IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF FLORIDA

CASE NO. 5D10-3188

Florida Bar No. 184170

MARK W. DARRAGH,

Appellee,

v.

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, a foreign corporation,

Appellant.

REPLY BRIEF OF APPELLANT
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY

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REFERENCES

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Summary of Reply Argument

The Appellee's argument is so specious it is submitted it is a concession that the rulings were wrong. The Plaintiff's arguments and the response to the arguments are:

I. **Reduction Instruction:** The Plaintiff argues the judge ruled correctly in not giving the Standard Jury Instruction on Reduction to Present Value, **by arguing that the Legislature changed a statute in 1999; and the pre-1999 cases which held it is reversible error not to give the instruction are no longer valid.**

This is purely a gratuitous and **inaccurate argument.** No case has held this; and to the contrary a **2009 case has again held it is reversible error not to give the instruction.** Milton, infra. Further, the **Florida Supreme Court** continues to have the reduction instruction as a **required Standard Jury Instruction.** In fact, the Supreme court has modified it in a minor fashion, and the fact that the Supreme Court has kept the Reduction Instruction shows the **Supreme Court is still holding it should be given.**

The bottom line is that the Supreme Court is the authority which determines procedural matters including jury instructions, so it clearly was reversible error not to give the required Standard Jury Instruction, in accord with the numerous cases.

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With future economic damages of over $1.5 million, and future non-economic damages of $1.75 million, for total future damages of $3.25 million, a new trial should be granted with the correct instructions given.

II. **Gross Medical Bills:** There is a split of authority as to whether the gross amount of medical bills should be presented, or whether the written down amount paid should be presented.

Due to the conflict of Districts it is respectfully submitted **this Honorable court should certify conflict to the Florida Supreme Court.**

If this rule of law applied solely to hospital bills it would be one thing, but **since it also applies to doctors it is submitted that it is a very bad rule.** As this Honorable Court knows, and as cases have discussed, there are doctors who specialize in litigation cases, and this rule encourages the Plaintiffs to have the litigation doctors inflate their bills multi-fold in order to increase the value of the case, including future medical expenses and also the other damages; since it is well known the juries use past medical expenses as a gauge of all the damages.

III. The Plaintiff tries to skirt around the fact that it was an **unauthenticated website**, by citing various statutes which require various government offices to compile records. However, the Plaintiff missed the point that the website is for

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informational purposes only, and that it specifically says that **various assumptions can change the calculations**, so it is **unauthenticated hearsay**. For instance, the Plaintiff's calculations from the website before trial were $1.8 million, and his calculations at trial were $718,000. This underscores the error of letting a lay person Plaintiff testify as to calculations he made from a website. Further, the **website says the website should not be relied upon** and the **calculations depend on assumptions** made **(page 38 of our main brief)**.

We cite several cases which hold that it is error to introduce unauthenticated websites.

IV. **Impeachment with Deposition Testimony:** The court further erred in allowing the Defendant to impeach the Plaintiff with his testimony in deposition that his retirement would be $1.1 million more than he testified at trial. This is a standard situation where a party testifies differently in deposition and at trial, and Florida law is clear the party can be impeached, which reflects on the credibility and reliability of the testimony.

In the present case allowing impeachment with the Plaintiff's testimony at deposition that his calculations were $1.1 million more than his testimony at trial, clearly would reflect on the reliability of the calculations and/or credibility of the Plaintiff. His attorney could then seek to rehabilitate

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the Plaintiff, but this different testimony in deposition is relevant testimony which is clearly allowed.

Further, the Defendant explained to the judge what testimony he wanted to bring out, which is a legally sufficient proffer under Florida law.

The fact that the jury awarded the Plaintiff the exact amount of future lost wages he calculated, $718,000 shows this was prejudicial.

This is in addition to the fact that it **was error** to allow the Plaintiff who was **not an expert to present his own spreadsheet calculations** as if he were an expert.

REPLY ARGUMENT

The Appellee's brief is convoluted and his position is constantly shifting. This makes it difficult to respond to the Brief and therefore the Appellant will address specific points made by the Appellee individually.

