IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA
CIRCUIT CIVIL

ANGEL MARTINEZ and MARIA ELENA MARTINEZ,

Plaintiffs,

Case No.: 2015-CA-007312 J

vs.

LOBSTER HAVEN, LLC,

Defendant.
_____/

DEFENDANT, LOBSTER HAVEN, LLC'S MOTION FOR JUDGMENT IN ACCORDANCE WITH ITS MOTION FOR DIRECTED VERDICT, OR ALTERNATIVELY, MOTION FOR A NEW TRIAL AND MOTION FOR REMITTITUR AND INCORPORATED MEMORANDUM OF LAW

Defendant, LOBSTER HAVEN, LLC ("Lobster Haven"), by and through its undersigned counsel, and pursuant to Florida Rules of Civil Procedure 1.480 and 1.530, and Florida Statute §768.74, hereby moves this Court for a judgment in accordance with its motion for directed verdict, or, alternatively, motion for a new trial and motion for remittitur. In support, Lobster Haven states as follows:

INTRODUCTION

This case arises out of injuries allegedly sustained by the Plaintiff, Angel Martinez, after he was served oysters and lobster at the Lobster Haven on December 21, 2013. Plaintiff claims the ingestion of the oysters (or seafood) caused him to sustain food poisoning, subsequently contract an auto-immune disorder called Guillain-Barre Syndrome ("GBS"), and sustain damages as a result. The Plaintiffs were unable to identify what portion of their meal at Lobster Haven caused them to become ill on December 21, 2013, but they believe the source was the raw oysters.

(Ex. 11, Dr. Freeman trial testimony, p. 17 – 18). Lobster Haven denies that the oysters (or seafood) it served Mr. Martinez caused GBS, as there has never been a 1) reported case, 2) clinical finding, 3) medical study, or 4) scientific connection linking GBS to eating oysters (or seafood).

Lobster Haven is entitled to a judgment in accordance with its motion for directed verdict as Plaintiffs could not prove their claim against Lobster Haven as a matter of law. Here, Plaintiffs' expert, Dr. Michael Freeman, stacked inference upon inference to opine that eating oysters caused GBS. Similarly, Dr. Adam Didio's testimony was based on speculation and conjecture. This is not allowed in Florida. Thus, Lobster Haven was entitled to a Directed Verdict in its favor at trial, and is entitled to a Judgment in accordance with its Motion for Directed Verdict.

In the alternative, Lobster Haven is entitled to a new trial because of the improper inference stacking by Dr. Freeman, the closing argument by Plaintiffs' counsel which improperly argued evidence related to Mr. Martinez's stool sample, the conduct of Plaintiff's counsel who continued to raise the issue of Lobster Haven's food preparation, storage, and hand washing even though this was not an issue in the case in breach of the agreement between the parties. Dr. Didio should also not have been allowed to testify to newly disclosed opinions which were based on speculation and conjecture. Also, under the manifest weight of the evidence standard, Lobster Haven's oysters did not cause Mr. Martinez's GBS and also 1) there was no GBS-causing defect in the oysters, 2) the oysters met the reasonable expectation of the ordinary consumer, 3) any purported defect was not unreasonably dangerous and 4) there was no proof that the oysters did not have the bacteria asserted to have caused Plaintiffs' injuries prior to the restaurant obtaining them – each failure of which independently merits a new trial. Finally, Mr. Martinez's testimony as to hearsay issues despite repeated warning from the Court and introduction of financial wealth evidence, in

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combination with the above actions by his counsel, mislead and confused the jury. In addition, remittitur is warranted based upon the excessive jury verdict.

RELEVANT PROCEDURAL BACKGROUND

On August 10, 2015, Plaintiffs Angel and Maria Martinez filed their Complaint against Lobster Haven alleging that on December 21, 2013, they consumed oysters at Lobster Haven which caused Mr. Martinez's GBS. Plaintiffs sued Lobster Haven for Strict Liability, Breach of Implied Warranty, Negligent Failure to Warn and Negligence. (Ex. 1, Complaint). Lobster Haven filed their Answer and Affirmative Defenses on October 6, 2015. (Ex. 2, Answer and Affirmative Defenses).

The parties proceeded to litigate the case over the ensuing two years. The case was set for trial on August 28, 2017. Prior to the trial, the parties filed numerous Motions in Limine, including Lobster Haven's Motion to Strike Dr. Michael Freeman as an Expert Witness and Motion in Limine. (Ex. 3, Defendant's Motion to Strike Dr. Michael Freeman as an Expert Witness and Motion in Limine). In its motion, Lobster Haven argued that during Dr. Freeman's initial deposition, he testified that Mr. Martinez's GBS was caused by campylobacter jejuni. (Ex 3, Motion to Strike, p. 2). In his second deposition, Dr. Freeman testified that Mr. Martinez's GBS was caused by vibrio parahaemolyticus. (Ex. 3, Motion to Strike, p. 2). Lobster Haven argued that in order to conclude that Mr. Martinez contracted GBS from eating vibrio parahaemolyticus, he had to stack three inferences together, none of which was based on any factual evidence or recognized science. These inferences were as follows:

1. The oysters Mr. Martinez ate at Lobster Haven contained vibrio parahaemolyticus;
2. The vibrio parahaemolyticus in the oysters caused a gastrointestinal infection in Mr. Martinez, and,

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3. The gastrointestinal infection caused GBS.

(Ex. 3, Motion to Strike, p. 2).

Lobster Haven argued that there has never been a single published case, clinical finding or medical study demonstrating that vibrio parahaemolyticus causes GBS. (Ex. 3, Motion to Strike, p. 2). Therefore, Dr. Freeman's opinion that Mr. Martinez's GBS was caused by eating oysters (or seafood) at Lobster Haven was arrived at by improper inference stacking which is not allowed in Florida.

The Court heard argument on the Motion in Limine and denied Lobster Haven's Motion to Strike Dr. Michael Freeman as an Expert Witness and Motion in Limine. (Ex. 4, Order Denying Motion to Strike). However, the Court ordered that a proffer would be required before Dr. Freeman testified at trial. (Ex. 4, Order Denying Motion to Strike). Dr. Freeman's testimony was proffered before the first trial, and the Court allowed him to testify as an expert at both trials finding that epidemiologists frequently are allowed to stack inferences. This was error which also entitles Lobster Haven to a directed verdict or, in the alternative, a new trial.

The case proceeded to trial on August 28, 2017. During the trial, Lobster Haven moved for a directed verdict based upon the testimony of Dr. Freeman which was based upon improper inference stacking. The Court denied the Motion and the case went to the jury.

On September 6, 2017, the Court granted a mistrial because the jury was deadlocked.

The case was re-set for trial on May 21, 2018. Prior to the second trial, on April 30, 2018, the Court held a pre-trial conference. During the conference, the following colloquy occurred:

> MR. STEINBERG: One item on the stipulations, I don't think we wrote it down. We were talking about it as we were walking in as to the legal issues that are preserved, you worded it nicely. Do you want to say it?

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> MR. DONEGAN: I don't know if you recall, there were several evidentiary issues in the case that we had, I think, a day-long motion in limine hearing. And what we had discussed is instead of having to reargue those, to make sure that both sides have preserved those for any appellate issues that might come up, to just adopt the Court's prior rulings regarding evidence, regarding the jury instructions that we went through; and both sides have just preserved their previous objections or motions in limine that we had argued.
>
> THE COURT: I have no problem with that. Actually, it makes a lot of sense to do it that way, and it will streamline the case.

(Ex. 5, Hearing on Pretrial Conference, p. 5).

The case proceeded to a second trial on May 21, 2018. At the conclusion of Dr. Freeman's testimony in the second trial, the defense renewed its Motion to Strike Dr. Freeman's testimony and requested the Court to instruct the jury to disregard his testimony in its entirety. The Court denied this motion based on its prior rulings on the evidentiary issues present during both the first and second trials. At the close of evidence, Lobster Haven preserved on all prior motions, including the Motion for Directed Verdict argued at the first trial regarding Dr. Freeman's improper inference stacking. (Ex. 6, Excerpts of Trial, Jury Instructions, Verdict, p. 4). The Court ruled that all prior motions were preserved and the same rulings would be made, which included the prior denial of Lobster Haven's Motion for Directed Verdict. (Ex. 6, Excerpts of Trial, Jury Instructions, Verdict, p. 4).

Plaintiffs abandoned their other claims and only submitted the strict liability claim to the jury. The jury returned a verdict finding that a defect in the seafood served by Lobster Haven was

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a legal cause of GBS and resulting damages to Angel Martinez. (Ex. 7, Verdict Form). The jury then awarded $6,375,000 in damages to the Plaintiffs. (Ex. 7, Verdict Form).[1]

RELEVANT TRIAL EVIDENCE

1. Testimony of Plaintiffs

Angel Martinez was born in Cuba and immigrated to the Unites States in 1971. (Ex. 8, A. Martinez trial testimony, p. 7). He resided in Texas from 1971 to 2002, working as a rancher during his adult life. (Ex. 8, A. Martinez trial testimony, p. 8-9). Mr. Martinez moved to Florida in 2002 and he and his wife owned and operated a grocery store. (Ex. 8, A. Martinez trial testimony, p. 12-13). They operated the store until 2010 when the Martinezes bought a 75-acre ranch where they owned and raised, among other things, dogs, chickens, horses, sheep and lambs. (Ex. 8, A. Martinez trial testimony, p. 65-66, 78).

