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

KRISTOPHER RICHARDSON,

Appellant,

vs.

Case No.: 6D23-2853
L.C. Case No.: 2018-CA-13196

DAERI TENERY,

Appellee.

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

In this Answer Brief, Appellee DAERI TENERY will be referred as "Tenery," and Appellant KRISTOPHER RICHARDSON will be referred to as "Richardson." The Record on Appeal will be designated as (R. ___) with page numbers, and the Supplemental Record will be designated as (SR. ___) with page numbers. The Trial Transcript will be designated as (T. ___), with the PDF page and line numbers. The Initial Brief will be designated as (IB. ___) with page numbers.

STATEMENT OF THE CASE AND FACTS

Tenery agrees generally with the procedural background set forth by Richardson in his Statement in the Initial Brief. However, Tenery does not agree with the selective picking of certain testimony and other evidence presented during the trial, and the obvious slant put on this evidence in the Statement. Further, Richardson does not include necessary information that puts the trial court's ultimate denial of a new trial on all issues and the trial court's rulings throughout the proceedings below in their proper context.

Thus, Tenery provides her own brief Statement to fill in these gaps, as well as to provide necessary context into the trial court's rulings in connection with the issues on appeal.

A. The Trial Court allows Dr. Jason Demery's opinions at trial, and after an objection instructs the jury that the court determined Dr. Demery is qualified to render an opinion on traumatic brain injury.

Tenery moved to strike the testimony and opinions of Dr. Demery under the standard set forth in both *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and under section 90.703, Fla. Stat. (R. 1826-1839) As part of her motion, Tenery filed the deposition transcript of Dr. Demery, and argued that Dr. Demery did not have a legally sufficient foundation for the conclusions that he would try to offer and that he did not have the qualifications to do so. (R. 1833)

Dr. Richard Frederick prepared a detailed Affidavit in which he explained how Dr. Demery's methodology and testing procedures are inaccurate and not accepted by the scientific community. (R. 2068-2073) He did this after reviewing the video and transcript of the compulsory medical examination of Tenery conducted by Dr. Demery, as well as reviewing Dr. Demery's test information and his deposition transcript. (R. 2072) Dr. Frederick testified that:

- Dr. Demery did not complete any neuropsychological testing, and instead based his conclusion that Tenery had no "brain-injury related functional cognitive impairments"

solely on review of the medical records. (R. 2072-2073, 2093)

- Dr. Demery did not administer the solely psychological test (the MMPI-2-RF) in a standard manner. (R. 2072-2073, 2094-2095)
- Dr. Demery did not conduct a crucial item analysis of Tenery's responses on the MMPI-2-RF, which unnecessarily allowed speculation that Tenery was exaggerating her complaints. (R. 2072-2073, 2095)

Tenery also argued that Dr. Demery has no degree in neuropsychology nor does Florida issue such a license. (R. 1838) As such, Dr. Demery's degree in psychology does not give him the ability to offer opinions regarding neuropsychology. (R. 1838) Tenery also argued that Dr. Demery could not offer opinions because he failed to conduct even a minimum neuropsychological evaluation, is not medically trained and cannot give medical opinions, and is relying upon a scale which has been rejected as biased against women. (R. 1838)

But the trial court denied Tenery's motion, allowing Dr. Demery to testify at trial that Tenery did not sustain a concussion at the time

of the crash and that Tenery did not sustain a traumatic brain injury as a result of the crash. (R. 4434-4435; T. 1718-1720) In doing so, the trial court's order focused primarily on "the reliability of his proposed opinion that she is not suffering from a TBI and his administration and use of the MMPI-2-RF test." (R. 4433) But, as to the "other issues raised" by Tenery in her Motion (including the qualifications of Dr. Demery to even give such opinions), the trial court ruled that those other arguments would be denied because they "similarly go to weight rather than admissibility under the Daubert standard." (R. 4435)

At trial, Tenery called Dr. Frederick to rebut Dr. Demery's testimony. (T. 2314) During Dr. Frederick's testimony, he set forth all of the documents he had reviewed, which included Dr. Demery's testimony from the trial. (T. 2320) Defense counsel objected, and a sidebar conference ensued. (T. 2322-2323) The trial court sent the jury out and also muted Dr. Frederick so that he could not hear the argument between counsel and the court. (T. 2323, 2331) While Richardson argues in his Initial Brief that Dr. Frederick heard what transpired during the subsequent discussion, which is clearly wrong according to the Record.

After some discussion, the trial court told counsel, "Pose your questions, have the witness offer their rebuttal opinions that have already been disclosed, but don't talk about their review of witness testimony during the trial…" (T. 2329) Dr. Frederick later testified to the trial court that he had not reviewed trial testimony. (T. 2331)The trial court sustained the objection and declined to give the jury a curative instruction based on Dr. Fredericks's answer. (T. 2332) No motion for mistrial was ever made by Richardson.

After Dr. Frederick testified that Dr. Demery refused to inspect Tenery's answers to see if they support or don't support the standard interpretation (T. 2341), the trial court sustained an objection because the court said this testimony was "creeping over into criticizing the other expert…" (T. 2343) The trial court gave a curative instruction for the jury to "disregard the characterization as a refusal." (T. 2344) Again, no motion for mistrial was made.

During redirect examination, Dr. Frederick was asked whether psychologists are permitted to determine whether or not an individual has a brain injury. (T. 2378) Dr. Frederick began his answer but was cut off by defense counsel's request to approach, after which defense counsel moved to strike this testimony. (T. 2378)

During the discussion on this objection/motion, Tenery's counsel Mr. Ryan Rudd correctly noted to the court that its rulings on this issue of qualifications during the pretrial matter only went to the weight of such evidence, not the ability of Tenery to ask these questions. (T. 2380) But the trial court sustained the objection, saying:

> If it was, he's a psychologist, he's not a medical doctor. **Let me explain to you why that's a weakness in the opinion, that's fine, that's weight**, but this is—it sounds like testimony about admissibility which really isn't for the jury.
>
> (T. 2381-2382)(emphasis added)

The trial court denied the mistrial motion, but then over Tenery's objection gave Richardson's proposed curative instruction, where the trial court not only instructed the jury to disregard the prior testimony but further told the jury that, "**The Court has determined that Dr. Demery is qualified to render an opinion on traumatic brain injury**." (T. 2385-2386)(emphasis added)

B. Dr. Santo BiFulco is listed many times prior to trial as a treating physician that will give testimony of future medical care needs and costs.

On March 6, 2020, Tenery listed Dr. BiFulco in her Disclosure of Expert Witnesses as a non-retained expert who was expected to testify at trial regarding his care and treatment, and was going to

offer opinions on "costs, reasonableness, necessity, and relationship of past and future medical care…" (R. 7285) This disclosure also stated that "This non-retained expert has reviewed any and all medical records pertaining to the care and treatment received by the plaintiff." (R. 7285)

On July 2, 2020, Dr. BiFulco was listed by Tenery on her Witness and Exhibit List for trial. (R. 7298) As part of this List, Tenery also disclosed that "These treating physicians & medical providers will give opinions as treating physicians on the issues of…damages, in the addition to Plaintiff's need for past and future medical care based on their care and treatment of Plaintiff, and the actual cost of same." (R. 7300)

On October 18, 2021, Tenery again listed Dr. BiFulco in her Amended Disclosure of Expert Witnesses the same way as he was listed previously. (R. 7307-7308) Dr. BiFulco again was listed in Tenery's Amended Witness and Exhibit List in the same way as before.