Jury Instruction 6.10 and Verdict Form 8.1(c) are the Law and are Required in all Cases

The Appellant begins arguing that Jury Instruction 6.10 and Verdict Form 8.1(c) are outdated and that Nationwide only cited to old cases preexisting the amendment of Florida Statute § 768.77. However, by the end of that section of the Brief, it appears as if the Appellant suddenly realized that Milton v. Reyes, 22 So. 3d 624 (Fla. 3rd DCA 2009), which is the first case

we cited in that section of our Brief, was decided in 2009, ten years after the statute changed. **Florida caselaw** dating back to 1934 until the present has continuously held that it **is reversible error to fail to give The Florida Jury Instruction concerning reduction** of future damages to present value. This has continuously remained the law since at least 1934 when DuPuis v. Heider, 152 So. 2d 659 (Fla. 1934) was decided up through Milton in 2009.

Jury Instruction 6.10 which was in effect at the time, provided for reduction of damages to present value. The Appellee did not cite to a single case that overturned any of the cases cited to in our Initial Brief, which say it is reversible error to not give Jury Instruction 6.10. This is a clearly erroneous argument and under all caselaw this was reversible error.

Jury Instruction 6.10 Remains Virtually Unchanged Under the Revised Jury Instructions as Jury Instruction 501.7

The Appellee makes what appears to be a public policy argument against Florida Jury Instruction 6.10, saying that the statute upon which it was originally based has been amended, and therefore, the instruction is no longer valid.

He apparently thinks that when the Florida Supreme Court revised the instructions it must not have known of the statute change.

This argument completely ignores the fact that the model

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Jury Instructions were very recently revised, and the Florida Supreme Court chose to include a virtually identical instruction. Former Jury Instruction 6.10 reads 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.**

Under the Revised Jury Instructions, 501.7 is nearly identical:

501.7 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.**
>
> **The present money value of future**

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> **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.**

This clearly indicates that the Florida Supreme Court intended for the Jury Instruction to remain in effect. Without this instruction, the jury clearly did not reduce the amount to present value, so this was reversible error.

Again, there are numerous Florida cases which hold that it is reversible error for the trial court not to give the Florida Jury Instruction on reduction of damages to present value and the accompanying verdict form. See, Milton v. Reyes, 22 So. 3d 624 (Fla. 3rd DCA 2009); Seaboard Coast Line Railroad Co. v. Burdi, 427 So. 2d 1048 (Fla. 3rd DCA 1983); Norman v. Mullin, 249 So. 2d 733 (Fla. 2nd DCA 1971); Howell v. Woods, 489 So. 2d 154 (Fla. 4th DCA 1986); DuPuis v. Heider, 152 So. 2d 659 (Fla. 1934); and Seaboard Coast Line Railroad Co. v. Garrison, 336 So. 2d 423 (Fla. 2nd DCA 1976).

The Appellant requested Jury Instruction 6.10 and Verdict Form 8.1(c), and made strenuous argument in favor of them because they are the law of Florida. In accord with Florida law and the Florida Standard Jury Instructions, it was reversible error for the trial court to refuse to give Jury Instruction 6.10 and Verdict Form 8.1(c).

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Trial Court Should Have Submitted the Written Down Medical Bills

It is respectfully submitted this Honorable Court should certify conflict to the Florida Supreme Court so that trial courts will know what procedure to follow.

It is submitted the trial court erred in allowing the gross amounts of the medical bills into evidence rather than the amounts actually paid by the insurer for which the Plaintiff was only ever liable. We cited to numerous cases in our brief which hold that this is the rule of law. Thyssenkrupp Elevator Corp. v. Lasky, 868 So. 2d 547 (Fla. 4th DCA 2003); Cooperative Leasing, Inc. v. Johnson, 872 So. 2d 956 (Fla. 2nd DCA 2004); Boyd v. Nationwide Mutual Fire Insurance, 890 So. 2d 1240 (Fla. 4th DCA 2005); Miami-Dade County v. Laureiro, 894 So. 2d 268 (Fla. 3rd DCA 2004); Horton v. Channing, 698 So. 2d 865 (Fla. 1st DCA 1997); and Dourado v. Ford Motor Company, 843 So. 2d 913 (Fla. 4th DCA 2003).

