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

CASE NO. 1D24-0574

KAREN E. KENNEDY, M.D., KAREN E. KENNEDY, M.D., P.A., and GYNECOLOGY SOLUTIONS, LLC,

Appellants,

L.T. Case No. 2018-CA-145

vs.

MOLLY D. PEARDON and BOBBY R. PEARDON, JR., Wife and Husband,

Appellees.
_____/

ON APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, IN AND FOR SANTA ROSA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEES

TAYLOR, WARREN, WEIDNER, HANCOCK & BARNES, P.A.

Scott E. Barnes
Florida Bar No. 40634
sbarnes@twwlawfirm.com
1700 West Main Street
Suite 100
Pensacola, FL 32502
Tel: (850) 438-4899

CREED & GOWDY, P.A.

Bryan S. Gowdy
Florida Bar No. 176631
bgowdy@appellate-firm.com
Nicholas P. McNamara
Florida Bar No.1026043
nmcnamara@appellate-firm.com
filings@appellate-firm.com
865 May Street
Jacksonville, Florida 32204
Tel: (904) 350-0075

Attorneys for Appellees

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES AND RULES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The appellees-plaintiffs, the Peardons, are a young married couple. They no longer share sexual intimacy because Dr. Kennedy performed an unnecessary procedure to remove a cyst from Molly Peardon's vaginal area. The Peardons sued the appellants—Dr. Kennedy and two entities vicariously liable for her negligence. The jury awarded $3 million and $1.5 million, respectively, in noneconomic damages to Molly and Bobby Peardon. Defendants seek a new trial, arguing that: (i) the trial court improperly limited their cross-examination of Dr. Jamieson, the Peardons' medical expert (Issue I), and (ii) the noneconomic damages are excessive (Issue II).

Defendants' statement of the case and facts—though mostly accurate—is incomplete and inaccurate in part. This statement provides additional context.

A. Facts pertaining to Issue I

The initial brief notes that "[f]ollowing openings, the court held over Dr. Kennedy's objections that Dr. Kennedy would not be permitted to question Dr. Jamieson regarding the lack of support in the medical literature for his opinion that the surgery should not have been performed two days after the drainage." Initial Br.9. But

the brief fails to note that the trial court relied on two independent legal grounds to prohibit Defendants from asking that question: sections 90.706 and 90.403, Florida Statutes.[1]

1. The trial court's ruling based on section 90.706

In opening, Defendants mentioned Dr. Jamieson's deposition testimony that there was no literature supporting his opinion that Dr. Kennedy was negligent by excising the cyst two days after the incision and drainage (I&D) procedure. T.177:21–25. After openings, the Peardons sought to prohibit Defendants from cross-examining Dr. Jamieson about the lack of literature, expressly citing section 90.706, Florida Statutes. *See* T.199:12–18.[2] Specifically, the Peardons argued that section 90.706 "[did]n't allow" Defendants "to ask … about the lack of literature." T.199:17–18.

The trial court agreed with the Peardons and their counsel (Mr. Barnes) based on section 90.706's purpose and text:

> [W]hen I'm looking at *what the purpose and what* the *text of this rule says … this rule of evidence, which is 90.706*, I think … 90.706, was to guide lawyers and Courts as to the use of authoritative sources, and it outlines that process.

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[1] This brief cites the 2023 version of these statutes that were in effect at the time of the trial.

[2] The arguments and rulings below on Issue I are at pages 199 to 215 of the trial transcript, which are included in the appendix.

> …[I]n this case … Mr. Barnes, you put it as the Defense is using the lack of any medical treatise or, as being authoritative. … I agree with the Plaintiffs' position on that. So I'm not going to allow that question to be asked.

T.213:15–25 (emphasis added).

Despite this ruling, the initial brief neither mentions section 90.706 nor examines the purpose or text of that section.

2. The trial court's ruling based on section 90.403

At trial, the Peardons explicitly invoked section 90.403, arguing that the cross-examination would be "absolutely misleading, fundamentally inappropriate [based] on [section] 90.403." T.200:19–21; *see also* T.199:20–24 (citing "403" and arguing "the possibility of prejudice or confusion … substantially outweighs any potential value of it," and "it's absolutely misleading"). The cross-examination would mislead the jury, the Peardons argued, because "[t]he lack of literature … isn't meaningful in any particular way" in the context of the narrow and fact-specific issue of whether Dr. Kennedy was negligent by excising the cyst two days after the I&D procedure. T.200:5–21. As an example, they pointed out that "there's no literature on using heroin as a painkiller at a hospital over morphine … because it's not something that's done." T.200:8–11.

In accordance with the Peardons' section 90.403 objection, the trial court weighed the probative value of the cross-examination against the possibility of misleading the jury. *See* T.206:9–215:2. The court noted that a medical expert "do[es]n't have to have medical literature to form … opinions," and found it "hard to believe that you're going to get any literature that's going to say, well, you shouldn't do this if you're going to do this in two days." T.207:1–5. The court also observed:

> I can see a little bit from the Defense, hey, there is no medical literature to support … your opinion. But I just don't know, especially when it comes to medicine, you're not going to find medical literature that deals with every aspect of medicine. And plus, in this particular case, what we're really looking at is the rubric in which decisions were made. And usually, when I think about medical literature and expert opinions, it's usually for causation purposes.

T.209:10–20. The trial court agreed with the Peardons that Defendants' proposed cross-examination would be "unfair." T.209:5.

Though the objection and ruling below were based on section 90.403, the initial brief never mentions section 90.403.

3. Dr. Jamieson's use of the word "unconscionable"

According to Defendants, Dr. Jamieson "repeatedly" told the jury that Dr. Kennedy's course of action was "unconscionable," and

the initial brief uses that word 13 times. Initial Br. 1, 9, 12, 16, 18, 22, 26, 30, 33. But Dr. Jamieson only used that word twice. *See* T.562:20–23, 569:15–19. One time, he used the word to refer to the issue on which Defendants sought to cross-examine him with the lack of literature: whether Dr. Kennedy was negligent by excising the cyst two days after the I&D procedure. *See* T.569:15–19. His other use of the word referred to the broader standard-of-care issue: whether Dr. Kennedy should have performed the excision *at all*, given Molly's young age. *See* T.562:20–23; Initial Br.8–9.

Defendants did not contemporaneously object to Dr. Jamieson's two "unconscionable" comments. *See* T.562:20–23, 569:15–19. Though their motion for new trial argued that these comments were so prejudicial as to constitute "fundamental error," *see* R.2735, Defendants have not asserted that argument on appeal.

B. Facts pertaining to Issue II

On noneconomic damages, the initial brief spends a single paragraph referring generally to the Peardons' testimony about their loss of sexual intimacy and its emotional impact. *See* Initial Br.10. That paragraph does not completely or fairly state the Peardons' testimony on their damages.

1. Molly Peardon's testimony

Ever since the procedure by Dr. Kennedy—which occurred just weeks after the Peardons' marriage and honeymoon—the "main issue" for Molly has been "being intimate with my husband." T.221:21–22, 233:2–8, 237:17–22, 257:8–9. Whenever the two would have sex, "it was excruciating" for her. T.253:5–6. While she was able to have three children, she said, "[c]onceiving our children was a nightmare for me and my husband." T.257:25–258:1. She described the process as follows:

> So my husband would go into our master bedroom, and he would self-stimulate to try and help minimize the time he had to be inside me. I would be in the bedroom just dreading what was coming next. And then when he was close to being done, I would just grit [*sic*] and bear it and try[] not to cry. It was a very cold and clinical and excruciating process.

T.258:12–19. After several years of "trial and error" proved futile, the Peardons would have sex only to conceive children. T.259:4–10. By the time of trial in late 2023, they were no longer having sex. T.259:11–12.

