



IN THE DISTRICT COURT OF APPEAL  
STATE OF FLORIDA  
FOURTH DISTRICT

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APPEAL CASE NO. 4D13-2552

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WAL-MART STORES, INC,

L.T. CASE NO. 562011CA002728

Appellant,

v.

TOM PAKALODOUKAS,

Appellee.

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ANSWER BRIEF OF APPELLEE TOM PAKALODOUKAS

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ON APPEAL FROM THE NINETEENTH JUDICIAL CIRCUIT  
IN AND FOR ST. LUCIE COUNTY, FLORIDA

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## **PRELIMINARY STATEMENT**

In this appeal, the following abbreviations or special terms will be used:

Appellant Wal-Mart Stores, Inc. will be referred to as “Wal-Mart.”

Appellee Tom Papakalodoukas will be referred to as “Papakalodoukas.”

The record on appeal will be cited as “R” with the volume and page number, as follows: “(R\_\_:\_\_).” Papakalodoukas’ Trial Exhibit 10, which was made a supplemental record by order of this Court dated April 11, 2014, will be cited as “(SR1:\_\_).”

The trial transcript, which is found at Volumes 31 through 40 of the Record on Appeal, will be cited as “T” with the volume and page number, as follows: “(T\_\_:\_\_).” The transcripts of the hearing on motions in limine and the jury voir dire, which were made a supplemental record by order of this Court dated March 5, 2014, will be cited respectively as “(ST1:\_\_:\_\_)” and “(ST2:\_\_:\_\_).”



## **STATEMENT OF THE CASE AND FACTS**

### **Nature of the Case**

Tom Papakalodoukas was injured when he when he slipped on a Gatorade sign that had fallen from its negligently assembled promotional display in a Wal-Mart store. Papakalodoukas underwent three surgeries as a result of his injuries and sued Wal-Mart. (R1:1-3) Papakalodoukas prevailed after a week-long jury trial, obtaining a judgment for \$1,158,429.71. (R26:5238-40; R30:5879)

Wal-Mart's appeal, like its failed motion for new trial, is based on multiple, flawed arguments. As to the first argument, the decision to instruct the jury on *res ipsa loquitur* rests solidly on evidence produced at trial demonstrating each element for that instruction. The remainder of Wal-Mart's arguments center on Papakalodoukas' counsel's remarks, in opening statement and closing argument. While some were objected to, most were not. Curiously, Wal-Mart does not even acknowledge its lack of preservation or mention the four-part fundamental error test set forth in *Murphy v. International Robotic Systems, Inc.*, 766 So. 2d 1010 (Fla. 2000), for unobjected-to closing argument. Regardless, counsel's remarks were not improper and, in any event, do not warrant a new trial under either standard. Wal-Mart's challenge to the damage award is equally meritless as each element of the award is supported by the record.

### Course of Proceedings

Discussion of the record is organized according to the points on appeal.

#### **A. Res Ipsa Loquitur And Failure To Preserve Evidence (Points I and II)**

Papakalodoukas was shopping in a Wal-Mart store when he slipped on a fallen Gatorade sign, injuring his left shoulder and arm. (T3:212-14; R8:1544-60:3:31:18) When Papakalodoukas filed his complaint he was aware only that he had slipped on a sign on the floor in the Wal-Mart store. (T3:218-20)

Despite Papakalodoukas' request for the videotape of the incident, it was not produced until ordered by the trial court, after Papakalodoukas was deposed. (R1:16; T3:219; T4:308) The videotape shows that just prior to Papakalodoukas' fall, a small child had been playing nearby and rested her foot on the shelf near the sign. (R8:1544-60, Trial Ex. 25-3:28:14)<sup>1</sup> When the child walked away, the sign fell to the floor. (R8:1544-60:3:28:27-40)

Papakalodoukas could not have known, until after viewing the videotape, how the sign had fallen or that negligent assembly of the promotional *display* that held the sign was the key to Wal-Mart's liability. (T6:553-54) By that time, a Wal-Mart employee had destroyed and discarded the *display*. (T5:469) The Wal-Mart employee, having seen the videotape before discarding the display, should have known of the display's importance to the case. (T5:484-87)

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<sup>1</sup> Trial Ex. 25 is the DVD of the incident, and is cited to the hour, minute and second on the DVD.

Wal-Mart viewed the case as a traditional slip and fall/notice case, as evidenced from its motion for summary judgment. (R1:37-2:271) Papakalodoukas, however, made it clear in his July 2012 response to that motion that the basis for the case is negligent assembly of the display, not notice. (R2:323-26) Papakalodoukas reiterated this point in a letter to Wal-Mart in August 2012. (R27:5489) Despite having been informed of Papakalodoukas' theory of the case six months before the trial, Wal-Mart falsely accused Papakalodoukas, in opening statement, of having changed his theory of the case at the last minute. (T2:126)

Even though the actual display was not available to inspect, Papakalodoukas was able to demonstrate *circumstantial* proof of negligence with testimony that the sign and display were shipped to Wal-Mart by Gatorade (T3:155) and were assembled by a Wal-Mart employee. (T5:465-68) In addition, Gatorade's national manager Gary Blankenmeister testified -- using an exemplar of the display -- that the bottom of the sign is attached to the display and held in place by plastic screws. Blankenmeister testified that if the display were assembled correctly, the sign could not fall out of the display, even if the top of the sign were to fall over. (T3:157-59, 161-62) The exemplar used by Blankenmeister in forming his opinion was not the precise display shown in the videotape -- a point Wal-Mart used to attack Blankenmeister's opinion at trial. (T3:162-163) Blankenmeister's inability to inspect and opine on the precise display used in this incident

necessitated the res ipsa loquitur instruction, which the trial court gave at Papakalodoukas' request. (T8:718-726; T10:932-33; R27:5470)

In closing, Papakalodoukas' counsel argued three times that one of the reasons for giving the res ipsa instruction is that Wal-Mart had discarded the display that held the sign. (T10:948-49, 996, 1000) *Wal-Mart did not object the first two times this argument was made.* It was not until the third time -- when Papakalodoukas responded to Wal-Mart's false accusation in closing that Papakalodoukas had changed his theory of the case -- that Wal-Mart objected. (T10:1000-02) The trial court overruled the objection but nevertheless instructed the jury to consider the argument as counsel's contention of what the evidence has shown and that counsel is permitted to comment on the law. (T10:1000-02)

**B. Order In Limine And Remarks As To Papakalodoukas' Drug Use (Point III)**

Papakalodoukas was aware that Wal-Mart planned to defend the case at trial by pointing to Papakalodoukas' use of prescription painkillers. (ST1:4) Papakalodoukas therefore moved in limine to preclude such evidence and argument. (R2:352-53; ST1:4-7) The trial court granted the motion in part, precluding *Wal-Mart* from mentioning that Papakalodoukas had abused prescription drugs. (R3:525-26; ST1:17) The trial court ruled, however, Wal-Mart would be permitted to inquire into other aspects and effects of long-term use of prescription painkillers. (ST1:17-18)

To lessen the impact of the permissible drug use evidence, Papakalodoukas' counsel told the jury in opening that she anticipated that "a lot, not a majority of [Wal-Mart's] testimony and evidence will be an attempt to make Mr. Papakalodoukas look like he's a drug abuser." (T2:73) Counsel meant to say drug *user* -- not drug *abuser* -- and told the judge so when Wal-Mart objected. (T2:75) Counsel also offered to withdraw the comment and suggested giving a curative instruction. (T2:73, 74-75) Wal-Mart moved for a mistrial but did not request a curative instruction. (T2:74-76) While Wal-Mart complains in its brief that the trial judge did not tell the jury that the comment had been withdrawn (IB at 5), Wal-Mart never asked the trial judge to do so. (T2:74-76)