The Appellee cites to Nationwide Mutual Fire Insurance Company v. Harrell, 53 So. 3d 1084 (Fla. 1st DCA 2010), which holds that the gross amount of medical bills submitted rather than the lesser amount paid by the Plaintiff's private health insurer should be admitted. Admittedly Harrell directly addresses this issue. However, it is also a First District Court of Appeal case and is therefore not binding precedent on this Court. Despite the Appellant's contentions, Goble v. Frohman,

9091 So. 2d 830 (Fla. 2005) is not directly on point because it does not address whether to introduce the gross amount of the medical bills or the amount actually paid by the insurer. However, the cases we cited to, including Thyssenkrup and Dourado are also directly on point. It was error for the court to admit the gross amount of the medical bills rather than the reduced amount that was actually paid.

This Court should **certify conflict** with the above cited cases for resolution **by the Supreme Court.**

Nationwide was Erroneously Prevented From Cross-Examining the Plaintiff on his Excell Spreadsheets Concerning his Future Lost Wages

Initially, it is important to note that the inaccuracies in the Answer Brief of the Appellee are significant. First, the Appellee states in the statement of the facts that "it was also undisputed that in 2005 the Plaintiff was involuntarily medically discharged from the military due to medical reasons solely related to his permanent back injury" (Brief of Appellee, 3). This is completely inaccurate because it was hotly contested whether the Plaintiff would have been discharged from the military regardless of his injury due to a subsequent heart attack that he suffered, which the defendant argued was unrelated to his back condition. This is evident in the Defense's Closing Argument when counsel argued that "we dispute his entitlement to future military benefits" because "...it is undisputed he had an

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unrelated acute mydio cardio enfarction." (T, 741-744). This is further evidenced at (T, 748-749), when counsel suggested that the Jury should award zero future lost wages because "the heart attack occurred before he would have reached the 20 years." Clearly, this issue was hotly disputed, which is why the admission of the government printouts and the excel spreadsheet, and the trial court's refusal to allow impeachment of Darragh on his calculations on the spreadsheet was such harmful error.

The Appellee then simultaneously argues that it was unclear what the defense sought to introduce and impeach the Plaintiff with, while also specifically addressing the issue, recognizing that **"Nationwide wanted to apparently impeach the Plaintiff with figures presented by his attorney at the hearing held a week before trial that showed his lost wages were $1.8 million, instead of $718,000"** (Brief of Appellee, 32). The side bar on this issue is in the Transcript at (T, 617-636), and clearly shows that the Defendant was attempting to impeach the Plaintiff with his prior deposition testimony and with previous versions of the excel spreadsheet, which he had created in the past. The heart of this issue is clear in the transcript at (T, 624-625):

> MR. BYRD: Right, that's what I was alluding to. In that deposition testimony, he was being asked about a chart that was produced back at the time when Answers to Interrogatories were offered. Again, it has the same flaw, in that it shows the pay he received in the retirement of 2011. But, it doesn't show —

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MR. DAVIS: That's the point.

MR. BYRD: Yes, I understand that's the point, which is why we've presented the correct chart now, with the correct calculations. If you've got a problem with the formula, if you've got a problem with his Excel Spread Sheet calculations, you attack that. But you don't attack it based upon the documents.

MR. DAVIS: I want to show prior inconsistent testimony.

MR. BYRD: It's not his testimony that's inconsistent.

MR. DAVIS: He said it.

MR. BYRD: No, he did not, he testified from a document. If the document is inconsistent, then you should have -

(T, 624-625).

The whole point was that if the Plaintiff had made errors in his assumptions and calculations previously, he could likely have made errors in his most recent version of the chart that he presented at trial. **The importance of this issue cannot be understated given that the jury awarded the exact amount requested by the Plaintiff for future lost earning capacity.**

Clearly, this impeachment was crucial because it would have allowed the Defendant to expose the previous errors of the Plaintiff in his calculations. Instead, the jury was left with the idea that the Plaintiff's calculations were flawless and unimpeachable. This was harmful reversible error.