On Saturday, December 21, 2013, Mr. Martinez awoke and had a cup of coffee. (Ex. 8, A. Martinez trial testimony, p. 63). Thereafter, he mowed his pastures where he likely mowed over fecal matter from one or several of his animals.[2] (Ex. 8, A. Martinez trial testimony, p. 65). He did not eat anything else that day until he and his wife went to Lobster Haven. (Ex. 8, A. Martinez trial testimony, p. 17, 63). They arrived between 7:00-7:30 p.m. (Ex. 8, A. Martinez trial testimony, p. 17). The Martinezes had been to Lobster Haven multiple times in the past. (Ex. 8,

[1] The jury awarded Mr. Martinez $5,000,000 in pain and suffering in the past and future, and awarded Mrs. Martinez $1,375,000 for her loss of consortium in the past and future. The jury did not include $325,098 in past or $16,450 in future medical damages to Mr. Martinez. (Ex. 6, Verdict Form).

[2] This is, of course, another possible source of Mr. Martinez's GBS unaccounted for by Plaintiffs.

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A. Martinez trial testimony, p. 76). Lobster Haven only has seafood on the menu. (Ex. 9, M. Martinez trial testimony, p. 54). When they arrived, they ordered their usual meal, a dozen blue point oysters and two cooked Maine lobsters. They also ordered a bottle of pinot grigio wine and a Corona. (Ex. 8, A. Martinez trial testimony, p. 17, 19-20; Ex. 9, M. Martinez trial testimony, p. 21). They left Lobster Haven at 10:00-10:15 p.m. that evening. (Ex. 8, A. Martinez trial testimony, p. 20).

The Martinezes began to drive home and the drive took about an hour and 15-20 minutes. (Ex. 8, A. Martinez trial testimony, p. 66-67). Around the time the Martinezes were arriving home from Lobster Haven, both of them became sick. Mrs. Martinez became queasy, her stomach hurt, she was throwing up and using the bathroom a lot. (Ex. 9, M. Martinez trial testimony, p. 12). Mr. Martinez also became queasy, had stomach pain and diarrhea, but he did not throw up. (Ex. 8, A. Martinez trial testimony, p. 20, 67).

Both Mr. and Mrs. Martinez believed they became sick from the oysters or lobster they ate at Lobster Haven. (Ex. 8, A. Martinez trial testimony, p. 76; Ex. 9, M. Martinez trial testimony, p. 22, 46). Mrs. Martinez speculated that since the lobster was cooked, she did not believe this was the cause of their food poisoning.[3] (Ex. 8, A. Martinez trial testimony, p. 46). However, this was pure speculation and they did not know what made them sick.

Mrs. Martinez testified that she was sick for two days and then she recovered. (Ex. 9, M. Martinez trial testimony, p. 24). Thus, she was fine by December 23, 2013. (Ex. 9, M. Martinez trial testimony, p. 24).

[3] Lobster Haven stipulated in the Uniform Pretrial Conference Order that the Martinezes were served contaminated seafood which caused food poisoning, but denied the contaminated seafood caused GBS. (Ex. 10, Uniform Pretrial Conference Order, p. 1). The presence of natural occurring bacteria in oysters (i.e. contamination) does not render the oysters defective.

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Mrs. Martinez testified at trial that her husband was sick on December 22 and 23, however, he was "a little better on" December 23. (Ex. 9, M. Martinez trial testimony, p. 24). However, during the trial, Mrs. Martinez was impeached with her April 1, 2016 deposition testimony and after reading it she testified as follows:

> Q. All right. So my question was do you have a recollection that Mr. Martinez may have been back to normal by the 22nd?
>
> A. Yes.
>
> Q. Yes?
>
> A. Yes.

(Ex. 9, M. Martinez trial testimony, p. 25-26).

Mr. Martinez testified that he felt sick from December 21 to New Year's Eve. (Ex. 8, A. Martinez trial testimony, p. 22). However, Mr. Martinez agreed that he started feeling better on December 23 and was well enough to slaughter a lamb on December 23 for a Christmas Eve party his friends and family were attending on December 24. (Ex. 8, A. Martinez trial testimony, p. 75). Mr. Martinez originally testified in his April 1, 2016 deposition that he selected the lamb, skinned it, and gutted it (by removing the intestines and guts) and slaughtered it, all while he was not wearing gloves. (Ex. 8, A. Martinez trial testimony, p. 71-72). However, he claims his wife later told him he was not the one who slaughtered the lamb and instead, two others did it while he supervised. (Ex. 8, A. Martinez trial testimony, p. 69). Thus, he told the jury what he said in his deposition was not true. (Ex. 8, A. Martinez trial testimony, p. 71).

Mrs. Martinez testified in her April 1, 2016 deposition that Mr. Martinez slaughtered the lamb on December 23. (Ex. 9, M. Martinez trial testimony, p. 27). However, she also changed her testimony at trial and stated that two other friends slaughtered the lamb while her husband watched.

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(Ex. 9, M. Martinez trial testimony, p. 47-48). Mrs. Martinez said she had a "memory[4]" a few months before the second trial that there were some pictures of the event on her phone and when thinking about those pictures, because she could not locate them, she did not remember seeing her husband in the pictures. (Ex. 8, A. Martinez trial testimony, p. 48-50, 52). Mrs. Martinez did not recall that she had these pictures at her April 1, 2016 deposition. (Ex. 9, M. Martinez trial testimony, p. 50). She did not produce the pictures claiming a bunch of her pictures were lost. (Ex. 9, M. Martinez trial testimony, p. 55). She did not testify about the existence of these photographs during the first trial. The first time she claimed they existed was after she had the benefit of learning the defense's theory that Mr. Martinez's GBS was from exposure to campylobacter jejuni during the lamb slaughter. She learned that Mr. Martinez's involvement in the lamb slaughter was a critical issue for her case during the first trial and from listening to opening statements in the second trial, as she sat in the courtroom the entire time. (Ex. 9, M. Martinez trial testimony, p. 52-53).

After the lamb was slaughtered, on December 23, it was put in a refrigerator at least 12 hours before it was taken to the Jeffreys' house, the family who was hosting the Christmas Eve celebration. (Ex. 9, M. Martinez trial testimony, p. 28). At approximately 8:00 a.m. the next morning, December 24, Mr. Martinez and one of his friends took the lamb to the Jeffreys' house. (Ex. 8, A. Martinez trial testimony, p. 23). Mr. Martinez was supposed to help roast the lamb, but he started feeling bad and went to go sit in his truck hoping he would feel better. (Ex. 8, A. Martinez

[4] It is unclear from Mrs. Martinez's testimony if she was referring to her actual recollection of the photographs or if she was referring to a program/application on her cell called "memory" when she was discussing seeing the photographs a few months before the second trial. Based on her testimony, she could no longer locate these photographs because she had gone through two new phones since taking them and she lost several of her photographs when she got her new phones. This seems to indicate she is referencing her recollection of the photographs. (Ex. 9, M. Martinez trial testimony, p. 48-50, 54-55).

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trial testimony, p. 23). He sat in his truck for 15 hours and experienced the "[w]orst pain, worst day of his life." (Ex. 8, A. Martinez trial testimony, p. 73). He said it was the most horrific pain he had ever felt. (Ex. 8, A. Martinez trial testimony, p. 75).

As was explained to the jury, lamb is a known source of campylobacter jejuni. In fact, the United States Department of Agriculture released an information sheet discussing the need for proper hygiene during the production and slaughtering of sheep and lamb due to these animals being known carriers of campylobacter jejuni and the risk of exposure to these bacteria for individuals involved in their processing. It was uncontested at trial that campylobacter jejuni is present in lamb and that the strongest, most documented and well-known cause of GBS is through a campylobacter jejuni induced gastrointestinal infection. (Ex. 11, Dr. Freeman trial testimony, p. 43). In fact, Dr. Gorson testified that there is a tight association between GBS and a particular strand of the campylobacter bacteria known as jejuni. (Ex. 12, Dr. Gorson trial testimony, p. 15).

The evidence at trial showed the reason the lamb slaughter was significant in the Martinezes' case was that the timeline of Mr. Martinez's illness supports that he in fact contracted two separate gastrointestinal illnesses. The first from the food poisoning from the oysters (or seafood) from Lobster Haven which resolved for both the Martinezes by December 23, 2013. The second was from Mr. Martinez ingesting campylobacter jejuni when he slaughtered a lamb on December 23, 2013. Even Dr. Freeman testified that the average and expected incubation period for a gastrointestinal infection from campylobacter jejuni would be 12–48 hours which matches perfectly with the time between Mr. Martinez slaughtering the lamb and developing the worst, most horrific pain in his life up to that point on December 24, 2013. (Ex. 11, Dr. Freeman trial testimony, p. 47, 57). Dr. Freeman also agreed that "the strongest link that we can establish is jejuni, leading to GI, leading to GBS." (Ex. 11, Dr. Freeman trial testimony, p. 43).

