

IN THE SIXTH DISTRICT COURT OF APPEAL OF THE  
STATE OF FLORIDA

RODOLFO FONSECA and  
NEW THUNDER GROUP, INC.,

Appellants,

vs.

CASE NO.: 6D23-3825  
L.T. CASE NO.: 2020-CA-6368-O

LILCON L. HUDSON,

Appellee.

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**APPELLANTS' INITIAL BRIEF**

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ON APPEAL FROM THE CIRCUIT COURT OF THE NINTH  
JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

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## **STATEMENT ON JURISDICTION**

This is an appeal from a final order, an Amended Final Judgment rendered September 29, 2023, following a jury trial. (R.2768-69). Also appealed is the prior document titled “Final Judgment” filed September 13, 2023 (R.2756), which if deemed a final judgment, was rendered on September 29, 2023, when the timely served motion to amend filed and served September 28, 2023 (R.2758-65), was granted. (R.2766). The Notice of Appeal was timely filed on October 27, 2023. (R.2772-88). This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(b)(1)(A).

## **STATEMENT OF CASE AND FACTS**

### **A. Statement of Case**

The case arose from a December 2018 accident on Interstate 4 in Orange County. Mr. Hudson was in the lead vehicle, when a van owned by Defendant Fonseca and driven by former defendant Bedoya, an employee of New Thunder Group, Inc., struck the rear of the Hudson vehicle. Mr. Hudson and his wife brought suit against driver Bedoya, owner Fonseca, and employer New Thunder Group, Inc. (R.26-27). The claims against the driver Hoover Ney Cruz Bedoya were resolved, and he is no longer a party to the case. (R.497, 509, 537, 1864). The consortium claims by Charmaine

Hudson against Defendants Rodolfo Fonseca and New Thunder Group, Inc., were dismissed with prejudice. (R.537).

The personal injury claim brought by Mr. Hudson against Mr. Fonseca and New Thunder Group, Inc., was heard by a jury June 5-8, 2023, as to issues of causation of future medical expenses, permanency, and damages. (R.2593, 2603). Whether the accident caused past medical expenses, past wage loss, or future lost wages and loss of earning capacity was not at issue in the trial. (R.305-307).

Plaintiff contended he suffered permanent injuries to his cervical and lumbar back with multilevel herniations causing radiating pain to his right leg or activation or aggravation of preexisting degenerative disc disease, and he sought future medical expenses and past and future intangible damages. (T.1341-1345, 1351, 1357, 1364-1365)(R.2603-04). Defendants pointed to a gap in treatment and contended Plaintiff had degenerative disc disease not caused by the accident, his future medical care was not caused by the accident, and he did not suffer a permanent injury as a result of the accident. *See, e.g.*, (T.1366-67, 1371-1376). Both sides presented testimony by physicians or chiropractic physicians in support of their position. (Neurosurgeon Dr. Jenkins, T.896-1070; and diagnostic radiologist Dr. Kleinman, T.1211-1295, 1304-19, for the defense)(Radiologist Dr.

Knapp, T.493-567; neurosurgeon Dr. Behrmann, T.574-698, chiropractor Dr. Boylan, T.753-804, and life care planner Dr. Nwaogwugwu, T.1121-97 for the Plaintiff).

The jury in its verdict determined the negligence of Mr. Bedoya was a legal cause of loss, injury or damage to the Plaintiff, which injury was permanent, and awarded \$700,000.00 in future medical expenses, \$200,000 in past noneconomic damages, and \$800,000 in future noneconomic damages, for a total award of \$1,700,000. (R.2603-04).

Defendants served a timely “Motion for Judgment in Accordance with its Prior Motion for Directed Verdict, or Alternatively, Motion for New Trial” (R.2653-89), which also sought remittitur as to the future medical expense award (R.2671-74). The motion addressed issues with the testimony of treater Dr. Knapp, the testimony of the life care planner Dr. Nwaogwugwu and the future medical expense award, and improper closing. (R.2653-2689). Plaintiff responded, opposing the relief sought. (R.2692-2730). The Court denied Defendants’ post-trial motion. (R.2731-34).

Thereafter, on September 13, 2023, the Court entered a “Final Judgment” in favor of Plaintiff Hudson in the amount of \$1,700,000.00 which reserved jurisdiction over “set-offs” and “statutory caps as well as post-trial motions, pre-judgment interests, fees and costs.

(R.2756-57). On September 28, 2023, Defendants timely served an Unopposed Motion to Alter and Amend Final Judgment seeking to amend the reservation of jurisdiction language and apply a \$70,000 agreed upon set-off to the sum owed. (R.2758-65). The Court on September 29, 2023, granted the Defendants' Unopposed Motion to Alter and Amend Final Judgment (R.2766-67), and entered an Amended Final Judgment in favor of Plaintiff against Defendants in the amount of \$1,630,000.00. (R.2768-69). Defendants timely appealed to this Court on October 27, 2023. (R.2772-88).

## **B. Statement of Facts**

### *1. The Plaintiff's Pretrial Disclosures as to Treater Dr. Knapp and Life Care Planner Dr. Nwaogwugwu*

Dr. Knapp and Dr. Nwaogwugwu testified at trial and were the subject of pretrial disclosures. The Trial Court had entered a Uniform Order governing disclosures of witnesses and experts. (R.42-43, 126). In part, the Order required "disclosure of expert witnesses (including treating experts) that in good faith will testify" with disclosure of the specific subjects of testimony and disclosure of "any changes of expert opinion or changes in the basis of an expert's opinion." (R.43). The discovery cut-off was set for the day prior to the pre-trial conference. (R.46)

Plaintiff disclosed Dr. Nanmdi C. Nwaogwugwu as a retained life care plan expert witness (R.120, 2285), advising,

Dr. Nwaogwugwu is a retained expert. He is a Board-Certified Physical Medicine and Rehabilitation Physician. He reviewed the medical records and radiological diagnostic studies of Plaintiff. Plaintiff anticipates that Dr. Nwaogwugwu will offer *opinion testimony about his findings with respect to a Life Care Plan*. Plaintiff intends to call Dr. Nwaogwugwu live at trial to elicit his opinions – to the extent he has same. To avoid any surprise or prejudice, Defendant should take Dr. Nwaogwugwu’s deposition if Defendant wants to ascertain the nature and extent of his opinion on these issues... (R.120-21, 2285-86)(emphasis added)

The Plaintiff’s expert disclosures also listed “non-retained expert witnesses,” stating:

Although *non-specially retained experts* are not within the classification of experts to be disclosed, to avoid any claim of surprise, Plaintiffs do hereby confirm that Plaintiffs expect to call as expert witnesses at trial one or more treating physicians and/or other medical care providers involved in the evaluation, care or treatment of Plaintiff who *may be asked to render expert opinions based upon their education, training, experience and evaluation, care or treatment of Plaintiff*, with respect to nature and extent of injuries, signs of injury, symptoms, medication, treatment, diagnosis, prognosis, causation of injury, and damages, extent of permanent physical impairment, extent of disability, aggravation of preexisting, or predisposing medical conditions, allocation of injuries if applicable, past and future medical treatment and medical bills, the necessity reasonableness and amount of past or future medical bills, interpretation of tests, imaging studies, and other diagnostic tools, as well as medical reports and records pertaining to Plaintiff, medical knowledge generally as it pertains to Plaintiff and/or other related medical opinions which may be offered relevant to this action. Said medical care providers are

believed to be available for deposition at Defendant's expense to explore their respective opinions and conclusions . . . . (R.121, 2286)(emphasis added).

In Plaintiff's Second Amended Disclosure served February 27, 2023, Dr. Knapp, who was residing in Puerto Rico, was identified as a "non-retained expert witness." (R.2286-87). Specifically, as to Dr. Knapp, the Second Amended Disclosure stated:

Dr. Knapp is not a retained expert. He was Plaintiff's Radiologist who treated Plaintiff for his injuries. Plaintiff anticipates that Dr. Knapp will offer opinion testimony about Plaintiff's injuries including but not limited to causation, diagnosis, prognosis, permanency, and the cost of future medical care. Since Dr. Knapp is Plaintiff's Radiologist, his office notes may or may not reflect any of the above opinions. Further, he may or may not have any opinion regarding the above issues. Plaintiff intends to call Dr. Knapp live at trial to elicit his opinions - to the extent he has same. To avoid any surprise or prejudice Defendant should take Dr. Knapp's deposition if Defendant wants to ascertain the nature and extent of his opinions on these issues. (R.2286-87)(emphasis in original).

2. *The Trial Court's Uniform Order as to Limine and Daubert Motions*

The Trial Court's Uniform Order also required:

(a) All Motions, including Daubert motions, other than motions in limine, must be FILED and HEARD at least thirty (30) days prior to the Pre-Trial Conference. Late filed motions are subject to summary denial.

(b) Motions in Limine or motions to exclude witnesses or evidence or motions directed to the conduct of the trial must be filed and served prior to the Pre-Trial Conference. Motions in

Limine must be scheduled and heard no later than one week prior to the beginning of the trial period. No Motions in Limine will be heard during the trial period, absent good cause. (R.46-47).

The pretrial conference was held March 30, 2023. (R.126, 437). The Court granted the motion to continue the trial until June 5, 2023, with discovery deadlines to remain in place. (R.440). Limine motions were filed by Plaintiff within 30 days of the March 30, 2023, pretrial conference on March 1, 2023, March 16, 2023, and March 21, 2023. (R.239-259, 282-300, 302-04, 308-310). Defendants' responses were served after the pretrial conference, (R.474-488, 492-496), and the Court issued orders on the limine motions in April 2023. (R.511-516).

