IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO.: 87,632 (DCA No. 95-274)

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

Petitioners,

v.

BOYD B. FARNES,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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

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INTRODUCTION

The District Court of Appeal expressly applied the standard of review of new trial orders that this Court mandated in *Cloud v. Fallis*, 110 So.2d 669 (Fla. 1959) and Baptist *Memorial Hospital, Inc.* v. Bell, 384 So.2d 145 (Fla. 1980). Specifically, the District Court determined that reasonable persons could not differ that the jury's determination was not contrary to the manifest weight of the evidence. This case presents no conflict for this Court to resolve through the exercise of its discretionary jurisdiction. Art. V, § 3(b)(3), Fla. Const.

The Petitioners ask this Court to find conflict in the language contained in the original, but now vacated, opinion of the District Court of Appeal of December 20, 1995 which contained an apparent scrivener's error in its paraphrase of the applicable standard of review. The Petitioners omit that the opinion of December 20, 1995 was vacated and compound the omission by appending to their brief an excerpt from the February 14, 1996 opinion that does not reveal the language expressly vacating the earlier opinion. The Respondent has, therefore, filed with this Response Brief an appendix containing the entire opinion of February 14, 1996 which is the only decision upon which the District Court's mandate issued.

STATEMENT OF THE CASE AND FACTS

The Respondent contracted Guillain Barré Syndrome ("GBS"), "a rare and severely crippling neurological disorder" shortly after

receiving an injection of the Petitioners' influenza vaccine.[1] Farnes Opinion at p. 2. Both sides presented expert medical testimony at trial on the issue of the adequacy of the language contained in the package insert to warn the physician as required by this Court in *Upjohn* Co. v. *MacMurdo*, **562** So.2d 680 (Fla. 1990). The Opinion of the District Court states as follows:

> Specifically, the experts testified as to whether or not the language in the package insert adequately warns 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 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.

Farnes Opinion at p. 2.

The Petitioners quote in their brief a portion of the earlier opinion of the court below, entered on December 20, 1995 and vacated on February 14, 1996. Contrary to the Petitioners' assertion, the District Court did not articulate "two very different formulations of the test it applied" in overturning the new trial order. Petitioners' Brief on Jurisdiction at p. 2. Instead, the District Court vacated its earlier opinion which had mistakenly dropped the double negative in paraphrasing the holding of the Second District Court of Appeal in *Crown Cork & Seal* Co. *v. Vroom*, **480** So.2d 108, 110 (Fla. 2d DCA 1985). The Opinion of

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[1] *Farnes v. E.R. Squibb & Sons, Inc.*, Third District Court of Appeal Case No. 95-274, February 14, 1996, hereinafter referred to as "The Farnes Opinion".

February 14, 1996, upon which mandate was entered, states the following:

> 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.

Farnes Opinion at p. 2.

The Petitioners' references to language from the vacated Opinion of December 20, 1995 are improper and should be stricken.

1. The District Court of Appeal properly conducted appellate review of the new trial order. *Wackenhut Corp.* v. *Canty*, 359 So.2d 430 (Fla. 1978). In concluding that reasonable persons could not differ that the verdict was not contrary to the manifest weight of the evidence, the District Court applied the exact standard of review established by this Court, *Baptist Memorial* Hospital, *Inc. v. Bell, supra.; Smith v. Brown,* 525 So.2d 068 (Fla. 1988); *Ford Motor Co. v. Kikis*, 401 So.2d 1341 (Fla. 1981), and consistently applied by the other District Courts of Appeal. *See, e.g.* Crown *Cork & Seal* Co. *v. Vroom,* 480 So.2d 108, 110 (Fla. 2d DCA 1985).

2. The Petitioners urge this Court to infer that the District Court of Appeal improperly applied this Court's decision in *Smith v. Brown, supra.*, regarding the propriety of the trial court's considering the credibility of the witnesses in ruling on a motion for new trial. Such "inherent" or "implied" conflict, however, may not serve as a basis for this Court's jurisdiction.

Kennedy v. Kennedy, 641 So.2d 408 (Fla. 1994); ***Department*** of *Health v. National Adoption Counseling,* **498 So.2d 888, 889 (Fla. 1986).**

The decision of the District Court of Appeal neither directly nor expressly conflicts with any decision of this Court or the other District Courts of Appeal. Accordingly, this Court is not presented with conflict jurisdiction.

