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IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 87,632

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

Petitioners,

v.

BOYD B. FARNES,

Respondent.

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

ON DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL

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INTRODUCTION

Boyd Farnes' answer brief is fervent, passionate and compelling. It invokes tremendous compassion for his tragic situation. It also illustrates precisely how jurors in this case were misled by compassion and sympathy for him, and returned a verdict in his favor despite manifestly unsupportive and insufficient record evidence. Farnes' brief highlights dramatically the wisdom of having a trial court's guiding hand ensure that verdicts are not solely the product of emotional appeals to a jury.

Drawing on his experience, his knowledge, and his unique perspective, the trial judge noted the surfeit of evidence and saw the jury swayed by the passion and emotion that are reflected in Farnes' brief. Acting on this Court's directive, the trial judge did his duty: he set aside the jury verdict in an order that accurately and specifically detailed the reasons for having another, **dis**passionate jury consider Farnes' legal claims. The law mandates that appellate courts presume that trial courts exercise this discretion properly. Yet the district court in this case gave the trial court no deference whatsoever, instead taking unto itself a re-evaluation of evidence it neither saw nor heard.

Appellants Connaught Laboratories, Inc. et al. ("Connaught") suggest that Farnes' answer brief illustrates the wisdom of the trial judge, and serves as "Exhibit A" for reinstatement of his order. The facts of Farnes' illness were not in dispute and are not relevant to any issue before this Court. Yet he reiterates them at length. He emphasized the same facts for the jury, through testimony and in closing argument. The indisputably sympathetic fact that Farnes himself was never warned about the potential side effects of a flu vaccine — a fact that is irrelevant to the legal standard of whether Connaught's package insert adequately advised *prescribing physicians* — is reprised in Farnes' answer brief. That same appeal to sympathy was directed to the jury. Even the issue of the adequacy of the warning was packaged for jurors in the sympathetic figure of Dr. Lichtenfeld, a former Guillain-Barré Syndrome ("GBS") patient, who expressed a personal opinion that was uncorroborated by

medical studies or testing and contradicted by the nurse who vaccinated Farnes and testified that she understood Connaught's package insert.

Farnes' brief graphically displays the compassion and sympathy that marked his presentation to the jury. The trial judge observed the degree to which emotion and sympathy impacted the jury, and he found that it dominated. The Third District fell prey to the same sympathy that unduly swayed the jury, choosing to ignore the proper question of whether *the trial court's* exercise of discretion in ordering a new trial was reasonable. Farnes now re-argues the emotional aspect of the case here.

The legal standard for appellate review has been structured to give deference to the on-site judicial officer. It is the wisdom of this Court that an appellate court should only reverse a trial court's exercise of its judgment to grant a new trial in rare instances. This was not such a case.

ARGUMENT

I. An appellate court may not reverse a trial court order granting a new trial unless reasonable men cannot differ about the propriety of *the trial court's* action.

Farnes "has no quarrel with CONNAUGHT'S presentation" of the standard of appellate review, which is analyzed and discussed in detail in Connaught's initial brief. (Answer Brief, hereafter "A.B.", at 27). That review applies the reasonable man standard *to the trial judge's decision*:

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

Smith v. Brown, 525 So. 2d 868, 869-70 (Fla. 1988) (quoting *Baptist Memorial Hospital, Inc. v. Bell*, 384 So. 2d 145, 146 (Fla. 1980) (emphasis added).[1] The Third District was quite candid in altering that standard to say:

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[1] Farnes suggests that the Court has not been faithful to its pronouncements, and in fact applied a standard of reviewing the jury's action rather than the trial court's in *Smith v.* (continued . . .)

> 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 v. E.R. Squibb and Sons, Inc., 667 So. 2d 1004, 1005 (Fla. 3d DCA 1996) (emphasis added). Patently, that court applied a very different standard than the Court had prescribed, choosing to ignore the issue of the reasonableness of the trial court's action in favor of a re-evaluation of the weight of the underlying evidence.