The Trial began on June 5, 2023. (T.1) On May 30, 2023, Defendants served their Motion in Limine to Preclude Opinions of Nnamdi Nwaogwugwu, M.D., discussed in detail below, which motion sought to exclude testimony as to "certain medical treatment recommendations made by Dr. Nwaogwugwu in his capacity as a retained life care planner expert." (R. 2276-2426). On June 2, 2023, Plaintiff filed two motions in limine: his "Motion in Limine Regarding the Defendants' Prospective Concession of Responsibility and Incorporated Memorandum of Law," (R.2520-22) as well as a "Motion in Limine - Precluding Testimony of Defendant Rodolfo

Fonseca” (R.2523-25). On June 4, 2023, Plaintiff filed his response to Defendants’ Motion in Limine Directed to Dr. Nwaogwugwu. (R.2582-86).

At the beginning of trial, Plaintiff’s motion in limine as to concession of responsibility and Defendants’ motion in limine as to certain opinions of Dr. Nwaogwugwu were addressed, the third recently filed limine motion having been resolved. (T.5, 8-17). The Court granted Plaintiff’s motion in limine in part and denied it in part. (T.364). However, the Court denied the Defendants’ motion in limine seeking to preclude certain opinions of Dr. Nwaogwugwu as an untimely “*Daubert*” motion. (T383-87).

3. *Dr. Knapp Expresses Opinions as to the Cervical Spine for Purposes of the Trial Based upon Medical Records and Images Provided by Plaintiff’s Counsel*

During opening arguments, Plaintiff’s counsel advised the jury that they would hear by Skype from one of Plaintiff’s “treating physicians,” Dr. Knapp, who was not hired (T.444) or chosen and is “what is called a treating doctor versus hiring him as a retained expert.” (T.445). Plaintiff’s counsel explained that when the “last MRI” [of the lumbar spine] was taken at Acumen it was sent to Dr. Knapp in Puerto Rico for the read and interpretation. (T.444-445). Plaintiff’s counsel advised the jury Dr. Knapp is going to give “opinions about Mr. Hudson’s cervical spine and his lumbar

spine” and opine that the “disc injury of both the herniations in the neck” and the L5-S1 herniation are related to the accident. (T.445).

Given the notice through Plaintiff’s opening statement that Dr. Knapp was going to provide opinions as to Mr. Hudson’s cervical spine, Defendants objected to Dr. Knapp testifying as to herniations in Mr. Hudson’s cervical spine as “Dr. Knapp did not review or interpret any cervical spine MRIs.” (T.478). As Dr. Knapp only read and interpreted a lumbar MRI taken in January 2023, and compared it to a prior October of 2020 MRI lumbar study (T.478-79, 489-90) and was disclosed as a non-retained treating physician (R.2286-87)(T.484), defense counsel contended opinions as to the cervical spine would be outside the scope of his treatment as he did not review, read or interpret cervical studies as a treating radiologist, and his opinion based upon materials reviewed outside the course and scope of his treatment would make him a retained expert. (T.478-79, 484, 486-90).

In response to this argument, Plaintiff’s counsel argued that Dr. Knapp was disclosed as an “expert” and Defendants should have taken his deposition to obtain his opinions. (T.480-484). Plaintiff’s counsel acknowledged he provided the doctor with records so “could come up with

the opinions that I have listed here [in the disclosure] that . . . I intend to elicit” and paid him for his testimony at trial. (T.485).

The Court overruled Defendants’ objection to testimony by Dr. Knapp as to the cervical spine, stating the witness “has been disclosed as an expert,” and the distinction of “retained or not retained” is one that does not have “any legal significance.” (T.490). Defendants moved for mistrial on that same basis, with defense counsel advising the Trial Court that Defendants would have taken Dr. Knapp’s deposition if it had been known he was going to be a hybrid expert witness and would testify outside of the records and imaging he interpreted, which motion was denied. (T.491-92).

Dr. Knapp, a neuroradiologist, then testified his practice interprets outpatient studies from various facilities. (T.494, 498-99). Dr. Knapp’s company provides services both as a treating physician interpreting scans for facilities, including Acumen, and as an expert. (T.543-45).

On behalf of Acumen, he read the MRI of the lumbar spine taken at Acumen dated January 18, 2023, (T.500-01, 545) and compared it to a prior lumbar MRI from October of 2020. (T.551). At trial he also opined that an August 5, 2019, MRI of the lumbar spine taken at Health Central he stated showed a disc herniation at L5-S1 and L5-6 annular tear, (T.501-08, 514-17, 529-530, 559), with his opinion different from that of the radiologist

that read and interpreted the report. (T.559-61), and testified as to a January 23, 2019 MRI. (T.508). He testified that “in consideration” of “my review of all of the MRIs, I think there are four MRIs of the lumbar spine” and the medical records provided to him it is “likely” that the L5-S1 disc herniation and annular tear is related to the patient’s trauma and is a permanent injury. (T.517-19, 533-34). His opinion as to the lumbar spine was based upon his view of the images and review of medical records provided to him by counsel. (T.533-34)

Dr. Knapp also provided his opinions as to Mr. Hudson’s cervical spine based upon imaging and reports received “in the past couple of weeks, potentially a couple of months.” (T.551). He confirmed he did not perform the initial read and interpretation of any of the cervical spine MRIs. (T.554). He testified he was engaged by Acumen to interpret the January 18, 2023, lumbar spine MRI, and not to interpret cervical studies. (T.547, 551-53). When asked whether he reviewed the cervical spine MRIs and reports for “purposes of providing an opinion here today at trial related to your opinions of those images” he stated that’s a “fair question,” explaining he was paid for the prior week’s consultation. (T.552). He intended to bill Plaintiff counsel’s law firm for his review of the imaging and medical records

reviewed including those provided after the prior week's consultation. (T.553).

Dr. Knapp testified that MRI studies of the cervical spine taken in 2019, showed disc herniations at C3-4, C4-5, C5-6, C6-7 and disc protrusions at C4-5, C5-6, and C6-7. (T.501, 508-11, 513-14, 519-22). He compared the 2019 MRIs of the cervical spine to a prior CT scan of the cervical spine taken on October 9, 2016. (T.508-10, 525-26), and X-rays of the cervical spine taken on December 26, 2018. (T.511-12). He acknowledged his opinion that the August 5, 2019, cervical MRI reveals herniations was different than the report by the interpreting radiologist opining the scan showed no disc herniations or bulging. (T.557).

He testified, based upon the provided studies and medical records, that disc herniations in Mr. Hudson's cervical spine were causally related to the accident trauma, opining, "I believe it's more likely than not that these levels are related to or acutely aggravated by the patient's trauma." (T.520-521). He testified that Mr. Hudson "sustained a cervical injury which was causally related to the collision in 2018," and a significant impairment of an important bodily function of the neck. (T.531-533).

In forming his opinions, Dr. Knapp was provided and utilized not only the additional radiological studies, but also emergency room records, Next

Medical records where care was sought after the accident, the records from neurosurgeon Dr. Behrmann, and records from Health Injury & Wellness and Dr. Boylan. (T.523-24) See also (T.546, stating he reviewed 2016 Monroe Regional Medical Center Records, NextMed/Dr. George records, Integrity Medical Group/Dr. Cooper records, and records from Dr. Khan and physician assistants). The additional medical records were provided to him “in the past few weeks” or possibly “last couple of months,” after his read and interpretation of the January 2023 lumbar spine MRI. (T.546). Dr. Knapp saw his role as both a treating and expert witness, stating:

I know I am the treating doctor in that I interpreted the January 18, 2023, MRI. But my understanding is that the other medical records, there’s more quality images, also qualifies me as an expert witness or hybrid. (T.547)

His office usually requests “all medical records and all imaging studies” “when I’m asked to do a trial or a deposition or be involved in a legal matter.” (T.547-48). While he sometimes requests medical records “from attorney’s office in my role as a treating physician” he acknowledged he did not request any additional records for purpose of reading and interpreting the January 2023 lumbar MRI. (T.549-50).

4. *The Pretrial Motion in Limine as to Life Care Planner Dr. Nwaogwugwu*

Defendants' pretrial motion in limine as to certain opinions to Dr. Nwaogwugwu sought to preclude testimony by him as to future medical treatment recommendations and costs not recommended by any treating physician but instead based upon Dr. Nwaogwugwu's opinions as a physician. (R.2276). The motion contended that a life care planner, such as Dr. Nwaogwugwu, prepares projections of future medical care and treatment needs based upon a treatment plan by the party's authorized physicians. (R.2277). The limine motion argued that opinions of Dr. Nwaogwugwu based upon his own evaluation of the Plaintiff lacked a proper factual basis for his expert opinion as to a life care planner as held in a recent decision by the First District Court of Appeal, *Anderson-Moody v. Wilson*, 357 So. 3d 1240, 1243 (Fla. 1st DCA 2023). (R.2278).

