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

CASE NO. 4D19-1533

CHARLES D. RUSSO, DMD and CHARLES D. RUSSO, DMD, PA,

Appellants,

vs. L.T. Case No.: CACE 17-5936(14)

JESSICA KVERNHAUGEN,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT, SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

This appeal arises from the final judgment on the jury's verdict awarding damages totaling $1.751 million against Defendants, Charles D. Russo, DMD and Charles D. Russo, DMD, PA (referred to collectively as "Dr. Russo"). In his initial brief, Dr. Russo includes an abbreviated, one-sided statement of the case and facts. (*See* Initial Br. 1-5.) Because Dr. Russo fails to state the facts in the light most favorable to Plaintiff,[1] we ask this Court to consider the following:

The nature of Plaintiff's injury. Plaintiff sued Dr. Russo to recover damages for an injury to her left lingual nerve (R.1-3), which controls the nerve endings on the front two-thirds of the tongue's left side (T.25). Plaintiff alleged, and the jury found, that Dr. Russo negligently severed the nerve during surgery to remove Plaintiff's partially impacted lower-left wisdom tooth (Tooth No. 17). (R.1-3; R.148-49; T.27-28.) Plaintiff was treated by Dr. Ramzey Tursun, a nerve repair surgeon who tried to repair (with limited success) her severed left lingual nerve. (T.29-30.)

At trial, Dr. Russo did not dispute that Plaintiff's nerve was completely severed by the wisdom tooth extraction. (T.50.) Dr. Russo denied any negligence and argued that the injury was a known recognized complication of the wisdom tooth surgery. (*E.g.*, T.50; T.77, 88, 128, 183-84.)

[1] *See, e.g.*, *J.T.A. Factors, Inc. v. Philcon Servs., Inc.*, 820 So. 2d 367, 372 (Fla. 3d DCA 2002).

Proceedings at trial. In opening statements, Plaintiff's counsel informed the jurors that they would hear the deposition of Dr. Tursun (T.39), her nerve repair surgeon (T.29). Counsel stated that Dr. Tursun would testify that Dr. Russo's original incision during the wisdom tooth removal surgery, which ran closer to the lingual side, created a higher risk of severing the lingual nerve. (T.41-42, 42-43.) Counsel also showed the jury a photograph of the neuroma removed from Plaintiff's mouth by Dr. Tursun. (T.43.) Explaining that a neuroma is "a big ball of nerve tissue," Plaintiff's counsel stated without objection that Dr. Tursun is "going to tell you that it's one of the biggest ones that he's found." (T.43.)

Dr. Tursun's testimony. Both parties listed Dr. Tursun as a witness for trial (R.68; R.71) and identified his deposition as a trial exhibit (R.58; R.61). In her list of disclosed witnesses, Plaintiff named Dr. Tursun as her treating physician and expert, noting that his testimony, "contained in the deposition he gave on April 24, 2018," was "expected to include testimony regarding his surgery and findings." (R.68.)

Plaintiff presented Dr. Tursun's testimony by deposition at trial. (T.439-40, 441-89.) "Virtually all" of the deposition was read to the jury by counsel. (T.439, 441-42.)

Dr. Tursun is an oral surgeon who is "double board certified in maxillofacial surgery and head and neck and microvascular surgery," with a focus on

reconstruction, microsurgery, and microneurosurgery. (T.444-45.) He practices at Jackson South Medical Center in Miami. (T.443, 459; Confidential Record on Appeal ("C.R.") 392-96.)

Dr. Tursun first saw Plaintiff on May 3, 2016, for an evaluation of left tongue numbness. (T.445.) She had experienced numbness on the left side of her tongue, along with a loss of taste, since the extraction of her wisdom tooth in late January, 2016. (T.445.) Plaintiff informed Dr. Tursun that she did not have pain unless she brushed or touched the area of the extracted wisdom tooth. (T.446-47.) Dr. Tursun noted that Plaintiff's pain was "most likely . . . all the time" because "you touch [that area] when you talk, when you swallow, when you do everything." (T.446.) Plaintiff also reported "sharp pain, sharp shooting pain toward the tongue causing her severe pain"; she told Dr. Tursun that she would "bite her tongue on that side without noticing it." (*Id*.)

Dr. Tursun's examination showed that Plaintiff had no sensation in her left tongue. (T.447.) The lower left side of the mouth, where the tooth had been located, "showed severe pain to the tongue." (*Id*.) In Dr. Tursun's opinion, this pain was significant because it indicated the "presence of neuroma." (T.448.) A neuroma is caused by an injury, "when the nerve gets injured or cut." (*Id*.) When the nerve tries to heal, he explained, it grows haphazardly, "almost like a mass of unorganized nerve tissue." (T.448.) This causes pain. (*Id*.)

Dr. Tursun concluded from his examination that Plaintiff's left lingual nerve was "completely transected." (T.452-53.) She had sustained a "[t]otal injury to the nerve, like total numbness, hypoesthesia." (T.453.) Plaintiff was told that nerve repair surgery was advised and any neuroma would need to be excised. (T.453.) If the nerve defect was small enough, Dr. Tursun explained to Plaintiff, he could do an immediate repair; otherwise, he would need to add a cadaver nerve to allow a connection with the generating nerve ("ergogenic nerve growth"). (T.480-81.)

Dr. Tursun performed surgery on Plaintiff on May 27, 2016. (T.459; C.R. 392-96.) He found the lingual cortex had been penetrated where the nerve was injured. (T.462-65.) According to Dr. Tursun, Plaintiff's lingual nerve had been completely severed. (T.479.) He described one "big neuroma," estimated to be ten millimeters by five millimeters "at least, if not bigger." (T.464; C.R.852, 854; *see* C.R.395 (surgical notes reflecting a "large neuroma about 0.5 x 1 cm").) He noted another neuroma, which measured one centimeter by "about one by six [1.6], one by seven [1.7]" centimeters. (T.465; C.R.379-80; C.R.856.) Dr. Tursun agreed with defense counsel that "as neuromas go," that was "a pretty big one." (T.465; *see also* T.479 (agreeing the neuroma was "a large defect").)

During surgery, Dr. Tursun "exposed the nerve, cut the neuroma, released the scars and then reconstruct[ed] the defect" with a cadaver nerve. (T.467; C.R.858.) He also added a conduit: "almost like a tube," designed to "prevent formation of a

new neuroma." (T.467; *see* C.R.377-78; C.R.858.) The cadaver nerve works "like a scaffold," allowing the "native nerve" to "go through it." (T.469.)

In her first post-operative visit, Plaintiff reported that her pain was "three out of ten controlled with pain medication." (T.470; *see* C.R.338.) She had trouble opening her mouth. (T.470.) Three and a half weeks after the surgery, Plaintiff believed she was healing well, but still complained of a limitation in opening her mouth wide. (T.470; *see* C.R. 339 ("[p]atient reports complete resolution of her previous dyesthesia secondary to traumatic neuroma").)

Five months after the surgery, Plaintiff had begun to feel tingling, like an electric shock. (T.471.) Dr. Tursun believed that was the start of nerve regeneration. (T.471-72.) When heavy pressure was applied, Plaintiff reported ten to twenty percent of sensation on the left side of her tongue. (T.471-72, 477-78.) With light pressure on the affected side, Plaintiff had no feeling and could not discern in which direction a Q-Tip was moved. (T.478.)

Dr. Tursun's deposition testimony, as read at trial, concluded with questions from Plaintiff's counsel. (T.477-89.) Dr. Tursun agreed that whatever degree of feeling Plaintiff presently had would continue in the future, especially given that the surgery was two years ago. (T.482.) Defense counsel did not follow up with any redirect. (T.489.)

Testimony of Plaintiff's standard of care and causation expert. Plaintiff also elicited testimony from Dr. Gary L. Wyatt, a board-certified oral and maxillofacial surgeon. (T.276.) Dr. Wyatt testified as Plaintiff's expert on standard of care and causation.

Based on his examination of Plaintiff, Dr. Wyatt concluded that she had no feeling or taste on the left side of her tongue. (T.309-11, 320-21, 323.) She could not feel light pressure (T.313) and was unable to feel anything when a needle was inserted completely through her tongue's left side (T.323-26). Dr. Wyatt concluded that Plaintiff's injury was permanent and would not improve. (T.327.) In his opinion, Plaintiff needed help from a pain management specialist to cope with the neuropathic pain that she continues to experience. (T.385-86.)

Dr. Wyatt explained to the jury that an oral surgeon is taught to avoid the lingual plate. (T.284.) Given that "the lingual nerve can be in a lot of different positions," surgery should be performed from the buccal side (the cheek side) of the mouth. (T.284). The bur of a drill is the most common way that the lingual nerve is cut in half during wisdom tooth removal surgery. (T.289.) The drill is very fast and has sharp flutes; "if it gets into the soft tissue around the nerve, it can chew it up really quickly." (T.289.) Alternatively, the original incision, if made incorrectly, can cut the lingual nerve (T.289), as can a sharp instrument if improperly placed into the lingual tissue (T.290). Dr. Wyatt testified that an oral surgeon who severs the lingual

nerve (whether by penetration of the lingual plate with a drill bur, or the use of a scalpel or sharp instrument in that area) is negligent. (T.290.)