When asked whether she still had "feelings of desire" for her husband, Molly answered, "I do, but I don't because of the overwhelming feeling of what that would look like for me in terms of

what we would have to go through and being in pain, and that it's just not enjoyable." T.260:14–19. She further testified:

> It's very sad and heartbreaking that we can't do something that is so special and crucial in a marriage. I feel very insecure and inadequate as a wife and guilty. It's an everyday obstacle with just, I mean, we could be sitting on the couch watching a movie and [a] romantic and intimate scene comes on, and it's just like a constant reminder of what we're dealing with, and what we've lost. But I constantly beat myself up about it and just feel like a total failure.

T.261:17–25.

Molly also testified about the "worst part" of her suffering:

> Not only do I have physical permanent pain, but I'm no longer able to have sex with my husband without excruciating pain. And it's become this sad and heartbreaking thing in our marriage because of, we aren't able to connect in that way, and we can't share that with each other. It's just such a beautiful prominent piece in a marriage that we no longer have. For us, sex was about, it's the ultimate way to show each other that you love them. And it was a way for us to connect and share something that was special. It was a way for us to feel closer with each other in the good times and in the bad times. And it reminds you how much you mean to each other and strengthens that bond and that emotional connection. And we don't get that anymore.

T.262:20–263:9.

Both Dr. Jamieson (the Peardons' retained expert) and Dr. Medlock (one of Molly's treating physicians) testified that the pain in

her vaginal area would be permanent. 609:22–610:1 (Dr. Jamieson); T.359:24–25 (Dr. Medlock).

2. Bobby Peardon's testimony

Bobby no longer enjoys sex because he "[doesn't] like to make [his] wife suffer," and because "[t]he pain it causes her does not give [him] enjoyment." T.511:3–8. Other forms of sexual intimacy do not "fill that void that we're missing … from making love." T.511:12–18. He felt that every time he would have sex with his wife after her injury—which was solely for purposes of conceiving children—he was "violating" her, which "felt disgusting." T.510:21–23, 512:23–25. The process was "torture." T.512:17. Since they have had several children, they presently "don't have sex at all." T.510:23–24.

Bobby worries about his wife "[a]ll the time" and that "it's heartbreaking to watch her suffer." T.514:17–20. He felt that his wife no longer desired him, though "she wished she wanted to." T.513:24–514:2. Because of his "ang[er] at the situation," he cries "[e]very once in a while"—something he tries to hide from his wife. T.515:6–9. He "worr[ies] … there's no end," and that the situation will last "forever." T.515:20–21. Like his wife, he testified that the most difficult part was "[n]ot being able to share a connection that we both so

desperately want," that "there's just no end in sight," and that "the struggle's going to last forever." T.516:7–12.

C. Additional factual context

The following statement in the initial brief is incomplete:

> Dr. Kennedy discussed all of the available treatments with Mrs. Peardon: doing nothing; another incision and drainage; another Word catheter; a surgical procedure called marsupialization; and surgical excision…. Although Mrs. Peardon claimed not to recall much of this discussion, Dr. Kennedy's medical record stated that she and Mrs. Peardon had discussed the treatment options and that Mrs. Peardon was "interested in excision, wants to discuss w husband."

Initial Br.4. While Molly's medical record does state that this discussion occurred, Dr. Kennedy admitted that she used a keystroke to auto-populate this information in the record rather than typing it out herself. *See* T.412:22–413:21.

As for the statement that "Mrs. Peardon claimed not to recall much of this discussion," she was able to recall that Dr. Kennedy "recommended the surgery" and stated that it was "the way to go" and "the definitive option." T.268:4–6. While Dr. Kennedy testified at trial that she remembered—without the use of her notes—discussing with Molly "the risks of the surgical excision," Dr. Kennedy was

impeached with her deposition testimony that she could "[n]ot specifically" recall the discussion. *See* T.406:6–18, 409:7–414:9.

The initial brief also states that Dr. Kennedy "was able to identify [Mrs. Peardon's] cyst," and that "she was able to remove *all* of it in fragments." Initial Br.5. (emphasis added). But the Peardons' expert, Dr. Jamieson, testified to the contrary, opining that Dr. Kennedy could not have "identif[ied] the entire cyst at that particular time," and that it was "impossible" for Dr. Kennedy to have excised the cyst in its entirety because the surgical field was inflamed. *See* T.570:18–20, 582:8–10, 592:1–10. Moreover, the fact that the cyst was removed in fragments—as shown by the pathology report—indicated that it was not completely removed. *See* T.590:3–591:17.

The initial brief further notes that "[a]t [doctor's] visits in November of 2015, Mrs. Peardon rated her pain at 1/10 and 2/10, and in December she rated it a 2/10 and 3/10 on different visits." Initial Br.7. However, the question on the form about the pain score did not specifically ask for the level of pain when pressure is applied. T.339:12–15. Molly testified that she would feel "knife stabbing like pain" when pressure was applied to the vaginal area. *See* T.250:20–251:3.

SUMMARY OF ARGUMENT

The initial brief does not challenge either ground—section 90.706 or section 90.403—relied on by the trial court to prohibit Defendants from asking Dr. Jamieson about the lack of literature supporting his opinion. Thus, Defendants have abandoned any challenge to the ruling. Additionally, Defendants did not contemporaneously object to Dr. Jamieson's two "unconscionable" comments, and thus any argument based on these comments was not preserved.

Defendants' challenge to the evidentiary ruling also fails because the trial court did not abuse its discretion. Under section 90.706, the trial court reasonably determined that the lack of literature was not "authoritative" for the highly fact-specific standard-of-care issue. Under section 90.403, the trial court reasonably found that the cross-examination would have misled the jury. Alternatively, any error was harmless, as the literature also did not support the defense expert's contrary opinion.

Defendants' second argument—attacking the Peardons' noneconomic damages award as excessive—largely depends on the correctness of their first argument. It fails for the same reasons that

the first argument fails. The second argument also impermissibly asks this Court to sit as a seventh juror by either rejecting or minimizing the Peardons' testimony about their inability to share sexual intimacy. That, of course, is not this Court's role.

This Court should reject both the first and second arguments, and it should affirm the final judgment.

ARGUMENT

I. Defendants have abandoned, and failed to preserve, any challenge to the trial court's ruling limiting Defendants' cross-examination of Dr. Jamieson, and regardless, that ruling was neither an abuse of discretion nor harmful.

Standard of review

Defendants concede that the standard of review is abuse of discretion. Initial Br.13; *see Moore v. State*, 701 So. 2d 545, 549 (Fla. 1997) ("Limitation of cross-examination is subject to an abuse of discretion standard."). Discretion is abused when "the judicial action is arbitrary, fanciful, or unreasonable"—in other words, when "no reasonable man would take the view adopted by the trial court." *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980). Granted, "such discretion is limited by the rules of evidence,'" and a court abuses its discretion if "its ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Black v. State*, 120 So. 3d 654, 655 (Fla. 1st DCA 2013) (internal quotations omitted) (quoting *Patrick v. State*, 104 So. 3d 1046, 1056 (Fla. 2012)). But the initial brief neither mentions a rule of evidence nor explains how the trial court erroneously viewed a rule of evidence.

Argument

The trial court's limitation on the cross-examination of Dr. Jamieson should be affirmed for four independent reasons:

(A) The initial brief abandons any challenge to the trial court's ruling, as it fails to address the two alternative reasons—sections 90.706 and 90.403—on which the trial court relied for its ruling.

(B) Defendants failed to preserve any appellate challenge to the trial court's limitation on Dr. Jamieson's cross examination insofar as that challenge is based on Dr. Jamieson's "unconscionable" comments.