This case was set for trial to take place beginning March 13, 2023. (R. 7363) Thus, Richardson knew for at least three years that Dr. BiFulco would be testifying in trial, that he would be testifying

about Tenery's need for future medical care and that he would testify about the actual costs of that future care. It is undisputed that at no time during this three-year period did Richardson take the deposition of Dr. BiFulco.

C. Invoice 1967 was for medical treatment of Tenery only and was mistakenly sent to and mistakenly paid by Morgan and Morgan.

Richardson brought to the attention of the trial court (and Tenery's counsel) an invoice with a total amount of $10,050 that consisted of medical bills relating to Dr. BiFulco's initial examination of Tenery as a treating physician on June 27, 2018, as well as charges for multiple follow up examinations and telehealth visits that took place from 2019 to 2022. (R. 4426-4428) Both the original and paid invoice were addressed to Tenery. (R. 4426-4428) $5,000 of this invoice was paid. (R. 4428)

This invoice was shown to Dr. Bifulco at trial, and he was asked questions about who paid it and whether it was paid for expert services. (T. 1428) Dr. BiFulco said at that time that he did not remember the source of the payment for that invoice, nor did the document refresh his recollection on the source, testifying that he was "not involved in that part." (T. 1428)

Following the trial, Dr. BiFulco signed an Affidavit and gave testimony that this invoice was generated by his office to reflect the balance due and owing for Tenery's ongoing medical treatment but was inadvertently sent to Morgan and Morgan. (R. 7943-7944) At his direction, his office refunded Morgan and Morgan the $5,000 paid and this balance was added to Tenery's outstanding bill, for which Dr. BiFulco testified Tenery was personally and wholly responsible. (R. 7944)

Tenery's counsel Mr. Rudd also signed an Affidavit regarding this issue. (R. 7941-7942) Mr. Rudd confirms in his Affidavit that Tenery has been personally seen and has been provided medical treatment and recommendations by Dr. BiFulco several times in the past five years. (R. 7941) Mr. Rudd learned that Morgan and Morgan inadvertently paid the subject invoice during Dr. BiFulco's testimony and then later verified that Dr. BiFulco's group had refunded this money back to Morgan and Morgan. (R. 7941-7942) Mr. Rudd further testified that at no time during this litigation was Dr. BiFulco a retained expert, nor was any retainer signed by his office for expert work in this case. (R. 7942)

There was no counter-affidavit or counter-evidence submitted

by Richardson to rebut the affidavits of Dr. BiFulco and Mr. Rudd, other than the Invoice in question.

D. Objections to Dr. BiFulco's medical records and testimony are overruled and he is allowed to testify at trial regarding future medical care needs and costs.

Prior to Dr. BiFulco's testimony, there was argument regarding treatment notes of Dr. BiFulco being entered into evidence. (T. 1130) Tenery's counsel Mr. Brian McClain noted for the trial court that the medical treatment records of Dr. BiFulco said there were discussions with Tenery about future costs of her future treatment during examinations. (T. 1131-1133) Mr. McClain argued to the court that these medical treatment records were not a narrative report as Richardson suggested but were instead part of Dr. BiFulco's medical chart and should be admitted into evidence. (T. 1133)

Mr. McClain also pointed out to the court that Dr. BiFulco was listed as a treating doctor, that he was disclosed as having future medical care and costs opinions, and that Richardson had chosen to never take his deposition. (T. 1136-1137) Mr. McClain pointed out that Dr. BiFulco had been given treatment records of Tenery on an ongoing basis for the past five years. (T. 1270-1271)

Dr. BiFulco then gave testimony by proffer outside the presence

of the jury. (T. 1280) Dr. BiFulco testified that he frequently discusses his future care opinions or recommendations, as well as the costs of that future care, with his patient during medical visits, and that these opinions are formed while he is treating the patient. (T. 1281-1282, 1286) Dr. BiFulco testified that he reviewed all of Tenery's medical records during the five years while he was providing care and treatment to her. (T. 1282-1283) Dr. BiFulco further confirmed that the medical treatment records that were objected to by Richardson as a "narrative report" were opinions that he formed during the course of treating Tenery as her treating physician. (T. 1286-1287)

Dr. BiFulco verified that he had not been retained as a certified lifecare planner in this case and confirmed that in his normal doctor-patient relationship with his patients he can cost out future medical treatment. (T. 1287) The trial court questioned Dr. BiFulco, and part of that exchange is set forth below:

> THE COURT: Okay. With respect to your opinions, first of all, about what future care would be needed, are those opinions that you discussed with Dr. Tenery during your appointments with her?
>
> THE WITNESS: Yes. We've been discussing that for the years that I've been following her, absolutely. And I think the first time I really outlined those was in 2019 and where I started to talk about categories of care and the things that she would need

over the course of her lifetime. So yes, we've been discussing that for quite a long time.

THE COURT: Now, in terms of the cost of that care, is -- did you discuss those numbers with her in the course of seeing and being involved in the treatment of Dr. Tenery?

THE WITNESS: Yes, we would have discussed those over the times that I've seen her.

(T. 1299, L 16 to 1300, L 9)

After this proffered testimony was concluded, the trial court overruled Richardson's objection to Dr. BiFulco's treatment notes and overruled what the court took as an *ore tenus* motion in limine regarding Dr. BiFulco's testimony. (T. 1303) The trial court first addressed Richardson's prejudice arguments pursuant to *Binger v. King Pest Control,* 401 So. 2d 1310 (Fla. 1981), and held that within the disclosures of Dr. BiFulco, and in Dr. BiFulco's medical records, the costs of medical care and future medical care were listed as topics of his testimony. (T. 1303-1304)

The trial court further held that if there was any ambiguity in Richardson's mind about what Dr. BiFulco's testimony was going to be, a deposition could have been taken and was not. (T. 1304) The trial court also referred to the Florida Supreme Court case of *Gutierrez v. Vargas*, 239 So. 3d 615 (Fla. 2018), and read into the

record extensive holdings from that opinion as part of his reasoning for his decision. (T. 1304-1306) Based on the testimony of Dr. BiFulco, and the *Gutierrez* case, the trial court held that Dr. BiFulco's opinions were developed in the course of treatment, which established the foundation for Dr. BiFulco to testify as to the necessity of future care and the cost of that care. (T. 1306-1307)

After these rulings, Dr. BiFulco testified before the jury consistent with the opinions allowed by the trial court.

E. The trial court properly limits Nicole Bonaparte's proposed opinions. Richardson then chooses not to call her at trial.