The motion did not seek to exclude Dr. Nwaogwugwu as an expert or from testifying as to a life care plan based upon the treatment recommendations of Plaintiff's treating physicians for follow-up evaluations for lumbar epidural steroid injections and "if failed a L5-S1 microdiscectomy." (R.2279-80). Instead, the motion sought to preclude testimony by Dr. Nwaogwugwu as a "retained life care planner" in his

January 24, 2023, report as to future medical treatment only recommended by Dr. Nwaogwugwu (R.2277, 2282-83, 2291-93):

- a. Annual visits with a neurosurgeon for the duration of Plaintiff's life (22 years) at a cost of \$11,550.00 (R.2304);
- b. Annual visits with a physiatrist for the duration of Plaintiff's life (22 years) at a cost of \$8,250.00.(R.2304);
- c. Annual MRIs of the lumbar spine for the duration of Plaintiff's life (22 years) at a cost of \$11,261.80 (R.2305);
- d. Annual MRIs of the cervical spine for the duration of Plaintiff's life (22 years) at a cost of \$11,261.80(R.2305);
- e. EMG/NCS of right lower extremity every other year for the duration of Plaintiff s life at cost of \$5,280.00 (R.2305);
- f. Annual x-rays of the lumbar spine for the duration of Plaintiff's life (22 years) at a cost of \$859.10 (R.2305);
- g. Annual x-rays of the cervical spine for duration of Plaintiff's life (22 years) at a cost of \$859.10 (R.2305);
- h. Annual physical therapy rehabilitation for lumbar/cervical pain for the duration of Plaintiff's life (22 years) at a cost of \$71,860.00 (R.2306);

- i. Lumbar trigger point injections twice a year for the duration of Plaintiff's life (22 years) at a cost of \$3,080.00 (R.2306);
- j. Cervical trigger point injections twice a year for the duration of Plaintiff's life (22 years) at a cost of \$3,080.00 (R.2306);
- k. Lumbar epidural injections every other year for the duration of Plaintiff's life (22 years) at a cost of \$177,650.00 (R.2306);
- l. Lumbar facet injections every other year for the duration of Plaintiff's life (22 years) at a cost of \$200,750.00 at a cost of (R.2306);
- m. Cervical epidural injections every other year for the duration of Plaintiff's life (22 years) at a cost of \$177,650.00 (R.2306);
- n. Cervical facet injections every other year for the duration of Plaintiff's life (22 years) at a cost of \$201,850.00 (R.2306);
- o. Lumbar orthosis to be replaced every three years for the duration of Plaintiff's life (22 years) at a cost of \$6,548.61 (R.2307);

p. Next wave electrotherapy to be replaced every five years for the duration of Plaintiff's life (22 years) at a cost of \$1,100.00 (R.2307);

q. Medications at a cost of \$5,142.74; (R.2307);

r. Lumbar fusion surgery at a cost of \$55,000 (R.2307).

(R.2280-83).

Prior to the trial, on June 4, 2024, Plaintiff filed his response, arguing that the motion was untimely, the cases cited were distinguishable, and the testimony appropriate as Dr. Nwaogwugwu examined the Plaintiff and is a physiatrist. (R.2582-86). The response acknowledged Dr. Nwaogwugwu "determined the medically necessary future care required to treat [Plaintiff's] diagnostic conditions over the long term." (R.2584).

The motion was addressed at the beginning of the trial after jury selection in conjunction with Plaintiff's limine motion. (T.5, 8-10, 12-17, 382-88). The Trial Court refused to hear the motion at trial, viewing it as a *Daubert* motion untimely under the Pretrial Order. (T.385-388). Defense counsel contended the motion was not a *Daubert* motion as it was only seeking to preclude specific opinions, as Dr. Nwaogwugwu could provide a life care plan based upon the recommendations by a treater, pointing out a

motion in limine was how the issue was presented in the *Anderson-Moody* case, (T.387), but the Court ruled the motion was untimely. (T.388).

5. *The Trial Testimony as to Plaintiff's Future Medical Care*

At trial Defendants presented expert testimony by neurosurgeon Dr. Jenkins that Mr. Hudson did not have a permanent injury to his cervical spine or his lumbar spine as a result of the car accident. (T.909-110). Dr. Jenkins opined that Mr. Hudson has degenerative changes in his cervical and lumbar spine not caused by the accident. (T.906-08, 912-13, 918-19). Dr. Jenkins also testified that any future medical treatment of Mr. Hudson's lumbar spine and cervical spine was not related to the accident. (T.910-11). As to the L5-S1 microdiscectomy surgery recommended by Dr. Behrmann, Dr. Jenkins opined the surgery would not be related to the accident but would be related to degeneration. (T.911).

At trial, Plaintiff's current chiropractor Dr. Boylan, who also reviewed medical records provided by Plaintiff's counsel (T.786-87), testified that Mr. Hudson had a permanent L5-S1 herniation related to the accident (T.774, 779) and, if he had an underlying degenerative condition, it was activated by this automobile accident. (T.782). He stated that Mr. Hudson should continue to receive the chiropractic treatment he was receiving. (T.780, 803). He had not ordered MRIs during his care of Mr. Hudson as additional

radiographic studies were not clinically indicated, (T.792), and whether future MRIs would be ordered depended upon “how he presents for care.” (T.792).

Neurosurgeon Dr. Behrmann, who treated Mr. Hudson pursuant to a letter of “protection” or “financial agreement” (T.630-31), opined that Mr. Hudson had a permanent lower back injury and herniation caused by the accident with resulting radiating leg pain. (T.618-20). He declined to state the cervical herniations were causally related to the accident, stating,

My opinion is I don't think all of the [cervical] discs were specifically related to any one accident. But I think his symptomatology and onset of problems certainly is related to this injury, and I don't know that myself or anyone else could specifically pinpoint where that -- where that exactly comes from. (T.622-23).

He agreed the radiologist reported no herniation of the cervical spine in the MRI he ordered (T.658). Mr. Hudson underwent lumbar epidural spinal injections but declined cervical lumbar spinal injections. (T.668, 673, 835).

As to future medical care, Dr. Behrmann recommended lumbar epidural spinal injections, with no statement as to the frequency of such injections, and an L5-S1 laminectomy, microdiscectomy. (T.608-10). Dr. Behrmann did not testify as to the costs of such treatments. Dr. Behrmann testified the surgery was not ordered or scheduled, and Mr. Hudson has not advised him that he wants to proceed with the surgery. (T.625-27). Dr.

Behrman has not made any recommendation for cervical surgery or any recommendation for Mr. Hudson to see a physiatrist (T.671). Whether an annual MRI of the lumbar and cervical spine is required would be based upon his subsequent evaluation of Mr. Hudson. (T.671-72). Neither Dr. Behrman nor his office ordered or suggested lumbar trigger point injections or cervical trigger point injections. (T.673). No physical therapy, lumbar or cervical facet injections, lumbar orthoses, or new wave electrotherapy had been ordered. (T.673-75). Dr. Behrman has not recommended a lumbar fusion surgery for Mr. Hudson. (T.676). Dr. Behrman stated he does not have a “specific opinion about his future other than what I have suggested,” and he would defer pain management to a pain management doctor. (T.624).

Radiologist Dr. Knapp did not provide testimony as to future medical care, but stated the injuries to the lumbar and cervical spine are “progressive” and the symptomology or the “pain and suffering which is associated” can be progressive. (T.535).

The Plaintiff testified that he has not made the decision to have the laminectomy discectomy procedure recommended by Dr. Behrman, as he is still on the “fence” as to whether to undergo the procedure. (T.859-60).

He “might” have surgery depending on his pain condition in the future, but the future is “speculative.” (T.861).

6. *Trial Testimony of Dr. Nwaogwugwu and His Life Care Plan Based Upon his Own Assessment of Mr. Hudson*

At trial Dr. Nwaogwugwu (T.1121-97) testified he was not a “treating doctor providing any medical care” to Mr. Hudson and he was “involved in this case as a life care planner” and “would be generating a report suggesting future care and services.” (T.1168). His life care plan was based upon his assessment of Mr. Hudson’s future needs “per” Dr. Nwaogwugwu. (T.1180).

Dr. Nwaogwugwu diagnosed Mr. Hudson with lumbar radiculopathy related to the accident, intervertebral disc displacement with L5-S1 disc herniation, cervicalgia, and lumbar sprain. (T.1129). He testified the accident was the “predominant cause of Mr. Hudson’s neck pain, the low back pain, the disc herniations within a reasonable degree of medical certainty.” (T.1159). According to him a lumbar MRI showed an L5-S1 disc herniation with annular tear which “actually shows that there might be compression of the nerve, which is existing at that level.” (T.1188). He took the studies into account “when determining the permanency and causation of Mr. Hudson’s injuries.” (T.1190). His testimony addressed his findings on examination, whether a hospital usually diagnoses a herniated

disc, whether a sprain/strain can be a permanent injury, the quality of the 2019 studies, and whether a gap in treatment is uncommon. (T.1192-95).

According to his own assessment of Mr. Hudson, he opined that Mr. Hudson would need, with a reasonable degree of medical certainty, future medical care in the amount of \$953,022.08. (T.1153-54). As he explained, his life care plan was based upon his recommendations as to what Dr. Nwaogwugwu perceived Mr. Hudson's needs to be, and his life care plan was "not the thoughts and concerns of [treaters] Dr. Behrmann, or Dr. Cooper, or Tom Young."(T.1183). Dr. Nwaogwugwu did not speak with Mr. Hudson's chiropractors, (T.1169), Dr. Behrmann, or physician assistant Cohen, and only spoke with Dr. Cooper a week prior to trial and did not issue an addendum to his report after that conversation. (T.1165-66).