As predicted, Wal-Mart made it a point to portray Papakalodoukas as a drug *abuser*, without using that precise word. During opening, Wal-Mart extensively detailed Papakalodoukas' purportedly increasing levels of prescriptions from 2002 through 2010, for sleeping pills and painkillers such as Methadone, Percocet and Oxycodone. (T2:135-142) Wal-Mart also cross-examined Papakalodoukas at length regarding his history of prescriptions for pain and anxiety medications. (T4:357, 360, 363, 364, 368)<sup>2</sup> In addition, Wal-Mart elicited testimony from physician witnesses that Papakalodoukas had a history of prescription drug use since 2000 (T7:644); that he had increased the quantity of Percocet (T7:696-97);

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<sup>2</sup> Papakalodoukas' counsel did not object to any of these remarks or the first four questions in Papakalodoukas' cross-examination. (T4:366)

and that “usually patients that have a longstanding history of narcotics develop tolerance, so they can develop some addictions to it...” (T5:423) Wal-Mart also elicited testimony from its expert Dr. Zeide, inferring that Papakalodoukas had doctor-shopped, by misinforming his doctors about his medical history, to obtain more prescription drugs. (T7:656) In short, Wal-Mart’s entire defense centered on Papakalodoukas’ purported drug “abuse” without actually using that word.

**C. Comments During Opening And Closing (Point IV)**

1. Papakalodoukas’ opening statement.

Wal-Mart complains in this point of five comments in opening statement. Wal-Mart, however, asserted only one *specific* objection -- to the comment regarding loss of health insurance from his job loss. (T2:78) The trial judge sustained that objection, denied the motion for mistrial and instructed the jury to disregard that comment, though no curative instruction was requested. (T2:78-79)

Wal-Mart also complains about the opening comment that Papakalodoukas was suffering from situational depression before the accident -- from having lost his job, marital difficulties, foreclosure of his house and medical issues. (T2:110) Wal-Mart asserted only a *general* objection as to this comment, which was overruled on the basis of relevance. (T2:110) The comment about Papakalodoukas’ job loss, in fact, was relevant to Papakalodoukas’ claim for lost wages because Wal-Mart intended to attack the lost wages claim with this very

point. Anticipating Wal-Mart's line of defense, Papakalodoukas' counsel endeavored to disclose *all* facts relevant to the lost wages claim.

Wal-Mart did not object to the other three opening remarks complained of -- namely, (1) that Papakalodoukas' daughter was experiencing problems and that he had lost his job, resulting in financial difficulties (T2:82); (2) that Papakalodoukas "was having financial issues, his house went into foreclosure, you will see lost wages. He hasn't worked since this incident occurred" (T2:110); and (3) that the jury would "hear evidence...showing what his [Papakalodoukas'] wages were before, even though he was out of work 13 days before this." (T2:114)

2. Papakalodoukas' closing rebuttal arguments.

Wal-Mart complains of two closing arguments but did not object to either argument. Regardless, both arguments were fair rebuttal to Wal-Mart's arguments.

The first argument complained of is that Medicaid is not *private* health insurance and Papakalodoukas had lost that before the accident. (T10:1004) The argument was fair game response to the argument by Wal-Mart that Papakalodoukas has health insurance in the form of Medicaid. (T10:978)

The second closing argument complained of was in response to Wal-Mart's attack on Papakalodoukas' treating doctor, Dr. Simovitch. Wal-Mart inferred bias in Dr. Simovitch's testimony because he has a letter of protection and stands to gain from a verdict in favor of Papakalodoukas. (T10:989-90) Papakalodoukas'

responded in rebuttal that “thank goodness [Dr. Simovitch] treated him without him having health insurance, which is really hard to find these days where a doctor will treat you and do surgery without health insurance.” (T10:1012)

**D. Evidence and Argument As To Damages and Jury Award (Point V)**

Papakalodoukas had three surgeries to repair the damage to his shoulder and bicep muscle resulting from the fall, and his medical bills totaled just over \$200,000.00. (SR1:1; T4:305-06) Papakalodoukas has a significant residual deformity called a “Popeye deformity,” and his injuries are permanent. (T5:395-96, 407) Papakalodoukas will need at least 36 sessions of physical therapy, which cost \$400 per session, totaling \$14,400.00. (R6:1082-84; SR1:5-10) Papakalodoukas’ implanted cadaver tendon, from the third surgery, is still tight; he is not cleared to return to work; and he is still unable to use his arm. (T3:245-46) Additional surgery may be necessary, the \$50,000 cost of which is in evidence. (SR1:1)<sup>3</sup>

Papakalodoukas testified to his past and continuing pain from his injuries and surgery, thus supporting the awards for past and future pain and suffering. (T3:245; T4:361; T5:404-05) He was, in fact, brought to tears from severe pain

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<sup>3</sup> The bill summary (SR1:1) lists the following charges for the October 15, 2012 cadaver implant surgery: \$41,256.25 for Palm Beach Gardens Medical Center; \$5,250.00 for Dr. Rondon; and \$2,625.00 for PBG Anesthesia, P.A.



after his second surgery and is depressed from not being able to work as a result of his injuries.<sup>4</sup> (T3:200-01; T3:229; T4:285-86, 289)

During voir dire, a prospective juror stated she believed she had lost her malpractice case because her attorney had asked for too much money. (ST2:84-85, 154) In light of that comment, Papakalodoukas' counsel conservatively *suggested* a low figure of \$150,000 for pain and suffering but reiterated that this is "just a suggestion" and that it is really a matter of "discretion as a jury." (T10:968)

The jury found Wal-Mart 90% negligent (R26:5238-39) and determined damages to be \$1,287,144.12, as follows: \$86,337.12 in lost wages; \$100,000.00 in lost future earning capacity; \$200,807.00 in past medical expenses; \$100,000.00 in future medical expenses; \$350,000.00 in past non-economic damages; and \$450,000.00 in future non-economic damages. (R26:5238-40)

**E. Post-Trial Motions and Disposition in the Lower Court**

Wal-Mart moved for a new trial and remittitur. (R28:5532-688) Papakalodoukas filed an opposing memorandum (R29:5699-714) and an *amended* memorandum in opposition. (R29:5723-825) While the first memorandum stated that Wal-Mart may be entitled to remittitur as to some future medicals, no amount

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<sup>4</sup> Papakalodoukas was not aware, until Dr. Simovitch told him, that because of his prior use of Methadone, the post-operative medications were not as helpful at managing his pain as they should have been. (T3:229; T4:289)

was given. (R29:5712) The *amended* memorandum, which supplanted the first, demonstrated record support for the future medical damage award. (R29:5745-46)

The trial court denied Wal-Mart's motion for new trial and motion for remittitur, finding that Wal-Mart "was not denied a fair trial" and that the damages awarded "are within the legal range of evidence." (R30:5878) Final judgment was entered in the amount of \$1,158,429.71. (R30:5879) This appeal followed.

### **SUMMARY OF ARGUMENT**

The trial court properly instructed the jury on *res ipsa loquitur* because Papakalodoukas demonstrated each element for that instruction. Wal-Mart challenges to two of the elements: exclusive control and lack of direct proof of negligence. Wal-Mart, however, was in exclusive control of the instrumentality of its negligence -- the Gatorade promotional display -- because it had installed and assembled it and no one had tampered with the display. The child's contact with the *sign* did not negate exclusive control of the *display* because, as Gatorades' national manager testified, the sign could not have fallen if the display had been assembled properly. And since Wal-Mart had discarded the display before Papakalodoukas was made aware of its significance and could request it, Papakalodoukas lacked *direct* proof of negligence.

Wal-Mart also complains about the argument in closing that the *res ipsa* instruction was given because Wal-Mart had discarded the display. At the outset,

the argument was not objected to the first two times it was made. In addition, Wal-Mart invited the argument with its false accusation that Papakalodoukas had changed his theory of the case just before trial. And regardless the argument was factually and legally correct.

