

IN THE SUPREME COURT
STATE OF FLORIDA

Case No. SC06-____
L.T. Case No. 1D05-5643

THE DOCTORS COMPANY

Petitioner/Appellant,

v.

STATE OF FLORIDA, DEPARTMENT OF INSURANCE, ETC.

Respondent/Appellee

BRIEF ON JURISDICTION OF THE DOCTORS COMPANY

On Discretionary Review from a Decision of the
First District Court of Appeal

Barry Richard
Fla. Bar No. 010559
M. Hope Keating
Fla. Bar No. 0981915
Greenberg Traurig, P.A.
101 East College Avenue
Tallahassee, FL 32301
(850) 222-6891

Arthur J. England, Jr.
Fla. Bar. No. 022730
Edward G. Guedes
Fla. Bar No. 768103
Greenberg Traurig, P.A.
1221 Brickell Avenue
Miami, FL 33131
(305) 579-0500

William R. Clayton
Fla. Bar No. 485977
Greenberg Traurig, P.A.
401 East Las Olas Blvd.
Suite 2000
Fort Lauderdale, FL 33301
(954) 765-0500

Counsel for The Doctors Company

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS	ii
INTRODUCTION.....	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. The <i>TDC</i> decision conflicts with decisions holding that trial courts may not exclude non- cumulative rebuttal testimony which goes to the heart of a defense	5
II. The <i>TDC</i> decision conflicts with <i>Armadillo</i> and its progeny as regards the treatment of testimonial deficiencies as a matter of weight, not admissibility	6
III. The <i>TDC</i> decision conflicts with the legal principle that witness exclusions are improper when a less extreme remedy is available	8
CONCLUSION	9
CERTIFICATE OF SERVICE.....	11
CERTIFICATE OF COMPLIANCE.....	11

TABLE OF CITATIONS

Cases	<u>Page</u>
<i>Dos Santos v. Carlson</i> 806 So. 2d 539 (Fla. 3d DCA 2002)	1, 4, 6
<i>Florida Dept. of Trans. v. Armadillo Partners</i> 849 So. 2d 279 (Fla. 2003).....	1, 4, 6, 7
<i>Griefer v. DiPietro</i> 708 So. 2d 666 (Fla. 4 th DCA 1998), <i>review dismissed</i> , 732 So. 2d 323 (Fla. 1999)	1, 3, 4, 5, 6
<i>Klose v. Coastal Emergency Servs. of Fort Lauderdale, Inc.</i> 673 So. 2d 81 (Fla. 4 th DCA 1996), <i>review denied</i> , 684 So. 2d 1352 (Fla. 1996).....	8
<i>Lombard v. Executive Elevator Serv., Inc.</i> 545 So. 2d 453 (Fla. 3d DCA 1989)	7
<i>O'Rourke v. State</i> 645 So. 2d 569 (Fla. 5 th DCA 1994), <i>approved</i> , 661 So. 2d 800 (Fla. 1995).....	8
<i>Pasqual v. Dozier</i> 771 So. 2d 552 (Fla. 3d DCA 2000)	1, 6
<i>Smith v. State</i> 372 So. 2d 86 (Fla. 1979).....	1, 8, 9
<i>The Doctors Co. v. State Dept. of Ins.</i> 206 WL 2612692 (Fla. 1 st DCA Sept. 13, 2006).....	1
<i>Utica Mut. Ins. Co.</i> 639 So. 2d 41 (Fla. 5 th DCA 1994), <i>review dismissed</i> , 649 So. 2d 234 (Fla. 1994).....	8
<i>White v. Westlund</i> 624 So. 2d 1148 (Fla. 4 th DCA 1993), <i>review dismissed</i> , 640 So. 2d 1109 (Fla. 1994).....	7

TABLE OF CITATIONS (cont.)