(C) The trial court's ruling was not an abuse of discretion.

(D) Any error was harmless.

A. The initial brief abandons any challenge to the trial court's ruling because it does not address either of the trial court's two alternative reasons for its ruling.

The trial court's ruling limiting Dr. Jamieson's cross-examination relied on two independent grounds—sections 90.706 and 90.403. To obtain reversal, Defendants must establish that both grounds—and the trial court's reasoning supporting those grounds—were an abuse of discretion. In their brief, however, Defendants do

not mention or challenge either of these two grounds or the trial court's reasons for its ruling.

This Court's role is not to independently determine—like a trial court would—whether the cross-examination of Dr. Jamieson should have been limited. Instead, its role is to review the trial court's ruling and determine whether that ruling was an abuse of discretion—that is, whether the ruling was "arbitrary, fanciful, or unreasonable." *See Canakaris*, 382 So. 2d at 1203; *Hillsborough Cnty. Bd. of Cnty. Comm'rs v. Pub. Emp. Rel. Comm'n*, 424 So. 2d 132, 134 (Fla. 1st DCA 1982) ("[T]he function of the appellate court is to determine whether the lower tribunal committed error based on the issues and evidence before it."). Practically, this Court can perform this function only by reviewing the *reasons* given by the trial court for its ruling.

Unless this Court knows the trial court's reasons for its ruling, this Court cannot meaningfully evaluate whether that ruling was an abuse of discretion. For example, if the trial court limited the cross-examination of Dr. Jamieson because it occurred on a Wednesday, this Court would easily conclude that ruling was arbitrary, fanciful, unreasonable, and an abuse of discretion. But if the trial court limited the cross examination based on its weighing of the factors

under section 90.403, this Court's task of determining whether that ruling was an abuse of discretion would be more difficult. *Cf. Sims v. Brown*, 574 So. 2d 131, 133 (Fla. 1991) ("The weighing of relevance versus prejudice or confusion is best performed by the trial judge who is present and best able to compare the two."). The same ruling—i.e., a limitation on cross examination—may be an abuse of discretion if it is based on one reason but not an abuse of discretion if it is based on another reason.

The initial brief does not mention the trial court's two alternative reasons (sections 90.706 and 90.403), much less argue that those reasons were an abuse of discretion. Thus, Defendants have abandoned any appellate challenge to the trial court's ruling. *See Brown v. State*, 304 So. 3d 243, 267 (Fla. 2020) (affirming denial of motion to vacate conviction where the trial court's order was based on three independent grounds, and the appellant only challenged one of those grounds); *TropiFlora, LLC v. Fla. Dep't of Health*, 346 So. 3d 1271, 1276 (Fla. 1st DCA 2022) (affirming final judgment because the appellant "failed to challenge all of the independent, alternative reasons the trial court relied on for granting final judgment"); *CTCW-Berkshire Club, LLC v. CED Cap. Holdings 2000 EB, LLC*, 330 So. 3d

991, 991 (Fla. 5th DCA 2021) (Sasso, J., concurring specially) ("Appellant does not challenge [the trial court's] alternative basis in its initial brief and therefore has waived the issue."); *Transp. Eng'g, Inc. v. Cruz*, 152 So. 3d 37, 47 (Fla. 5th DCA 2014) (Lawson, J.) ("When an appellant fails to challenge properly on appeal one of the grounds on which the district court based its judgment, he is deemed to have abandoned any challenge of that ground, and it follows that the judgment is due to be affirmed.") (citation omitted).

This Court's "exclusive duty as a court of appeal is 'to determine whether the [lower tribunal] made any ruling or conducted the proceedings in a manner contrary to established principles of law to the prejudice of the appellant.'" *Doe v. Baptist Primary Care, Inc.*, 177 So. 3d 669, 673 (Fla. 1st DCA 2015) (quoting *Fla. Dep't of Corrs. v. Bradley*, 510 So. 2d 1122, 1124 (Fla. 1st DCA 1987)). Established principles of law include statutes. *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 890 (Fla. 2003).

Accordingly, where, as here, a trial court's ruling is based on a statute, the appellant must explain to this Court why the ruling is contrary to the statute. Failure to do so precludes this Court's merits review. *See City of Bartow v. Brewer*, 896 So. 2d 931, 932 (Fla. 1st

DCA 2005) (affirming a JCC's order because the employer/carrier's initial brief only argued that the worker's injury was non-work-related, without addressing the JCC's ruling that the employer/carrier's challenge to compensability was statutorily time-barred); *see also White v. White*, 627 So. 2d 1237, 1239 (Fla. 1st DCA 1993) ("It is the duty of counsel to prepare appellate briefs so as to acquaint the Court with the material facts, *the points of law involved*, and the legal arguments supporting the positions of the respective parties.") (emphasis added and citation omitted).

Here, Defendants' failure to challenge the grounds for the trial court's evidentiary ruling is similar to the defendants' failure in *Letterman v. Does*, 859 F.3d 1120 (8th Cir. 2017). There, the defendants argued a new trial was necessary based on the trial court's erroneous exclusion of relevant evidence. 859 F.3d at 1127. However, the trial court's ground for excluding the evidence was Federal Rule of Evidence 403, and the defendants "ma[d]e no attempt to counter the district court's reasons for excluding the evidence" under that rule. *Id.* The appellate court stated that "even if we agree with Defendants that the evidence is relevant, Defendants must provide a reason why the district court abused its discretion by

excluding the evidence under Rule 403." *Id.* Because they failed to do so, the appellate court had "no basis to disturb the district court's evidentiary rulings." *Id.*

The initial brief merely argues that "it is reversible error for a trial court to limit a cross-examination of an expert that is intended to challenge the basis for the expert's opinion." Initial Br.14. The initial brief fails to mention or challenge the *two alternative reasons* given by the trial court to support its discretionary ruling.

First, the initial brief does not refute the trial court's interpretation or application of section 90.706. *Cf.* T.213:15–25. Nor does the brief refute the trial court's subsidiary determination that the lack of literature was not "authoritative" under section 90.706. *Cf. id.* Granted, the initial brief cites a single case—*Duss v. Garcia*, 80 So. 3d 358 (Fla. 5th DCA 2012)—that applies section 90.706. Initial Br.22. This citation is insufficient to avoid abandonment. "[T]o obtain appellate review, alleged errors relied upon for reversal must be raised clearly, concisely, and separately as points on appeal." *Brewer*, 896 So. 2d at 932–33 (cleaned up); *see also Coolen v. State*, 696 So. 2d 738, 742 n.2 (Fla. 1997) ("Coolen's failure to fully brief and argue these points constitutes a waiver of these claims."). The

initial brief fails this standard. It never discusses *Duss*'s application of section 90.706. Instead, it cites *Duss* only for the general assertion that "there is nothing improper about questioning experts regarding the absence of literature to support their opinions." Initial Br.22.

Second, the initial brief does not refute the trial court's other ground for its ruling (section 90.403). *Cf.* T.206:9–215:2. This Court therefore must affirm. *See State v. J.V.*, 184 So. 3d 662, 662 (Fla. 1st DCA 2016) ("As the order on appeal had two grounds …, and as the State's initial brief only challenges the first ground …, we are compelled to affirm since reversal can only be premised on arguments made in the initial brief."). Granted, the initial brief quotes *Flores v. Miami-Dade County*, 787 So. 2d 955, 958 (Fla 3d DCA 2001), which briefly mentions section 90.403. Notwithstanding this citation, the initial brief does not argue that the trial court misapplied section 90.403. *See* Initial Br.20.

