IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 96-_____
Third District Court of Appeal Case No. 95-274

E.R. SQUIBB & SONS, INC.,
CONNAUGHT LABORATORIES, INC.
and
HENRY SCHEIN, INC.,

Petitioners,

v.

BOYD B. FARNES,

Respondent.

PETITIONERS' BRIEF ON JURISDICTION

DISCRETIONARY PROCEEDING TO REVIEW A DECISION OF
THE THIRD DISTRICT COURT OF APPEAL

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INTRODUCTION

Nothing frustrates trial court judges and attorneys more, or harbors more juridical uncertainty, than a usurpation by the district courts of appeal of the discretionary duties imposed on trial courts at the conclusion of jury trials. The tension between the two levels of judicial officers has a particularly lively history in relationship to the responsibility of trial judges to consider and rule on motions for new trials. Evidence of the head-on clash of roles is seen in the multiple decisions addressing the standard of review prescribed for the district courts in their evaluation of that discretionary, trial-level responsibility.

In 1988, the scope of appellate review was thoughtfully and carefully established by the Court in ***Smith v. Brown, 525 So.*** 2d **868** (Fla. **1988).** The acceptance of the circumscribed appellate role there prescribed has not come easily to some of the district courts, however. It would benefit the bench and the bar greatly for the Court to express itself once more, if only with emphasis, on the very limited role available to appellate judges when they review trial court orders that have granted a new trial from the ground-level, on-the-scene, point of observation that trial judges possess.

Connaught Laboratories, Tnc., E.R. Squibb & Sons, Inc. and Henry Schein, Inc. bring to the Court for review the Third District's reversal of an order granting a new trial in ***Farnes v. E.R. Squibb and*** Sons, *Inc.*, 21 Fla. L. Weekly **D2** (3d **DCA** 1995), as altered in its dispositive rationale "on motion for clarification granted" at **21** Fla. L. Weekly D392. A copy of the original and the altered decisions are attached as Appendices 1 and **2,** respectively.

STATEMENT OF THE CASE AND FACTS

In October of 1989, Boyd Farnes was injected with an influenza vaccine manufactured by Connaught Laboratories, sold by Squibb and distributed by Schein. Sometime after injection with the vaccine, Mr. Farnes developed Guillain-Barre Syndrome, a rare neurological disorder affecting an individual's immune system. Farnes sued.

A jury returned a verdict in his favor based on a determination that warning language on the insert accompanying the vaccine was inadequate. The trial court set aside the verdict and ordered a new trial in a written order addressing the credibility of Farnes' expert witness and the evidence, concluding that the jury verdict was contrary to the manifest weight of the evidence.[1]

The Third District reversed the trial court's new trial order, and directed that the verdict be reinstated. The court stated that the grant of a new trial was an abuse of the trial court's discretion, but it articulated two very different formulations of the test it applied to reach that result. In its first opinion, the court ruled from a belief that a trial court will be found to abuse its discretion in granting a new trial

> where reasonable persons can differ as to whether or not the verdict was against the manifest weight of the evidence.

(21 Fla. L. Weekly at D2). Later, purporting to act on a "motion for clarification granted," the court left the outcome of the case intact but completely changed its formulation of the standard being applied to rule that an abuse of discretion occurs

> where reasonable persons cannot differ that the verdict was not against the manifest weight of the evidence.

(21 Fla. L. Weekly at D392).

The Third District's decision also holds that in cases involving dueling expert witnesses, as here, trial judges cannot substitute their judgment for that of the jury. (*Id.*).

SUMMARY OF ARGUMENTS

1. The appropriate standard for appellate review of an order granting a new trial, as formulated by this Court, is that there can be no abuse of discretion

> if reasonable men could differ as to the propriety ***of the action taken by the trial court.***

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[1] When a warning is accurate, clear and unambiguous, its adequacy is a question of law for the court. ***Upjohn Co. v. MacMurdo, 562 So.*** 2d **680,** 681-82 (Fla. 1990).

