain and suffering awarded of $750,000, this was clearly prejudicial reversible error, and likely would have made a difference of hundreds of thousands of dollars.

II. The trial court allowed the Plaintiff to present to the

jury the total amount of medical bills sent by the doctors and hospitals, rather than the written down amount actually paid. In other words, the total past medical bills were $189,995, and approximately $100,000 were written off, so the amount paid was approximately $90,000, or half (T 64; HML, 54). The Defendant contended the jury should only be advised as to the amount paid of $90,000, and not the total amount sent by the medical providers, namely $190,000. The court denied this and held the Plaintiff could present the entire $190,000 worth of medical bills, and the court would reduce it post-Verdict.

This is error because it was misleading to the jury, and there is an appellate case which says that the written down amount should be submitted.

This is also clearly prejudicial error because the jury uses the past medical expenses as a gauge for the award of future medical expenses. The jury awarded future medical expenses of $800,000, and it is likely that if it had known that the past medical bills paid were only half the amount, the future medical expenses awarded would likely have been half that amount, or $400,000.

Additionally, with the **reduction to present value instruction**, it would most likely have been even less than that, so this clearly was prejudicial reversible error.

III. The next error was that the Plaintiff planned to present as evidence an unauthenticated printout from a government website to show the amount of retirement he would have been

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entitled to if he had completed 20 years of military service. At the time of the accident, he had 13 years of military service, and wanted to prove at trial that if he had not had the accident he would have completed 20 years, and to use this website to show the amount he would have been entitled to.

It should be specifically pointed out the website specifically states that the data should not be relied on, (this is quoted in the Argument section) and the website itself is in the Appendix at (A, 5-14).

The Defendant objected that it was an unauthenticated website, that the website said that it was not to be relied on; and further that there was no one to cross-examine on this, but the court held that it could be introduced as evidence.

This was clearly error since it was an unauthenticated website, and in fact, the website said it was not to be relied on. There are several factors which can effect retirement, and if someone were present to testify he could be cross-examined on this and this was clearly error.

IV. The next error was that the Defendant himself created a spreadsheet to show the jury his damages. The Plaintiff was not an economist or an accountant, and did not have any experience in calculating future medical costs or other costs, and this was objected to, but the court allowed it, which was error.

Even more substantial was the fact that when the Plaintiff testified concerning his spreadsheet at the deposition, there were errors in it, such as the calculations were based on

receiving his retirement after 20 years, although it would only receive it when he would turn 60. By the time of trial the Plaintiff changed his spreadsheet to reflect he would only receive it when he was 60 years old.

The Defendant wanted to impeach the Plaintiff with this evidence to show the lack of reliability of the spreadsheet, since the Plaintiff was not an accountant or economist and made this blatant error, but the trial court would not allow this in. This also was reversible error, to not allow this impeachment.

In view of the multiple prejudicial errors at trial, and the excessive Verdict of $3.99 million dollars, this clearly should be reversed for a New Trial or Remittitur.

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ARGUMENT

I. THE COURT ERRED IN FAILING TO GIVE FLORIDA STANDARD JURY INSTRUCTION 6.10 and VERDICT FORM 8.1, INSTRUCTING THE JURY TO REDUCE FUTURE DAMAGES TO PRESENT VALUE, AND THIS CASE SHOULD BE REVERSED FOR A NEW TRIAL OR REMITTITUR.

Standard of Review

The appropriate Standard of Review applied to a trial court's denial of a Motion for New Trial is whether the trial court abused its discretion. Campbell v. Griffith, 971 So. 2d 232, 235 (Fla. 2nd DCA 2008).

The Law

At trial, counsel for the defense repeatedly requested Jury Instruction 6.10 and Verdict Form 8.1c. The court continually overruled the objections, and refused to give these. **There are numerous Florida cases which hold that the failure to give Florida Jury Instruction 6.1 when properly preserved, is reversible error. These instructions read as follows:**

> **6.10 REDUCTION OF DAMAGES TO PRESENT VALUE**
>
> Any amount of damages which you allow for [future medical expenses], [loss of ability to earn money in the future], [or] (describe any other future economic loss which is subject to reduction to present value)] should be reduced to its present money value [and only the present money value of these future economic damages should be included in your verdict][and both the amount of such future economic damages and their present money value should be stated in your verdict].

The present money value of future economic damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate (claimant) for these losses as they are actually experienced in future years.

