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IN THE SUPREME COURT
OF THE STATE
OF FLORIDA

DOCKET NO. 90,197

RUPERT B. BROWN and LETTIE NELL BROWN, his wife, and V. LEE POTTER,

Petitioners/Defendants,

vs.

THE ESTATE OF A. P. STUCKEY, SR., and SARAH STUCKEY,

Respondents/Plaintiffs.

APPEAL FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT
STATE OF FLORIDA

DOCKET NO. 96-150

PETITIONERS/DEFENDANTS' INITIAL BRIEF TO THE MERITS

* * * * * * * * *

Martin S. Page
228 East Duval Street
Lake City, Florida 32055
(904) 752-0920
Florida Bar No. 0060736

Attorney for Petitioners/Defendants

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Abbreviations:

ROA - Record-on-Appeal

NOTE: Petitioners here were the Appellees before the First District Court of Appeal and the Defendants before the trial court. In this brief reference to them is primarily by their proper name **"the Browns"**. In like fashion, the Respondents are primarily referred to as **"the Stuckeys"**

TABLE OF CITATIONS

STATEMENT OF THE CASE

In May, 1989, A. P. STUCKEY, SR. and SARAH STUCKEY, his wife, as Plaintiffs, filed a multi-count action against RUPERT B. BROWN and LETTIE NELL BROWN, his wife, in the Circuit Court of Suwannee County, Florida. The action sought an accounting and partition of alleged partnership assets composed of real estate, equipment, personalty and thoroughbred horses employed in a horse farm business. (ROA, Volume 1, pages 1 through 10). An order was concurrently entered which divided the horse farm between the parties for their separate use during the pendency of the action. (ROA, Volume I, page 11 through 12)

In March, 1993, the Stuckeys filed a Second Amended Complaint seeking, in addition to the partnership relief, money damages for malicious interference with business relationships of the Stuckeys, libel and slander, civil assault, civil theft, intentional infliction of emotional distress, and ejectment. All of these additional claims were alleged to have occurred between the time of the original complaint and March, 1993. (ROA, Volume III, pages 1 through 25).

To this, the Browns filed answer denying the various claims and the existence of a partnership and counter-claimed for partition of land, civil theft, rentals, conversion, civil assault, and damages for the death of a horse. (ROA, Volume III, pages 26 through 34). Plaintiffs filed their Answer and

Affirmative Defenses and issue was thus joined. (ROA, Volume III, pages 35 through 41). Mr. Stuckey died in October of 1994, and his widow, Plaintiff, Sarah Stuckey, as personal representative of his estate was substituted in his place as co-plaintiff (ROA, Volume III, page 200).

On December 5, 1994, trial to jury commenced and resulted in a verdict on December 16, 1994 in favor of Plaintiffs on all counts, save one: Civil Assault (ROA, Volume IV, pages 12 through 15). Defendants filed Motion for New Trial on December 21, 1994 (ROA, Volume IV, pages 22 through 24) setting forth several grounds, among which were that the verdict was contrary to the manifest weight of the evidence; that Plaintiffs placed in evidence nothing (i.e., tax returns or testimony of actual experiences) demonstrating of loss of earnings for years 1989 through 1994, but the jury returned those losses at $380,000.00; and also that post-verdict knowledge had come to Defendants that during the trial one of the jurors had visited the horse farm operation that was in question.

On January 26, 1995, Defendants filed a Motion for Order permitting jury interview (ROA, Volume IV, pages 25 through 27) upon which hearing was held.

After interviewing one juror who was of the original six sitting, but who became ill during trial and was excused, the trial court ordered the interview by the court of three of the jurors who deliberated. From that order, Plaintiffs took

certiorari to the District Court which denied issuance of the writ. See case number 95-423, First District Court of Appeal, July 20, 1995, at 658 So.2d 995. Upon remand, (ROA, Volume IV, page 46) the three jurors, one of whom as the foreman, were interviewed by the Court who, although concerned with the conduct reported, did not find the conduct sufficient of itself to set aside the verdict. (See second paragraph of trial court's order granting new trial: ROA, Volume IV, pages 47 through 51, filed December 14, 1995). He further found in said order, that the jury foreman may have visited the farm as alleged, but that if true, it did not appear to have been used to influence the other jurors.

However, the Court, in its order granting Defendants' Motion for New Trial, found the verdict contrary to the manifest weight of the evidence and gave a detailed analysis of those factors which led to that conclusion.