As to Dr. Behrmann's recommendation of future lumbar epidural spinal injections, (T.608), Dr. Nwaogwugwu opined that Mr. Hudson would need two injections per year every other year. (T.1142-43). Dr. Nwaogwugwu testified that the combined costs of the physical therapy, lumbar and cervical trigger point injections, lumbar and cervical epidural injections, and lumbar and cervical facet injections was \$835,920, with the physical therapy \$71,860, and the remainder for "injections." (T.1149-50). While Dr. Behrmann's recommended a L5-S1 laminectomy,

microdiscectomy, (T.610), Dr. Nwaogwugwu instead recommended a lumbar fusion surgery at a cost of \$55,000.00 which he stated cost approximately the same as a laminectomy and microdiscectomy. (T.1152-53). Dr. Nwaogwugwu did not include chiropractic care in his life care plan. (T.1139-54).

Dr. Nwaogwugwu's testimony set forth future medical procedures recommended by Dr. Nwaogwugwu. While Mr. Hudson has never had a lumbar facet injection or cervical facet injections Dr. Nwaogwugwu included lumbar and cervical facet injections in this life care plan, (T.1184), stating he was "of the opinion he needs a lumbar facet injection" despite the fact that Mr. Hudson is not "his patient." (T.1184). He testified as to the costs of all injections combined. (T.1149-50). He recommended a lumbar fusion surgery, not recommended by Dr Behrmann. (T.1152-54, 1187), although he acknowledged he is not a neurosurgeon or orthopedic surgeon and has never performed a lumbar fusion surgery, (T.1163), and would defer to Dr. Behrmann. (T.1187).

He personally opined Mr. Hudson needed annual visits to a neurosurgeon, pain management physician, and a physiatrist calculated at a life time cost of \$19,800 (T.1139-40); diagnostic tests at a life-time cost of \$29,521.80 for annual MRIs of the lumbar spine, annual X-rays of the

lumber spine and cervical spine, and EMGs of the lower right extremity every two years (T.1140-41); pain management treatment at a life-time cost of \$835,920.00, consisting of physical therapy at a cost of \$71,850 plus the costs of lumbar trigger point injections, cervical trigger point injections, lumbar epidural injections, lumbar facet injections, cervical epidural injections, and cervical facet injections (T.1141-43, 1149-50); lumbar orthosis at a life-time cost of \$6,538.61 (T.1150-51); TENS unit at a life-time cost of \$1,100 (T.1151), and medications at a life-time total cost of \$5,142,72.(T.1151).

Dr. Nwaogwugwu explained to the jury, while holding a Tuohy needle, how an epidural injection was done, the painful nature of the procedure Plaintiff had undergone five times, and the potential complications of the procedure. (T.1144-48). He also explained the future surgery and potential complications of other future medical procedures and care. (T.1152-53, 1160-61).

Dr. Nwaogwugwu opined Mr. Hudson would need \$953,022.08 in future medical care and it was his opinion “all of the future medical needs that he has were caused by the accident of December 21, 2018.” (T.1154), and the treatments as testified to should be deemed “reasonable and medically necessary.” (T.1162).

Thereafter, at the conclusion of Plaintiff's case in chief (T.1199, 1201), Defense counsel made motions for directed verdict, renewing Defendants' objection to Dr. Nwaogwugwu's testimony, arguing the doctor testified as a life care planner, and not a treater, and his recommendations were based upon his opinions if he were a treater, and he deferred to Dr. Behrmann as to future medical treatment (T.1201-02), Defendants requested his opinions as to future medical care be excluded which motion was denied. T.1202).

Defendants also moved for directed verdict and to exclude Dr. Nwaogwugwu's testimony on the basis no evidence existed as to how Dr. Nwaogwugwu derived his numbers as to costs or the recommended treatment options (T.1202). The motion was denied. (T.1202).

The directed verdict motions, as well as the denial of the motions to exclude were reasserted in Defendants' post-trial motion, (R.2653-59, 2671-72), and denied. (R.2731).

#### *7. Plaintiff's Rebuttal Closing Argument*

Plaintiff's counsel in his rebuttal closing argument expressed his opinion that Defense counsel improperly accused Plaintiff and his counsel of fraud and collusion and the defense was engaged in distraction and "cherry picking" the evidence:

And so Defense Counsel says, well, he comes from a lovely family. You know, and he's a good dad, and, you know, they're

nice people, and things like that. Oh, by the way, Daddy is a fraud. *Is that what he's saying? Daddy's a fraud.* Daddy didn't need this chiropractic care. Daddy didn't need his shots. Daddy didn't go to the doctor. *This is all a collusion.* (T.1387)(emphasis added)

\* \* \*

And another thing, which is interesting, they throw out this thing about the LOP, letter of protection, that Mr. Hudson (indiscernible) sign those documents. That worries him. Why? Well, Dan Newlin's name was – represented Mr. Hudson one time. We don't have any affiliation. I've never seen him in the courthouse. Well, a month later he hired Mr. Newlin. *Why even put that up? Well, it's a distraction.* It's not (indiscernible) you get told it's a lawyer thing. There's collusion. If he's a fraud, don't give him anything. Tell him to leave. But if you believe him, you got to give him everything. It's either/or here, but *they're accusing this man* who has a unblemished past or they would have brought it up, you've met his family, *of being a fraud.* (T.1387-88)(emphasis added)

\* \* \*

He went in June to a flare up. That's what it says. Came in for a flare up. I mean, what's the point of going -- why would be going and saying, look I'm going to the doctor every week. That's what someone that is fraudulent does, not doesn't go to the doctor for six months. (T.1388-89).

\* \* \*

Not going to the doctor doesn't equate to no herniated discs from this accident, and Defense Counsel is saying, well, no future treatment, no future treatment. Well, apparently, he's conceding that the past treatment was reasonable and necessary and related to the accident, right? You didn't hear him say from the accident on. It's all degenerative. No. His doctors said that, but he didn't say that. Oh, and this is *cherry picking*. This this is what's called *cherry picking* when Defense

gets up here. And of course, then there's the *collusion* that me and Mr. Hudson and Mr. Seidule are *colluding to defraud* you. (T.1389)(emphasis added).

Defense counsel objected to the "disparaging remarks" noting he had not accused Mr. Hudson of committing fraud on the court or suggested collusion between Plaintiff and his counsel. (T.1389-90). The Court sustained the objection, and instructed counsel to "argue the facts and the evidence." (T.1390). The next statement by Plaintiff's counsel was "[s]o cherry picking . . . . Well, Defense Attorney, why don't you also show me a little later in the record . . . . Because they want to cherry pick . . . ." (T.1390-91).

Defendants sought a new trial on the basis of identified improper closing arguments (R.2665-66) which expressed personal beliefs, commenting on the truthfulness of counsel and attacking defense counsel and denigrating the defense (R.2686-87), contending the identified improper remarks met the standard for a new trial under *Murphy v. International Robotic Systems, Inc.*, 766 So. 2d 1010 (Fla. 2000). (R.2685-87). Defendants also sought a new trial of the cumulative effect of the errors and improper argument (R.2688). The new trial motion was denied. (R. 2731).

## SUMMARY OF ARGUMENT

Defendants are entitled to a new trial given the improperly admitted expert testimony causing substantial prejudice to them resulting in an unfair trial. Plaintiff used a treating physician to provide undisclosed expert testimony, and used an expert life care planner, who admitted he was not a treating physician, to provide opinions of a treating physician, and then include his own treatment opinions in the life care plan. Contrary to the Trial Court's understanding (T.490), a legal distinction exists between a physician testifying as a treater, a physician testifying as a life care planner, and a physician testifying as an expert. *Gutierrez v. Vargas*, 239 So. 3d 615, 622 (Fla. 2018)(treating physicians are limited to their medical opinions as they existed at the time they were treating the plaintiff, while an expert may form new opinions in order to help the trier of fact decide the case); *Anderson-Moody*, 357 So. 3d at 1240 (physician serving as life care planner cannot include own opinions as to treatment in plan). The Trial Court erred in its understanding of the law and abused its discretion in allowing testimony contrary to these principles of law.

Plaintiff was improperly allowed to present testimony by treating radiologist, Dr. Knapp, (R.2286-87), who read and interpreted an MRI study of the lumbar spine (T.500-01, 545, 551), to provide surprise expert

testimony at trial outside of his scope of treatment and opine as to the Plaintiff's cervical spine based upon additional cervical studies and medical records provided to him from Plaintiff's counsel shortly before trial. *Tetrault v. Fairchild*, 799 So. 2d 226, 228 (Fla. 5th DCA 2001)(reversible error for treating radiologist to provide undisclosed opinion testimony as to MRI not seen during treatment). The radiologist, Dr. Knapp, confirmed at trial he was asked to read the cervical spine MRIs and reports for the purpose of providing opinions at trial for which he would be billing the Plaintiff's counsel. (T.552-54). As Defendants learned at trial of this surprise-in-fact expert testimony by a physician disclosed as a treating physician, Defendants were prejudiced, and the judgment should be reversed, and a new trial ordered.

Similarly, a new trial should be granted as Plaintiff was improperly permitted to present a life care plan by Dr. Nwaogwugwu, a non-treating physician, based upon his own opinions as to what reasonably certain medical care and treatment Mr. Hudson's conditions would require, despite the absence of any treating physicians having such opinions. The Trial Court erred in not applying the holding of *Anderson-Moody v. Wilson*, 357 So. 3d 1240 (Fla. 1st DCA 2023) and abused its discretion in not striking

the testimony of Dr. Nwaogwugwu based upon treating recommendations when Dr. Nwaogwugwu himself admitted he was not a treating physician.

Alternatively, a directed verdict, remittitur, or new trial as to future medical expenses should have been granted. No evidentiary basis existed for a \$700,000.00 award of future medical expenses based upon the evidence of the treating physicians when Dr. Nwaogwugwu's improper testimony is ignored.

