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

CASE NO.: 6D23-3825

RODOLFO FONSECA and
NEW THUNDER GROUP, INC.

Appellants,

v.

LILCON L. HUDSON

Appellee.

ON APPEAL TO THE SIXTH DISTRICT COURT OF APPEAL
FROM THE NINTH CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

LILCON HUDSON'S ANSWER BRIEF

MICHAEL M. BROWNLEE, B.C.S
The Brownlee Law Firm, P.A.
200 E. Robinson St. Suite 800
Orlando, Florida 32801
Telephone: (407) 403-5886
mbrownlee@brownleelawfirmpa.com

Appellate Counsel for Lilcon L. Hudson

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STATEMENT OF THE CASE AND FACTS

The following recap fills in some of the blanks from Appellants' Statement of the Case and Facts in the initial brief, and buttresses Appellee's arguments in favor of affirmance.

This case stems from a December 2018 car accident. Defendants/Appellants Rodolfo Fonseca and New Thunder Group, Inc., admitted negligence on the eve of trial, and the case went to trial on the issues of causation, permanency, and damages. After a four-day jury trial, the jury returned a verdict for Plaintiff for $1,700,000.00, which includes an award for future medical expenses, and past and future non-economic damages.

A. Mr. Hudson testifies about the accident, his symptoms and his need for future medical care

Mr. Hudson testified at trial that the accident occurred while he was driving with his daughter to an Apple Store. (TT.816). Immediately after the collision, Mr. Hudson had a severe headache at the base of his skull, but his primary focus was on his daughter and ensuring she received the medical attention she needed. (TT.822-24). Mr. Hudson rode in the ambulance with his daughter to the emergency room, and for a few days after the accident, Mr.

Hudson continued to experience symptoms. He testified he had severe headache, as well as lower back pain. (TT.826). This was just days before Christmas, the Hudson family had guests over, and Mr. Hudson tried to tough it out over the holidays. (TT.826). After the pain became too much to bear, Hudson went back to the same emergency room that treated his daughter. (TT.826). The hospital took X-rays and Mr. Hudson was told to follow up with his primary care physician. (TT.891-892).

Two days later, Mr. Hudson went to a chiropractor. (TT.828). He had an MRI and was told he had herniated discs in his lower back and neck. (TT.828-829). Mr. Hudson had never been previously diagnosed with herniated discs. (TT.829). After a series of treatments, Mr. Hudson's original chiropractor told him he had plateaued, and he was released from chiropractic care because there was nothing further they could do to treat his pain. (TT.830). He was released from active care and, based upon the AMA Guides to the Evaluation of Permanent Impairment, assigned a 14% whole person impairment as a direct result of the accident. (TT.775-778). Furthermore, the report indicated that he would need future care for exacerbation and flare-ups directly related to the accident.

Mr. Hudson then began treating with Dr. Behrmann, a neurosurgeon, who prescribed muscle relaxers and anti-inflammatory medications. (TT.833-834). Mr. Hudson had never previously taken any prescriptions for neck or back pain, and he never previously took over-the-counter medication for any type of neck or back pain. (TT.834). Through a series of treatments under the care of Dr. Behrmann, Mr. Hudson received five epidural injections to treat his ongoing pain. (TT.835).

Mr. Hudson also testified about his gap in treatment, which he attributed to the COVID pandemic. Mr. Hudson's sister-in-law had just died from COVID, he was already facing a risk of COVID via his employment, and he explained: "I didn't want to go [to] a doctor during the middle of COVID." (TT.839-840).

Notably, Mr. Hudson confirmed that prior to the accident, he never had any permanent leg pain. (TT.848). He never received epidural injections (TT.848), he never had constant muscle spasms (TT.848), and never had a prior MRI of his neck or lower back. (TT.848). Prior to the accident, Mr. Hudson never had a neurosurgical consultation (TT.848), and he never previously visited an orthopedic doctor, chiropractor, or neurosurgeon. (TT.828).

Mr. Hudson also testified about his conversations with Dr. Behrmann concerning his need for surgery, and explained to the jury that if his pain continues to get progressively worse—as it had thus far—he would have surgery. (TT.842-844).

In concluding his testimony, Mr. Hudson provided detailed accounts of his pain and suffering and how his injuries have permanently affected his life, all of which was unimpeached. (TT.849-859). Mr. Hudson's wife gave corroborating testimony that was likewise unimpeached.

