STATEMENT OF THE FACTS AND CASE

The Plaintiff did not put the entire trial transcript in the Record on Appeal, but relies solely on the two snippets attached to his Brief. However, the Record does establish the following facts which support the Jury Verdict for the Plaintiff, the trial court's denial of the Plaintiff's Motion for New Trial and the Fourth District's Opinion affirming that Order. Lamz v. GEICO General Insurance Company, 748 So. 2d 319 (Fla. 4th DCA 1999)(A 1-3).

On February 16, 1996, Deborah Lamz was driving a vehicle in which her husband was a passenger, when they were involved in an accident with Ms. Nichols (R 1-8). Mr. and Mrs. Lamz sued Nichols and the car owner, Leisner, as well as their UM carrier GEICO (R 1-8). GEICO appeared and participated at trial, as a named party, represented by separate counsel from the attorneys representing the Defendants, Nichols and Leisner.

At the beginning of trial, GEICO requested that the court address the issue of how the parties were going to be described to the jury, in order to prevent anything prejudicial being discussed about the UM carrier (R 239). The Plaintiffs announced there was going to be a full disclosure as to exactly who the parties were and that GEICO was going to be described as the "underinsured" motorist carrier (R 239-240). GEICO objected, as there was no need to get into the difference between

"uninsured" versus "underinsured," as the jury simply needed to know that GEICO insured the Plaintiffs and stood in the shoes of the alleged tortfeasors (R 240). The Plaintiffs argued that the real party in interest had to be disclosed, otherwise it would be unfair and deceptive and GEICO agreed. The Plaintiff continued to argue that GEICO could only be identified as the "underinsured" motorist carrier (R 241-242). The trial court noted the difficulty of letting the jury know that one of the parties did not carry adequate insurance; with GEICO agreeing that whether the tortfeasor were insured or uninsured should not make a difference to the jury in their deliberations; and the case law discussed the jury being entitled to know that GEICO was a real party in interest and GEICO agreed and no one was asking the judge not to tell the jury that GEICO was not a party at trial (R 243-244). GEICO pointed out that the jury was going to be instructed that GEICO stood in the shoes of the tortfeasors and if the Defendants were negligent, GEICO was going to be responsible for that negligence, under their insurance policy (R 244-245). The court noted that GEICO's objection was only that it not be identified as the "underinsured" motorist carrier and GEICO agreed, because to identify it as the underinsured carrier told the jury that there was available underlying insurance and the status of that underlying insurance is not something the jury should be considering (R 245-246). The Defendants agreed that the main intent of the law was to identify the

parties, not for the jury to be aware of the availability of insurance from the Defendants; and to tell the jury underinsured motorist coverage was available meant there was underlying coverage available for the Defendants, which was improper for the jury to be considering (R 246-247).

The Plaintiffs claimed that the Supreme Court's decision in Government Employees Insurance Company v. Krawzak, 675 So. 2d 115 (Fla. 1996) required that the jury be told that the insurance company was there as the "underinsured motorist carrier" and the jury should not be misled to believe that GEICO was there defending the Defendant/tortfeasors (R 237-248). GEICO pointed out that Krawzak did not hold that the jury had to be told that GEICO was the "UIM" carrier, all the jury had to know was that GEICO was a real party in interest at trial, an actual Defendant; the jury should be instructed that GEICO was sued by the Plaintiffs as their insurer; they had a contract of UM coverage and if the Plaintiff wanted to say that, that was fine; and that GEICO stood in the shoes of the Defendants and was properly a party at trial (R 249-250). The Defendants asked the court then to confirm that GEICO would be on the verdict form with the other Defendants; there was not going to be any separation of these Defendants; and again, the Defendants pointed out that under Krawzak it was okay to refer to the UM carrier, as the UM carrier, but not the UIM carrier (R 250-251). GEICO noted that the problem with

the prior cases on this issue was that the insurance company was passed off as the lawyer for the individual defendants, without the jury knowing that it was a real party defendant and that is all the jury needed to be informed of for disclosure of who the parties were at trial (R 252).

The Plaintiffs then argued that they would be prejudiced if the jury was told that GEICO was the UM carrier, instead of the UIM carrier, because then the jury would think that the Defendants were uncollectible and that was misleading and the Plaintiffs wanted the jury to know that the Defendants had insurance and the Plaintiffs had insurance that was available to pay for this claim (R 252-253). The trial judge announced that all the parties agreed that the jury needed to be aware that the Defendant, GEICO, was an actual Defendant in the case and the issue was just whether to describe them as the UM carrier, or the UIM carrier, or just the Plaintiff's insurance company; and the judge found the later the most attractive alternative (R 252-254). Identifying GEICO as the "underinsured" motorist carrier was a comment on the availability of insurance and this was prejudicial to the Defendants and not really of any benefit to the Plaintiffs; so the judge decided that he would announce that GEICO was the Plaintiffs' automobile insurer (R 253-254). In line with this ruling, at the beginning of voir dire, the judge told the jury that GEICO was the Plaintiffs' automotive insurance carrier and was joined as a

Defendant in the lawsuit (T 265).

After a five day trial, the jury returned a Verdict finding Ms. Nichols 85% liable, Mrs. Lamz 15% liable, found no permanency for Mrs. Lamz and awarded her $9,700 in past medical expenses and no loss of consortium for Mrs. Lamz (R 159-161). On Mr. Lamz's claim, it found he was permanently injured, it awarded him $8,600 in past medical expenses; $14,000 in future medicals and past and future pain and suffering in the amount of $18,500, for a total of $31,100 and no loss of consortium for Mrs. Lamz (R 162-164). The jury was polled and all agreed that was their Verdict (R 508). The Plaintiffs then objected that there was a possibility that there might be an inconsistent verdict, to find a permanent injury for Mr. Lamz and not award any consortium to his wife, but he was not a 100% sure, but the Defendants and the court seem to think what the jury did was okay (R 509). The Defendants said there was no legal requirement for a jury to return a verdict for loss of contortion, simply on the basis that a permanency was determined (R 509). The Plaintiffs then formerly objected to no consortium damages, with a finding of permanency for Mr. Lamz, and said that this was inconsistent with the law and wanted an opportunity to provide the court case law (R 510). GEICO then suggested that if there was an inconsistency, it would be better to simply send the jury back and have them enter an award for loss of consortium, which could be later

struck if it turned out to be improper (R 510).

The Plaintiffs then objected to the jury going back and reconsidering the issue at all (R 510-511). The jury had already spoken, it was not fair for the jury to be sent back to reconsider the issue, it could not be cured by sending them back, and if the jury made a mistake it was up to the appellate court to correct (R 510-511). GEICO noted if the Plaintiffs did not want the jury to reconsider its Verdict, then they were waiving any alleged error regarding it (R 511). The court then decided to take a break and let the parties do some research on it, with GEICO again noting that the jury should be sent back; but Plaintiffs' counsel was objecting to the jury reconsidering its Verdict and said the judge simply could not send the jury back if everybody did not agree to sending them back, and the Plaintiffs did not agree (R 511).

The Plaintiffs then presented case law that stated that once the jury had been discharged it could not be called back to reconsider its Verdict; but the judge noted the jury had not been discharged in the case (R 513). The Plaintiffs then moved for a mistrial, based on the claimed inconsistent Verdict of a zero consortium award to Mrs. Lamz after finding a permanency for Mr. Lamz, and since it was internally inconsistent a mistrial should be granted, because once the jury was discharged the error could not be corrected by recalling the jury (R 515-517). Again, the Plaintiffs

objected to the jury reconsidering its Verdict, saying that the jury heard the case for five days, deliberated for five hours, had a unanimous Verdict, they were polled, they all agreed, and now they could not be instructed to go back and consider the consortium award; and there was no way this prejudice could be cured, other than by granting a new trial (R 517). GEICO then said that if in fact this was an inconsistent Verdict; which the Defendant did not agree with; the thing to do was to reinstruct the jury to reconsider their Verdict and since the jury had not been discharged that was the proper thing do; then it would be up to the jury to decide if it wanted to change its Verdict on consortium or on permanency, "because they could reconsider the whole verdict" (R 518-519).