Smith v. Brown, 525 So. 2d at **869-70** (emphasis added). The Third District patently substituted *its* judgment as to the weight of the evidence before the jury for that **of** the trial court, in direct and express contravention of *Smith.*

2. In *Smith,* the **Court** also said that the appropriate role of a trial judge in deciding if *the* manifest weight of the evidence is contrary to the verdict

> must *necessarily* [include] the credibility of the witnesses along with the weight **of** all of the other evidence.

(Id. At **870** (emphasis added)). In this case, the Third District held that trial judges should *not* have that responsibility, based on a "substitution of judgment" shibboleth from district court decisions that pre-date the *Smith* decision.

ARGUMENT

The Third District has deviated from decisions of this **Court,** and from all of the district court decisions elsewhere in the state which have followed the Court's formulation of **standards,** in two separate ways. These deviations are express and direct, and they continue an inter-district disharmony in an *area* of the law that affects almost every appeal from every jury trial. The Third District has knowingly departed from the policy carefully crafted over the years by this Court, as to what role the appellate courts must accept when trial courts set aside jury verdicts and order new trials, The Court **is** urged to establish statewide uniformity of the law, on a subject that arises daily in the work-a-day world of trial courts.

1. The standard for review of new trial orders requires the district courts to evaluate the action taken by the trial court, and not re-evaluate the evidence considered by the jury

Over the years, the Court **has** been called upon to formulate appellate standards **of** review, to resolve conflicting appellate decisions and to answer certified questions in the thorny area of how appellate courts are to evaluate trial court orders that grant new trials. **An** early, major pronouncement on the subject was made in 1872 in *Schultz v. Pacific Insur. Co.,* 14 Fla. **73 (1872).** Another major decision on the subject was rendered **some 83** years later in

Turner v. Frey, 81 So. 2d 721 (Fla. 1955), followed some 4 years later in Cloud ***v. Fallis***, 110 ***So.*** 2d **669** (Fla. 1959). Yet another major analysis of the issue was undertaken 21 years later in ***Baptist*** Memorial ***Hospital, Inc. v. Bell,*** 384 ***So.*** 2d 145 (Fla. 1980), and 8 years after that when the Court responded to the need for still further clarification in ***Smith v. Brown.***

The decision of Third District in this case conflicts with each of these decisions. It also conflicts, of course, with the host of decisions from the other district courts which have followed ***Smith v. Brown*** and its precedential predecessors.;

In ***Smith v. Brown,*** the Court quoted from and re-affirmed two forerunners — *Cloud* ***v. Fallis,*** and ***Baptist*** Memorial ***Hospital*** — to hold that appellate courts are obliged to review the propriety of the action taken by the trial court on a new trial motion, and not to substitute their appellate evaluation of the weight of the evidence for that of the trial court. In ***Smith,*** the Court quoted with approval the standard expressed in ***Baptist Memorial Hospital*** that, "[i]f reasonable men could differ as to the propriety of the action taken by the trial court" in granting a new trial, then "there can be no finding of an abuse of discretion." (525 So. 2d at **869-70).** The focus of appellate perspective is directed by these decisions to what the trial court has done, as distinct from how judges on the appellate court would themselves view the evidence of the trial. That focus is grounded on sound policy and practical experience.

A trial judge has unique proximity to the trial, and alone among the jurists considering any particular case has the ability to observe the demeanor and the credibility of witnesses. Because of that ground-level perspective, the Court has said over and over again that the trial judge is better positioned than any other one person to comprehend completely the processes by which the jurors reached their decision. ***Cloud v. Fallis,*** 110 ***So.*** 2d at **672.** See ***also***

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[2] *E.g.*, ***Becker v. Williams, 652 So.*** 2d 1182, 1184 (Fla. 4th DCA 1995); ***Jones v. Stevenson,*** 598 ***So,*** 2d 219 (Fla. 5th DCA 1992); ***DeLucia v. Egan,*** 540 ***So.*** 2d 937 (Fla. 2d DCA 1989); ***Sarser v. Humana of Florida, Inc.***, 404 ***So.*** 2d 856, 858 (Fla. 1st DCA 1981).