The proper standard of appellate review embodies the notion that mere disagreement from an appellate perspective is insufficient as a matter of law to permit reversal, *Castlewood Int'l Corp. v. LaFleur*, 322 So. 2d 520, 522 (Fla. 1975), and presumes that a decision of a trial judge in granting a new trial "will seldom be reversed by an appellate court." *Pyms v. Meranda*, 98 So. 2d 341, 342 (Fla. 1957) (citing *Duboise Const. Co. v. City of South Miami*, 108 Fla. 362, 146 So. 833 (1933)). That standard is overlaid with the procedural requirement that trial judges detail the reasons for exercising their discretion to grant a new trial so that appellate courts are not left "to grasp at straws" as to the trial court's rationale. *Wackenhut Corp. v. Canty*, 359 So. 2d 430, 434 (Fla. 1978).

Farnes does not challenge any of these principles. Rather, he argues, incorrectly, that the Third District expressly followed them. (A.B. 28-29).[2] The words of the district court, however, contradict Farnes' rhetoric.

Brown. (A.B. at 42-43). His suggestion is disingenuous. The text he has quoted from that decision is the Court's wrap-up sentence for its disposition of that appeal, preceded by a phrase that Farnes neglects to identify — namely, "Applying these principles . . . ." 525 So. 2d at 870. Two of the principles the Court had applied were that "the ruling [of a trial court] should not be disturbed in the absence of a clear showing that it has been abused," and an abuse of discretion does **not** exist if "reasonable men could differ as to the propriety of the action taken *by the trial court*." *Id.* at 869 (emphasis added).

[2] While seeming to accept the correct standard of appellate review, Farnes' entire argument is cast in a formulation that reflects his own refusal to acknowledge the difference between appellate review of the trial court's action and appellate review of the evidence *de novo*. He titled the first "Argument" in his brief in relation to the district court's conclusion that reasonable men could not fault "*the jury's decision,*" not the trial court's action! (A.B. 27).

A. The Third District re-evaluated the evidence instead of evaluating the trial court's action in granting a new trial.

The district court did not apply *Smith v. Brown*, as Farnes argues. Instead, the district court reviewed the evidence *de novo*, disregarding any deference to the trial judge's personal observation of the sound and fury in the courtroom.[3] The standard the district court *should* have applied was adopted and refined over the course of 100 years precisely because the sterile, black-ink-on-white-paper review by appellate courts cannot substitute for the trial judge's live observations.

> [T[he trial judge is given the discretionary power because he is on the scene and can actually see, hear, and observe all the participants in the trial and therefore has a superior vantage point as compared to those of us on the appellate court who must look at a bare record.

Castlewood Int'l Corp. v. LaFleur, 322 So. 2d at 523 (Overton, J. concurring).

> [B]ecause of his contact with the trial and his observation of the behavior of those upon whose testimony the finding of fact must be based [the trial judge] 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.

Cloud v. Fallis, 110 So. 2d 669, 673 (Fla. 1959) (citing *Pyms v. Meranda,* 98 So. 2d 341).

An appellate court cannot duplicate the trial court's perception of the evidence; it lacks the first hand opportunity to observe the impact of passion and sympathy on jurors. For this reason, when the trial court has exercised its discretion to set aside a verdict, appellate courts *must* presume that the court has acted properly. *Schultz v. The Pacific Ins. Co.*, 14 Fla. 73, 94 (1872).

The Court has consistently repeated that directive. *See, e.g.*, *Castlewood Int'l Corp. v. LaFleur*, 322 So. 2d at 522 ("a trial court's discretion to grant a new trial is 'of such firmness that it would not be disturbed except on clear showing of abuse . . . .'") (quoting *Cloud v. Fallis*, 110 So. 2d at 672); *Pyms v. Meranda*, 98 So. 2d at 343 ("In innumerable decisions we have consistently held that trial courts are allowed a very broad and liberal discretion in the matter of granting new trials."). The district court's opinion in this case gives no indication

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[3] See Connaught's initial brief, hereafter "I.B.", at 18-20.

that it gave the trial court's decision the required presumption, and demonstrates conclusively that the district court attempted to review the evidence from the trial court's perspective.

B. The existence of conflicting testimony does not alter the standard of review or lessen the duty of a trial court to set aside a verdict that is contradicted by the manifest weight of the evidence.