* * * * *

8.1c

If you find for (defendant), you need not proceed further except to sign and return your verdict. By answering the following questions you will determine the damages if any that (name claimant or claimants) sustained as a result of the incident in question. [In determining the amount of damages, do not make any reduction because of the negligence, if any, or (name). If you find that (name) was to any extent negligent, the court in entering judgment will make an appropriate reduction in the damages awarded.]

* * * * *

2. What is the present money value of any damages to be sustained by (named claimant) in the future,

[a. for medical expenses? $_____

]

[b. for lost earning ability? $_____

]

The most recent case on point is Milton v. Reyes, 22 So. 3d 624 (Fla. 3d DCA 2009), in which it was held that a failure to give Jury Instruction 6.1, instructing the jury on reduction of future economic damages to present money value, required a new trial. In Milton, the court made it clear that this was reversible error and required a new trial on damages:

On the points of error asserted by International Club, we find merit only on the

> **single point, conceded by Reyes, that the trial court erred in failing to give Florida Standard Jury Instruction 6.10, which instructs the jury to reduce the award of future economic damages to present money value.** *See Seaboard Coast Line R.R. Co. v. Burdi*, 427 So. 2d 1048, 1050 (Fla. 3rd DCA 1983). Accordingly, we reverse this case solely for the purpose of retrial of the jury's award of damages for future medical expenses. *See e.g., Sanchez v. Hernandez*, 971 So.2d 944, 946 (Fla. 3d DCA 2007) (ordering new trial only as to the issue of past and future economic damages); *Bradshaw v. State Farm Auto Ins. Co.*, 714 So.2d 620, 623 (Fla. 5th DCA 1998)(reversing and remanding for new trial solely on the element of the wife's entitlement to loss of consortium damages)(Emphasis added).
>
> Milton, 624-625.

Another case which unequivocally holds that failure to give Jury Instruction 6.1 is reversible error, is Seaboard Coastline Railroad Company v. Burdi, 427 So. 2d 1048 (Fla. 3rd DCA 1983). In Burdi, following a trial in which there was approximately $10,000 in medical bills and lost wages, the trial court instructed the jury to reduce future medical expenses and lost earning capacity to present value. Afterwards, in a Motion for New Trial, the trial court determined that since there had been no expert evidence on the issue of damages and inflation, and reduction to present value, it erred by giving the instruction and granted a new trial.

On appeal, the Third District Court of Appeal reversed the Order Granting a New Trial, holding that it would have been error for the court not to give the instruction:

Because the defendant had not introduced expert evidence on the issue at the trial, the trial court also found that it had erroneously instructed the jury and permitted the Seaboard to argue that, as stated in Standard Jury Instruction 6.10, the plaintiff could recover only the present money value of his future medical expenses and loss of earning capacity. Again, we disagree. Even if, as it should not, the fact that neither the charge nor the argument was objected to below may be overlooked, see *Bishop v. Watson*, 367 So.2d 1073 (Fla. 3rd DCA 1979), **we find that this conclusion was wrong on the merits. There is no question that SJI 6.10 correctly represented the law of Florida. *Braddock v. Seaboard Air Line R. Co.*, 80 So.2d 662 (Fla. 1955). In fact, it would have been reversible error if the charge had not been given.** *DuPuis v. Heider*, 113 Fla. 679, 152 So.2d 659 (1934); *Norman v. Mullin*, 249 So.2d 733 (Fla. 3d DCA 1971). Furthermore, although such evidence is indeed admissible at the behest of either party, Annot. Damages - Testing by Actuary, 79 A.L.R.2d 275 (1961); see *City of Tallahassee v. Ashmore*, 158 Fla. 73, 27 So.2d 660 (1946), it is not, contrary to the ruling below, a prerequisite to the instruction that the defendant introduce sworn testimony as to the mathematical manner in which reduction to present money value is calculated. *Pennsylvania R. Co. V. McKinley*, 288 F.2d 262 (6th Cir. 1961); *Andrews v. Gulfstream Ventures, Inc.*, 411 So.2d 1336 (Fla. 4th DCA 1982), rev. denied, 419 So.2d 1195 (Fla. 1982); cf. *Haddigan v. Harkins*, 441 F.2d 844 (3d Cir. 1970)(failure of *plaintiff* to introduce such evidence results in reversal on defendant's appeal). Not only is there apparently no reported decision to the contrary of this proposition, we are convinced, viewing the matter independently, that it represents a sound rule. Jurors, as persons of common experience, know generally that one needs to invest less than a dollar today to insure the return of a dollar in the future, so that expert testimony, while helpful, may hardly be considered indispensable to a consideration of the question. See 31 Am.Jur.2d, Expert and Opinion Evidence,

§ 19 (1967). **Moreover, it is the plaintiff whose right vel non to recover for future monetary losses is limited by the reduction requirement.** See, *Braddock v. Seaboard Air Line R. Co., supra; Haddigan v. Harkins, supra.* In the light of both of these factors, we find no warrant whatever for imposing a burden of presenting such testimony upon the defendant.