Wal-Mart next argues that Papakalodoukas violated an order in limine with an inadvertent comment in opening that Wal-Mart would try to portray Papakalodoukas as a “drug abuser.” The order in limine, however, was requested by Papakalodoukas and directed to Wal-Mart -- so there was no violation. In addition, the order did not preclude Papakaloukas from arguing as to how Wal-Mart would try to portray Papakalodoukas. And in fact, the prediction was true because Wal-Mart repeatedly introduced evidence and argument portraying Papakalodoukas as a drug “abuser” without using that precise term. That aside, Wal-Mart was not prejudiced or “whipsawed” by the comment. Unlike the “whipsaw” cases cited by Wal-Mart, Papakalodoukas did not argue that Wal-Mart failed to produce the very evidence he had succeeded in precluding.

Wal-Mart also complains about other allegedly improper comments of counsel in opening statement and closing argument. Wal-Mart, however, objected to only two of the comments made in opening, neither of which was improper or harmfully prejudicial and inflammatory. Wal-Mart did not object to the closing arguments complained of -- a fact Wal-Mart fails to even acknowledge in its brief.

In addition, Wal-Mart made no attempt in its motion for new trial or on appeal to satisfy the four-part fundamental error test set forth in *Murphy v. International Robotic Systems, Inc.*, 766 So. 2d 1010 (Fla. 2000), as to the unobjected-to closing arguments. Wal-Mart, in any event, opened the door to the arguments it now complains of. The comments and arguments of Papakalodoukas' counsel do not warrant a new trial under any standard -- for preserved or unpreserved argument of counsel -- either individually or cumulatively.

The record supports the award for future medicals. The \$800,000 award for non-economic damages is not unreasonable, in light of Papakalodoukas' three surgeries, \$400,000 in economic damages, and severe pain and suffering. The total award did not exceed the amount *requested* because counsel merely *suggested* a conservative figure for pain and suffering but did not *request* a set amount. Wal-Mart's cherry-picked verdict comparison mentions only cases involving obviously less serious injuries. And Wal-Mart fails to mention two recent \$1 million verdicts *against Wal-Mart* for similarly severe injuries -- in cases where Wal-Mart was represented by the same firm as in this case.

## **ARGUMENT**

### **I**

#### **PAPAKALODOUKAS MET ALL REQUISITES FOR RES IPSA LOQUITUR JURY INSTRUCTION**

##### **Standard of Review**

The trial court's decision to give a particular jury instruction "is reviewed under a mixed standard of *de novo* and abuse of discretion," and is "limited by the case law." *Costa v. Aberle*, 96 So. 3d 959, 963 (Fla. 4th DCA 2012).

##### **Discussion**

Res ipsa loquitur gives an "injured plaintiff a common sense inference of negligence when direct proof is wanting," if plaintiff can show that:

[T]he instrumentality causing his or her injury was under the exclusive control of the defendant, and that the accident is one that would not, in the ordinary course of events, have occurred without negligence on the part of the one in control.

*Goodyear Tire & Rubber Co. v. Hughes Supply, Inc.*, 358 So. 2d 1339, 1341 (Fla. 1978). Each element has been satisfied. Wal-Mart does not contest the first element: that "the occurrence is a phenomenon which does not ordinarily happen except in the absence of due care." *Id.* at 1342. And in any event, Blankenmeister testified that the sign could not have fallen from the display in the absence of due care in the display's assembly -- even if leaned on by a child. (T3:159, 161-62)

**A. Wal-Mart Had Exclusive Control of the Display**

Wal-Mart argues that it was not in exclusive control because a child purportedly leaned against the *sign*. (IB at 21) Wal-Mart misses the point. The instrumentality of Wal-Mart's negligence was the improperly assembled *display* -- not the fallen sign. Wal-Mart had assembled the Gatorade display and mounted the sign onto the display. (T5:465-68) And Wal-Mart produced no evidence that anyone else had unscrewed the sign or tampered with the display after it had been assembled. (T10:952) Wal-Mart, therefore, was in exclusive control of the *display* -- the instrumentality of its negligence.

The mere fact of the child possibly touching the sign with her foot does not negate Wal-Mart's exclusive control over the display. The point is illustrated in this Court's decision in *Nodurft v. Servico Centre Assocs.*, 884 So. 2d 395 (Fla. 4th DCA 2004), and its underpinning, *Bonventre v. August Max*, 645 N.Y.S.2d 867 (N.Y. Sup. Ct. App. Div. 1996). In *Nodurft*, a trash receptacle fell from the wall of a hotel restroom onto plaintiff's foot. The trial court denied the *res ipsa* instruction, finding that defendant lacked exclusive control because a member of the public might have tampered with the trash receptacle. *Id.* at 397. This Court, however, reversed, finding that the trial court's interpretation of the *res ipsa loquitur* doctrine and exclusive control was "too narrow." *Id.*

In so holding, this Court relied upon *Bonventre*, which involved facts strikingly similar to this case. The plaintiff in *Bonventre* was shopping in an August Max store when a mirrored wall panel fell on her. *Id.* at 867. The trial court refused to apply *res ipsa loquitur* because a member of the public may have touched a part of the display. *Id.* at 868. But the appellate court reversed, reasoning that plaintiff need only show that defendants' control was *sufficiently exclusive to rule out other factors*:

The plaintiff need not have shown that the defendants were the *only ones* in control of the panel, but she must have shown that the defendants' control was of sufficient exclusivity to fairly rule out the chance that any purported defect was caused by some other agency....*While the public might have touched the shelving in question, that does not explain the collapse of the entire panel.*

*Id.* at 868 (emphasis added). This reasoning, quoted in full in *Nodurft*, 884 So. 2d at 398, applies with equal force here. In this case as in *Bonventre*, while the child in the video may have touched the sign, that does not explain why it fell from the display onto the floor. The explanation is in the display's assembly -- not the child's contact. (T3:159, 161-62) In light of this Court's controlling decision in *Nodurft*, the element of exclusive control is met here. *See also Fleming v. Wal-Mart, Inc.*, 595 S.W.2d 241 (Ark. Ct. App. 1980) (finding Wal-Mart had exclusive control, notwithstanding that a customer had inspected the cabinet display just before it fell on plaintiff).

The Fifth District’s decision in *Monforti v. K-Mart, Inc.*, 690 So. 2d 631, 633 (Fla. 5th DCA 1997), does not assist Wal-Mart for several reasons. First, the court in that case held that the evidence was unclear on the issue of exclusive control because instrumentality of negligence was *merchandise* to which customers had access. Here, by contrast, the instrumentality of Wal-Mart’s negligence was a *promotional display* that held the sign. And the testimony demonstrated that Wal-Mart installed the display; no one had tampered with the display; and the sign could not have fallen with a child’s contact absent negligence in the display and sign installation.<sup>5</sup> Also, the plaintiff in *Monforti* had ample *direct* evidence of negligence. *Id.* Regardless, to the extent of any conflict, *Nodurft* controls.

**B. No Direct Proof of Negligence**

Wal-Mart argues that Papakalodoukas had direct evidence of negligence from the video, Blankenmeister and Wal-Mart employee Connie Weeks. Wal-Mart is mistaken. While Papakalodoukas had some *circumstantial* proof of negligence, it lacked *direct* proof because Wal-Mart had discarded the display.

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<sup>5</sup> The other two “exclusive control” cases cited by Wal-Mart are so factually dissimilar as to be of no assistance on that issue. *City of New Smyrna Beach Util. Comm’n v. McWhorter*, 418 So. 2d 261 (Fla. 1982) (public access to sewer lines that backed up into plaintiff’s home); *Goodyear Tire*, 358 So. 2d at 1342-43 (defective tire in customer’s possession). Wal-Mart’s other cases of customer injuries in a retail store did not turn on exclusive control. *Hancock v. Wal-Mart Stores East, L.P.*, 487 Fed. Appx. 545 (11th Cir. 2012); *Ploetz v. Big Discount Panel Ctr., Inc.*, 402 So. 2d 64 (Fla. 4th DCA 1981).