During cross-examination, Defendants/Appellants introduced a letter of protection (LOP) between Mr. Hudson and Dr. Behrmann/Integrity Medical Group. (TT.883-884). Mr. Hudson objected to its relevance, and Appellants claimed that it was relevant to show bias, in "that Dr. Behrmann himself is suggesting future surgeries, future epidural injections. So the suggestion would be if those are done at Integrity under the letter of protection, that's a bias and a financial gain for Integrity and Dr. Behrmann." (TT.883). The court overruled Mr. Hudson's objection. (TT.883).

B. Dr. Behrmann testifies as to causation, permanency, and the need for future medical care

Dr. Behrmann is a board-certified neurosurgeon with 30 years of experience. (TT.576). He began treating Mr. Hudson in February of 2019, and Mr. Hudson was under Dr. Behrmann's care through the time of trial. (TT.576). Dr. Behrmann testified extensively about the nature of Mr. Hudson's treatment and his diagnosis, and agreed that Mr. Hudson was suffering from disc herniations at C4-5, 5-6, 6-7 and L5-Sl. (TT.598).

Dr. Behrmann recommended lumbar surgery, and testified that it was a good treatment option for Mr. Hudson, given his persistent symptoms. (TT.609-610). Dr. Behrmann confirmed that Mr. Hudson "doesn't appear to have gotten better." (TT.621-622).

On the issue of causation, Dr. Behrmann testified that in his opinion, Mr. Hudson's injuries are causally related to the December 2018 car accident. (TT.618; 622-623). He agreed that Mr. Hudson sustained a permanent injury to his back, one that represents the impairment of an important bodily function. (TT.618-619). When asked if surgery is definitely something Mr. Hudson needs, Dr. Behrmann stated: "Well, I think for a period of time now, it has

been his best treatment option." (TT.622).

C. Dr. Nwaogwugwu testifies as to permanency, causation, and future medical costs

Dr. Nwaogwugwu ("Dr. N.") is board-certified in physical medicine and rehabilitation and has been practicing for 23 years. (TT.1112). Dr. N. analyzed all of Mr. Hudson's prior medical records, physically examined Mr. Hudson and provided a diagnosis, which included a life care plan for the future medical care Mr. Hudson would require. (TT.1125-1126; 1127). Typically, after examining a patient like Mr. Hudson, Dr. N. reaches his own conclusion regarding the permanency of a patient's injury, and he then begins the process of preparing a life care plan, which includes the "diagnostic tests that he's going to require, pain management services he's going to require whether physical therapy, injections, or whatever, and then medications, and if he might need surgery." (TT.1126). Dr. N. also explained: "Once I have those categorizations, then I figure out the frequency and the duration of the treatments he's going to need for the duration of his life. And once - once I determine that, then I do a cost analysis, and I figure out exactly what the cost is going to be for each of those individual

categories." (TT.1126).

After reviewing all of Mr. Hudson's medical records and physically examining Mr. Hudson, Dr. N. opined that Mr. Hudson suffered a permanent injury as a result of the subject accident, and that the force of the accident caused Mr. Hudson's neck and back pain, as well as his disc herniation. (TT.1130-1131).

Dr. N. noted the importance of the fact that Mr. Hudson had no prior complaints of back pain. (TT.1133). Dr. N. also testified that degeneration of the spine can be pain-free and then activated by trauma. (TT.1135). Dr. N. noted that it is fairly common for someone who has some preexisting degeneration to be aggravated by trauma. (TT.1137).

Dr. N. testified extensively about Mr. Hudson's future medical care, including the pain management treatment that he or a similar physician would provide Mr. Hudson. According to Dr. N., Mr. Hudson would need epidural injections (TT.1145-1147) and physical rehabilitation that Dr. N. or a similar physician would provide (TT.1150).

Dr. N. testified that future surgery was recommended by Dr. Behrmann and noted that while Dr. Behrmann recommended a

laminectomy or a microdiscectomy, Mr. Hudson may also require a fusion. Dr. N. specifically noted that whether Hudson undergoes a laminectomy, microdiscectomy, or fusion, the cost would be similar. (TT.1152-1153). In total, Dr. N. testified the cost of Mr. Hudson's required future medical care was $953,022.08. (TT.1153).