Baptist Memorial Hospital Inc., 384 *So.* 2d 145, 146 (Fla. 1980) (reiterating the fact of the trial court's direct and superior vantage point); *Wackenhut Corp. v. Canty*, 359 So. 2d 430, 434 (Fla. 1978); and *Schultz*, 14 Fla. at 94.

For over 100 years the Court has held that trial courts must have broad discretion in deciding whether to grant or deny a motion for a new trial. See *Schultz*, 14 Fla. at 94. The role of the appellate courts in reviewing that exercise of broad discretion has been a persistent problem for the Court, however. For example, in *Cloud v. Fallis* the Court resolved a conflict between appellate courts applying the "broad discretion" test and those favoring a "substantial competent evidence" test, by rejecting the latter and reaffirming the breadth of a trial judge's discretion.

> We adhere to the early rule placing in trial courts broad discretion of such firmness that it would not be disturbed except on clear showing of abuse. . . .

Cloud v. Fallis, 110 *So.* 2d at 672. Indeed, not only did the Court thereby decree the standard to be "an abuse" of discretion — looking to what the trial court did in light of the discretion it was responsible to exercise — but the court further tightened the limitations on review with the admonition that the "very broad and liberal discretion" of the trial court should be infrequently disturbed, and not disturbed at all to upset a new trial order absent a clear abuse of discretion. 110 *So.* 2d at *672*, citing *Duboise Const. Co. v. City of South Miami*, 108 Fla. *362*, 146 *So.* 833 (1933), and *Turner v. Frey*, 81 So.2d at 722.

The passage of time, and further apparent uncertainty among the district courts prompted the Court to consider again, and to re-adopt the formulation of *Cloud v. Fallis*, in *Baptist Memorial Hospital*. The Court did not mince words in shoring up the back-sliding that it observed:

> Mere disagreement from an appellate perspective is insufficient, as *a matter of law*, to overturn the trial court's discretionary act. . . .

384 *So.* 2d at 146 (emphasis added).

Some of the district courts were quick to get the message. In *Fitzgerald v. Molle-Teeters,* 520 *So.* 2d **645, 647-48** (Fla. 2d **DCA 1988),** and in *McNair v. Davis,* 518 *So.* 2d 416 (Fla. **2d DCA 1988),** the court held that "[f]ew decisions of a lower court **are** granted greater deference in our judicial system **than** a trial court's order granting a new trial." In that **same year, the** Court decided ***Smith v. Brown*** in response to a certified question from the Fourth District. The Court took the occasion to repeat its instruction to the district courts:

> **If** reasonable men could differ as to the propriety of the action ***tuken by the trial court,*** then the action **is** not unreasonable and there can be no finding of **an** abuse of discretion.

525 So. 2d at 869-70, quoting ***Baptist Memorial Hospital,* 384 *So.*** 2d at **146** (emphasis added).

Despite its historical and practical roots, ***Smith v. Brown*** was not given intellectual deference **by** all **of** the judges of the district courts. In ***Montgomery Ward & Co. v. Pope, 532 So.*** 2d **722** (Fla. **3d DCA 1988),** Judge Schwartz wrote a dissent that presaged the result in this case. **He** there identified and distinguished what he described as two contradictory principles governing the review of new trial orders, each of which he found to be supported by a line of appellate decisions.

The first, he observed, advocates review **for** abuse of discretion, and is reflected in ***Smith v. Brown,*** in ***Baptist Memorial Hospital,*** in ***Cloud v. Fallis***, in ***Ford Motor Co. v. Kikis***, **401 *So.*** 2d **1341 (Fla.** 1981), **and** in *Castlewood Int'l Corp. v. LaFleur*, **322 *So.*** 2d 520 (Fla. **1975). The second** principle, he **suggested,** instructs the **trial** court not to sit as a "seventh juror,'' citing to ***Wackenhut Corp. v. Canty,* 359 *So.*** 2d **430** (Fla. **1978);** *Laskey v. Smith,* **239 *So.*** 2d 13 (Fla. 1970); ***Hodge v. Jacksonville Terminal Co.*, 234 *So.*** 2d **645** (Fla. 1970), ***cert. denied,* 400 U.S. 904** (1970).

