IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CASE NO. 1D09-5733

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,

Appellant,

v.

L.T. Case No. 16-2008-CA-014323

SHEILA W. HARRELL,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Plaintiff/Appellee, Sheila Harrell (the "Plaintiff"), accepts the statement of the case and facts set forth in the Initial Brief of Appellant, with the following additions:

First, Plaintiff notes that Dr. Von Thron, the expert witness called by Defendant/Appellant, Nationwide Mutual Fire Insurance Company (the "Insurer"), testified on cross-examination that he would "expect" the Plaintiff to "probably need some ongoing treatment" for pain. (T-II-296.)

Next, Plaintiff seeks to clarify the form of the verdict, and the trial court's instructions related to the verdict. (*See* Initial Brief of Appellant ("Init. Br."), at 22.) The verdict required the jury first to find whether the motor vehicle accident caused injury or damage to Sheila Harrell. (R-V-668.) If the jury answered the first question "yes," the form of the verdict required the jury to determine "the total amount of recoverable damages for medical bills incurred in the past and reasonably certain to be incurred in the future." (R-V-668-69.) Only if the jury found that the Plaintiff had sustained "a permanent injury or permanent aggravation of a pre-existing condition" could it award damages to the Plaintiff for pain and suffering, disability or physical impairment, mental anguish, and loss of capacity for the enjoyment of life. (R-V-669; T-II-378.)

The jury found that the accident caused injury or damage to the Plaintiff and awarded damages for the Plaintiff's past and future medical expenses. (R-V-668.) The jury did not find that the Plaintiff sustained a permanent injury. (R-V-669.) The Insurer did not ever object to the jury's verdict as inconsistent or otherwise request that the jury reconsider its verdict at any time before the jury was discharged. (T-II-382-86.)

The Insurer moved for a new trial, arguing that the verdict was against the manifest weight of the evidence. (R-V-686.) The Insurer also moved for remittitur, arguing that the award of future medical expenses "was excessive in that it was the full amount requested by the plaintiff and the jury found no permanent injury as a result of the subject accident." (R-V-688.)

Plaintiff filed a memorandum of law in opposition to the Insurer's motion for new trial and for remittitur. (R-V-693-99.) In the memorandum of law, Plaintiff relied on *Auto-Owners Insurance Co. v. Tompkins*, in which the Florida Supreme Court ruled that a permanent injury is not prerequisite for an award of future economic damages. 651 So. 2d 89, 91 (Fla. 1995). (R-V-698.) Plaintiff also argued that the Insurer did not ask the trial court to take any action to cure a potentially inconsistent verdict. (R-V-698.)

The trial court heard the Insurer's post-trial motions on October 7, 2009. (Supp. R-1-11.) Counsel for the Insurer stated that "the motions speak for

themselves." (*Id.* at 4.) Aside from briefly attempting to reargue the trial court's ruling on the motion *in limine* (on the question of the past medical bills), counsel for the Insurer did not raise any additional argument in support of its motions for new trial and for remittitur. (*Id.* at 4-5.)

The trial court declined to change its prior ruling on the motion *in limine*. (*Id.* at 4.) The trial court noted that the jury's verdict was "interesting" because the jury awarded "all the medicals asked for, but did not find a permanent injury." (*Id.* at 5.) The trial court continued:

> At first blush, I thought that might be an inherently contradictory verdict, but then, of course, I recalled the standard instruction on the life tables not being binding. Indeed, both sides pointed that out to the jury, so I don't think it's an inherently inconsistent verdict.

(*Id.*)

Counsel for the Plaintiff argued that the case law cited in its opposition supported the jury's verdict. (*Id.* at 5.) As he explained, the case law allowed the jury to "do precisely what [it] did," which "seems logically inconsistent," but "legally consistent." (*Id.*) The Insurer had no response. (*Id.*) The trial court denied the motions for new trial and for remittitur. (*Id.*)

SUMMARY OF ARGUMENT

The Insurer is not entitled to reversal of the final judgment on the jury's verdict and a new trial on future medical expenses.

First, the Insurer fails to show that the trial court abused its discretion in permitting the Plaintiff to "board" the gross amount of her past medical bills, while excluding evidence of the contractual discounts provided by her private health care insurer. The jury was not misled as to the true damages suffered by the Plaintiff. Florida follows the common-law collateral source rule, which prohibits the Insurer from introducing evidence of any reductions in Plaintiff's medical bills – whether paid by her insurer or written off by agreement between the insurer and her providers. The continuing validity of this common-law rule allows the jury to consider evidence of – and award damages equal to – the gross amount of Plaintiff's total past medical expenses.

Neither the Legislature's enactment of the statute governing post-verdict setoffs of collateral sources nor the Medicare case law relied upon by the Insurer abrogates Florida's common-law evidentiary rule. Any reduction in the damages awarded by the jury could have been made only by the trial court after the jury reached its verdict. The trial court correctly granted the Plaintiff's motion *in limine* to exclude evidence of any contractual reductions or amounts written off by the Plaintiff's private health care insurer.

Second, the Insurer is not entitled to a new trial on future medical expenses on the grounds that the jury's award for future medical expenses was excessive or contrary to the manifest weight of the evidence. The Insurer argues that "the jury's award of future medical expenses was excessive in light of its finding that the plaintiff suffered no permanent injury as a result of this accident." (Init. Br., at 31.) Essentially, the Insurer claims the jury's verdict was inconsistent. (*See id.* at 33.) Yet because the Insurer did not object to any inconsistency in the verdict before the jury was discharged, the Insurer waived this argument for appeal. *See Fla. Dep't of Transp. v. Stewart*, 844 So. 2d 773, 774 (Fla. 4th DCA 2003). The Insurer cannot circumvent its failure to timely object by arguing that the jury's verdict was "contrary to the manifest weight of the evidence." *See Hendelman v. Lion Country Safari, Inc.*, 609 So. 2d 766, 767 (Fla. 4th DCA 1992) (Dell, J., concurring specially).

On the merits, the jury's award of future medical expenses is neither "legally excessive" nor "unsupported by the record evidence." (Init. Br., at 32.) To the extent the Insurer claims that the absence of any finding of permanency renders the jury's award of future medical expenses excessive as a matter of law (*id.* at 31-32), this is contrary to Florida law. *See Auto-Owners Ins. Co. v. Tompkins*, 651 So. 2d 89, 91 (Fla. 1995). A finding of permanent injury is not a prerequisite to the recovery of future economic damages. *Id.*

In any event, the jury's award of future medical expenses is well-supported by the record evidence, which demonstrates that the Plaintiff is reasonably certain to incur costs for future medical care. The jury's award was entirely consistent with the testimony and evidence presented by the Plaintiff.

For all these reasons, the Insurer is not entitled to reversal of the final judgment on the jury's verdict and a new trial on future medical expenses. Plaintiff asks that this Court affirm the final judgment rendered by the trial court.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING THE PLAINTIFF TO INTRODUCE INTO EVIDENCE, AND REQUEST FROM THE JURY, AN AWARD OF DAMAGES EQUAL TO THE GROSS AMOUNT OF HER PAST MEDICAL BILLS.

Standard of Review

The trial court's ruling on the admissibility of evidence is reviewed by this Court for an abuse of discretion. *See Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000) ("Admission of evidence is within the discretion of the trial court and will not be reversed unless there has been a clear abuse of that discretion") (citation omitted).

The Insurer fails to show that the trial court abused its discretion in permitting the Plaintiff to "board" the gross amount of her past medical bills, while excluding evidence of the contractual discounts provided by her private health care insurer. Under Florida's common-law collateral source rule, evidence of the

contractual discounts was properly excluded. The Insurer ignores established Florida law in arguing otherwise.

A. Florida's common-law collateral source rule prohibits the Insurer's attempt to admit evidence showing contractual reductions in the Plaintiff's medical bills, agreed to by her private health care insurer.

Plaintiff properly introduced evidence of the total amount of her past medical expenses, without reductions or write-offs. As a measure of her damages, Plaintiff is entitled to recover the reasonable value or expense of her "medical and nursing care and treatment necessarily or reasonably obtained." Fla. Std. Jury Instr. (Civil) 501.4. Her past medical bills are relevant and admissible proof of the reasonable charges that she incurred for medical treatment. *See, e.g., Crowe v. Overland Hauling, Inc.*, 245 So. 2d 654, 657-58 (Fla. 4th DCA 1971).