In Dr. Wyatt's opinion, Dr. Russo negligently severed Plaintiff's left lingual nerve when his drill passed into the lingual tissues. (T.328-29; *see* T.290.) The nerve was "severely sever[ed]," causing significant scarring and necessitating a graft for repair. (T.328-30.) Dr. Wyatt also believed that Dr. Russo's incision to remove Plaintiff's wisdom tooth was too far towards the tongue side of her mouth. (T.329.) This, too, was negligence, although not the cause of Plaintiff's severed lingual nerve. (T.333-35.)

According to Dr. Wyatt, Plaintiff reported that after Dr. Tursun repaired her lingual nerve, he told her he had difficulty finding the nerve "because it was so high up and back" and "there was a large neuroma present." (T.297-98, 329-30, 417.) Dr. Wyatt explained that the lingual nerve "had retracted considerably up," "much further than" Dr. Tursun had "expected to find it." (T.417, 418; *see* T.329-30.)

Plaintiff's wisdom tooth removal. Plaintiff testified live at trial. She was then thirty-three. (T.536.) She received her associate of science degree in 2017, and is enrolled in a four-year program at Embry-Riddle Aeronautical University. (T.535, 581-82.) Plaintiff manages Florida Coast to Coast Helicopters, where she has worked for eight years. She enjoys her work and plans to continue there after she completes her bachelor's degree of aeronautical science. (T.534-36, 582-83.)

Plaintiff was referred to Dr. Russo by her primary dentist. On January 28, 2016, Dr. Russo removed her wisdom tooth. (T.537-37, 542-44.) The next day, Plaintiff was groggy and "still in pain"; she could not open her mouth very well. (T.545.) She described the pain as "[b]ad, excruciating," adding that although "the pain meds helped a little bit, . . . without those, it was pretty painful." (T.545; *see also* T.551 (describing pain "where the wisdom tooth was" and "on the side of my tongue").) Plaintiff also noticed she could not feel the left side of her tongue. (T.545.)

When Plaintiff reported her symptoms at her first (and only) follow-up appointment, Dr. Russo responded that the numbness in her tongue would either go away or would be there for life. (T.547-48.) In Plaintiff's words, Dr. Russo "didn't seem concerned at all." (T.548.) Neither Dr. Russo nor his office staff told Plaintiff that she needed to return for another follow-up appointment. (T.548, 551.) Plaintiff returned to work a few days after the wisdom tooth removal. (T.548-49.)

Plaintiff testified that over the next month, she was slowly able to open her mouth a little farther; as the sutures healed, the pain from the wisdom tooth removal began to lessen. (T.551.) However, she experienced the same numbness on the left side of her tongue. (T.550, 551.) She also noticed a loss of taste. (T.551.)

In the following weeks, Plaintiff continued to experience pain and numbness. (T.551-53.) Eventually, Plaintiff began to realize that her symptoms were not a normal consequence of wisdom tooth removal. (T.551-53.) As she researched the

symptoms to find a cause, Plaintiff saw Dr. Tursun's name (T.553-54), and contacted his office to schedule an appointment (T.554-55).

Plaintiff's treatment by Dr. Tursun. Plaintiff testified that she first saw Dr. Tursun in May of 2016. (T.554-55.) On direct examination, she was asked, "What did [Dr. Tursun] tell you about your situation?" (T.555.) Defense counsel objected, stating, "Objection, hearsay." (T.555.) The trial court overruled the objection. (*Id*.) The defense did not ask for a continuing objection. (*Id*.)

Plaintiff's counsel then sought to elicit Plaintiff's explanation of what occurred during her appointment with Dr. Tursun, as detailed below:

> Q: Well, I'm just trying to understand and I want the Jury to understand what occurred. You went to see him and then just tell us what occurred.
>
> A: Yes, I went to see him. Sat in the room for a few minutes. He came in and asked what the symptoms were. Just went over medical history, whatnot. And he did a couple of the tests with, like, pricking it or pricking my tongue, whatnot.
>
> Q: With something sharp?
>
> A: Yes. And then something dull is what he said it was. He was trying to see if I could tell the difference between a sharp point or a dull object.
>
> And then he said that he would send me back for a cone beam scan.[2]
>
> Q: All right. Did he do that?

[2] A cone beam scan is like a CAT scan of the mouth. (T.29; T.212-13; T.377-78.)

A: Yes.

Q: After you had the cone beam scan, did you come back and see Dr. Tursun that day?

A: Yes.

Q: Did he discuss with you the results of the cone beam scan?

A: Yes. He was looking at it on the screen and he said that it appeared that I have nerve damage and that he would send it out as well. I mean, he read it but then I believe he also sent it out to a radiologist.

And then also he talked with me about possible nerve repair surgery and if I would want to do that, if it was worth it to me. He said to think about it. So I thought about it.

Afterwards we didn't make the schedule for the surgery at that appointment. I called back later to schedule the surgery.

(T.555-57.)

The first opening for surgery was not for another three to six months, but Plaintiff was told that Dr. Tursun's office "would do their best to squeeze [her] in." (T.557.) When she was told a couple of days later that Friday, May 27, 2016 was available for her surgery, she agreed to that date. (*Id*.)

Plaintiff testified to the events on the day of surgery. (T.557-58, 560.) Dr. Tursun performed the surgery, along with "a team of other surgeons"—including his resident. (T.558-59.) When asked whether she had talked with Dr. Tursun after she woke up, Plaintiff responded:

Not that same day. I did speak with his resident though. Dr. Tursun had left because I guess he was exhausted. The surgery I was

> told was supposed to take about an hour, but I guess it actually took about three.

(T.559.) Defense counsel did not object. (*Id*.)

Plaintiff was then asked, "And what were you told by the resident?" (T.559.) Without any objection from the defense, Plaintiff recounted:

> That the surgery had taken longer than they expected. It was a little more difficult because the nerve was basically so stretched that they were inside my mouth into the base of my skull trying to do the surgery.
>
> If they would have known it was that bad, they actually would have gone through my neck and I would have a scar here down my neck. And then he gave me pain medication, muscle relaxers since my mouth was open for so long, and yeah, to schedule a follow-up and come back to speak with Dr. Tursun.
>
> Also later in the day, since there were no hospital rooms available, eventually the resident came and checked my vitals and everything and said I was okay to go home and rest there.

(T.559; *see* T.559-60.)

A few days after the surgery, Plaintiff saw Dr. Tursun for a follow-up appointment. (T.560.) She was "still in pain" and "unable to open [her] mouth very far." (*Id*.) When asked whether Dr. Tursun told her "anything about the procedure that he had done or what he had found," Plaintiff responded:

> Yes. The nerve was completely severed, that there were some large neuromas that were removed, some of the largest he had seen. And also, once again, that they would have actually gone through my neck if they would have known how bad it was and how separated, how farly [sic] separated the nerves were and that he had to use cadaver nerve because he was unable to suture the nerve together.

(T.560-61.) Defense counsel did not object to this testimony. (*Id*.)

Events following the nerve surgery. When Plaintiff next saw Dr. Tursun, she had healed from the surgery. (T.562.) Removal of the neuromas had resolved Plaintiff's pain in the back of her mouth. (T.562 (describing the "one thing that was a success from the surgery": "removing those neuromas that were in the back of my mouth"); T.563 (stating that "[a]fter the surgery, … the neuroma pain was resolved"); T.596-96 (explaining that "I had no pain where the neuromas were because the neuromas were removed"); *see* C.R.339.)

Before Dr. Tursun's surgery, Plaintiff explained, the neuromas were "very painful." (T.562.) Not only was the pain "pretty much constant," if her tongue actually touched the neuromas (as it would, simply in the course of moving around her mouth), the pain was "excruciating." (T.562.)

Aside from relieving the neuroma pain, Plaintiff testified, "there was not any change at all" with regard to the other symptoms that the surgery sought to correct. (T.562.) The left side of her tongue remained numb. (T.563.) She still had pain in the back of her mouth where the wisdom tooth was, along with throbbing pain in the middle of her tongue. (T.563; *see also* T.596 (explaining that in October 2016, she had no pain where the neuromas were, but "never said" she "had no pain").) Plaintiff described the pain in her tongue as "an electrical kind of shock pain," together with "a deep, dull pain" that "would come and go." (T.563.)

Five months after the surgery, Plaintiff could feel "maybe 10 to 15 percent more in the middle of her tongue" with heavy pressure. (T.564.) She still could not feel a light touch on the left side of her tongue. (T.564.)

Dr. Tursun informed Plaintiff that she would reach the maximum of healing from the surgery after about a year. (T.565.) He gave her exercises and instructed her on "all different types of stimulus to try to get the nerves to start working," which she did every day. (T.565-66.) The exercises did not improve her sensation. (T.566.)