The individual Defendants agreed that the jury should be reinstructed and should be instructed that it had to award some type of damages to Mrs. Lamz (R 519). The judge then announced the Motion for Mistrial was denied; and once again GEICO pointed out that the jury could not be sent back just to award consortium and not consider anything else, because their whole Verdict was open to them and the jury could change any part of it they chose; and so, it had to be instructed that if it found a permanent injury, then it should consider the loss of consortium award (R 519-520).

The court announced that was exactly what it was going to do; and, once

again, the Plaintiffs objected to the jury being allowed to reconsider its Verdict on damages, complaining that for all intents and purposes it was discharged and the jury could not be allowed to reconsider all the issues (R 520-521). The jury was called back, instructed that if it again found that the Plaintiffs sustained a permanent injury, then it had to, in paragraph six, award some money in that paragraph; the jury was given its entire Verdict back and told that it could retire to consider its Verdict (R 521-522).

The jury returned the exact same Verdict, with the exception of the added award of $5,500 in past and future loss of consortium to Mrs. Lamz (R 523). The jury was once again polled and then discharged (R 523-524). For the first time after the jury was discharged, the Plaintiffs objected, asserting that it was error to allow the jury to reconsider the issue of consortium alone; with GEICO disagreeing that that was what the jury had done, noting that was not how they were instructed (R 524-525). The Plaintiff then moved for a new trial claiming GEICO should have been identified as the "underinsured" motorist carrier, that the jury should have been instructed to reconsider its entire Verdict; it was error for the jury to fail to award Mrs. Lamz loss of consortium damages (ignoring the second Verdict in the case); and that based on legislative history the Plaintiffs' damages were inadequate as a matter of law (R 180-195). After an apparently unrecorded hearing, the Motion for

New Trial was denied and appealed (R 527; 528-530).

The Fourth District affirmed the trial judge and rejected the Plaintiffs' argument that the jury should know that there was insurance coverage available to pay the Plaintiffs' Judgment and the Defendants were collectible. Lamz, 320-321.

The Fourth District applied this Court's decisions in Krawzak, supra, and Medina v. Peralta, 705 So. 2d 703 (Fla. 3d DCA 1998), approved, 724 So. 2d 1188 (Fla. 1999):

> [K]rawzak was a case where Geico was joined as a defendant in a personal injury lawsuit against the driver of an automobile which rear-ended the plaintiff Krawzak's car. Geico was Krawzak's underinsured motorist carrier. The trial court granted Geico's motion in limine and prevented any reference before the jury about an insurance company being involved in the case. The jury had no idea that Geico was a party in the trial; Geico's lawyers were identified as co-counsel for the defendant tortfeasor. See 675 So.2d at 116-17.
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> This court reversed for a new trial in Krawzak v. Government Employees Insurance Co., 660 So.2d 306 (Fla. 4th DCA 1995), aff'd, 675 So.2d 115 (Fla.1996). We held that "[a]n uninsured or underinsured motorist carrier should not be able to hid its true identity by being severed from the lawsuit while retaining its influence over the conduct of the lawsuit as co-counsel for the tortfeasor." 660 So.2d at 310. We reasoned that [i]n this case, GEICO is the real party in interest.... If there had been a settlement with the tortfeasor, there would be no question that GEICO would have been the only party before the jury. GEICO could not have been made invisible or disguised in the courtroom in the fashion

which occurred here, where the jury was told that GEICO's counsel was the tortfeasor's co-counsel but was unaware that it was otherwise a party.

Id. at 309.

The supreme court affirmed and approved our decision in Krawzak. See Krawzak, 675 So.2d at 117. The court wrote that "it is appropriate for a jury to be aware of the presence of a UM insurer which has been properly joined in the action against the tortfeasor." Id. The supreme court emphasized that to allow a UM insurer, "which by statute is a necessary party, not [to] be so named to the jury is a pure fiction in violation" of the policy against charades in trials. Id. at 118. The court observed that the "unknown consequences of such a fiction could adversely affect the rights of the insured who contracted and paid for this insurance." Id.

Cases since Krawzak have reversed where the UM carrier was not identified at all as a party in a trial. For example, in Medina, the supreme court held that it was per se reversible error for a trial court to entirely "exclude from a jury the identity of an uninsured or under insured motorist (UM/UIM) insurance carrier that has been joined as a necessary party to an action." 724 So.2d at 1189; see also State Farm Mut. Auto. Ins. Co. v. Miller, 668 So.2d 935 (Fla. 4th DCA 1996); Brush v. Palm Beach County, 679 So.2d 814 (Fla. 4th DCA 1996); Smith v. Baker, 704 So.2d 567, 568 (Fla. 2d DCA 1997).

We read Krawzak as requiring identification of a UM or UIM carrier as a party defendant and designation of the attorneys representing the carrier at trial. We do not read the case as mandating the revelation of the precise nature of the insurance coverage implicated in the case. The major policy reason behind the Krawzak rule-the avoidance of charades at trial-is satisfied by the

> disclosure of the insurer as a party and the identification of the lawyers at trial acting on its behalf. With such disclosure, a jury observing and listening to the carrier's lawyers will understand the carrier's position at trial.
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> Revealing in this case that Geico was the underinsured motorist carrier would have been suggested to the jurors that the other defendants had insurance coverage. This runs counter to the policy of "excluding improper references of a defendant's insurance coverage in civil proceedings... to preclude jurors from affixing liability where none otherwise exists or to arrive at excessive amounts through sympathy for the injured party with the thought that the burden would not have to be borne by the defendant." Melara v. Cicione, 712 So.2d 429,431 (Fla. 3d DCA 1998)(citing Carls Mkts, Inc. v. Meyer, 69 So.2d 789, 793 (Fla.1953)); see Brush, 679 So.2d at 815; Nicaise v. Gagnon, 597 So.2d 305, 306 (Fla. 4th DCA 1992); cf. Dosdourian v. Carsten, 624 So.2d 241, 248 n. 5 (Fla.1993)(noting that the trial judge has discretion not to advise the jury of a settlement amount if doing so would unfairly prejudice a party).
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> Lamz, 320-321 (A 1-3).

Since the Plaintiffs did put in the transcript of their week long trial, they argued to this Court that the error in not identifying GEICO as the "underinsured" motorist carrier for the Plaintiffs was per se legal error causing direct and express conflict; while GEICO maintained that this Court's law was properly applied and there is no conflict for this Court to resolve.

SUMMARY OF ARGUMENT

The Record in this case undisputedly established that GEICO's position was never that the jury should be misled, nor that its identity should be hidden from the jury. GEICO was properly identified as the insurance carrier for the Plaintiffs; GEICO was identified as a named party Defendant in the suit; GEICO was represented by independent counsel; GEICO participated in the trial; and GEICO was listed on the Verdict form. Under every single case cited by the Plaintiffs there was no prejudicial, reversible error. Not a single case cited by the Plaintiffs requires that GEICO be identified as the "underinsured" carrier and there can be no direct and express conflict with this Court's decisions, which were relied upon by the Fourth District. Based on the law from this Court, there was no reversible error, the Plaintiffs had a fair five day trial and the Verdict for the Plaintiffs and the decision in Lamz must be affirmed.