Contrary to the Insurer's contention, principles governing compensatory damages do not limit an injured plaintiff's recovery only to that portion of the medical bills she actually paid. *Goble v. Frohman*, 901 So. 2d 830, 835 (Fla. 2005) (Lewis, J., concurring). Instead, at common law, Florida follows the collateral source rule. *See id.*; *Janes v. Baptist Hosp. of Miami*, 349 So. 2d 672, 673 (Fla. 3d DCA 1977).

The collateral source rule establishes that a wrongdoer is "responsible for the total damages caused to an injured party, which would include the reasonable value of any medical services rendered, regardless of whether the injured party actually

paid for or received payment for some of the damages from collateral sources." *Goble*, 901 So. 2d at 835 (Lewis, J., concurring); *see also Robert E. Owen & Assocs. v. Gyongyosi*, 433 So. 2d 1023, 1025 (Fla. 4th DCA 1983) (noting that "[t]he law appears well settled in Florida that a tortfeasor may not avail himself of payments from collateral sources such as insurance policies owned by the plaintiff or third parties, employment benefits, or social legislation benefits"); *Janes*, 349 So. 2d at 673 (ruling that "Florida follows the collateral source rule which stands for the proposition that total or partial compensation received by the injured party from a collateral source wholly independent of the wrongdoer will not operate to lessen the damages recoverable from the person causing the injury"); *Walker v. Hilliard*, 329 So. 2d 44, 45 (Fla. 1st DCA 1976) (finding that "[i]n tort actions, it is well settled that the recovery of damages by the owner of property from the party who damaged the property may not be reduced by the amount of insurance proceeds received by the owner from his insurance company"); *Paradis v. Thomas*, 150 So. 2d 457, 458 (Fla. 2d DCA 1963) (relying on the collateral source rule to find that the value of hospital and medical services, rendered to a member of the armed services, was a proper element of damages). Otherwise, the tortfeasor would be permitted to benefit from an insurance policy that was written for the benefit of the insured, the injured party. *Walker*, 329 So. 2d at 45; *accord Janes*, 349 So. 2d at 673. "If there must be a windfall, it is more just that the injured party

profit, rather than the wrongdoer be relieved of full responsibility for his wrongdoing." *Walker*, 329 So. 2d at 45; *accord Janes*, 349 So. 2d at 673; *see also* Restatement (Second) of Torts § 920A (stating that "benefits conferred on an injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable").

At common law, the collateral source rule "prohibited both the introduction of evidence of collateral benefits received and the setoff of any collateral source benefits from the damage award." *Sheffield v. Superior Ins. Co.*, 800 So. 2d 197, 200 n.3 (Fla. 2001). While the enactment of section 768.76, Florida Statutes, may have altered the common-law rule governing setoff,[1] the collateral source rule of evidence remains good law. *See id.* at 200 & n.3. Indeed, as recently as 1991, the Florida Supreme Court "breathed renewed life" into this common-law rule of evidence. *Benton v. CSX Transp., Inc.*, 898 So. 2d 243, 245 (Fla. 4th DCA 2005) (explaining *Gormley v. GTE Prods. Corp.*, 587 So. 2d 455 (Fla. 1991)). Courts throughout Florida – including the Florida Supreme Court – continue to enforce the common-law rule to exclude the introduction of collateral sources at trial. *See Sheffield*, 800 So. 2d at 200; *Gormley*, 587 So. 2d at 459; *Benton*, 898 So. 2d at 245; *Weaver v. Wilson*, 532 So. 2d 67, 68 (Fla. 1st DCA 1988).

[1] *See infra*, at pages 12-14.

The Florida Supreme Court did create one exception to the admissibility of evidence of future benefits when it decided *Florida Physician's Insurance Reciprocal v. Stanley,* 452 So. 2d 514 (Fla. 1984). *See Weaver*, 532 So. 2d at 68 (explaining *Stanley*). In *Stanley*, the defense introduced evidence concerning the potential availability of charitable and governmental assistance for the parents of a brain-damaged child, the plaintiffs in a medical malpractice action. 452 So. 2d at 515. The plaintiffs argued that the trial court's admission of the evidence violated the collateral source rule. *Id.*

The Florida Supreme Court disagreed, finding that the collateral source rule should be limited to benefits "earned in some way by the plaintiff." *Id.* The policy behind the collateral source rule, the *Stanley* Court reasoned, "simply is not applicable if the plaintiff has incurred no expense, obligation, or liability in obtaining the services for which he seeks compensation." *Id.* (quoting *Peterson v. Lou Bachrodt Chevrolet Co.*, 76 Ill. 2d 353, 392 N.E.2d 1 (1979)). Accordingly, the Florida Supreme Court concluded:

> Governmental or charitable benefits available to all citizens, regardless of wealth or status, should be admissible for the jury to consider in determining the reasonable cost of necessary future care. . . . The jury should consider those future services available to all, regardless of wealth or status, when deciding on the proper award of future damages.

Id. at 515-16.

The limitation of *Stanley* does not apply to benefits earned or otherwise paid for by a plaintiff,[2] or to governmental or charitable benefits relevant only to the reasonable cost of a plaintiff's *past* medical care.[3] Even after *Stanley*, the common-law collateral source rule excludes evidence of collateral source benefits, other than free or low-cost benefits available to all citizens. *See Stanley*, 452 So. 2d at 515; *accord Gormley*, 578 So. 2d at 458; *Weaver*, 532 So. 2d at 68.

Under the common-law collateral source rule, evidence of the contractual discounts of Plaintiff's past medical bills, whether "written off" by her medical providers or her private health care insurer, was properly excluded. *See Goble*, 901 So. 2d at 832-33 (finding that contractual reductions of provider charges, agreed to between an insurer and a health care provider, satisfied the definition of "collateral sources"). The trial court correctly granted the Plaintiff's motion *in limine*, thereby prohibiting any evidence or argument regarding the contractual reductions of medical bills "written off" by agreement between the Plaintiff's health care insurer and her medical providers. (R-I-276-77.) To permit the

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[2] *See Weaver*, 532 So. 2d at 68; *see also Parker v. Hoppock*, 695 So. 2d 424, 428 (Fla. 4th DCA 1997) (noting that although "there is dicta in *Stanley* that the 'common-law collateral source rule . . . should be limited to those benefits earned in some way by the plaintiff,' . . . the term 'collateral sources' has never been limited to those benefits that a plaintiff has earned or paid for").

[3] *See Velilla v. VIP Care Pavilion Ltd.*, 861 So. 2d 69, 71-72 (Fla. 4th DCA 2003).

introduction of this evidence would violate Florida's common-law collateral source rule. *See Sheffield*, 800 So. 2d at 200.

B. Section 768.76 of the Florida Statutes, which governs the post-verdict setoff of payments by collateral sources, does not require the exclusion of the gross amount of the Plaintiff's past medical bills.

The Legislature's enactment of section 786.76, which governs collateral sources of indemnity, does not require a different result. The clear and unambiguous language of section 768.76 illustrates that the statute governs the post-verdict setoff of damages awarded to compensate the injured claimant – not the admission of evidence related to collateral sources.

Section 768.76 provides, in relevant part:

> (1) In any action to which this part applies in which liability is admitted or is determined by the trier of fact and in which damages are awarded to compensate the claimant for losses sustained, *the court shall reduce the amount of such award by the total of all amounts which have been paid for the benefit of the claimant, or which are otherwise available to the claimant, from all collateral sources*; however, there shall be no reduction for collateral sources for which a subrogation or reimbursement right exists . . . .
>
> (2) For purposes of this section:
>
> (a) "Collateral sources" means any payments made to the claimant, or made on the claimant's behalf, by or pursuant to:
>
> . . . .
>
> 2. Any health, sickness, or income disability insurance; automobile accident insurance that provides health

> benefits or income disability coverage; and any other similar insurance benefits, except life insurance benefits available to the claimant, whether purchased by her or him or provided by others.
>
> 3. Any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental, or other health care services.