Burdi, 1050.

In Norman v. Mullin, 249 So. 2d 733 (Fla. 2nd DCA 1971), it was again held that **Florida law requires Jury Instruction 6.1, instructing the jury on reduction of present value:**

In this negligence action plaintiff-appellees were awarded a judgment against appellant which included future loss of wages, earning capacity and medical and hospitalization expenses. Although requested, the trial judge failed to charge the jury on their duty to reduce such future damages to present value. This was reversible error.

Mullin, 734.

Another case which illustrates that Florida law requires this instruction to reduce future damages to present value is Howell v. Woods, 489 So. 2d 154 (Fla. 4th DCA 1986). The court noted that, despite any counter argument, the state of the law in Florida is that future damages must be reduced to present value:

Another of appellee's arguments is that the real value of Instruction 6.10 is doubtful. He contends we do not know from history precisely how there came to be such an instruction, except that a Florida Supreme Court opinion discussed at length the law of reduction. *See Braddock v. Seaboard Air Line Railroad,* 80 So.2d 662 (Fla. 1955). Appellee observes that the jury is left to its own devices in determining the present value of the future pecuniary losses, and the result

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> is therefore often problematic. Appellee urges that such reduction should be applied only when there has been testimony on the reduced present value and opinion evidence on the future interest rates. (One wonders whether anticipated inflation rates should not also be put before the jury, if this suggestion is to be followed.) While in the abstract this rationale may have merit, it does not reflect the current law, which does require reduction to present value of stated types of future losses caused by the tort.
>
> Howell, 155.

In the present case, it is clear that **the trial court's failure to give Jury Instruction 6.10 was error, since the court's failure to do so was continually objected to and preserved for the record.**

Another case on point is Dupuis v. Heider, 152 So. 2d 659 (Fla. 1934), in which the Florida Supreme Court held that it was reversible error to fail to give the Florida Jury Instruction concerning reduction of future damages to present value:

> The charge of the court upon the matter of damages as affected by the consideration of the plaintiff's probably diminished earning capacity after reaching the age of twenty-one years, in failing to direct the jury that when it ascertained what amount of earnings the plaintiff would probably lose after attaining twenty-one years, to reduce the amount to its present value, was error. *See F.E.C. Ry. Co. v. Young*, 104 Fla. 541, 140 So. 647.
>
> * * *
>
> ...so in remanding the case for a new trial we direct the issues to be confined t o the question of contributory negligence and the damages sustained, under proper instructions

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> as to the rule of ascertaining the correct measure of damages.
>
> Dupuis, 686.

See also Seaboard Coast Line Railroad Company v. Garrison, 336 So. 2d 423 (Fla. 2nd DCA 1976):

> **Third, we note that Standard Jury Instruction 6.10 requires Reduction of Damages to Present Value, and failure to instruct the jury on this point is error.** *Norman v. Mullin*, Fla.App.2d 1971, 249 So.2d 733....
>
> Garrision, 425.

Clearly, in the present case, the trial court erred in failing to give Jury Instruction 6.10, requiring the reduction of future damages to present value. The amount of future medical expenses awarded was $800,000, and the future lost earnings awarded was $718,775.38, so this Honorable Court should reverse for a New Trial.

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II. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE FULL AMOUNT OF THE MEDICAL BILLS INTO EVIDENCE INSTEAD OF THE AMOUNTS AFTER THE INSURANCE WRITE DOWN, SO A NEW TRIAL OR REMITTITUR SHOULD BE GRANTED.

At trial, the court allowed the full amount of the Plaintiff's medical bills to be admitted into evidence, and allowed the Plaintiff to testify about the full amount of his medical bills, despite the fact that he had insurance, and that these bills had been written down to a much smaller contracted rate so that he was never liable for a large portion of the bills.

Counsel for the defense moved in limine to exclude the full amount of the bills and allow only the written down amounts into evidence and repeatedly objected to the introduction of the full pre-write down amounts (HML, 54; 64). However, the court denied the Motion in Limine and the objections, and allowed the full amount into evidence. This is prejudicial to the Defendant since the inflated number gives the false impression to the jurors that the damages were greater than they were. **This additionally affects the future damages award since jurors consider the amount of past medicals as a guide to award future medical damages, in proportion to past medical amounts.**

A case on point which holds that it is error to allow admission of the excess amount of medical bills which was discharged for which the patient was never actually liable is Thyssenkrupp Elevator Corporation v. Lasky, 868 So. 2d 547 (Fla.