GEICO was joined as a party Defendant and this Court does not have to address, in any manner, the non-joinder statute. It certainly does not have to rule again that the statute is constitutional. The constitutionality of § 627.4136, Fla. Stat. (1993) is being raised for the first time in this Court and was never a legal issue in the trial court or the appellate court. Therefore, any claim of unconstitutionality by the Plaintiffs, or the Amicus, has clearly been waived.

The only reason the jury was sent back to reconsider its entire first Verdict, over the Plaintiffs' objection, was in the event the appellate court should agree it was an inconsistent Verdict; and that way an entire new trial would not have to be held. However, under established case law, the original Verdict in this case was not inconsistent and, therefore, any alleged error in having the jury reconsider it could not be sufficient to require the granting of a new trial. This is especially true where the Plaintiffs agreed to a Final Judgment based on the second Verdict awarding the Plaintiffs more money.

Defense counsel agreed to allow the jury to reconsider all the issues in the case, when the Plaintiffs objected to no loss of consortium award to Mrs. Lamz. When the jury was reinstructed, there was no objection by the Plaintiffs to the instructions. Therefore, the Plaintiffs again have waived any alleged error regarding the jury re-instruction.

The Appellants have failed to provide this Court with the entire trial transcript and as such the Verdict for the Plaintiffs must be affirmed. The Appellants have made no showing of a miscarriage of justice on this appeal. As previously indicated, this case involved a five day jury trial in which the jury heard an abundance of evidence and entered a Verdict for the Plaintiffs. Then it was reinstructed and gave the Plaintiffs more money. The Appellants cannot show in the

Record there was any harmful reversible error and the Verdict must be affirmed.

ARGUMENT

I. TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT GEICO WAS THE INSURANCE CARRIER FOR THE PLAINTIFF; GEICO WAS A PARTY AT TRIAL REPRESENTED BY SEPARATE COUNSEL; WAS LISTED ON THE VERDICT FORM AND GEICO CORRECTLY IDENTIFIED AS BEING LEGALLY RESPONSIBLE FOR ANY NEGLIGENCE OF THE DEFENDANTS BECAUSE OF ITS POLICY WITH THE PLAINTIFFS; EVERY CASE CITED BY THE PLAINTIFFS REQUIRE AFFIRMANCE OF THE VERDICT FOR THE PLAINTIFFS AND THE DECISION IN LAMZ.

The law is crystal clear on this issue, because every single case cited by the Plaintiffs stands for the proposition that the insurance carrier must be identified as such, to the jury and that is exactly what happened in the present case. The weakness in the Plaintiffs' position is demonstrated by their continued refusal to discuss the distinguishing fact in every single case they cite, which is that the identity of the insurance carrier as a party was **not** told to the jury at all. In every single case, the insurance company did **not** participate at trial, was **not** identified as a party, and was **not** represented by separate counsel. Not a single case from this Court holds that GEICO had to be identified as the "underinsured" motorist carrier for the Plaintiffs, to ensure that the jury know the Defendants were collectible and the Plaintiffs' Verdict would be covered by available insurance coverage. That has

never been the law in this State and neither Krawzak or Medina require such disclosure to the jury. The law on this issue is absolutely settled, there is no conflict, legally or factually, and this Court must affirm the $50,000 Verdict for the Plaintiffs and the Fourth District's decision in Lamz.

A. Legal Standards of Review

In the absence of a clear showing of an abuse of discretion, the trial court's broad discretion in granting or denying a new trial will not be disturbed on appeal. Brown v. Estate of A.P. Stuckey, 749 So. 2d 490 (Fla. 1999); Murphy v. International Robotics Systems, Inc., 25 Fla. L. Weekly S610 (Fla. August 17, 2000)(abuse of discretion standard applies in the granting or denial of a new trial); Cankaris v. Cankaris, 382 So. 2d 1197 (Fla. 1980)(if reasonable persons could differ at to the propriety of an action taken by the trial court, the action is not unreasonable and there can be no finding of any abuse of discretion).

The Plaintiffs have also failed to provide the Court with a complete trial transcript, nor a transcript of the post-trial hearing. The duty was on the Plaintiffs, as Appellants, to properly establish and preserve the Record in this case. Haist v. Scarp, 366 So. 2d 402 (Fla. 1978). A complete transcript is essential to proper consideration of the Jury Verdict and because the Appellants have failed to furnish one, this Court like the Fourth District had a duty to affirm. Gardner v. Gardner,

501 So. 2d 1300 (Fla. 4th DCA 1986); E.H. Development, Inc. v. Kelly Tractor Company, 501 So. 2d 1301 (Fla. 4th DCA 1986). The burden was on the Appellants to overcome the presumption of correctness of the Verdict, which they failed to do. McNair v. Pavlakos/McNair Development Company, 576 So. 2d 933 (Fla. 5th DCA 1991); Ahmed v. Travelers Indemnity Co., 516 So. 2d 40 (Fla. 3d DCA 1987); Morgan v. Kearney, 395 So. 2d 570 (Fla. 4th DCA 1981). Without the transcript, no court could make a determination that reversible error occurred. Tomlinson v. Register, 553 So. 2d 766 (Fla. 1st DCA 1989).

Since the jury below was not misled as to the identities of the real parties in interest, who all appeared at trial, were identified, were represented by separate counsel; and where the Plaintiffs objected to the jury reconsidering its entire Verdict, which it did anyway; and the Plaintiffs did not provide a complete record; the presumptively correct ruling that the prejudice to the Defendant outweighed the probative value of identifying GEICO as the "underinsured" motorist carrier; and the presumptively correct Jury Verdict for the Plaintiffs must be affirmed; as the Plaintiffs have shown no clear abuse of discretion.

B. Jury Properly Informed Regarding Status of GEICO at Trial

GEICO expressly agreed that it needed to be, and it was, identified as a party

Defendant at trial; GEICO was represented, as a named Defendant, by separate counsel at trial; GEICO suggested the Plaintiffs have the option of referring to GEICO as the Plaintiffs' insurance carrier, or the Plaintiffs' uninsured motorist carrier. The Plaintiffs refused both, wanting GEICO identified as the "underinsured" motorist carrier, so the jury would know there was two available coverages to pay whatever award the jury made.

The Plaintiffs still have failed to cite a single case that stands for the proposition that the Plaintiff's carrier must be referred to as the "underinsured" motorist carrier; which would clearly identify for the jury the fact that the tortfeasor has insurance coverage, that might not be adequate to cover the Plaintiffs' claim, but the Plaintiffs have additional insurance coverage. It was on this basis that GEICO objected, but it had no objection to being referred to as the "uninsured" motorist carrier, or the Plaintiffs' insurance carrier as the judge chose. The jury awarded almost $50,000 after reconsidering its entire Verdict.

Every single case addressing this issue, including those cited by the Plaintiffs as being in conflict with Lamz, have found reversible error only when the plaintiff's carrier was not identified, at trial, at all. That is not the situation in the present case, where not only was GEICO identified at a party Defendant at trial, but GEICO's counsel participated from being to end of trial; and throughout the Plaintiffs could

refer to GEICO as the Plaintiffs' insurance company in complete and total compliance with Krawzak, supra. The holding in Krawzak is as follows:

> We approve the decision below and resolve the conflict by finding that in actions to which section 627.727(6), Florida Statutes (1991), is applicable, it is appropriate for a jury to be aware of the presence of a UM insurer which has been properly joined in the action against the tortfeasor. We agree with the well-reasoned opinion of the district court in this case and disapprove *Colford* to the extent it is in conflict with the district court's decision on this issue.
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> Krawzak, 117.