That was the very point of *McDougald v. Perry*, 716 So. 2d 783, 786-87 (Fla. 1998), where the supreme court concluded that defendant's failure to preserve the instrumentality of its negligence was the reason direct proof of negligence was unavailable. In *McDougald*, plaintiff's car was hit by a spare tire that had come loose from its carriage under defendant's truck. *Id.* at 786-87. Defendant did not preserve the chain and securing device. Res ipsa loquitur applied because,

There was insufficient evidence available to [plaintiff]. The likely cause of this accident, the chain and securing device, *were in the exclusive possession of [defendants] and were not preserved.*

*Id.* (emphasis added). Here, just as in *McDougald*, the likely cause of the fall -- the promotional display -- was in the exclusive possession of Wal-Mart and was not preserved. Papakalodoukas therefore lacked *direct* proof of negligence. Wal-Mart's argument that preservation of evidence has nothing to do with res ipsa loquitur is flatly incorrect.

In addition, the video showing the child's foot near the sign did not supply *direct* proof of negligence because Wal-Mart's negligence was in assembling the display. Wal-Mart employee Connie Weeks' testimony, that Wal-Mart had installed and assembled the display, was direct proof of Wal-Mart's *control* -- not direct proof of Wal-Mart's *negligence*. Nor did Gary Blankenmeister supply *direct* proof of negligence. Since Blankenmeister did not have the *actual* display, his opinion testimony was circumstantial, *not direct*. Wal-Mart in fact cross-examined

Blankenmeister on that very point, eliciting testimony that the *exemplar* from which he testified is not the same as the *actual display* shown in the video. (T3:162-63) Wal-Mart cannot claim at trial that Blankenmeister's opinion is not worthy of belief because he did not have the actual display while arguing on appeal that Blankenmeister directly proved negligence by using the exemplar.

Wal-Mart's case law on this point is equally unavailing. In *Ploetz*, plaintiff had *direct* proof as to how the mirrored panels had been placed just before they fell on plaintiff. Likewise in *Benigno v. Cypress Community Hospital, Inc.*, 386 So. 2d 1303 (Fla. 4th DCA 1980), there was substantial *direct* testimony of the alleged negligence in placing decedent in the hospital chair from which he fell. Not so in this case. Papakalodoukas had no *direct* proof as to how the display had been assembled because it had been discarded by Wal-Mart.

## II

**CLOSING ARGUMENTS REGARDING REASONS  
FOR GIVING RES IPSA LOQUITUR  
INSTRUCTION ARE FACTUALLY AND  
LEGALLY CORRECT, WERE NOT  
IMMEDIATELY OBJECTED TO, AND DO NOT  
WARRANT NEW TRIAL**

### *Standard of Review*

The trial judge's ruling on motion for new trial is reviewed for abuse of discretion. *Murphy v. Int'l Robotic Sys., Inc.*, 766 So. 2d 1010 (Fla. 2000).

## Discussion

Wal-Mart falsely argued from the start of the trial that Papakalodoukas had changed his theory of the case just before trial. (T2:126) The point, presumably, was to explain why Wal-Mart no longer had the display that was critical to Papakalodoukas' case. Wal-Mart's ill-conceived strategy, however, backfired because it was not true. Wal-Mart knew long before trial -- and long before Papakalodoukas knew it -- that the display was key to demonstrating Wal-Mart's negligence. In light of the false accusation, Papakalodoukas' counsel had no choice but to respond. Counsel therefore argued that she had asked Wal-Mart to hold onto the "stuff" and one of the reasons the jury received the *res ipsa loquitur* instruction was that Wal-Mart had thrown out the display. (T10:948, 998-97, 1000)

### **A. No Contemporaneous Objection**

Wal-Mart completely glosses over the fact that it did not object to this argument *the first two times* it was made. (T10:948-49, 996-97) The contemporaneous objection rule requires an *immediate* objection. *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978); *R.J. Reynolds Tobacco Co. v. Townsend*, 90 So. 3d 307, 310 (Fla. 4th DCA 2012) ("by waiting until the end of closing argument to object to the argument and move for mistrial...RJR failed to preserve this issue for appellate review"). Since there was no contemporary objection, Wal-Mart was required to satisfy the *Murphy* four-part fundamental error test to merit a new trial.

**B. Wal-Mart Did Not Satisfy *Murphy* Test**

Under *Murphy*, a party seeking a new trial on the basis of unobjected-to closing argument must demonstrate fundamental error by showing that the argument was 1) improper, 2) harmful, 3) incurable, *and* 4) so damaging to the fairness of the trial that the public's interest in our system of justice requires a new trial. *Id.* at 1028. Each prong is addressed.

1. *Arguments regarding res ipsa were factually and legally correct.*

The argument that Papakalodoukas' counsel had asked Wal-Mart to "hold onto the stuff" and that Wal-Mart had not kept the evidence (T10:1000) is factually correct. Papakalodoukas had asked Wal-Mart at the very beginning of the case to save the video and not to alter or destroy it. (T8:759-60) Not until Wal-Mart finally produced the videotape -- *after* Papakalodoukas' deposition -- did it become clear to Papakalodoukas' counsel that the *display* was key to demonstrating Wal-Mart's negligence. Because of Wal-Mart's court-sanctioned delay in producing the videotape of the incident,<sup>6</sup> Papakalodoukas' counsel was not aware at the beginning of the case of the importance of the display or the need to request it. (T8:759-60) By the time counsel saw the videotape, Wal-Mart had destroyed the display. (T5:469-70)

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<sup>6</sup> Case law from this district holds that the trial court has discretion to allow a defendant to withhold surveillance video of the incident that is the subject of the lawsuit, until after plaintiff's deposition. *See McClure v. Publix Supermarkets, Inc.*, 124 So. 3d 998, 998-99 (Fla. 4th DCA 2013).

The argument was also legally correct, in light of *McDougald*, which held that a res ipsa instruction is proper where defendant *fails to preserve* the instrumentality of plaintiff's injuries. 716 So. 2d at 786-87. Wal-Mart also had a duty to save relevant evidence of Papakalodoukas' fall, *regardless of any specific request*, if the claim was reasonably foreseeable. This Court so held in *Golden Yachts, Inc. v. Hall*, 920 So. 2d 777, 781 (Fla. 4th DCA 2006). If there were no such duty, a potential defendant could easily escape liability by destroying evidence of injuries before counsel could be hired, send a preservation letter or obtain a copy of any incident surveillance video.

The fact that the trial court denied Papakalodoukas' request for an adverse inference instruction did not place this legally correct argument off limits. As this Court recognized in *Martino v. Wal-Mart Stores, Inc.*, 835 So. 2d 1251, 1258 n.2 (Fla. 4th DCA 2003), even if an adverse inference instruction is not appropriate, "counsel is free to make arguments regarding adverse inferences created by [defendant's] failure to produce [evidence]." Since there was nothing improper about the argument, the *Murphy* analysis should end there.