Judge Schwartz found the two principles irreconcilable. He opined **that,** "despite valiant efforts to do so, *e.g.*, ***Smith v. Brown,*** 525 ***So.*** 2d at **870,** no test has been devised to

determine into what class of decisions a particular case falls." (*Id.*). He further concluded that "within six weeks after Smith was decided, the Second District in **Case *v. Bentley*, 527 *So.*** 2d 939 (Fla. 2d DCA 1988) . . . was able to come to what seems to be a completely opposite result."

What Judge Schwartz failed to discern in *Montgomery Ward* was that all of his "second principle" cases antedated Smith ***v. Brown.*** What he failed to acknowledge in ***Montgomery*** Ward was that ***Smith v. Brown*** was not a new test, but the restatement of a principle that had a long and distinguished history. What he failed to do in ***this*** case was to follow ***Smith v.*** Brown. The Per Curiam decision in this case, by Judges Schwartz, Nesbitt and Levy, expressly relies on **Case *v. Bentley*** — "a completely opposite result" from ***Smith v. Brown,*** according to Judge Schwartz — and nowhere even mentions ***Smith v.*** Brown!

The Court has directed the district courts to apply a standard of review which is not based on subjective judgments of the evidence made from an appellate perspective. Reasonable men (that is, appellate judges) are given the more limited role of acting only when it is "clear" that a case necessarily falls into one of two categories — either the evidence is so overwhelming or the evidence is so lacking — that no reasonable person (that is, no trial judge) could have reached any other result. In these polar-opposite categories, there is no room for an exercise of discretion at the trial level. When reasonable men can differ on th trial court's action, however, then the trial court has necessarily exercised its broad discretion appropriately and that exercise of discretion may not be disturbed. That is the teaching of ***Smith v. Brown,*** and predecessors such as ***Baptist Memorial Hospitul (see*** 384 ***So.*** 2d at 146).

The Court-ordered restraint placed on the appellate review function may not be comfortable for appellate judges who routinely review trial court judgments for competent and substantial record evidence. The Court has made the more narrow appellate review function on new trial orders easier, however, by requiring written articulation of the reasons that

support such an order. ***Baptist Memorial Hospital,* 384 *So.*** 2d at 146.[3] The more narrow appellate **task** *can* be performed appropriately, as the Third District itself illustrated in ***North Dade*** *Golf,* ***Inc. v. Clarke,* 439 *So.*** 2d 296 (Fla. 3d **DCA** 1983), where the court found no abuse of discretion on the issues **of** negligence and legal causation with respect to orthopedic injuries but just the opposite on legal causation **as** to the plaintiff's heart attack.'

It is perfectly clear that the district court judges in this case viewed the evidence at trial to determine how ***they*** would weigh the evidence.[5] Their decision expressly **so states**, both in its original formulation of what the court acknowledged it in fact ***did,*** and in its reliance (even in its changed decision) on a decision that one of the panel members considers to be "completely opposite" to the controlling precedent of ***Smith v.*** *Brown.*

2. A trial court does not abuse its discretion, act as a "seventh juror,' or "substitute its judgment" for the jury by evaluating the credibility of expert or other witnesses along with the weight of all other evidence

The second conflict between the decision below and ***Smith v. Brown*** is even more pronounced and overt. In ***Smith,*** the Court recognized the necessity for a trial judge to consider, along with all other evidence, the credibility of witnesses. ***(525 So.*** 2d at 870, citing ***Ford v. Robinson,* 403 *So.*** 2d **1379** (Fla. **4th** DCA **1981)).** While acknowledging that the trial court in this **case** did precisely that, the Third District faulted **and** reversed the trial court for considering witness credibility and itself treated the mere presence of competing testimonials — without regard to the substance or veracity of the testimony **as** seen by the trial court in the courtroom — as being **a** dispositive "abuse.··

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[3] The trial court met that requirement here, as is shown by the district **court's** discussion of the trial court's credibility evaluation.