The conflict resolved in Krawzak was between the lower court decision in that case and the Fifth District's decision in Colford v. Braun Cadillac, Inc., 620 So. 2d 780 (Fla. 5th DCA), rev. denied, 626 So. 2d 1367 (Fla. 1993). Colford held that a UM carrier should not be identified at all at trial, because of the potential problem of informing the jury that their was insurance coverage available to pay the plaintiff's damages. Therefore, the only issue was whether the carrier should be identified at all at trial. It was not an issue of whether the carrier must be referred to as the "uninsured" motorist carrier, the plaintiff's insurance carrier, or the "underinsured" motorist carrier. That was never an issue in any of the cases up to Krawzak and following Krawzak.

In Krawzak, the Supreme Court affirmed the lower court decision's out of the

Fourth District in Krawzak v. Government Employees Insurance Company, 660 So. 2d 306 (Fla. 4th DCA 1995), which had held that where the plaintiff had a direct cause of action against GEICO, as the UM insurer under § 627.736(6), the presence of the UM carrier, which is lawfully sued and properly joined in the suit, should be disclosed to the jury, in its actual status as a party defendant. Below GEICO was identified as a party Defendant and the Plaintiffs' insurance carrier at trial.

The issue in Krawzak was simply whether the UM carrier needed to be identified at all as a party to the lawsuit -- not how much insurance coverage it provided, as either the uninsured motorist carrier, or the underinsured motorist carrier. This conclusion is substantiated by the cases which have actually looked at this issue, both before and after Krawzak. Medina, supra (it is per se reversible error for a trial court to exclude from jury the identity of an UM/UIM insurance carrier that has been joined as a party to the action; reversing trial court ruling that Allstate would not participate at trial, except for the final judgment); State Farm Mutual Automobile Insurance Company v. Miller, 688 So. 2d 935 (Fla. 1996)(where judge had ruled that the jury would not be told UM carrier was a party; following the Fourth District's decision in Krawzak, held that juries "should be made aware that the insurer is a party in UM cases"); Smith v. Baker, 704 So. 2d 567 (Fla. 2d DCA 1997)(jury should be aware that UM insurer is a party, when properly

sued and joined in action; trial court erred in ruling sua sponte that UM carrier would be excluded from trial; no references could be made and no mention be made of State Farm during trial; counsel for State Farm had to act as the attorney for individual defendant; and State Farm's name could not be used on verdict form); Brush v. Palm Beach County, 679 So. 2d 814 (Fla. 4th DCA 1996)(identifying the attorneys for the UM carrier as co-counsel for the tortfeasor and severing the UM carrier was a deception on the jury, where UM carrier was a party defendant and should have been identified as such, along with the uninsured's tortfeasor); Furtado v. Walmer, 673 So. 2d 568 (Fla. 4th DCA 1996)("it appears that in a suit for uninsured/underinsured motorist benefits the insurance carrier may now be identified to the jury as a party in the lawsuit").

The Plaintiffs have abandoned the claim made in their Brief on Jurisdiction that there could be, or possibly is, direct and express conflict between Lamz and Allstate Insurance Company v. Boecher, 733 So. 2d 993 (Fla. 1999) and Dosdourian v. Carsten, 624 So. 2d 241 (Fla. 1993). As this Court is well aware, Boecher, a case handled by undersigned counsel, announced no different rule of law, nor has a holding that could possibly be in direct and express conflict with Lamz. Lamz dealt with the proper identification of parties to the suit; while Boecher simply had to with whether or not a party, was bound by the same

limitations on discovery, as experts at trial. If all parties are identified as such at trial, like they were below, there can be no undermining of the jury system and no unclear alignment of interests. GEICO was identified as a Defendant and the Plaintiffs' insurance carrier, which was responsible for money owed by the co-Defendants. The alignment was clear and not misrepresented to the jury. Furthermore, at trial, the Plaintiffs expressly wanted GEICO identified as the "underinsured" motorist carrier to ensure the jury knew there was plenty of money available through two insurance carriers to pay the Verdict, a fact the Plaintiffs totally ignore throughout these appeals.

Dosdourian, supra, is the landmark case that held Mary Carter Agreements invalid. What the Court was referring to in Dosdourian, regarding the truth being told to the jury, was that a Mary Carter Agreement allowed a defendant to appear as if they were a real defendant when, in fact, the strategy was for the defendant to be testifying in favor of the plaintiff. Because of this charade between the plaintiff and defendant, this Court invalidated Mary Carter Agreements. Again, there is nothing in Dosdourian that has any application to the Lamz decision. The Plaintiffs cite a Dosdourian footnote, regarding the "alignment of interest;" which was never an issue raised below and the Lamz jury was clearly aware of how the parties were aligned. The parties were told that GEICO was a Defendant, being sued by the

Plaintiffs and any bias or prejudice regarding this alignment of interest was completely covered with the jury in voir dire.

The Plaintiffs continue to try and change the facts of this case to fit the law they want to rely on. In the appellate court they wrote a Brief that mislead the reader into believing that GEICO was never identified at all at trial (Initial Brief of Appellant, pages. 1-6). Now they argue Brush, supra, as a case requiring the disclosure of GEICO's "completely true status as the underinsured insurance carrier;" because Brush corrected a similar gross injustice and condemned a similar judicial practice which undermined fairness at trial. Perhaps if what happened in Brush happened below, the Plaintiff's argument would not be so hollow and unavailing. In Brush, a Fourth District case, the attorneys for two UM carriers were identified as counsel for the tortfeasor and the jury was never told that State Farm and Allstate were named defendants in the case. If Brush were even marginally persuasive, it certainly would have been cited to, and distinguished by the Fourth District in Lamz.

The parties were properly identified at the Lamz trial; there was no charade, nor undisclosed "arrangement" between one side and the other; nor between the co-Defendants; and the jury was not mislead in any way whatsoever. The jury found for the Plaintiffs awarding $50,000. There is no direct and express conflict; nor any

inference of any direct and express conflict; nor any "intent" leading to direct and express conflict between Lamz and any decision of this or any other appellate court. The Opinion in Lamz must be affirmed.

C. No Basis To Hold Non-Joinder Statute Unconstitutional

The easy answer to the position that the non-joinder statute must be held unconstitutional, is that this Court has no jurisdiction to consider it, as it was never raised at any point in the proceedings below, including the appeal in the Fourth District and is waived. There is no direct and express conflict between the decision in Lamz and any of this Court's prior decisions, even going back as far as Stecher v. Pomeroy, 253 So. 2d 421 (Fla. 1971). There is also no jurisdiction to address a brand new issue for the first time, especially when it is a request to hold a Florida statute unconstitutional. The Academy goes one step beyond the Plaintiffs' Brief, in asking that the non-joinder statute be found unconstitutional, so that third-party plaintiffs can sue a tortfeasor's liability carrier directly and have that carrier appear at trial. The legal issue in this case is how precisely must a UM carrier be identified as a party-defendant at trial in an action between the plaintiff and his own insurance carrier. However, the Academy wants the non-joinder statute held unconstitutional, arguing that third-party plaintiffs have a right of direct action against the unrelated

tortfeasor's liability carrier. Not only does this Court not have jurisdiction to rule on the previously unpresented argument on the constitutionality of the non-joinder statute, there certainly is no basis to abrogate the statute as to third-party plaintiffs.