§ 768.76(1), (2)(a)2. & 3., Fla. Stat. (emphasis added).

Nowhere in its plain language does section 768.76 require that the jury – as the trier of fact – must calculate the amount of any setoff. *See* § 768.76(1), Fla. Stat. That determination is one for the trial court, after an award of damages to "compensate the claimant for losses sustained." § 768.76(1), Fla. Stat.; *accord Caruso v. Baumle*, 880 So. 2d 540, 544 (Fla. 2004) (comparing § 768.76(1), under which "the court reduces the jury award by the amount of collateral source benefits," with the then-applicable PIP statute, which allowed the trier of fact to setoff for collateral PIP benefits). Nor does the statute alter the fundamental common-law principles governing compensatory damages in Florida. *See Goble v. Frohman*, 901 So. 2d 830, 836 (Fla. 2005) (Lewis, J., concurring in result only).

In sum, section 768.76 does not limit the Plaintiff's measure of compensatory damages or otherwise require the admission of collateral source evidence showing any contractual reductions in the amount of Plaintiff's medical bills, written off or reduced by agreement between her providers and her health

care insurer. *See Gormley*, 587 So. 2d at 459; *accord Benton*, 898 So. 2d at 245. Section 768.76 is not a rule of evidence. *See Gormley*, 587 So. 2d at 459. Instead, the statute simply establishes a legislative scheme requiring the reduction of damages after a jury's verdict. *See Gormley*, 587 So. 2d at 459. The trial court correctly prohibited the Insurer's attempt to introduce evidence of any amounts "written off" by the Plaintiff's medical providers, or her health insurer, under Florida's common-law collateral source rule. *See, e.g.*, *Benton*, 898 So. 2d at 245; *accord Gormley*, 587 So. 2d at 457.

C. The opinions of other Florida courts are easily distinguishable. None of the decisions cited by the Insurer requires reversal of the trial court's ruling.

Notwithstanding the longstanding history of the common-law collateral source rule – and recent decisions of the Florida Supreme Court enforcing this rule of evidence – the Insurer argues that the trial court erred in allowing the Plaintiff to "board" the gross amount of her past medical bills. Citing decisions from the Second, Third, and Fourth Districts, the Insurer contends that

> other courts throughout the state have held that the Plaintiff may not introduce the gross amount of his or her past medical bills when the evidence effectively misleads the jury into believing that the plaintiff has actually incurred damages that he or she did not.

(Init. Br., at 26; *see id.* at 27-28 (citing cases).) The Insurer urges this Court to "follow the decisions and reasoning" of these other courts and reverse the judgment for a new trial on future medical expenses. (*Id.* at 30.)

The decisions cited by the Insurer are inapposite. Each of the cases relied upon by the Insurer addresses the inadmissibility of the original, total amounts of medical bills for charges eventually paid or written off by Medicare – not benefits paid or contractual reductions under an injured claimant's private health care insurance, which were earned by the claimant or procured at her expense. *See Thyssenkrupp Elevator Corp. v. Lasky*, 868 So. 2d 547 (Fla. 4th DCA 2004); *accord Miami-Dade County v. Laureiro*, 894 So. 2d 268 (Fla. 3d DCA 2005); *Cooperative Leasing, Inc. v. Johnson*, 872 So. 2d 956 (Fla. 2d DCA 2004), *review dismissed*, 905 So. 2d 76 (Fla. 2005). And, contrary to the Insurer's interpretation, the decision of the Florida Supreme Court in *Goble* does not suggest that these decisions apply in any context other than cases arising under Medicare or Medicaid.

1. The Fourth District prohibits the introduction of evidence showing the total amounts billed for medical services written off or paid by Medicare, but otherwise enforces the exclusion of evidence of a plaintiff's insurance benefits under the common-law collateral source rule.

The Insurer first relies on the Fourth District's opinion in *Thyssenkrupp*, arguing that the Fourth District "held, in no uncertain terms, that the plaintiff

should not be permitted to introduce the gross amount of the bills into evidence if the plaintiff and/or her insurer paid a lesser amount in settlement of those bills." (Init. Br., at 27.) The Insurer's interpretation contradicts *Thyssenkrupp* and other decisions of the Fourth District.

For example, *Thyssenkrupp* addresses only the effect of reductions in charges for medical services under Medicare. *See* 868 So. 2d at 551. The Fourth District expressly ruled that evidence of a health care provider's original, higher charge, when satisfied by the provider's acceptance of less than the full amount under Medicare, must be excluded at trial. 868 So. 2d at 551. The *Thyssenkrupp* court reasoned that

> [w]hen a provider charges for medical service or products and later accepts a less 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.

Id. The court clarified its opinion to emphasize that its holding should be understood as an evidentiary ruling, not an issue of setoff. *Id.*[4]

[4] The Fourth District noted that "some cases interpret[] section 768.76(1) appear not to allow a setoff for this kind of Medicare benefits." *Id.* at 551. The court certified conflict with *Goble v. Frohman*, 848 So. 2d 406 (Fla. 2d DCA 2003), in which the Second District ruled contractual discounts negotiated by a plaintiff's HMO, and written off by the plaintiff's medical providers, subject to setoff under section 768.76. *See* 868 So. 2d at 551, n.1 (certifying conflict with *Goble*, "[t]o the extent that HMO benefits and Medicare benefits are interchangeable for this subject").

In explaining its decision, the *Thyssenkrupp* court considered the Florida Supreme Court's decision in *Stanley* to be "instructive." *Id.* at 549. The Fourth District noted that in *Stanley*, the Florida Supreme Court had ruled that evidence of free or low-cost benefits from governmental or charitable agencies, "available to all citizens, regardless of wealth or status," must be admitted for the jury's consideration. *Id.* at 549-50 (quoting *Stanley*, 452 So. 2d at 515-16). Like *Stanley*, *Thyssenkrupp* concluded that to allow the admission of evidence of the excess discharged by Medicare would give the plaintiff "an undeserved and unnecessary windfall." *Id.* at 550 (citing *Stanley*, 452 So. 2d at 515). Nowhere in *Thyssenkrupp*, then, did the Fourth District find evidence of the original, total amount of *non-Medicare* provider charges, like the past medical bills at issue, to be inadmissible.

The Insurer acknowledges that *Thyssenkrupp* involved Medicare payments. (Init. Br., at 27.) Nonetheless, the Insurer contends that the reasoning of the Fourth District "applies in any case in which the provider accepts a reduced amount in settlement of the bills." (*Id.* (citing *Boyd v. Nationwide Mut. Fire Ins. Co.*, 890 So. 2d 1240 (Fla. 4th DCA 2005); *Didonato v. Youth Invs. of Davie, Inc.*, 870 So. 2d 206 (Fla. 4th DCA 2004)). Neither of the decisions cited by the Insurer supports this interpretation.

First, in *Boyd*, the Fourth District expressly considered whether the trial court properly limited evidence of the past medical bills to the amounts actually received by the Medicare provider. 890 So. 2d at 1241. Relying on *Thyssenkrupp*, the *Boyd* court rejected the plaintiff's contention that the trial 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." *Id.*

Similarly, *Didonato* does not extend the reasoning of *Thyssenkrupp*. 870 So. 2d at 206. In *Didonato*, the Fourth District affirmed the trial court's judgment *per curiam*. *See id.* The opinion includes no discussion of the underlying facts. *Id.* Instead, the opinion simply cites to *Thyssenkrupp* in certifying conflict. *Id.* Because the *Didonato* court certified conflict for the same reason stated in *Thyssenkrupp*, the logical conclusion is that *Didonato* also addressed the exclusion of evidence of provider charges reduced under Medicare. *See id.* (citing *Thyssenkrupp*, 868 So. 2d at 547, n.1).

Contrary to the Insurer's assertion, the reasoning of the Fourth District does not apply to "any case in which the provider accepts a reduced amount in settlement of the bills." (Init. Br., at 27 (citing *Boyd* and *Didonato*).) Nowhere in its decisions has the Fourth District suggested that a plaintiff's total past medical

bills, once paid or written off by a non-governmental insurer, become irrelevant and thus inadmissible.