The trial court entered an extensive order regarding Ms. Bonaparte's proposed opinions about Tenery's past medical bills. (R. 4429-4432) In that order, the trial court broke down Ms. Bonaparte's proposed opinions in two general categories: 1) opinions that certain procedures were improperly coded; and 2) opinions that Tenery's claimed past medical expenses exceeded the usual, customary, and reasonable charges. (R. 4429-4430)

After setting forth the applicable standards under *Daubert* and section 90.702, the trial court found that Ms. Bonaparte had the qualifications to offer opinions in the billing and coding areas

(category 1). (R. 4430) The trial court then found that Richardson had not carried his burden of demonstrating that the requirements of *Daubert* were satisfied with respect to category 2 opinions regarding Tenery's past medical expenses, holding:

> 5. Defendants have not carried their burden of demonstrating that the requirements of Daubert are satisfied with respect Ms. Bonaparte's proposed opinions regarding the usual, customary, and reasonable charges for the services at issue. Ms. Bonaparte bases her opinion largely on databases, manuals, and schedules that compile charges for various procedures.
>
> 6. Information obtained from an array of facilities and providers who billed using unknown methodologies for services provided to patients in unknown circumstances with an understanding that a portion of the charges, in many cases, would be paid by a third-party payor **is an inadequate basis upon which to develop an opinion as to the reasonableness of medical expenses for a patient in Plaintiff's circumstances — namely, a self-pay patient treated subject to a letter of protection**. As a result, Ms. Bonaparte's proposed opinions regarding the usual, customary, and reasonable charges for the services at issue are not based on sufficient facts or data and are not the product of reliable principles and methods, and allowing the opinions would permit Ms. Bonaparte to serve as a mere conduit for information that is otherwise inadmissible hearsay.
>
> 7. The Court acknowledges that Defendants are entitled to challenge the reasonableness of Plaintiff's claimed medical expenses. The Court must, however, assess expert testimony under the Daubert standard, and Defendants have not shown that Ms. Bonaparte's opinions regarding the usual, customary, and reasonable charges for the subject services meet that standard. **Defendants are not precluded from challenging the reasonableness of Plaintiff s medical expenses, but must**

do so in a way that meets the requirements of the Florida Evidence Code.

(R. 4431)(emphasis added)

Richardson later, as part of his motion for new trial, argued that he "ultimately elected not to call Ms. Bonaparte to the trial of this matter." (R. 7263) While Richardson lists various arguments as to why he did so, they are just arguments with no evidentiary backing.

Richardson also argued in that motion that the trial court was treating Dr. BiFulco's testimony about the reasonableness of past medical bills differently than Ms. Bonaparte's testimony. (R. 7279-7230) But Dr. BiFulco testified that he did not perform an analysis of matching up CPT codes and values regarding Tenery's past medical bills. (T. 1290) He also testified that he did not specifically look at reference material for Tenery's past medical bills. (T. 1293) As to future medical bills, Dr. BiFulco testified that he does review databases including the Physicians' Fee Reference and GoodRx for medications. (T. 1294-1295)

F. The trial court rejects Richardson's post-trial arguments regarding Dr. BiFulco's testimony and Invoice 1967 and denies his motion for new trial in total.

In its Order denying Richardson's motion for new trial, the trial

court discussed defense counsel's use of Boecher interrogatory answers at trial regarding Dr. BiFulco from another case. (R. 8475) The trial court noted that defense counsel "clearly stated that the *Boecher* interrogatory answers from another case were being used only to refresh recollection." (R. 8475) The court noted that the inquiry ended when Dr. BiFulco stated the document did not refresh his recollection and that Richardson did not then seek to use the responses for impeachment or any other purpose. (R. 8475)

That is accurate (T. 1423-1424), and the document was only introduced into evidence for identification after using it to try and refresh Dr. BiFulco's recollection. (T. 1438-1439; SR. 11224) The trial court then held:

> Because Defendant ended the inquiry with the attempt to refresh recollection and requested no further relief on the issue at trial, the Court did not have an opportunity to address the issue, hear argument from the parties on whether the responses should be allowable for impeachment purposes or whether Dr. BiFulco's designation as a treating physician should be revisited. If the issue had been raised, the Court could have promptly addressed it and determined whether further action was appropriate and, if so, taken steps to cure prejudice. As it stands, the Court is left to speculate what arguments the parties would have raised and how the trial would have been impacted if the matter was pursued beyond the effort to refresh recollection.
>
> The remaining arguments as to Dr. BiFulco's testimony on

future medical expenses were raised and addressed at length during trial and do not warrant a new trial.

Because the Court is unable to find a preserved objection or error that warrants a new trial, the Court hereby DENIES the remainder of the Motion.

(R. 8476)

SUMMARY OF ARGUMENT

Richardson has presented nothing in this appeal that would entitle him to a new trial. Richardson received a fair trial, and the trial court acted well within its discretion in ruling as it did during the trial and after trial.

The question posed to Dr. Frederick did not violate any of the trial court's previous orders. However, even if it did, the trial court cured whatever prejudice was there by telling the jury that it had determined Dr. Demery could give the very opinions that Richardson wanted the jury to believe. Thus, there was no prejudice to Richardson.

The trial court did not abuse its discretion in its rulings regarding the testimony of Dr. BiFulco. The evidence clearly show that Dr. BiFulco was not a retained expert but was a treating physician. He was absolutely entitled to give the opinions he did regarding future medical care and the costs of that care, which were properly disclosed years prior to Richardson.

The evidence clearly shows that the paying of Dr. BiFulco's Invoice was a mistake, and there is no evidence of some type of scheme by Tenery's counsel and Dr. BiFulco to somehow make him

a secret retained expert. These baseless accusations have no place in this appeal, and Tenery urges this Court to reject such allegations.

The evidence and the trial court's rulings show that it did not treat Dr. BiFulco and Ms. Bonaparte differently, and that this was a fair trial. The trial court stayed well within its discretion in limiting Ms. Bonaparte's testimony as it did, and Richardson decided himself not to present testimony or attack the reasonableness of Tenery's past medical bills in other ways.

Therefore, this Court should affirm the trial court's Order denying the new trial motion and affirm the jury's verdict and Final Judgment.

ARGUMENT

I. RICHARDSON CANNOT SHOW THAT THE TRIAL COURT ABUSED ITS DISCRETION IN ITS DENIAL OF THE MOTIONS FOR MISTRIAL OR NEW TRIAL REGARDING DR. FREDERICK'S TESTIMONY.

A. Reviewing a trial court's denial of a new trial/mistrial.

Tenery agrees with Richardson that the standard of review that this Court will use for all of the issues in this appeal is the abuse of discretion standard. But that is not the only standard this Court's review will consist of in this case.

An appellate court is constrained to "accord to the judgment of the trial court the presumption of correctness to which it is entitled in law," and an appellant has the burden to present a record that will overcome the presumption of the correctness of the trial court's findings. *Hurst Ins. Agency, Inc. v. O'Malley*, 262 So. 2d 224, 226 (Fla. 3d DCA 1972); *Ahmed v. Travelers Indem. Co.*, 516 So. 2d 40 (Fla. 3d DCA 1987). Failure to do so requires the appellate court to affirm a ruling that is not fundamentally erroneous on its face. *Id.*

A trial court is traditionally given "broad discretionary latitude to grant or deny a motion for new trial." *Wilson v. The Krystal Co.*, 844 So. 2d 827, 829 (Fla. 5th DCA 2003). This Court must be

"mindful of the superior vantage point enjoyed by the trial court, which…appellate courts have traditionally deferred to when considering a motion for new trial." *Tanner v. Beck*, 907 So. 2d 1190, 1196 (Fla. 3d DCA 2005)(*citing Allstate Ins. Co. v. Manasse*, 707 So. 2d 1110, 1111 (Fla. 1998)); *see also Nor-Tech Powerboats, Inc. v. H.P.B.C., Inc.,* 855 So. 2d 103, 105 (Fla. 2d DCA 2003)(holding that a trial court "has broad discretion in considering a motion for new trial, and its ruling on such a motion will not be disturbed in the absence of a clear showing of abuse.").