The district court's decision was forthright in stating its legally-flawed view that "[t]rial court judges do not have the discretion to substitute their judgment for that of the jury in regard to the conflicting testimony of expert medical witnesses." *Farnes*, 667 So. 2d at 1005. Farnes endeavors to support the district court's application of an impermissible standard, and its use of generic, legal maxims that ignore the trial court's actions, by arguing that jury verdicts are virtually inviolate when the parties have presented conflicting evidence. (A.B. at 29-33). Contrary to Farnes' contention, however, the district court's pronouncement is not the law.

Since 1872, the Court has made clear that trial judges **do** have the power, and indeed the obligation, to set aside jury verdicts that are the result of passion or prejudice notwithstanding the presence of conflicting testimony.

> The verdict of the jury here is founded on the evidence of facts, complicated and contradictory, which require an investigation into the character and credit of the witnesses, whose testimony it was necessary to compare and weigh. To do this is the proper function of a jury.
>
> * * *
>
> While it is true that this is the proper function and province of the jury, it is at the same time true that in cases where there is conflict in the testimony, it is within the province and power of the court to set aside a verdict which does not reach a substantially just conclusion in cases where the conflicts are of such character and the circumstances of such nature as to give just grounds for the belief that the jury acted through prejudice, passion, mistake or any other cause which should not properly control them. This power exists in the court.

Schultz v. The Pacific Ins. Co., 14 Fla. at 93.

The Court's instruction on this point has not varied in the years following the *Schultz* decision. In *Turner v. Frey*, 81 So. 2d 721, 722 (Fla. 1955), the Court not only reiterated that

principal, but it admonished the trial judge for his belief that he could not upset the jury's verdict when it had chosen to believe the plaintiff. This principal was most recently affirmed in *Smith v. Brown*.

In this case, Farnes' and Connaught's experts contradicted one another on the dispositive issue: whether Connaught's package insert adequately advised the learned intermediaries, prescribing physicians, of a possible risk to patients with a history of a neurological disorder. The trial judge looked to, identified and applied the standard so carefully honed by the Court over the years and weighed the testimony of Drs. Lichtenfeld and Weiderholt along with all of the other evidence. (R. 1006). The district court's later failure to inquire into the reasonableness of his action, and its usurpation of *his* job rather than the performance of its own, contradicts established law.

C. The trial court's order granting Connaught's motion for a new trial is fully supported by the record.

Farnes argues that the trial court's order is based on mistaken recollections of and erroneous inferences from the evidence. (A.B. at 37). His attempt to separate the record summary contained in the trial judge's order from the trial judge's observation of the actual testimonial and documentary evidence (A.B. 38-42) is precisely the type of "cold record" analysis that makes the appellate court an inappropriate forum to re-evaluate the evidence. In this regard particularly, Farnes' answer brief is a prime exhibit of why the district court was persuaded improperly to perform the trial court's function.

Farnes offers the Court a "few examples" of recitations in the trial court's order that he claims are erroneous, and he argues that Dr. Lichtenfeld's testimony was corroborated by other evidence. (A.B. at 38). A review of those examples fully explains how sympathy, passion and advocacy, not the weight of the evidence, captured the jurors' votes.

(a) Farnes faults the trial court for stating that Dr. Lichtenfeld admitted Connaught's package insert did not violate community standards. (A.B. 38). But Dr. Lichtenfeld stated he knew of no study after the CDC study of 1978-79, in which he

participated, and acknowledged that the 1978-79 study was inconclusive on whether a connection was shown to exist between GBS and the flu vaccine. (R. 1326). In fact, the substantive evidence other than Dr. Lichtenfeld's personal views aligned Connaught's insert language with the standard of the day, for the CDC had concluded from that same test that influenza vaccine after 1976 *was not associated with an increased risk of GBS*. (R. 1571). The trial court's recitation as to the efficacy of Dr. Lichtenfeld's testimony on contemporaneous associational risk was completely accurate.

(b) Farnes does not fault the trial court for stating that, after 1976, there has been no completed study of the risk of contracting GBS from a flu vaccine, but for omitting (i) testimony by Dr. Lichtenfeld about *partial* studies and (ii) an *absence* of testimony that there was no such risk in 1989. (A.B. at 18 n.9). In this regard, Farnes is criticizing the trial court for omissions attributable to his own shortfall of evidence. He complains that the court should have weighed as being equally relevant to *completed* studies some *partial* (that is, incomplete and inconclusive) studies that his expert mentioned, and he suggests that the court should have drawn an inference from evidence that he never presented. Here, too, the trial court's recitation is a sound reflection of the weight of the evidence.