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Mr. Martinez testified he was sick until New Year's Eve and then he felt better. (Ex. 8, A. Martinez trial testimony, p. 24). From January 1 to January 3, he thought he was okay. (Ex. 8, A. Martinez trial testimony, p. 24). Starting on January 4, he started feeling worse until January 9, when his wife called 911 and he was taken to Pasco Regional Hospital. (Ex. 8, A. Martinez trial testimony, p. 28-29). He was subsequently transferred to Tampa General Hospital where he was diagnosed with GBS. (Ex. 8, A. Martinez trial testimony, p. 31, 37-38).

2. Testimony of Dr. Michael Freeman

Dr. Michael Freeman is a medical doctor who practices in the field of forensic pathology and forensic epidemiology. (Ex. 11, Dr. Freeman trial testimony, p. 4). He was originally trained as a chiropractor. (Ex. 11, Dr. Freeman trial testimony, p. 6). He then returned to school and obtained a Ph.D. in epidemiology from Oregon State University and a medical degree from Umea University in Sweden. (Ex. 11, Dr. Freeman trial testimony, p. 5-6). He does not have a clinical practice, so he does not see patients. (Ex. 11, Dr. Freeman trial testimony, p. 5-6).

A large percentage of Dr. Freeman's time is testifying in court about the causal link between one thing and another. (Ex. 11, Dr. Freeman trial testimony, p. 9). He estimated 70 percent of his time is litigation work with 30 percent devoted to academia. (Ex. 11, Dr. Freeman trial testimony, p. 65). Dr. Freeman does not just focus his professional work on food borne illness cases. (Ex. 11, Dr. Freeman trial testimony, p. 41). In fact, he works on all types of litigation cases, including criminal and civil cases. (Ex. 11, Dr. Freeman trial testimony, p. 41). Forty percent of the professional work he does on civil cases arises from car accident cases. (Ex. 11, Dr. Freeman

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trial testimony, p. 41). Of all of the civil cases he handles, eighty-five percent is on behalf of the plaintiff in a lawsuit. (Ex. 11, Dr. Freeman trial testimony, p. 41).

Dr. Freeman relies on the Hill criteria – a set of nine guidelines – to look at the cause and effect relationship that one is investigating to determine if it is real. (Ex. 11, Dr. Freeman trial testimony, p. 10). The first step in the Hill criteria is to determine "does it make sense? Is it reasonable that the thing we are investigating could have caused the outcome that we have?" (Ex. 11, Dr. Freeman trial testimony, p. 11). Dr. Freeman said one has to get past this first step before continuing. (Ex. 11, Dr. Freeman trial testimony, p. 11). The next step is "do we think this event caused this person's illness?" (Ex. 11, Dr. Freeman trial testimony, p. 11). Dr. Freeman utilized the Hill criteria in reaching his opinions in this case. (Ex. 11, Dr. Freeman trial testimony, p. 11).

Dr. Freeman gave an example of the Hill criteria, testifying as follows:

> So there are different factors like coherence is one of them, which is just a very simple way of saying, does it make sense? Is that something we have experience with?
>
> But analogy is a very important one. So, for example, if you think about someone being – a pregnant woman being exposed to a virus, which is always a very dangerous thing. If German measles, for example, can cause a birth defect, which it can, then if you saw a birth defect after there was a different kind of viral infection, you would tend to think that that is analogous. You don't have to have a million cases to say, well, that makes sense that that would be related. And then there is a variety of others like temporality, how close are cause and effect in time and other factors like that.

(Ex. 11, Dr. Freeman trial testimony, p. 10).

Dr. Freeman admitted that he did not know exactly what made Mr. Martinez sick. (Ex. 11, Dr. Freeman trial testimony, p. 35). He also admitted that he did not know what bacteria or pathogen caused the foodborne illness. (Ex. 11, Dr. Freeman trial testimony, p. 35). However, he opined that the food poisoning event at Lobster Haven on December 21, 2013 caused Mr.

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Martinez's GBS. (Ex. 11, Dr. Freeman trial testimony, p. 11, 16, 24). He believed it arose from vibrio parahaemolyticus, a bug that is commonly found in oysters, even though less than 300 people get sick from vibrio parahaemolyticus each year. (Ex. 11, Dr. Freeman trial testimony, p. 18, 61). He also believed the vibrio parahaemolyticus caused Mr. Martinez's GBS even though he has never seen a case linking vibrio parahaemolyticus or oyster consumption to the development of a gastrointestinal illness leading to GBS. (Ex. 11, Dr. Freeman trial testimony, p. 62). He also testified that "I did not find anything that said oysters resulted in GBS." (Ex. 11, Dr. Freeman trial testimony, p. 63).

Dr. Freeman also testified as follows:

> Q: There is no test that we can do today on Mr. Martinez to say this is what actually caused his GBS?
>
> A. No. There is no test we can ever do. You can't ever actually see a cause. You always have to infer it.

(Ex. 11, Dr. Freeman trial testimony, p. 66). Rather, Dr. Freeman was making an educated guess and testifying as to what he believed was most probable. (Ex. 11, Dr. Freeman trial testimony, p. 66).

He then admitted that his opinion that eating the Lobster Haven oysters (or seafood) caused Mr. Martinez's GBS was based upon several inferences. First, he inferred that the gastrointestinal illness caused the GBS. (Ex. 11, Dr. Freeman trial testimony, p. 66). Second, he inferred that the gastrointestinal infection that led to the GBS came from a meal served at Lobster Haven. (Ex. 11, Dr. Freeman trial testimony, p. 67). Third, he inferred that there was only one gastrointestinal infection. (Ex. 11, Dr. Freeman trial testimony, p. 67).

Dr. Freeman testified that Mr. Martinez's GBS was not caused by campylobacter jejuni, a bug that is found in chicken (and other farm animals), even though this is the most common cause

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of GBS. (Ex. 11, Dr. Freeman trial testimony, p. 33). He eliminated campylobacter jejuni as the cause of Mr. Martinez's GBS because in this case there was a short incubation time, and typically campylobacter jejuni takes more time to develop into the gastrointestinal infection that leads to GBS.[5] (Ex. 11, Dr. Freeman trial testimony, p. 33). He also ruled out lamb as a cause of the GBS because the odds of someone getting a food borne illness on two consecutive days would be incredibly rare and would make Mr. Martinez one of the unluckiest people around. (Ex. 11, Dr. Freeman trial testimony, p. 37).[6]

Dr. Freeman admitted that his first diagnosis was that campylobacter jejuni was the cause of Mr. Martinez's GBS. (Ex. 11, Dr. Freeman trial testimony, p. 42-43). However, he changed his mind because the incubation time was less than 12 hours if he was trying to connect the meal to causing the gastrointestinal infection that lead to the GBS, and the normal incubation time for campylobacter jejuni is 12-48 hours. (Ex. 11, Dr. Freeman trial testimony, p. 47, 57). He then opined that if he was looking at a three to four hour incubation time, the gastrointestinal infection that lead to the GBS was likely caused by vibrio parahaemolyticus from eating oysters. (Ex. 11, Dr. Freeman trial testimony, p. 47). Dr. Freeman conceded at trial that at least 20% of GBS cases are idiopathic. (Ex. 11, Dr. Freeman trial testimony, p. 43).

3. Testimony of Dr. Kenneth Gorson

[5] The incubation time is the time between when one consumes or is exposed to a potential pathogen and the time they become sick. (Ex. 11, Dr. Freeman trial testimony, p. 46).

[6] This opinion, of course, is not based upon any science but is pure speculation by Dr. Freeman. It ignores that the most identified link between a gastrointestinal infection and GBS is campylobacter jejuni. (Ex. 11, Dr. Freeman trial testimony, p. 43). It also ignores the science that shows there is a greater percentage of GBS cases where the cause is unknown than from vibrio parahaemolyticus. Dr. Freeman admitted these percentages were 20% (unknown) versus 0% (vibrio parahaemolyticus). (Ex. 11, Dr. Freeman trial testimony, p. 43).

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Dr. Kenneth Gorson is a neurologist who specializes in neuromuscular disorders and autoimmune neuropathies. (Ex. 12, Dr. Gorson trial testimony, p. 4). He is board certified in neurology. (Ex. 12, Dr. Gorson trial testimony, p. 6). He is familiar with GBS which he described as a neurologic condition that exists in the general population. (Ex. 12, Dr. Gorson trial testimony, p. 7). He treats patients with GBS in his medical practice, and also researches GBS, has written articles on GBS, participates in foundations to educate patients about GBS and investigates GBS. (Ex. 12, Dr. Gorson trial testimony, p. 10). Dr. Gorson is the principal investigator for the largest GBS prospective study in the world, following 1,500 patients with GBS syndrome over the last seven or eight years. (Ex. 12, Dr. Gorson trial testimony, p. 9).