The prejudice to Defendants was exacerbated by attacks in Plaintiff's rebuttal closing argument on the integrity of defense counsel and the defense. The cumulative effect of the improperly admitted evidence as well as the improper attacks on defense counsel deprived Defendants of a fair trial, and a new trial should be granted.

### **STATEMENT OF PRESERVATION**

(Issue I) The issue of whether the Trial Court improperly allowed Dr. Knapp to provide expert opinions as to the cervical spine formed for purposes of trial based upon records of other providers was raised at trial by objection prior to his testimony, (T.478-490), which objection was overruled (T.490), and by motion for mistrial (T.491-92), which motion was denied (T.92). Defendants also moved for a new trial as to the admission

of the expert testimony of Dr. Knapp as to the cervical spine, (R.2653-54, 2659-64), which motion was denied. (R.2731).

(Issues II-IV) The issue of whether the Trial Court improperly allowed Dr. Nwaogwugwu as a life care planner to provide testimony to future medical expenses not based upon treatment recommendations by the Plaintiff's treating physicians/chiropractor contrary to *Anderson-Moody*, 357 So. 3d at 1240, was presented by a pretrial motion in limine (R.2276-2426), with arguments presented before testimony at trial (T.5, 8-10, 12-17, 382-88), denied at trial (T.386-88), by a renewed motion during trial seeking to exclude his opinions (T.1201-02), also denied. (T.1202), and by post-trial motions (R. 2653, 2655, 2664, 2671, 2673) which were denied. (R.2731)

(Issue II) The issue of whether a new trial should be granted given Dr. Nwaogwugwu's testimony as to his own medical opinions was presented in the motion for new trial (R. 2671, 2674-77) and denied. (R.2731).

(Issue III) The issue of whether a directed verdict or judgment in accordance with prior motions for directed verdict should be granted as to the award of future medical expenses based upon Dr. Nwaogwugwu's testimony was made at trial at the conclusion of Plaintiff's case in chief (T.1201-02), which motion was denied, (T.1202), and was reasserted in

Defendants' post-trial motion (R.2653, 2664-65, 2671, 2690), and denied. (R.2731).

(Issue IV) The issue of whether remittitur is appropriate as to the future medical expense award, or alternatively a new trial, was presented in a timely post-trial motion, and denied. (R.2671-74, 2731).

(Issue V) The issue of improper closing was the subject of a sustained objection (T.1389-90) and was the subject of the denied motion seeking a new trial under the standard of *Murphy*, 766 So. 2d at 1028-30. (R.2665-66, 2685-87, 2731).

(Issue VI) The issue of whether a new trial should be granted for cumulative error was asserted in the post-trial new trial motion (R.2687-88), which motion was denied. (R.2731).

## **ARGUMENT**

### **I. The Trial Court Abused its Discretion in Allowing Dr. Knapp to Provide Expert Opinions Outside of his Treatment of Plaintiff Based Upon Materials Provided by Plaintiff's Counsel**

#### **A. Standard of Review**

This court applies the abuse of discretion standard in reviewing a trial decision as to whether to grant a new trial as well as whether to admit expert testimony over objection the opinion was not properly disclosed as required by a pre-trial order. See *Suarez-Burgos v. Morhaim*, 745 So. 2d

368, 370 (Fla. 4th DCA 1999)(non-disclosed expert opinion and motion for new trial/mistrial); *Cantore v. West Boca Medical Ctr., Inc.*, 254 So. 3d 256, 260 (Fla. 2018)(admission of evidence); *Gutierrez*, 239 So. 3d at 621, 628 (new trial motion and compliance with pre-trial order).

However, a Trial Court's discretionary decision based upon an error of law is reviewed *de novo*. *Van v. Schmidt*, 122 So. 3d 243, 246, 252 (Fla. 2013)(*de novo* review as to misapplication of legal standards set forth in cases); *Schwartz v. Wal-Mart Stores, Inc.*, 155 So. 3d 471, 473 (Fla. 5th DCA 2015); *Gutierrez*, 239 So. 3d at 621. An erroneous view of the law has been held both to be an error and an abuse of discretion. *Finkel v. Batista*, 202 So. 3d 913, 915 n.1 (Fla. 3d DCA 2016).

**B. Dr. Knapp's Opinions as to the Cervical Spine Formed for Purposes of Testifying at Trial Based upon Other Providers' Medical Records were Undisclosed Surprise Testimony Requiring a New Trial**

Dr. Knapp was disclosed as a "Plaintiff's Radiologist who treated Plaintiff for his injuries" with Plaintiff advising, "Dr. Knapp is not a retained expert." (R.2287) On behalf of Acumen, he read the MRI of the lumbar spine taken at Acumen dated January 18, 2023 (T.500-01, 545) and compared it to a prior MRI from October of 2020. (T.551). The Florida Supreme Court has defined the proper scope of testimony by a treating physician:

a treating physician testifies as a fact witness “concerning his or her own medical performance on a particular occasion and is not opining about the medical performance of another . . . .” *Fittipaldi USA, Inc. v. Castroneves*, 905 So.2d 182, 186 (Fla. 3d DCA 2005) . . . A treating physician is a fact witness, and testifies to past facts based on personal knowledge . . . . The treating physician's perception of the plaintiff's symptoms, their diagnostic opinion, and their recommendation of a particular treatment are all facts in issue. An expert witness testifies with the benefit of hindsight, whereas a treating physician does not . . . .

Treating physicians are limited to their medical opinions as they existed at the time they were treating the plaintiff, while an expert may form new opinions in order to help the trier of fact decide the case. See *Tetrault v. Fairchild*, 799 So.2d 226, 227–28 (Fla. 5th DCA 2001) (ordering a new trial where treating physician gave opinion testimony based on MRIs he had not seen during treatment). Although a treating physician may possess the same qualifications as an expert witness, treating physicians form medical opinions in the course of rendering treatment and may therefore testify to the fact that they formed those opinions, and explain why they did so, provided such testimony is otherwise admissible.

*Gutierrez*, 239 So. 3d at 622–23. Medical professionals testifying as treating or examining doctors acquire their expert knowledge not for the purpose of litigation but rather in the course of caring and treating for the patient. *Frantz v. Golebiewski*, 407 So. 2d 283, 285 (Fla. 3d DCA 1981).

The purpose of pretrial orders requiring disclosures is to avoid surprise and to prevent trial by ambush. Cf. *Florida Marine Enterprises v. Bailey*, 632 So. 2d 649, 652 (Fla. 4th DCA 1994)(affirming decision that inadequate disclosure can be deemed failure to comply with the court's

order). Accordingly, given Plaintiff's disclosure of Dr. Knapp as a treating radiologist and not a retained expert, Defendants reasonably expected Dr. Knapp's testimony to be consistent with that of a treating physician and only address Mr. Hudson's lumbar spine based upon the lumbar studies reviewed during the course of his care and treatment of Mr. Hudson. See, e.g., *Tetrault*, 799 So. 2d at 227-28 (interrogatory answer disclosing radiologist as treater who will testify as to his care and treatment does not disclose that radiologist will testify based upon review of additional MRIs supplied to him by Plaintiff's counsel).

At trial, Defendants learned for the first-time during Plaintiff's opening statement that Dr. Knapp was going to provide expert opinion testimony outside the scope of medical services provided to Mr. Hudson and testify as to Mr. Hudson's cervical spine condition and the cause and permanency of that condition. Such testimony is that of a retained "expert." Dr. Knapp was provided cervical studies and medical records by Plaintiff's counsel in the past few weeks" or possibly "last couple of months," months after his read and interpretation of the January 2023 lumbar spine MRI. (T.546). He was provided the additional records for purposes of forming opinions for trial for which he was being paid by Plaintiff's counsel. (T.552-53). Where opinions are formed based upon "later reviews of other records" the opinions

are formed for trial and not treatment. *Gutierrez*, 239 So. 3d at 624-625 (analyzing whether treaters formed opinions for trial or conducted later review of other records). A treating physician who provides testimony as to a “medical opinion formed for the purpose of litigation rather than treatment” is an expert one, and the “mere fact that the physician once treated the plaintiff would not prevent that doctor from being considered an expert witness. *Id.* at 623-24; *Pitts v. Neptune*, 49 Fla. L. Weekly D555 \*1 (Fla. 1st DCA Mar. 6, 2024) (where treating physicians are given medical records from other providers and are offering testimony based upon the review of those records they are acting as retained “expert witnesses,” not as a treating physician).

In allowing Dr. Knapp to provide this surprise-in-fact expert testimony, the Trial Court made an error of law. The Trial Court erred in determining the testimony was not expert testimony. Specifically, the Trial Court’s determination the distinction of “retained or not retained expert” is one that does not have “any legal significance” (T.490) is error, and an abuse of discretion. See *Gutierrez*, 239 So. 3d at 622-23; *Buzby v. Turtle Rock Cmty. Ass’n, Inc.*, 333 So. 3d 250, 254 (Fla. 2d DCA 2022)(a treating physician provides surprise “expert” opinion testimony when he provides opinion testimony as to records outside his care and treatment); *Tetrault*,

799 So. 2d at 227-28 (reversible error to allow treating radiologist to provide expert opinion as to MRIs not reviewed as part of treatment); *Frantz*, 407 So. 2d at 285. Dr. Knapp provided undisclosed surprise-in-fact expert testimony as to Mr. Hudson's cervical spine.