Dr. N. testified about Mr. Hudson's degenerative changes in his spine and stated such changes could *not* cause the sudden onset of Mr. Hudson's pain and the other symptoms Mr. Hudson attributed to the car accident. (TT.1158). According to Dr. N., the accident was the predominant cause of Mr. Hudson's neck and back pain, as well as his disc herniations. (TT.1159). As part of his opinion, Dr. N. spoke with Dr. Cooper at Integrity Medical (where Dr. Behrmann practices), concerning Dr. Cooper's treatment of Mr. Hudson. (TT.1165-1166). Dr. N. reviewed the life care plan with Dr. Cooper and collaborated with Dr. Cooper regarding Mr. Hudson's future medical care. (TT.1182).

Dr. N. discussed how he formulated the life care plan for Mr. Hudson. Dr. N. considered that Dr. Behrmann recommended surgery and further pain management and therapy (TT.1181; 1183; 1187), that Dr. Behrmann stated Mr. Hudson needed future pain

management (TT.1181), and that Dr. Behrmann and others had ordered sequential MRIs of Mr. Hudson in the past (TT.1182-1183). Mr. Hudson's counsel walked Dr. N. through his life care plan and discussed in detail the various future care and treatments Mr. Hudson would require. (TT.1127-1162).

D. Dr. Knapp testifies as to causation and permanency

Dr. Knapp is a radiologist with over 20 years of experience. (TT.494; 499). Dr. Knapp testified about his review and diagnosis of Mr. Hudson's MRIs, noting that Mr. Hudson's January 23, 2019 MRI revealed a disc herniation at C3-4, C4-5, CS-6, and C6-7. (TT.508). Dr. Knapp testified that disc herniations can be part of the normal aging process, but made clear that in in this case, they were not. (TT.509). Dr. Knapp noted that a prior CT scan from October 2016—taken before the accident—was useful to compare to Mr. Hudson's post-accident January 2019 MRI, and that Mr. Hudson's October 2016 CT scan did not show any evidence of disc herniation. (TT509; 510).

Dr. Knapp also discussed the x-rays taken during Mr. Hudson's initial trip to the emergency room, noting that in the emergency room, MRIs are often not done and are instead

prescribed as outpatient procedures. (TT.512-513). He also noted that you cannot detect a herniated disc on an x-ray. (TT.513).

Dr. Knapp testified extensively about Mr. Hudson's lumbar MRIs, noting that his January 2019 MRI showed disc herniations, as did his August 5, 2019 MRI. (TT.514-515; 516-517). Dr. Knapp testified that the herniations related to the trauma from the December 2018 accident (TT.534), that they are permanent (TT.518), and represent a significant impairment. (TT.518-519).

As for Mr. Hudson's cervical MRI, Dr. Knapp also testified that herniations were causally related to the trauma Mr. Hudson sustained in the car accident. (TT.520-521). Dr. Knapp confirmed that all the herniations have anatomically changed the nature of the discs and that this can predispose Mr. Hudson to more advanced symptoms, more degenerative changes or symptoms, and opined that "[o]nce it's injured, it's going to tend to get worse over time." (TT.535).

Appellants objected to Dr. Knapp's trial testimony concerning Mr. Hudson's cervical spine. (TT.478). Appellants objected because Dr. Knapp read and interpreted only the January 2023 lumbar MRI and compared it to the October 2020 lumbar MRI. (TT.478-479).

Appellants argued that Dr. Knapp was identified as a non-retained treating physician, and it was improper for him to opine on records that he did not review during the course of his treatment of Mr. Hudson. (TT.478-479).

In response, Mr. Hudson noted that Dr. Knapp was disclosed as an expert, even though he was also a treating doctor, and that Mr. Hudson's expert disclosure included a notice that Dr. Knapp "will offer opinions about the plaintiff's injuries including but not limited to causation, diagnosis, prognosis, permanency, cost of future medical care." (TT.479-480). Mr. Hudson also noted that Appellants elected not to depose Dr. Knapp in order to learn the scope of any of his expert opinions and that as a radiologist, Dr. Knapp regularly looks at prior MRIs in order to diagnose and treat a patient. (TT.480). The Court overruled Appellants' objection, finding that Dr. Knapp was properly disclosed as an expert. (TT.490). Dr. Knapp also testified that as a business practice he routinely requests and reviews the patient's medical records. (TT.522-523). Dr. Knapp testified that he requested that Plaintiff's counsel provide him with these records. (TT.545-548).