Plaintiffs appealed that order to the District Court of Appeal, First District, which reversed it with written opinion, finding that its "review of the record indicates that there was sufficient evidence from which a reasonable jury could have returned this verdict in favor of the Plaintiffs. A full recitation of the evidence or the specific facts would serve no purpose." 688 So.2d 438 (Feb. 28, 1997) at bottom of page 439 to the top of page 440).

On Defendants' Motion for Rehearing or Clarification (and after discretionary jurisdiction had been sought by Defendants

in the Supreme Court), the District Court granted the motion as to clarification, with written opinion, seeking to recede from any indication in its prior opinion that it would reverse such trial court orders if there was sufficient evidence from which a jury could have returned a verdict in favor of the Plaintiffs. 695 So.2d 796 (May 2, 1997). It sought to correct its opinion by announcing "the correct test for reviewing a trial court's order granting a new trial based on the verdict being against the manifest weight of the evidence:

> The general standard of review of an order granting a new trial is whether the trial court has abused its discretion. If an abuse of discretion has occurred, however, the appellate court will reverse the order granting a new trial. For instance, where a new trial is granted because the verdict was against the manifest weight of the evidence, a trial court may not substitute its view of the evidence for that of the jury. ***A verdict can be found to be against the manifest weight of the evidence only when it is clear, obvious and indisputable that the jury was wrong.*** (695 So.2d, at page 797)

On March 27, 1997, Defendants filed with the instant court their Notice to Invoke Discretional Jurisdiction, timely filed their briefs to jurisdiction and this court by it order dated September 2, 1997, accepted jurisdiction, ordering briefs to the merits but dispensing with oral argument.

STATEMENT OF THE FACTS

This action resulted from the breakup of a partnership venture between the Petitioners, Rupert B. Brown and Lettie Nell Brown, his wife, and Respondents, A. P. Stuckey (now deceased) and Sarah Stuckey, his wife, involving the establishment and operation of a thoroughbred horse farm in Suwannee County, Florida, known as Running Rose Farm.

Prior to 1981, the Browns had for some years been involved in owning, training and racing thoroughbreds from their farm in the Ft. Myers area of Florida, where they lived and where Mr. Brown was the owner of a successful construction business. That construction business afforded the means to maintain a unique enterprise such as raising and racing thoroughbreds. (Rupert Brown, Transcript, Volume X, page 1640, line 10 through page 1651, line 10)

The Browns not only had the horses and farm, but also a full-time, state licensed thoroughbred horse trainer, Wilson Vitter. (Wilson Vitter, Transcript, Volume VI, page 971, lines 20 through 24; page 978, line 21 through page 981, line 20) Under his care and training of the horses, the Browns developed winning race horses and were even "eyeing" the possibility of entering one of their horses in the Kentucky Derby. (Defendants' Exhibit No. 6, ROA, Volume XVII, page 61 through 89)

By 1981, the Browns were desirous of moving their horse enterprise to northern Florida because the climate and terrain

were more conducive to healthy horses. They were considering the Ocala area where other owners had established thoroughbred farms. (Rupert Brown, Transcript, Volume X, page 1666, line 22 through page 1668, line 24)

Mr. A. P. Stuckey, Sr., was a trainer of thoroughbreds, whom the Browns had met at various tracks. In 1981, the Stuckeys lived in the Lake City-Live Oak area of north Florida, where they operated a child care business in Lake City and Mr. Stuckey had a few thoroughbreds that he trained. They lived in a double-wide mobile home at a mobile home park in Lake City. (Sarah Stuckey, Transcript, Volume V, page 907, line 16 through page 908, line 24) One of the horses under his care belonged to the Browns. On one occasion when the Brown's horse was entered in a race in the area where the Stuckey's lived, the Browns came to view the race. At that occasion the Browns voiced to the Stuckeys their desire to have a farm in north Florida for their horses and where they could ultimately come to live when they sold their construction business and retired. (Rupert Brown, Transcript, Volume X, page 1663, line 3 through page 1669, line 10)

Mr. Stuckey had himself always wanted a farm where he could train horses of others and provide all the services and facilities necessary to that enterprise. (Sarah Stuckey, Transcript, Volume V, page 759, line 21 through 760, line 9; page 768, line 9 through 23)