North Dade Golf is one **of** the cases on which the Third District here relied.

[5] The Third District has continued its ***appellate*** weighing of the evidence, rather than reviewing the propriety of the trial court's action, in another recent decision overturning **an** order granting **a** new trial. *Atkins v. Hansel,* **21** Fla. L. Weekly **D466** (Fla. 3d **DCA** Feb. **21,** 1996).

> Where, as in the instant case, each party had an expert witness testify at trial regarding causation, it is for the jury to resolve and weigh the conflicting testimony.

(21 Fla. L. Weekly at D392). In doing so, the district court removed altogether the duty of a trial court to reject wholly *incredible* testimony which the jury might have weighed along with other evidence, expressly contrary to ***Smith v. Brown.*** **(525** ***So.*** 2d at **870).** ***Contrast, Jones v. Stevenson,*** 598 ***So.*** 2d 219 (Fla. 5th **DCA** 1992) ("Given the court's finding that the witnesses for both sides were credible, we find that the trial court abused its discretion by improperly reweighing the evidence."), which held that a trial court ***will*** abuse its discretion in granting a new trial if it has found ***both*** parties' experts to be credible.

The Third District's discussion and citations reflect a belief that trial courts too freely invade the fact-finding province of the jury. That view is misplaced. A trial judge does not settle facts; it merely gives another jury the opportunity to resolve factual disputes on the basis of reliable and credible evidence. *Schultz*, 14 Fla. at 93. The Court has long insisted that the trial judge should ***not*** refrain from interfering with a verdict that appears difficult to reconcile with the justice of the case and the manifest weight of the evidence. *Id.* at 93. See *also Cloud v. Fallis*, 110 ***So.*** 2d 669.

The mischief in excessive appellate deference to juries, as distinct from jury fact-finding in particular cases, is its chilling and debilitating effect on the experience, skill and wisdom of the trial judges to prevent manifest miscarriages of justice: the cases where a jury has "been 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 at **673.** The Third District decision in this case effectively eliminates all of the trial court's discretion, and revives the previously-discredited "substantial competent evidence" test which focuses review away from the trial court's decision and onto a remote, "cold record" re-examination of what the jury heard and saw.

A trial court that is prevented from considering the credibility of the witnesses, along with all of the other evidence, is a trial court that is prevented from concluding the jury was persuaded by something other than the manifest weight of the evidence. A trial court that independently considers the credibility of a witness does not substitute its judgment for the jurors — it merely orders a different jury to weigh the evidence free of observed influences that obstructed a *just* decision. The Third District transforms the trial judge into a figurehead whose function is merely to rubber stamp a jury verdict. That court may prefer jury judgments to trial court overviews, but in that regard its view conflicts with the role prescribed in ***Smith v. Brown.***

CONCLUSION

The Third District's decision in this case, reflecting its persistent insistence on the right to re-examine the evidence at trial for its weight rather than confining its review to the propriety of the trial court's actions based on the reasons expressed, should be accepted for review. There is a compelling need to reconcile decisional conflicts in the appellate courts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief was mailed on March 25, 1996 to: James J. Breen, Esq. and Donna L. DeConna, Esq., Wampler, Buchanan & Breen, P.A., 900 Sun Bank Building, 777 Brickell Avenue, Miami, Florida 33131, and to Steven Stark, Esq., Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A., International Place - 17th Floor, 100 S.E. 2d Street, Miami, Florida 33131-1101.

Arthur J. England Jr.