A jury's verdict in a civil case is likewise 'clothed with a presumption of regularity.' *Coba v. Tricam Indus.,* 164 So. 3d 637, 643 (Fla. 2015)(*quoting Republic Servs. of Fla. L.P. v. Poucher,* 851 So. 2d 866, 869 (Fla. 1st DCA 2003)). Unless the party seeking a new trial can demonstrate that the party has been harmed in some way, there are no grounds for granting a new trial and the jury's verdict should remain undisturbed. *Harvell v. Division of Admin., State Dept. of Transp.*, 342 So.2d 1011, 1012 (Fla. 4th DCA 1977).

B. Argument

To begin, Tenery notes that Richardson sets forth multiple questions and answers from Dr. Frederick's testimony, prior to the

redirect testimony that is actually at issue in this appeal and argues that these questions and/or answers were improper in one way or another. But none of the questions and answers (save the one during redirect examination) were properly preserved for review by this Court.

While objections were sustained to these questions, and a curative instruction was given after one, there were no contemporaneous motions for mistrial made by Richardson to those questions or answers. Thus, any argument that these questions and answers should somehow also be used by this Court to award a mistrial or new trial should be swiftly rejected as any such arguments are unpreserved for this Court's review. *See Companioni v. City of Tampa*, 51 So. 3d 452, 454 (Fla. 2010)(holding that to preserve a sustained objection for appellate review, a motion for a mistrial must be made at the time the improper comment was made).

As to the redirect examination question and partial answer, Tenery maintains that this question was not objectionable in the first instance because it went to the weight the jury could or should give to Dr. Demery's opinion. Dr. Frederick, a licensed psychologist himself, was asked based upon his experience, training and

understanding whether psychologists in general are permitted to determine whether or not an individual has a brain injury. Dr. Frederick proceeded to testify, at least partially, that psychologists aren't qualified because those are medical opinions that they cannot make. (T. 2378)

Tenery's counsel correctly noted to the trial court that its rulings in denying the pretrial motions went to the weight of such evidence, meaning there was no ruling that Tenery could not ask Dr. Frederick about this known opinion or that Dr. Frederick's opinion was inadmissible. While the trial court sustained the objection, the court also noted in its discussion that the fact Dr. Demery was a psychologist, and not a medical doctor, was indeed a weakness in the opinion. (T. 2381-2382) Thus, this question was proper in that it went to explain the weight a jury should give Dr. Demery's opinion.

But even if this question and partial answer is found to be improper in this Court's eyes, Richardson's arguments fail for two fundamental reasons: 1) the trial court did not allow Dr. Frederick to give this opinion; and 2) the trial court instructed the jury that Dr. Demery could indeed give this opinion. Caselaw cited by Richardson primarily deals with situations where a trial court allows opinions to

be given without stopping them and is then reversed for doing so. *See Carver v. Orange County*, 444 So. 2d 452 (Fla. 5th DCA 1983)(reversal because the trial court allowed expert to give his opinion as to other expert's ability); *see Acosta v. State*, 798 So. 2d 809 (Fla. 4th DCA 2001)(reversing conviction when trial court allowed detective to testify as to truthfulness of another witness). That was not the case here.

Dr. Frederick's answer was interrupted by Richardson's objection, which was sustained. After lengthy discussion, Richardson's own crafted curative instruction was given to the jury, telling them specifically that the trial court had determined Dr. Demery could in fact give such an opinion. Thus, even if this question or Dr. Demery's partial answer violated a previous order in limine or the trial court' previous ruling on the *Daubert* motion, the trial court instructed the jury on exactly what Richardson wanted them to believe.

Richardson tries to argue in this appeal that the curative instruction was inadequate and could not overcome the alleged prejudice, giving assorted reasons why. (IB. 30-33) But none of these arguments can now be reviewed by this Court because they were not

properly preserved below.

If a party does not object to a curative instruction's sufficiency when it is given, any subsequent argument on appeal is not preserved for review. *Nolan v. Kalbfleisch*, 369 So. 3d 346, 347 (Fla. 5th DCA 2023); *Cosme-Sella v. State*, 301 So. 3d 254, 255 (Fla. 4th DCA 2020). In this case, Richardson could not object to the curative instruction's sufficiency because the trial court gave the exact instruction Richardson wanted. Thus, all of the arguments Richardson brings in this appeal as to why the curative instruction was not sufficient or was ineffective have not been preserved for review by this Court, and this Court should not review them now.

But even if these arguments had been properly preserved, Florida law is clear that jurors are presumed to follow the court's instructions, including curative instructions. *Nolan,* at 347 (*citing Carter v. Brown & Williamson Tobacco Corp.*, 778 So. 2d 932, 942 (Fla. 2000)). There is no reasonable possibility that the jury thought that Dr. Demery could not give the opinions he did on traumatic brain injury after the trial court read them Richardson's curative instruction. The trial court not only instructed the jury to disregard the prior testimony of Dr. Frederick but went way further and

instructed the jury that it had determined "Dr. Demery is qualified to render an opinion on traumatic brain injury." (T. 2385-2386)

Richardson argues that since Dr. Frederick was board-certified in psychology, his partial answer could not be undone by the trial court. But Richardson ignores the fact that the trial court instructed the jury specifically, and the jurors are presumed to follow the trial court's instructions. To argue that the jury would have somehow cast aside a specific instruction from the trial court, who oversaw the entire court proceedings and ultimately gave the jury the law they would use to determine this case, in favor of partial testimony from a party's expert witness is simply not realistic. And one question, with a partial answer and a strong curative instruction and directive, cannot be a basis for a new trial. *See Murphy v. Int'l Robotic Sys., Inc.,* 766 So. 2d 1010, 1029-30 (Fla. 2000)(finding that "[p]assing remarks" were of "little consequence in the scope of a lengthy trial.").

Thus, even if this Court were to find that the question was improper, any such error was harmless. In *Special v. West Boca Medical Center*, 160 So. 3d 1251, 1256 (Fla. 2014), the Florida Supreme Court set forth the standard that this Court would follow for determining harmless error in this appeal:

> To test for harmless error, the beneficiary of the error has the burden to prove that the error complained of did not contribute to the verdict. Alternatively stated, the beneficiary of the error must prove that there is no reasonable possibility that the error contributed to the verdict.

To be clear, Tenery still maintains that the trial court committed no error in denying the motions for mistrial and new trial on this issue, and that the question was proper in the context of the trial. But even if this Court disagrees, Tenery has shown that the error complained of was harmless.