Approximately one year after the surgery, Plaintiff saw Dr. Wyatt, another oral and maxillofacial surgeon. (T.567.) She did not return to Dr. Tursun because of the distance for travel and the difficulty in scheduling an appointment. (T.566-67.) Dr. Wyatt performed the same kinds of testing that Dr. Tursun had. (T.567-68.)

The jury was shown a video, in which Dr. Wyatt inserted a needle completely through Plaintiff's tongue. (T.575.) Plaintiff testified that she could not feel that at all. (T.575.)

Plaintiff's treatment by a pain management specialist. Plaintiff continued to experience pain. To alleviate that pain, she saw Dr. Lowell Davis, a pain management specialist. (T.568.) Dr. Davis initially prescribed Lyrica. Plaintiff found the out-of-pocket cost ($348 per month) too expensive, and asked Dr. Davis to prescribe alternatives. (T.570-71.) Plaintiff tried other medications, which did not help the pain and made her "very groggy and sleepy." (T.570.) Eventually, she tried

Lyrica and found that it helped her pain (T.570, 571-72), without causing any side effects (T.608-9).

Although Dr. Davis gave Plaintiff a few samples of Lyrica, she now buys it on her own. (T.572.) Plaintiff testified that she had been able to reduce her out-of-pocket cost for Lyrica to $200 per month. (T.572.) She takes 75 milligrams of Lyrica twice a day. (T.572.)

When asked how Lyrica helps the pain, Plaintiff responded: "[I]t lessens it, about 50, 60 percent. It kind of depends on the day." (T.572.) She described the pain as "[d]eep, like a dull, throbbing pain in the middle of my tongue." (T.573.) Plaintiff testified that she also experiences pain "back where the wisdom tooth was"; "[e]very time" she touches that area with food or brushes her teeth, she explained, "it sends like an electrical pain, shock." (T.573.) Plaintiff added: "I actually hate brushing my teeth but of course I have to. So … [Lyrica] helps with that." (T.573.)

Before Plaintiff began taking Lyrica, she experienced that pain "five to 10 times a day, maybe a little bit less, sometimes maybe a little bit more." (T.573.) The pain lasted "anywhere from 30 seconds or a minute to maybe 30 minutes to an hour," with no set time. (T.573.) Her pain level at that point was a "five to a seven." (*Id*.) Lyrica lessens the pain, both in terms of intensity and frequency. (T.573-74.) With Lyrica, she experiences pain "50, 60 percent less," and also finds the pain is "about 50 to 60 percent less on the pain scale." (T.574.)

Plaintiff sees Dr. Davis every six months. (T.569.) He treats her only for pain. (T.575.) Although Plaintiff mentioned her loss of taste to Dr. Davis (and to all of her doctors), he does not treat her for that. (T.574-75.) In fact, there is no treatment (T.574), and Dr. Tursun informed Plaintiff that her sense of taste will never return (T.574-75).

Effects of Plaintiff's continued numbness and pain. Plaintiff testified that her condition has not improved since she last saw Dr. Wyatt in May of 2017. (T.568, 575.) She is aware, "24 hours a day," that half her tongue is numb. (T.575.) Plaintiff explained that the left-sided numbness makes it "hard to know where the food is"; when food gets stuck in her mouth, she has to "reach back and kind of get it out" because she "can't feel it." (T.575.) She is "always cautious of biting [her] tongue." (T.576.) Even if it doesn't hurt, she still has "the swelling from biting it and of course the taste of blood" in her mouth. (T.576.) Sometimes when she bites her tongue "really hard," she can "actually hear . . . a crunch," which is "a horrible sound." (T.576.)

Plaintiff chews on the right side of her mouth. (T.576.) She testified that she does not go out to eat as often as she previously did and cooks far less often. (T.576.) When she does eat in public, she is concerned and embarrassed about food dripping or falling out of her mouth, which she cannot feel until it is on her lips. (T.577.) She still cannot taste food on the left side of her tongue. (T.577.) Although she can taste

on the right side, the sensation is more intense: spicy foods are now "too spicy" and warm foods feel "even hotter." (T.577-78.) The left-sided numbness also impacts Plaintiff's other activities, like kissing her husband. (T.579.)

Plaintiff testified that because of the numbness, she is constantly aware of her speech. (T.578.) Sometimes she will slur at the end of the day (T.578), especially if she has been talking on the phone all day (T.610-11). She explained that she tries hard to concentrate on speaking, including the movement and location of her tongue while she speaks. (T.578-79.)

Plaintiff has suffered depression as a result of the numbness and pain in her tongue. (T.580-81.) "Especially right after" her wisdom tooth removal surgery, she explained, she felt "invaded, like someone that you're supposed to trust because they're a medical professional basically mutilated you." (T.580.) She "didn't go out of the house very often." (T.580.) Plaintiff added:

> Just not knowing what happened or why it happened. I mean, I know Dr. Russo had said in his statements that he has no recollection of me whatsoever. Every second of every single day of every week of every month for the last three years it's just consumed me.
>
> It's all—I think about it every day. And … it's definitely [taken] a little bit away from me …. [P]art of the spark is gone, it's true.

(T.580.) Plaintiff has lost faith in dentists and doctors. (T.580.) Not only is she depressed, she feels a "blatant disregard of care from somebody who takes an oath and is supposed to heal people." (T.581.)

Testimony of Plaintiff's pain management specialist. At trial, Plaintiff read into evidence the deposition testimony of her interventional pain management specialist, Dr. Lowell Davis. (T.515-33.)

Dr. Davis is double board-certified in anesthesia and pain management. (T.518.) He first treated Plaintiff in September of 2017, when she complained of left-sided mouth and tongue pain. (T.518-19, 526-27.) Plaintiff's pain, although intermittent, was described by Dr. Davis as "lancinating pain," which is "typical of neuropathic pain or nerve pain." (T.519.)[3] According to Dr. Davis, Plaintiff's description of the "zinger," or electrical sensation that she experiences, is "typical of neuropathic pain." (T.523.)

Before seeing Dr. Davis, Plaintiff had tried anti-inflammatories, including 800 milligrams prescription ibuprofen, for pain. (T.519.) On a scale of zero to ten, she reported that her pain was a five. (T.520-21.) Dr. Davis believed "there was definitely an issue with regard[] to" Plaintiff's lingual nerve (T.523) that he diagnosed as lingual dysarthria, or a "paralysis of the lingual nerve." (T.522, 524.) He also diagnosed neuropathy, or nerve pain (T.526-27), and believed this neuropathic pain caused Plaintiff's facial and tongue pain (T.532).

[3] *See* https://www.merriam-webster.com, accessed September 16, 2019 (defining "lancinating" to mean "characterized by piercing or stabbing sensations").

Given Plaintiff's particular diagnosis, injection therapy was not an option. (T.525.) Dr. Davis could only prescribe medications to address Plaintiff's symptoms, not the cause. (T.525.)

Dr. Davis initially prescribed Lyrica, a medication for nerve pain, to give Plaintiff "some symptomatic relief." (T.522-23.) Dr. Davis later prescribed Neurontin, which made Plaintiff sleepy and was not as effective as Lyrica. (T.523-24.) She was then prescribed Cymbalta, another medication for neuropathic pain. (T.524-25.)

When Plaintiff next saw Dr. Davis, she reported that she had not tolerated the Cymbalta well. (T.526.) She tried yet another generic medication, Topamax, which–like the Cymbalta—made her sleepy. (T.527-28.) Eventually, once Plaintiff determined that she could obtain Lyrica at a cheaper cost (T.527), Dr. Davis prescribed 75 milligrams of Lyrica twice daily (T.529).

According to Dr. Davis, Plaintiff "was doing better with the Lyrica." (T.528.) She was able to tolerate the medication, which gave her "a positive response." (T.528; *see also* T.531 (testifying that he is satisfied with Plaintiff's response to Lyrica).) Plaintiff reported her pain as a four on a scale of zero to ten. (T.528.) When asked whether this was a 40 percent improvement, Dr. Davis explained:

> It's a subjective visual analog score. We tell them zero to ten and then they say maybe it's a 60 percent reduction because her daily function improved, but her pain wasn't that much better.

(T.528-29.) Dr. Davis testified that neuropathic pain "lingers for a long, long time." (T.530-31.) Even stable patients, whose pain is controlled on medications like Lyrica, "still have pain." (T.531.)

Dr. Davis believed Plaintiff would probably need to take Lyrica "on a chronic basis, years." (T.531-32.) He thought it "[p]robable" she would require Lyrica for the rest of her life. (T.532.) His opinions regarding Plaintiff's future care and treatment were all stated within a reasonable degree of medical probability. (T.533.)

Testimony of Plaintiff's husband. Plaintiff's husband, James W. Bryan, Jr., also testified. (T.502.) The two had lived together for several years before their November 2016 engagement, and married in November 2018, a few months before trial. (T.502, 511, 513.)