Because the Court found the testimony as to the cervical spine was not undisclosed expert testimony, (T.490), the Court erred in not considering consider the factors set forth in *Binger v. King Pest Control*, 401 So. 2d 1310, 1314 (Fla. 1981), and, accordingly, the Court abused its discretion and erred in its analysis. *Montero v. Corzo*, 320 So. 3d 976, 980 (Fla. 3d DCA 2021)(failing to analyze *Binger* factors is reversible error as such analysis must be part of the court's exercise of discretion); *Gurin Gold, LLC v. Dixon*, 277 So. 3d 600, 603 (Fla. 4th DCA 2019)(*Binger* analysis controls physician providing expert testimony as to additional MRI shown to him during trial)

The Trial Court also abused its discretion in allowing this "surprise- in-fact" and prejudicial testimony that Mr. Hudson had a permanent injury as to the cervical spine caused by the accident, and in failing to grant a new trial given the improper admission. See, e.g., *Binger*, 401 So. 2d at 1314; *Suarez-Burgos*, 745 So. 2d at 371 (undisclosed expert opinion is a surprise under *Binger*). The Plaintiff's disclosure of Dr. Knapp as a treating

radiologist and non-retained expert did not reasonably advise Defendants he would have expert opinions as to the cervical spine formed outside of his care and treatment, Plaintiff counsel provided new records to Dr. Knapp for purposes of obtaining the new expert opinions such that the noncompliance with the disclosure order was intentional, and, given the expert opinion was disclosed at trial, the untimely compliance disrupted an efficient (and fair trial) as the trial had begun. *Binger*, 401 So. 2d at 1314; *Gurin*, 277 So. 3d at 604-05 (time for development of new testimony during trial is long past). The testimony should have been excluded.

In *Tetrault*, 799 So. 2d at 226-28, the appellate court held the trial court erred in allowing a disclosed treating radiologist to testify outside of his care and treatment by providing opinions based on MRIs provided to him prior to the trial. In *Tetrault*, the treating radiologist was provided with subsequent MRIs shortly before trial and was asked to give an opinion concerning the injury they depicted. In response to expert interrogatories, the plaintiff had disclosed treating doctors would testify as to “their care and treatment of [p]laintiff” and would also testify as to the “causation of the injuries for which they treated plaintiff” and “diagnosis, prognosis and the necessity for further follow-up care.” *Id.* at 227. Because until trial the radiologist was “indicated as nothing more than the post-accident

emergency room x-ray-reading radiologist who had written a report reporting no injury” the defense was not “reasonably put” on notice the radiologist would render opinions based on two subsequent MRIs. *Id.* The appellate court reversed the judgment in favor of the plaintiff and ordered a new trial. *Id.* at 228. The same result should occur here.

Here, not only was Dr. Knapp provided subsequent studies, but he asserted opinions as to a different area of the spine, the cervical spine, not the subject of diagnostic studies read and interpreted as a treating radiologist. (T.500-01, 545). He reviewed the cervical studies provided by counsel after his treatment had concluded and expressed causation and permanency opinions as to the cervical spine. (T.519-22, 531-33). The Plaintiff’s disclosure of Dr. Knapp as a non-retained treater (R.2287) did not reasonably put Defendants on notice his opinions at trial would concern expert opinions as to the cervical spine as he did not read or interpret a cervical study. Defendants were allowed to rely upon the Plaintiff’s disclosure that Dr. Knapp was a non-retained treater, (R.2286-87), in determining whether a deposition of Dr. Knapp in Puerto Rico was required. *See, e.g., Tetrault*, 799 So. 2d at 227-28 (interrogatory answer disclosing treaters would testify as to causation does not disclose the treaters would testify based upon outside care and treatment); *Doctors Co. v. State of*

*Florida, Dep't of Ins.*, 940 So. 2d 466, 471 (Fla. 1st DCA 2016) (expert testimony of a disclosed fact witness excluded as lack of notice of the expert testimony deprived the other side of an “adequate opportunity” to depose him before trial and, therefore, his testimony was properly excluded); *cf. Suarez-Burgos*, 745 So. 2d at 371 (stating “[t]here is no requirement or need for the opposing party to take the deposition of every expert” and opposing party can rely on the expert report).

Furthermore, as Dr. Knapp received records and studies “in the past few weeks” or possibly “last couple of months,” (T.546), and the trial was in June of 2023, the expert opinions were formed after the March 30, 2023, discovery cutoff. (R.46, 437, 440, 442). Mr. Knapp’s expert testimony, discovered at trial, as to the cervical spine was prejudicial surprise testimony which could not be cured. *Suarez-Burgos*, 745 So. 2d at 372 (finding prejudicial surprise when some of expert's opinions were based upon materials received hours before testifying); *see also Department of Health & Rehab. Serv. v. Spivak*, 675 So. 2d 241, 243 (Fla. 4th DCA 1996) (court abused discretion in permitting surgeon's opinion as to information obtained after the discovery deadline); *cf. Bryan v. Whitfield*, No. 3:14-cv-341, 2015 WL 3407485 (N.D. Fla. March 16, 2015) (where treater’s

opinions extend past facts disclosed during care and treatment, rules regarding pretrial disclosure of expert opinions apply).

All Defendants could do is cross-examine Dr. Knapp on his new expert opinions. “Clearly, except under extraordinary circumstances which do not exist here, the lawyers have a right to expect that once a trial commences, discovery and examinations must cease....” *Grau v. Branham*, 626 So. 2d 1059, 1061 (Fla. 4th DCA 1993); *see also Gurin*, 277 So. 3d at 604-05. As in *Tetrault*, 799 So. 2d at 228, this Court should reverse the judgment for the Plaintiff and remand for a new trial.

In addition, even if this Court disagrees with the contention that Dr. Knapp provided expert testimony, the Trial Court should not have allowed him to provide new opinions formed after the discovery cutoff. *See Auto Owners Ins. Co. v. Clark*, 676 So. 2d 3, 4 (Fla. 4th DCA 1996) (“[I]t was error to permit plaintiff’s neurosurgeon to give testimony regarding a treatment session which occurred after the discovery deadline in the suit); *Krysiak v. Dawson*, 301 So. 3d 259, 264-65 (Fla. 4th DCA 2020).

It was “reversible error” to allow Dr. [Knapp] to offer expert testimony based on the records and scans provided to him by Plaintiff’s counsel as to Mr. Hudson’s cervical spine. The Judgment should be reversed and remanded for a new trial. *Tetrault*, 799 So. 2d at 228.

**II. The Trial Court Erred in Allowing the Life Care Planner to Provide Testimony Based Upon his Own Medical Opinion, Contrary to the Binding Precedent of *Anderson-Moody v. Wilson*, 357 So. 3d 1240 (Fla. 1st DCA 2023) and Abused its Discretion in Not Awarding a New Trial Given the Improperly Admitted Expert Testimony**

**A. Standard of Review**

Whether a Trial Court failed to follow binding precedent is a matter of law and, therefore, is an issue reviewed *de novo*. *Allstate Prop. & Cas. Ins. Co. v. Marcia C. Sasso, D.C., P.A.*, 325 So. 3d 903, 904 (Fla. 4th DCA 2021)(concluding trial court “erred” in not following binding precedent of district court and supreme court).

The abuse of discretion review standard applies to a trial court’s decision as to whether to grant a new trial, decisions as to the admission and proper range of expert testimony, and decisions as to compliance with the trial court’s pretrial orders. See *Cantore*, 254 So. 3d at 260; *Angrand v. Key*, 657 So. 2d 1146, 1148 (Fla. 1995) (range of subjects on which the expert can testify); *Gutierrez*, 239 So. 3d at 628.

**B. The Trial Court Abused its Discretion in Not Ruling on The Merits**

Defendants' Motion in Limine as to Dr. Nwaogwugwu (R.2276-2426) was denied as an untimely "*Daubert*" motion. (T.385-88). See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); § 90.702, Fla. Stat. While the Court heard and granted another limine motion at trial (T.364), the Court construed the Dr. Nwaogwugwu limine as a *Daubert* motion requiring the Court to undertake a *Daubert* hearing. (T.385-86). The Court abused its discretion in making such a decision. No *Daubert* fact finding inquiry was required by the Court. No dispute existed that the witness, a physician, intended to testify as to a life care plan based upon future medical care not based upon the treatment recommendations by the Plaintiff's treating physicians but upon his own recommendations for the Plaintiff. The motion did not seek to establish that Dr. Nwaogwugwu was not a qualified expert or his opinion was pure opinion which did not meet the requirements of *Daubert*. Cf. *State Farm Mut. Auto. Ins. Co. v. Long*, 189 So. 3d 335, 337 n. 3 (Fla. 5th DCA 2016)(differentiating between a *Daubert* analysis to prohibit pure opinions versus the court's determination that a witness was qualified to testify on a subject matter.) The Trial Court failed to recognize a motion in limine is a proper vehicle to limit an expert's testimony. See, e.g., *Anderson-Moody*, 357 So. 3d at 1243.

In addition, even if the motion was a “*Daubert*” one, such motions can be heard during trial. *Rojas v. Rodriguez*, 185 So. 3d 710, 711-12 (Fla. 3d DCA 2016)(finding party must raise a *Daubert* objection or request a *Daubert* hearing prior to conclusion of trial and citing *Booker v. Sumter County Sheriff's Office/N. Am. Risk Servs.*, 166 So. 3d 189, 192-93 (Fla. 1st DCA 2015)).

In any event, after the Trial Court heard Dr. Nwaogwugwu’s testimony and the basis for his future medical expense opinions, the Trial Court should have stricken the testimony as requested (T.1201-02). Given Dr. Nwaogwugwu’s acknowledgement his life care plan rested upon his own opinions as to Mr. Hudson’s needs (T.1180, 1183), contrary to *Anderson-Moody*, no further inquiry was required for a ruling striking such testimony and directing a verdict on those items of future medical expenses.