Merely citing caselaw that applies or mentions sections 90.706 or 90.403 does not save Defendants from abandonment. *See Ellison v. Willoughby*, 373 So. 3d 1117, 1121 (Fla. 2023). In *Ellison*, the defendant-petitioner relied on caselaw and section 768.76, Florida Statutes, to argue to the trial court that she was entitled to a setoff

of a bad-faith settlement against a damages award. The trial court denied the setoff, and the Second District affirmed. 373 So. 3d at 1119. Even though the defendant did not cite to the trial court a second statute—section 768.041(2)—in support of her setoff argument, the Second District concluded that she preserved her argument based on this statute because the caselaw she provided to the trial court applied the statute. *Id.* at 1121.

The supreme court disagreed. The argument based on section 768.041(2) was not preserved because the defendant "did not ask the trial court for a setoff under section 768.041(2)." *Id* at 1120. The supreme court was unaware of any authority "for the notion that the trial court's mere awareness of case law discussing section 768.041(2), without any accompanying argument, put that statute in play for preservation purposes." *Id.* at 1121. The supreme court noted that sections 768.041(2) and 768.76 "present[] distinct issues of interpretation," and that "[i]f [the defendant] wanted the trial court to consider a setoff under both statutes, she had the obligation to present both issues to the trial court." *Id.* Accordingly, the supreme court quashed the Second District's opinion insofar as it addressed section 768.041(2). *Id.*

While *Ellison* concerned preservation, its reasoning applies equally here in the context of abandonment. Like the two statutes in *Ellison*, sections 90.403 and 90.706 present distinct issues. The mere fact that the initial brief cites two cases applying these statutes is insufficient to place the statutes at issue in this appeal.

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In sum, because the initial brief does not mention or challenge the trial court's two alternative reasons for its evidentiary ruling—sections 90.403 and 90.706—Defendants have abandoned any challenge to that ruling.

B. Defendants' appellate challenge is unpreserved insofar as it is based on Dr. Jamieson's "unconscionable" comments.

Defendant did not contemporaneously object when Dr. Jamieson used the word "unconscionable." Nevertheless, Defendants bootstrap Dr. Jamieson's use of this word into their argument that the trial court purportedly erred by limiting Dr. Jamieson's cross-examination. Defendants ignore that the purpose of preservation is to "allow[] the lower tribunal to consider and resolve errors *when they arise*." *State v. Clark*, 373 So. 3d 1128, 1131 (Fla. 2023) (emphasis added).

Defendants' argument on appeal—that the trial court's evidentiary ruling precluded them from challenging the "unconscionable" comments, Initial Br.1, 12—was not raised by Defendants when the comments were made. Therefore, it is not preserved. *See J.D. v. State*, 349 So. 3d 540, 540 (Fla. 1st DCA 2022) ("[T]o be preserved …, an issue must be presented to the lower court *and the specific legal argument or ground to be argued on appeal or review must be part of that presentation* ….") (emphasis added) (citation omitted); *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982) ("[F]or an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.").

In response, Defendants may cite section 90.104, Florida Statutes, providing that "[i]f the court has made a definitive ruling on the record admitting or excluding evidence … a party need not renew an objection … to preserve a claim of error for appeal." After openings, the Peardons sought a ruling prohibiting Defendants from using the lack of literature to cross-examine Dr. Jamieson. T.199:4–201:1. Defendants countered that the questioning was "fair game" because Dr. Jamieson testified in his deposition that no literature supported

his opinion. T.201:3–22. However, Defendants did not argue below that this questioning was necessary to impeach his opinion that Dr. Kennedy's conduct was "unconscionable."

Indeed, Dr. Jamieson made his "unconscionable" comments *after* the trial court ruled that he could not be cross examined about the lack of literature. *See* T.562:20–23, 569:15–19. Perhaps Defendants could have argued—though they did not—that Dr. Jamieson's post-ruling "unconscionable" comments opened the door to being cross examined on the lack of literature. But it was incumbent on Defendants to ask the trial court to revisit the issue, and they did not do so. *See Powell v. State*, 79 So. 3d 921, 923 (Fla. 5th DCA 2021) (noting that "if the evidence introduced at trial materially differs" from representations in a motion in limine, it is "incumbent upon the objecting party to revisit the issue"). When an evidentiary ruling is made "based upon representations as to how the evidence will unfold, the judge's ruling is 'definitive' only as to the facts as represented." *Id.* Since Defendants did not ask the trial court to revisit its evidentiary ruling in light of Dr. Jamieson's post-ruling "unconscionable" comments, their argument is not preserved.

What's more, Defendants had other options to remedy the purported prejudice from the "unconscionable" comments. They could have (1) objected to the comments, (2) moved to strike the comments, (3) asked for a curative instruction, and (4) moved for a mistrial. But Defendants did none of these things; rather, they waited until their motion for new trial to address the two comments. *See* R.2730–43. This was too late. *See Perry v. State*, 718 So. 2d 1258, 1260 (Fla. 1st DCA 1998) ("Comments not properly preserved by contemporaneous objection and accompanying motion for mistrial are procedurally barred unless they constitute fundamental error.").

In sum, Defendants failed to preserve any appellate challenge to the trial court's ruling to limit the cross examination of Dr. Jamieson insofar as that challenge is based on Dr. Jamieson's "unconscionable" comments.

C. On the merits, the trial court did not abuse its discretion.

If this Court considers the merits (which it should not do, *supra*, § I.A–B), it should conclude that the trial court did not abuse its discretion as to either of its stated rationales for limiting the cross examination of Dr. Jamieson.

1. The trial court did not abuse its discretion by limiting Defendants' cross-examination based on section 90.706.

Section 90.706 provides that literature may be used to cross-examine an expert so long as the literature is deemed by the expert or the trial court to be "authoritative and relevant to the subject matter." The trial court applied this rule to the absence of literature on the issue of whether excising a Bartholin's cyst two days after an I&D procedure violates the standard of care. The court agreed with the Peardons that the lack of on-point literature was not authoritative, and thus disallowed the proposed cross-examination. T.213:20–24.

a. The trial court properly applied section 90.706 to the lack of on-point literature.

The trial court's application of section 90.706 to the absence of on-point literature was consistent with *Phillip Morris, Inc. v. Janoff*, 901 So. 2d 141 (Fla. 3d DCA 2004). The Peardons cited *Janoff* to the trial court, but Defendants do not mention it in their brief. *See* T.205:24–206:8.

In *Janoff*, the defense's medical expert opined there was no link between environmental tobacco smoke (ETS) and chronic sinusitis.

901 So. 2d at 143. Defense counsel asked the expert whether certain textbooks and journals linked ETS to chronic sinusitis. *Id.* The expert testified to an absence of any such conclusion in the textbooks and journals. *Id.* The trial court granted a new trial based on improper bolstering in violation of section 90.706. *Id.* at 142. The Third District affirmed, finding the questioning impermissible because its purpose "was solely to bolster the defense expert's opinion by showing that his opinion must be correct because it was supported by the lack of articles stating otherwise." *Id.* at 145.

It does not matter that this case concerns cross-examination, whereas *Janoff* concerned direct examination. The takeaway from *Janoff* is that the requirements of section 90.706 apply to the use of a *lack* of literature in questioning an expert—i.e., what the literature does *not* say is treated the same as what the literature *does* say.

b. The trial court did not abuse its discretion by determining that the lack of on-point literature was not authoritative.

"Trial courts have wide latitude to impose reasonable limits on the scope of cross-examination." *Jones v. State*, 580 So. 2d 143, 145 (Fla. 1991). The trial court here did not go beyond this wide latitude.