In fact, even after deciding *Thyssenkrupp*, *Boyd*, and *Didonato*, the Fourth District has continued to rule evidence of collateral source benefits inadmissible. *See Benton v. CSX Transp., Inc.*, 898 So. 2d 243, 245 (Fla. 4th DCA 2005). The plaintiff in *Benton*, a railroad employee, moved for a new trial, arguing that the trial court "erred in admitting evidence of the railroad benefits received by the plaintiff." *Id.* The trial court denied the motion, and the Fourth District reversed. *Id.*

The *Benton* court explained the "long history of legal precedent" establishing the "inadmissibility of collateral sources evidence." *Id.* (citations omitted). This longstanding common-law rule, the Fourth District noted, had been given "renewed life" by the Florida Supreme Court's decision in *Gormley v. GTE Products Corp.*, which held that "[a]s a rule of evidence, the collateral source rule prohibits the introduction of any evidence of payments from collateral sources." *Benton*, 898 So. 2d at 245 (citing 587 So. 2d 455, 457 (Fla. 1991)). Finding that the trial court erred in permitting testimony concerning the plaintiff's receipt of railroad benefits, the Fourth District reversed the judgment and remanded for a new trial. *Id.* at 245-46.

Benton illustrates that even notwithstanding the enactment of section 768.76 requiring the post-verdict setoff of collateral sources – or the Fourth District's decision in *Thyssenkrupp* – the common-law collateral source rule remains an enforceable rule of evidence. *See Benton*, 898 So. 2d at 245; *accord Sheffield*, 800 So. 2d at 200 & n.3. Because the insurance benefits at issue here, like the benefits in *Benton*, were not free or low-cost government benefits – but had been "earned" by the Plaintiff, whether through her employment or by her own payment of premiums – *Thyssenkrupp* does not require reversal of the judgment. *Cf. Weaver*, 532 So. 2d 67, 68 (Fla. 1st DCA 1988) (distinguishing *Stanley*, which had limited the common-law collateral source rule to benefits earned by a plaintiff). The trial court below properly excluded evidence related to any contractual reductions or write-offs of the Plaintiff's past medical bills, paid on her behalf by her private health insurer.

2. The decisions of the Second and Third Districts follow *Thyssenkrupp*, and are similarly limited to the reduction of charges for medical services under Medicare or Medicaid.

Likewise, the Insurer may not rely on the decisions of the Second and Third District Courts of Appeal to argue that the trial court below erred in permitting the Plaintiff to introduce into evidence the gross amount of medical bills, when her providers accepted a lesser amount. (Init. Br., at 27-28 (citing *Cooperative Leasing, Inc. v. Johnson*, 872 So. 2d 956 (Fla. 2d DCA 2004), *review dismissed*,

905 So. 2d 76 (Fla. 2005); *Miami-Dade County v. Laureiro*, 894 So. 2d 268 (Fla. 3d DCA 2005)).

Again, the decisions cited by the Insurer are inapposite. Like the facts of *Thyssenkrupp*, the Second District in *Cooperative Leasing* considered only the admissibility of evidence reflecting the difference between the total amount of the plaintiff's medical bills and the amount that her providers agreed to accept under Medicare. 872 So. 2d at 957-58, 961. Although the Second District interpreted *Thyssenkrupp* to find that the "reasonable value" of medical services should be "limited to the amount accepted as payment in full for medical services," *id.* at 958, *Cooperative Leasing* does not demand the same result here. The Second District's ruling applies only to benefits paid, or contractual charges reduced, under Medicare. *See id.* at 961 (holding that "the appropriate measure of compensatory damages for past medical expenses *when a plaintiff has received Medicare benefits* does not include the difference between the amount that the Medicare providers agreed to accept and the total amount of the plaintiff's medical bills") (emphasis added).

Likewise, in *Laureiro*, the Third District vacated the plaintiff's judgment because the verdict may have included "amounts for medical bills beyond those actually paid by Medicare." 894 So. 2d at 269. The Third District did not rule that evidence inadmissible or order a new trial on damages. *See id.* The Third District

otherwise affirmed the judgment and, like the Fourth District in *Thyssenkrupp*, directed the trial court on remand "to receive such evidence as may be necessary to fix the precise amount of the reduction [if any] required." *Id.* (quoting *Thyssenkrupp*, 868 So. 2d at 550); *accord Cooperative Leasing*, 872 So. 2d at 960 (reversing judgment and remanding "for calculation of damages in accordance with this opinion").

Neither *Laureiro* nor *Cooperative Leasing* requires reversal of the judgment. The facts before this Court are completely unlike those addressed by the Second and Third Districts. The common-law collateral source rule continues to require exclusion of evidence of benefits "earned" by the Plaintiff. Only if a plaintiff receives free or low-cost governmental or charitable benefits does the danger arise that she will receive a windfall if the jury considers evidence of the full amount of her medical bills. *See Cooperative Leasing*, 872 So. 2d at 958 (citing *Stanley*, 452 So. 2d 514; *Peterson v. Lou Bachrodt Chevrolet Co.*, 76 Ill. 2d 253, 392 N.E.2d 1 (1979)). Where, as here, a plaintiff has paid premiums to obtain insurance benefits, a wrongdoer should not be permitted to benefit from an insurance policy written for the benefit of the injured party. *Walker*, 329 So. 2d at 45; *see also Stanley*, 452 So. 2d at 515-16 (noting that the policy behind the common-law collateral source rule does not apply "if the plaintiff has incurred no expense,

obligation, or liability in obtaining the services for which he seeks compensation") (citing *Peterson*, 392 N.E.2d at 5).

3. Contrary to the Insurer's interpretation, the decision of the Florida Supreme Court in *Goble* in fact supports the trial court's *in limine* ruling.

The Insurer suggests that the Florida Supreme Court will likely follow the decisions of the Second, Third, and Fourth Districts. According to the Insurer, the Florida Supreme Court's decision in *Goble* "addressed the appropriateness of post-trial set-offs when the gross amount of the bills had been admitted into evidence in the absence of the defendant's objection." (Init. Br., at 28 (citing 901 So. 2d 830 (Fla. 2005).) The Insurer relies on a concurring opinion by Justice Bell to suggest that under Florida law, "the measure of damages in a tort case is limited to the actual damages sustained by the aggrieved party." (*Id.* (citing *Goble*, 901 So. 2d at 834) (Bell, J., specially concurring).) The Insurer misapprehends the facts and ruling of *Goble*.

The Insurer's explanation of the issue supposedly presented by *Goble* reflects a fundamental misunderstanding of the facts of that case. The defendant in *Goble* did not fail to object to the admissibility of the gross amount of the bills, as the Insurer contends. (Init. Br., at 28.) To the contrary, the defendant in *Goble* argued, on appeal to the Second District, that the trial court erred in excluding evidence of the contractual discounts negotiated by the plaintiff's HMO and

accepted by the plaintiff's medical providers. *Goble v. Frohman*, 848 So. 2d 406, 410 (Fla. 2d DCA 2003) (addressing defendant's cross-appeal), *approved*, 901 So. 2d 830 (Fla. 2005). Noting that the collateral source rule "functions as both a rule of damages and a rule of evidence," the Second District affirmed the exclusion of evidence of the plaintiff's collateral source benefits. 848 So. 2d at 410 (citing *Gormley*, 587 So. 2d at 457).

The Florida Supreme Court approved this ruling. *See Goble*, 901 So. 2d at 833. Nowhere in its opinion did the supreme court overrule the Second District's reliance on the common-law collateral source rule as a rule of evidence. *See id.* at 831-33. The supreme court instead addressed only whether the contractual discounts negotiated by the plaintiff's HMO, and written off by his medical providers, met the statutory definition of "collateral sources" subject to setoff by the trial court after the jury's verdict, in accordance with section 768.76, Florida Statutes. *Id.* at 831-33. The Insurer cannot rely on the supreme court's decision in *Goble* to argue for a wholesale revision of the common-law rule of evidence, which prohibits the introduction of evidence of insurance benefits "earned" by the claimant.