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4th DCA 2003). In Thyssenkrupp, the plaintiff was awarded $269,000 in damages, which included past medical expenses. The amount submitted to the jury apparently had the full amount billed by the medical provider, even though the medical provider had accepted a reduced amount as payment by Medicare. The defendant moved to reduce the award of medical expenses pursuant to Fla. Stat. § 768.76(1), concerning collateral sources and the trial court refused.

The defendant appealed and the Court of Appeal reversed holding that admitting the full amount of the bills into evidence provided an undeserved windfall to the plaintiff, and was contrary to public policy:

> ...It would also be contrary to the public purpose of reducing health care costs to allow inflated damage recoveries to stand without reduction. We therefore conclude that defendant is entitled to have the past medical expenses awarded by the jury reduced-to the extent such amounts are actually included in the past medical expenses awarded-by the difference between the amounts charged by a provider and the amounts actually paid that provider by Medicare.
>
> Thyssenkrupp, 551.

On Rehearing, the Fourth District Court of Appeal further explained that this is an evidentiary issue concerning the relevancy of the full amounts billed and that the original charge should not be admitted into evidence:

> Thus our actual holding should be understood as an evidentiary ruling. When a provider charges for medical service or products and later accepts a lesser sum in full

> satisfaction by Medicare, the original charge becomes irrelevant because it does not tend to prove that the claimant has suffered any loss by reason of the charge.
>
> Thyssenkrupp, 551.

This is exactly on point with the present case since the Plaintiff had insurance at all times relevant, and therefore, was never liable for the full amount of the original bills submitted. Just as in the situation with Medicare and medical providers, the insurer also had a contracted rate of service with the medical provider and received a write down to the original bill prior to paying any of it. The only amount that should have been admitted into evidence was the amount that the insurer actually paid, and not the original charge billed. The trial court's failure to exclude the original charge resulted in a windfall to the Plaintiff. The ruling below must be reversed.

In the Florida Supreme Court case of Goble v. Frohman, 901 So. 2d 830 (Fla. 2nd DCA 2005), it was also held that a Claimant was not entitled to recover the amount billed by the medical provider, but only the amount actually paid by the insurer. In Goble, the plaintiff was driving a motorcycle when he was struck by the defendant. At trial, the plaintiff was allowed to admit the full amount of the medical bills which were charged, and he was awarded the full amount of approximately $575,000. The plaintiff had health insurance through Aetna and pursuant to Aetna's fee schedules, the providers were paid approximately $146,000 for medical services rendered and the excess was

discharged. The defendant moved to reduce the amount of past medical expenses awarded, so that the plaintiff would not receive a windfall. The trial court granted the reduction and the Second District Court of Appeal agreed.

The Florida Supreme court affirmed the ruling holding that a plaintiff is only entitled to recover that amount which was actually paid:

> ...In this case, the discounts negotiated by Goble's HMO fully discharged Goble's obligation to his medical providers. Because of the medical providers' contracts with Goble's HMO, Goble was obligation to pay the claimants $145,970.76, rather than the billed charges of $574,554.31. In this light, the discounts negotiated by Goble's HMO remittance of $145,970.76 to satisfy the remaining charges on Goble's medical bills. The contractual discounts, therefore, constitute "amounts which have been paid for the benefit of the claimant, from [a] collateral source [ ]." Therefore, under Section 768.76, the amount of the contractual discount, for which no right of reimbursement or subrogation exists, is an amount that should be set off against an award of compensatory damages.
>
> Goble, 833.

Another case which upholds the rule of law set forth in Thyssenkrupp that a claimant is only entitled to admit into evidence the actual amount paid to the medical providers and not the amount billed, is Cooperative Leasing, Inc. V. Johnson, 872 So. 2d 956 (Fla. 2nd DCA 2004). In Cooperative Leasing, the plaintiff was struck by the defendant's automobile, and filed suit. Her medical provider billed approximately $57,000 and PIP paid $15,000. Medicare paid approximately $13,000 in full

satisfaction of the remaining amount of medical services. Prior to trial, the defendant moved in limine to prevent the plaintiff from introducing into evidence the full amount of her medical bills, and sought to limit the amount introduced to the $13,000 paid by Medicare because she had never become liable for the excess. The trial court allowed in the full amount of her medical bills and the defendant appealed.