Richardson argues that all of Dr. Demery's opinions would have been disregarded by the jury because the jury believed he was not qualified to give them. There is no reasonable possibility that the jury believed that because the trial court specifically instructed them otherwise. And any argument that this curative instruction "was no match for the cumulative effect" of multiple statements of Dr. Frederick was unpreserved as already addressed above. Thus, in the end, Richardson cannot prove that the trial court abused its discretion, and this Court should affirm.

II. RICHARDSON CANNOT SHOW THAT THE TRIAL COURT ABUSED ITS DISCRETION IN ITS DENIAL OF A NEW TRIAL BECAUSE THE TRIAL COURT CORRECTLY RULED THAT DR. BIFULCO COULD TESTIFY ABOUT FUTURE MEDICAL TREATMENT AND COSTS.

A. Dr. BiFulco was disclosed properly as a treating physician and was not subject to financial discovery.

Richardson first argues that Tenery created a "super expert" who avoided being subject to expert discovery but was allowed to give future medical treatment and costs opinions. Richardson continues to question Dr. BiFulco's testimony that he was not retained as an expert witness, and counsel for Tenery's representations as such, because of the $5,000 invoice that was mistakenly paid by Morgan and Morgan. But these arguments fail by looking at the actual facts and evidence in this case.

Dr. BiFulco was clearly not a retained expert in this case, and was never disclosed as such, and was therefore not required by any Rule to give a report to Richardson. Dr. BiFulco was designated multiple times as a treating physician, so there was no surprise to Richardson that he had these opinions.

It is undisputed that Richardson never took his deposition, so any argument now that there was somehow confusion as to what he

would have testified to based on his disclosure could have been cleared up very easily by Richardson. He did not do so and should not be able to make such an argument to this Court.

As to the Invoice that Richardson has continued to characterize as some sort of retainer paid by Morgan and Morgan (or medical treatment paid for by Tenery's attorneys), the facts and evidence show that it is nothing of the sort. It is clear that the Invoice in question was for Tenery's medical treatment and was mistakenly sent to Morgan and Morgan even though it was addressed to Tenery. This invoice was then mistakenly paid by Morgan and Morgan.

When that mistake was found out, both Dr. BiFulco and Mr. Rudd/Morgan and Morgan took steps to remedy that mistake. There is absolutely no evidence of some kind of plot or concerted effort by Tenery's counsel to somehow hide Dr. BiFulco and his opinions from Richardson under the alleged guise that he was actually a retained expert. In fact, Richardson knew that Dr. BiFulco was going to give these opinions all along as a treating physician because he was disclosed as such.

In its Order denying Richardson's motion for new trial, the trial court noted that defense counsel "clearly stated that the *Boecher*

interrogatory answers from another case were being used only to refresh recollection." (R. 8475) The court noted that the inquiry ended when Dr. BiFulco stated the document did not refresh his recollection and that Richardson did not then seek to use the responses for impeachment or any other purpose. (R. 8475) That is accurate (T. 1423-1424), and the document was only introduced into evidence for identification after using it to try and refresh Dr. BiFulco's recollection. (T. 1438-1439; SR. 11224)

The trial court then held that because this inquiry ended with the attempt to refresh recollection, the court did not have an opportunity to address the issue and would be left to speculate on what arguments the parties would have raised. (R. 8476) This is exactly right and was part of the reason why the trial court denied the motion for new trial. Richardson cannot say otherwise.

Richardson argues in his Initial Brief that his arguments regarding the Invoice are preserved for assorted reasons. (IB. 48-50) Richardson seeks to downplay his reliance on this Invoice as a reason he is now seeking a new trial, saying that the "real" issue on appeal is whether the trial court abused its discretion in admitting medical records or allowing Dr. BiFulco to give future medical treatment and

costs opinions. (IB. 48)

But Richardson weaves in and out of his arguments throughout this section his baseless argument that Dr. BiFulco was allegedly a retained expert because an invoice for medical care was mistakenly paid by Morgan and Morgan. Again, there is absolutely no evidence of some kind of plot or concerted effort by Tenery's counsel to somehow hide Dr. BiFulco and his opinions from Richardson. And if Richardson wanted the trial court to use that Invoice or the *Boecher* interrogatory responses for any other purpose, he was required to bring it up at trial. He did not do so and should not be allowed to do so now under the guise of alleged misconduct.

Richardson tries to thread into his argument an alleged discovery violation, saying that he was unable to get retained expert witness discovery regarding Dr. BiFulco. But this argument should be rejected for many reasons.

First, Dr. BiFulco was not a retained expert but was solely a treating physician, and therefore was not subject to financial discovery. Pursuant to *Worley v. Central Florida Young Men's Christian Ass'n, Inc.*, 228 So. 3d 18, 26-26 (Fla. 2017), any such financial relationship is not discoverable:

> "[W]e find that the relationship between a law firm and a plaintiff's treating physician is not analogous to the relationship between a party and its retained expert.... Allowing further discovery into a possible relationship between the physician and the plaintiff's law firm would only serve to uncover evidence that, even if relevant, would require the production of communications and materials that are protected by attorney-client privilege.... Accordingly, we find that the supplemental request to produce requires the production of privileged materials. We also find that the supplemental request to produce is unduly burdensome.... [W]e do not believe that engaging in costly and time-consuming discovery to uncover a 'cozy agreement' between the law firm and a treating physician is the appropriate response. We are concerned that this type of discovery would have a chilling effect on doctors who may refuse to treat patients who could end up in litigation out of fear of becoming embroiled in the litigation themselves. Moreover, we worry that discovery orders such as the one in this case will inflate the costs of litigation to the point that some plaintiffs will be denied access to the courts, as attorneys will no longer be willing to advance these types of costs. Finally, attempting to discover this information requires the disclosure of materials that would otherwise be protected under the attorney-client privilege."
>
> *Id.* (emphasis supplied); *see also Rodriguez v. GEICO Gen. Ins. Co.*, 2020 WL 5983395, at *2–3 (M.D. Fla. Aug. 19, 2020) ("[Here,] [r]equests 6 and 9 ask for documents regarding payments made to Dr. Datta's practice from Plaintiffs' counsel and documents referencing a referral relationship between Dr. Datta or his practice and Plaintiffs' counsel. Doc. No. 63-1 at 2. These documents encompass communications that are protected by the attorney-client privilege under *Worley*.).

Under the Florida Supreme Court's decision in *Gutierrez v. Vargas*, 239 So. 3d 615 (Fla. 2018), the issue is whether the treating physician would have formed the subject opinion in the course of

treatment; if so, then the physician remains a treater. *Id.*, at 622-24. ("[I]f the treating physician gives a medical opinion formed during the course and scope of treatment in fulfillment of their obligation as a physician, then the physician is a fact witness, albeit a highly qualified one."). Federal cases are consistent with *Gutierrez*. *See Hughes v. Wal-Mart Stores E., LP*, 2023 WL 3172527, at *8 (S.D. Fla. May 1, 2023); *see Jones v. Royal Caribbean Cruises, Ltd.*, 2013 WL 8695361, at *5 (S.D. Fla. Apr. 4, 2013)(*quoting Levine v. Wyeth, Inc.*, 2010 WL 2612579, at *1 (M.D. Fla. June 25, 2010)); *see Torres v. Wal-Mart Stores E., L*.P., 555 F. Supp. 3d 1276, 1297–98 (S.D. Fla. 2021)("[A]s many courts have recognized, physicians who form their causation opinions during treatment can offer those opinions under Rule 26(a)(2)(C)—even without a Rule 26(a)(2)(B) report.")