And, to the extent the Insurer relies on Justice Bell's concurring opinion to limit the measure of damages, Justice Lewis disagreed. 901 So. 2d at 835 (Lewis, J., concurring in result only). In his separate concurring opinion, Justice Lewis

wrote to "address the incorrect conclusion . . . that under common-law principles of compensatory damages an injured party is allowed to recover only the portion of medical bills he or she has actually paid." *Id.* Justice Lewis explained:

> at common law a wrongdoer was responsible for the total damages caused to an injured party, which would include the reasonable value of any medical services rendered, regardless of whether the injured party actually paid for or received payment for some of the damages from collateral sources.

Id. (citations omitted).

Justice Lewis did note that section 768.76 limited an injured party's recovery to "only that portion of his medical bills that he is actually obligated to pay." *Id.* at 836. He emphasized that the statute's limitations on recovery are "purely a statutory construct," with "no origin in the common law principles of compensatory damages applied in this state." *Id.*

Justice Lewis also distinguished the cases relied on to advance Justice Bell's incorrect legal conclusion, the majority of which involved statutory schemes. *Id.* As Justice Lewis explained, Medicare and Medicaid cases are not based on common law, but instead involve statutory limitations that artificially establish reasonable charges for recovery. *Id.* at 836, 837; *see also id.* at 836 ("Cases involving Medicare or Medicaid address totally different statutory circumstances"). Consequently, Justice Lewis reasoned, those cases cannot be relied upon to state, as a "fundamental principle of Florida law," that "the measure of compensatory

damages in a tort case is limited to the actual damages sustained by the aggrieved party." *Id.* at 836 (quoting specially concurring op. at 834). Given Justice Lewis's well-reasoned concurring opinion, which is supported by "nearly overwhelming modern authority,"[5] the Florida Supreme Court does not appear likely to adopt the Insurer's interpretation of the appropriate measure of compensatory damages.

4. The trial court's ruling is not contrary to statewide precedent.

For many of the same reasons expressed by Justice Lewis in *Goble*, the Insurer cannot rely on *Thyssenkrupp*, *Cooperative Leasing*, or *Laureiro* to argue that the Plaintiff should not have been permitted to "board" the gross amount of her medical bills, which exceeded the amounts paid by her private health insurance. The jury was not misled as to the true amount of damages suffered by the Plaintiff. At common law, the measure of compensatory damages remains the reasonable value of the medical services rendered, regardless of whether benefits were paid on behalf of the injured party by collateral sources.

Consistent with the Plaintiff's argument to the trial court,[6] the facts of this case are different from the decisions cited by the Insurer. Because Plaintiff paid insurance premiums for her coverage, she "earned" the right to those benefits. *See*

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[5] *Goble*, 901 So. 2d at 836 (quoting *Paradis v. Thomas*, 150 So. 2d 457, 458 (Fla. 2d DCA 1963)).

[6] *See* Init. Br., at 28-29; *see also* T-1-11-12 (arguing that because Plaintiff paid for her health insurance, she should be allowed to "board" the total amount of medical expenses billed, without reductions or write-offs).

Gormley, 587 So. 2d at 458; *accord Weaver*, 532 So. 2d at 65. Evidence of her insurance benefits remains inadmissible under the common-law collateral source rule. *See Gormley*, 587 So. 2d at 458; *accord Sheffield*, 800 So. 2d at 200; *Goble*, 848 So. 2d at 410. Neither the enactment of section 768.76 governing post-verdict setoffs nor case law decided under Medicare and Medicaid abrogates Florida's common-law rule. *See, e.g.*, *Goble*, 901 So. 2d at 836-37 (Lewis, J., concurring).

D. Any error in the trial court's ruling did not prejudice the Insurer.

Even assuming *arguendo* that the Insurer correctly interprets the decisions of the Second, Third, and Fourth Districts (which, of course, it does not), the Insurer is not entitled to a new trial on future medical expenses. The trial court's ruling *in limine* did not prejudice the defense.

The Insurer first complains that the admission of the Plaintiff's total past medical bills led the jury to award an excessive amount of damages for future medical expenses. (*See* Init. Br., at 29-30.) According to the Insurer, the total amount of the Plaintiff's past medical bills necessarily may not be relied upon by the jury to calculate an award of damages for future medical expenses. (*Id.* at 30 (citing *DeAlmeida v. Graham*, 524 So. 2d 666 (Fla. 4th DCA 1987).) The Insurer misinterprets Florida law.

Under Florida law, a jury may award damages for medical expenses that a plaintiff is reasonably certain to incur in the future. *See White v. Westlund*, 624 So.

2d 1148, 1150 (Fla. 1993) (citing *Loftin v. Wilson*, 67 So. 2d 185, 188 (Fla. 1953); Fla. Std. Jury Instr. (Civil) 6.1(a)). Florida courts have found that a plaintiff's past medical bills, together with evidence showing that a plaintiff will require medical care in the future, provide a sufficient basis for the jury to calculate, with reasonable certainty, an award of damages for future medical expenses. *See, e.g.*, *Nat'l Car Rental Sys., Inc. v. Holland*, 269 So. 2d 407, 411-12 (Fla. 4th DCA 1972); *see also White*, 624 So. 2d at 1150-51 ("generally, where there is sufficient evidence from which a jury could infer a need for future medical treatment with reasonable certainty, an award of future medical expenses is proper") (citations omitted).

The Insurer relies on the Fourth District's decision in *DeAlmeida* to argue otherwise. (Init. Br., at 30.) Yet nowhere in its opinion did the Fourth District prohibit a jury from relying on past medical bills to compute the amount of future medical expenses. *See DeAlmeida*, 524 So. 2d at 668-69. Instead, the court in *DeAlmeida* explained:

> *The only basis* for the award of future medical expenses [was] highlighted in appellee's closing argument:
>
> His past medical bill . . . came to $7,289.35. I figure it is reasonable to assume that over the years he is going to have an average of $2,500 a year in medical expenses when they hospitalize him and they check him again when he feels so bad that he has got to go to a doctor.

524 So. 2d at 668 (emphasis added). This, the Fourth District found, was "insufficient to support the jury's award for future medical expenses." *Id.*

Unlike the plaintiff in *DeAlmeida*, Plaintiff did not rely only on her counsel's estimate of medical expenses to show that she is reasonably certain to require future medical care. *See id.* Instead, Plaintiff elicited evidence from her physicians that she will require future medical treatment indefinitely, at a cost of $205,140.00. (*See* T-I-80, 82-83, 95-96; T-I-191-93, 195.) The jury's award of $205,140.00 for future medical expenses is reasonably supported by the evidence. The Insurer cannot demonstrate that the admission of the past medical bills – which totaled $26,937 – allowed the Plaintiff to "artificially inflate" her future medical expenses, or led the jury to award damages that she is not reasonably certain to incur in the future. Any error that may have been created by the trial court's ruling is harmless.

The collateral source evidence that the Insurer sought to introduce is not probative in any event. "[E]vidence of contractual discounts received by managed care providers is insufficient, standing alone, to prove that nondiscounted medical bills were unreasonable." *Goble*, 848 So. 2d at 410 (quoting *Hillsborough County Hosp. Auth. v. Fernandez*, 664 So. 2d 1071 (Fla. 2d DCA 1975)).

Nor did the trial court's *in limine* ruling prevent the Insurer from otherwise challenging the reasonableness or necessity of the medical bills. *See Goble*, 848

So. 2d at 410. At trial, the Insurer questioned the value of – and the need for – the Plaintiff's ongoing medical treatment. (*See* T-II-283-84.) The Insurer elicited evidence from its own expert witness, Dr. Von Thron, who testified that the Plaintiff's persistent complaints of neck and back pain are not related to the motor vehicle accident. (T-II-280, 282-83.) According to Dr. Von Thron, the motor vehicle accident caused only a temporary aggravation in the Plaintiff's condition; he testified that her need for future medical care is related to her pre-existing condition, not from the accident. (T-II-283-84.)