Dr. Gorson testified that the core issue in the case was to determine the triggering mechanism for Mr. Martinez's GBS. (Ex. 12, Dr. Gorson trial testimony, p. 14). He testified that the eating of oysters did not cause the Mr. Martinez's GBS for several reasons. First, there is no proof the oysters (or seafood) were infected with vibrio parahaemolyticus. (Ex. 12, Dr. Gorson trial testimony, p. 30). Second, there has never been a reported case of GBS following an infection of vibrio parahaemolyticus. (Ex. 12, Dr. Gorson trial testimony, p. 14, 19). Third, Dr. Gorson said in all vibrio parahaemolyticus outbreaks which led to gastrointestinal illness, they were all self-limited and did not lead to GBS. Finally, the records show that Mr. Martinez got sick after eating at Lobster Haven on December 21, was better on December 23, and then violently sick on December 24. This is not a pattern typically seen in people with gastroenteritis, and Dr. Gorson believes "[s]omething else is going on." (Ex. 12, Dr. Gorson trial testimony, p. 25-26). This something else, of course, as argued by the defense, was the slaughtering of a lamb without gloves by Mr. Martinez.

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Dr. Gorson also explained how medical investigators have been able to establish certain causes for GBS. He first explained that investigators were able to link campylobacter jejuni to GBS because they were able to see that there was an increase in diagnosed cases of GBS associated with an outbreak of gastrointestinal infections in rural China with chicken farmers. (Ex. 12, Dr. Gorson trial testimony, p. 26). Due to an increase in the number of confirmed campylobacter jejuni gastrointestinal infections, medical investigators also saw an increase in the number of confirmed GBS cases which developed within two weeks of the gastrointestinal infection. Similarly, with the recent Zika outbreak, medical investigators saw a spike in confirmed GBS cases in the population that contracted Zika. (Ex. 12, Dr. Gorson trial testimony, p. 18-19). Therefore, medical investigators have been able to show a link between Zika and GBS. Dr. Gorson went on to testify there have been at least 40 confirmed vibrio parahaemolyticus outbreaks in the United States since 1971 and there has not been an increase GBS cases in the populations exposed to the vibrio parahaemolyticus outbreaks. (Ex. 12, Dr. Gorson trial testimony, p. 19). Dr. Gorson also agreed with Dr. Freeman that in many cases the cause of the GBS is unknown, stating "[p]atients in about two-thirds of cases will have an identifiable immunological trigger." (Ex. 12, Dr. Gorson trial testimony, p. 15).[7]

4. <u>Testimony of Dr. Adam Didio</u>

[7] Dr. Gorson's testimony demonstrates the fundamental flaw in the opinions of Dr. Freeman (and Dr. Didio). For example, Dr. Gorson showed a recognized scientific link between Zika and GBS. Dr. Freeman tried to do the same thing with oysters (or seafood) and GBS, through the Hill criteria, as set forth on page 10, *supra*. However, unlike the connection between Zika and GBS, or of viruses besides German measles causing birth defects in pregnant women, there has never been a clinical, scientific, or temporal cause and effect or link between eating oysters (or seafood) and GBS. In fact, Dr. Freeman only reached two steps of the Hill criteria, at most. No matter the criteria used, the leap of faith that was made by Dr. Freeman (and Dr. Didio) in this case is not allowed in Florida and entitles Lobster Haven to a judgment in its favor, or, alternatively, a new trial.

Dr. Adam Didio also testified in the case as a treating physician and expert. (Ex. 14, Dr. Didio trial testimony). He diagnosed Mr. Martinez with GBS. (Ex. 14, Dr. Didio trial testimony, p. 13). He opined that Mr. Martinez's GBS was caused by the gastrointestinal illness which began on December 21, 2013. (Ex. 14, Dr. Didio trial testimony, p. 37).

Dr. Didio, like Dr. Freeman, admitted there was a lot about GBS that is unknown. (Ex. 11, Dr. Freeman trial testimony, p. 43; Ex. 14, Dr. Didio trial testimony, p. 30, 60). He testified that he was not aware of a single case or medical study linking vibrio parahaemolyticus to a gastrointestinal infection which caused GBS. (Ex. 14, Dr. Didio trial testimony, p. 57, 72). He also testified that he is unaware of a single case that links oyster consumption to a gastrointestinal illness to GBS. (Ex. 14, Dr. Didio trial testimony, p. 57-58). He was aware, however, that there was a link between campylobacter jejuni and GBS. (Ex. 14, Dr. Didio trial testimony, p. 58).[8] In fact, when a patient has GBS, treating physicians like Dr. Didio focus on campylobacter jejuni as the most likely cause of the GBS. (Ex. 14, Dr. Didio trial testimony, p. 58). Dr. Didio, like Dr. Freeman, also testified that in 20% of GBS cases the cause of the GBS is unknown. (Ex. 14, Dr. Didio trial testimony, p. 60). Dr. Didio also testified he was only 75% sure the gastrointestinal infection even led to Mr. Martinez's GBS. (Ex. 14, Dr. Didio trial testimony, p. 60).

Dr. Didio based his opinion on medical records that contained information from Mr. Martinez. (Ex. 14, Dr. Didio trial testimony, p. 63). Importantly, Dr. Didio also based his opinions on there being only one gastrointestinal illness without considering whether the lamb incident had caused a gastrointestinal infection. (Ex. 14, Dr. Didio trial testimony, p. 65). As a treating physician, however, it was not important to him what caused the gastrointestinal infection. (Ex.

[8] Dr. Didio admitted that oysters contain vibrio parahaemolyticus while lamb contains campylobacter jejuni. (Ex. 14, Dr. Didio trial testimony, p. 77).

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14, Dr. Didio trial testimony, p. 67). He was not trying to tell the jury what led to the gastrointestinal illness. (Ex. 14, Dr. Didio trial testimony, p. 73). Dr. Didio's opinion that the gastrointestinal illness began on December 21, 2013 was based solely on what Mr. Martinez reported to his physicians. (Ex. 14, Dr. Didio trial testimony, p. 73). Dr. Didio also noted the slaughter of the lamb on December 23 was not reported in any medical records. (Ex. 14, Dr. Didio trial testimony, p. 73). Dr. Didio opined that medical treaters do not have on an investigative hat and are not trying to connect a link between oysters and GBS, they are simply concerned that the patient has GBS. (Ex. 14, Dr. Didio trial testimony, p. 76-77).

ARGUMENT

I. JUDGMENT IN ACCORDANCE WITH THE MOTION FOR DIRECTED VERDICT IS WARRANTED—THERE IS NO EVIDENCE TO SUPPORT THE PLAINTIFF'S CLAIM THAT DEFECTIVE SEAFOOD SERVED TO THEM BY LOBSTER HAVEN CAUSED MR. MARTINEZ'S GBS

A directed verdict is the appropriate method for the Court to determine that a party is entitled to judgment on a claim or defense, as a matter of law. *See* Fla. R. Civ. P. 1.480. A directed verdict is appropriate when no view of the evidence supports the plaintiff's claims and the Court has a duty to enter a directed verdict in favor of the defense when there is no evidence upon which a jury could return a verdict in the plaintiff's favor. *See Stirling v. Sapp*, 229 So. 2d 850, 852 (Fla. 1969) ("the trial judge is authorized to grant [a motion for directed verdict] only if there is no evidence or reasonable [sic] inferences to support the opposing position."). The standard for the

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Court's consideration of a judgment in accordance with the motion for directed verdict is the same as that on an original motion. *See Greene v. Flewelling*, 366 So. 2d 777 (Fla. 2d DCA 1979).

In making a motion for directed verdict, a defendant, for the purpose of the motion, admits all evidence presented by the plaintiff and all reasonable inferences and conclusions that may be drawn from this evidence. However, such inferences and conclusions must be "reasonable"—speculation has no place in this analysis.

In this case, it was one of Plaintiffs' burden to prove that the contaminated seafood served to Mr. Martinez by Lobster Haven caused his GBS. The only concession here was that seafood served to Plaintiffs at Lobster Haven caused Plaintiffs to contract food poisoning, which cleared up in two days. The theory presented by Plaintiffs to the jury was that this contaminated seafood led to a gastrointestinal illness and then to GBS is scientifically unfounded, and goes against all that is known about the causes of GBS. Plaintiffs own expert admitted that there has never been a case linking oysters to GBS. Plaintiffs therefore failed to present any legally sufficient evidence upon which a jury could hold Lobster Haven liable for their damages. Dr. Freeman should not have been allowed to testify as his proffer before the first trial was insufficient. This was error which also entitles Lobster Haven to a directed verdict or, in the alternative, a new trial. *See St. Johns Water Management Dist. v. Fernberg Geological Servs.*, 784 So.2d 500 (Fla. 5th DCA 2001) ("A motion for directed verdict should be granted where there is no reasonable evidence upon which a jury could legally predicate a verdict in favor of the nonmoving party."). Here, the Plaintiffs' allegations with respect to what caused Mr. Martinez's GBS were based upon a chain of inferences and plain guesswork as opined by Dr. Michael Freeman:

1. The gastrointestinal illness caused the GBS. (Ex. 11, Dr. Freeman trial testimony, p. 66).

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2. The gastrointestinal illness that led to the GBS came from a meal served at Lobster Haven. (Ex. 11, Dr. Freeman trial testimony, p. 67). And,
3. There was only one gastrointestinal illness. (Ex. 11, Dr. Freeman trial testimony, p. 67).[9]
4. A generalized gastrointestinal illness with unknown causative origin – but not campylobacter jejuni – caused GBS.