(c) Farnes faults the trial court for stating that Dr. Lichtenfeld admitted that he never reviewed other package inserts. (A.B. 39). This statement is a fully justified inference from what Dr. Lichtenfeld in fact said. He testified that he did *not* review any other current package inserts in preparation for this trial. (R. 1297). Farnes brought to court three package inserts from companies other than Connaught, yet his expert neither reviewed nor testified about any but Connaught's. Farnes cannot validly fault the trial court for finding significant, in the course of weighing *all* the evidence, that Farnes' expert admittedly failed to consider the language in the contemporaneous package inserts that Farnes himself brought to court.

(d) Farnes suggests that Connaught mischaracterized Dr. Lichtenfeld's testimony in a number of ways. (A.B. 39-41). A careful look at Farnes' complaints will show that, on this

point, too, he uses the *absence* of evidence to suggest that a different characterization could be given to Dr. Lichtenfeld's statements.

In sum, nothing in the "examples" that are presented indicates that the trial court made inaccurate findings in its order granting a new trial. In fact, a reprise of a few examples from the record paints a picture that supports the trial court's conclusion that there was no substance to Farnes' claim that Connaught's package insert gave inadequate information.

(1) The trial court found that Dr. Lichtenfeld "gave no particular basis, apart from personal preference, for his opinion that the warning should have been stronger." (R. 1004). The record bears out the judge's observation. Dr. Lichtenfeld testified that he found "hundreds of cases in the world's medical literature of GBS that followed *vaccinations, all types of vaccinations.*" (R. 1295). But, according to Dr. Lichtenfeld, "[n]o one vaccination stood out." (R. 1295). He testified that "GBS as a consequence of vaccination was clearly recognized in the medical literature," (*id.*), but he named no specific article, identified no doctor or research analyst by name, cited to no test, and linked no particular vaccination to GBS.

(2) Farnes attempts to bolster Dr. Lichtenfeld's opinion with examples of allegedly corroborating evidence, such as Farnes' assertion that Dr. Weiderholt never said Connaught's package insert adequately warned physicians of the GBS risk. (A.B. at 35). Passing whether the *absence* of evidence can be "corroborating" evidence, the fact is that when Dr. Weiderholt was asked if Connaught's insert provided adequate state of the art medical information to health care providers he responded: "I think it does." (R. 1573). His declaration that the package insert contains state of the art medical knowledge certainly does not corroborate Dr. Lichtenfeld's personal opinion.

(3) Farnes derides the author of the Connaught package insert with an assertion that he "just laughs" at reports he receives of adverse reactions.

(A.B. at 36). But Farnes quotes Dr. Samuelson out of context. Dr. Samuelson testified that some of the reports linking the flu vaccine to GBS "are so off the wall I just laugh at them." (R. 1436CC). He also testified, however, that he nevertheless "investigate[s] *all* allegations very thoroughly" by calling the physician, by documenting the phone calls, and by requesting medical records and laboratory reports. (*Id.*) (emphasis added).

(4) The trial court found that Dr. Lichtenfeld had agreed no epidemiological study had shown a statistically significant link between the influenza vaccine and GBS since 1976, an observation that Farnes does not deny. Yet the plaintiff cites as corroborative of Dr. Lichtenfeld that Dr. Samuelson disagreed with the experts who believed that the 1976 study proved a causal connection between flu vaccine and GBS. (A.B. at 37). Dr. Samuelson's testimony on the point was quite different than represented. He said that although he had seen reports of GBS temporally associated with Fluzone, he had never seen a report from which he could state with assurance that the vaccine indeed caused GBS. (R. 1436DD).

(5) The trial court found significant Dr. Lichtenfeld's concession that the International Guillain-Barré Society, on whose board he sat, specifically recommended that patients with a history of GBS *should* receive the influenza vaccine. (R. 1004). In light of Dr. Weiderholt's testimony that the package insert accurately reported the state of medical knowledge in 1989, the court also stated that, fairly read, the Connaught insert advised that the influenza vaccine had been associated with an increase of GBS cases in 1976 but that no such connection had been demonstrated in subsequent years. (R. 1005). The court specifically and correctly found that Farnes offered no evidence that this statement was untrue or inaccurate. (*Id.*).