Notwithstanding its inability to introduce evidence of the contractual reductions or write-offs, the Insurer was allowed to present other evidence – which had "more probative value" and created "less likelihood of prejudice" than evidence of the Plaintiff's insurance benefits. *Gormley*, 587 So. 2d at 458 (quoting *Williams v. Pincombe*, 309 So. 2d 10, 11 (Fla. 4th DCA 1975); *accord Goble*, 848 So. 2d at 210. Once again, the Insurer was not prejudiced by the trial court's ruling.

Nonetheless, the Insurer suggests that the jury's consideration of the gross amount of past medical bills resulted in an unjust windfall to the Plaintiff. (*See* Init. Br., at 28, 29-30.) Yet the Plaintiff earned her health insurance benefits: she paid the premiums. *See Gormley*, 587 So. 2d at 458; *Weaver*, 532 So. 2d at 68. Plaintiff paid for insurance to protect her against the very loss that occurred. *See*

Gormley, 587 So. 2d at 459. The Insurer, as the liability insurer for the wrongdoer, may not benefit from payments made on the Plaintiff's behalf by her own health insurance. *See Walker*, 329 So. 2d at 45; *accord Janes*, 349 So. 2d at 673. To the extent there is any windfall, Florida courts have long held that "it is more just that the injured party profit, rather than the wrongdoer be relieved of full responsibility for his wrongdoing." *Janes*, 349 So. 2d at 673 (citing *Walker*, 329 So. 2d at 45).

And even if this Court adopts the Insurer's interpretation, and limits the measure of compensatory damages, the Insurer is not entitled to a new trial. The Insurer suggests that the admission into evidence of the Plaintiff's total past medical expenses is so prejudicial that a new trial on damages is warranted. (Init. Br., at 30.) According to the Insurer, the inherently prejudicial effect of this evidence is "undoubtedly why *all* of the appellate courts that have dealt with this issue have found the error sufficient to warrant reversal for a new trial." (*Id.* (emphasis added); *see also id.* at 28 (arguing that in both *Cooperative Leasing* and *Laureiro*, the courts reversed the judgment and "ordered a new trial on damages, as did the Fourth District in *Thyssenkrupp*").)

The Insurer misconstrues the relief granted in each of the cited decisions. Contrary to the Insurer's contention, none of these courts reversed for a new trial on future medical expenses, notwithstanding that each court excluded evidence of amounts paid or reduced by Medicare. *See Thyssenkrupp*, 868 So. 2d at 550;

accord Laureiro, 894 So. 2d at 269; *Cooperative Leasing*, 872 So. 2d at 960. Instead, the courts simply remanded for a reduction in the past medical expenses awarded by the jury, authorizing the trial courts, on remand, to "receive such evidence as may be necessary to fix the precise amount of the reduction required." *Thyssenkrupp*, 868 So. 2d at 550; *accord Laureiro*, 894 So. 2d at 269; *Cooperative Leasing*, 872 So. 2d at 960.

The Insurer cannot rely on these cases to seek a new trial on future medical expenses. Even if this Court accepts the Insurer's interpretation, on remand the Insurer is entitled to nothing more than a post-verdict reduction in the damages awarded for past medical expenses. *See Thyssenkrupp*, 868 So. 2d at 550; *accord Laureiro*, 894 So. 2d at 269; *Cooperative Leasing*, 872 So. 2d at 960.

In contrast to the Insurer's inability to demonstrate prejudice from the trial court's ruling, admission of collateral source evidence would have harmed the Plaintiff. Introduction of collateral source evidence for the jury's consideration is inherently prejudicial. *See Sheffield*, 800 So. 2d at 203. This is "the very reason the collateral source rule was first established." *Id.* While the Florida Supreme Court has not gone so far as to suggest a *per se* rule of reversal, the court has "recognized the inherently damaging effect of the jury hearing collateral source evidence both on the issues of liability and on issues of damages." *Id.* (citing *Gormley*, 587 So. 2d at 458; *Parker*, 695 So. 2d 429).

Here, for example, had the Insurer been allowed to introduce collateral source evidence, the jury could have concluded that the Plaintiff had already been adequately compensated. *See Gormley*, 587 So. 2d at 459. The jury could have decided that the accident did not cause the Plaintiff "injury or damage": the first issue it was asked to decide. (R-V-668); *see also Gormley*, 587 So. 2d at 459 (considering jury's finding that there was no fault on the part of the defendant that "was a legal cause of damage"). As to the second issue for the jury's consideration, the total amount of recoverable damages for medical expenses (R-V-668), admission of collateral source evidence could have allowed the jury to reduce its award of future medical expenses. The jury very well could have concluded that because the Plaintiff had insurance available, "there would be no need to award substantial damages for the future." *See Sheffield*, 800 So. 2d at 203. Given that the Plaintiff is not guaranteed *any* future insurance benefits, the trial court properly refused to allow the Insurer to introduce evidence of the contractual discounts.

For all these reasons, the Insurer fails to show that the trial court erred in granting Plaintiff's motion *in limine*, or that the trial court's ruling prejudiced the defense. The Insurer is not entitled to reversal of the judgment for a new trial on future medical expenses.

II. THE TRIAL COURT CORRECTLY DENIED THE DEFENSE'S MOTION FOR REMITTITUR OR NEW TRIAL ON THE AWARD OF FUTURE MEDICAL EXPENSES.

Standard of Review

The trial court's Order denying the Motion for Remittitur or New Trial is reviewed for an abuse of discretion. *See Lassitter v. Int'l Union of Operating Eng'rs*, 349 So. 2d 622, 627 (Fla. 1977); *accord Glabman v. De La Cruz*, 954 So. 2d 60, 62 (Fla. 4th DCA 2007). When reviewing the denial of a motion for remittitur, "the law has afforded the trial court 'considerable deference' . . . in the matter because of the unique vantage point which the trial court has to personally observe the witnesses and the jury." *Glabman*, 954 So. 2d at 62; *see also J.T.A. Factors, Inc. v. Philcon Servs., Inc.*, 820 So. 2d 367, 372 (Fla. 3d DCA 2002) (in reviewing a denial of a motion for new trial, the evidence and every conclusion derived from the evidence must be viewed in the light most favorable to the Plaintiff). "Broadly speaking, the jury's verdict should be disturbed only when contrary to the manifest weight of the evidence." *Subaqueous Servs., Inc. v. Corbin*, 25 So. 3d 1260, 1267 (Fla. 1st DCA 2010).

The trial court did not abuse its discretion in denying the Insurer's motion for new trial or remittitur, as shown by the following:

A. To the extent the Insurer claims on appeal that the jury was "misled" or "confused" as to its award of future medical expenses, the Insurer waived this argument for appeal. The Insurer did not timely object to any inconsistency in the verdict.

Essentially, the Insurer claims that the jury returned an inconsistent verdict when it awarded future medical expenses, despite a finding of no permanent injury. (Init. Br., at 31-32; R-V-688; Supp. R-3-4.) To the extent the Insurer seeks a new trial based on the jury's inconsistent verdict, the appellant failed to preserve this ground for appeal. *See Fla. Dep't of Transp. v. Stewart*, 844 So. 2d 773, 774 (Fla. 4th DCA 2003) (considering appellant's claim that "the jury returned an inconsistent verdict on damages where the jury found that [plaintiff] had not sustained any . . . permanent injury as a result of the accident, yet at the same time awarded damages for future medical expenses and lost income").