It is well-established Florida law that plaintiffs cannot rely upon an impermissible stacking of inferences to prove their case. *Cohen v. Arvin*, 878 So. 2d 403, 405 (Fla. 4th DCA 2004); *Gelco Convention Servs.*, 710 So. 2d at 583; *Nielsen v. City of Sarasota*, 117 So. 2d 731, 733 (Fla. 1960). The rule prohibiting impermissible stacking of inferences is designed to protect litigants from verdicts based upon conjecture and speculation. *Stanley v. Marceaux*, 991 So. 2d 938, 938 (Fla. 4th DCA 2008); *Voelker v. Combined Inc. Co. of America*, 73 So. 2d 403 (Fla. 1954). In *Stanley*, the court stated:

> If a party to a civil action depends upon the inferences to be drawn from circumstantial evidence as proof of one fact, it cannot construct a further inference upon the initial inference in order to establish a further fact unless it can be found that the original, basic inference was established to the exclusion of all other inferences.

Stanley, 991 So. 2d at 940. "The opinion of an expert is not sufficient to eliminate the necessity of proving the foundation facts necessary to support the opinion." *Harris v. Josephs of Greater Miami, Inc.*, 122 So. 2d 561, 562 (Fla.1960).

[9] Dr. Freeman's opinion that the food poisoning event on December 21, 2013 at Lobster Haven caused GBS simply flies in the face of all scientific evidence of what causes GBS. (Ex. 11, Dr. Freeman trial testimony, p. 11, 16). It simply cannot be allowed to stand or sustain a verdict as it did in this case.

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In *Commercial Credit Corp. v. Varn*, 108 So. 2d 638 (Fla. App. 1959), the Florida Appellate Court examined a slip-and-fall case which was based upon a stacking of inferences. The Court reasoned that to find for the Plaintiff, the jury would have to make three successive inferences:

> In order to arrive at a conclusion that the appellant was responsible in damages for the ultimate injury, the jury would have to infer in the first place that under all of the circumstances there was negligence on the part of the defendant in the maintenance of its floor. On top of this inference it would have to infer that such negligence in maintenance produced a dangerous condition of the floor which in turn existed at the time the appellee walked over it and then the ultimate final inference that such inferred dangerous condition was the proximate cause of the appellee's skidding.

Id. at 640-41. The Court held that the "ultimate conclusion of the jury would have to be founded on inferences based upon inferences" and, under the law of Florida, this was impermissible. *Id.*

Moreover, Dr. Freeman admitted that he did not know exactly what made Mr. Martinez sick. (Ex. 11, Dr. Freeman trial testimony, p. 35). He also admitted that he did not know what bacteria or pathogen caused the foodborne illness. (Ex. 11, Dr. Freeman trial testimony, p. 35). He also admitted there are more cases where the cause of GBS is unknown (20%) than oysters (0%). Dr. Freeman finally dismissed the most common cause of GBS, campylobacter jejuni that is found in lamb, because Mr. Martinez would have been the unluckiest guy around to sustain two separate gastrointestinal infections in a few days. This is not science, it is pure speculation, and speculative testimony such as this cannot support a party's claim. Indeed, "[s]peculative testimony is not competent substantial evidence." *Realauction.com, LLC v. Grant Street Group, Inc.*, 82 So. 3d 1056, 1059 (Fla. 4th DCA 2011). A jury simply cannot make an inference of negligence based exclusively upon speculative or inferential testimony. *See id.*; *accord Mount Sinai Med. Ctr. of Greater Miami, Inc. v. Gonzalez*, 98 So. 3d 1198 n.3 (Fla. 3d DCA 2012) (observing that even

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otherwise sufficient circumstantial evidence is insufficient to create an issue of fact where there is unrebutted direct testimony or evidence).

The Florida Statutes confine expert testimony to that which will assist the trier of fact to determine what occurred:

> **90.702. Testimony by experts**
>
> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.
>
> *** * * ***
>
> **90.703. Opinion on ultimate issue**
>
> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact.

§§ 90.702-.703, Fla. Stat.

Although experts are permitted to opine on ultimate issues, Florida law prohibits the use of expert testimony that directs the trier of fact how to decide the case or that draws improper legal conclusions based upon evidence presented. *See Town of Palm Beach v. Palm Beach County*, 460 So. 2d 879, 882 (Fla. 1984) (explaining that it is inappropriate for an expert to testify that premises were "negligently constructed", but appropriate to testify whether the premise were constructed and maintained in accordance with reasonably safe standards), *citing Gifford v. Galaxie Homes of Tampa*, 223 So. 2d 108, 111 (Fla. 2d DCA 1969) (permitting expert testimony that a building was not constructed or maintained according to reasonably safe construction standards). Florida courts have held that speculative, conclusory or pure opinion testimony by an expert is not permitted as

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evidence. *Perez v. Bell South Telecom., Inc.*, 138 So. 3d 492, 497 (Fla. 3d DCA 2014) (observing that the Florida Statutes were amended to conform with the Federal Rules of Evidence and "tighten the rules for admissibility of expert testimony in the courts of this state" and preclude admission of "pure opinion" testimony),[10] *citing Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993). In amending section 90.702, the legislature prohibited Florida courts from admitting "pure opinion testimony," as previously recognized by the Florida Supreme Court in *Marsh v. Valyou*, 977 So.2d 543 (Fla. 2007). *See* § 90.702, Fla. Stat.; 2013 Fla. Sess. Law Serv. Ch. 2013-107 (West); *see also Giamio v. Fla. Auto. Sport*, 154 So. 3d 385 (Fla. 1st DCA 2014) (rehearing denied Jan. 14, 2015) (acknowledging the legislature's intent to depart from the former opinion in *Marsh*, disallowing "pure opinion" testimony).

A directed verdict is proper if, at the close of a party's case, the causal connection between the alleged liability and damages is based on the impermissible stacking of inferences. *See Voelker*, 73 So. 2d at 405-08; *Stanley*, 991 So. 2d at 940-41; *Broward Exec. Builders, Inc. v. Zota*, 192 So. 3d 534, 537, 540 (Fla. 4th DCA 2016).

[10] "Pure opinion" refers to expert opinion developed from inductive reasoning based on the experts' own experience, observation, or research," not "expert testimony" that relies on some scientific principle or test." *Marsh*, 977 So.2d at 560; *accord U.S. v. Frazier*, 387 F.3d 1244, 1261 (11th Cir. 2004) (citing *Daubert* and explaining that "If admissibility could be established merely by the ipse dixit of an admittedly qualified expert, then the reliability prong would be, for all practical purposes, subsumed by the qualification prong."). The law simply does not permit the Court to take the expert's word that his opinion is reliable unless it is based upon a factual basis. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (explaining that, if there is "too great an analytical gap between the data and the opinion proffered," then the opinion may be excluded); *see also Cook v. Sheriff of Monroe Cnty.*, 402 F.3d 1092, 1111 (11th Cir. 2005) (holding that opinions that are "imprecise and unspecific, or whose factual basis is not adequately explained" should be excluded).

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In this case, Dr. Freeman impermissibly stacked inferences to come to his ultimate conclusion without any factual or scientific support. Dr. Freeman is the Plaintiffs' only witness who opined that Mr. Martinez's consumption of raw oysters ultimately led to his GBS.[11] Dr. Freeman was also the only witness to testify that vibrio parahaemolyticus could cause GBS. (Ex. 11, Dr. Freeman trial testimony, p. 11). There is simply no record evidence showing that Mr. Martinez's consumption of raw oysters caused his GBS. Because Dr. Freeman's testimony is based on the impermissible stacking of inferences, is nothing more than an educated guess or pure opinion, a directed verdict for Lobster Haven should have been entered at trial because the Martinezes have otherwise failed to submit evidence that Lobster Haven caused Mr. Martinez's damages. As a result, the Court should enter a directed verdict in Lobster Haven's favor and Lobster Haven requests that this Court enter judgment in in accordance with the motion for directed verdict. *See Stanley v. Marceaux*, 991 So. 2d 938, 940 (Fla. 4th DCA 2008) (warning that it impermissible to stack inferences, and explaining that this rule is meant to protect litigants from verdicts based upon speculation and conjecture).

Similarly, Dr. Didio's testimony was also based upon speculation and conjecture. Dr. Didio based his opinion on medical records that contained information from Mr. Martinez. (Ex. 14, Dr. Didio trial testimony, p. 63). He also based his opinions on there being only one gastrointestinal illness. (Ex. 14, Dr. Didio trial testimony, p. 65). As a treating physician, however, it was not important to him what caused the gastrointestinal infection. (Ex. 14, Dr. Didio trial testimony, p. 67). He was not trying to tell the jury what led to the gastrointestinal illness. (Ex.

[11] Dr. Didio testified the gastrointestinal illness began on December 21, 2013, which is when the Martinezes at seafood at Lobster Haven, so his opinion was different than Dr. Freeman's opinion to the extent he focused on the date. However, he relied on what Mr. Martinez told his medical doctors and did not have all available and relevant facts at his disposal.