Cases	<u>Page</u>
<i>Young-Chin v. City of Homestead</i> 597 So. 2d 879 (Fla. 3d DCA 1992)	2, 6
<i>Zanoletti v. Norle Properties Corp.</i> 688 So. 2d 952 (Fla. 3d DCA 1997)	3, 4
Other Authority	
Arthur J. England, Jr. & Richard C. Williams, Jr. , <i>Florida Appellate Reform One Year Later</i> , 3 Fla. St. U. L. Rev. 221 (Spring 1981)	4

INTRODUCTION

It isn't very often that the Court is asked to review a district court's decision which, on its face, evinces a denial of a defendant's due process right to present a defense to a multi-million dollar claim, in conflict with a host of Florida appellate court decisions arising in precisely the same factual context. The 2-1 decision brought for review in this case -- *The Doctors Co. v. State Dept. of Ins.*, 2006 WL 2612692 (Fla. 1st DCA Sept. 13, 2006) (hereafter referenced as "*TDC* at * _") -- is such a case, however.

The *TDC* decision conflicts with decisions which hold that the exclusion of expert witnesses for reasons unrelated to their competence is an abuse of discretion (1) when the witnesses are the party's only experts and prepared to offer non-cumulative, rebuttal testimony which goes to the heart of the defense, and (2) when the court could have averted any prejudice to the plaintiff by simply recessing the trial to permit the witnesses to be questioned or deposed.

The district court's affirmance of the trial court's exclusion of all of *TDC*'s expert witnesses expressly and directly conflicts with the fundamental principles of law which hold that witness exclusion under circumstances such as these constitutes an abuse of discretion. Among the decisions expressing that principle are *Florida Dept. of Trans. v. Armadillo Partners*, 849 So. 2d 279 (Fla. 2003), *Smith v. State*, 372 So. 2d 86 (Fla. 1979), *Griever v. DiPietro*, 708 So. 2d 666 (Fla. 4th DCA 1998), *review dismissed*, 732 So. 2d 323 (Fla. 1999), *Dos Santos v. Carlson*, 806 So. 2d 539 (Fla. 3d DCA 2002), *Pasqual v. Dozier*, 771 So. 2d 552

(Fla. 3d DCA 2000), and *Young-Chin v. City of Homestead*, 597 So. 2d 879 (Fla. 3d DCA 1992).

STATEMENT OF THE CASE AND FACTS

The Department, as the receiver of Caduceus Self-Insurance Fund (a medical malpractice insurer), sued TDC for breach of contract. *TDC* at * 1. The sole issue at trial was whether TDC breached its contractual obligation to pay an alleged cumulative profit generated in the operation of Caduceus over a three-year period. *Id.* The Department's expert testified, based on TDC's annual statements and other data provided by the Department, that TDC had generated a cumulative profit of \$14.1 million which it failed to pay Caduceus. *Id.* at * 2.

Through a series of rulings, the trial court precluded all of TDC's expert testimony in rebuttal. *Id.* at * 2-4. Those rulings paved the way for the jury to award the Department "damages in the amount of the cumulative profit as determined by [the Department's expert]." *Id.* at * 3.

When TDC began its defense, the trial court excluded both of TDC's designated expert witnesses: its expert in the field of insurance industry transactions and custom and usage, James Schacht; and its chief financial officer David Preimesberger. *Id.* at * 2-3. The trial court barred Mr. Schacht from testifying that the cumulative profit calculation of the Department's expert "was flawed," "inflated," and "employed defective methodology, " because the sources

for his information were “unreliable” and not the type on which experts normally rely. *Id.* at * 2.¹

Mr. Preimesberger, who had been designated as an expert in an interrogatory response and was available at the trial, was then excluded as an expert on the ground that he was not timely designated as an expert under a pretrial order which set a time limit for expert witness designations but allowed a showing of good cause for calling witnesses not designated. *Id.* at * 1, 3, 4. The trial court barred TDC from calling him as an expert because the alleged failure to re-designate him “deprived [the Department] of an adequate opportunity to depose Mr. Preimesberger before trial.” *Id.* at * 4.