It is also important to remember that the reason the Plaintiff wanted GEICO identified as the "underinsured" motorist carrier was to make sure that the jury understood that there was ample insurance coverage to pay for his Judgment. Now the Academy wants the non-joinder statute held unconstitutional; and wants this Court to rule that third-parties, once again, have a direct right of action against a tortfeasor's insurance carrier and it wants to be able to tell the jury the extent of coverage provided by this insurer/defendant. There is no reason for this Court to issue some type of advisory opinion, regarding the non-joinder statute. Suffice it to say, that even when joinder of insurance carriers was permitted by this Court, the extent of liability limits available to the plaintiff was not evidence allowed to go to the jury. Stecher, 423:

> One of the objectives of Beta and Bussey was to provide a disclosure of policy limits Between the parties which had not previously been allowed. The reasons were for purposes of negotiation and to encourage settlement between the parties and thus shorten litigation and speed up the courts' heavy trial dockets. It was never intended that policy limits should go to the jury and Beta Eta expressly said so. It is immaterial for the jury's consideration, because the principles still stand that its decision must rest solely upon the evidence and the law as

> charged. Moreover, to reveal defendants' amount of insurance before the jury would equally entitle a defendant to bring out his coverage when the limits are minimal and advantageous to him. Neither one has relevancy and has no place before the jury.
>
> It was felt in reaching our decisions in Beta and Bussey that revealing the existence of an insuror as a real party in interest justifiably reflects the true fact that there is financial responsibility.
>
> * * *
>
> If this position of the carriers is to be recognized, as it was at their urging by concurring with them in the position they asserted then, it surely follows that such Real party in interest should be present and revealed when the cases are tried. Consistency in the law, and certainly consistency of one's position, is essential to equal justice.
>
> Stecher, 423.

As a first party, a plaintiff is entitled to sue his UM carrier in the same lawsuit against as the tortfeasor, and the carrier is a named party defendant. In a third party suit, a plaintiff is allowed a direct action against the tortfeasor, but not the tortfeasor's insurance carrier. If this Court were to revert back to Stecher, by holding the non-joinder statute unconstitutional, the identification of the carrier still cannot reflect the availability of financial responsibility by the insurance company. In the present case, GEICO agreed with the trial court that it should be identified as a party-Defendant; it was and it was also identified as the Plaintiff's insurance

carrier and it had separate counsel and it participated as a party Defendant throughout trial. By identifying GEICO as the Plaintiff's insurance carrier, even the public policy announced in Stecher was met, because it was clear to the jury there was an entity with financial responsibility and the availability to respond to the Jury's Verdict.

The Academy wants to take us back to the days of Beta Eta and Stecher and eliminate the non-joinder statute, so that, not only can first parties bring their carriers into the suit, but so can third parties; and once the carrier is a named party defendant, the extent of their financial responsibility should be revealed to the jury as well. Beta Eta House Corporation, Inc. of Tallahassee v. Gregory, 237 So. 2d 163 (Fla. 1970). However, not even Stecher, or any other Supreme Court case, has ever held that the amount of policy limits, or the amount of coverage available, is a proper consideration for the jury in a plaintiff's personal injury suit. Below, Lamz argued that the jury had the right to know that the tortfeasor was underinsured and that there was another insurance carrier, with coverage available beyond the underinsured tortfeasor's limits, to respond to the Jury's Verdict. For this reason, the Plaintiff refused to agree to having GEICO identified as the uninsured motorist carrier, or the Plaintiff's insurance carrier. However, Lamz is completely consistent with the decisions of this Court from Stecher all they way through to Krawzak and

Medina. Every single one of the more recent cases, dealing with the identification of the plaintiff's insurance carrier, all involve situations where the carrier was not identified at all, or in any manner, at trial. The issue was not how much coverage was available.

In Krawzak, the UM carrier filed a motion in limine to sever itself from the trial completely and to preclude any reference to the presence of the insurance company in the case. Krawzak, 116. It expressly asked to be identified as co-counsel for the tortfeasor and the trial judge agreed. The Fourth District reversed and this Court affirmed; finding that since Krawzak had a direct cause of action against GEICO, as the UM carrier under § 627.727(6), Fla. Stat. (1991), "the presence of a UM insured who is lawfully sued and properly joined in a suite should be disclosed to the jury in its actual status as a party defendant." Krawzak, 117.

In the present case, GEICO was identified to the jury in its actual status as a party Defendant and the jury was additionally told that GEICO was the insurance carrier for the Plaintiffs. This disclosure certainly met the full disclosure requirements of Dosdourian, supra. There is nothing in Krawzak that holds that the extent, or type, of insurance coverage made available by this named party Defendant, must be revealed to the jury, in order to have a fair trial in a personal injury case. If this Court were to rule that the amount of policy limits must be

revealed to the jury, or the type of coverage available, it would certainly be in direct and express conflict with this Court's prior decisions in Beta Eta, supra; Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969); and Stecher.

In Krawzak, this Court held that it was appropriate under the UM statute for the jury to be made aware of the presence of the UM insurer, which has been properly joined in the action against the tortfeasor. For that very reason, GEICO agreed below that it should be identified as the UM carrier, or the Plaintiff's insurance carrier; and these two choices were given to Lamz and he rejected both.

In Medina, there was also a complete preclusion of any identification of Allstate, the UIM carrier, who had been joined as the necessary party pursuant to § 627.727(6) and the court held that it was improper to obscure the identity of a party. Medina, 1189. In the present case, GEICO's identity was not obscured or hidden; GEICO was not severed; it was properly identified as a party Defendant; it participated at trial as a party Defendant, it was represented by independent counsel and was identified as the Plaintiff's insurance carrier. In Medina, this Court was concerned with the severance of the automobile insurance carrier from the case, finding that the pre-trial exclusion of the insurer's identification constituted a per se miscarriage of justice. Medina, 1190. Once again, in the present case, there was no exclusion of the insurer's identity.

The Plaintiffs claim that the extent of the insurance coverage has to be revealed to the jury; not simply that the carrier is there as a named party defendant, represented by separate counsel, and not somehow co-joined with the tortfeasor.

The Academy claims that in order to maintain consistency and to avoid the exception to the rule of full disclosure; which it characterizes as the Fourth District's decision in Lamz; this Court must find the non-joinder statute unconstitutional. That way, every insurance carrier, in every case, will be a named defendant, identified as such to the extent of its financial responsibility to respond to the verdict under the old Beta Eta line of cases. The Academy does not distinguish, however, the fact that, even when there was joinder of insurance carriers, the extent to which a party was financially responsible was never allowed to go to the jury. Clearly, this full financial disclosure is the goal of the plaintiffs' bar. If simply identifying an insurance company as such in a third-party claim against a tortfeasor were sufficient, the Academy would not have appeared in on this case; which has to do with whether the insurance carrier must be identified, not just as the Plaintiff's carrier, or an uninsured motorist carrier, but must be identified as the underinsured motorist carrier. In other words, the extent of coverage available is totally tied up with the Plaintiff's and Academy's argument in this case; and this is cemented by the fact that the Academy's citation to Stecher, puts in bold, the portion of the opinion that

requires disclosure of the policy limits "between the parties." (Brief of Amicus, page 19).

Even if non-joinder is abolished by this Court or the legislature, there is not a single case in Florida that allows the extent of financial responsibility on the part of a named party-defendant to be a consideration for the jury at trial

The Academy really is asking for an advisory opinion, regarding the non-joinder statute and third party plaintiffs, which has absolutely nothing to do with this case, because the insurance carrier was properly joined in the lawsuit and named as a party Defendant and identified as such.

GEICO was joined as a party Defendant and this Court does not have to address, in any manner, the non-joinder statute. It certainly does not have to rule again that the statute is constitutional. The constitutionality of § 627.4136, Fla. Stat. (1993) is being raised for the first time in this Court and was never a legal issue in the trial court or the appellate court. Therefore, any claim of unconstitutionality by the Plaintiffs, or the Amicus, has clearly been waived. Sanford v. Rubin, 237 So. 2d 134 (Fla. 1970); Cato v. West Florida Hospital, Inc., 471 So. 2d 598 (Fla. 1st DCA 1985).