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14, Dr. Didio trial testimony, p. 73). Dr. Didio's opinion that the gastrointestinal illness began on December 21, 2013 was based solely on what Mr. Martinez reported to his physicians. (Ex. 14, Dr. Didio trial testimony, p. 73). Dr. Didio also noted the slaughter of the lamb on December 23 was not reported in any medical records. (Ex. 14, Dr. Didio trial testimony, p. 73). Dr. Didio opined that medical treaters do not have on an investigative hat and are not trying to connect a link between oysters and GBS, they are simply concerned that the patient has GBS. (Ex. 14, Dr. Didio trial testimony, p. 76-77).

He linked the gastrointestinal illness of December 21, 2013 to Mr. Martinez's GBS based on a flawed presumption contained in the medical records, as told to the treating doctors by Mr. Martinez. Dr. Didio did not investigate (nor did any records contain) information about Mr. Martinez slaughtering a lamb on December 23, or evidence that Mr. Martinez was back to normal two days after he left Lobster Haven.

Finally, Dr. Didio, like Dr. Freeman, admitted there was a lot about GBS that is unknown. (Ex. 11, Dr. Freeman trial testimony, p. 43; Ex. 14, Dr. Didio trial testimony, p. 30, 60). He testified that he was not aware of a single case or medical study linking vibrio parahaemolyticus to a gastrointestinal infection which caused GBS. (Ex. 14, Dr. Didio trial testimony, p. 57, 72). He also testified that he is unaware of a single case that links oyster consumption to a gastrointestinal illness to GBS. (Ex. 14, Dr. Didio trial testimony, p. 57-58). He was aware, however, that there was a link between campylobacter jejuni and GBS. (Ex. 14, Dr. Didio trial testimony, p. 58).[12] In fact, when a patient has GBS, treating physicians like Dr. Didio focus on campylobacter jejuni as the most likely cause of the GBS. (Ex. 14, Dr. Didio trial testimony, p. 58). Dr. Didio, like Dr.

[12] Dr. Didio admitted that oysters contain vibrio parahaemolyticus while lamb contains campylobacter jejuni. (Ex. 14, Dr. Didio trial testimony, p. 77).

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Freeman, also testified that in 20% of GBS cases the cause of the GBS is unknown. (Ex. 14, Dr. Didio trial testimony, p. 60). Thus, since Dr. Didio's testimony is not based upon any recognized science, was admittedly delivered without any independent investigation of the facts and possible causes outside of the medical records and instead is based upon flawed history, speculation and conjecture, it cannot support the verdict in this case and Lobster Haven is entitled to a directed verdict.

II. ALTERNATIVELY, LOBSTER HAVEN IS ENTITLED TO A NEW TRIAL AND REMITTITUR

"Although a motion for new trial is addressed to the sound discretion of the trial court, the trial judge has a duty to grant such a motion when the jury has been influenced by extraordinary considerations, misled by the force and credibility of the evidence, or when the verdict fails to comport with the manifest weight of the evidence." *Pierce v. Nicholson Supply Co.*, 676 So. 2d 70, 71 (Fla. 2d DCA 1996).

A. Lobster Haven is entitled to a new trial because Dr. Freeman's testimony is based on the impermissible stacking of inferences, is nothing more than an educated guess or pure opinion

Lobster Haven adopts its argument set forth in section I, above as if fully set forth herein, and asserts that if the Court does not enter judgment in in accordance with the motion for directed verdict, Lobster Haven is entitled to a new trial.

B. Lobster Haven is entitled to a new trial because the verdict was against the manifest weight of the evidence

Lobster Haven is also entitled to a new trial because the verdict is contrary to the manifest weight of the evidence. The Florida Supreme Court set forth the appropriate standard for a trial judge to follow when ruling upon a motion for new trial asserting that the verdict is contrary to the

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manifest weight of the evidence. In *Cloud v. Fallis*, 110 So. 2d 669, 673 (Fla. 1959), the Supreme Court stated as follows:

> When a motion for new trial is made it is directed to the sound, broad discretion of the trial judge, who because of his contact with the trial and his observation of the behavior of those upon whose testimony the finding of fact must be based is better positioned than any other one person fully to comprehend the processes by which the ultimate decision of the triers of fact, the jurors, is reached.
>
> When a judge, who must be presumed to have drawn on his talents, his knowledge and his experience to keep the search for the truth in a proper channel, concludes that the verdict is against the manifest weight of the evidence, it is his duty to grant a new trial, and he should always do that if the jury has been deceived as to the force and credibility of the evidence or has been influenced by considerations outside the record.

The Third District in *Florida Power & Light Co. v. Goldberg*, 856 So. 2d 1011, 1024-1025 (Fla. 3d DCA 2002) has also stated as follows: [13]

> A motion for new trial is granted when the jury has been influenced by extraordinary considerations, misled by force and credibility of evidence, or when the verdict fails to comport with [sic] manifest weight of evidence. *Pierce v. Nicholson Supply Co.*, 676 So. 2d 70, 71 (Fla. 2d DCA 1996). A new trial may be ordered on the grounds that the verdict is excessive or inadequate when 1) the verdict shocks the judicial conscience or 2) the jury has been unduly influenced by passion or prejudice. *Brown v. Estate of Stuckey*, 24 Fla.L.Weekly S397, [749 So. 2d 490] (Fla. August 26, 1999). Such an order granting a new trial must give reasons from the record to support those conclusions. *Hawk v. Seaboard Sys. R.R. Inc*, 547 So. 2d 669 (Fla. 2d DCA 1989).

[13] On Rehearing En Banc, the panel reversed and remanded the judgment in favor of the Goldbergs. On appeal, the Florida Supreme Court quashed that opinion and remanded the case for reinstatement of the remitted final judgment in favor of the Goldbergs as originally entered by the Third District. *Goldberg v. Florida Power & Light Co.*, 899 So. 2d 1105 (Fla. 2005).

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1. <u>The verdict was not supported by any causal link between the alleged defect and the injury and damages</u>

A new trial is required because the manifest weight of the evidence shows no causal link between the oysters served at Lobster Haven and Mr. Martinez's GBS. In this case, as more fully set forth above, Plaintiffs' expert, Dr. Freeman, based his opinion that contaminated seafood at Lobster Haven caused Mr. Martinez's GBS based upon impermissible stacking of inferences, educated guesswork and unscientific dismissal of a second gastrointestinal infection because it would be unlucky. Similarly, Dr. Didio admitted that he did not perform a true investigation and determination of what caused Mr. Martinez's GBS, removing all evidentiary weight and credibility from his opinions.

However, Lobster Haven's expert, Dr. Kenneth Gorson – a board certified neurologist who treats patients with GBS - testified unequivocally that the eating of oysters did not cause the Mr. Martinez's GBS for several reasons. First, Dr. Gorson testified that there is no proof the oysters (or seafood) were infected with vibrio parahaemolyticus. (Ex. 12, Dr. Gorson trial testimony, p. 30). Second, Dr. Gorson testified – and Dr. Freeman agreed – that there has never been a reported case of GBS following an infection of vibrio parahaemolyticus or from consuming oysters. (Ex. 12, Dr. Gorson trial testimony, p. 14, 19; (Ex. 11, Dr. Freeman trial testimony, p. 62-63). Third, Dr. Gorson testified that in all vibrio parahaemolyticus outbreaks which led to gastrointestinal illness, they were all self-limited and did not lead to GBS. Finally, Dr. Gorson testified that the records show that Mr. Martinez got sick after eating at Lobster Haven on December 21, was better on December 23, and then violently sick on December 24. This is not a pattern typically seen in

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people with gastroenteritis, and Dr. Gorson believes "[s]omething else is going on." (Ex. 12, Dr. Gorson trial testimony, p. 25-26).

Moreover, the Martinezes had no credibility at trial on several key issues. First, Mrs. Martinez testified in deposition in April, 2016, that Mr. Martinez was back to normal after he ate at Lobster Haven.

> Q. All right. So my question was do you have a recollection that Mr. Martinez may have been back to normal by the 22nd?
>
> A. Yes.
>
> Q. Yes?
>
> A. Yes.

(Ex. 9, M. Martinez trial testimony, p. 25-26).[14] This is crucial testimony because if Mr. Martinez was back to normal on December 22, it would eliminate contaminated seafood at Lobster Haven as the cause of his GBS. It also supports the probability that there was a second gastrointestinal infection from the lamb slaughter.

Second, Mr. Martinez originally testified in his April 1, 2016 deposition that he selected the lamb that was slaughtered on December 23, skinned it, gutted it (by removing the intestines and guts) and finally slaughtered it, all while he was not wearing gloves. (Ex. 8, A. Martinez trial testimony, p. 71-72). However, he changed his testimony because his wife later told him he was not the one who slaughtered the lamb and instead, two others did it while he supervised. (Ex. 8, A. Martinez trial testimony, p. 69). Mr. Martinez testified that his wife told him he did not slaughter the lamb after their depositions on April 1, 2016; however, he never mentioned this conversation

[14] This is entirely consistent with what happened to Mrs. Martinez, who was also sick for two days after eating at Lobster Haven until she completely recovered. (Ex. 9, M. Martinez trial testimony, p. 24).