According to Mr. Bryan, Plaintiff was in "excruciating pain" after the wisdom tooth removal surgery. (T.506.) She began complaining about numbness in her tongue "pretty quickly after the procedure" (T.506), had difficulty eating, and "was pretty miserable" (T.507). Additionally, Mr. Bryan testified, Plaintiff "complained that . . . she had weird electrical pulses" that "she described as a zinging feeling going on somewhere in that part of her mouth." (T.506-7.)

Mr. Bryan stated that in the three years since the nerve repair surgery (in May of 2016), Plaintiff's condition had not really changed or improved. (T.508.) She still complains of numbness, pain, and loss of taste. (T.508-9.) Although she is a

"phenomenal cook," she no longer enjoys cooking. (T.509.) When asked to describe the impact of Plaintiff's injury, Mr. Bryan responded:

> [W]hen I first met Jessica, one of the reasons that we became friends and one of the reasons that I eventually fell in love with her was that she was always so positive and happy and outgoing and cheerful and probably the most positive person you could ever meet.
>
> She still is to an extent, but . . . a lot of that is now mixed with depression, sadness, frustration. You know, it's just taken a piece of that spark away from her I think. Just going through all of this. It's been very difficult.

(T.510.)

Testimony of the defense expert. The defense presented one expert, Dr. Salvatore Ruggiero. (T.616-700.) Dr. Ruggiero is a board-certified oral and maxillofacial surgeon. (T.616.) The defense expert opined that Dr. Russo acted within the standard of care in extracting Plaintiff's wisdom tooth and was not at all negligent. (T.641.)

The jury's verdict. The jury found that Dr. Russo negligently breached his duty of care to Plaintiff, and awarded damages totaling $1.751 million. The jury awarded $51,000 for past medical expenses, $200,000 for future medical expenses, $250,000 for past pain and suffering, and $1.25 million for future pain and suffering. (R.148-49.)

Dr. Russo filed a motion for new trial or remittitur, arguing that the non-economic damages award was excessive. (R.204-39.) Dr. Russo also asserted that

the trial court erred in allowing Plaintiff to testify as to what she was told by Dr. Tursun and his resident after the nerve repair surgery. (R.204-5.) The defense did not argue that Plaintiff's counsel improperly commented on the evidence in opening statement. Plaintiff filed a written response (R.242-90), and the defense replied (R.907-43). The trial court denied the motion for new trial and granted a remittitur only as to the future medical expenses, which—the parties agreed—should be reduced to $117,360. (R.957-59.) Dr. Russo timely appealed. (R.963-69.)

SUMMARY OF ARGUMENT

Dr. Russo fails to provide any basis for this Court to reverse the final judgment on the jury's verdict. The defense is not entitled to a new trial, or to remittitur of the jury's award of non-economic damages.

First, the jury's non-economic damages award of $1.5 million is supported by the evidence, bears a reasonable relationship to Plaintiff's injury, and does not suggest that the jury was unduly or improperly influenced by passion or prejudice. *See generally* § 768.74(5)(a)-(e), Fla. Stat. (2019). The non-economic damages award, when compared to verdicts in similar cases, is not excessive, but well within a reasonable range. The trial court did not abuse its discretion in denying a new trial or remittitur.

Nor is Dr. Russo entitled to a new trial based on his contention that the trial court erred in admitting prejudicial hearsay testimony. By failing to timely and

contemporaneously object to the Plaintiff's testimony relaying what she was told by her treating physicians after surgery, Dr. Russo has waived any claim of error on appeal. Even if Dr. Russo is found to have preserved the issue (which he did not), two reasons support affirmance of the trial court's ruling. First, Plaintiff's testimony, by definition, was not hearsay: her statements were not "offered in evidence to prove the truth of the matter asserted." § 90.801(1)(c), Fla. Stat. The trial court correctly allowed the testimony. Second, the evidentiary error, if any, was harmless. Plaintiff's testimony was consistent with the already-admitted, and unobjected-to, evidence. There is no reasonable possibility that the purported error contributed to the jury's verdict.

Dr. Russo is not entitled to a new trial or to remittitur. This Court should affirm the final judgment and the trial court's order denying a new trial or remittitur of the non-economic damages award.

ARGUMENT

I. Dr. Russo is not entitled to a new trial or remittitur of the $1.5 million non-economic damages award.

Standard of review. This Court reviews the denial of a new trial or remittitur for an abuse of discretion. *See Lassitter v. Int'l Union of Operating Engineers*, 349 So. 2d 622, 627 (Fla. 1976). The trial court's decision comes to the appellate court "properly boxed in the wide discretion of the trial court . . . carefully wrapped in presumption of correctness and securely tied with the strong cord of a jury verdict."

Smith v. Goodpasture, 179 So. 2d 240, 240-41 (Fla. 2d DCA 1965); *accord Glabman v. De La Cruz*, 954 So. 2d 60, 62 (Fla. 3d DCA 2007). Given the trial court's "unique vantage point" to "personally observe the witnesses and the jury," its decision denying remittitur is afforded "considerable deference." *Rety v. Green*, 546 So. 2d 410, 418 (Fla. 3d DCA 1989); *see also Lassitter*, 349 So. 2d at 627 (when a trial court refuses to grant remittitur, "[t]he correctness of the jury's verdict is strengthened"). A court "should never declare a verdict excessive merely because it is above the amount which the court itself considers the jury should have allowed." *Bould v. Touchette*, 349 So. 2d 1181, 1184 (Fla. 1977) .

A. The trial court properly exercised its discretion in refusing to grant a new trial or remittitur of the jury's non-economic damages award.

In determining whether an award is excessive, the trial court must consider the criteria set forth in section 768.74, Florida Statutes. *See Aills v. Boemi*, 41 So. 3d 1022, 1027 (Fla. 4th DCA 2010). Here, none of those criteria was met. The jury's non-economic damages award of $1.5 million is amply supported by the evidence, bears a reasonable relationship to Plaintiff's injury, and does not suggest that the jury was unduly or improperly influenced by passion or prejudice. *See generally* § 768.74(5)(a)-(e), Fla. Stat. (2019). Dr. Russo is not entitled to a new trial or remittitur.

1. The jury followed the law in awarding non-economic damages.

Dr. Russo first contends that the jury's non-economic damages award "runs afoul of each prong" of section 768.74. (Initial Br. 9.) His argument arises from a fundamental misunderstanding of Florida law. The standard advocated by Dr. Russo would allow for recovery of non-economic damages only upon a plaintiff's proof of "constant pain" and an injury so disabling that she could not attend school, work, or marry. (*See id*. 9-10.)

This is not the standard. *See, e.g.*, *R.J. Reynolds Tobacco Co. v. Townsend*, 90 So. 3d 307, 311 (Fla. 1st DCA 2012) (recognizing that jurors, who "know the nature of pain, embarrassment and inconvenience," are authorized under Florida law to assess non-economic damages, which are "inherently difficult to measure") (citing *Braddock v. Seaboard Air Line R. Co.*, 80 So. 2d 662, 668 (Fla. 1955)). Florida law establishes that non-economic damages may properly be awarded for a plaintiff's pain and suffering, disability or physical impairment, disfigurement, mental anguish, inconvenience, and loss of capacity for the enjoyment of life. *See, e.g.*, Fla. Std. Jury Instr. 501.2(a). To be entitled to an award of non-economic damages, a plaintiff need not be so debilitated that she is unable to complete a college degree, earn a living, or marry.

By emphasizing Plaintiff's continued ability to work, Dr. Russo apparently confuses economic and non-economic damages. Yet Plaintiff did not even ask for

past or future lost wages as a measure of her economic damages. Instead, she limited her economic damages claims to past and future medical expenses. (R.138-39; T.773-77.)

In any event, the record reflects that the jury was properly instructed on damages. (T.735-36.) There is simply no indication that the jury took "improper elements of damages into account," or awarded damages based only on speculation and conjecture. (*See* R.1014-15 (citing § 768.74(5)(c), Fla. Stat.).)

Given Plaintiff's life expectancy of 48.9 years (T.775), the jury's award of $1.25 million for future pain and suffering equals a little more than $25,500 a year—or about $70 per day. (R.1016-17.) The damages awarded for future pain and suffering, together with the $250,000 award for past pain and suffering, were well-supported by the evidence and logically calculated. (R.1016-18 (addressing § 768.74(5)(e), Fla. Stat.).) The jury's award of past and future non-economic damages "bears a reasonable relation to the amount of damages proved and the injury suffered." § 768.74(5)(d), Fla. Stat.; *see also id.* § (5)(b) & (e), Fla. Stat. This amount is fair and just in light of the evidence. *See* Fla. Std. Jury Instr. (Civil) 501.2; *see also Townsend*, 90 So. 3d at 311 (affirming jury's award of compensatory damages).