The trial court reasoned that the issue on which Defendants sought to cross-examine Dr. Jamieson—whether Dr. Kennedy breached the standard of care by excising the Bartholin's cyst two days after performing an I&D procedure—was too narrow and fact-specific for the lack of on-point literature to be authoritative under section 90.706. *See* T.206:16–207:15. The court indicated that its assessment would have been different if the issue was causation, rather than the standard of care. *See* T.209:18–20.

The trial court illustrated its reasoning with a hypothetical concerning a pitcher struck in the head by a baseball hit by a batter:

> You have to … rush him to the hospital. And instead of doing tests, the doctor just rushes in and does brain surgery. … I don't know that you'll have any medical literature that says you shouldn't do brain surgery like right away, that you need to take these certain steps before you do that. … [To] say … there is no literature out there to support your opinion …, there may not be, but that is because medicine is always changing.

T.207:20–208:5.

The initial brief notes that the Peardons asked Dr. Kennedy and her medical expert whether they had ever drained a Bartholin's cyst a couple days before removing it. *See* Initial Br.25. But asking a witness about literature is different from asking a witness about his

or her own experience. The former is governed by section 90.706; the latter is not.

The trial court carefully considered the issue and properly exercised its discretion under section 90.706 to find that the lack of literature was not authoritative. The court's ruling was not arbitrary, fanciful, or unreasonable, and thus was not an abuse of discretion.

2. The trial court did not abuse its discretion by limiting Defendants' cross-examination based on section 90.403.

The trial court's limitation on cross-examination also was based on section 90.403. *See supra* at 3–4. "The weighing of probativeness versus unfair prejudice [under section 90.403] is best addressed by the trial court ... and [this Court] will not overturn that court's decision absent a clear abuse of discretion." *Floyd v. State*, 913 So. 2d 564, 575 (Fla. 2005); *see also Wade v. State*, 265 So. 3d 677, 680 (Fla. 1st DCA 2019) ("We afford the [trial] court's rule 403 balancing substantial deference and review only for an abuse of discretion.").

The trial court's role in a 90.403 analysis is to "weigh the importance of the evidence to the specific purpose" for which it is introduced "against the possibility that the evidence will unfairly prejudice the party it is offered against, [or] confuse or mislead the

jury." *Poole v. State*, 151 So. 3d 402, 414 (Fla. 2014). Here, the trial court determined that, given the highly fact-specific nature of the standard-of-care issue, there was a risk that the jury would place undue weight on the fact that Dr. Jamieson's opinion was not supported by any medical literature. *See* T.207:6–15. This is a valid ground for exclusion under section 90.403. *See BDO Seidman, LLP v. Banco Espirito Santo Intern.*, 38 So. 3d 874, 880 (Fla. 3d DCA 2010) (holding that the risk that the jury will give "undue weight" to evidence is grounds for exclusion under section 90.403); *Byrd v. BT Foods, Inc.*, 26 So. 3d 600, 606–07 (Fla. 4th DCA 2009) (same).

As a matter of common sense, if a layperson hears that an expert's opinion is not supported by any literature, the layperson is likely to give less weight to the expert's opinion. But where—as here—the expert's opinion concerns the proper course of action under a unique and specific set of factual circumstances, it would be unfair to attack the opinion on the basis that it is not supported by any literature.

The initial brief does not refute the trial court's determination that the proposed cross-examination would have misled the jury or unduly prejudiced the Peardons. Instead, the initial brief focuses on

the prejudice to *Defendants*. *See* Initial Br.18–22. This argument misses the mark because, under section 90.403, probative value must be weighed against "the unfair prejudice to *the party opposing admission*." *Childers v. State*, 936 So. 2d 585, 594 (Fla. 1st DCA 2006) (emphasis added). Defendants have not shown that the trial court's weighing of the 90.403 factors was arbitrary, fanciful, or unreasonable.

3. The initial brief's cases are distinguishable.

The initial brief cites several cases to argue that the trial court's limitation of cross-examination was an abuse of discretion. *See* Initial Br.18–22. None of these cases is availing.

a. *Stradtman v. State*, 334 So. 2d 100 (Fla. 3d DCA 1976)

In *Stradtman*, *see* Initial Br.19, the defendant sought to cross-examine the State's key witness—the victim—on her pending civil suit against the defendant. 334 So. 2d at 101. The trial court prohibited this cross-examination as "irrelevant, immaterial, and collateral," but the Third District reversed, finding that the jury was prevented from hearing "relevant and important facts bearing on the

crucial testimony" of the State's key witness. *Stradtman*, 334 So. 2d at 101.

Unlike in the instant case, the proposed cross-examination in *Stradtman* was highly probative of the credibility of the witness, as it would have demonstrated a financial motive for her to fabricate her testimony. But as discussed *supra* in sections I.C.1. and I.C.2., the significance of the lack of literature to the highly fact-specific standard-of-care issue was minimal here.

b. *Clark v. State*, 567 So. 2d 1070 (Fla. 3d DCA 1990)

Clark is similar to *Stradtman*. In *Clark*, *see* Initial Br.19, the defendant sought to cross-examine his wife—the State's key witness—on an incident she claimed to have occurred in a sworn affidavit. 567 So. 2d at 1071. According to the defendant, his wife fabricated the incident. *Id.* The trial court found this was a collateral matter and prohibited the cross-examination, but the Third District reversed, determining that "cross-examination of [the wife] was necessary to impeach her credibility" regarding the alleged incident. *Id.* The proposed cross-examination in *Clark*—which sought to catch

a key fact witness in a lie—is a far cry from the cross-examination at issue here. Defendants do not contend that Dr. Jamieson was lying.

c. *Arrascue v. State*, 42 So. 3d 927 (Fla. 5th DCA 2010)

In *Arrascue*, *see* Initial Br.19, the Fifth District found that the defendant failed to preserve his argument that the trial court improperly limited his cross-examination of the victim, since he failed to proffer the desired cross-examination. 42 So. 3d at 929. Since *Arrascue* did not adjudicate this issue on the merits—let alone discuss the content of the cross-examination—it is of no use to this Court. *See Warren v. DeSantis*, 365 So. 3d 1137, 1144 n.5 (Fla. 2023) (Francis, J., concurring) (noting that "[a] decision's authority as precedent is limited to the points of law raised by the record, considered by the court, and determined by the outcome.") (quoting Bryan A. Garner et al., *The Law of Judicial Precedent* 84 (2016)).

d. *Dempsey v. Shell Oil Co.*, 589 So. 2d 373 (Fla. 4th DCA 1991)

In *Dempsey*, *see* Initial Br.20–21, the defendant driver struck the plaintiff pedestrian on a dark road. 589 So. 2d at 374. The defense's accident reconstructionist opined that the vehicle's size and headlights meant that the plaintiff pedestrian had a better chance to

avoid the accident than the defendant driver. *Id.* at 378. The plaintiff sought to cross-examine this expert on the range of visibility afforded by the headlights—a factor the expert had omitted from his analysis. *Id.* The trial court prevented this cross-examination, but the Fourth District reversed, noting that "[v]isibility … was a critical issue" in determining causation. *Id.*

Thus, in *Dempsey*, the plaintiff was precluded from cross-examining a causation expert regarding a key variable that he did not account for in his model. This questioning would have assisted the jury in assessing the model's accuracy. But here—given the absence of literature going either way, *see infra* at 37–38—asking Dr. Jamieson whether his standard-of-care opinion was supported by any literature would not have assisted the jury.

e. *Young-Chin v. City of Homestead*, 597 So. 2d 879 (Fla. 3d DCA 1992)

In *Young-Chin*, *see* Initial Br.21, the defense expert opined that it was impossible for the decedent to have aspirated while in a head-down position. 597 So. 2d at 881. However, the trial court prevented the plaintiff from cross-examining the expert on this opinion *at all*.