E. Dr. Boylan testifies as to permanency, causation, and the need for future medical care.

Dr. Boylan is a chiropractic physician who has been treating Mr. Hudson since November of 2022. (TT.753-755). Dr. Boylan testified in detail about the types of treatment he provides to his patients, including the specific treatment he provides to Mr. Hudson. (TT.762-771). He also discussed how he treats patients who have undergone surgical procedures similar to those Dr. Behrmann recommended, noting that such patients typically do not completely heal and require continued treatment for pain. (TT.771). Dr. Boylan discussed how discs in the spine degenerate over time and noted that he has had patients in their 80's with degeneration and no pain. (TT.771). He noted that "degenerative disease" is not an actual disease but a term used for general degeneration of discs. (TT.771). Based on his treatment and review of Mr. Hudson's MRIs, Dr. Boylan testified that Mr. Hudson suffered from herniated discs and that his condition was permanent. (TT.774).

Dr. Boylan also testified that, in his opinion, the car accident caused Mr. Hudson's injuries. (TT.779). Importantly, Dr. Boylan testified that if an individual had degenerative changes that were

previously pain-free, and that individual went through a trauma, it could create a painful condition. (TT.781). Dr. Boylan noted that if someone had pain-free degeneration, it can then be activated and create a painful situation that did not present previously. (TT.782). He also opined that if there was an underlying degenerative condition in this case, it was activated by the December 2018 car accident. (TT.782). Dr. Boylan testified that he is continuing to treat Mr. Hudson and that he recommends that Mr. Hudson continue treatment in the future. (TT.780).

F. Appellants present their theory of the case at trial: that Mr. Hudson's injuries resulted from a previously unknown and asymptomatic degenerative disc disease.

Appellants' overarching theory of the case was that Mr. Hudson's spinal injuries stemmed from degenerative disc disease, and were not the result of the accident. Appellants' expert, Dr. Jenkins, testified that Mr. Hudson's need for surgery was related to degeneration and not the December 2018 accident. (TT.911). Dr. Jenkins opined that he reviewed Mr. Hudson's films, which revealed "degenerative" changes in his cervical and lumbar spine that caused his symptoms and created a potential need for

surgery. (TT.911-912). Dr. Jenkins never examined Mr. Hudson (TT.914), and he conceded that his review did not include Mr. Hudson's August 2019 films. (TT.915). Dr. Jenkins also conceded that he was *not* opining that Mr. Hudson did not need future medical care, just that such care is unrelated to the accident and instead stems from degeneration. (TT.918-919). Dr. Jenkins conceded that Mr. Hudson may need surgery in the future. (TT.919)

SUMMARY OF THE ARGUMENT

This Court should affirm in all respects. The trial court did not abuse its discretion by allowing Dr. Knapp to testify as a treating physician and an expert witness. That is exactly how he was disclosed, and Florida law allows treating physicians to testify as experts. There was likewise no problem with Dr. N.'s testimony and Mr. Hudson presented competent, substantial evidence supporting the jury's award of future medical expenses. Finally, a new trial is not warranted due to the closing argument from Mr. Hudson's attorney. Appellants received a fair trial.

ARGUMENT

I. The trial court did not abuse its discretion by allowing Dr. Knapp to testify as a treating physician and an expert witness.

Appellants' first argument is that the trial court erred by allowing Dr. Knapp to provide testimony regarding injuries to Mr. Hudson's cervical spine, when Dr. Knapp's treatment of Mr. Hudson was for injuries to his lumbar spine. (IB at 33-41). According to Appellants, this was "surprise" testimony that "ambush[ed]" Appellants at trial. (IB at 34). This Court should be surprised Appellants are claiming surprise.

Mr. Hudson specifically stated in his expert disclosure that "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" who "may be asked to render expert opinions based upon their education" and "training" with "respect to [the] nature and extent of" Plaintiff's "injuries" and "past and future medical treatment and medical bills." (R.2286). Appellee added: "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.2287).

Appellants did not take Dr. Knapp's deposition. Instead, they simply ignored Appellee's disclosures, which were specifically intended to avoid the "surprise" Appellants are now claiming. This Court should reject Appellants' arguments based on the language of the expert disclosures alone.