2. *Arguments not harmful.*

If reached, the second prong requires that that comment must be "so highly prejudicial...as to gravely impair a fair consideration and determination of the case by the jury." *Murphy*, 766 So. 2d at 1029. Contrary to Wal-Mart's contention, the

arguments did not mislead the jury into punishing Wal-Mart for failing to preserve the evidence. And in any event, Wal-Mart opened the door to these comments when it falsely accused Papakalodoukas of changing his theory of the case, deceptively implying that Wal-Mart had no idea of the importance of the display until just before trial. (T2:133)

In addition, Papakalodoukas did not argue that Wal-Mart should be *found* negligent because it failed to preserve the display. Counsel argued, consistent with the law, that the res ipsa instruction simply permits an *inference* of negligence if all elements are met. (T10:948, 997) These arguments were prejudicial only in the sense that argument in favor of one party is prejudicial to the opposing party. The arguments, however, were not *harmfully* prejudicial or so highly prejudicial as to gravely impair the jury's determination of the case, which is the test under *Murphy*. And the fact of the \$1.2 million verdict does not demonstrate prejudice. The verdict is supported by the record in that Papakalodoukas demonstrated three painful surgeries, more than \$400,000 in economic damages and severe and continuing pain and suffering. *See Carnival Corp. v. Jimenez*, 112 So. 3d 513, 521-22 (Fla. 2d DCA 2013) (comment deemed harmless where ample evidence supported jury's verdict).

3. Arguments not incurable.

The standard for incurability, if reached, is whether the allegedly improper remarks “are of such character that neither rebuke nor retraction may entirely destroy their sinister influence.” *Murphy*, 766 So. 2d at 1030. Wal-Mart does not explain why this comment had any sinister influence or was incurable. And in any event, the trial judge gave a curative instruction when Wal-Mart objected the third time this was argued, even though he had overruled the objection. (T10:1000-01)

4. Arguments did not damage fairness of trial.

Even if Wal-Mart could satisfy the first three prongs -- which it cannot -- the fourth prong is reserved for a narrow category of arguments, traditionally encompassing “appeals to racial, ethnic, or religious prejudices.” Our supreme court, in *Murphy*, has essentially closed the door to all but the most egregious cases of attorney misconduct in argument. In the high court’s words:

Although we have not absolutely “closed the door” on appellate review of unreserved challenges to closing argument, we have come as close to doing so as we believe consistent with notions of due process which deserve public trust in the judicial system.

766 So. 2d at 1031. Heeding this admonition, this Court and its sister courts, time and time again, have rejected attempts to obtain a new trial based upon unobjected-to argument at trial -- even in cases where the arguments were patently improper.

For example, in *USAA Insurance Co. v. Howell*, 901 So. 2d 876, 879-80 (Fla. 4th DCA 2005), plaintiff compared USAA’s adjuster to the Iraqi Minister of

Information. In *Philip Morris USA, Inc. v. Tullo*, 121 So. 3d 595, 600-01 (Fla. 4th DCA 2013), plaintiff compared tobacco companies to heroin dealers. In *Jimenez*, 113 So. 3d at 520-22, counsel inferred collusion between plaintiff's counsel and treating doctor. In *Health First, Inc. v. Cataldo*, 92 So. 3d 859, 867 (Fla. 5th DCA 2012), plaintiff's counsel invited the jury to punish defendant for not paying plaintiff for her injuries and suggested that the jurors had been chosen by God to provide for plaintiff. And in *Mercury Insurance Co. of Florida v. Moreta*, 957 So. 2d 1242 (Fla. 2d DCA 2007), plaintiff argued to the jury that defendant insurance company had a pattern of denial of uninsured motorist claims and had left its insured "out hanging."

The comments Wal-Mart complains of here pale in comparison to these blatantly prejudicial arguments and fall far short of meeting this final test. As *Murphy* makes clear, the trial judge "was in the best position to determine the propriety and potential impact of the allegedly improper closing argument." 766 So. 2d at 1031. The trial judge's decision should be upheld.



### III

#### **COUNSEL’S INADVERTENT OPENING REMARK THAT PURPORTEDLY VIOLATED ORDER IN LIMINE WAS NOT HARMFUL OR PREJUDICIAL TO WAL-MART**

##### **Standard of Review**

The ruling on motion for new trial is reviewed for abuse of discretion. *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1271 (Fla. 2006). Where an objection is asserted at trial, the trial judge must determine if the comment is “so highly prejudicial and inflammatory” that the movant was denied a fair trial. *Id.*

##### **Discussion**

Wal-Mart argues that Papakalodoukas violated an order in limine and “whipsawed” Wal-Mart by arguing that its strategy was to smear him as a drug abuser when Plaintiff had previously moved in limine to prevent such evidence from coming in at trial. Wal-Mart is wrong again. Technically speaking, there was no violation because the order in limine was directed to *defendant* -- not to all parties or to plaintiff. In addition, the trial court forbade *Wal-Mart* from introducing evidence or argument that Papakalodoukas had abused prescription drugs but allowed evidence and argument as to other aspects of continued use of painkillers. That aside, the order did not mention -- much less forbid -- argument as to how Wal-Mart would attempt to portray Papakalodoukas at trial.

Regardless, this Court made it clear in *Leyva v. Samess*, 732 So. 2d 1118, 1121 (Fla. 4th DCA 1999), that not all violations of orders in limine warrant a new trial, and that the argument must have caused prejudice to the opposing party. As Judge Warner, speaking for the unanimous panel in *Leyva*, writes:

Not every violation of a pretrial order in limine should automatically result in a new trial...The violation of a pretrial order, in and of itself, does not necessarily warrant the granting of a new trial where that violation has caused no prejudice to the opposing case.

*Id.* at 1121.

Wal-Mart cannot demonstrate prejudice here. Each case relied upon by Wal-Mart involves circumstances where the party who *opposed* the motion in limine violated its terms.<sup>7</sup> Not so in this case, where it was Papakalodoukas who had requested the order in limine and unintentionally ran afoul of its terms.

In addition, the authorities Wal-Mart cites -- unlike this case -- involved patently prejudicial comments or evidence introduced by the party who had *opposed* the motion in limine. For example, in *Howard*, 123 So. 3d at 1172, defendant elicited prohibited testimony as to how quickly plaintiff had hired an attorney for his accident. In *Orvis*, 861 So. 2d at 1182, defendant elicited

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<sup>7</sup> E.g., *Howard v. Palmer*, 123 So. 3d 1171 (Fla. 4th DCA 2013); *Orvis v. Caulkins Indiantown Citrus Co.*, 861 So. 2d 1181 (Fla. 4th DCA 2004) (same); *Azriel v. La Marca*, 722 So. 2d 952, 953 (Fla. 3d DCA 1998); *Fischman v. Suen*, 672 So. 2d 644, 645 (Fla. 4th DCA 1996); *Ratley v. Batchelor*, 599 So. 2d 1298 (Fla. 1st DCA 1992).

prohibited testimony as to plaintiff's involvement in illegal and unethical contracts. In *Fischman*, 672 So. 2d at 645, one party elicited prohibited testimony about the other party's involvement in Medicare fraud. In *Azriel*, 722 So. 2d at 953, defendant elicited prohibited testimony as to plaintiff's status as an illegal alien. And in *Ratley*, 599 So. 2d at 1302, the defense accident reconstruction expert testified that his conclusions were similar to that of the traffic homicide investigator despite the accident report privilege and the stipulation precluding such comparison.

The subjects that were limited by the orders in limine in Wal-Mart's case law were demonstrably prejudicial to the party who had requested the order in limine -- either as a personal attack or an attack on a critical area of liability. Such testimony and argument therefore had the real potential to inflame the jury. By contrast, Papakalodoukas' argument that it was Wal-Mart's strategy to attack Papakalodoukas regarding his prescription drug use -- which ended up being an accurate depiction of Wal-Mart's defense -- was not the sort of argument that was inherently prejudicial or inflammatory. If anything, the comment prejudiced Papakalodoukas, by putting his name in the same sentence as the phrase drug "abuser" -- a connection Papakalodoukas keenly wanted to avoid.

Wal-Mart's "sword vs. shield"/whipsaw argument is equally off-base. In the cases relied upon by Wal-Mart, the party who had obtained a pretrial exclusion of

evidence argued that the opposition had failed to offer the very evidence that the proponent had succeeded in blocking.<sup>8</sup> Not so here. And in any event, the argument that it was Wal-Mart's strategy to portray Papakalodoukas as a drug "abuser" turned out to be true, even though Wal-Mart was precluded from using that precise word. Wal-Mart was not "whipsawed" by Papakalodoukas; it was hoist on its own petard.