The Court of Appeal first noted that introduction of the full amount of bills was not consistent with the concept of compensatory damages:

> ...the objection of compensatory damages is to make the injured party whole to the extent that it is possible to measure his injury in terms of money. *Mercury Motors Express, Inc. V. Smith*, 393 So.2d 545, 547 (Fla. 1981). "[T]he primary basis for an award of damages is compensation." *Fisher v. City of Miami*, 172 So.2d 455, 457 (Fla.1965). In this case, Johnson sought to collect the 'additional value of medical services reasonably made necessary' by the appellants. We conclude, however, that Johnson was not entitled to recover for medical expenses beyond those paid by Medicare because she never had any liability for those expenses and would have been made whole by an award limited to the amount that Medicare paid to her medical providers.
>
> Cooperative Leasing, 958.

It was also held that the plaintiff should never have been allowed to introduce the full amount of the charges into evidence:

> ...The trial court should have granted the appellants' motion in limine and prohibited

> Johnson from introducing the full amount of her medical bills into evidence.
>
> Cooperative Leasing, 958.

This is also the holding in Boyd v. Nationwide Mutual Fire Insurance, 890 So. 2d 1240 (Fla. 4th DCA 2005):

> First, Boyd claims that the court erred in limiting the evidence regarding medical bills paid by Medicare to the amounts actually recovered by the medical providers pursuant to the Medicare fee schedule. However, this issue was decided adversely to Boyd's position in *Thyssenkrupp Elevator Corp. v. Lasky*, 868 So.2d 547 (Fla. 4th DCA 2003), as clarified on denial of rehearing by 868 So.2d at 550 (Fla. 4th DCA, March 10, 2004), in which we held that evidence of the contractual discount by Medicare providers should be excluded from trial. Thus, Boyd's contention is without merit.
>
> Boyd, 1241.

See also, Miami-Dade County v. Laureiro, 894 So. 2d 268 (Fla. 3rd DCA 2004)(reversing because the verdict included amounts for medical bills beyond those actually paid by Medicare); Horton v. Channing, 698 So. 2d 865 (Fla. 1st DCA 1997)(holding, in a wrongful death action, that the amount of economic damages should be reduced to reflect the amounts paid by the plaintiff's insurers); Dourado v. Ford Motor Company, 843 So. 2d 913 (Fla. 4th DCA 2003)(holding, in a wrongful death action, that it was error to admit evidence of medical expenses not charged against the estate or paid by or on behalf of the decedent, as proof of economic loss).

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In the present case, it was error to admit the full amount of medical bills submitted to the Plaintiff since the Plaintiff was never liable for the full charges, but only the reduced amount paid by his insurer. This is compounded by the fact that the court did not give the **"reduction to present value"** jury instruction as previously discussed. Furthermore, to the extent that the **jury weighed the amount of medical expenses in determining future medicals and, pain and suffering,** it gave the impression of much greater damage to the plaintiff, which likely inflated the future medical expenses and, pain and suffering, awards. It was error for the trial court to deny the Motion for New Trial, and Motion for Remittitur, and the ruling below should be reversed.

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III. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING INADMISSIBLE HEARSAY NOT SUBJECT TO CROSS-EXAMINATION, WHICH WAS REVERSIBLE ERROR AS THIS WAS THE PLAINTIFF'S ONLY OBJECTIVE EVIDENCE OF ANY LOST FUTURE EARNINGS. A NEW TRIAL OR REMITTITUR MUST BE GRANTED.

At trial, the Plaintiff relied upon hearsay documents to show past and future damages. **The Plaintiff was allowed to enter into evidence unauthenticated printouts from government websites to prove the amount of retirement he would have been entitled to,** if he had been able to complete 20 years of service. There was no testimony by anyone other than Darragh that these numbers would, in fact, have applied to him. The admission of these hearsay documents was error.

This evidence was also highly prejudicial to the defense. The trial court's admission of the evidence denied the defense the opportunity to confront the author and to cross-examine him or her regarding the evidence presented on the Plaintiff's claim for future lost earnings. It was clearly prejudicial reversible error.

At trial, the Plaintiff argued that since these were government website print-offs, they were self-authenticating and did not require a person with knowledge to testify about them. However, this is contrary to Florida law. There is no way to determine the accuracy of the information or if the information applies to the Plaintiff. In fact, **the website specifically states, as argued to the trial judge, that the data should not be**

relied upon:

> **High-3 Retirement Calculator Output**
>
> These results are based on your assumptions. The future will differ from these assumptions and actual results will differ correspondingly. Remember these results are not guaranteed; they are merely estimates. This point cannot be emphasized too heavily - there is no guarantee that the assumptions will all prove correct. This is why you should "play" with the assumptions.
>
> The intent of this analysis is to help you to make a fairly simple and direct estimate of the financial flow resulting from your retirement and be able to investigate some of the basic factors that influence the results. The actual results will depend on what happens in the economy and your career decisions.
>
> (A, 6).