**C. The Trial Court Erred in Not Following the Precedent of *Anderson-Moody***

A Trial Court errs in not following binding precedent. *Allstate Prop. & Cas. Ins. Co. v. Marcia C. Sasso, D.C., P.A.*, 325 So. 3d 903, 904 (Fla. 4th DCA 2021). The decision of *Anderson-Moody*, 357 So. 3d at 1242, was binding on the Trial Court. *Sys. Components Corp. v. Fla. Dep't of Transp.*, 14 So. 3d 967, 973 n.4 (Fla. 2009); *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1982).

In *Anderson-Moody*, like in the instant case, a physician (neurosurgeon in *Anderson-Moody*, physiatrist in this case) was retained to create a life care plan and was not retained for the purpose of providing medical treatment. *Anderson-Moody*, 357 So. 3d at 1241. As in this case, the party opposing the testimony filed motions in limine before trial and objected to the admissibility at trial, but the trial court allowed testimony as to the costs of epidural steroid and facet joint injections which injections had not been recommended by a treating physician. *Id.* The First District Court of Appeal found the trial court abused its discretion in allowing the life care planner to testify based on his own medical opinions, as to the Plaintiff's future medical needs." *Id.* at 1243. The First District held:

The question presented is whether an expert witness, offered as a life care planner, may infuse his or her own medical opinions in calculating certain costs of future medical care when such future care is not recommended by a treating physician or medical expert. We answer the question in the negative. *Id.* at 1242.

This decision was binding on the Trial Court as to the admissibility of the testimony. Accordingly, the Trial Court erred in failing to exclude testimony by Dr. Nwaogwugwu under the binding precedent of *Anderson-Moody*.

**D. Dr. Nwaogwugwu Should Not Have Been Allowed to Testify as a Life Care Planner Based on His Own Medical Opinions.**

The jury's award for \$700,000.00 in future medical expenses was based on Dr. Nwaogwugwu's testimony. He was the only witness who provided testimony as to the costs of future medical care, and he was the only witness to opine Mr. Hudson needed the majority of the future care he set forth, and to explain to the jury what that future treatment would entail.

Dr. Nwaogwugwu, while a physician, testified his role in this case was one of an expert hired to create a life care plan, and not as a treating physician of Mr. Hudson. (T.1168). Thus, Dr. Nwaogwugwu's role was not to recommend treatment decisions for Mr. Hudson as he was not his doctor and not involved in his care and treatment. "Life care planners prepare comprehensive projections of future medical care and treatment needs to aid economists in calculating the present value of future medical care and treatment. In doing so, they necessarily rely on physicians' recommendations." *Olges v. Dougherty*, 856 So. 2d 6, 8 n.1 (Fla. 1st DCA 2003). The "responsibility for establishing a treatment plan rests with a claimant's authorized physicians." *Diamond R. Fertilizer v. Davis*, 567 So. 2d 451, 455 (Fla. 1st DCA 1990).

It is well established that an expert's opinion must be supported by a factual basis. See generally *Arkin Constr. Co. v. Simpkins*, 99 So. 2d 557, 561 (Fla. 1957); *Dozier v. Hodges*, 849 So. 2d 1094, 1095 (Fla. 3d DCA

2003). Under section 90.704, Florida Statutes, the fact and data underlying the expert opinion must be of the type reasonably relied upon by experts in that subject. Life care plan experts do not “typically use their experience as a physician to determine the future medical care needs of plaintiffs. Life care planners rely on admissible evidence from medical experts or treating physician when creating the life care plan.” *Anderson-Moody*, 357 So. 3d at 1243, but Dr. Nwaogwugwu based his opinions on his own assessment of Mr. Hudson’s needs. (T.1129, 1180,1183). Thus, the Trial Court abused its discretion in denying the motion in limine, in overruling the objections to Dr. Nwaogwugwu’s testimony based upon his own opinions, and in declining to strike such testimony, and in denying the post-trial motions based upon such testimony. (T.386-88, 1202)(R.2731).

Dr. Nwaogwugwu’s testimony included a discussion, while holding a Tuohy needle, as to the pain and potential complications of epidural injections the Plaintiff had undergone and will undergo, the description of future surgery, as well as the side effects, pain, and inconvenience of his opined future medical care and treatment, *see, e.g.*, (T.1144-48, 1152-53, 1160-611). Thus, his testimony related to noneconomic damages, and the new trial should not be limited to future medical expenses but also include the related past and future noneconomic damages. *Cf. Altileo v.*

*Gemperline*, 637 So. 2d 299, 302 (Fla. 1st DCA 1994)(reversing zero award for future medical expense and remanding for new trial on future damages “relating to the need for future surgery”); *Long*, 189 So. 3d at 340 (reversing judgment and ordering new trial “on the issue of future damages” where improper expert testimony as to future surgery should have been excluded); *Garrett v. Miami Transfer Co., Inc.*, 964 So. 2d 286, 291-92 (Fla. 4th DCA 2007)(discussing connection between future surgery and future intangible damages); *Dolphin Cruise Line, Inc. v. Stassinopoulos*, 731 So. 2d 708, 710 (Fla. 3d DCA 1999)(trial court abused discretion in denying motion for additur or new trial as to zero verdict on non-economic damages where plaintiff had past surgery, and a need for future surgery and painful rehabilitation). A new trial as to damages should be ordered on remand.

**III. Alternatively, the Trial Court Erred in Not Directing A Verdict as to Future Medical Expenses Based upon Dr. Nwaogwugwu’s Opinion**

**A. Standard of Review**

Whether a Trial Court should have granted a directed verdict or judgment in accordance with a prior motion for directed verdict is reviewed *de novo*. *Lemon v. People’s Trust Ins. Co.*, 344 So. 3d 56, 59 (Fla. 5th DCA 2022). A directed verdict should be granted where there is no

reasonable evidence by which a jury could enter a verdict in favor of the non-moving party. *Volusia County v. Joynt*, 179 So. 3d 448, 450 (Fla. 5th DCA 2015).

**B. Plaintiff Did Not Provide Competent Substantial Evidence Supporting the Award of Future Medical Expenses**

For recovery of future medical expenses, the plaintiff must provide an evidentiary basis showing the expenses are “reasonably certain to be incurred,” as well as an evidentiary basis upon which a jury can with reasonable certainty determine the amount of those expenses. *Loftin v. Wilson*, 67 So. 2d 185, 188 (Fla. 1953). While testimony that future medical expenses were “more probably than not be incurred” can support an award, *Fasani v. Kowalski*, 43 So. 3d 805, 812 (Fla. 3d DCA 2010), testimony that a treatment could be appropriate in the future does not provide a basis for an award. See, e.g., *Subaqueous Services, Inc. v. Corbin*, 25 So. 3d 1260, 1268-69 (Fla. 1st DCA 2010); *GEICO Indem. Co. v. DeGrandchamp*, 102 So. 3d 685, 687 (Fla. 2d DCA 2012)(good chance will need surgery not sufficient); *Auto Club Ins. Co. v. Babin*, 204 So. 3d 561, 563-64 (Fla. 5th DCA 2016). It is the plaintiff's burden to establish the future medical expenses will more probably than not be incurred. *Babin*, 204 So. 3d at 563; *Joynt*, 179 So. 3d at 452. As to each item of future care, there should be testimony the care was medically necessary, and the cost of care should

be quantifiable. *Joynt*, 179 So. 3d at 453, n.5, 454; *Fasani*, 43 So. 3d at 812.

As set forth above, the testimony of Dr. Nwaogwugwu as to the majority of future medical expenses should have been stricken as lacking an insufficient factual basis for a life care plan. When an expert opinion has an insufficient factual basis, it is as if the evidence was not presented to the jury such that a directed verdict is proper. See *Siegel v. Cross Senior Care, Inc.*, 239 So. 3d 738, 743 (Fla. 3d DCA 2018). Absent that improperly admitted testimony, Plaintiff did not meet his evidentiary burden as to future medical expenses.

While Dr. Behrmann recommended lumbar epidural injections (T.608-10), he did not opine as to the number or frequency of the lumbar epidural injections needed by Mr. Hudson, such that such the future costs of such speculative injections are not recoverable. Stepping out of his proper role, Dr. Nwaogwugwu did opine that two lumbar epidural spinal injections were needed every other year (T.1143), but his testimony at trial did not set forth a basis for the jury to determine the costs for just those injections. Instead, Dr. Nwaogwugwu only testified as to the joint costs of the lumbar epidural injections combined with lumbar and cervical trigger point injections, and lumbar and cervical facet joint injections. (T.1149-50).

Thus, Plaintiff failed to meet his evidentiary burden as to the lumbar epidural injections.

While Dr Behrmann did recommend a lumbar L5-S1 laminectomy/microdiscectomy (T.610), and Dr. Nwaogwugwu did testify as to its approximate costs (T.1153), Dr. Behrmann stated the surgery is not ordered or scheduled, and Mr. Hudson has not advised him he wants to proceed with the surgery. (T.625-27). The Plaintiff testified he has not made the decision to have the laminectomy microdiscectomy procedure recommended by Dr. Behrmann, as he is still on the “fence” as to whether to undergo the procedure. (T.859-61). He “might” have surgery depending on his pain condition in the future, but the future is “speculative.” (T.861). Thus, Plaintiff has not met his burden that a surgery is reasonably certain to occur. *Joynt*, 179 So. 3d at 454 (considering patients’ stated intent as to whether the care is reasonable certain to occur); see *Nevarez v. Friskney*, 817 So. 2d 856, 858 (Fla. 5th DCA 2002)(holding trial court erred in allowing recovery for future surgery where the doctor testified as to a possible need for surgery but the plaintiff testified that she did not want to have the surgery and would not have the surgery).