Id. The Third District found this was reversible error because there was evidence that the decedent had in fact aspirated. *Id.*

Here, unlike in *Young-Chin*, the trial court did not completely prohibit the defense from cross-examining Dr. Jamieson on his opinion that Dr. Kennedy was negligent by excising the Bartholin's cyst two days after performing the I&D procedure. Rather, the trial court only prohibited the defense from asking Dr. Jamieson a *single question*: whether that opinion was supported by any literature. *See* T.212:20–22. In *Young-Chin*, given the evidence that the patient aspirated, it was crucial for the plaintiff to be able to explore the defense expert's opinion that aspiration was impossible. *See* 597 So. 2d at 881.

f. *Poland v. Zaccheo*, 82 So. 3d 133 (Fla. 4th DCA 2012)

In *Poland*, *see* Initial Br. 21–22, the defense expert opined that the plaintiff's surgery after an auto accident was unrelated to the accident. 82 So. 3d at 134–35. However, analogous to the trial court in *Young-Chin*, the trial court *completely* prohibited the plaintiff from cross-examining the defense expert on this opinion. Id. at 135. Thus, *Poland* is distinguishable for the same reason as *Young-Chin*.

g. *Duss v. Garcia*, 80 So. 3d 358 (Fla. 5th DCA 2012)

Defendants rely on *Duss* to argue "there is nothing improper about questioning experts regarding the absence of literature to support their opinions." Initial Br.22. But the Peardons' position is *not* that questioning experts regarding the absence of literature is *always* improper. Unlike the instant case, *Duss* did not involve a determination of whether a lack of literature is "authoritative" under section 90.706, nor did it involve a weighing of prejudice against probative value under section 90.403. *Duss* therefore has nothing to say about either of the trial court's statutory grounds for limiting cross-examination.

What's more, the *Duss* court merely affirmed the trial court's ruling as not being an abuse of discretion. 80 So. 3d at 363. This does *not* mean that the trial court would have abused its discretion by ruling differently. *See Macomber v. State*, 254 So. 3d 1098, 1107 (Fla. 1st DCA 2018) (Winokur, J., concurring in part) ("[A] ruling that a trial court *may* exercise its discretion by admitting evidence does not mean that a court *must* admit this evidence, or that excluding the evidence constitutes an abuse of discretion.") (emphasis in

original); *cf. Silverstein v. Pub. Med. Assistance Trust Fund*, 911 So. 2d 831, 831 (Fla. 1st DCA 2005) ("While we may disagree with the trial court's decision, we are unable to say that the court abused its discretion in so ruling.").

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In sum, the trial court's limitation of Dr. Jamieson's cross-examination was not an abuse of discretion.

D. Any error was harmless.

Under the harmless-error test, "the beneficiary of the error must prove that there is no reasonable possibility that the error contributed to the verdict." *Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251, 1256 (Fla. 2014). No reasonable possibility exists that the limitation on the cross examination of Dr. Jamieson contributed to the verdict. The trial court found—and Defendants do not contest—that there is no literature going either way on the issue of whether excising a Bartholin's cyst two days after an I&D procedure is negligent. T.211:16–17. Thus, if Defendants had asked Dr. Jamieson whether any literature supported his opinion, the Peardons could have asked the defense expert the same question and would have received the same answer.

1. This Court must accept the trial court's finding that no literature supports the standard-of-care opinion of either side's expert.

The trial court pondered that if it were to allow Defendants to question the Peardons' expert on the lack of on-point literature, then the Peardons could pose the same question to the defense expert (Dr. Philpott). T.210:17–211:1. The Peardons pointed out that the defense expert would give the same answer, i.e., that there is no literature to support his opinion that Dr. Kennedy complied with the standard of care. T.211:7–9. The trial court then found that there was no literature "that we know of" going either way on the standard-of-care issue. T.211:16–17.

Below, Defendants never contested this finding by the trial court. Nor do they do so on appeal. Thus, Defendants failed to preserve, and have abandoned, any challenge to the trial court's finding. *See Harrell v. State*, 826 So. 2d 1059, 1059 (Fla. 1st DCA 2002) ("To be preserved, an issue, legal argument or objection must have been raised before, and ruled on by, the trial court.") (cleaned up); *Rosier v. State*, 276 So. 3d 403, 406 (Fla. 1st DCA 2019) ("[I]ssues not raised in the initial brief are considered waived or abandoned.").

2. No reasonable possibility exists that the trial court's limitation on Dr. Jamieson's cross-examination contributed to the verdict.

Neither side's expert was cross-examined based on the lack of literature. But if the trial court allowed Defendants to ask Dr. Jamieson about the lack of literature supporting his opinion, then the Peardons would have had the opportunity to ask Dr. Philpott the same question. Given the lack of literature going either way, the only reasonable expectation is that both experts would have given the same answer. There is no good reason why the jury's verdict in this scenario would be any different from the verdict the jury returned.

If anything, the advantage on this issue belonged to Defendants. During Defendants' opening, the jury heard Dr. Jamieson's purported deposition testimony that there was no literature to support his opinion. *See* T.177:20–25. However, the jury did not hear anything from the Peardons about the lack of literature supporting the defense expert's contrary opinion.

Moreover, the initial brief overstates the frequency with which Dr. Jamieson used the word "unconscionable" to describe Dr. Kennedy's conduct. To reiterate, he used that word only *once* in reference to the issue on which Defendants argue they were unfairly

precluded from cross-examining him. *See supra* at 5. Thus, there is no record support for the argument that Defendants were "manifestly prejudice[ed]" due to their "inability to fully challenge" Dr. Jamieson's "repeated" use of the word "unconscionable." *Cf.* Initial Br.12.

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In sum, any error in limiting the cross-examination of Dr. Jamieson was harmless.

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In conclusion on the first issue, this Court should affirm for four independent reasons: (A) abandonment; (B) lack of preservation; (C) no abuse of discretion; and (D) harmless error.

II. The jury's verdict is not excessive.

Standard of review and standards governing the trial court's decision

As Defendants concede, *see* Initial Br.26–27, a trial court's determination of whether a damages award is excessive is reviewed for an abuse of discretion. *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1263 (Fla. 2006). "Two factors unite to favor a very restricted review of an order denying a motion for new trial on ground of excessive verdict." *Odom v. R.J. Reynolds Tobacco Co.*, 254 So. 3d 268, 277 (Fla.

2018). First, the appellate court must defer to the trial judge, "who has had the opportunity to observe the witnesses and to consider the evidence in the context of a living trial rather than upon a cold record." *Id.* (emphasis altered). Second, the trial court must defer "to the jury's determination of such matters of fact as the weight of the evidence and the quantum of damages." *Id.*; *see also Dyes v. Spick*, 606 So. 2d 700, 702 (Fla. 1st DCA 2012) ("The trial court does not sit as a seventh juror. Neither does the reviewing court reserve the prerogative to overturn a damages verdict with which it merely disagrees.").

As compared to economic damages, pain and suffering damages are "even further removed from exact calculation and certain measurement," and thus rest "within the enlightened conscience of the jury." *Braddock v. Seaboard A.L.R. Co.*, 80 So. 2d 662, 668 (Fla. 1955). A trial court may hold a jury's damages award excessive only where it "shock[s] the judicial conscience"—i.e., where the award is "so excessive … so as at least to imply an inference that the verdict evinces or carries an implication of passion or prejudice, corruption, partiality, improper influences, or the like." *Odom*, 254 So. 3d at 277 (citations omitted). Further, "[t]he fact that the jury exceeded

requested damages does not render the award itself unreasonable or excessive." *Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294, 308 (Fla. 2017). And where, as here, "the defendant does not assist the jury in establishing a range for a verdict," it is "difficult for [the defendant] to challenge an award as excessive after the fact." *Odom*, 254 So. 3d at 280.