Furthermore, while Appellants make much of the line between treating physicians and expert witnesses, the reality is that treating physicians can also serve as expert witnesses, and as long as they are disclosed as "hybrid" witnesses, it is perfectly permissible for a treating physician to offer expert testimony. *See, e.g., Tillman v.*

Sweat, 49 Fla. L. Weekly D1287 (Fla. 5th DCA June 12, 2024) ("Therefore, these particular treating physicians are in fact 'hybrid' witnesses. A treating physician is properly characterized as a 'hybrid witness' when 'such a witness [provides] testimony on the plaintiff's medical history and course of treatment, while also offering opinions regarding future medical treatment and permanency.'"); *Clair v. Perry*, 66 So. 3d 1078, 1080 n.1 (Fla. 4th DCA 2011) (citing *Fittipaldi USA, Inc. v. Castroneves,* 905 So.2d 182, 186 (Fla. 3d DCA 2005)) ("[A] treating physician is not generally classified as an expert witness. Nevertheless, the rule is not absolute, and a treating physician may be deemed an expert in certain circumstances."); *Orthopedic Care Ctr. v. Parks*, 155 So. 3d 377, 382 n.5 (Fla. 3d DCA 2014) ("We also do not ignore the fact that a plaintiff's treating physician may often be characterized as a 'hybrid' expert, in that such a witness may be providing testimony on the plaintiff's medical history and course of treatment, while also offering opinions regarding future medical treatment and permanency."); *see also Santa Lucia v. Diaz*, 224 So. 3d 916, 917 (Fla. 2d DCA 2017) (On appeal in a medical malpractice action, the court found that the trial court erred when it found that one of the

treating doctors could not be considered an expert for the purposes of awarding fees); *Field Club, Inc. v. Alario*, 180 So. 3d 1138, 1141 (Fla. 2d DCA 2015) (In a negligence action for personal injuries, the court found that, for purpose of expert witness fee, the doctor "could properly be considered an expert witness because, even though he was [appellee's] treating doctor, he also gave his expert opinions on her injuries and their significance.").

In sum, Dr. Knapp was permitted to serve as a "hybrid" treating physician and expert witness. That is exactly how he was described in Mr. Hudson's expert disclosures. Any surprise perceived by Appellants at trial was a product of their own litigation decisions. The trial court did not err by allowing Dr. Knapp to present the testimony he did at trial.

II. The trial court did not abuse its discretion by allowing Dr. Nwaogwugwu to testify as to his medical opinion and *Anderson-Moody* is easily distinguishable from this case.

For starters, the trial court was correct that Appellants' attempt to preclude Dr. N.'s testimony was an untimely *Daubert* motion dressed up as a motion in limine. At the start of trial, the

trial court rejected Appellants' effort to exclude Dr. N.'s testimony, finding:

> Yeah, the Court finds that this is a *Daubert* motion. There is no way for the Court to entertain this motion absent a *Daubert* inquiry. I'm not so rigid that if it were not, you know, the day of trial, that, you know - and we were beyond the pretrial deadlines that we wouldn't do this. But, you know, last week, I could have held [a] *Daubert* [hearing]. Friday I could have [heard] a *Daubert* motion…What I'm not going to do is do that in the middle of trial. I do find the motion is untimely. Pursuant - and pursuant to *Booker versus Sumpter County Sheriffs Office*, the motion is denied.

(TT.384-385). *See also Booker v. Sumter Cty. Sheriffs Office,* 166 So. 3d 189, 193 (Fla. 1st DCA 2015) ("The failure to timely raise a *Daubert* challenge may result in the court refusing to consider the untimely motion."); *Feliciano-Hill v. Principi,* 439 F.3d 18, 24 (1st Cir. 2006) (explaining "[p]arties have an obligation to object to an expert's testimony in a timely fashion, so that the expert's proposed testimony can be evaluated with care"). The trial court did not abuse its discretion in refusing to conduct a *Daubert* hearing on the first day of trial.

On the merits, Appellants argue that Dr. N. improperly testified regarding his own medical opinions in calculating Mr. Hudson's future medical costs under *Anderson-Moody v. Wilson,*

357 So. 3d 1240, 1242 (Fla. 1st DCA 2023). Appellants' reliance on *Anderson-Moody* fails for several reasons.

First, in *Anderson-Moody,* while the expert was also a neurosurgeon, he was offered solely as a life care planner. There, the plaintiff stipulated that its expert would not testify regarding causation, permanency, or to the need or cost of future primary care doctor visits, neurologist visits, and durable medical equipment. *Id.* at 1241, n.2. The parties also stipulated that the expert would not testify regarding his physical examination of the plaintiff, because he was disclosed only as a life care planner. *Id.*

The opposite is true here. Not only did Mr. Hudson not enter into any such limiting stipulation, but his expert disclosure specified that Dr. N. would be testifying not just as a life care planner, but also as a "Board Certified Physical Medicine and Rehabilitation Physician." Mr. Hudson also noted that Dr. N. would opine "based upon his experience as a physician *and* life care planner." (R.2285) (emphasis added).