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during the first trial and testified consistent with his deposition during the first trial that he personally slaughtered the lamb. (Ex. 8, A. Martinez trial testimony, p. 69). The first time this story about him not being involved in the lamb slaughter came about after the Plaintiffs had learned a critical issue in the defense's case was Mr. Martinez's involvement with the lamb slaughter through the first trial and the opening statements of the second trial.

Mrs. Martinez also testified in her April 1, 2016 deposition that Mr. Martinez slaughtered the lamb on December 23. (Ex. 9, M. Martinez trial testimony, p. 27). However, she changed her testimony at trial and stated that two other friends slaughtered the lamb while her husband watched. (Ex. 9, M. Martinez trial testimony, p. 47-48). Mrs. Martinez said she remembered some pictures of the event on her phone a few months before the trial and did not see her husband in the pictures. (Ex. 8, A. Martinez trial testimony, p. 48-50, 52). Mrs. Martinez did not recall that she had these pictures at her April 1, 2016 deposition. (Ex. 9, M. Martinez trial testimony, p. 50). She did not produce the pictures claiming a bunch of her pictures were lost. (Ex. 9, M. Martinez trial testimony, p. 55).

2. <u>The verdict resulted from passion or prejudice.</u>

A new trial is also required because the verdict resulted from passion or prejudice. In *MacLaughlin v. Red Top Cab & Baggage Company*, 133 So. 2d 560 (Fla. 3d DCA 1961) the Third District upheld an order granting a motion for new trial where the plaintiff passenger in a taxi cab and her husband obtained a $42,500.00 verdict, because the verdict was so excessive that it shocked the conscience of the court. On appeal, the Third District held that "the order granting a new trial on damages in this case is affirmed, because appellants have not shown an absence of a reasonable basis on which the trial court could regard the verdict so excessive as to shock the

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judicial conscience, or that the broad discretion of the trial judge in such a matter was abused." *Id*. at 561.

Here, this Court should exercise its broad discretion and find that a new trial on liability and damages is warranted because 1) the verdict shocks the judicial conscience or 2) the jury has been unduly influenced by passion or prejudice outside the record. *Brown v. Estate of Stuckey*, 749 So. 2d 490 (Fla. 1999). One need look no further than the $6.375 million verdict to see that the verdict shocks the judicial conscience or the jury has been influenced by passion or prejudice.

Based upon the foregoing, Lobster Haven submits that the Court had a duty to grant a new trial because the manifest weight of the evidence favors Lobster Haven on the foregoing issues. Furthermore, the jury here was clearly deceived as to the force and credibility of the evidence or has been influenced by considerations outside the record. *Cloud v. Fallis*, 110 So. 2d 669, 673 (Fla. 1959). One can reach no other conclusion after reviewing the testimony of the experts and Mr. and Mrs. Martinez on key issues in the trial.

C. Lobster Haven is entitled to a new trial because Plaintiffs failed to show the presence of an unreasonably dangerous defect not characteristic of the product itself that was beyond the reasonable expectations of the consumer

At the heart of each strict liability theory is the requirement that the plaintiff's injury must have been caused by some defect in the product. *Royal v. Black and Decker Mfg. Co.*, 205 So.2d 307, 309 (Fla. App. 3d 1967). Here, considering the manifest weight of the evidence, Plaintiffs failed to show a defect in the oysters served by defendant caused GBS, meriting a new trial. Vibrio[15] and like bacteria are not added substances. They are naturally occurring bacteria taken in as the oysters filter-feed water. *See*, e.g., *Woeste v. Wash. Platform Saloon & Rest.*, 163 Ohio

[15] Plaintiffs further failed to show under the manifest weight of the evidence standard that the oysters contained a vibrio strain.

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App. 3d 70, 76 (Ohio App. Ct. 2005). Florida has adopted and follows the Restatement of Torts 2D §402A with respect to strict liability claims. *See, e.g., Keith v. Russell T. Bundy & Assocs.*, 495 So. 2d 1223, 1227-28 (5th Dist. 1986). The comments to Restatement §402A provide, in part:

> …. The defective condition may arise not only from harmful ingredients, *not characteristic of the product itself* either as to presence or quantity, but also from foreign objects contained in the product.

RESTATEMENT OF TORTS 2D § 402A, cmt. h (emphasis added). Since vibrio bacteria are indigenous to shellfish such as oysters, they are characteristic of the product itself and, therefore, not a defective condition per the Restatement. *Simeon v. Doe*, 602 So. 2d 77 (La. App. 1992), aff'd in part, vacated in part, 618 So. 2d 848 (La. 1993). Plaintiffs did not sufficiently evidence the presence of a bacteria not indigenous to oysters as required to establish a defective condition.

The comments to 402A further add that "[t]he rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, *in a condition not contemplated by the ultimate consumer*, which will be unreasonably dangerous to him." RESTATEMENT OF TORTS 2D § 402A cmt. g (emphasis added). Thus, under Florida law, one must not reasonably expect to find the item in the food to recover. *See Thompson v. McNeil-PPC, Inc.*, 2012 U.S. Dist. LEXIS 194501, *10 (noting that under Florida law "for a claim in strict liability, the focus is on "the product itself and the reasonable expectations of the consumer"). As noted, potentially harmful bacteria are indigenous to oysters and must, therefore, reasonably be expected to be present in oysters, precluding liability here. Indeed Restatement 402A comment i acknowledges that: "[m]any products cannot possibly be made entirely safe for all consumption, and any food… necessarily involves some risk of harm… the article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it." Courts to consider

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the issue have held that consumers cannot reasonably expect raw clams or like seafood to be free of harmful levels of naturally present bacteria. *Clime v. Dewey Beach Enters.*, 831 F. Supp. 341 (D.C. Del. 1993); *Bergeron v. Pac. Food, Inc.*, 2011 Conn. Super. LEXIS 366, *14 (Conn. Super. 2011).

Moreover, even assuming *arguendo* that the oysters were defective, Plaintiffs failed to establish an unreasonably dangerous defect that caused GBS. Foodborne illness causing bacteria have a minimal effect on the general population. *See e.g., Woeste*, 163 Ohio App. 3d at 76. At most, they cause diarrhea and other food poisoning symptoms. *See id.* Indeed, there has never, ever, despite all the studies propounded on the causes of GBS, been a reported case of vibrio or any other mystery bacteria cited by plaintiffs' expert, causing GBS. The manifest weight of the evidence thus compels a finding that the oyster product was not unreasonably dangerous. This is especially so when courts have considered that harmful bacteria *known* to result in death for a certain percentage of the population, do not render raw seafood unreasonably dangerous. *Id.*

Finally, *Horan v. Dilbet, Inc.*, 2018 U.S. App. LEXIS 4110 (3d Cir. Feb. 21, 2018), a case from the Third Circuit Court of Appeals, is instructive and shows that where there is no proof that the bacteria was not already present in the oysters before the restaurant received them, judgment in the restaurant's favor is appropriate. In *Horan*, the plaintiff ate at a restaurant and thereafter suffered a devastating infection, requiring above-the knee amputation of her left leg, and several left arm surgeries. *Id.* at *2-3. The court noted that vibrio naturally occurs in oysters and clams and that such seafood is not *per se* defective because of its presence. *Id.* at 14. The court held it therefore followed that plaintiff— in order to even reach the issue of causation—was required to first establish that defendant restaurant created a defect in the first place. *Id.* Absent proof that the clams did not contain infective levels of vibrio at the time of delivery, the jury would be

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speculating as to whether the restaurant created the defect that caused plaintiff's injury. *Id.* at 15. The court, therefore, affirmed the award of summary judgment in favor of the restaurant. *Id.* Here, as in *Horan*, where plaintiffs could not and did not show at trial that the (purportedly present) vibrio or other strain of bacteria was not already in the oysters at the time the restaurant obtained them, the claim fails and a new trial, or judgment in defendant's favor, should be granted.

D. <u>Lobster Haven is entitled to a new trial because the of erroneous evidentiary rulings</u>

Lobster Haven is entitled to a new trial because of numerous improper references to facts outside of the evidence made by Plaintiffs and their counsel.

First, in closing argument, Plaintiffs' counsel stated as follows:

> What we can say is their explanation with a negative campylobacter test, that is passed out in the stool is inaccurate. It didn't pass out in the stool. It was still there the whole time. So that is not an explanation for why the campylobacter test is negative.

(Ex. 13, Closing Argument, p. 73).