"To preserve the issue of an inconsistent verdict, the party claiming inconsistency must raise the issue before the jury is discharged. If the trial court agrees, the trial court may reinstruct the jury and send it back for further deliberations." *Id.* (citing *Cocca v. Smith*, 821 So. 2d 328, 330 (Fla. 2d DCA 2002)). Requiring an objection before the jury is discharged allows that jury to correct any inconsistency. *Id.*

If the Insurer believed the jury may have been "misled" or "confused" in its award (Init. Br., at 32-33), the defense had a duty to inform the trial court before the jurors were dismissed. *Fla. Dep't of Transp.*, 844 So. 2d at 774. Yet the

Insurer failed to object to the jury's verdict before the jury was discharged. (T-II-381-86.) The Insurer's failure to object – or otherwise to inform the trial court of an inconsistent verdict – "waive[d] the inconsistency in the verdict as a point on appeal." *Fla. Dep't of Transp.*, 844 So. 2d at 774; *accord Hendelman v. Lion Country Safari, Inc.*, 609 So. 2d 766, 766-67 (Fla. 4th DCA 1992) (Dell, J., concurring specially); *Burgess v. Mid-Fla. Serv.*, 609 So. 2d 637, 638 (Fla. 4th DCA 1992); *Cowart v. Kendall United Methodist Church*, 476 So. 2d 289, 290-91 (Fla. 3d DCA 1985); *Wiggs & Maale Constr. Co. v. Harris*, 348 So. 2d 914, 915 (Fla. 1st DCA 1977). The Insurer's "failure to seek jury reconsideration" must be regarded as "a conscious choice of strategy." *Cowart*, 476 So. 2d at 290, n.2; *see also C.G. Chase Constr. Co. v. Colon*, 725 So. 2d 1144, 1145 (Fla. 3d DCA 1988) (by objecting to an inconsistent verdict, the complaining party "would naturally risk having the award unfavorably adjusted").

The Insurer may not circumvent its failure to object by arguing that the jury's verdict is contrary to the manifest weight of the evidence. *See Fla. Dep't of Transp.*, 844 So. 2d at 774. "[M]ost inconsistent verdicts, in some respect, would be either inadequate or contrary to the manifest weight of the evidence." *Id.* (citing *Hendelman*, 609 So. 2d at 767); *accord C.G. Chase Constr. Co.*, 725 So. 2d at 1145. Yet where, as here, "the thrust of [appellant's] objection to the verdict [is] based on the inconsistency between an award for future economic damages and no

finding of permanent injury," the Insurer "waived any error by not raising this issue before the jury was discharged." *Fla. Dep't of Transp.*, 844 So. 2d at 755; *see also Burgess*, 609 So. 2d at 637 (reversing order granting new trial on damages; notwithstanding jury's "patent" error on the verdict form, defendants "raised no objection to the verdict prior to the discharge of the jury").

B. The Insurer's argument is contrary to Florida law and the record evidence.

On the merits, the Insurer is not entitled to a new trial on future medical expenses. Neither the law nor the facts require reversal of the judgment on the jury's verdict. The jury's verdict is not contrary to the manifest weight of the evidence or otherwise excessive.

1. Under Florida law, a jury may award future medical expenses even absent a finding of permanency.

The Insurer concedes that a finding of permanent injury is not a prerequisite to the recovery of future economic damages under Florida law, but nonetheless contends that "the jury's award for future medical expenses was excessive in light of its finding that the plaintiff suffered no permanent injury as a result of this accident." (Init. Br., at 31, 32 (citing *Auto-Owners Ins. Co. v. Tompkins*, 651 So. 2d 89, 91 (Fla. 1995)); *see also* R-V-688.) According to the Insurer, the jury's award of future medical expenses based on a plaintiff's life expectancy – without a finding of permanent injury – is excessive as a matter of law. (Init. Br. at 31-32.)

Despite the Insurer's attempt to argue otherwise, its argument is really nothing more than a claim that the jury may not award future medical expenses in the absence of a finding of permanent injury. (*See* Init. Br., at 31-33; *see also* Supp. R-3-4.) This is contrary to Florida law. *See Tompkins*, 651 So. 2d at 91. In *Tompkins*, the Florida Supreme Court rejected the "mandatory permanent injury threshold test for future economic damages," finding instead that "the appropriate test is to permit the recovery of future economic damages when such damages are established with reasonable certainty." *Id.* A permanent injury is "not a prerequisite to recovering future economic damages." *Id.* The jury's award of future medical expenses, even absent a finding of permanent injury, is not "clearly excessive" or otherwise improper. *See id.*

2. The jury's award of damages is reasonably supported by the record evidence, which demonstrates that the Plaintiff is reasonably certain to incur future medical expenses of $205,140.

In any event, the jury's award of future medical expenses is not greater than that claimed or supported by the evidence. The Insurer errs in arguing that the Plaintiff "did not offer testimony by which the jury could determine, with any certainty, the amount of future medical expenses she would incur in the event that the jury found that her injuries were not permanent." (Init. Br., at 31.) Evidence of the amount of Plaintiff's future medical expenses did not depend upon a finding of permanency, as the Insurer argues. (*See id.* at 31, 33).

The Insurer attempts to limit the evidence that a jury may consider in calculating an award of future medical expenses. The requirements of Florida law, however, are not so restrictive. Courts throughout Florida have upheld awards of future medical expenses based upon many different kinds of evidence.

Florida law requires only that the record "contain evidence from which the jury can determine the amount of medical expenses the plaintiff is reasonably certain to incur in the future." *Subaqueous Servs.*, 25 So. 3d at 1268 (citing *Loftin v. Wilson*, 67 So. 2d 185, 188 (Fla. 1953)). "[O]nly those future medical expenses that are 'reasonably certain to be incurred' are recoverable." *Shearon v. Sullivan*, 821 So. 2d 1222, 1225 (Fla. 1st DCA 2002) (quoting *Loftin*, 67 So. 2d at 188). Where a plaintiff introduces sufficient evidence to allow the jury to infer a need for future medical treatment with reasonable certainty, an award of future medical expenses is proper. *Id.*

Simply because future damages ultimately must be proven to a reasonable certainty "does not mean that every link in the chain of evidence must be so proven." *A Quest for Reasonable Medical Certainty in Fla.*, 30 Fla. B.J. 327 (quoted with approval in *White v. Westlund*, 624 So. 2d 1148, 1151 (Fla. 4th DCA 1993)); *see also Nat'l Car Rental Sys., Inc. v. Holland*, 269 So. 2d 407, 411-412 (Fla. 4th DCA 1972) (finding that lack of "definitive evidence as to the frequency with which plaintiff would need medical care and attention, nor the nature, extent

and cost thereof, did not make it error for the court to instruct on this element of damages when there was evidence to show that the plaintiff would require medical care for the rest of his life"). For example, expert medical testimony is not required to establish the reasonable necessity of future medical treatment. *See Sullivan v. Price*, 386 So. 2d 241, 244 (Fla. 1980). A jury may rely on uncontradicted evidence of the nature of the plaintiff's injury and lack of recovery, along with evidence of the injury's duration and effect, to conclude with reasonable certainty that the consequences of the plaintiff's injury will continue into the future. *Sullivan*, 386 So. 2d at 244; *see also Shearon*, 821 So. 2d at 1225. Evidence of a plaintiff's past medical bills also may be relevant. *See Nat'l Car Rental Sys., Inc.*, 269 So. 2d at 411-12.

Even when a plaintiff relies on expert medical testimony, such evidence need not be proven to the degree of reasonable certainty. *White*, 624 So. 2d at 1151; *accord Vitt v. Ryder Truck Rentals, Inc.*, 340 So. 2d 962 (Fla. 3d DCA 1976). "A medical expert may testify that future medical procedures are 'possible' or 'likely,' and need not phrase an opinion in terms of such surgery or treatment being 'reasonably necessary.'" *White*, 624 So. 2d at 1151. Such qualifications affect the weight of an expert's opinion, not its admissibility. *White*, 624 So. 2d at 1151; *accord Shearon*, 821 So. 2d at 1225.

Here, there is ample evidence to support the jury's award of future medical expenses, despite the jury's finding of no permanent injury. Plaintiff did not rely only on her physicians to testify as to her need for future medical care. She, her husband, and her son all testified that she has continued to suffer from back and neck pain since the February, 2008 motor vehicle accident. (T-I-107-108, 117-19; T-I-140-43; T-II-228, 249-50.) The uncontroverted testimony of the Plaintiff and her family establishes that her pain is not improving; indeed, her condition may be deteriorating. (T-I-117-18; T-I-140; T-II-228-30, 232.) Plaintiff cannot participate in the same activities that she enjoyed with her family before the accident, and she requires treatment from her pain management specialist in order to continue to work. (T-I-119; T-I-142-43; T-II-254-57.)