SUMMARY OF ARGUMENT

The *TDC* decision conflicts with precedents which protect the fundamental due process right of defendants to present a defense to a plaintiff’s claim. Specifically, the decision conflicts with decisions which hold that it constitutes an abuse of discretion to exclude non-cumulative rebuttal testimony from a party’s most important or sole expert witness when his or her testimony goes to the heart of a defense. That was indisputably the case here.

¹ In its recitation of the facts, the panel majority stated that TDC’s expert did not “provide his own cumulative profit calculation.” *TDC* at * 2. In rendering its decision, however, the court noted that the trial court had only ruled the testimony inadmissible due to the unreliability of his sources and the fact they were not of the type upon which experts normally rely (*id.*), and the district court affirmed only *those* rulings. *Id.* at * 3-4. The absence of a calculation by TDC’s expert was not a basis for the court’s ruling, and in any event could not be. *See, e.g., Griefer*, 708 So. 2d at 672; *Zanoletti v. Norle Prop., Corp.*, 688 So. 2d 952, 954; and *TDC* at * 8 (Ervin, J., dissenting).

Additionally, the *TDC* decision conflicts with decisions which hold that the mere failure of an expert to consider everything that may influence his opinion is a matter of weight rather than admissibility, and with decisions which hold that a witness should never be excluded if there is a less extreme remedy available to avert prejudice such as recessing the trial to allow the witness to be deposed.

ARGUMENT

The district court upheld the trial court's exclusion of both expert witnesses presented by TDC to rebut the Department's cumulative profit expert when they were called to testify at trial following the Department's case-in-chief.² The trial court's rulings denied TDC any challenge to the \$14 million calculation of the Department's expert, and completely eliminated any defense by TDC.³ The overt and dramatic disagreement between the panel majority and the dissent on such vital doctrines as the right of a defendant to call an expert witness to counter the

² The district court's decision reflects the Department's lack of any pretrial notification or motion signaling an intent to prevent TDC from offering its expert witnesses.

³ Judge Ervin wrote a detailed and comprehensive dissent to the panel majority's affirmation of the trial court's exclusion of TDC's primary expert witness. *TDC* at * 5-9. While the Court does not use facts in a dissenting opinion to ascertain the basis for conflict review (*see* Arthur J. England, Jr. and Richard C. Williams, Jr., *Florida Appellate Reform One Year Later*, 3 Fla. St. U. L. Rev. 221, 232 (Spring 1981)), it can take note of the pains to which Judge Ervin went to explain why the panel majority's approval of the exclusion of TDC's expert witness "significantly prejudiced [TDC] in its defense." *TDC* at * 5. The Court can also take note that Judge Ervin was not only dismayed that each and every reason offered by the majority ran counter to the record (*id.* at * 5-9), but that the majority's decision was expressly at odds with the *Griefer*, *Zanoletti*, *Dos Santos*, and *Armadillo Partners* decisions. *Id.* at * 8-9.

other party's expert, and the necessity for trial courts to utilize less draconian measures to avoid party prejudice, fosters disharmony in the due process principles which govern trial proceedings throughout the state. The Court's intercession is both appropriate and necessary.

I. The TDC decision conflicts with decisions holding that trial courts may not exclude non-cumulative rebuttal testimony which goes to the heart of a defense.

At trial, the trial court first precluded TDC's insurance expert from shredding the methodology and calculations of the Department's expert, and then prevented TDC from offering expert rebuttal witness testimony from its CFO. This led directly to the jury's award of precisely the amount which the Department's expert conjectured.

In *Griefer*, the Fourth District held that it constitutes an abuse of discretion for the trial court to limit "non-cumulative rebuttal that goes to the heart of the principal defense," finding error in the preclusion of testimony presented by a party's most important witness to "challenge the calculations of a [an opposing party's] expert," and to provide the jury with

classic, admissible and essential rebuttal testimony – indispensable for [a party] to assist the jury in weighing the validity of [the opposing party's] expert.