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The Spreadsheet Should Have Been Excluded

As previously argued, this evidence should have been excluded under § 90.403 because its probative value was outweighed by its prejudicial effect. Specifically, the fact that it was put together in the form of a spreadsheet based upon calculations on the government website, which are not even meant to be relied upon, undoubtedly left the jury with the impression that this clear list of damages presented on a spreadsheet without the underlying calculations was accurate and infallible, when in fact the Plaintiff had already made one error, and he was not qualified to perform such complicated calculations. As the Appellee points out in his Brief, Florida Statute § 90.956 provides for presentation of summaries or calculations by a "qualified witness":

> Florida Statute § 90.956, entitled "Summaries" provides:
>
> When it is not convenient to examine in court the contents of voluminous writings, recording, or photographs, a party may present them in the form of a chart, summary, or calculation by calling a **qualified witness.** The party intending to use such a summary must give timely written notice of his or her intention to use the summary, proof of which shall be filed with the court, and shall make the summary and the originals or duplicates of the data from which the summary is compiled available for examination or copying, or both, by other parties at a reasonable time and place. A judge may order that they be produced in court.
>
> Fla. Stat. § 90.956.

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The Plaintiff is not qualified to calculate the uncertain future military benefits, and has no knowledge of the underlying assumptions and conditions that affect the future benefits. The Appellee's argument that he was qualified to create a spreadsheet misses the whole point. It was not his ability to generate the spreadsheet, but to calculate the data included in it that was objectionable. Furthermore, the statute provides for the submission of "originals or duplicates to the opposing party for examination." This clearly anticipates that the opposing party will be allowed to examine these materials and cross-examine the compiler of these summaries and calculations on the assumptions underlying them. However, in the present case the Defendant was prevented from cross-examining or impeaching the Plaintiff on his assumptions and previous errors. This prejudiced the Defendant so a new trial is required.

The Military Website Printoffs Should Not Have Been Admitted Into Evidence

Despite the Appellee's contentions, the website printoffs should not have been admitted into evidence because: 1) they were not authenticated; 2) the author of the website was not subject to cross-examination as to its current correctness or its applicability to the Plaintiff; and 3) the printoffs specifically state that the calculations are assumptions and should not be relied upon. The printoffs are in the Appendix attached to the

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Initial Brief and state that they are merely assumptions and should not be relied upon:

> Retirement discusses the various retirement systems currently in effect. In addition to explaining the rules regarding Final Pay, High-3 Year Average, and CSB/REDUX for active duty, calculators are available to demonstrate the **potential** income stream from these retirement systems and to assist those allowed to choose between High-3 and CSB/REDUX.
>
> (Appendix, 8)
>
> * * *
>
> 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 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.**
>
> (Appendix, 10)
>
> * * *
>
> These results were based on your choices and assumptions. **The future will differ** from these assumptions and actual 40 year projection table.
>
> (Appendix, 11-12).

These tables were not meant to be fully relied upon and are not conclusive. Furthermore, the fact that they state that the

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information can change depending on the economy and career decisions indicates that these numbers may be far off base given the huge changes in the economy over the last few years.

This would certainly have been a significant issue for cross-examination of someone with knowledge of the retirement pay system and how such events as a sustained economic downturn or government cuts could affect the retirement benefits.

Instead, the Plaintiff was allowed to imagine his own future lost wages without any reference to the factors that affect the calculations. Clearly, the Defendant was prejudiced by the admission of this unauthenticated hearsay, without any opportunity to cross-examine the person who created this website or compiled the information included on it.

We cite several cases in our main Brief which hold it is error to allow into evidence unauthenticated websites. Campbell v. State, 949 So. 2d 1093 (Fla. 3rd DCA 2007); Whitley v. State, 1 So. 3d 414 (Fla. 1st DCA 2009); Cofiled v. State, 474 So. 2d 849 (Fla. 1st DCA 1985); and King v. State, 590 So. 2d 1032 (Fla. 1st DCA 1991).

CONCLUSION

The Appellant is entitled to a new trial based upon the numerous evidentiary errors that occurred below.

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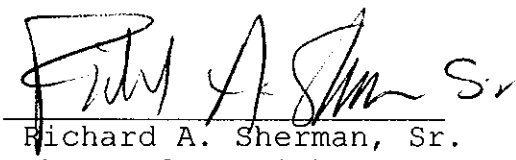
By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 28th day of November, 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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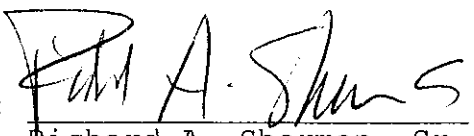
By: 
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