That is the situation here. Dr. BiFulco provided medical treatment and care to Tenery, was called at trial, and gave opinions as a treating physician regarding the future medical needs of Tenery and the costs of her future medical needs. Under the Florida Supreme Court's binding *Gutierrez* decision, and the caselaw above, he was and is a treating physician witness, and Richardson was not entitled at any point in the litigation to financial-relationship discovery.

Second, there is nothing in the record to show that Richardson ever got an Order from the trial court compelling this alleged expert discovery, or even that he tried to get such discovery from Dr. BiFulco (or any treating physician for that matter). In fact, the trial court denied the only motion to compel expert discovery filed by Richardson (without prejudice) because he did not comply with a local administrative order. (R. 2272) This motion tellingly did not include any prayer for treating physician discovery at all. (R. 2143-2148)

Third, and most tellingly, Richardson had financial bias numbers on Dr. BiFulco from another case but abandoned any use of them of his own. Thus, because Richardson did nothing to seek this supposed overdue discovery below and abandoned any use of the discovery he had at trial, this Court should not entertain any arguments about discovery now.

B. Richardson's arguments that Tenery tried her case by ambush, or that the trial court abused its discretion in allowing Dr. BiFulco's future medical care testimony, should be swiftly rejected by this Court.

Richardson rightly acknowledges that the trial court had broad discretion in whether to admit the testimony of Dr. BiFulco on the

issue of future medical needs and costs. The trial court went above and beyond in its role this case by allowing a proffer of that testimony outside the presence of the jury, by questioning Dr. BiFulco himself, and in allowing extensive argument by both parties on the issue. In the end, the trial court determined that this testimony was not a surprise under well-established Florida law and should therefore be allowed. It did not abuse its discretion in doing so, and none of the arguments brought by Richardson should sway this Court otherwise.

Well-established law in Florida shows that "a treating doctor…while unquestionably an expert, does not acquire his expert knowledge for the purpose of litigation but rather simply in the course of attempting to make his patient well." *Clair v. Perry,* 66 So. 3d 1078 (Fla. 4th DCA 2011)(*citing Frantz v. Golebiewski*, 407 So. 2d 283, 285 (Fla. 3d DCA 1981)). In *Perry*, the court refused to accept the defendant's contention that a treating doctor who gives permanency opinions automatically becomes an expert witness. *Id.*

The Third District affirmed the trial court ruling allowing the treating physician to so testify (which was made in reconsideration of a prior trial court ruling not allowing same) on the issue of permanency, even when that opinion was not disclosed during

discovery. *Id.* The Third District further held that the defendant was not prejudiced in her ability to mount a defense in the case because the defendant had been provided with the medical records which contained all the data upon which the doctor formed his opinion. *Id.* Thus, the Third District found that the defendant was on notice that permanency would be an issue at trial, and that the treating physicians might express an opinion on the lasting nature of the plaintiff's condition. *Id.* (*citing Scarlett v. Oullette*, 948 So.2d 859 (Fla. 3d DCA 2007) and *Ganey v. Goodings Million Dollar Midway, Inc.*, 360 So.2d 62 (Fla. 1st DCA 1978)); *see also Sorrells v. Montesino,* 2 So. 3d 297 (Fla. 4th DCA 2008).

Dr. BiFulco testified clearly that he went over his opinions about future medical needs and costs with Tenery at multiple times during his treatment of her. Dr. BiFulco testified further that his opinions were formed in the course and scope of treating Tenery as her treating physician. The Florida Supreme Court in *Gutierrez* expressly held that "if the treating physician gives a medical opinion formed during the course and scope of treatment in fulfillment of their obligation as a physician, then the physician is a fact witness, albeit a highly qualified one." *Gutierrez*, at 624. That is precisely what Dr. BiFulco

did in this case, and what is patently reflected in his medical records and his unrebutted trial testimony.

Richardson speculates that Dr. BiFulco's testimony should not be believed as to when he received medical records outside of his own, nor when he reviewed those records with Tenery or prior to trial. But there is simply no credible evidence of a "trial by ambush" and there is no evidence of prejudicial misconduct by Tenery's counsel. What occurred in this case was that Dr. BiFulco formed opinions during his treatment of Tenery, Tenery's counsel properly disclosed to Richardson multiple times throughout the litigation that these opinions would be given at trial, and in the three years from when the first disclosure was given Richardson did nothing to find out the scope of Dr. BiFulco's opinions. As the trial court correctly pointed out and ruled, that is not a surprise, and the opinions could properly be given to the jury.

Richardson tries to make Dr. BiFulco a retained expert, and then cites cases such as *Suarez-Burgos v. Morhaim*, 745 So. 2d 368 (Fla. 4th DCA 1999), for the proposition that it is not necessary to take the deposition of an expert where a report has been given. But as a treating physician, Dr. BiFulco is not subject to *Suarez-Burgos,*

which deals with the requirement that a compulsory medical examiner provide a report to the plaintiff with all of the retained expert's opinions. Dr. BiFulco was clearly not a retained expert in this case, and therefore was not required by any Rule to give a report to Richardson. And there is no caselaw that Richardson has put forth that extends the principles of *Suarez-Burgos* to a treating physician's medical records.

Richardson's next argument, that there is somehow evidence of bad faith because Dr. BiFulco did work on the eve of trial, is wrong as well. The only work that Dr. BiFulco did was to get ready for his testimony, which meant that he put together the raw numbers that he would be testifying about and made personal notes for himself so that he would be able to accurately give those numbers to the jury. Dr. BiFulco was not hired as a retained life care planner expert, so he did not do a formal life care plan. Instead, he made notes for himself that were not given to the jury to aid in his own testimony. This is no more a "trial by ambush" than any expert using his or her own personal notes about a patient's treatment to make sure their testimony is accurate, and their memory is right.

Richardson then argues that somehow Dr. BiFulco was a

retained expert because he testified about permanency opinions. But *Gutierrez* allows treating physicians to give permanency opinions if the opinions are formed during the treatment of the patient. *See Gutierrez*, at 624. That is what occurred in this case.

Richardson also argues that because permanency and future treatment opinions are categorized as expert opinions, somehow that means Dr. BiFulco could not give them. But again, *Gutierrez* says otherwise. *See Id.* ("Again, the determination turns on the role played by the witness: if the treating physician gives a medical opinion formed during the course and scope of treatment in fulfillment of their obligation as a physician, then the physician is a fact witness, albeit a highly qualified one.")

Later in his Brief, Richardson argues that Dr. BiFulco was not allowed to testify about future treatment and costs outside his specialty. (IB. 46-48) Richardson cites to an unreported federal court decision of *Galarza v. Carnival Corp.*, 2016 WL 7507883 (S.D. Fla. August 8, 2016), as his sole support for this argument.