A case which holds that even websites of government entities require authentication, and without such testimony is inadmissible hearsay, is Campbell v. State, 949 So. 2d 1093 (Fla. 3rd DCA 2007). In Campbell, a career criminal was convicted of attempted robbery and burglary with an assault and battery. At the sentencing hearing, the State sought to have the defendant classified as a violent career criminal. Under the statute, the State had to establish that the primary felony offense for which the defendant was to be sentenced was committed within 5 years after the defendant's release from prison. **At the sentencing hearing, the State offered a paper print-out of the Florida Department of Corrections' website, relating to the defendant.** The website showed the defendant to have been released on July 9,

1999, which was within 5 years of the current offense. The State maintained that this showed the defendant was released from prison within 5 years of his felony. The defense objected to the printout, saying that is was hearsay and not self-authenticating, which the court overruled and adjudicated the defendant to be a violent career criminal.

The Court of Appeal reversed, holding that the government document was hearsay and required authentication:

> We conclude that the hearsay objection to the printout should have been sustained. The First District has said:
>
> "Computer printouts, like business records, are admissible *if* the custodian or other qualified witness is available to testify as to manner of preparation, reliability and trustworthiness of the product." *Cofiled v. State*, 474 So.2d 849, 851 (Fla. 1st DCA 1985) (adopting rule as stated in *Pickrell v. State*, 301 So.2d 473, 474 (Fla. 2nd DCA 1974); see *Desue v. State*, 908 So.2d 1116 (Fla. 1st DCA 2005). In appropriate circumstances, a printout may also be admissible as a properly certified copy of an official public record. *See* § 90.902(4), Fla. Stat. (2003); *Charles W. Ehrhardt, Florida Evidence* § 902.5, at 945 (2004 ed.) (Explaining that to be self-authenticating under section 90.902(4), "the custodian of the document, or other person authorized by statute to make a certification, must certify that the copy is correct and that the person has custody of the original.... The custodian's signature must follow the statement"). *Compare King v. State*, 590 So.2d 1032, 1033 (Fla. 1st DCA 1991)(holding probation officer's testimony regarding defendant's release date, based on an unauthenticated Department of Corrections computer printout, was inadmissible hearsay, and that "[w]ithout the improperly admitted testimony, the evidence is legally insufficient to support the trial court's

finding that appellant is an habitual felony offender").

Campbell, 1094.

Here, the printouts were unauthenticated and there was absolutely no testimony by anyone qualified to testify about the retirement benefits to authenticate the documents, or further link them to the Plaintiff. Furthermore, the documents should have been precluded by Fla. Stat. § 90.403, since the prejudice caused by allowing the unauthenticated documents without testimony linking them to the Plaintiff was unduly prejudicial.

This Honorable Court should reverse the Order Denying the Motion for New Trial.

This is also the holding of Whitley v. State, 1 So. 3d 414 (Fla. 1st DCA 2009), which holds that printouts from government websites are inadmissible hearsay without further authentication. In Whitley, the State sought to show the defendant was a prison release re-offender and admitted into evidence the Department of Corrections website, showing the defendant's release date from the correctional facility. The trial court overruled the plaintiff's objections to the printout, coming in and the Court of Appeal reversed, holding that it was error to allow the unauthenticated website document into evidence without the testimony of custodian or other qualified witnesses.

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IV. THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE PLAINTIFF WHO WAS NOT AN ACCOUNTANT OR ECONOMIST TO TESTIFY FROM HIS SPREADSHEET CONCERNING FUTURE DAMAGES, AND NOT ALLOWING THE DEFENDANT TO IMPEACH THE PLAINTIFF WITH HIS DEPOSITION TESTIMONY CONCERNING THE CHANGES TO THE SPREADSHEET HE CREATED, WITH HIS INCONSISTENT TESTIMONY FROM HIS DEPOSITION, AND A NEW TRIAL OR REMITTITUR SHOULD BE GRANTED.

At trial, the trial court allowed the Plaintiff to testify off a spreadsheet which he had created, to show his damages including his past medical expenses, future medical expenses, and lost earnings. **Additionally, the numbers he testified to were different than the numbers he had testified about during deposition, and the Defendant sought to impeach the Plaintiff based upon the disparity in his testimonies. The trial court refused to allow the Defendant to impeach the Plaintiff about the numbers he had in his spreadsheet in his Deposition, and this was error.**

It was error to allow the Plaintiff to use his damage spreadsheet into evidence because its probative value was outweighed by the prejudice, specifically undue influence.