Assuming arguendo, that this Court considers the constitutionality of the statute and its decision in VanBibber v. Hartford Accident & Indemnity Insurance

Co., 439 So. 2d 880 (Fla. 1983), it is respectfully submitted the end result would be exactly the same and this Court would uphold the constitutionality of the non-joinder statute.

The statute address the third-party beneficiary concept and the right of a third-party to bring a direct action against a tortfeasor's liability carrier:

> **627.4136. Nonjoinder of insurers**
>
> (1) It shall be a condition precedent to the accrual or maintenance of a cause of action against a liability insurer by a person not an insured under the terms of the liability insurance contract that such person shall first obtain a settlement or verdict against a person who is an insured under the terms of such policy for a cause of action which is covered by such policy.
>
> (2) Notwithstanding subsection (1), any insurer who pays any taxable costs or attorney's fees which would be recoverable by the insured but for the fact that such costs or fees were paid by the insurer shall be considered a party for the purpose of recovering such fees or costs. No person who is not an insured under the terms of a liability insurance policy shall have any interest in such policy, either as a third-party beneficiary or otherwise, prior to first obtaining a settlement or verdict against a person who is an insured under the terms of such policy for a cause of action which is covered by such policy.
>
> (3) Insurers are affirmatively granted the substantive right to insert in liability insurance policies contractual provisions that preclude persons who are not designated as insureds in such policies from joining a liability insurer as a party defendant with its insured prior to the rendition of a verdict. The contractual provisions

authorized in this subsection shall be fully enforceable.

> (4) At the time a judgment is entered or a settlement is reached during the pendency of litigation, a liability insurer may be joined as a party defendant for the purposes of entering final judgment or enforcing the settlement by the motion of any party, unless the insurer denied coverage under the provisions of s. 627.426(2) or defended under a reservation of rights pursuant to s. 627.426(2). A copy of the motion to join the insurer shall be served on the insurer by certified mail. If a judgment is reversed or remanded on appeal, the insurer's presence shall not be disclosed to the jury in a subsequent trial.

When examining a statute, the Court begins with the legal principle that the statute is presumptively valid, constitutional, and it must be construed as constitutional, if at all possible. A legislative enactment is presumptively valid and will not be declared unconstitutional unless it is demonstrated beyond a reasonable doubt that the statute conflicts with some designated provision of the constitution. Metropolitan Dade County v. Bridges, 402 So. 2d 411 (Fla. 1981); State v. Ocean Highway and Port Authority, 217 So. 2d 103 (Fla. 1968).

Therefore, the party asserting unconstitutionality bears the heavy burden of clearly demonstrating that the act is invalid.
Village of North Palm Beach v. Mason, 167 So. 2d 721 (Fla. 1964). In addition, the party challenging the statute must overcome the strong presumption of constitutionality that attaches to all legislative enactments and a statute must be

construed as constitutional, if at all possible. Gardner v. Johnson, 451 So. 2d 477 (Fla. 1984); Gulfstream Park Racing Association Inc. v. Department of Business Regulation, 441 So. 2d 627 (Fla. 1983); Burnsed v. Seaboard Coastline Railroad Company, 290 So. 2d 13 (Fla. 1974)(high level of judicial restraint must be exercised when ruling upon the constitutionality of a statute, as every presumption should be indulged in favor of the validity of a statute; and a statute should be considered in light of the principle that the state is primarily the judge of regulations in the interest of public safety and welfare); Powell v. State, 345 So. 2d 724 (Fla. 1977)(if reasonably possible, all doubts must be resolved in favor of a statutory constitutionality).

This Court has stated that it is obliged to construe statutes in such a way as to render them constitutional, if there is any reasonable basis for doing so. Aldana v. Holub, 381 So. 2d 231 (Fla. 1980); VanBibber, supra (if a statute can be construed to be constitutional it should be); City of St. Petersburg v. Siebold, 48 So. 2d 291 (Fla. 1950)(where two or more interpretations can be reasonably given to a statute, the one that will sustain its validity should be given and not the one that destroys the purpose of the statute); Vildibill v. Johnson, 492 So. 2d 1047 (Fla. 1986).

Even the elimination of one possible ground for relief does not require the legislature to provide some replacement relief. Jetton v. Jacksonville Electric

Authority, 399 So. 2d 396, 398 (Fla. 1st DCA 1981):

> ... The Constitution does not require a substitute remedy unless legislative action has abolished or totally eliminated a previously recognized cause of action.
>
> As discussed in Kluger, and borne out in later decisions, no substitute remedy need be supplied by legislation which reduces but does not destroy a cause of action. The Court pointed out that legislative changes in the standard of care required, making recovery for negligence more difficult, impede but do not bar recovery, and so are not constitutionally suspect.

The most recent version of the non-joinder statute is a substantive enactment, which simply requires the plaintiff to obtain a judgment against the insured, before obtaining a judgment against the liability carrier. VanBibber, supra. Plaintiffs are not barred from suing the tortfeasor and so the plaintiff has access to courts and a judgment. The fact that a two step process is required, even if viewed as inequitable, does not render the law unconstitutional. Loxahatchee River Environmental Control District v. School Board of Palm Beach County, 496 So. 2d 930, 938 (Fla. 4th DCA 1986)(in order to invalidate a statute, it must be so disparate in its effect as to be wholly arbitrary; the reviewing court must only determine whether the goal is legitimate and the means to achieve it is rationally related to the goal); The Florida High School Activities Association, Inc. v. Thomas,

434 So. 2d 306 (Fla. 1983).

For a statute to withstand constitutional scrutiny, under principles of substantive due process, it need merely be rationally related to the achievement of a legitimate legislative purpose. Department of Insurance v. Southeast Volusia Hospital District, 438 So. 2d 815 (Fla. 1983).

This Court carefully explained, in VanBibber, the difference between the prior decision in Markert v. Johnston, 367 So. 2d 1003 (Fla. 1978), where it found the non-joinder unconstitutional and VanBibber which found the subsequent statute constitutional. VanBibber was injured at Publix and sued the supermarket and its insurance carrier, Hartford. Relying on the non-joinder statute § 627.7262, Hartford was dismissed from the case. Unlike the present lawsuit, the plaintiff in VanBibber challenged the non-joinder statute as being unconstitutional, the trial court found it was valid and applied it to the plaintiff's claim. VanBibber, 881-882. This Court began by noting that in Shingleton the Court had adopted the third-party beneficiary concept, which allowed an injured third party to bring a direct cause of action against the tortfeasor's insurance carrier. In response to that decision, the legislature wanted to modify Shingleton, so that the injured party had no beneficial interest in the liability policy, until that person first obtained a judgment against an insured. In other words, the right of recovery was not eliminated, it was simply delayed,

transferring the accrual date from the date of the incident, to the date of the judgment. VanBibber, 882. The statute clearly and unambiguously provided no cause of action against an insurance company until a judgment against the insured had been obtained and the statute authorized insurance companies to contain non-joinder provisions in their insurance policies. VanBibber, 882. In other words, the actual contract between the insured defendant and its carrier contained a provision requiring that any one seeking to recover under the policy, to first obtain a judgment against the insured.

Shingleton held that the legislature had not given the insurance carriers the substantive right to insert a non-joinder clause in their liability policy and, therefore, there was no basis for the non-joinder statute, to require a judgment first under the previous non-joinder statute's procedural rules. VanBibber, 882, citing, Shingleton, 718-719. In Markert, the court expressly found the prior non-joinder statute to be procedural and held it unconstitutional, for invading the Court's rule making authority; noting that if the subsequent non-joinder statute was also procedural and not substantive, it would be unconstitutional under the Court's decision in Markert. VanBibber, 882.