Even the Insurer's expert, Dr. Von Thron, admitted that the Plaintiff will need ongoing treatment for pain. (T-II-282, 296.) He found no evidence that her complaints of pain were not real. (T-II-295.) Dr. Von Thron simply disagreed with the Plaintiff's theory of causation. In his opinion, Plaintiff's need for future medical care is related to a pre-existing, degenerative condition, not the motor vehicle accident. (T-II-282-83.)

This evidence is sufficient to establish nature of the Plaintiff's injury, her lack of recovery, and the duration and effect of her injury. The jury was entitled to

conclude, with reasonable certainty, that the consequences of the Plaintiff's injury will continue into the future. *Sullivan*, 386 So. 2d at 244.

As to the amount of future medical expenses, Plaintiff elicited testimony from Dr. Galiano, her family practice physician. Dr. Galiano testified that he expected the Plaintiff to continue to experience pain in the future. (T-I-82.) He testified that she will require future medical care for her neck and back injuries (including treatment with her pain management specialist) "indefinitely." (T-I-79-80).

Plaintiff also relied on testimony from her pain management specialist, Dr. Caudill. Dr. Caudill testified that the Plaintiff's injuries are permanent. (T-I-190.) He explained that she will continue to require medical procedures in the future, at a total cost of $7,890 each year. (T-I-190-92.)[7] He also reviewed the Plaintiff's past medical bills, stating that he believed the charges for his services to be reasonable and representative of the usual and customary charges for similar treatment in Jacksonville. (T-I-189.)

Again, the jury's award of future medical expenses is not contrary to the manifest weight of the evidence. The record contains sufficient evidence to support the jury's award of damages for medical expenses the Plaintiff is

[7] Plaintiff's medical costs include two lumbar radiofrequence lesioning procedures ("lumbar RFLs") per year, at a cost of $1,605 each (T-I-192), together with six cervical epidural injections per year, at a cost of $780 each (T-I-193).

"reasonably certain to incur in the future." *Subaqueous Servs.*, 25 So. 3d at 1268. The jury was entitled to rely on the testimony of Plaintiff's physicians, along with evidence of her past medical bills, to award damages for her future medical care.

Nonetheless, the Insurer suggests that the jury's award of $205,140 in future medical expenses (which equals $7,980 years per year, multiplied by 26 years) is legally excessive. According to the Insurer, Plaintiff did not offer evidence of the amount of future medical expenses she would incur if her injuries were not permanent. (Init. Br., at 31.)

Evidence related to Plaintiff's future medical treatment, however, did not depend upon an assumption of permanency, as the Insurer claims. (*See* T-I-79-80, 82; T-I-192-95.) Even the Insurer's expert, Dr. Von Thron, conceded that he expected the Plaintiff would continue to require ongoing treatment for pain (T-II-296) – even though he did not believe her injuries were permanent (T-II-283). Certainly, the jury was entitled to accept evidence of the future costs that the Plaintiff was reasonably certain to incur, while rejecting her contention that the injuries were permanent. (Supp. R-5 (noting that jury was not bound by mortality tables)); *cf.* Fla. Std. Jury Instr. (Civil) 501.6 (jury instruction on use of mortality tables).

The jury could have relied on its own common knowledge to determine that the amount of Plaintiff's future medical costs could be offset by future inflation, or

by the rising costs of medical care. *See Burgess*, 609 So. 2d at 639 (citing *Delta Air Lines, Inc. v. Ageloff*, 552 So. 2d 1089 (Fla. 1989)); *see also In re Std. Jury Instr. in Civil Cases*, --- So. 3d ---, 2010 WL 727521, *118 (Fla. March 4, 2010) (noting that absent evidence of present value, jurors may resort to common knowledge, as guided by Fla. Std. Jury Instr. (Civil) 501.7 and argument) (citing *Seaboard Coast Line R.R. v. Burdi*, 427 So. 2d 1048, 1050 (Fla. 3d DCA 1983)). At closing argument, counsel for the Plaintiff argued without objection that the jury should calculate its award of future medical costs equal to $7,980 a year for 26 years, without any reduction for present value. (T-II-331-33, 335.) In response, the Insurer's counsel suggested that because "future medical bills are not related to this accident," the jury should award no damages. (T-II-359-60.) If the jury decided to "be generous and help [Plaintiff] out" with future medical costs, counsel for the Insurer argued that the jury should reduce its award to present value. (T-II-360.) The Insurer asked the jury to use its common sense, without otherwise arguing (or, for that matter, eliciting evidence to support) any other amount of damages for future medical expenses. (T-II-359-60; *see also* T-II-272-308; R-V-697.)

The facts of *Garriga v. Guerra*, 753 So. 2d 146 (Fla. 3d DCA 2000), cited by the Insurer, are distinguishable. In *Garriga*, the plaintiff sought a new trial,

arguing that the jury's verdict was inconsistent. 753 So. 2d at 147.[8] The jury awarded $15,000 in damages for future medical expenses, but did not find her injuries permanent. *Id.* The plaintiff sought a new trial. *Id.*

On appeal, the Third District agreed with the plaintiff, and reversed the judgment. *Id.* The Third District found:

> The jury's verdict . . . is not inconsistent simply because it awards future medical expenses on a finding of no permanency. It is inconsistent, however, because the only evidence of the need for future medical expenses . . . was inextricably linked to the evidence of a permanent injury: the only witness who testified to [the plaintiff's] future medical needs was [her family physician] who stated that she required surgery to alleviate the pain caused by a permanent condition, i.e., the herniated discs.

Id.

Unlike the facts of *Garriga*, the evidence of the Plaintiff's need for future medical expenses was not "inextricably linked to the evidence of a permanent injury." *Id.* Although Dr. Caudill testified that the Plaintiff's disk bulges were permanent – and could be corrected only through surgery – he did not recommend surgery for her neck or back. (T-190-91.) Instead, he testified that the Plaintiff will continue to require treatment for her pain, including the same or similar medications and procedures that he had previously prescribed as part of her treatment plan. (T-I-191-94; *see also* T-I-159 (describing medications); T-I-163-

[8] Presumably, the appellant in *Garriga* – unlike the Insurer here – timely objected to any inconsistency in the verdict before the jury was discharged.

65, 168-69, 174-75 (describing prior treatment using lumbar RFL); T-I-170-71, 173 (describing prior treatment using cervical epidurals).) Once again, the jury could have reasonably relied on evidence of the Plaintiff's past medical expenses, together with evidence that she is reasonably certain to incur costs for the treatment of her ongoing pain, to calculate the award of future medical expenses. The Insurer's reliance on *Garriga* is not persuasive.

Nor is this a case in which the Plaintiff failed to present any evidence of her future medical expenses. *See Fla. Farm Bureau Gen. Ins. v. Jordan*, 995 So. 2d 1135, 1137 (Fla. 5th DCA 2008) (finding that "no evidence was offered of future medical expenses reasonably certain to occur"); *accord Truelove v. Blount*, 954 So. 2d 1284, 1287-88 (Fla. 2d DCA 2007) (absent evidence showing how often plaintiff would need treatment in the future, award of future damages for medical expenses was not reasonable). Here, Plaintiff requested – and the jury awarded – future medical costs, even without a finding of permanent injury. *See Tompkins*, 651 So. 2d at 90 (permitting the recovery of future economic damages, in the absence of permanent injury, when such damages are proven with reasonable certainty). While a finding of permanent injury may have entitled the Plaintiff to additional, non-economic damages, it was not a prerequisite to an award of damages for past and future medical expenses that she is reasonably certain to

incur. *See id.* (*See* T-II-378-79 (explaining verdict form).) The jury's award was not contrary to the manifest weight of the evidence.

CONCLUSION

For all the foregoing reasons, the final judgment on the jury's verdict should be affirmed. The Insurer is not entitled to a new trial.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been furnished to **Hinda Klein**, Conroy, Simberg, Ganon, Krevans, Abel, Lurvey, Morrow, & Schefer, P.A., 3440 Hollywood Boulevard, Second Floor, Hollywood, FL 32021, counsel for Appellant; and **Kristie Schrader**, Law Offices of Patricia E. Garagozlo, 7406 Fullerton Street, Suite 206, Jacksonville, FL 32256, trial counsel for Appellant; by U.S. Mail, this 21st day of June, 2010.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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