2. The evidence at trial supports the jury's award of non-economic damages.

Nonetheless, Dr. Russo suggests that the jury's award lacked an evidentiary basis. (Initial Br. 10.) His contention contradicts the record evidence and

underestimates the challenges that Plaintiff faces. While Plaintiff does make efforts to "live[] a normal life" (*id.*), the jury also heard ample evidence of her pain and suffering, physical impairment, mental anguish, inconvenience, physical defect and loss of capacity for the enjoyment of life. The record flatly contradicts Dr. Russo's suggestion that "there is no evidentiary basis whatsoever" for the jury's non-economic damages award of $1.5 million. (*Id.*)

For instance, Dr. Russo's claim that Plaintiff had "no pain" ten months after removal of her wisdom tooth is misleading. (Initial Br. 9 (citing T.471).) Five months after the nerve repair surgery, Plaintiff reported only that she had no *neuroma* pain. (T.562-53; *see* C.R.339, 340.) Before the repair surgery, Plaintiff testified, the neuromas were "very painful" and the pain was "pretty much constant"; when she actually touched the neuromas, the pain was "excruciating." (T.562; *see* C.R.335.)

Now, although Plaintiff may not have "constant pain" (Initial Br. 9), she continues to suffer a deep, "dull, throbbing pain" in the middle of her tongue and a shocking, "electrical pain" whenever she touches where her wisdom tooth was. (T.573; *see* C.R.340.) Brushing her teeth can be painful. (T.573.) The shocking "zinger" described by Plaintiff is typical of neuropathic pain (T.519, 523), which can "linger[] for a long, long time" (T.530-31).

Before she began taking Lyrica, Plaintiff experienced pain five to ten times a day, lasting "anywhere from 30 seconds or a minute to maybe 30 minutes to an hour," with a pain level of five to seven. (T.573.) While the medication reduces the pain's intensity and frequency (T.573-74; *see* T.528-29, 531), Plaintiff still describes her pain as a four on a ten-point scale (T.528-29). Even stable patients like Plaintiff, whose pain is controlled by Lyrica, have pain. (T.530-31.) Plaintiff's pain management specialist believed she would need to take Lyrica "on a chronic basis, years"—probably for the rest of her life. (T.531-32.) While the evidence may not show that Plaintiff's condition is expected to "deteriorate" (Initial Br. 10), neither is there evidence to establish that her condition will improve over time. (*See*, *e.g.*, T.531-32.)

Dr. Russo also points to evidence that Plaintiff had "full sensation" and "the ability to taste on the *right* side of her tongue" to suggest that she "lives a normal life." (Initial Br. 10 (emphasis added).) Yet Plaintiff testified that she is aware, "24 hours a day," that half her tongue is numb. (T.575.) The numbness on the left side of her tongue negatively impacts her taste overall, intensifying certain sensations (like spicy food and warm coffee) to the extent those are no longer pleasurable. (T.577-78). She is "always cautious" of biting her tongue. (T.576.)

The left-sided tongue numbness impairs Plaintiff's ability to eat. (T.575.) Although her husband described her as a "phenomenal cook," she no longer enjoys

cooking. (T.509; T.576.) She does not go out to eat as often, either. (T.576.) As Plaintiff explained, when she goes out to eat, she worries about "food dripping down," which embarrasses her (T.576-77).

Moreover, the numbness impacts Plaintiff's speech. (T.578-79, 610-11.) Notwithstanding one juror's comment that Plaintiff's "speech does not appear to be impaired" (Initial Br. 10 (citing T.610)), the evidence is undisputed that the lingual nerve damage sometimes affects Plaintiff's speech at the end of the day, especially if she's been talking on the phone. (T.610-11.) Regardless, Plaintiff must "constantly be aware and focus" on her speech. (T.578.) Even when she testified at trial, Plaintiff was "trying to really concentrate" on her tongue's movement. (T.578-79.)

And although Plaintiff married a few months before trial, she testified that the left-sided tongue numbness affects intimate activities like kissing. (T.579 (adding that it is "just a strange feeling" and "there is drool").) At trial, her new husband explained to the jury that Plaintiff's once positive and cheerful personality was "now mixed with depression, sadness, [and] frustration." (T.510.) In his words, Plaintiff's injury had "taken a piece of that spark away from her." (*Id.*)

Plaintiff agreed with her husband's characterization of the emotional impact of her injury. (T.579-80.) While Dr. Russo has said that "he has no recollection" of her "whatsoever," she "think[s] about it every day." (T.580.) Plaintiff testified: "Every second of every single day of every week of every month for the last three

years it's just consumed me." (*Id.*) Not only have the pain and numbness caused depression, she has lost faith in dentists and doctors. (T.580-81; *see* T.299.) Given the abundance of evidence elicited at trial, there is no basis for setting aside the jury's non-economic damages award of $1.5 million.

3. Comparison of the economic damages award to the amount awarded for Plaintiff's past and future pain and suffering does not establish that the non-economic damages award is excessive.

Next, Dr. Russo claims the award must be excessive because the jury awarded "nearly six times the amount" for Plaintiff's pain and suffering as it did for her economic damages. (Initial Br. 10.) His argument is not persuasive. Florida law does not impose such mechanistic guidelines for calculating non-economic damages. *Cf. Aills v. Boemi*, 41 So. 3d 1022, 1028-29 (Fla. 2d DCA 2010) (affirming trial court's decision not to follow a mechanical formula in granting remittitur of non-economic damages).

To the extent Dr. Russo relies on *Smith v. Goodpasture* to suggest otherwise, the Second District did not base its decision solely on a mathematical calculation. 179 So. 2d 240, 242 (Fla. 2d DCA 1965). Nor did the *Smith* Court establish a uniform rule requiring remittitur whenever a jury's damages award for pain and suffering exceeds a certain multiple of the compensatory damages. *See id.* Instead, the Second District concluded that the award was excessive after reviewing "the facts, the status of the plaintiff, [and] the amount allowed as computable compensatory damages,"

together with "the philosophy and general trend in cases in this state dealing with the question of damages for pain and suffering." *Id.* Given that the plaintiff in *Smith* was 68 years old at the time of the accident, the Second District was especially concerned about her average life expectancy. *Id.* Dr. Russo cannot point to similar concerns here. (*See* T.775 (explaining Plaintiff's life expectancy of 48.9 years).)

To impose the strict mathematical formula argued by Dr. Russo would limit the discretion of juries and trial courts alike. The Florida Supreme Court has repeatedly emphasized that in measuring pain and suffering damages, "[t]echnical or mathematical calculations are impossible to make." *Angrand v. Key*, 657 So. 2d 1146, 1149 (Fla. 1995); *see also Braddock v. Seaboard Air Line R. Co.*, 80 So. 2d 662, 668 (Fla. 1955) (jurors rely on their "enlightened conscience" in equating money with pain, embarrassment, and inconvenience; the problem "is not one of mathematical calculation but involves an exercise of [jurors'] sound judgment of what is fair and right").

Indeed, as the trial court correctly instructed the jury, there is "no exact standard for measuring such damage." (T.736.) *See* Fla. Std. Jury Instr. (Civ.) 501.2(a); *see also Odom v. R.J. Reynolds Tobacco Co.*, 254 So. 3d 268, 276 (Fla. 2018) ("[M]easuring noneconomic damages is inherently difficult as 'there is no objective standard by which to measure them.'") (quoting *Angrand*, 657 So. 2d at

1149). The amount must simply be "fair and just in light of the evidence." (T.736.) Fla. Std. Jury Instr. (Civ.) 501.2(a). That standard was met here.

4. The jury did not ignore the evidence or otherwise act improperly.

Lastly, Dr. Russo emphasizes that the jury improperly awarded more in future medical expenses ($200,000) than Plaintiff requested ($117,360). This, the defense contends, shows that the jury must have acted under the influence of passion (Initial Br. 11) or ignored the evidence (*see* R.1009-10).

The record contradicts Dr. Russo's claim. The jury's award of future medical expenses—which was correctly reduced to $117,360 (R.957)—is easily explained. (*See* R.1001-3.)

At trial, Plaintiff initially testified that her out-of-pocket cost for Lyrica would have been $348 per month. (R.1002; T.570-71.) Plaintiff clarified, though, that she was eventually able to reduce her cost for Lyrica to $200 a month. (T.572.) Accordingly, Plaintiff's counsel asked the jury to award $117,630 in future medical expenses for the cost of Lyrica, calculated as "$200 a month times 12 months or $2,400 a year, times 48.9 years." (T.775.)

After closing argument, and during deliberations, the jury asked the trial court for a "breakdown of future costs using the mortality tables." (T.840.) The trial court instructed the jurors to rely on their memory of the testimony, along with the exhibits and mortality tables in evidence. (T.842.) The jury eventually returned its verdict,

which included an award of $200,000 for future medical expenses. (T.845-46; R.148-49; *see* R.1002-3.)

At the post-trial hearing, Plaintiff agreed with Dr. Russo that the award for future medical expenses should be reduced to $117,640. But, Plaintiff's counsel emphasized, the $200,000 award was not "some crazy number" that was "just picked out of the air by the jury." (R.1002-3.) The record reflects instead that the jury awarded future medical expenses based on Plaintiff's initial testimony that her out-of-pocket cost for Lyrica was $348 each month. Plaintiff's counsel explained:

> [I]f you take $348 a month, multiply it by 12, multiply it by 48.9, which is the number of years that she would have had to use this medication in the future according to the testimony, that comes to $204,206.40.