The Court, however, found a substantial difference between the prior non-joinder statute and the current non-joinder statute. The current statute required the

vesting of the plaintiff's interest in the insurance policy after judgment, where the prior statute did no; and the current statute specially provided for a contractual provision in policies prohibiting direct third-party suits, which the prior statute also did not. VanBibber, 882-883. In finding the current non-joinder statute constitutional, the Court reasoned:

> The regulation and supervision of insurance is a field in which the legislature has historically been deeply involved. *See* chs. 624-632, Fla.Stat. While this Court may determine public policy in the absence of a legislative pronouncement, such a policy decision must yield to a valid, contrary legislative pronouncement. In *Shingleton* we found that public policy authorized an action against an insurance company by a third-party beneficiary prior to judgment. The legislature has now determined otherwise. Our public policy reason for allowing the simultaneous joinder of liability carrier espoused in *Shingleton*, therefore, can no longer prevail. Finding that the statute is substantive and that it operates in an area of legitimate legislative concern precludes our finding it unconstitutional. If a statute can be construed to be constitutional it should be. *Falco v. State*, 407 So.2d 203 (Fla.1981). We hold that section 627.7262, Florida Statutes (Supp.1982), is constitutional.
>
> VanBibber, 883.

For nearly two decades, since VanBibber, this Court has never chosen to deviate from that decision, holding the non-joinder statute constitutional and neither has the legislature deviated from the public policy set forth in that law. The

plaintiffs' bar argues that the playing field has not leveled itself and is uneven, in an adverse way to plaintiffs, because of this Court's decision in Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993); which held that the tortfeasor/defendant should only be liable for its percentage of fault for economic damages under § 768.81(3), Fla. Stat. (Supp. 1988). Prior to Fabre, plaintiffs would settle with the defendant with the largest amount of liability and the least amount of financial responsibility, sometimes leaving a financially solvent defendant, with a very small percentage of liability on the hook for the entire amount of the plaintiff's damages. Walt Disney World Co. v. Wood, 515 So. 2d 198 (Fla. 1987)(operator found 1% at fault, was liable to the plaintiff for 86% of the damages under joint and several liability, leaving any change in the apportionment of liability to the legislature). The legislature believed it was leveling the playing field, by the enactment of § 768.81(3). Understandably, the plaintiffs' bar felt that it was being abused, by requiring a defendant to pay only for its percentage of fault.

Somehow the plaintiffs now think, that in order to compensate for Fabre and an alleged anti-plaintiff climate, that the non-joinder statute must be held unconstitutional and abolished. Again, this type of decision must be left to the legislature, which has the duty to enact, modify or change substantive rights in existing Florida law. The fact that plaintiffs now believe they should have a better

chance to have bigger judgments, paid in full, with the abolishment of the non-joinder statute, certainly is not a basis for finding the statute unconstitutional and void due to today's climate.

None of these issues, surrounding the non-joinder statute, has absolutely anything to do with the actual issue on appeal in this case. GEICO was properly joined in the lawsuit as a party-Defendant; was properly identified as a party-Defendant; was represented by independent counsel as a party-Defendant; and appeared on the verdict form, as a separate party. The Court has no jurisdiction to address the constitutionality of the statute; any claim of unconstitutionality has been waived and there is no basis for this Court to be issuing an advisory opinion on how the non-joinder statute should be addressed after Fabre, Krawzak, and Medina. The Fourth District's decision in Lamz, properly applied this Court's law, and even if non-joinder was abolished, the identification of GEICO in this case was in full compliance with the decision of this Court from Beta Eta to Stecher, to Dosdourian, to Krawzak and the Opinion below must be affirmed.

II. THE TRIAL COURT PROPERLY SENT THE JURY BACK TO RECONSIDER ALL ISSUES ON THE VERDICT FORM; ANY ALLEGED ERROR IN THIS PROCEDURE WAS WAIVED BY THE PLAINTIFF WHO OBJECTED TO HAVING THE JURY RECONSIDER ALL THE ISSUES; AND IN THE ABSENCE OF THE ENTIRE TRIAL TRANSCRIPT THERE CAN BE NO REVERSIBLE ERROR; THE VERDICT FOR THE PLAINTIFFS MUST BE AFFIRMED.

Once again the Plaintiffs do not refer to all the facts, even in the snippets of the trial transcript contained in the Record on Appeal. It was not determined, after the jury returned, that it had reached an inconsistent Verdict. Both the trial court and the Defendants correctly stated there was no inconsistency in the failure to award no loss of consortium damages to Mrs. Lamz. Furthermore, the Plaintiffs continue to be less than candid, even with this Court, when they neglect to inform it that the Plaintiffs objected to the jury being sent back to reconsider its entire Verdict. The Plaintiffs repeatedly objected, on the basis that only a mistrial could be granted and that it would be prejudicial to the Plaintiffs if the jury reconsidered the entire Verdict. In light of that fact alone, there could not possibly be any error being raised, especially on this appeal. Furthermore, as this Record clearly indicates, the jury was sent back to reconsider its entire Verdict and was specifically instructed that if it found permanency again, it was to award loss of consortium

damages. When the Plaintiffs belatedly tried to switch legal positions and argue the jury was erroneously sent back on just one issue, once again the Defendants reminded the court that the proper procedure had been used, which the Plaintiffs had objected to. Therefore, there could not possibly be any prejudicial, reversible error sufficient to grant a new trial; nor, more importantly, any error creating conflict with this Court's law.

The only reason the jury was sent back to reconsider its entire first Verdict, over the Plaintiffs' objection, was in the event the appellate court disagreed with the judge and the Defendants and found an inconsistent Verdict; and if it did, an entire new trial would not have to be held. However, case law clearly establishes that the original Verdict in this case was not inconsistent and, therefore, any alleged error in having the jury reconsider it could not be sufficient to require the granting of a whole new trial. This is especially true where the Defendants agreed to a Final Judgment, based on the second Verdict awarding the Plaintiffs more money.

It is only upon a showing of competent, substantial evidence of loss of consortium that such an award can be made. Such an award is not required simply because the Plaintiff proves a permanent injury under § 627.737, Fla. Stat. (1985).

In other words, unless the Plaintiff proves a permanent injury, there is no right to any consortium award, and the jury in the present case properly refused to make

any such award to Mr. Lamz, having found a non-permanent injury to his wife.

More importantly, even when permanency is found, there still is no mandatory loss of consortium award. The loss of consortium claim must be supported by substantial competent evidence; and even the Plaintiff's cases cited to the Fourth District hold this as well. Christopher v. Bonifay, 577 So. 2d 617 (Fla. 1st DCA 1991)(zero loss of consortium verdict reversed, where there was substantial undisputed evidence); Jenkins v. West, 463 So. 2d 581 (Fla. 1st DCA 1985)(zero consortium award reversed, where plaintiff offered competent substantial undisputed evidence of loss of consortium). The Plaintiff did not cite a single case that holds that a finding of permanency equals a mandatory loss of consortium award, because there is no such law.

Defense counsel agreed to allow the jury to reconsider all the issues in the case, when the Plaintiffs objected to no loss of consortium award to Mrs. Lamz. When the jury was reinstructed, there was no objection by the Plaintiffs to the instructions. Therefore, the Plaintiffs again have waived any alleged error regarding the jury re-instruction.

The Plaintiffs are misleading this Court, inferring that they asked to have the entire case submitted to the jury. As the Plaintiffs are well aware, the jury was reinstructed by Judge Stafford; the Plaintiffs did not object to these instructions in

any manner; and therefore, there can be no prejudicial reversible error, when the jury was sent back to award the Plaintiffs more money.