Putting aside the fact that *Galarza* has no real precedential value for this Court, when this Court looks at what actually happened in that case, it supports Tenery's position, not Richardson. The

district court in *Galarza* held that any such evidentiary matter is within the court's discretion looking at the specific facts of the case. *Id.*, at *6. The *Galarza* court also held that any inquiry into such a matter is not stringent, and so long as the expert is minimally qualified, objections to the level of the expert's expertise would go to credibility and weight, not admissibility. *Id.* (citation omitted) And the *Galarza* court ultimately found that based on Dr. Lichtblau's experience, he possessed sufficient qualifications to give his opinions and that he "does not need to be a psychologist, psychiatrist, or orthopedic surgeon to render opinions on these subjects." *Id.*, at *7.

Save for a sentence or two in argument, there was never any real challenge made by Richardson to Dr. BiFulco's opinions being beyond his area of expertise at trial. According to even the case Richardson cites, if Dr. BiFulco possessed sufficient qualifications to give his opinions, he did not have to be in the same specialty as those who would be performing the actual future medical care procedures to give his opinions regarding those procedures or treatments. He clearly had those qualifications, and the trial court rightly allowed his testimony on these issues.

C. The trial court did not abuse its discretion in admitting the June 19, 2019, medical record of Dr. BiFulco.

Richardson argues that the June 19, 2019, medical record of Dr. BiFulco listing 'Categories of Care' should not have been entered into evidence by the trial court. (R. 11051-11052) Also, confusingly, Richardson combines this argument with an Excel spreadsheet created by Dr. BiFulco to get ready for his trial testimony, a spreadsheet that clearly was not entered into evidence and was only marked for identification by the trial court. (R. 10247-10248; T. 1410-1411)

Richardson's argument about this medical record fails for multiple reasons. First, Richardson was aware of this medical record because he had gotten this record (and others) by subpoena, so there was no surprise. Second, the trial court addressed Richardson's prejudice arguments pursuant to *Binger* and held that within the disclosures of Dr. BiFulco and in Dr. BiFulco's medical records, the opinions regarding future medical needs and the costs for those needs were listed as topics of his purported testimony. (T. 1303-1304)

Third, any argument now that the medical record lacked trustworthiness and constituted inadmissible hearsay should also be

rejected. Reversal of an evidentiary determination by a trial court for abuse of discretion is only warranted when no reasonable person would arrive at the same conclusion as that of the trial court. *Sims v. State*, 291 So. 3d 982 (Fla. 3d DCA 2019). The trial court is given a large measure of discretion under section 90.403, Fla. Stat., in making its evidentiary determination. *State v. Knowles*, 265 So. 3d 733 (Fla. 5th DCA 2019).

Richardson tries to convince this Court that the trial court committed reversible error in admitting a medical record of Dr. BiFulco, and that this error was so terrible that this Court should give him a new trial. He cites primarily to *McElroy v. Perry,* 753 So. 2d 121 (Fla. 2d DCA 2000), in support of his argument, and says that this medical record is akin to a narrative report.

Tenery believes that this issue has not been properly preserved for appeal because Richardson did not object that this medical record was somehow hearsay below, as he now argues it was on appeal. Even though Richardson now says this is "inadmissible hearsay," and seeks a new trial because of his allegation that the trial court apparently overruled his hearsay objection, which is not borne out by the record. Because Richardson did not make a specific hearsay

objection at trial he cannot do so now.

But even if this Court reviewed the unpreserved argument, Florida law holds that when a trial court is faced with a purely demonstrative exhibit (not a medical record) and allows it as evidence to go back with the jury, that is a matter strictly within the trial court's discretion. *First Federal Savings & Loan Ass'n of Miami v. Wylie*, 46 So.2d 396 (Fla. 1950); *Brown v. State*, 550 So.2d 527 (Fla. 1st DCA 1989). Appellate courts generally acknowledge that the trial court has a superior vantage point in ruling on the admissibility of even demonstrative exhibits, and a trial court's findings will not be disturbed absent a clear abuse of discretion. *Chamberlain v. State*, 881 So.2d 1087 (Fla. 2004)(*citing Harris v. State*, 843 So.2d 856 (Fla. 2003)).

In this case, the trial court provided an extensive analysis of Richardson's arguments and ultimately ruled against him. That was well within the trial court's discretion to do, and just because Richardson disagrees with what the trial court did does not make it error.

Further still, even if this Court determined that this issue was preserved, and that the trial court committed error, Richardson still

would not be entitled to a new trial because any such error was harmless. An error in the introduction of evidence may be considered harmless if the evidence is merely cumulative to other evidence that was properly introduced. *White Constr. Co. v. Dupont*, 455 So. 2d 1026, 1029 (Fla. 1984); *Foster's Auto Crushing v. Wood*, 427 So. 2d 1009 (Fla. 1st DCA 1983). Tenery presented verbal testimony from Dr. BiFulco regarding the future medical needs of Tenery and the individual and total amounts of future medical costs, totaling $2,309,886. (T. 1399) Thus, the jury already had Dr. BiFulco's testimony, and the verdict itself shows that the jury did not just adopt his future medical care total costs blindly, as they awarded $1,000,000 (which was 43% of Dr. BiFulco's total cost number). This Court should affirm.

D. Richardson's argument that Tenery and her counsel deceived the trial court and jury during trial, and that Tenery's counsel likely violated the Rules Regulating the Florida Bar, is unfounded, scandalous, and should be swiftly condemned by this Court.

In his Initial Brief, Richardson (through his counsel) argues that it was only after Richardson moved for a new trial and the trial court ordered Tenery to respond that Affidavits were done "to attempt to avoid misconduct." As if this was not enough, Richardson outright

accuses both Tenery and her counsel of misconduct in his Brief and makes a flippant reference to a quote from Shakespeare's Hamlet that is used to describe corruption in that play. (IB. 52)

To be clear, there is zero credible evidence that Richardson has to support these baseless accusations. The trial court did not find that there was any impropriety by Tenery or her counsel, which is correct because there was none. This was a simple mistake in an invoice being paid by Morgan and Morgan that should not have been paid. When it was looked into, it was immediately remedied by both Dr. BiFulco, Mr. Rudd, and Morgan and Morgan. Any arguments based on these accusations should be rejected by this Court.

There is absolutely no evidence that Morgan and Morgan intentionally paid this invoice with full knowledge that it was for its client's treatment. And instead of actually offering evidence to the contrary, all Richardson offers is innuendo and speculation as to what Dr. BiFulco and Mr. Rudd's affidavits mean in his (or his counsel's) own mind, and an unsupported and unfounded allegation of ethical misconduct by Tenery's counsel and the undersigned's firm. To say that such baseless accusations should not be part of any Brief to this Court does not do it justice. So Tenery turns to Florida

law on this subject.

Richardson and his counsel should be aware that Florida law holds "counsel who appear before [appellate courts]…understand that briefs submitted to us, upon which we must rely so heavily in the discharge of our appellate function, be truthful and fair in all respects", and that "an attorney 'always carries a duty and obligation of candor' in presentations and submissions to the court." *Hutchins v. Hutchins*, 501 So. 2d 722, 723 (Fla. 5th DCA 1987)(citation omitted and bracketed language added).