The preceding comparisons of Farnes' complaints regarding the trial court's findings with the record evidence demonstrate that the trial judge accurately and properly met his obligation to determine if the *weight* of the evidence preponderated against the jury's verdict. The district court judges, however, never performed *their* job of reviewing the *trial court's action* as reasonable men. Rather, just as Farnes himself has done here, the district court reviewed and re-evaluated the evidence, picking at pieces, drawing inferences and stepping into the trial court's role.

Lacking the trial court's perspective, the district court could only consider a pale reflection of the evidence — the words on paper that make up the record on appeal. The record in this case contradicts both Farnes' and the district court's notion that no reasonable person could differ about the propriety of the trial judge's action. Since reasonable men indeed can differ about his action, there was no abuse of discretion and the district court should not have disturbed the result.[4]

II. By reciting state of the art medical knowledge in accurate and unambiguous language, Connaught's 1989-90 package insert adequately advised physicians to whom the vaccine is provided of a possible connection between the vaccine and neurological disorders.

Farnes bore two burdens in this proceeding: first, to prove that Connaught's package insert was inadequate; and second, to prove that its inadequacy was the proximate cause of the plaintiff's injury. Farnes failed on both. (*See* I.B. at 25-32). The "adequacy" issue is a threshold matter for courts, not juries, and when Farnes failed to meet that burden Connaught was entitled to judgment in its favor as a matter of law. *Upjohn Co. v. MacMurdo*, 562 So. 2d 680 (Fla. 1990); *Felix v. Hoffmann-LaRoche, Inc.*, 540 So. 2d 102 (Fla. 1989).

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[4] An adoption by the Court of Connaught's suggestion that the district courts be mandated to express *their* reasons for reversing new trial orders (I.B. at 23-24) would go a long way toward eliminating the temptation of appellate courts to substitute their record review for the trial court's. Such a requirement is no more a "radical departure" from the Constitution, as Farnes suggests (A.B. at 44), than was the Court's decision in *Wackenhut* to require the articulation of reasons by trial judges.

Farnes asserts four bases for arguing that Connaught's package insert was not sufficiently accurate, clear and unambiguous to warrant judgment for Connaught. (A.B. 46). First, he says that while Connaught relies on the adequacy of its warning to Nurse Fox it produced no evidence of an adequate warning to her supervisor, Dr. Jahnig. (A.B. 46-48). Second, he characterizes Connaught's evidence as addressing only *active* neurological disorders, rather than pre-existing and dormant ones. (A.B. 47). Third, he faults Connaught for arguing that its package insert tracked the findings of ACIP, the expert panel convened by the Center for Disease Control, without having placed ACIP's language into evidence. (A.B. 49). Fourth, he repeats his legal theory that the jury's verdict is inviolate. (A.B. 49-50).

His legal contention regarding the sanctity of jury verdicts simply repeats his earlier argument, and needs no further comment. On the three issues he purports to link with the evidence, Farnes presents a skewed view of the record.

1. **Nurse Fox and Dr. Jahnig.** Nurse Fox read and understood Connaught's package insert. Farnes' prescribing physician was Dr. Jahnig. He did not testify. There can be no validity to Farnes' suggestion that, due to the absence of testimony from Dr. Jahnig, the adequacy of the warning to physicians was not demonstrated. Farnes concedes that Nurse Fox "was working under the clinical supervision of Paul Jahnig, M.D." (A.B. at 5). Nurse Fox understood the risk to patients with a history of a neurological disorder, such as GBS. Surely Dr. Jahnig, had he been called to testify, could not have testified to a lesser level of comprehension.[5] The warning was demonstrably adequate. The proximate cause of Farnes' illness, assuming the flu vaccine was the triggering event, could only have been Nurse Fox's admitted failure either to obtain Farnes' medical history or to refer him to Dr. Jahnig for evaluation.

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[5] Dr. Lichtenfeld opined that Connaught's statement was inadequate to convey to a nurse the risk associated between GBS and the influenza vaccine (R. 1310), but Nurse Fox's testimony refutes his disdain for a nurse's level of understanding.