In addition, as a board-certified physical medicine and rehabilitation physician who clinically examined Mr. Hudson, Dr. N. was qualified to opine as to the future pain management,

rehabilitation, and similar medical treatment Mr. Hudson would require in the future. In *Ocasio v. C.R. Bard, Inc.,* 2020 WL 7586930 (M.D. Fla. Dec. 22, 2020), the court found that a physician holding the exact same board certifications as Dr. N. could properly offer opinions on plaintiff's future medical damages, because his "opinions are based upon his review of medical records, his examination and meeting with Plaintiff, and his experience as a board-certified physical medicine and rehabilitation physician." *Id.* at *7. The court noted that to the extent defendants believed the expert's opinions lacked adequate support, those challenges spoke to the weight of his testimony, not its admissibility. *Id.* (noting that defendants' argument that the expert failed to consider certain facts "can be challenged on cross examination or by defense experts"); *see also H. K. Corp. v. Estate of Miller,* 405 So. 2d 218, 219 (Fla. 3d DCA 1981) (holding that the testimony of plaintiffs' expert witness was properly admitted into evidence on the basis that the sufficiency of the facts required to form an opinion must normally be decided by the expert himself and any deficiency relates to the weight rather than the admissibility of the expert's opinion).

Here, Dr. N. was disclosed as a physician *and* a life care planner, and he offered opinions using his expertise in both, testifying about Mr. Hudson's future medical needs and the associated costs. Like the expert in *Ocasio,* Dr. N. examined Mr. Hudson, reviewed his medical records, and reviewed available diagnostic testing and records including MRIs, x-rays, and CT scans performed by Mr. Hudson's treating physicians. Once the diagnostic conditions were determined, Dr. N. determined the medically necessary future care required to treat the diagnostic conditions over the long term.

In determining the duration of the long-term care, Dr. N. looked for any medical condition which, if left untreated, could shorten the lifespan of Mr. Hudson and as a result shorten the duration of care. Once the required medical care was determined and the frequency and duration of care was established, Dr. N. utilized recognized databases of medical care and costs as well as medications to price out the life care plan.

Ultimately, *Anderson-Moody* does not support the relief Appellants request. The case involved an expert solely disclosed as a life care planner, and was thus limited to employing the

methodology of a non-physician life care planner. Because a non- physician life care planner cannot opine on medical necessity, they must rely on treating physicians for such opinions. And since there were no treating physicians in *Anderson-Moody* who supplied the requisite medical foundation for non-physician life care planners, the methodology did not pass *Daubert* muster. Here, Dr. N. was disclosed as a board-certified physical medicine and rehabilitation physician, and he was able to offer his own medical opinions on Mr. Hudson's future medical needs, as Dr. N was not limited to the role of a non-physician life care planner.

Finally, Appellants' argument that Mr. Hudson's proof of future medical expenses was deficient lacks merit. As explained above, Dr. N.'s testimony was proper and constitutes competent, substantial evidence of Mr. Hudson's future medical expenses. But even without Dr. N.'s testimony, Mr. Hudson adduced sufficient evidence at trial to support the jury's award.

Since 1953, Florida law has permitted an injured party to recover future medical expenses so long as plaintiff proves that the expenses are "reasonably certain" to be incurred. *Loftin v. Wilson,* 67 So. 2d 185, 188 (Fla. 1953). But there is no requirement that

witnesses use magic words like "reasonably certain" in order to establish an evidentiary basis for recovery of future medical expenses.

For example, in *White v. Westlund,* 624 So. 2d 1148 (Fla. 4th DCA 1993), the defendant in a personal injury case argued that "unless an expert can testify that the need for a future procedure is reasonably certain, that testimony is inadmissible." *Id.* at 1150. In rejecting this argument, the appellate court noted that Florida case law holds that "whatever qualification is placed on the opinion by the expert (i.e., surgery is possible or likely) goes to the weight of the opinion, and not its admissibility." *Id.* at 1151.