And if Wal-Mart were truly concerned about how it might look when it introduced all of this drug use evidence, it should have requested a curative instruction from the judge. Wal-Mart's failure to do so torpedoes any claim of harmfulness or prejudice. Papakalodoukas' counsel did not prejudice the jury against Wal-Mart by inadvertently using the term drug "abuser" at the beginning of an otherwise clean, 7-day trial in describing Wal-Mart's strategy to the jury.

As this Court has often remarked, a party is entitled to a fair trial -- not a perfect trial. *E.g., Gen'l Motors Corp. v. McGee*, 837 So. 2d 1010, 1033 (Fla. 4th DCA 2002). Here, the trial judge was well-aware of Wal-Mart's game plan to portray Papakalodoukas as a drug abuser. In that light, the judge did not abuse his

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<sup>8</sup> *E.g., Carnival Corp. v. Pajares*, 972 So. 2d 973, 975-76 (Fla. 3d DCA 2008) (plaintiff obtained order excluding doctor's testimony as to reasonable care and argued at trial that he never testified that all was done correctly); *Hernandez v. Home Depot U.S.A, Inc.*, 695 So. 2d 484, 485 (Fla. 3d DCA 1997) (defendant obtained order excluding plaintiff's liability expert witness before trial then argued at trial that plaintiff had put on no proof of negligence).

discretion in finding that, despite some improper comments by Papakalodoukas' counsel, Wal-Mart was not denied a fair trial. (R30:5878)

#### IV

### NO ABUSE OF DISCRETION IN DENYING MOTION FOR NEW TRIAL BASED UPON COUNSEL'S REMARKS IN OPENING AND CLOSING, MOST OF WHICH WERE NOT OBJECTED TO AT TRIAL

#### Standard of Review

The trial judge's ruling on motion for mistrial or new trial is reviewed for abuse of discretion. *Engle*, 945 So. 2d at 1271; *Murphy*, 766 So. 2d at 1030-31.

#### Discussion

Wal-Mart complains about seven comments of counsel -- five in opening statement and two in closing rebuttal -- but neglects to mention that most of the comments were not objected to at trial. Regardless, Wal-Mart was not denied a fair trial under the standard for either preserved or fundamental error.

#### A. Comments in Opening Statement

##### 1. Lack of preservation.

Wal-Mart did not object to first, third and fourth comments it complains about, regarding Papakalodoukas' job loss, financial difficulties, and mortgage foreclosure. (T2:82, 110, 114) The only opening comment preserved for appellate

review by contemporaneous specific objection is the comment regarding Papakalodoukas' lack of health insurance from his job loss. (T2:77-78)

In addition, Wal-Mart did not preserve an objection to the second comment regarding job loss, financial and marital problems and mortgage foreclosure because it raised only a *general* objection to that comment. (T2:110) There was no objection that this was an improper plea for sympathy, as Wal-Mart argues on appeal. Florida law is clear that “the specific legal ground upon which a claim is based must be raised at trial and a claim different than that will not be heard on appeal.” *Aills v. Boemi*, 29 So. 3d 1105, 1109 (Fla. 2010). And while *Murphy*, permits an appeal as to unobjected-to *closing* argument, that decision does not mention a similar procedure for unobjected-to *opening statement*.

2. *Preserved and unpreserved comments do not warrant new trial.*

On the merits, Wal-Mart argues that the opening comments are irrelevant, an improper plea for sympathy, and that the mere mention of *insurance* warrants a new trial. While the trial court sustained Wal-Mart's objection to the comment about Papakalodoukas' lack of health insurance from his job loss, that remark was not improper because it relates directly to how much he personally owed his medical providers and his mental stress and anxiety from mounting medical bills incurred as a result of Wal-Mart's negligence. (T4:361) The lack of health insurance is also relevant to counter the anticipated evidence from Wal-Mart that

Papakalodoukas had doctor-shopped to get more prescription painkillers. (T7:679; 692) *See Sossa v. Newman*, 647 So. 2d 1018, 1019 (Fla. 4th DCA 1994) (financial inability to continue medical treatment is relevant where defense opens door and argues plaintiff failed to return to treating doctor).

In addition, Wal-Mart brought up the subject of health insurance in closing, after it had succeeded on prohibiting its mention during Papakalodoukas' opening statement. (T10:978) Wal-Mart's re-injection of "health insurance" into the trial -- after it had successfully objected to its mention in Papakalodoukas' opening statement -- rendered the prior comment harmless.

Wal-Mart's further argument that the mere mention of "insurance" requires reversal confuses *health* insurance with *liability* insurance. Mention of *liability* insurance may give the jury the impression that a deep pocket insurer will be paying rather than the defendant. *See, e.g., Nicaise v. Gagnon*, 597 So. 2d 305, 306 (Fla. 4th DCA 1992). That is not the case with *health* insurance because health insurance benefits are not dependent upon liability.<sup>9</sup>

The comment about Papakalodoukas' job loss is also relevant and not improper because it relates to his financial strain -- and resulting mental stress --

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<sup>9</sup> Wal-Mart's case law in this regard involves the mention of *liability* insurance as grounds for a new trial -- *not health insurance*. *E.g., Gold Vann & White, P.A. v. DeBerry*, 639 So. 2d 47, 54-55 (Fla. 4th DCA 1994); *Nicaise*, 597 So. 2d at 307; *Pierce v. Smith*, 301 So. 2d 805, 806-07 (Fla. 2d DCA 1974); *Seminole Shell Co. v. Clearwater Flying Co.*, 156 So. 2d 543 (Fla. 2d DCA 1963).

since his injuries. In addition, Papakalodoukas' counsel told the jury about Papakalodoukas' job loss to be upfront about potential arguments refuting his lost wage claim. That aside, Papakalodoukas testified regarding his financial hardship and job loss *without objection from Wal-Mart*. (T3:209-12; T4:296-97, 298-99) Wal-Mart likely did not object because it planned to -- and did -- attack Papakalodoukas' lost wage claim with the fact that he was not working at the time he fell. (T4:321-22)

In addition, unlike the cases relied upon by Wal-Mart, Papakalodoukas' counsel did not *contrast* his relative wealth with Wal-Mart's in an effort to gain sympathy. *See Batlemento v. Dove Fountain, Inc.*, 593 So. 2d 234 (Fla. 5th DCA 1991) ("argument directly contrasting the poverty of one of the parties with the wealth of the other"); *Sossa*, 647 So. 2d 1018, 1019 (Fla. 4th DCA 1994) (general rule is that financial status of parties should not be contrasted). Nor did Papakalodoukas attempt to depict Wal-Mart as a deep pocket defendant.

As to the remaining unpreserved comments regarding Papakalodoukas' financial and marital issues, these comments, likewise, are directly relevant to the claim for mental stress and anxiety resulting from his injuries and inability to work. And by failing to object to these comments about Papakalodoukas' financial circumstances, Wal-Mart rendered the prior comment about job loss harmless. The



trial court did not abuse its discretion in denying Wal-Mart's motion for new trial based upon the preserved and unpreserved comments in opening statement.

**B. Closing Arguments Do Not Warrant New Trial**

1. Lack of contemporaneous objection.

As noted above, Wal-Mart did not object to the closing arguments complained of regarding Papakalodoukas' lack of health insurance and to Dr. Simovitch's letter of protection. (T10:1004, 1012) The arguments were preserved for appellate review only by Wal-Mart's motion for new trial but are governed by the *Murphy* four-prong fundamental error test.