(R.1002.)

Even though the jury may have been confused by Plaintiff's testimony, its damages calculation had a rational basis. Nothing in the record suggests that the jury's award of $200,000 in future medical expenses could have only been the product of passion or undue emotion. *See State Farm Mut. Auto. Ins. Co. v. Rindner*, 996 So. 2d 932, 935 (Fla. 4th DCA 2008) (affirming denial of motion for new trial; despite mother's "emotional outburst," the rest of the trial proceeded uneventfully, without "excessively emotional testimony" or "appeals to sympathy in the closing arguments"); *cf. Glabman v. De La Cruz*, 954 So. 2d 60, 62-63 (Fla. 3d DCA 2007) (damages were so excessive that they could only have been based on the highly

emotional testimony of the decedent's father" that "caused him, the court personnel, and the trial judge to cry").

In fact, at the post-trial hearing, the trial court commented that it had not seen any inappropriate prejudice or passion in this case. The trial court explained:

> I don't see anything like that. You know, counsel's very even keeled, level headed. He doesn't . . . get unduly emotional during [trial]. So there was nothing that I saw that way that would inflame the jury.

(R.1006-7.)

Denial of the motion for new trial or remittitur was within the trial court's discretion. *See Rindner*, 996 So. 2d at 935 (deferring to trial court's ruling, based on its observations of the events at trial). The trial court correctly reduced only the award of future medical expenses, without disturbing the remainder of the jury's verdict. (R.957-59; R.1023.)

5. The final judgment on the jury's verdict must be affirmed.

The jury, "guided by its judgment and everyday life experiences," was "in the best position to make a fair assessment" of Plaintiff's non-economic damages. *Odom*, 254 So. 3d at 276 (quoting *Angrand*, 657 So. 2d at 1149). This jury got it right. Because Dr. Russo cannot show any abuse of the trial court's discretion in denying the motion for new trial or remittitur, the final judgment on the jury's verdict must be affirmed.

B. Comparison of the jury's award to awards in other cases does not support reversal for a new trial or remittitur.

Dr. Russo is also unable to establish that the jury's non-economic damages award of $1.5 million, when compared to jury awards in other cases, is excessive as a matter of law. (*See* Initial Br. 12-18.) Because "no injury is exactly like another and different individuals may be adversely affected to a greater or lesser degree by similar injuries, such comparisons must be made with caution." *Aills*, 41 So. 3d at 1028 (citing *Loftin v. Wilson*, 67 So. 2d 185, 189 (Fla. 1953)). Contrary to the defense's claim, comparison of Plaintiff's verdict to awards in other cases demonstrates the *reasonableness* of this jury's award of non-economic damages.

First, the verdicts cited by Dr. Russo are easily distinguishable. In more than half the cases relied on by the defense, there is no mention of any complaint of pain by the plaintiff. (*See, e.g.*, R.213 (complaints of numbness and loss of taste); R.215 (plaintiff testified that "he continues to experience loss of sensation and taste"); R.220-21 (complaints of lack of sensation and taste); R.225 (permanent numbness of right top tongue); R.228 (plaintiff "maintained . . . she will permanently suffer numbness and a reduction in the sense of taste"); R.238 (permanent loss of taste and permanent numbness). And only two of the defense's cases mention any potential impact that the nerve injury may have had on the plaintiff's speech. (R.223 ("speech difficulty"); R.235 (injury caused plaintiff "to spit when he talked").)

For that matter, none of the cases relied on by the defense includes the same panoply of conditions that Plaintiff sustained from Dr. Russo's negligence. (*See, e.g.*, R.233-34 (permanent numbness to right lower lip and chin, along with emotional distress, without any mention of difficulty eating or speaking).) Even if her pain is not "constant" (Initial Br. 16), Plaintiff suffers daily from both dull, aching pain and intermittent sharp, shooting pain. Her pain is reduced, but not eliminated, by medication. Additionally, Plaintiff experiences left-sided tongue numbness and a loss of taste; she often bites her tongue so hard it bleeds. The lingual nerve damage affects her speech and her ability to eat, and impairs intimate activities with her husband, like kissing. She has become depressed and distrustful of medical professionals.

When these facts are considered, the verdicts relied on by Plaintiff are much more comparable to this case than those cited by the defense. (R.246-90 (citing *Sheets v. Seigler*, 2011 WL 8177841 (N.J. Super. Ct. 2011) ($2.3 million award for lingual nerve injury during wisdom tooth removal, as a result of which plaintiff experienced "severe and constant neuropathic pain"); *Della Pietro v. Stanley*, 1995 LEXIS 51711 (N.J. Super. Ct.) ($1.5 million award for lingual nerve injury sustained during removal of wisdom tooth, which caused numbness and "associated slurred speech, difficulties with drooling and frequent episodes" of biting her tongue); *Eckholm v. Perrone*, 2018 WL 8732120 (N.Y. 1st Jud. Dist.) ($3.7 million award

for severed lingual nerve during wisdom tooth removal; plaintiff suffered permanent numbness and loss of taste); *Baisley v. Bui*, 2012 WL 6800044 (Cir. Ct. Mich.) ($2.69 million award for nerve injury during wisdom tooth removal, which caused numbness, hypersensitivity, and pain in her left lower lip and chin); *Mora v. St. Vincent's Catholic Med. Ctrs. of N.Y.*, 2008 WL 2663201 (N.Y. 1st Jud. Dist.) ($2.5 million settlement; plaintiff suffered lingual nerve injury during surgery to remove submandibular gland, which caused numbness and difficulty eating and speaking); *Hagins v. Miller*, 2012 WL 6966642 (N.Y. 9th Jud. Dist.) ($7.66 million award, including damages for lost earnings, for fractured jaw and severed lingual and trigeminal nerves sustained during wisdom tooth removal); *Hummer v. Levin*, 1993 WL 519571 (D.C. Superior Ct.) ($3.29 million award for lingual nerve injury caused by improper injection; plaintiff suffered severe difficulties in speaking and constant pain in her tongue).)

Dr. Russo's efforts to distinguish Plaintiff's cases are to no avail. Again, the jury's determination of a reasonable damages award did not depend on Plaintiff's inability to work or a finding that she suffers constant pain. (*Contra* Initial Br. 16-17 (discussing *Hagins*, *Hummer*, and *Della Pietro*).) Even if Plaintiff's wisdom tooth removal surgery was "medically indicated"—and the correct tooth extracted (*id*. at 17 (discussing *Eckholm* and *Mora*))—Dr. Russo still had a duty not to negligently sever Plaintiff's lingual nerve. Although Plaintiff does not claim she is unable to

communicate or eat solid foods (*id*. at 17-18 (discussing *Mora*)), the injury does impair her ability to speak and eat. And, even if Plaintiff may not have the bur tip of a drill lodged in her jaw (*id*. at 17 (citing *Baisley*)), expert evidence revealed that Plaintiff's lingual nerve was likely severed by the bur tip of Dr. Russo's drill.

Dr. Russo criticizes Plaintiff for citing out-of-state verdicts, but the defense likewise relies on cases decided outside Florida. (Initial Br. 13-15.) Only three of the eleven cases submitted by Dr. Russo are Florida verdicts. Of those three, the most recent (*Wilkins v. Gesek*, 2015 WL 2152739 (Fla. 4th Cir. Ct. 2015)) was tried in 2015—before the Florida Supreme Court ruled the $500,000 statutory cap on non-economic damages unconstitutional. (R.213-14; *see* Initial Br. 13 (citing 2005 and 1999 verdicts).) *See generally N. Broward Hosp. Dist. v. Kalitan*, 219 So. 3d 49, 59 (Fla. 2017).

Even then, the jury in *Wilkins* awarded $600,000 for past and future non-economic damages to a plaintiff who had sustained just $33,757.50 in past medical expenses. (R.213-14.) Comparison of the damages reveals that the jury in *Wilkins* awarded non-economic damages *more than 17 times* the amount awarded for economic damages. (*Id.*) Contrary to Dr. Russo's suggestion that a non-economic damages award of even six times greater than economic damages cannot withstand judicial scrutiny (Initial Br. 10), the jury's verdict in *Wilkins* was subject to reduction

only because of Florida's then-effective legislative cap on non-economic damages. (R.214.) The case "settled post-trial for a confidential amount." (*Id.*)

Another three of the eleven cases cited by Dr. Russo include awards of non-economic damages ranging from 200 to 1000 times the award of economic damages. (*See* R.233-34 (award of $2,000 for past medical expenses, compared to $400,000 for pain and suffering, for a multiplier of 200); R.222-24 (award of $350 for past medical expenses, compared to $120,000 awarded for pain and suffering, for a multiplier of more than 300); R.237-39 (award of $700 in economic damages, compared to $750,000 non-economic damages, for a multiplier of more than 1,000)). Even more notable, in an additional four cases cited by the defense, plaintiffs were awarded non-economic damages for pain and suffering without recovering a single dollar for past and future medical expenses. (R.225-27; R.228-29; R.230-31; R.235-36.)