Under Fla. Stat. § 90.403, evidence must be excluded if it is misleading or results in unfair prejudice:

> "Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence."

In the present case, the spreadsheet was created by the

Plaintiff to show his damages. The Plaintiff is not an accountant, and does not have any experience in calculating future medical costs or future lost wages, and further did not reduce this to present value. By the court allowing him to admit his spreadsheet into evidence, the Defendant was prejudiced because of the likelihood that the jury gave unfair weight to it. The admission of the document was error.

At trial, the Defendant sought to impeach the Plaintiff with testimony from his deposition concerning the numbers he included on his spreadsheet, which had changed between the time of deposition and the time of trial. However, the court ruled that the Defendant could not impeach the Plaintiff with this testimony at his deposition. This was absolutely error and requires reversal.

The chart which the Plaintiff relied upon at deposition sought to show the amount of benefits someone retiring in 2011 from the military would receive until the end of life. However, this was erroneous because the Claimant would not be entitled to receive benefits until he turned 60 years old. The erroneous calculation that he had made, based upon the chart in his deposition, that he would receive significantly more than he would actually be entitled to.

Counsel for the Defendant brought this to the attention of the Plaintiff prior to trial, and the Defendant subsequently corrected the error. At trial, the Defendant sought to impeach him using his deposition testimony concerning the old chart. The

Plaintiff objected at (T 614), and the court ruled that the Defendant could not impeach the Plaintiff with his testimony at (T 625-626). The ability to impeach the Plaintiff was important since the Plaintiff was allowed to submit his spreadsheet to the jury in evidence, showing the amount of damages he had suffered, including the lost future earnings. The Defendant should have been allowed to impeach him about his erroneous previous calculations that he offered in his deposition, so that the jury could weight the credibility of his calculations when awarding damages.

A case on point that holds it is error for the trial court to refuse to allow impeachment from deposition testimony, is Annis v. First Union National bank of Florida, 566 So. 2d 273 (Fla. 1st DCA 1990).

In Annis, the plaintiff brought suit following a collision at an intersection between two vehicles. The plaintiff's theory of the case was that the defendant's employer had negligently driven into the intersection causing the defendant to swerve into oncoming traffic, hitting the plaintiff. At trial, the defendant's employer testified that the co-defendant's vehicle was 240 feet north of the intersection as he began to drive his vehicle from a parking lot onto a street. The plaintiff sought to introduce a portion of his pre-trial deposition, in which he said he was uncertain as to where the co-defendant's vehicle was before entering the intersection.

The court refused to allow the plaintiff to impeach the

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defendant with his own deposition testimony. After an unfavorable verdict, the plaintiff appealed, arguing that he should have been allowed to impeach the defendant. The Court of Appeal agreed holding that the impeachment evidence should have been allowed:

> ...The type of impeachment evidence introduced here, evidence that prior statements of an adverse witness are inconsistent with his in-court testimony, is probably the most common form of impeachment evidence. See Section 90.608(2)(a), Florida Statutes (1989).
>
> ...Because the excluded deposition testimony was relevant impeachment evidence going to the issue of the credibility of trial testimony on a question central to the issue of liability, we find the trial court's exclusion of the evidence to be reversible error. Consequently, we reverse the final judgment and remand for a new trial.
>
> Annis, 275.

Scheel v. Metropolitan Dade County, 353 So. 2d 650 (Fla. 3rd DCA 1977), also holds that a party is entitled to impeach another party with deposition testimony which is inconsistent with the testimony given at trial:

> We disagreed, and affirm. First, it was valid use of a deposition for impeachment purposes, the witness having given a different answer than that which he gave on an earlier deposition. *Adams v. State*, 54 Fla. 1, 45 So. 494 (1907); *Cunningham v. State*, 239 So.2d 21 (Fla. 1st DCA 1970); *Robinson v. State*, 254 So.2d 379 (Fla. 3rd DCA 1971); *State v. Young*, 283 So.2d 58 (Fla. 1st DCA 1973); *Fireman's Fund Insurance Company v. Riley*, 294 So.2d 59 (Fla. 3rd DCA 1974); *Crespo v. State*, 344 So.2d 501 (Fla. 3rd DCA 1977); *United States v. Rodriguez-*

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> *Hernandez*, 493 F.2d 168 (5th Cir. 1974), cert. denied 422 U.S. 1056, 95 S.Ct. 2678, 45 L.Ed.2d 708. Second, after the witness denied that he had ever been convicted of a crime, counsel was justified in refreshing his memory from the deposition as to the robbery conviction and, further, he was justified in demonstrating that the witness had been convicted of crimes other than the robbery conviction.
>
> Scheel, 651.