Argument

A. Defendants' arguments based on Dr. Jamieson's "unconscionable" comments fail for the same reasons argued in section I of this brief.

Defendants' primary argument that the jury's award was excessive is based on "Dr. Kennedy's inability to challenge Dr. Jamieson's testimony that her treatment of Molly Peardon was 'unconscionable.'" *See* Initial Br. 26, 30. But as discussed *supra* in section I, Defendants have abandoned and not preserved any such challenge; they have not shown an abuse of discretion; and any error was harmless. Defendants' other attacks—specific to Molly and Bobby individually—also fail, as explained next.

B. The trial court did not abuse its discretion in finding that the $3,000,000 noneconomic damages award to Molly Peardon was not excessive.

Defendants acknowledge that Molly "had a poor surgical outcome" and that, if her injuries were caused by negligence, she would be entitled to past noneconomic damages for her time spent receiving medical treatment. Initial Br.28. Nevertheless, Defendants contend the jury's award of $2,000,000 for Molly's future noneconomic damages is disproportionate to the $1,000,000 award for her past noneconomic damages because "all of Mrs. Peardon's medical treatment is confined to the past." *Id.* Defendants also minimize Molly's injuries with unsupported factual assertions, including the assertion that "she can continue to fully enjoy having a relationship with her husband." *Id.* at 29. Finally, Defendants rely on three wrongful-death cases to argue that Molly's noneconomic damages award is excessive. *Id.* at 30. None of these arguments has merit.

1. Defendants mischaracterize the nature and extent of Ms. Peardon's noneconomic damages.

Defendants ignore that the evidence of Molly's past noneconomic damages was not solely related to her undergoing

medical treatment for her injuries. Molly testified that in the fall of 2015—i.e., a few months after Dr. Kennedy performed the surgery—she "was still having a lot of pain … and then the wound was also not healing." T.250:18–22. She described this pain as "very sharp like [a] knife stabbing." T.250:25–251:1. She not only felt this pain while riding a bicycle, but also while "sitting" and "riding in the car." T.251:1–3.

This knife-like pain has persisted since the surgery. T.257:1–6. As set forth *supra* at 6–8, the Peardons gave testimony that after the surgery, they only had sex to conceive children. Now that they have children, they no longer have sex; i.e., they have lost "the ultimate way to show each other that you love them." T.263:2–3. Defendants' assertion that Molly "can continue to fully enjoy having a relationship with her husband" is belied by the record. Initial Br.29.

Defendants argue that Molly's future noneconomic damages award of $2 million is disproportionate to her past noneconomic damages award of $1 million. *See* Initial Br.28. However, her past noneconomic damages covered a period of just over eight years, while her life expectancy at the time of trial was 49.9 years. *See* R.1327. One million dollars over eight years equates to $125,000 per year,

while $2 million over 49.9 years equates to $40,080.16 per year. Given the evidence that Molly's injuries are permanent, the award for future noneconomic damages was not disproportionately high. The math does not support Defendants' position.

2. Defendants' cited cases are distinguishable.

Defendants cite no authority for the argument that the $3-million noneconomic damages award must be supported by evidence of "brain damage;" "blindness or paralysis;" "loss of a limb, organ, or functionality;" and "future surgery or medical treatment," among other things. Initial Br.29. The cases cited by Defendants are far afield from the facts of this case.

a. *Glabman v. De La Cruz*, 954 So. 2d 60 (Fla. 3d DCA 2007)

In *Glabman*, *see* Initial Br. 30, the Third District reversed an $8-million damages award to the parents of a deceased child. 954 So. 2d at 61. The father there gave emotional testimony that caused him, the court personnel, and the trial judge to cry. *Id.* at 62–63. Nothing of the sort occurred here. The unique nature of Molly's damages—including permanent physical pain—is different from the nature of the parents' damages in *Glabman*, a wrongful-death case. It is of no

consequence that Dr. Jamieson used the word "unconscionable" to describe Dr. Kennedy's treatment. *See* Initial Br.26, 30. Dr. Jamieson is a medical expert, not a party-witness—like the father in *Glabman*—giving emotional testimony about dealing with the loss of a child.

In any event, Dr. Jamieson's unobjected-to testimony was about Dr. Kennedy's breach of the standard of care, not the Peardons' damages. *See supra* at 4–5. And, as argued *supra* in section I.B., Defendants failed to preserve any appellate challenge based on Dr. Jamieson's "unconscionable" comments.

b. *R.J. Reynolds Tobacco Co. v. Webb*, 93 So. 3d 331 (Fla. 1st DCA 2012)

Webb, *see* Initial Br.30, is another wrongful-death case. The jury awarded the sole plaintiff—a 54-year-old married woman with adult children and grandchildren—$7.2 million in compensatory damages for the loss of her father, a smoker who died from lung cancer at age 78. 93 So. 3d at 337–39. Key to this Court's reversal of the damages award was the jury's apparent "emotional response to testimony regarding difficulties Ms. Webb and her father faced and overcame before cancer befell him, rather than evidence of his illness, subsequent death, and the noneconomic consequences of the death

itself." *Id.* at 339. But here, the jury heard no testimony about the Peardons' pre-injury difficulties, and the Peardons are much younger than both the plaintiff and the decedent in *Webb*.

c. *Gresham v. Courson*, 177 So. 2d 33 (Fla. 1st DA 1965)

In the nearly 60-year-old *Gresham* case, *see* Initial Br.30, the jury awarded $100,000 in damages to the parents of a child who died at the age of eleven months. *Gresham*, 177 So. 2d at 34. In a 2-1 decision, this Court reversed, determining that $50,000 was the maximum amount warranted. *Id.* at 40.

Since *Gresham* was a wrongful death case, there was no physical injury to either parent, let alone a permanent physical injury. Moreover, the parents subsequently adopted a new baby, leading the mother's condition to "improv[e] almost immediately" to the point where "she appeared to have returned to her normal self." *Id.* at 38. Unlike here, there was also no evidence that either parent "required any medication or medical treatment beyond the time of the funeral." *Id. Gresham*'s facts are not analogous to the facts here.

3. Damages awards in analogous cases support Molly Peardon's noneconomic-damages award.

No analogous Florida case supports Defendants' argument that the damages award here was excessive. However, cases from sister courts—including a federal court applying Florida law—support the trial court's decision to deny a new trial on damages.

a. *Eghnayem v. Boston Sci. Corp.*, No. 1:14–cv–024061, 2016 WL 4051311 (S.D. Fla. Mar. 17, 2016), *affirmed*, 873 F.3d 1304 (11th Cir. 2017)

In *Eghnayem*, four female plaintiffs each received $6.5 million in noneconomic damages for injuries caused by the defendant's vaginal-mesh implants. 2016 WL 4051311 at *1, *15. Each plaintiff suffered chronic pain in the pelvic area, and sex was painful for three of them. *Id.* at *1–2. The Southern District—"keeping in mind Florida's deference towards the jury"—rejected the argument that the verdicts were excessive, citing evidence that the plaintiffs' injuries "could be permanent." *Id.* at *16. The defendant appealed unsuccessfully on multiple grounds, but tellingly did not raise the ground that the verdicts were excessive. *See Eghnayem v. Boston Sci. Corp.*, 873 F.3d 1304 (11th Cir. 2017).

b. *Kaiser v. Johnson & Johnson*, 947 F.3d 996 (7th Cir. 2020)

In *Kaiser*, another vaginal-mesh case, a 60-year-old plaintiff suffered "permanent pelvic pain, bladder spasms, and pain during intercourse." 947 F.3d at 1019. The jury awarded her $10 million in noneconomic damages, and the Seventh Circuit held this was not an excessive award. *Id.* at 1019.

c. *Burchell v. Faculty Physicians & Surgeons of Loma Linda. Univ. Sch. of Med.*, 54 Cal.App.5th 515 (2020)

In *Burchell*, a male plaintiff was awarded $9.25-million in noneconomic damages because an unnecessary surgery resulted in permanent damage to his penis, rendering sex "painful, not pleasurable". 54 Cal.App.5th at 521, 526. The California appellate court held this award was not excessive. *Id.* at 527–28.