It is the declared policy of reviewing courts to confine all parties to the points and questions raised and determined at trial, especially regarding jury instructions. The Plaintiffs have failed to identify any instruction they requested, which was not given and there can be no error on this point. It is established law that the failure to object at the charge conference, to the denial of requested instructions, waives review of the alleged error and does not constitute fundamental error reviewable without objection. Ashley v. Ocean Roc Motel, Inc., 518 So. 2d 943 (Fla. 3d DCA 1987), rev. denied, 528 So. 2d 1181 (Fla. 1988).

In order to establish that the court's denial of a requested jury instruction was reversible error, the Plaintiffs, in addition to showing that the alleged requested instruction was an accurate statement of the law, must show that the facts in the case supported giving the instruction and that the instruction was necessary for proper determination of the case. Ashley, supra, 945; Davis v. Charter Mortgage Company, 385 So. 2d 1173 (Fla. 4th DCA 1980); Gallagher v. Federal Insurance Company, 346 So. 2d 95 (Fla. 3d DCA 1977)(To warrant reversal of a judgment on the grounds that the court failed to give instructions that might properly have been given, the court must be satisfied that the jury was misled.); Alderman v. Wysong &

Miles Company, 486 So. 2d 673 (Fla. 1st DCA 1986); Kinya v. Lifter, Inc., 489 So. 2d 92 (Fla. 3d DCA 1986), rev. denied, 496 So. 2d 142 (Fla. 1986). No such showing was made by the Plaintiffs and the Verdict in their favor must be affirmed, and the new trial Motion was correctly denied. Hill v. Sadler, 186 So. 2d 52 (Fla. 2d DCA 1966), cert. denied, 192 So. 2d 487 (Fla. 1966)(the fact that a requested instruction correctly states the law does not make the court's refusal to give it reversible error); Leake v. Watkins, 73 Fla. 596, 74 So. 652 (1917)(where the charges given are in accord with the evidence and the applicable law and there is ample evidence to support the verdict against the party objecting, errors in refusing to give instructions will not warrant reversal); Southeastern General Corporation v. Gorff, 186 So. 2d 273 (Fla. 2d DCA 1966); Reeder v. Edward M. Chadbourne, Inc., 338 So. 2d 271 (Fla. 1st DCA 1976).

In the absence of a clear showing in the Record, it is presumed that the jury was correctly instructed. Dicosola v. Heitel, 138 So. 2d 804 (Fla. 2d DCA 1962). Similarly, absent a clear showing to the contrary, it must be presumed that the jury followed the court's instructions and applied the law to the facts as it found them. Eley v. Moris, 478 So. 2d 1100 (Fla. 3d DCA 1985); National Car Rental System, Inc. v. Holland, 269 So. 2d 407 (Fla. 4th DCA 1972).

Decisions regarding jury instructions are within the sound discretion of the

trial court and should not be disturbed on appeal absent prejudicial error. Goldschmidt v. Holman, 571 So. 2d 422 (Fla. 1990). Prejudicial error requiring a reversal of judgment or a new trial occurs only where "the error complained of has resulted in a miscarriage of justice." Goldschmidt, 425, citing, § 59.041, Fla. Stat. (1989).

It is well settled that not every error warrants reversal, but only harmful, prejudicial error. The appellate court will review the evidence contained in the entire transcript, in the light most favorable to the Verdict of the jury. If the alleged error is harmless then the Verdict must be affirmed. The jury in this case was reinstructed only as a safety measure, in case the first Verdict was legally inconsistent, which it was not. Therefore, even if he trial court erred in using its instruction, the error would be harmless; especially where the Plaintiffs objected to the whole case going back to the jury. The harmless error doctrine applies to jury instructions. Security Mutual Casualty Company v. Bleemer, 327 So. 2d 885 (Fla. 3d DCA 1976).

The test to be applied by the appellate court in determining whether prejudicial error has been committed is whether, but for the error complained of, a different result would have been reached by the jury. This requires consideration of the alleged error in light of the entire transcript to determine whether a miscarriage

of justice has occurred. State Farm Mutual Automobile Insurance Company v. Wright, 348 So. 2d 1198 (Fla. 3d DCA 1977); Wallace v. Rashkow, 270 So. 2d 743 (Fla. 3d DCA 1972). The Plaintiffs have failed to provide any court with the entire trial transcript and as such the Verdict for the Plaintiffs must be affirmed. The Appellants have made no showing of a miscarriage of justice on this appeal. As previously indicated, this case involved a five day jury trial in which the jury heard an abundance of evidence and entered a Verdict for the Plaintiffs. Then it was reinstructed and gave the Plaintiffs more money. The Appellants cannot show in the Record there was any harmful error, clear or abuse of discretion, and the Verdict must be affirmed.

GEICO totally agrees with the law cited by the Plaintiffs on this Point, including Hollywood Corporate Circle Associates v. Amato, 604 So. 2d 888 (Fla. 4th DCA 1992), a case handled by undersigned counsel. The law is that the whole verdict must be resubmitted to the jury, which is exactly what the Defendants asserted below, the Plaintiffs objected to the jury redoing its entire verdict; but the judge allowed the whole verdict to be resubmitted. The Plaintiffs objected and suggested no instruction for the jury, because they wanted a mistrial and not an entire resubmission. At best, they waived any alleged error and there is no conflict or basis to reverse Lamz and it must be affirmed.

CONCLUSION

There is no direct and express conflict between the holding and the principles of law used in Lamz and any other decision, including those of the Florida Supreme Court and Lamz must be affirmed. There is no reversible, prejudicial error in the jury reconsidering its Verdict in its entirety and the Verdict for the Plaintiffs must be affirmed.

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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-492

Florida Bar No. 184170

RANDY LAMZ and DEBORAH LAMZ, his wife,

Petitioners,

v.

GEICO GENERAL INSURANCE COMPANY, a foreign corporation, MORRIS LEISNER and MARNEE HEATHER NICHOLS,

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE FOURTH DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON THE MERITS
MORRIS LEISNER and MARNEE HEATHER NICHOLS

(With Appendix)

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REFERENCES

POINTS ON APPEAL

I. TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT GEICO WAS THE INSURANCE CARRIER FOR THE PLAINTIFF; GEICO WAS A PARTY AT TRIAL REPRESENTED BY SEPARATE COUNSEL; WAS LISTED ON THE VERDICT FORM AND GEICO CORRECTLY IDENTIFIED AS BEING LEGALLY RESPONSIBLE FOR ANY NEGLIGENCE OF THE DEFENDANTS BECAUSE OF ITS POLICY WITH THE PLAINTIFFS; EVERY CASE CITED BY THE PLAINTIFFS REQUIRE AFFIRMANCE OF THE VERDICT FOR THE PLAINTIFFS AND THE DECISION IN LAMZ.

II. THE TRIAL COURT PROPERLY SENT THE JURY BACK TO RECONSIDER ALL ISSUES ON THE VERDICT FORM; ANY ALLEGED ERROR IN THIS PROCEDURE WAS WAIVED BY THE PLAINTIFF WHO OBJECTED TO HAVING THE JURY RECONSIDER ALL THE ISSUES; AND IN THE ABSENCE OF THE ENTIRE TRIAL TRANSCRIPT THERE CAN BE NO REVERSIBLE ERROR; THE VERDICT FOR THE PLAINTIFFS MUST BE AFFIRMED.

CERTIFICATION OF TYPE

It is hereby certified that the size and type used in this Brief is 12 point Courier, a font that is not proportionately spaced.

INDEX TO RESPONDENT'S APPENDIX

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