This is also a holding in Gidney Auto Sales v. Cutchins, 97 So. 2d 145 (Fla. 3rd DCA 1957):

> ...Clearly any different or inconsistent prior statements in the deposition were admissible, and the other parts, which were not prior inconsistent statements, if they could be harmful, were not shown to be so.
>
> Cutchins, 147.

In the present case, it was error for the trial court to refuse to allow impeachment with the deposition testimony which was inconsistent with the testimony given at trial. It would have been significant for the defendant to impeach him with this testimony, so that the jury could see that Darragh, who is not qualified in performing such calculations, had already erred once in performing his calculations and, therefore, may have been in error in other calculations. It is crucial to his credibility and the validity of his calculations and, therefore, impeachment should have been allowed. The ruling below must be reversed.

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V. THE JURY VERDICT OF $3.99 MILLION WAS EXCESSIVE, AND ESPECIALLY WITH NO MULTIPLE ERRORS AT TRIAL A NEW TRIAL OR REMITTITUR SHOULD BE GRANTED.

The Verdict of $3.99 million was excessive, and with the multiple errors at trial a New Trial or Remittitur should be granted.

Review of the appropriateness of the amount of damages in an automobile collision case is no longer one simply for the application of certain common law principles. In 1977, the Florida Legislature enacted § 768.043, Fla. Stat. (1993), which calls for remittitur or additur in causes arising out of operation of motor vehicles. The statute sets forth certain criteria to be considered by the trial court in determining whether an award is clearly excessive and improper:

> (a) Whether the amount awarded is indicative of prejudice, passion, or corruption on the part of the trier of fact.
>
> (b) Whether it clearly appears that the trier of fact ignored the evidence in reaching the verdict or misconceived the merits of the case relating to the amounts of damages recoverable.
>
> (c) Whether the trier of fact took improper elements of damages into account or arrived at the amount of damages by speculation or conjecture.
>
> (d) Whether the amount awarded bears a reasonable relation to the amount of damages proved and the injury suffered.
>
> (e) Whether the amount awarded is supported by the evidence and is such that it could be adduced in a logical manner by reasonable persons.

A remittitur or new trial should be ordered where it appears the amount of damages was the result of prejudice, speculation or conjecture, where the amount does not bear a reasonable relationship to the damages proved, and where the amount is not supported by the evidence so that it could not be adduced in a logical manner by reasonable persons. See § 768.043(2)(c), (d), and (e). All of those criteria were met in this case.

It is also established law in Florida, that while a jury may be afforded latitude in awarding damages in an action for personal injuries, the jury's discretion is not unbridled and relief must be granted to a defendant where the verdict is simply not supported by the evidence. Aylesworth v. London, 119 So. 2d 816, 818 (Fla. 2d DCA 1960). It is also well established that in determining whether a damage award must be reversed, because a trial judge abused his discretion, that determination is based on the appellate court's examination of the record. Baptist Memorial Hospital, Inc. v. Bell, 384 So. 2d 145 (Fla. 1980); Cloud v. Fallis, 110 So. 2d 669, 673 (Fla. 1959); Staib v. Ferrari, Inc., 391 So. 2d 295 (Fla. 3d DCA 1980); Westbrook v. All Points, Incorporated, 384 So. 2d 973, 974 (Fla. 3d DCA 1980); Salazar v. Santos (Harry) & Co., Inc., 537 So. 2d 1048, 1050 (Fla. 3d DCA 1989).

Because of the multiple prejudicial errors at trial, the trial court's denial of the Motion for New Trial and Remittitur should be reversed.

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CONCLUSION

There were multiple errors in this trial, and the Verdict of almost $4 million should be reversed for a New Trial or Remittitur.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 22nd day of February, 2011 to:

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CERTIFICATION OF TYPE

It is hereby certified that the size and type used in this Brief is 12 point Courier, a font that is not proportionately spaced.

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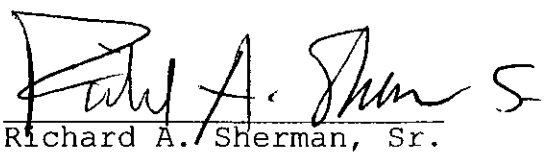
By: 
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RAS/ag/mn

INDEX TO APPELLANT'S APPENDIX