Discussing the sufficiency of evidence, the Fourth District described the state of Florida law at that time (which has not changed through the years):

> Other Florida courts, including the supreme court and this court, have held generally that, where there is sufficient evidence from which a jury could infer a need for future medical treatment with reasonable certainty, an award of future medical expenses is proper. See *Sullivan v. Price,* 386 So. 2d 241, 244 (Fla. 1980)(instruction on future damages appropriate, despite absence of expert medical testimony, where there was uncontradicted evidence of the nature of plaintiffs injury, its duration, and lack of recovery at trial, so that the jury

> could conclude with reasonable certainty that the consequences of the injury would continue in the future); *Chess v. Wright,* 602 So. 2d 673, 673-74 (Fla. 4th DCA 1992) (where doctors phrased testimony in terms of "Probably so," "I think that," and "it's very likely that" plaintiffs delay in seeking surgery contributed to her subsequent condition, such testimony was sufficient, to create a jury question as to plaintiffs comparative negligence); *DeAlmeida v. Graham,* 524 So. 2d 666,668 (Fla. 4th DCA)(although no direct evidence on claim for future medical care, where radiologist testified adhesions are permanent, evidence was sufficient from which jury could infer need for such care), rev. denied, 519 So. 2d 988 (Fla. 1987); *National Car Rental Sys., Inc. v. Holland,* 269 So. 2d 407, 411 (Fla. 4th DCA 1972)(same where treating physician testified, in his opinion, plaintiff would need care for remainder of his life), rev. denied, 273 So. 2d 768 (Fla. 1973).

White, 624 So. 2d at 1050-51 (emphasis added).

In *White,* the court further held that even though future damages ultimately must be proven to a reasonable certainty, "this does not mean that every link in the chain of evidence must be so proven. Medical evidence is but an aid to the trier of fact; it may be only one factor to be considered-only one link in the chain-in determining the ultimate questions" involved in the case. *Id.* (internal citations and quotations omitted). The court added that "we agree that a medical expert may testify that future medical

procedures are 'possible' or 'likely,' and need not phrase an opinion in terms of such surgery or treatment being 'reasonably necessary'". *Id.* at 1151; *see also Vitt v. Ryder Truck Rentals, Inc.,* 340 So. 2d 962 (Fla. 3d DCA 1976) (holding that opinions on future medical care need not be phrased in exact terms of "reasonable certainty"); *Shearon v. Sullivan,* 821 So. 2d 1222 (Fla. 1st DCA 2002)(quoting *White* with approval).

In *Shearon,* the First DCA held that a trial court erred in not submitting future medical expenses to the jury when testimony by a plaintiff's treating neurologist couched the need for future medical care in terms of a "reasonable degree of medical probability." *Id.* at 1225. This was so even though the neurologist gave equivocal answers on direct and cross that seemed to place the need for future medical care in doubt. *Id.* at 1225-26. The court concluded that this testimony went to the weight of the evidence, not its admissibility, and was therefore sufficient to allow the jury to consider awarding future medical expenses. *Id.* at 1226.

In fact, Florida law allows an injured party to recover future medical expenses even in the absence of expert medical testimony. *Sullivan v. Price,* 386 So. 2d 241, 244 (Fla. 1980). In *Sullivan,* the

Florida Supreme Court held that "expert medical testimony is not required as a prerequisite to a jury instruction on future damages." *Id.* at 244. The injured party in *Sullivan* produced evidence showing that the nature of his injury was permanent, the duration of the injury had lasted up to trial, and that there was a lack of recovery at the time of trial. The Florida Supreme Court held that the "jury could have concluded with reasonable certainty that the injury's consequences would continue into the future." *Id.* at 244.

Finally, Appellants' argument regarding a purported lack of competent, substantial evidence supporting the future medical award ignores the testimony from witnesses other than Dr. N. While Dr. N. put a dollar amount on the expenses, as he was fully qualified to do as a certified life care planner, there was additional medical testimony that established the need for that future care, such as Dr. Behrmann's testimony that Mr. Hudson needed future surgery and future epidural injections, as well as Dr. Boylan's testimony that he is continuing to treat Mr. Hudson and that he recommends that Mr. Hudson continue treatment in the future. Even Appellants' expert, Dr. Jenkins, conceded that Mr. Hudson may need future surgery, albeit from degeneration only. And Mr. Hudson himself

testified that if his pain continues to get progressively worse—as it has thus far—he would undergo surgery. (TT.842-844).