Together, the Stuckeys and Browns began to look at various tracks of land in the Lake City-Live Oak area that were available and their efforts led finally to two tracts, known as the "Sapp" farm which was separated only by a paved road. It was 151 acres in the aggregate and was for sale at $1,000.00 per acre. (Rupert Brown, Transcript, Volume X, page 1670, line 5 through page 1673, line 15)

The Stuckeys did not have the where-with-all to pay for the land, much less build the barns, fences, pasture and exercise tracks that a thoroughbred horse farm required. When it was decided that the Sapp farm would be desirable for the project, Mr. Stuckey told the Browns that if the Browns would pay for this land and pay for and build the facilities necessary to a horse farm (that is, barns, paddocks, fencing, exercise tracks, etc.), Mr. Stuckey would personally train and take care of all of the Browns' horses without charge. Then when Mr. Stuckey established his independent training and stabling of the horses of others to a point where it was profitable, Mr. Stuckey will then pay back to the Browns one-half of every dollar the Browns spent to acquire and establish the farm. (Rupert Brown, Transcript Volume X, page 1673, line 23 through page 1675, line 24; Wilson Vitter, Transcript, Volume VI, page 1022 and page 1034; Bill Pierce, Transcript, Volume VII, page 1126, line 1 through page 1127, line 5; Lettie Nell Brown, Transcript, Volume VII, page 1148, line 8 through line 25)

That deal was accepted by the Browns. On August 19, 1981, the Browns paid the $73,000.00 cash down payment on the Sapp farm and the Browns and Stuckeys received a warranty deed to the land, each couple, as an estate by the entirety, owning an undivided one-half interest. (Rupert Brown, Transcript, Volume X, page 1672, lines 1 through 18; Plaintiffs' Exhibit No. 3, ROA, Volume IX, page 162 through 164) The grantees gave a purchase money mortgage payable in semi-annual installments over the next several years. (Plaintiffs' Exhibit No. 4, ROA, Volume IX, page 164 through 167)

Thereafter, the Browns brought up from Ft. Myers the men and equipment to clear the land, construct the barns and other improvements to complete the farm for its intended purpose. They then moved the horses up from Ft. Myers to be cared for by Mr. Stuckey. This effort took several years. The Browns also paid all installments on the mortgage until it was paid in full in 1988. (Rupert Brown, Transcript, Volume X, page 1678, line 18 through page 1684, line 13) Over those years (1981 through 1988) they also sent approximately $30,000.00 to the Stuckeys to pay the personal living expenses of the Stuckeys. (Sarah Stuckey, Transcript, Volume V, page 885, line 12 through line 20)

Mr. Stuckey's independent horse business began to pick up in 1987 and 1988. For those years, his and Mrs. Stuckey's tax returns showed substantial gross cash flow, but also substantial expenses so that the taxable income for 1987 was

reported at minus $5,911.13, and for 1988 at $13,647.63. (Defendants' Exhibits No. 21 and 22 respectively, ROA, Volume XX, pages 42 through 57) However, it was the view of the Stuckeys that within five to six years (1989 through 1994) their enterprise should come to be able to net them $35,000.00 to $40,000.00 per year.) (Sarah Stuckey, Transcript, Volume V, page 895, lines 15 through 21) Mr. Brown noticed the increase in Stuckey's business and began to ask when he might expect to start receiving reimbursement for his costs in the farm. He was told, however, that the Stuckey business was not yet that profitable. (Rupert Brown, Transcript, Volume X, page 1693, line 12 through page 1695, line 23) At that point in time, the Browns had invested of their own funds in excess of $450,000.00 for land payments, funds paid directly to Mr. Stuckey, and land improvements. (Defendants' Exhibit No. 8, ROA, Volume XVIII, pages 1 through 117) That sum did not include equipment and labor furnished by Brown from his construction business to clear and reshape the land.