The *Hutchins* court found that misrepresentation in an appellate brief warranted sanctions of striking the offending language from the brief and assessment of attorney fees to be paid to the offended party by the offending attorneys, not by their clients. *Id.* The misrepresentations, innuendo, and outright accusation of a violation of an ethical rule certainly warrants this Court looking at the statements made in the Initial Brief to see if similar sanctions are warranted in this case. Tenery and her counsel will leave that decision to this Court's good judgment.

III. THE TRIAL COURT WAS WELL WITHIN ITS DISCRETION IN EXCLUDING THE OPINIONS OF MS. BONAPARTE AND IN DENYING RICHARDSON'S MOTION FOR NEW TRIAL.

As stated previously, reversal of an evidentiary determination by a trial court for abuse of discretion is only warranted when no reasonable person would arrive at the same conclusion as that of the trial court, and the trial court is given a large measure of discretion under section 90.403, Fla. Stat., in making its evidentiary determination. *See Sims* and *Knowles, supra.* This is because "Admission of evidence is within the discretion of the trial court and will not be reversed unless there has been a clear abuse of that discretion." *Ray v. State,* 755 So. 2d 604, 610 (Fla. 2000).

A trial court has broad discretion in ruling on the admissibility of expert witness testimony. *McWatters v. State*, 36 So. 3d 613, 629 (Fla. 2010). With respect to billing and coding experts, although such an expert may be qualified to render opinions as to whether the bills submitted by a plaintiff's medical providers accurately reflect the care documented in the medical records, they are not automatically qualified to render opinions regarding the reasonableness of the charges. *Castellanos v. Target Corp.*, 568 Fed. Appx. 886, fn. 2 (11th

Cir. 2014) This is because reasonableness and necessity of medical bills can be established by lay testimony. *Dungan v. Ford*, 632 So. 2d 159, 163 (Fla. 1st DCA 1994). Thus, the question of reasonableness and necessity should be determined from the perspective of the plaintiff.

The trial court entered an extensive order regarding Ms. Bonaparte's proposed opinions, focusing on her methodology used in reviewing Tenery's past medical bills. The trial court found that Ms. Bonaparte had the qualifications to offer opinions in the billing and coding areas but found that Richardson had not carried his burden of demonstrating that the requirements of *Daubert* were satisfied. The trial court held that the information Ms. Bonaparte relied upon was an inadequate basis upon which to develop an opinion as to the reasonableness of past medical expenses for Tenery, a self-pay patient treated subject to a letter of protection. (R. 4331) The trial court was well within its discretion to so find.

It is important to note that the trial court did not stop Richardson from challenging the reasonableness of Tenery's medical expenses by other methods at trial, but simply said he would have to do so in a way that met the requirements of Florida's Evidence Code.

(R. 4431) Also, it is clear that Richardson did not even call Ms. Bonaparte to trial, and it was his sole decision not to do so.

Richardson argues in this appeal that the trial court treated Dr. BiFulco's testimony about the reasonableness of past medical bills differently than Ms. Bonaparte's testimony. But Dr. BiFulco testified that he did not perform an analysis of matching up CPT codes and values regarding past medical bills. (T. 1290) He also testified that he did not specifically look at reference material for Tenery's past medical bills. (T. 1293) Thus, the trial court did not treat each parties' experts differently as Richardson suggests.

Richardson's argument is also wrong when he states that he did not have the ability to challenge the reasonableness of Tenery's medical bills without Ms. Bonaparte's testimony. Richardson had several other means to present this testimony, some of which he did. He could cross-examine Dr. BiFulco on his testimony, which occurred. He could have had the medical providers' staff testify as to their billing practices and knowledge of entering the codes to bill Tenery. Richardson could have gone over each medical bill with Tenery if he believed the charges were unsupported, unreasonable, or unnecessary. Thus, there are many ways that Richardson could

have attacked the reasonableness of Tenery's past medical bills, some he did, some he did not.

Richardson relies heavily on the case of *State Farm Mut. Auto. Ins. Co. v. Bowling*, 81 So. 3d 538 (Fla. 2d DCA 2012) in support of his argument. In that case, the Second District found that the trial court committed error in excluding the testimony of Debra Pacha as State Farm's medical billing and coding expert. *Id.*, at 540. Part of State Farm's defense was that the plaintiff's medical providers fabricated or exaggerated the medical care necessary for the plaintiff's alleged injuries, and Ms. Pacha's testimony was going to be that the bills did not correlate to the treatment in the medical records to prove such fabrication. *Id.*

While the Second District found that Ms. Pacha could render an opinion on whether the bills submitted by the plaintiff's medical providers accurately reflected the care documented in those providers' records, the court also found that Ms. Pacha did not have the necessary medical background to render an opinion on whether the medical care actually provided to the plaintiff was reasonable. *Id.*, at 541. The Second District found in reversing that Ms. Pacha's testimony was important in that particular case because some of the

plaintiff's medical providers admitted at trial that certain bills included items that should not have been billed. *Id.*, at 542.

Nothing of the sort is present in this case. There was no evidence presented that Tenery's medical bills were fabricated, and Ms. Bonaparte's purported testimony would have only been that the bill charges were above those customary in the Orange County community. (R. 2388). And Ms. Bonaparte, like Ms. Pacha, did not have the necessary medical background to render an opinion on whether the medical care that the bills reflected were actually provided was reasonable or not.

Also, Tenery does not need to carry a burden under *Special* because the trial court did not commit error in limiting Ms. Bonaparte's testimony. But even if she does, any error in excluding her testimony is harmless not only because Richardson chose not to have Ms. Bonaparte testify, but because Richardson is seeking a new trial after failing to attack the reasonableness of medical bills as he could and should have done. Thus, this Court should affirm in all respects.

Lastly, Richardson argues in general that the alleged errors he points to in this appeal either individually, or cumulatively, denied

his right to a fair trial. As Tenery has shown above, the trial court did not commit errors in this case, and even if there were errors committed (which there were not), they were harmless.

The often-repeated principle is that a party is entitled to a fair trial, but not a perfect one. *Warning Safety Lights, Inc. v. Gallor*, 346 So. 2d 92, 95 (Fla. 3d DCA 1977); *General Motors Corp. v. McGee*, 837 So. 2d 1010 (Fla. 4th DCA 2002). In this case, Richardson received a fair trial, and the jury's verdict was supported by the breadth of the evidence presented at trial. The trial court did not commit any errors that affected this fair trial, and this Court should affirm the trial court's rulings in all respects and should affirm the jury's verdict.

CONCLUSION

For all the reasons set forth above, this Court should affirm the trial court's rulings, the jury's verdict, and the Final Judgment for Tenery.

Morgan & Morgan

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September, 2024, a true and correct copy of the foregoing was electronically filed using the Florida Courts E-Filing Portal and was electronically furnished to all counsel of record listed below via the E-Filing Portal in accordance with Fla. R. Jud. Admin. 2.516:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Answer Brief complies with the applicable font and word count limit requirements of Fla. R. App. P. 9.045 and 9.210, in that said Brief is written in Bookman Old Style 14-point font and does not exceed 13,000 words.

/s/ Brian J. Lee
Attorney