2. **Active neurological disorders.** GBS is a neurological disorder. The insert expressly cautioned that, while the vaccine should not be prescribed for an individual suffering from an active neurological disorder, it could be considered when the condition had stabilized. (Pl. Ex. 3 at 3). This advice was consistent with the standard recommendation in the medical community. It was more cautious than the 1990 newsletter of the International Guillain-Barré Foundation, which had *recommended* vaccination for former GBS sufferers in order to prevent influenza.

> The safety of flu vaccine for the current or former Guillain-Barré patient is unclear. However, *the risk of the vaccine triggering the symptoms is much lower than the risk associated with influenza. Indeed, flu vaccines used since 1976 have not been associated with an increased risk of contracting GBS.*

(R. 1349) (emphasis added). Dr. Lichtenfeld's disagreement with the Foundation is not an evidentiary basis to suggest that the insert language was facially inadequate to advise physicians of the vaccine's potential risks. The information was certainly in line with the learned literature, meaning it was adequate, Dr. Lichtenfeld's views to the contrary notwithstanding.

3. **Language on the package insert.** The trial court found that none of the information in Connaught's insert contained any misstatements. (R.1005).[6] The trial court pointed out the following insert language:

> Unlike the 1976 swine flu influenza vaccine, subsequent vaccines prepared from other virus strains *have not been associated with an increased frequency* of Guillain-Barré Syndrome.

(R. 1002) (emphasis added). It noted in particular that this sentence was followed by footnotes referring the physician reader to three peer-reviewed articles in medical journals that discuss the relationship between influenza vaccine and GBS. (*Id.*). The trial court was correct.

Farnes' expert conceded the accuracy of the statement in the insert.

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[6] Farnes compares Connaught's insert with those of other manufacturers. (A.B. at 9). This is not an "industry standard" case, however, and the contents of other manufacturers' inserts is irrelevant to a determination of the adequacy of Connaught's insert.

> What happened in 1976 continues to happen every year but the incidence is not nearly as dramatic because the numbers are not as dramatic. You don't have 45 million people being vaccinated in 10 weeks. When you do have those numbers, then what is a rare occurrence becomes obvious. *When you don't have those numbers, the rare occurrence slips into a general background and it's not an obvious standout.*

(R. 1302). While Dr. Lichtenfeld expressed his personal belief that the 1978-79 test demonstrated a significant risk, Dr. Weiderholt testified that the Center for Disease Control had concluded from that same test that influenza vaccine after 1976 *was not associated with an increased risk of GBS*. (R. 1571). Dr. Lichtenfeld also took issue with the finding contained in language on the insert advising that the association between the 1976 swine flu vaccine and GBS had been questioned by some physicians. Yet he conceded the accuracy of the text.

> Q. Doctor, what about the next statement that follows this in the product insert that I have not highlighted but says after that: However, this association has been questioned by other physicians. What does that indicate to you?
>
> A. That indicates that even the 1976 association has been questioned by some physicians. And then it references those. * * *

(R. 1311). Aside from the referenced articles that analyzed and questioned the 1976 phenomenon, no other record evidence exists on the point. Obviously, the insert was accurate in its representation.

In sum, Farnes presents no valid argument against a finding as to the adequacy of the insert as a matter of law by the court. This point becomes all the more clear when the context of the case is considered. Farnes worked in a health care facility where he was in daily contact with patients particularly susceptible to influenza. Between what Dr. Jahnig must be presumed to have known when he recommended that Farnes be vaccinated, and what Nurse Fox in fact knew, adequacy was indisputable and the trial court should not have allowed the jury to pass on Connaught's liability for causing harm to Farnes. Since Farnes' argument rested entirely on Dr. Lichtenfeld's personal opinion that Connaught's insert was inadequate, and that opinion was uncorroborated by available medical knowledge and contradicted by Nurse Fox, the trial court should have held Farnes' evidence insufficient to create a question of fact for the jury.

Removing the passion from the jury verdict was only necessary because the trial court was unwilling to apply *Felix* and *UpJohn*. This Court should have no similar hesitancy.

CONCLUSION

Connaught, Squibb, and Schein request that the Court direct that judgment be entered for them, or at a minimum that the Court vacate the district court's decision and reinstate the trial court's order granting a new trial.

Respectfully submitted,

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