708 So. 3d at 672. Significantly, the rebuttal witnesses at issue in *Griefer* were prohibited from testifying on grounds virtually identical to the grounds used to bar TDC's two expert witnesses in this case: an assertion by the trial judge that the evidence offered by one expert would not assist the jury; and a technical ruling that the other expert was not timely disclosed (in response to expert interrogatories).

In *Dos Santos* and *Pascual*, the exclusion of the defendants' most important witnesses was also held to constitute an abuse of discretion. The situation in those cases parallels closely the situation in this case, in that the excluded experts in each of those cases were the only ones who could counter the plaintiff's expert witness testimony. *Dos Santos*, 806 So. 2d. at 542 ("plaintiff's counsel effectively hammered the defense with [the un rebutted testimony from plaintiff's expert] during closing argument"); *Pasqual*, 771 So. 2d at 554 (plaintiff was able to emphasize during closing argument its expert's unrefuted testimony). Even a limitation imposed on rebuttal evidence which went to the heart of the opposing party's case, as opposed to a complete exclusion, was held to be error in *Young-Chin*, 597 So. 2d at 883.

The *Griever*, *Dos Santos*, *Pascual*, and *Young-Chin* cases express the most fundamental feature of due process -- the right to present evidence in support of a party's theory of the case. The decision in this case, which carries with it a dissent that meticulously dissects the panel majority's analysis and reasoning, is in stark contrast to and hopeless conflict with those four decisions.

II. The TDC decision conflicts with *Armadillo* and its progeny as regards the treatment of testimonial deficiencies as a matter of weight, not admissibility.

In *Armadillo*, the Court set forth the seminal legal principle that an expert's opinion

is subject to impeachment or to having its weight reduced because of its failure to properly consider one of the many factors that may influence an opinion . . . *but that failure should not prevent the opinion's admission, nor cause its complete exclusion from the jury's consideration.*

849 So. 2d at 287-88 (emphasis added).

That principle was followed and applied in *White v. Westlund*, 624 So. 2d 1148, 1151 (Fla. 4th DCA 1993) (qualifications placed on a medical expert's opinion are matters of weight, not admissibility), *review dismissed*, 640 So. 2d 1109 (Fla. 1994), and in *Lombard v. Executive Elevator Serv., Inc.*, 545 So. 2d 453, 455 (Fla. 3d DCA 1989) (expert's inability to testify as to exact cause of elevator malfunction related to weight, not admissibility).

The district court's affirmation of the exclusion of Mr. Schacht's expert witness testimony -- on the ground that he relied on "unreliable" sources of the type not normally relied on by experts -- is directly in conflict with *Armadillo* and its progeny. The record evidence in the trial and information provided by the party's attorneys -- the data used by Mr. Schacht (*TDC* at * 4) - was some of the same factual evidence used by the Department's experts. *Id.* at * 2. His failure to consider more extensive evidence, given his background and expertise in insurance regulation, was an insufficient justification for barring his testimony altogether.

The proper ruling with respect to Mr. Schacht would have been to allow him to testify, but then to give the Department free rein to challenge the foundation for opinions through cross-examination and argument to the jury. But *Armadillo* and its progeny hold that it was *improper*, and an abuse of discretion, to prevent the jury from ever hearing his testimony.

III. The TDC decision conflicts with the legal principle that witness exclusions are improper when a less extreme remedy is available.