ARGUMENT

I. The Opinion of the District Court of Appeal neither expressly nor directly conflicts with a decision of this Court or any other District Court of Appeal

The Petitioners' brief on jurisdiction encourages this Court to ignore the express language of the Opinion being reviewed and assume that the judges of the Third District Court of Appeal harbor some sort of latent defiance for this Court's decisional authority. Such a tactic belies the well settled rule that conflict **must be** "express and direct, i.e., it must appear within the four corners of the majority decision." *Department* of Health *v. National* ***Adoption*** *Counseling,* **498** So.2d at **889** (quoting from *Reaves* v. *State,* **485** So.2d 829, 830 (Fla. 1986)).

The Petitioners make no attempt to illuminate precisely how the language contained in the Farnes Opinion "express and directly" conflicts with decisions of this Court or another District Court of Appeal. Instead, they point to the language of the vacated earlier opinion **and** to Judge Schwartz's dissent in Montgomery *Ward* & ***Co.*** *v. Pope,* 532 So.2d 722 (Fla. **3d** DCA **1988),** a case that was not alluded to by the court below. The Petitioners' failure to stay within the

"four corners" of the decision of issue is further demonstrated by the following statement made in their brief:

> 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. [fn.5]. Their decision expressly so states both in its original formulation of what the court acknowledged that it in fact did, and in its reliance (even in its changed decision) on a decision that one of its panel members considers to be "completely opposite" to the controlling precedent of *Smith* v. *Brown.*

Petitioners' Brief on Jurisdiction at p. 8. In the footnote contained in the above quote, the Petitioners point to the subsequent and unrelated case of *Atkins* v. *Hansel,* 21 Fla. L. Weekly D466 (Fla. 3d DCA February 21, 1996).

The Petitioners thus conclude that the District Court's decision in this case is expressed, not in the opinion upon which mandate issued, but rather in (1) its prior vacated opinion, (2) the dissent of one of its panel members in an earlier unrelated case decided seven years ago, and (3) the opinion of a different panel of the same court in a subsequent unrelated case. The meaning given to the words express and direct by the Petitioners is thus far different than that historically given to them by this Court and by respected legal scholars. See, e.g., Kennedy v. *Kennedy, supra.* (conflict jurisdiction cannot arise from the opinions of a minority of the District Court judges hearing a case en banc); *Jerry's, Inc.* v. *Marriott Corporation,* 401 So.2d 1335 (Fla. 1981) (Justice England, concurring); England, Hunter &

Williams, Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform, 32 U. Fla. L. Rev. 147, **187-191.**

The standard **of** review of new trial orders expressly applied by the District Court is not in conflict with the decisions of this Court or any other District Court of Appeal. Accordingly, Petitioners have not demonstrated how discretionary jurisdiction is presented to this Court by the'instant case.

11. The District Court's application of the correct standard of review does not conflict with those decisions speaking to the trial judge's duty to consider the weight of all of the evidence in ruling on a motion for new trial

This Court has repeatedly confirmed that it is "a jury function to evaluate the credibility of any given witness," *Smith v. Brown,* **525** So.2d at *870,* and that the jury may accept or reject expert medical opinion testimony, or give it such weight as it deems appropriate, in accordance with the applicable jury instructions. *Easkold v. Rhodes,* **614 So.2d 495, 497 (Fla. 1993)** (applying Fla. Std. Jury Inst. (Civ.) 2.2(b)). Petitioners, however, contend that express and direct conflict exists with this Court's ruling in *Smith* v. *Brown* that a trial judge, in deciding whether **a** verdict is contrary to the manifest weight of the evidence, "must necessarily consider the credibility of the witnesses along with the weight of all of the other evidence." 525 So.2d at *870.* The Farnes Opinion, however, contains no language that expressly conflicts with the ruling in *Smith* v. *Brown.*

The Petitioners' Brief on Jurisdiction again attempts to argue by inference that the decision below "removed all together 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*". Petitioners' Brief on Jurisdiction, at p. 9. The language advanced by the Petitioners appears nowhere in the Opinion of the District Court. Nevertheless, the Petitioners would infer it in the District Court's statement of the well settled principle that it is the jury's function to "resolve and weigh the conflicting testimony" of experts as to causation. *See, e.g., Easkold* v. ***Rhodes,*** 614 So.2d at 497.

Smith v. *Brown* does not state, as the Petitioners espouse, that a new trial order may not be reversed where the credibility of witnesses is at issue. Indeed, this Court was careful to emphasize that "[t]he trial judge should only intervene when the manifest weight of the evidence dictates such action." 525 So.2d at 870 (emphasis supplied by this Court). The Court in *Smith* went on to conclude that, notwithstanding the attack on the Respondent's credibility in that case:

> we are unable to say, after viewing the evidence as a whole, that reasonable men could not have concluded that the verdict for Petitioners was against the manifest weight of the evidence.