Yet in none of the cases cited by Dr. Russo was the jury's verdict reduced because of the "excessive nature of the non-economic damages award" when compared to the amount of economic damages. (*Contra* Initial Br. 10.) Had the same multipliers been applied here, the amount of non-economic damages awarded by the jury would have far exceeded $1.75 million.[4]

[4] For instance, multiplying the jury's award of $251,000 in past and future medical expenses by 200 would result in non-economic damages of more than $50 million.

Rather than establishing the unreasonableness of the non-economic damages awarded to Plaintiff, the verdicts cited by Dr. Russo show just how reasonable this jury's verdict is. At trial, Plaintiff was found to be entitled to significant past and future medical expenses totaling more than $250,000. (R.148-49; *see also* R.957-58 (reducing award of future medical expenses to $117,360, as agreed by the parties); R.960-61.) Given the extent of Plaintiff's economic damages (which Dr. Russo does *not* contest), the jury certainly was entitled to calculate an equally fair award for Plaintiff's past and future pain and suffering. The jury's award of $1.5 million in non-economic damages clearly bears a reasonable relation to the significant amount of economic damages proven and the injury to this Plaintiff—and was well within a reasonable range. The jury's verdict should not be disturbed. *See Bould*, 349 So. 2d at 1184–85.

II. Dr. Russo is not entitled to a new trial based on the admission of Plaintiff's unobjected-to testimony.

Standard of review. This Court reviews the trial court's admission of evidence for an abuse of discretion. *See Cantore v. W. Boca Med. Ctr.*, 254 So. 3d 256, 260 (Fla. 2018). The trial court's discretion is "limited by the rules of evidence and the applicable case law." *Horwitz v. State*, 189 So. 3d 800, 802 (Fla. 4th DCA 2015). "The question of whether evidence falls within the statutory definition of hearsay is a matter of law, subject to *de novo* review." *Burkey v. State*, 922 So. 2d 1033, 1035 (Fla. 4th DCA 2006).

Because the trial court did not err in allowing Plaintiff's testimony, Dr. Russo is not entitled to reversal of the final judgment on the jury's verdict, or to a new trial.

A. Dr. Russo failed to timely and contemporaneously object to Plaintiff's testimony. He has waived the issue for appeal.

First, Dr. Russo is not entitled to a new trial because he waived the error, if any, by failing to timely and contemporaneously object to Plaintiff's testimony.

Dr. Russo complains of two instances of Plaintiff's "graphic" and "evocative" hearsay testimony, which he claims prejudiced the defense and had a significant impact on the jury. (Initial Br. 19-20 (citing T.559, 560-61).) Dr. Russo contends that this purportedly inadmissible testimony followed a "timely hearsay objection." (*Id*. at 19 (citing T.555).) He fails to mention, however, that the complained-of statements occurred after defense counsel's hearsay objection, and in response to additional questions by Plaintiff's counsel related to entirely different events. (*Compare* T.555 *with* T.559, 560-61.)

Defense counsel objected only once to Plaintiff's account of her experiences with Dr. Tursun: when Plaintiff was asked to recount what he told her at her first visit, in May of 2016. (T.555; C.R.335-36.) After the trial court overruled that objection (T.555), Plaintiff explained what occurred at that first visit. She recounted that Dr. Tursun "said that he would send [her] back for a cone beam scan," "said that it appeared" she had "nerve damage," "talked with [her] about possible nerve repair

surgery," and "said to think about" whether she "would want to do that." (T.556-57.)

Nowhere in his initial brief does Dr. Russo argue that the trial court erred in admitting this specific testimony. (*See* Initial Br. 19-20.) Even if the trial court erred in overruling the isolated hearsay objection (which it did not), Dr. Russo failed to preserve this issue for appeal. *See J.A.B. Enters. v. Gibbons*, 596 So. 2d 1247, 1250 (Fla. 4th DCA 1992) ("an issue not raised in an initial brief is deemed abandoned and may not be raised for the first time in a reply brief").

The objected-to testimony is not the same testimony that Dr. Russo now contends constitutes inadmissible "graphic" and "evocative" hearsay. (Initial Br. 19-20.) Dr. Russo instead seeks a new trial based on Plaintiff's *unobjected-to* statements: first, her testimony recounting what Dr. Tursun's resident told her immediately after the May 27, 2016 surgery (T.559); second, her testimony summarizing what Dr. Tursun told her he had found at her first post-surgery follow-up appointment (T.560-61). Absent a timely, contemporaneous objection to this testimony (T.559, 560-61), Dr. Russo is not entitled to a new trial. *See Aills v. Boemi*, 29 So. 3d 1105, 1108 (Fla. 2010); *see also* § 90.104(1)(a), Fla. Stat. (2019) (requiring "a timely objection . . . stating the specific ground of objection").

Defense counsel's hearsay objection was directed only to Plaintiff's earlier testimony concerning her initial visit with Dr. Tursun. (T.555.) Defense counsel

never asked for a continuing hearsay objection and did not obtain a definitive pre-trial ruling excluding Plaintiff's account of what she was told by Dr. Tursun and his resident after her surgery. *See* § 90.104(1), Fla. Stat. (2019) ("If the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."). Dr. Russo makes no claim of fundamental error (Initial Br. 18-21), nor would the facts support such a ruling here. *See Newman v. State*, 676 So. 2d 40, 41 (Fla. 3d DCA 1996).

The absence of a timely, contemporaneous objection to Plaintiff's testimony is fatal to Dr. Russo's argument on appeal. *See Aills*, 29 So. 3d at 1109; *see also In re Eriksson*, 36 So. 3d 580, 594 (Fla. 2010) ("a failure to object to hearsay evidence constitutes a waiver"); *Rhodes v. State*, 638 So. 2d 920, 924 (Fla. 1994) (failure to "challenge the admission of much of the hearsay testimony addressed" waived "those portions of his claim" on appeal). Dr. Russo's single hearsay objection—made when Plaintiff's counsel asked about her initial appointment with Dr. Tursun—did not adequately preserve the trial court's error, if any, in admitting Plaintiff's later testimony. For this reason alone, Dr. Russo is not entitled to a new trial.

B. Even if Dr. Russo preserved the issue, he is not entitled to a new trial.

Even if Dr. Russo adequately preserved the issue for appeal (which he did not), he is not entitled to relief. This Court should affirm the judgment on the jury's verdict, and the denial of Dr. Russo's motion for new trial, for two additional (and independent) reasons. First, Plaintiff's statements were not "offered in evidence to prove the truth of the matter asserted." § 90.801(1)(c), Fla. Stat. Because Plaintiff's statements were not hearsay, the trial court correctly allowed her testimony. Second, the evidentiary error, if any, was harmless. The jury heard nothing new from Plaintiff. Her testimony was consistent with the already-admitted, and unobjected-to, evidence. There is no reasonable possibility that the purported error contributed to the jury's verdict. *See Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251, 1256–57 (Fla. 2014).

1. The out-of-court statements recounted by Plaintiff in her testimony were properly admitted as evidence of her state of mind. By definition, her testimony was not hearsay.

Dr. Russo first fails to show that the trial court committed any error in admitting Plaintiff's unobjected-to testimony. By definition, Plaintiff's testimony was not hearsay. *See* Charles W. Ehrhardt, 1 Fla. Prac., Evidence § 801.6 (2019 ed.) ("[w]hen evidence of an out-of-court statement is offered to prove the state of mind of a person who heard the statement, the statement is not hearsay because it is not being offered to prove the truth of the statement's contents"); *see also Dade Cty.*

Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 645–46 (Fla. 1999) ("if a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record").

Section 90.801(1)(c), Florida Statutes, defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." § 90.801(1)(c), Fla. Stat. (2019). Here, Plaintiff did not offer her recollection of what she was told after surgery to prove the truth of the matter asserted. (R.999-1000.) Plaintiff did not contend that the neuromas removed by Dr. Tursun were, in fact, "some of the largest he had seen" (T.561), or that she would have a scar "down [her] neck" after surgery (T.559; *see* T.560). Dr. Tursun did not actually "go[] through [Plaintiff's] neck" to repair the lingual nerve, nor was Plaintiff left with a scar down her neck. (T.559, 560; *see* T.460-69.) She did not rely on her recollection to prove the accuracy of her physicians' medical opinions. *See 194th St. Hotel Corp. v. Hopf*, 383 So. 2d 739, 740 (Fla. 3d DCA 1980); *accord Hartsfield v. Orlando Reg'l Med. Ctr.*, 522 So. 2d 66, 68 (Fla. 5th DCA 1988).