2. Arguments fail Murphy test.

Neither argument was improper. Papakalodoukas' rebuttal argument regarding lack of health insurance (T10:1004) was a fair response to Wal-Mart's argument, *in closing*, that Papakalodoukas has health insurance in the form of Medicaid. (T10:978)

And the rebuttal argument regarding Dr. Simovitch was a fair response to Wal-Mart's attack on Simovitch's motivation for his testimony. *See Carnival Corp. v. Jimenez*, 112 So. 3d 513, 520 (Fla. 2d DCA 2013) (discussion of letter of protection opens door to rebuttal as to motivation for treating doctor's testimony). In that regard, Wal-Mart argued in closing that Simovitch has a letter of protection and therefore stood to be compensated for his services rendered to Papakalodoukas

from a jury verdict in his favor. (T10:989-90) Papakalodoukas properly argued in rebuttal that Simovitch “thankfully” had treated Papakalodoukas without insurance, since he had no way of knowing whether the Papakalodoukas would recover in his personal injury lawsuit. (T10:1012) And in any event, this argument was not an improper vouching of the credibility of a witness or the necessity of his services.<sup>10</sup>

Nor were the arguments harmful. To demonstrate harmfulness, comment must be “so highly prejudicial...as to gravely impair a fair consideration and determination of the case by the jury.” *Murphy*, 766 So. 2d at 1029. “Passing remarks of little consequence in the scope of a lengthy trial should find little sympathy if no contemporaneous objection is voiced.” Here, passing remarks regarding the lack of health insurance and gratitude that Dr. Simovitch had accepted a letter of protection in treating Papakalodoukas were not harmful in the scope of this one-week trial.

Wal-Mart has not attempted to demonstrate incurability. To do so, the complaining party must establish that even if an objection had been made, “curative measures could not have eliminated the probability that the unobjected to

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<sup>10</sup> Wal-Mart’s reliance upon *Cohen v. Pollack*, 674 So. 2d 805 (Fla. 3d DCA 1996), in this regard is misplaced. In that case, plaintiff’s counsel repeatedly argued to the jury that everything put into evidence *is true*. *Id.* at 806 n.1. No such arguments were made in this case.

argument resulted in an improper verdict.” *Id.* at 1030. As the court made clear, however, incurability is “extremely difficult” to establish. *Id.*

As to the fourth prong, as discussed above in Point II, this Court and other courts in Florida have rejected *Murphy* challenges regarding patently improper argument -- far more egregious than the benign comments complained of here. *E.g.*, *USAA Ins. Co. v. Howell*, 901 So. 2d 876, 879-80 (Fla. 4th DCA 2005) (arguments comparing defendant to the Iraqi Minister of Information did not meet the fundamental error test), and cases cited in Point II above. In accordance with *Murphy*’s teachings and progeny, there was no abuse of discretion in denying Wal-Mart’s motion for new trial based upon these comments.

**C. Cumulative Effect Of Opening and Closing Comments And Other Purported Errors Does Not Warrant New Trial**

Wal-Mart asserts two “cumulative effect” arguments regarding (1) the comments and arguments of counsel; and (2) all errors complained of on appeal. The trial court rejected these arguments, as should this Court.

This Court in *Aarmada Protection Systems 2000, Inc. v. Yandell*, 73 So. 3d 893, 900-01 (Fla. 4th DCA 2011), in fact, dispatched a cumulative effect argument remarkably similar to that posited by Wal-Mart here. In *Yandell*, the defendant complained of cumulative, but largely unpreserved, error from argument that exploited an order in limine requested by plaintiff; 2) mentioned the parties’ financial disparity; and 3) expressed personal beliefs, among other improprieties.

*Id.* at 899. The trial court denied the motion for new trial. *Id.* And this Court affirmed, noting that some of the arguments were improper but others may have been invited by defense counsel’s “equally inflammatory” arguments. *Id.* at 900. On consideration of the entire record, this Court refused to find an abuse of discretion in denying the motion for new trial, noting in particular that the improprieties do not “fall into that very rare set of cases where the basic integrity of the judicial system is impacted by the argument.” *Id.* at 901.

*Yandell* is a virtual road map for this case. Here as in *Yandell*, Wal-Mart complains of argument that allegedly exploited an order in limine, argument about Papakalodoukas’ financial circumstances and argument allegedly expressing counsel’s personal beliefs. Just as in *Yandell*, Wal-Mart objected to some but not all of the arguments it complains of on appeal. And just as in *Yandell*, many of Papakalodoukas’ arguments were invited by Wal-Mart’s inflammatory arguments. Given the virtually identical circumstances, this Court should reject Wal-Mart’s “cumulative error” argument and hold -- as it did in *Yandell* -- that the arguments Wal-Mart complains of were not harmful, incurable and that they do not “fall into that very rare set of cases where the basic integrity of the judicial system is impacted by the argument.” *See id.* at 901.<sup>11</sup>

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<sup>11</sup> Papakalodoukas is mindful of *Howard v. Palmer*, 123 So. 3d 1171 (Fla. 4th DCA 2013), where this Court considered the cumulative effect of preserved and unpreserved error including a violation of an order in limine. The

Wal-Mart argues that prejudice is evident from the verdict of double the amount sought by Papakalodoukas' counsel in closing. Wal-Mart is mistaken. Counsel merely *suggested* a figure and left it to the jury's discretion. In addition, here -- unlike *Walt Disney World Co. v. Blalock*, 640 So. 2d 1156 (Fla. 5th DCA 1994), relied upon by Wal-Mart -- there was ample evidence of Papakalodoukas' lost wages, medical damages, and pain and suffering to support the award. The mere fact that the verdict was a high amount does not mean the jury was improperly inflamed against Wal-Mart.

Wal-Mart also contends that its credibility was destroyed with argument showing it to be a large corporate entity that was going to portray an impoverished plaintiff as a drug abuser and that had tampered with evidence to avoid liability. First, there was no argument mentioning the fact that Wal-Mart is a large corporate entity. Second, there was evidence and argument at trial suggesting that Wal-Mart may have tampered with the sign<sup>12</sup> and that Wal-Mart had destroyed the display

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defendant in *Howard*, however, had *intentionally* violated the order in limine and disingenuously feigned ignorance of its meaning. Here, unlike *Howard*, the "violation" of the motion in limine was inadvertent and harmless because it was committed by the very party who had requested it.

<sup>12</sup> Wal-Mart had stated in opening that the sign showed indentations around the screw holes. (T2:128) Papakalodoukas cross examined Wal-Mart's employee Conseno about whether the sign had those indentations when it was first turned over to counsel. (T9:879-80) And Papakalodoukas' counsel argued in closing that there were no indentations around the screw holes when the sign was first produced. (T10:946)

despite having seen the videotape of the incident which showed the display's relevance. (T5:469, 484-87; T9:879-80) Wal-Mart never objected to such evidence. Wal-Mart cannot base its catch-all cumulative error argument on imaginary and unpreserved arguments.

Wal-Mart also misplaces its reliance upon the cumulative effect holdings in *City Provisioners, Inc. v. Anderson*, 578 So. 2d 855 (Fla. 5th DCA 1991), and *Carnival Corp. v. Pajares*, 972 So. 2d 973 (Fla. 3d DCA 2008). *City Provisioners* pre-dates *Murphy*. And since *Pajares* was decided after *Murphy* but does not mention that decision, it must be presumed that the appellant -- *unlike Wal-Mart* -- objected at trial to the improper comments.