In *Smith v. State*, the Court held that a court should avert prejudice by the simple expedient of recessing the trial to permit the questioning or deposition of a witness, rather than excluding the witness altogether. 372 So. 2d at 89. That important step toward assuring even-handedness in trial proceedings, and the elimination of tactical gamesmanship, has been repeatedly recognized and followed throughout the state. *E.g.*, *Klose v. Coastal Emergency Servs. of Fort Lauderdale, Inc.*, 673 So. 2d 81, 83 (Fla. 4th DCA 1996) (prejudice “easily curable” by adjourning the trial to depose the witness), *review denied*, 684 So. 2d 1352 (Fla. 1996); *Utica Mut. Ins. Co.*, 639 So. 2d 41, 43 (Fla. 5th DCA 1994) (no abuse of discretion where opposing party was afforded an opportunity to depose the witness the night before trial), *review dismissed*, 649 So. 2d 234 (Fla. 1994); *O’Rourke v. State*, 645 So. 2d 569, 571 (Fla. 5th DCA 1994) (trial court has obligation to ascertain the extent to which the opposing party would be prejudiced by allowing the testimony of an undisclosed witness, and to seek a way to rectify any possible prejudice short of exclusion), *approved*, 661 So. 2d 800 (Fla. 1995).

The district court lost sight of that principle when it affirmed the trial court’s exclusion of TDC’s CFO as an expert simply because he had not been re-designated as an expert in the formal disclosure required by a pretrial order. He had been named as an expert on TDC’s interrogatory response two months before the trial began (*TDC* at * 4), giving the Department ample opportunity to depose him or otherwise ascertain his expert opinions. On the face of the district court’s decision, however, the panel majority affirmed his exclusion as an expert witness

based on a “lack of notice” which deprived the Department of an adequate opportunity to depose him before trial. *Id.* at * 4. That rationale does not hold water.

Not only was there more than an ample discovery opportunity which the Department never used, but the very pretrial order on which the court relied expressly relieved a failure to disclose a witness “for good cause.” *Id.* at * 1. The Department’s previously un signaled and completely unanticipated motion to exclude Mr. Schacht’s testimony, when granted by the trial court at trial, was certainly “good cause” for doing something with respect to Mr. Preimesberger short of exclusion.

Prejudice is often averted at trial through the simple expedient of a recess to permit the questioning or deposition of witnesses.

Smith, 372 So. 2d at 89.

Any prejudice to the Department in this case could have been cured with a recess or a belated deposition. The only incurable prejudice in this case was that suffered by TDC, when the trial court stripped it of any defense to the flawed calculations of the Department’s expert and allowed the jury to swallow hook, line, and sinker his opinion that TDC had failed to pay a cumulative profit of \$14 million. In this regard, the district court’s decision is directly at odds with *Smith*.

CONCLUSION

TDC respectfully requests that the Court exercise its discretion to accept the district court’s decision for review.

Greenberg Traurig, P.A.
Arthur J. England, Jr.
Florida Bar No. 022730
Edward G. Guedes
Florida Bar No. 768103
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0500

Greenberg Traurig, P.A.
101 E. College Avenue (32301)
P.O. Drawer 1838
Tallahassee, FL 32302
Telephone: (850) 222-6891

Barry Richard
Florida Bar No. 105599
M. Hope Keating
Florida Bar No. 0981915

Greenberg Traurig, P.A.
William R. Clayton
Florida Bar No. 485977
401 East Las Olas Blvd., Suite 2000
Ft. Lauderdale, Florida 33301
Telephone: (954) 765-0500
Fax: (954) 765-1477

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail certified mail to the following this ____ day of _____, 2006:

Theodore Doran, Esq.
Scott R. Rost, Esq.
Doran, Wolfe, Rost & Ansay
P.O. Drawer 15110
Daytona Beach, FL 32115
Facsimile: (386) 253-4260

Eric E. Scott, Esq.
Florida Department of Financial
Services
Division of Rehabilitation &
Liquidation
P.O. Box 110
Tallahassee, FL 32302-0110
Facsimile: (850) 488-1510

Barry Richard

CERTIFICATE OF COMPLIANCE

I certify that this brief was typed in Times New Roman 14-point font in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

Barry Richard