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APPENDIX 1

* * *

Torts—Product liability—New trial—Plaintiff contracting neurological disorder after receiving injection of influenza vaccine—Error to order new trial based upon conclusion that jury verdict determining that package's warning language was inadequate was contrary to manifest weight of evidence—Where each party had expert witness testify regarding causation, it was for jury to resolve and weigh conflicting testimony

BOYD B. PARNES. Appellant, vs. E.R. SQUIBB AND SONS. INC., CONNAUGHT LABORATORIES, INC., and HENRY SCHEIN, INC., Appellees. 3rd District. Case No. 95-274. Opinion filed December 20. 1795. An Appeal from the Circuit Court for Monroe County, M. Ignatius Lester. Judge. Counsel: Wampler, Buchanan & Breen and Donna L. DeConna, for appellant. Fowler, White. Burnett, Hurley. Banick & Strickroot and Steven E. Stark, for appellees.

(Before SCHWARTZ. C.J., and NESBITT and LEVY, JJ.)

(PER CURIAM.) Boyd B. Farnes (hereinafter "Farnes") appeals a trial court order granting a new trial in a products liability action. We reverse,

Farnes received an injection of an influenza vaccine manufactured by Connaught Laboratories. Inc., sold by E.R. Squibb & Sons, Inc., and distributed by Henry Schein, Inc. in October of 1989. Shortly thereafter, Farnes contracted Guillain-Barre Syndrome ("GBS")—a rare and severely crippling neurological disorder. At trial, each party had an expert witness testify concerning the adequacy of the warning language included in the package insert which came with the vaccine.

Specifically, the experts testified as to whether or not the language in the package insert adequately warned physicians about the risk of patients contracting GBS from an injection of the influenza vaccine. Following this and other testimony, the jury determined that the warning language was inadequate and, consequently, awarded a verdict in favor of the plaintiff. The trial court ordered a new trial based upon its conclusion that the jury verdict was contrary to the manifest weight of the evidence.

A trial court may not properly grant a motion for a new trial where reasonable persons can differ as to whether or not the verdict was against the manifest weight of the evidence. Crown Cork *& Seal Co. v. Vroom*, 480 So. 2d 108, 110 (Fla. 2d DCA 1985). Where. as in the instant case, each party had an expert witness testify at trial regarding causation, it is for the jury to resolve and weigh the conflicting testimony. *Oakes v.* Pittsburgh *Corning.Corp.*, 546 So. 2d 427,430 (Fla. 3d DCA 1989). Trial court judges do not have the discretion to substitute their judgment for that of the jury in regard to the conflicting testimony of cxpcrt medical witnesses, *North Dade Golf, Inc. v. Clarke,* 439 *So.* 2d 296,298 (Fla. 3d DCA 1983). *review denied,* 449 *So.* 2d 264 (Fla. 1984).

Here, the trial court abused its discretion in ordering a new trial and rejecting the jury's determination that the warning language was inadequate. *Case v. Bentley, 527 So.* 2d 939 (Fla. 2d DCA), review *denied,* 534 So. 2d 398 (Fla. 1988). Accordingly, we reverse.

Reversed and remanded with instructions to the trial court to reinstate the jury verdict.

* * *

APPENDIX 2

BOYD B. FARNES, Appellant. vs. E.R. SQUIBB AND SONS, INC.. CONNAUGHT LABORATORIES, INC., and HENRY SCHEIN, INC.. Appellees. 3rd District. Case No. 95-274. L.T. Case No. 92-10250. Opinion filed February 14.1996. An Appeal from the Circuit Court for Monroe County, M. Ignatius Lester, Judge. Counsel: Wampler, Buchanan & Breen and Donna L. DeConna, for appellant. Fowler. White, Burnett, Hurley, Banick & Strickrootand Steven E. Stark, for appellees.

(Before SCHWARTZ. C.J., and NESBITT and LEVY, JJ.)

ON MOTION FOR CLARIFICATION GRANTED

[Original Opinion at 21 Fla. L. Weekly D2a]

[Editor's note: The first sentence of the original opinion's fourth paragraph was changed to read as follows.]

A trial court may not properly grant a motion for a new trial where reasonable persons cannot differ that the verdict was not against the manifest weight of the evidence.

* * *