III. A new trial is not warranted due to the closing argument from Mr. Hudson's attorney.

Appellants are not entitled to a new trial due to the closing argument from Mr. Hudson's counsel. There was evidentiary support for counsel's comments, as Appellants introduced the Letter of Protection to support their theory that Mr. Hudson and Dr. Behrmann were biased, and that Dr. Behrmann's surgery recommendation was motivated by financial gain rather than necessary patient care. (TT.883;1378). Appellants also questioned why it took Mr. Hudson four days to go to the emergency room (TT.1371), they made Mr. Hudson's gaps in treatment a focal point of their defense (TT.1371-1373), and Appellants suggested that Mr. Hudson only returned to his chiropractor and obtained additional epidural injections because trial was approaching (TT.1373-1374). These comments were meant to attack Mr. Hudson's credibility, and his attorney's attempt to "punch back" was permissible.

Ultimately, Mr. Hudson's counsel's statements during closing argument do not amount to the type of "highly prejudicial and

inflammatory" remarks that warrant a new trial. After Appellants' objection, the comments were discussed during a sidebar, and Mr. Hudson's counsel quickly dropped the issue and moved on. *See, e.g., Whitney* v. *Milien,* 125 So. 3d 817,819 (Fla. 4th DCA 2013) (determining that the trial court did not abuse its discretion in denying the appellant's motion for new trial because it could not be said that a reasonable man would take the view that the improper comments undermined "the entire three-week trial"); *Maksadv. Kaskel,* 832 So. 2d 788, 793 (Fla. 4th DCA 2002) ("We have carefully read the entire closing argument. While a few words and phrases in Dr. Colletta's two hour closing argument and one word of the hospital's closing argument may be objectionable, in the trial court's view they did not justify a new trial. We agree."); *see also R.J. Reynolds Tobacco Co. v. Kaplan,* 321 So. 3d 267, 274-75 (Fla. 4th DCA 2021).

A new trial is also not warranted because Appellants failed to preserve this argument for review. While Appellants' counsel objected, and while the trial court sustained the objection, Appellants were required to either request a curative or move for a

mistrial. They did neither, and are now prohibited from making this argument on appeal. *See Companioni v. City of Tampa,* 51 So. 3d 452 (Fla. 2010) ("when a party objects to instances of attorney misconduct during trial, and the objection is sustained, the party must also timely move for a mistrial in order to preserve the issue for a trial court's review of a motion for a new trial."); *Barkett v. Gomez,* 908 So. 2d 1084, 1087 (Fla 3d DCA 2005) ("in order to preserve a claim based on an improper comment, once the trial court sustains the objection, the objecting party must request a curative instruction or a mistrial."); *State v. Fritz,* 652 So. 2d 1243, 1244 (Fla. 5th DCA 1995) (determining that a party cannot await the outcome of a trial to seek the relief of a new trial based on an improper comment, but instead must request a curative instruction or a mistrial at the time of the instruction or at the end of closing arguments); *Ringelstein v. Naples Courtyard Inn*, 365 So. 3d 505 (Fla 6th DCA 2023).

CONCLUSION

This Court should affirm in all respects.

Respectfully submitted,

/s/Michael M. Brownlee
Michael M. Brownlee
Florida Bar No.: 68332
THE BROWNLEE LAW FIRM, P.A.
200 E Robinson Street, Suite 800
Orlando, Florida 32801
Telephone: (407) 403-5886
mbrownlee@brownleelawfirmpa.com

Counsel for Appellee, Lilcon Hudson.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 2, 2024, I filed the foregoing with the Clerk of the Clerk of Court, using the Florida Courts E-Filing Portal. Accordingly, a copy of the foregoing will be served to the Appellee via electronic mail, as well as Rhonda B. Boggess, Esq., Marks Gray, P.A., 1200 Riverplace Blvd., Suite 800, Jacksonville, FL 32207, at rboggess@marksgray.com and cthomas@marksgray.com.

/s/Michael M. Brownlee
Michael M. Brownlee

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Answer Brief complies with the font and formatting requirements contained in Rule 9.045(b) and the word count requirements of Rule 9.210(a)(2)(B) of the Florida Rules of Appellate Procedure.

/s/Michael M. Brownlee
Michael M. Brownlee