Instead, Plaintiff offered that testimony to prove her state of mind when she heard the treating physicians' explanations. (R.999-1001.) The impact to Plaintiff of Dr. Russo's negligence—including the pain and suffering, disability, inconvenience, and mental anguish that she experienced after learning he had severed her lingual

nerve—were material elements of her claims for damages. (T.736, 778-79; R.999-1001.) Even absent a timely, contemporaneous objection by Dr. Russo, Plaintiff's testimony was admissible. *See Hopf*, 383 So. 2d at 740-41; *see also* 1 Fla. Prac., Evidence § 801.6 ("Whenever a material issue in an action involves the state of mind of a person, out-of-court statements which are probative of that issue are admissible if they are offered to prove this state of mind.").

Hopf is instructive. There, the plaintiff sought to recover for serious injuries she sustained when she slipped and fell on a dangerously worn (and inadequately lit) area of a hotel lobby's walkway. 383 So. 2d at 740. The plaintiff experienced a collapsed lung that was "repaired only by a painful operative procedure." *Id.*

At trial, the plaintiff was allowed to testify what her physician told her about her future. Plaintiff stated, "He told me that I would have to live with myself and to be careful never to strain myself." *Id.* Overruling the defendant's hearsay objection, the trial court allowed the jury to consider the testimony for the purpose of showing the plaintiff's state of mind when she received this information. *Id.*

The Third District affirmed. *Id.* The *Hopf* court explained:

> Since the statement was specifically not admitted to prove the truth of its contents, that is, the accuracy of the medical opinion that the plaintiff must avoid future strain, it should not technically be regarded as "hearsay" at all.

383 So. 2d at 740. "In any case," the Third District continued, "it is well-settled that evidence of an out-of-court statement to show its effect upon the mental attitude of

the person who hears it is properly admissible." *Id.* (citations omitted). Because the plaintiff's "reasonable belief that she must avoid future physical stress" was relevant to her damages claims, the trial court properly allowed the jury to hear "one of the bases for that concern." *Id.* at 740–41.

Similar to the facts of *Hopf*, Plaintiff's reaction upon hearing the extent of her lingual nerve damage was relevant to her damages claims. Plaintiff believed she had been "basically mutilated" by Dr. Russo and felt betrayed by his "blatant disregard" of her care. (T.580-81.) She has become depressed and has lost faith in dentists and doctors. (*Id.*) Given the nature of Plaintiff's injuries, the jury was entitled to hear at least one reason why she feels that way. *See Hopf*, 383 So. 2d at 740-41.

By definition, Plaintiff's testimony was not hearsay. Notwithstanding the defense's failure to object, Dr. Russo is unable to show that the trial court committed any error. The trial court correctly allowed Plaintiff's testimony recounting her conversations with Dr. Tursun and his resident.

2. Admission of Plaintiff's unobjected-to testimony was harmless.

Alternatively, even if the trial court somehow could have erred in admitting Plaintiff's unobjected-to testimony, the error was harmless. Plaintiff's explanations were consistent with the already-admitted testimony of her treating and expert physicians (including Dr. Tursun), and the medical records. The trial court's error,

if any, in allowing Plaintiff's testimony did *not* prejudice the jury's determination on liability or its award of non-economic damages. *See Special*, 160 So. 3d at 1256.

Dr. Russo's arguments are unavailing. Dr. Russo claims, for instance, that Dr. Tursun "testified to none of those things" Plaintiff said he had told her. (Initial Br. 19 (citing T.443-89).) This is incorrect.

Notably, Dr. Tursun testified that he confirmed from Plaintiff's surgery that her lingual nerve had been completely severed. (T.479; *see* T.452-53 (lingual nerve was "100 percent completely transected"; "that's a nerve injury").) He described in detail the neuromas he removed during the surgery, circled a "[b]ig neuroma," and added:

> Do you see how big is the neuroma? This [proximal segment of the nerve] is supposed to be two to three millimeter[s]. Look how big . . . this one [is].

(T.464; C.R.852, 854.) Dr. Tursun estimated the size of that neuroma as "10 millimeter[s] by five at least, if not bigger." (T.464.)

Another neuroma, Dr. Tursun testified, measured one centimeter by "about one by six [1.6], one by seven [1.7]" centimeters. (T.464-65; C.R.856.) When asked by defense counsel whether that is a "pretty big one" as "neuromas go," Dr. Tursun responded, "I think so and they had indicated it." (T.465 (citing C.R.856).) Dr. Tursun added: "It [was] a large defect." (T.479.)

As Dr. Tursun's deposition testimony was read, the jury saw photographs of Plaintiff's nerve repair surgery and the neuromas that Dr. Tursun removed, without any objection from the defense. (T.463-65, 467-69, 489; C.R.846-81; T.731-32.) Along with the surgical photographs, Plaintiff's medical records—including summaries of her visits with Dr. Tursun, his operative report, and the hospital records—were admitted into evidence by stipulation. (T.730-32; C.R.333-41; C.R.342-90; C.R.391-96; C.R.397-663.) Dr. Tursun's operative report specifically identified Dr. Marwan as the resident who assisted with Plaintiff's surgery. (C.R.393; C.R.416.) And the medical records—like Dr. Tursun's testimony—described Plaintiff's lingual nerve injury, the detailed and lengthy repair surgery, the use of a graft, and the size of the neuromas. (C.R.335-36, 393-95, 415-17, 421.)

Moreover, before Plaintiff testified at trial, the jury heard from Dr. Wyatt, her expert oral and maxillofacial surgeon. Dr. Wyatt testified without objection that during the nerve repair surgery, Dr. Tursun "had trouble finding the [nerve's] proximal segment." (T.417; *accord* T.329-30.) As Dr. Wyatt explained, the lingual nerve "had retracted considerably up," "much further than" Dr. Tursun had "expected to find it." (T.417, 418.) Because the two ends of the nerve were so far apart, Dr. Wyatt testified, Dr. Tursun had to use a cadaver graft. (T.330.)

Plaintiff's explanations, then, were nothing new. Her testimony was consistent with the already-admitted evidence, to which the defense did not object.

Nonetheless, Dr. Russo complains on appeal that Dr. Tursun "was not available to be cross-examined at trial," and that the "unnamed resident physician never testified." (Initial Br. 19.) The record reflects, however, that the parties agreed to read "virtually all" of Dr. Tursun's deposition testimony into evidence. (T.439-41; *see* R.58, 61.) As a practical matter, Dr. Russo could have subpoenaed both Dr. Tursun and Dr. Marwan, who practice in Miami (T.443; C.R.393-95), to testify live at trial. *See generally* Fla. R. Civ. P. 1.410(a), (b); Fla. R. Civ. P. 1.451(a); § 48.011, Fla. Stat. (2019). Instead, defense counsel chose to stipulate to the reading of Dr. Tursun's deposition testimony and to the admission of Plaintiff's medical records.

Dr. Russo also did not object when Plaintiff's counsel, in opening statement, displayed a photograph of the neuroma and told the jury: "[Dr. Tursun]'s going to tell you" that this is "one of the biggest ones that he's found." (T.43.) Dr. Russo cannot now claim that this unobjected-to remark had any significant impact on the jury. Nowhere in the motion for new trial does Dr. Russo even mention the remark by Plaintiff's counsel. (R.204-10.) *See Murphy v. Int'l Robotic Sys., Inc.*, 766 So. 2d 1010, 1027 (Fla. 2000); *see also Bradley v. So. Baptist Hosp. of Fla., Inc.*, 943 So. 2d 202, 207 (Fla. 1st DCA 2006) (failure to list defense counsel's allegedly improper remarks in motion for new trial did not sufficiently preserve the issue for appellate review).

Finally, any contention by Dr. Russo that Plaintiff's "evocative hearsay . . . conjured images of long neck scars" (Initial Br. 20) ignores the record evidence. Plaintiff never introduced testimony or photographs of "long neck scars." The jury heard unequivocally from Plaintiff that this did *not* happen. (T.559, 560-61.) As far as images of "surgery within a patient's skull" (Initial Br. 20), Dr. Russo again waived any claim of error. Not only did Dr. Russo stipulate to the admissibility of the medical records, his counsel failed to object to the detailed descriptions of Plaintiff's nerve repair surgery, testified to by her treating and expert physicians.

Dr. Russo is not entitled to a new trial. Any error in allowing Plaintiff's unobjected-to testimony did not prejudice the defense or otherwise "materially impact the jury's liability determination" and "its non-economic damages award." (*Contra* Initial Br. 20.) Plaintiff shows there is no reasonable possibility that the trial court's ruling—even if preserved, and even if erroneous—contributed to the jury's verdict. *See Special*, 160 So. 3d at 1256–57. Competent, substantial evidence establishes Dr. Russo's liability and entitles Plaintiff to the damages awarded.

CONCLUSION

For all the foregoing reasons, this Court should affirm the final judgment on the jury's verdict, together with the trial court's denial of Dr. Russo's motion for a new trial or remittitur on non-economic damages.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed with the Clerk of Court on October 4, 2022, via the Florida Courts E-Filing Portal, and an electronic copy has been furnished to the following counsel of record:

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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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