After reviewing the evidence here, the District Court of Appeal applied the same standard of review expressed in *Smith* and simply reached a different result based upon different evidence. Discretionary jurisdiction in this Court does not arise from the Petitioners' bare contentions that the District Court is somehow

incapable of conducting the same kind of review as was conducted by this Court in *Smith* v. *Brown.*

The arguments advanced by the Petitioners are, at most, attempts to raise inherent or implied conflicts which cannot furnish a basis for Supreme court jurisdiction. *Department of Health v. National Adoption Counseling, supra.; Kennedy v. Kennedy, supra.* This point was well articulated in the concurring opinion of then Justice England in *Jerry's, Inc. v. Marriott Corp.*,:

> I find no basis for the exercise of our discretionary jurisdiction here....
>
> Nowhere in the district court's decision is the legal principle expressed that district courts can reweigh evidence which has been presented to the trial court. Petitioner suggests, and apparently some of my colleagues agree, that the issue of reweighing "inheres" in the district court's decision. My understanding of the 1980 constitutional change in our jurisdiction, however, is that decisional conflicts must be "express"and not inherent.(FN*) I regret that some on the Court would turn back the clock to the days when our members selectively disagreed with the District Courts, the very problem which prompted constitutional change in 1980.
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> FN* England, Hunter & Williams, Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform, 32 U.Fla.L. Rev. 147 (1980).

401 So.2d at 1335 (Fla. 1981).

CONCLUSION

The Opinion of the District Court of Appeal does not expressly and directly conflict with any decision of this Court or any other District Court of Appeal. Instead, it demonstrates that the Court properly conducted its appellate review function and reversed the

properly conducted its appellate review function and reversed the new trial order because it found that reasonable persons could not differ that the verdict was not contrary to the manifest weight of the evidence. The Respondent respectfully submits that this Court should not exercise its discretionary review authority in this case.

Respectfully submitted,

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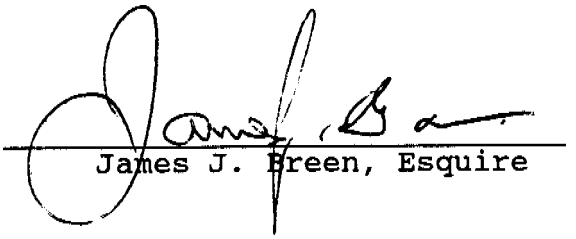
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was mailed on April 12, 1996 to: Arthur J. England, Jr., Esquire, GREENBERG, TRAURIG, HOFFMAN, LIPOFF, ROSEN & QUENTEL, P.A., 1221 Brickell Avenue, Miami, Florida 33131 and Steven Stark, Esquire, FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A., International Place, 17th Floor, 100 S.E. 2nd Street, Miami, Florida 3313-1101.



James J. Breen, Esquire

A P P E N D I X

M A N D A T E

DISTRICT COURT OF APPEAL OF **FLORIDA**

THIRD DISTRICT

DCA # 95-274

BOYD B. FARNES
vs.
E.R. SQUIBB AND **SONS,** INC., *et* **al.**

This cause having been brought to this Court by appeal, and after due consideration the Court having issued its opinion;

YOU ARE HEREBY COMMANDED that such further proceedings be had **in said** cause in accordance with the opinion of this **Court attached** hereto and incorporated as part of this order, and with the rules of procedure and laws of the State of Florida.

A True Copy
ATTEST
LOUIS J. SPA
Clerk Dis
Appeal,

Case No. 92-10250 MONROE

WITNESS, The Honorable ALAN B. SCHWARTZ

Chief Judge of said District Court and seal of said Court at Miami, this

1ST day of MARCH 19 96

Clerk District Court of Appeal of Florida, Third District

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, 1996

BOYD B. FARNES,	**	
Appellant,	**	
VS.	**	CASE NO. 95-274
E.R. SQUIBB *AND* SONS, INC., CONNAUGHT LABORATORIES, INC., and HENRY SCHEIN, INC.	**	LOWER TRIBUNAL NO. 92-10250
Appellees.	**	

Opinion filed February 14, 1996.

An Appeal from the Circuit Court for Monroe County, M. Ignatius Lester, Judge.

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.

ON MOTION FOR CLARIFICATION GRANTED

PER CURIAM.

The Opinion of this Court filed on December 20, 995, is vacated and this Opinion is substituted in its stead.

Boyd B. Farnes (hereinafter "Farnes") appeals a trial court

discretion to substitute their judgment for that of the jury in regard to the conflicting testimony of expert 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.