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The noneconomic damages award in each of these cases was more than double Molly's award. Molly is significantly younger than the plaintiffs in *Kaiser* and *Burchell*. Defendants have not shown any good reason for this Court to take a different approach from the courts in *Eghnayem*, *Kaiser*, and *Burchell*.

C. The trial court did not abuse its discretion in finding that the jury's $1.5-million noneconomic damages award to Bobby Peardon is not excessive.

In attacking the jury's noneconomic-damages award to Bobby Peardon, Defendants do not cite any analogous cases where consortium damages were held to be excessive. Instead, Defendants' make the unsupported assertion that "[t]he Peardons are not otherwise prevented from being intimate, having a relationship, or living a normal life," *see* Initial Br.31, and they ask this Court to sit as a seventh juror by deeming the Peardons' uncontradicted testimony "inexplicable." *See id.* at 32.

The former argument is belied by the Peardons' testimony, while the latter argument is unsupported and also improper, given this Court's lack of an "opportunity to observe the witnesses and to consider the evidence in the context of a living trial rather than upon a cold record." *Odom*, 254 So. 3d at 277 (emphasis altered and citation omitted). As to Defendants' argument that Bobby's award is excessive "[f]or the same reasons" as Molly's, *see* Initial Br.31, the Peardons incorporate by reference the arguments of section II.A. of this brief.

1. Defendants ignore testimony from the Peardons.

The Peardons gave extensive testimony regarding the harm that Molly's surgical injury has caused to their marriage. *See supra* at 6–9. Defendants contend this testimony is "inexplicable," *see* Initial Br.32, but they fail to point to any contrary record evidence. Therefore, Defendants fail to meet their burden of showing that Bobby's damages award is "unsupported by the evidence" or "influenced by passion or prejudice." *Bould v. Touchette*, 349 So. 2d 1181, 1184 (Fla. 1977).

2. Defendants' argument is not supported by the caselaw.

Defendants' reliance on *Peterson v. Sun State International Trucks, LLC*, 56 So. 3d 840 (Fla. 2d DCA 2011), *see* Initial Br.31–32, is misplaced.[3] In that case, the jury awarded damages to a wife for permanent injuries sustained in a car crash, while it awarded zero damages to her husband for loss of consortium. *Peterson*, 56 So. 3d at 841. Based on the couple's "substantial unrebutted testimony concerning the adverse effect that [the wife's] injuries had on their

[3] Defendants also cite *Webb*, 93 So. 3d 331, *see* Initial Br.33, but that case is distinguishable for the reasons discussed *supra* in section II.B.2.b at 46–47.

marital life," the Second District held that the husband was "entitled to an award of *at least* nominal damages," and remanded for a new trial on his damages. *Id.* (emphasis added).

Defendants apparently read *Peterson* as holding that damages for loss of sexual relations are only a minor component of consortium damages, in contrast to "those types of injuries that catastrophically interfere with the marriage." *See* Initial Br.31–32 (quoting *Peterson*, 56 So. 3d at 842, for the proposition that consortium "means much more than mere sexual relation"). But Defendants omit key context from *Peterson*.

In *Peterson*, the defendants' only argument in closing as to the husband's consortium claim was the fact that at trial, the wife attributed the decrease in the couple's sexual activity to the accident, while in her deposition, she denied any such connection. *Peterson*, 56 So. 3d at 843. In reversing the jury's zero-damages award to the husband, the Second District observed that "the interests involved in a claim for loss of consortium involve far more than sexual relations," and pointed to other evidence—not of a sexual nature—supporting the husband's consortium claim.

Defendants misread *Peterson* as downplaying the importance of sexual relations to consortium. But *Peterson* does no such thing; it simply holds that sexual relations are not the *only* component of consortium. Moreover, *Peterson* did not reverse an excessive noneconomic damages award; it reversed a zero-damages award and gave the jury an opportunity to decide the value of the husband's loss of consortium—which is exactly what the jury did here. In sum, *Peterson* provides no support for Defendants' argument that Bobby's consortium damages are excessive.

While the Peardons have not found any analogous Florida cases with respect to Bobby's damages, *Eghnayem*, *Kaiser*, and *Burchell* remain useful reference points because the plaintiffs in each case suffered a loss of sexual intimacy. *See supra* § II.B.3. at 48–49. Molly's inability to have pleasurable sex equally affects her husband. The difference is that, on top of this loss, she also suffered permanent physical injuries and underwent extensive medical treatment. It therefore makes sense that Bobby's award is half the amount of Molly's. *Cf. Doe v. Raezer*, 664 A.2d 102 (Pa. Super. Ct. 1995), *superseded by rule on other grounds*, *Vogelsberger v. Magee-Womens Hosp. of UPMC Health Sys.*, 903 A.2d 540 (Pa. Super. Ct. 2006)

(affirming $750,000 in consortium damages to wife of patient who was awarded $1.5-million in compensatory damages for permanent penile injury).

*****

The trial court did not abuse its discretion by refusing to set aside the $3-million noneconomic damages award to Molly Peardon and the $1.5-million noneconomic damages award to Bobby Peardon.

CONCLUSION

This Court should affirm the final judgment.

CREED & GOWDY, P.A.

/s/*Nicholas P. McNamara*

Nicholas P. McNamara
Florida Bar No.1026043
nmcnamara@appellate-firm.com

/s/*Bryan S. Gowdy*

Bryan S. Gowdy
Florida Bar No. 176631
bgowdy@appellate-firm.com
filings@appellate-firm.com
865 May Street
Jacksonville, Florida 32204
Attorneys for Appellees

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing document complies with the word count limitation of Rule 9.210, Florida Rules of Appellate Procedure, in that it contains 10,539 words (including words in headings, footnotes, and quotations), according to the word-processing system used to prepare this document. This document also complies with the line spacing, type size, and typeface requirements of Rule 9.045, Florida Rules of Appellate Procedure.

/s/ Nicholas P. McNamara
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing notice was filed with the Clerk of Court on November 7, 2024, via the Florida Courts E-Filing Portal, which will serve a notice of electronic filing to all counsel of record:

Dinah S. Stein
Lindsey Hicks
HICKS, PORTER, EBENFELD AND STEIN, P.A.
5301 Blue Lagoon,
Suite 900
Miami, FL 33126
dstein@mhickslaw.com
lhicks@mhickslaw.com
eclerk@mhickslaw.com
Counsel for Defendants/Appellants

Michael W. Kehoe
QUINTAIROS, PRIETO, WOOD & BOYER, P.A.,
114 E. Gregory St.
2nd Floor
Pensacola, FL 32502
Michael.kehoe@qpwblaw.com
marcela.molina@qpwblaw.com
blairluchte@qpwblaw.com
Trial Counsel for Defendants

Scott E. Barnes
Austin R. Ward
WARD & BARNES, P.A.
222 W. Cervantes St.
Pensacola, FL 32502
sbarnes@wardbarnes.com

receptionist@wardbarnes.com
Trial Counsel for Plaintiff

/s/ Nicholas P. McNamara
Attorney