The Trial Court should have directed a verdict in Defendants’ favor as to the future medical expenses. No competent substantial evidence

supported the future medical expense award when the improperly admitted testimony of Dr. Nwaogwugwu is not considered. This Court should reverse the judgment and strike the \$700,000.00 future medical expense award. *Fasani*, 43 So. 3d at 813; *Joynt*, 179 So. 3d at 454-55; *cf. Anderson-Moody*, 357 So. 3d at 1243 (reversing award for costs of future medical expenses not recommended by doctors).

**IV. Alternatively, the Trial Court Erred in Not Granting a Remittitur or New Trial as to the Future Medical Expense Award as the Award is Not Supported without Dr. Nwaogwugwu’s Testimony**

**A. Standard of Review**

A trial court’s ruling on a motion for remittitur or new trial is reviewed for an abuse of discretion. *See Truelove v. Blount*, 954 So. 2d 1284, 1287 (Fla. 2d DCA 2007)

**B. The Award of \$700,000.00 for Future Medical Expenses Is Clearly Excessive**

Pursuant to section 768.043, Florida Statutes, the Trial Court had the authority to remit the future medical expense award. The statute provides in relevant part that “it shall be the responsibility of the court, upon proper motion, to review the amount of” the jury’s “award to determine if such amount is clearly excessive . . . in light of the facts and circumstances” and, if it finds the amount is clearly excessive to order a remittitur. § 768.043(1), Fla. Stat. The trial court is to consider five statutory criteria: (1) whether the

verdict was infected by “prejudice, passion, or corruption;” (2) whether the jury ignored the evidence or misconceived the merits; (3) whether the jury took improper elements of damages into account or engaged in speculation; (4) whether the award bears a reasonable relation to the damages proved and the injury suffered; and (5) whether the award is supported by the evidence and could have been logically determined by reasonable people. See § 768.043(2)(a)-(e).

Defendants sought a remittitur of the \$700,000.00 the future medical expenses or new trial as to future medical expenses as an alternative remedy. (R.2671-74). Where a Plaintiff does not establish future medical expenses with reasonable certainty and the amount supported was not supported by the evidence, the court should enter an order of remittitur or new trial as to future medical expenses. *Pruitt v. Perez-Gervert*, 41 So. 3d 286, 288, 290 (Fla. 2d DCA 2010).

Absent Dr. Nwaogwugwu’s testimony as to future medical expenses he personally recommended, which testimony should have been stricken, the award of \$700,000.00 in future expenses does not bear a reasonable relationship to the damages proven, and is not supported by the proper evidence, § 768.043(2)(d) & (e) such that the Trial Court abused its discretion in not granting new trial or remittitur as to the future medical

award. *Truelove*, 954 So. 2d at 1287; *Wal-Mart Stores, Inc. v. Thornton*, 241 So. 3d 867, 868 (Fla. 4th DCA 2018); *General Emp. Ins. Co. v. Isaacs*, 206 So. 3d 62, 63 (Fla. 4th DCA 2016).

**V. A New Trial Is Required Given the Fundamentally Improper Attacks on Defense Counsel and Expressions of Personal Belief in Plaintiff’s Rebuttal Closing Argument**

**A. Standard of Review**

Whether the trial court properly denied a new trial for closing arguments argued to be fundamentally improper under *Murphy*, 766 So. 2d at 1028-30, is reviewed for an abuse of discretion. *Id.* at 1031; *Sullivan v. Kanarek*, 79 So. 3d 900, 903 (Fla. 2d DCA 2012); *Florida Peninsula Ins. Co. v. Nolasco*, 318 So. 3d 584, 586 (Fla. 3d DCA 2021).

**B. Attacks on the Integrity of Defense Counsel Are Fundamentally Improper**

It is completely improper to denigrate the other side’s counsel for defending the case. *See, e.g., Johnnides v. Amoco Oil Co., Inc.*, 778 So. 2d 443, 444 (Fla. 3d DCA 2001)(accusing opposing counsel of conspiring with expert to confuse the jury); *Wicklow v. State*, 43 So. 3d 85, 87-88 (Fla. 4th DCA 2010)(“fundamentally erroneous” for attorney to attack integrity of opposing counsel by contending defense counsel was trying to manipulate the jury); *Intramed, Inc. v. Guider*, 93 So. 3d 503, 507 (Fla. 4th DCA 2012)(accusing other attorneys of wrongful conduct in defending the case);

*Fasani*, 43 So. 3d at 809 (improper to suggest a party should be punished for contesting a claim). It is also improper for counsel to express personal beliefs as to an opposing counsel or party. *Murphy*, 766 So. 2d at 1028 (improper under R. Regulating Fla. Bar 4-3.4(e) to state personal opinions); *Wicklowsky*, 43 So. 3d at 87-88.

The Plaintiff's counsel's rebuttal closing argument accused defense counsel of "cherry picking" evidence, distracting the jury, and characterized the defense as accusing Plaintiff of fraud, (T.1387-89). Such arguments were an improper and prejudicial attack on defense counsel and Defendants' right to defend this case. Defense counsel did object and assert Plaintiff's counsel was improperly attacking defense counsel, and the objection was sustained, (T.1389-90) but the improper arguments continued. (T.1390-91). Further objections or curative would not have undone the prejudice. See, e.g. *Walt Disney World Co. v. Blalock*, 640 So. 2d 1156, 1158 & n.1, 1159 (Fla. 5th DCA 1994); *Johnnides*, 778 So. 2d at 445 (attacks on integrity of counsel meet *Murphy* test). Such attacks are incurable as a curative instruction would only highlight the statement, and the Judge and opposing counsel cannot respond to the attack. The public's interest in a fair trial is damaged as the arguments improperly shifted the focus of the jury from the issues they are to consider to attacks

on counsel. Plaintiff counsel's expressed opinions as to the integrity of defense counsel thus meet the *Murphy* test of improper, harmful, incurable and an argument so damaging to the fairness of trial that the public's interest in system of justice requires a new trial. *Murphy*, 766 So. 2d at 1028-30; see, e.g., *Florida Peninsula Ins. Co. v. Nolasco*, 318 So. 3d 584, 588 (Fla. 3d DCA 2021)(arguments impugning the integrity of opposing counsel constitute fundamental error); *Johnnides*, 778 So. 2d at 445 (Fla. 3d DCA 2001)(accusing defense counsel of trying to confuse the jury would meet *Murphy* standard); *Wicklow*, 43 So. 3d at 87-88 (comments about closing counsel fundamentally erroneous). This Court should reverse the judgment and order a new trial on remand.

## **VI. The Cumulative Prejudicial Effect of the Improperly Introduced Testimony and Improper Comments Requires a New Trial**

### **A. Standard of Review**

Whether the Trial Court should have granted a new trial for cumulative error is reviewed by the abuse of discretion standard. *City of Orlando v. Pineiro*, 66 So. 3d 1064, 1068, 1075 (Fla. 5th DCA 2011).

### **B. Defendants Did Not Receive a Fair Trial Given the Cumulative Effect of the Errors and Improper Argument**

A cumulative error claim requests the appellate court "evaluate claims of error cumulatively to determine if the errors collectively warrant a new trial." *Harrison v. Gregory*, 221 So. 3d 1273, 1278 (Fla. 5th DCA 2017).

Trial conduct “must always be so guarded that it will not impair or thwart the orderly processes of a fair consideration and determination of the cause by the jury.” *Manhardt v. Tamton*, 832 So. 2d 129, 132 (Fla. 2d DCA 2002)(citations and quotations omitted). “While a party is not necessarily entitled to a perfect trial, a party is entitled to a fair one.” *Norman v. Gloria Farms, Inc.*, 668 So. 2d 1016, 1020 (Fla. 4th DCA 1996); *Harrison*, 221 So. 3d at 1278. There is a point at which the error and improprieties combined, “raise doubts as to the overall fairness of the trial court proceedings.” *Bocher v. Glass*, 874 So. 2d 701, 704 (Fla. 1st DCA 2004).

Defendants maintain the individual effect of any one of the above issues warrant a new trial; however, the cumulative effect rises to the level of warranting a new trial. *State Farm Mut. Auto. Ins. Co. v. Medina*, 300 So. 3d 177, 184 (Fla. 4th DCA 2020)(preserved and unpreserved error may be considered in a cumulative error analysis); *Intramed*, 93 So. 3d at 505 (untimely disclosure of expert combined with improprieties in closing required a new trial).

## **CONCLUSION**

Defendants request the Judgment be reversed and remanded for a new trial. Alternatively, Defendants request the future medical expense award be stricken or the Trial Court on remand be instructed to order a new trial or remittitur as to the future medical expense award.

Respectfully submitted this 6th day of June 2024.

**MARKS GRAY, P.A.**

*/s/ Rhonda B. Boggess*

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing documents with the Clerk of Court via the FACC ePortal Filer, and that a copy or link to the copy of the foregoing document has been furnished to the following individuals by email via the FACC ePortal Filer on this 6th day of June 2024.

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**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this brief complies with the applicable font and word count limit requirements of Fla. R. App. P. 9.045(b) and 9.210(a)(2), as it is in Arial 14 point font and consists of 12,629 words as calculated under the rule.

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