Lobster Haven's counsel immediately objected, stating that Plaintiffs' counsel was making up evidence that was not true. The Plaintiffs' counsel was claiming that campylobacter jejuni could survive in a person's stool while it was still in the colon for a week due to there not being a bowel movement even though there was never any medical evidence to support this proposition. (Ex. 13, Closing Argument, p. 72-73). Furthermore, the Plaintiffs never raised this issue during discovery, the first trial, or any point during the second trial until the Plaintiffs' rebuttal closing argument. Lobster Haven's counsel stated that both experts agreed the negative stool sample meant

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that the substance was eliminated by a bowel movement and that the evidence was made up. Lobster Haven moved for mistrial, which was denied. (Ex. 13, Closing Argument, p. 74-76).[16]

Second, during Mrs. Martinez's testimony, one of the jurors asked a question about whether there was an employee hand washing sign in the bathroom. Mrs. Martinez said she did not remember. (Ex. 9, M. Martinez trial testimony, p. 53-55). However, thereafter, Plaintiffs continued to raise the issue of Lobster Haven's food preparation, storage, and hand washing even though this was not an issue in the case. For example, Dr. Freeman talked about how oysters get vibrio parahaemolyticus, and said this can occur "if they are not stored properly or they are allowed to get too warm." (Ex. 11, Dr. Freeman trial testimony, p. 18). On this occasion, Lobster Haven moved for mistrial. (Ex. 11, Dr. Freeman trial testimony, p. 22). Lobster Haven noted that this issue was being raised because a juror asked a question about handwashing during Mrs. Martinez's testimony. (Ex. 11, Dr. Freeman trial testimony, p. 19, 21). The Court denied the motion for mistrial but instructed the jury that "there is no issue for you, the jury, to consider the care, handling, maintenance or delivery of the food at Lobster Haven." (Ex. 11, Dr. Freeman trial testimony, p. 24).

Immediately thereafter, Dr. Freeman was discussing the likely delivery device for the GBS that afflicted Mr. Martinez. He then testified that norovirus causes most foodborne illnesses in the country because people do not wash their hands after they have used the bathroom. (Ex. 11, Dr. Freeman trial testimony, p. 24). Lobster Haven's counsel objected again. (Ex. 11, Dr. Freeman trial testimony, p. 24). The Court stated at sidebar that "[t]he delivery of food and the maintenance

[16] Plaintiffs' counsel stated on one more occasion that there was no evidence that the campylobacter was passed out through a stool, and stated "[i]t was not passed out in the stool." Lobster Haven's counsel made the same objection and motion for mistrial which was again denied. (Ex. 13, Closing Argument, p. 77).

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of the food, it's not an issue in this case." (Ex. 11, Dr. Freeman trial testimony, p. 25). Lobster Haven again noted that this issue was being raised because a juror asked a question about handwashing during Mrs. Martinez's testimony. (Ex. 11, Dr. Freeman trial testimony, p. 32). After discussing the parameters of what Dr. Freeman could discuss on the stand, the Court overruled Lobster Haven's objection that the issue of handwashing was irrelevant. (Ex. 11, Dr. Freeman trial testimony, p. 32).

Third, Mr. Martinez's testimony as to hearsay issues despite repeated warnings from the Court and introduction of financial wealth evidence, in combination with the above actions by his counsel, mislead and confused the jury. Here, the Court had to warn Mr. Martinez not to inject hearsay statements into his answers (or the objected to question was withdrawn) on four separate occasions. (Ex. 8, A. Martinez trial testimony, p. 18, 27, 29, 33). In addition, Mr. Martinez testified "at the time they released me from the hospital, I was still in pretty bad shape. I didn't have no insurance, so they sent me home." (Ex. 8, A. Martinez trial testimony, p. 38-39). Lobster Haven's counsel moved for mistrial, but withdrew the motion after the parties agreed to counteract the statement with additional evidence and a curative instruction was given. (Ex. 8, A. Martinez trial testimony, p. 41, 51).

Finally, Dr. Didio should not have been allowed to opine as to the cause of Mr. Martinez's GBS. Lobster Haven objected to allowing him to testify to the ultimate issue because it was a newly disclosed opinion. (Ex. 14, Dr. Didio trial testimony, p. 33-36). This opinion should not have been allowed, as it was newly disclosed, was based on pure speculation, and was cumulative to the opinion given by Dr. Freeman. The cumulative effect of these issues denied Lobster Haven a fair trial. Florida law is clear, "for evidence to be relevant, it must have a logical tendency to prove or disprove a fact which is of consequence to the outcome of the action." *Shaw v. Jain*, 914

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So. 2d 458, 460 (Fla. 1st DCA 2005) (quoting Charles W. Ehrhardt, Florida Evidence § 401.1, at 120 (2005 ed.)). When the probative value of relevant evidence is outweighed by unfair prejudice, the evidence must be excluded. *See* § 90.403, Fla. Stat. The effect of the trial court's evidentiary rulings noted above – including the denial of two motions for mistrial - caused Lobster Haven undue prejudice and requires a new trial. *See Midtown Enters, Inc. v. Local Contractors, Inc.*, 785 So. 2d 578, 580 (Fla. 3d DCA 2001) (holding that a trial court should grant a new trial on the basis of evidentiary errors where the error was substantially prejudicial); *see also* § 90.401, Fla. Stat.; *Parsons v. Motor Homes of America, Inc.*, 465 So. 2d 1285, 1290 (Fla. 1st DCA 1985). As the beneficiary of the admission of the above evidence, the Martinezes have the burden to prove that the error complained of did not contribute to the verdict. "Alternatively stated, the beneficiary of the error must prove that there is no reasonable possibility that the error contributed to the verdict." *Special v. West Boca Med. Ctr.*, 160 So.3d 1251, 1256 (Fla. 2014).

E. <u>Lobster Haven is entitled to a remittitur.</u>

The jury returned a verdict in the sum of $6,375,000, apportioned as follows:

Past Medical Expenses:	$325,098
Future Medical Expenses:	$16,450
Past Pain & Suffering:	$1,000,000
Future Pain & Suffering:	$4,000,000
Loss of Consortium Past:	$375,000
Loss of Consortium Future:	$1,000,000

This verdict, specifically the amounts awarded for past and future pain and suffering and past and future loss of consortium, are grossly excessive in relation to the damages established by the evidence. An award of this nature can only suggest one conclusion—that it was a product of the jury's sympathy for the Plaintiff.

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Section 768.74(1), Florida Statutes, provides that, upon motion, a trial court must review an award of money damages to determine whether an award is excessive in light of the facts and circumstances presented to the trier of fact. A remittitur is required when the court determines that the amount of an award is excessive. *See* § 768.74(4), Fla. Stat. To come to its conclusion, a trial court may consider: "(a) whether the amount awarded is indicative of prejudice, passion, or corruption on the part of the trier of fact; (b) whether it appears that the trier of fact ignored the evidence in reaching a verdict or misconceived the merits of the case relating to the amounts of damages recoverable; (c) whether the trier of fact took improper elements of damages into account or arrived at the amount of damages by speculation and conjecture; (d) whether the amount awarded bears a reasonable relationship to the amount of damages proved and the injury suffered; and (e) whether the amount awarded is supported by the evidence and is such that it could be adduced in a logical manner by reasonable persons." *Normius v. Eckerd Corp.*, 813 So. 2d 985, 987-88 (Fla. 2d DCA 2002) (citing section 768.74(5), Fla. Stat.).

Here, as has been discussed in detail above, the verdict is against the manifest weight of the evidence. There is no basis in the record to support the jury's award of $5 million for past and future pain and suffering and $1.375 million for past and future loss of consortium. Accordingly, an appropriate remittitur of the damages should be as follows:

Past Medical Expenses:	$220,000
Future Medical Expenses:	$16,450
Past Pain & Suffering:	$100,000
Future Pain & Suffering:	$25,000
Loss of Consortium Past:	$50,000
Loss of Consortium Future:	$10,000

Lobster Haven therefore submits that the appropriate verdict in this case, assuming a new trial is not granted by the Court, is $421,450, and requests a remittitur to that number.

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CONCLUSION

WHEREFORE, based upon the above facts and legal authority, Defendant, Lobster Haven respectfully requests that this Court direct a verdict in favor of on the issues set forth herein, or alternatively, grant a new trial in this matter on both liability and damages or a remittitur of damages.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of June, 2018, a true and correct copy of the foregoing was filed with the Clerk of Hillsborough County by using the Florida Courts e-Filing Portal, which will send an automatic e-mail message to the following parties registered with the e-Filing Portal system: Brandon G. Cathey, Esq., Swope, Rodante, P.A., team2eservice@swopelaw.com;eservice@swopelaw.com, 1234 E Fifth Avenue, Tampa, FL 33605, (813) 273-0017/(813) 223-3678 (F), Attorney for Plaintiff, Angel Martinez.

COLE, SCOTT & KISSANE, P.A.
Counsel for Defendant LOBSTER HAVEN, LLC
4301 West Boy Scout Boulevard
Suite 400
Tampa, Florida 33607
Telephone (813) 864-9333
Facsimile (813) 286-2900
Primary e-mail: daniel.shapiro@csklegal.com
Secondary e-mail:
christopher.donegan@csklegal.com
Alternate e-mail: bethany.goodrow@csklegal.com

By: s/ Daniel Shapiro
DANIEL A. SHAPIRO
Florida Bar No.: 965960
CHRISTOPHER J. DONEGAN
Florida Bar No.: 100703

0363.0425-00/10411699

COLE, SCOTT & KISSANE, P.A.
4301 WEST BOY SCOUT BOULEVARD - SUITE 400 - TAMPA, FLORIDA 33607 - (813) 289-9300 - (813) 286-2900 FAX