## V

### **NO ABUSE OF DISCRETION IN DENYING MOTION FOR REMITTITUR AS TO FUTURE MEDICAL EXPENSES OR AS TO ENTIRE DAMAGE AWARD**

#### **Standard of Review**

The standard of review on appeal from an order denying remittitur is abuse of discretion. *Hernandez v. Gisonni*, 657 So. 2d 33, 35 (Fla. 4th DCA 1995). In addition, “the correctness of the jury’s verdict is strengthened when the trial judge refuses to grant a new trial or a remittitur.” *Id.*

## Discussion

### **A. Future Medical Expenses**

As noted above, the evidence at trial demonstrated that Papakalodoukas' injuries are permanent; he is still in pain and in need of pain medication; he had follow-up doctor's appointments to keep; and he will need at least 36 sessions of therapy, which cost 400 per session, totaling \$14,400.00. (T3:245-46; T5:407; R6:1076-77, 1082-84, 1107; SR2:5-10) Papakalodoukas' implanted cadaver tendon is still tight and he is still unable to use his arm because of the severe deformity or bulge in his arm called a "Popeye deformity." (T3:245-48; T5:395-96) Additional surgery, which cost close to \$50,000 (SR2:1), therefore, may be necessary.<sup>13</sup>

This Court's decision in *Hernandez* illustrates why the award in this case, for \$100,000 in future medical expenses, should stand. There, plaintiff had undergone cervical disk surgery, and there was evidence at trial that his cervical disks could degenerate, potentially necessitating future surgery. In addition, plaintiff would be required to follow-up with his doctor twice a year. *Id.* Here as in *Hernandez*, the record amply supports the award for future medical expenses.

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<sup>13</sup> The fact that Dr. Simovitch did not recommend future surgery is irrelevant because Papakalodoukas was no longer treating with Dr. Simovitch; and, in any event, the jury was entitled to reject that testimony.

The fact that Papakalodoukas' counsel did not mention future medicals in closing argument is of no consequence. In fact, the verdict form, to which Wal-Mart agreed, provided for an award of future medical expenses. (R26:5238-40) Wal-Mart's further argument -- that Papakalodoukas admitted to remittitur in response to Wal-Mart's motion -- also lacks merit. Papakalodoukas supplanted his first memorandum with an *amended* memorandum, detailing the evidentiary support for future medicals. *Cf. State Farm Fire & Cas. Co. v. Tippett*, 864 So. 2d 31, 32-33 (Fla. 4th DCA 2003) ("amended pleading supersedes an earlier pleading unless it expresses an intent to preserve portions of the earlier pleading"). That aside, the first memorandum suggested merely that *some* but not all future medicals were not supported.

**B. Entire Award**

Wal-Mart argues that the entire award should be remitted because it exceeds the amount requested by counsel in closing and because jury verdicts in purportedly "similar" cases had much lower verdicts. Wal-Mart is wrong again.

Papakalodoukas' counsel did not *request* \$600,000 -- as Wal-Mart repeatedly argues. She merely *suggested* a damage award, making it clear that the final amount was up to the jury. As counsel argued,

My suggestion to you is \$150,000 in pain and suffering for the past and future. Not both, combined. *That's just a suggestion.* I don't know how else to put a monetary



figure on it. It's not subject to mathematics, it's really in your discretion as a jury.

(T10:968, emphasis added) And the amount suggested was intentionally conservative because of comments of a prospective juror in voir dire who thought she had lost her malpractice case as a result of her attorney's overly aggressive damage request. (ST2:84-85, 154) Regardless, there is nothing improper about a jury verdict for non-economic damages that exceeds a plaintiff's request. *Lopez v. Cohen*, 406 So. 2d 1253, 1256 (Fla. 4th DCA 1981).

Wal-Mart also makes the illogical argument that the verdict must be the result of prejudice if it is *higher* than requested, because attorneys typically request *more* damages than are sustainable. (IB at 44-45) The implication being that only a verdict lower than that suggested should survive scrutiny. The thought is ludicrous. Given the amount of economic damages proven and awarded -- \$437,669 -- there was nothing excessive about an award of non-economic damages of just under twice that amount. In fact, in *Aills v. Boemi*, 41 So. 3d 1022, 1028 (Fla. 2d DCA 2010), *on remand* ("*Aills II*"), the defendant doctor suggested that non-economic damages of *four to five times* the actual damages would be appropriate. The non-economic damages award here is low in comparison.

Damages in tort are, in any event, subject to the jury's discretion and there is no set formula for computation:

Where recovery is sought for a personal tort...we cannot apply fixed rules to a given set of facts and say that a verdict is for more than would be allowable under a correct computation. In tort cases damages are to be measured by the jury's discretion. The court should never declare a verdict excessive merely because it is above the amount which the court itself considers the jury should have allowed.

*Bould v. Touchette*, 349 So. 2d 1181, 1184-85 (Fla. 1977).

Wal-Mart's argument regarding purportedly "similar" jury verdicts is equally misguided. As the court noted in *Aills II*, comparison with other jury verdicts should be exercised with caution "because no injury is exactly like another and different individuals may be adversely affected to a greater or lesser degree by similar injuries..." 41 So. 3d at 1028. Bearing that out, none of the comparison trial verdicts Wal-Mart cites involved three surgeries and economic damages exceeding \$400,000.

Tellingly, Wal-Mart neglects to mention two Florida verdicts of \$1 million, involving slip and fall cases at *its own stores*: *Dantzler v. Wal-Mart Stores, Inc.*, No. 16-2009-CA11353 (Fla. 4th Jud. Cir. Ct. Jan. 12, 2012) (\$585,000 in non-economic damages, \$415,000 in economic damages), *aff'd*, 113 So. 3d 1 (Fla. 1st DCA 2013); and *Wright v. Wal-Mart Stores Inc.*, No. 05-CA-000878 (Fla. 20th Jud. Cir. Ct. July 11, 2008) (\$323,000 in economic damages, \$676,000 in non-economic damages), *aff'd*, 44 So. 3d 592 (Fla. 2d DCA 2010). The omission is even more remarkable since Wal-Mart was represented at trial, in both cases, by

the same firm as in this case; and the trial attorney in *Wright* was the same as in this case.

In addition, several other Florida juries have awarded damages in the \$1 million to \$2 million range regarding similar injuries or numbers of surgeries. *E.g.*, *Pavone v. Royal Caribbean Cruises*, No. 2004-1880-CA-01 (Fla. 11th Jud. Cir. Ct. June 22, 2010) (\$1.7 million verdict for torn rotator cuff, injury to the shoulder nerve and herniated disks, with two shoulder surgeries), *rev'd on other grounds*, 92 So. 3d 243 (Fla. 3d DCA 2012); *Nickerson v. Lenders Plus*, No. 56 2008 CA 005372 (Fla. 19th Jud. Cir. Ct. Feb. 23, 2010) (\$1 million verdict where plaintiff suffered herniated disks and had three surgical procedures); *Cox v. Royal Caribbean Cruises Ltd.*, No. 2004-17613-CA-01 (Fla. 11th Jud. Cir. Ct. May 27, 2008) (\$1.6 million verdict where plaintiff suffered back injury requiring fusion and shoulder injuries requiring two surgeries), *aff'd mem.*, 60 So. 3d 418 (Fla. 3d DCA 2011). The trial judge did not abuse his discretion in denying Wal-Mart's motion for remittitur.

### **CONCLUSION**

Wal-Mart received a fair, if not perfect, trial. Judgment in favor of Papakalodoukas should be affirmed in all respects.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via E-Mail on this **6th** day of **June, 2014** to Thomas A. Valdez, Esq., Quintairos, Prieto, Wood & Boyer, P.A., *attorney for appellant*, 4905 West Laurel Street, Suite 200, Tampa, Florida 33607, at [tvaldez@qpwblaw.com](mailto:tvaldez@qpwblaw.com); and to David Tarlow, Esq., Quintairos, Prieto, Wood & Boyer, P.A., *attorney for appellant*, One East Broward Blvd., Suite 1200, Ft. Lauderdale, FL 33301 at [dtarlow.pleadings@qpwblaw.com](mailto:dtarlow.pleadings@qpwblaw.com).

**CERTIFICATE OF COMPLIANCE WITH FONT SIZE REQUIREMENTS**

The undersigned hereby certifies that, in accordance with *Fla. R. App. P.* 9.210(a)(1), the font of this brief is Times New Roman 14.

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