The relationship between the parties remained amicable until 1988, when a check representing a win by one of the Brown's horses was sent by the track to the Stuckey's address and was deposited by them in their account. Calls by Mr. Brown resulted in the Stuckey's refunding the monies to the Browns. (Rupert Brown, Transcript, Volume X, ROA, page 1702, line 17 through page 1706, line 9) Then in February or March, 1989, the Stuckeys sent an invoice to the Browns purporting to

show what it was costing the Stuckeys to maintain the Brown's horses for one month. That matter lead to disputes over who-had-done-what in the partnership venture which was then declared dissolved. (Sarah Stuckey, Transcript, Volume X, page 815, line 6 through page 817, line 8) Both parties were using the farm for their own purposes, a circumstance that generated further disputes, which inevitably lead to this litigation being instituted by the Stuckeys by the filing of the first complaint by the Stuckeys on May 5, 1989, seeking partition of partnership assets and an accounting. (ROA, Volume I, pages 1 through 10)

The Stuckeys maintained that the partnership venture had been upon entirely different terms. In pleadings and at trial the Stuckeys maintained that from its inception, the partnership had been one in which all of the Brown's horses, those owned in 1981, and all thereafter acquired, became "partnership" horses, to be housed and trained by the Stuckeys at the Running Rose Farm. The Browns were to pay for the land, improvements, etc., to establish the farm. But they (the Browns) were to be permitted to keep all winnings generated by the partnership horses until one-half of those winnings equalled one-half of the total sum they (the Browns) had invested in establishing the farm. Thereafter, the winnings were to be divided equally between the partners. Additionally, the independent business of the Stuckeys with other clients on that farm would be theirs (the Stuckeys)

alone; the Browns would not be entitled to share in any profits of that business when and if it became profitable. (Alex P. Stuckey, Jr., Transcript, Volume II, page 231, line 23 through page 232, line 15; page 237, line 9 through line 25; Volume III, page 434, line 4 through page 437, line 4)

The matter proceeded to trial on December 5, 1994, on the Stuckey's Second Amended Complaint, filed March 23, 1993, which, as stated in the Statement of the Case supra, set forth a number of causes of action.

SUMMARY OF ARGUMENT

In its review which led to the reversal of the trial court's order granting new trial, the First District Court of Appeal employed a faulty and erroneous standard of appellate review. In its initial opinion, **Estate of Stuckey v. Brown**, 688 So.2d 438 (Feb. 28, 1997), it simply found that there was sufficient record evidence from which "a reasonable jury" could have returned the verdict. In its clarifying opinion (695 So.2d 796, May 2, 1997), it stated that it had applied the correct standard of review and that such an order granting a new trial may be sustained only where it is "clear, obvious and indisputable that the jury was wrong."

In so doing, it came into conflict with the clearly and oft repeated standard of this Court, which states that if reasonable men could differ as to the propriety of the trial court's act in granting a new trial upon the ground that the verdict is contrary to the manifest weight of the evidence, then there is no abuse of discretion shown and the order must be upheld. **Baptist Memorial Hospital v. Bell**, 384 So.2d 145 (Fla. 1980); **Ford Motor Co. v. Kikis**, 401 So.2d 1341 (Fla. 1981); **Smith v. Brown**, 525 So.2d 868 (Fla. 1988)

Applying the proper standard to a review of the trial record of the cause now before this Court will demonstrate that reasonable men could differ as to the propriety of the trial court's act in granting a new trial, for there are areas of the jury's verdict which have either no, or very

questionable, support in the record. The trial court's order was supported in law and must be sustained.

ARGUMENT

POINT I

THE STANDARD EMPLOYED BY THE FIRST DISTRICT COURT OF APPEAL, IN ITS REVIEW OF THE TRIAL COURT'S ORDER GRANTING A NEW TRIAL UPON THE GROUND THAT THE VERDICT WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE, IS CONTRARY TO AND IN DIRECT CONFLICT WITH THE STANDARD ANNOUNCED BY THIS COURT TO BE EMPLOYED BY REVIEWING COURTS IN SUCH INSTANCES

Baptist Memorial Hospital v. Bell, 384 So.2d 145 (Fla. 1980), at page 146:

> "In reviewing this type of discretionary act of the trial court, the appellate court should apply the reasonableness test to determine whether the trial judge abused his discretion. 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 an abuse of discretion [citation omitted]. As we stated in Cloud [110 So.2d 669, Fla. 1959], the ruling should not be disturbed in the absence of a clear showing that it has been abused, and there has been no such showing in the instant case. From this record the action of the trial judge was reasonable although reasonable men may differ".

Ford Motor Co. v. Kikis, 401 So.2d 1341 (Fla. 1981), at page 1342:

> "This case presents one issue which we have never addressed and another issue which we have never stopped addressing. The first requires clarification of the 'expressly' requirement in this Court's constitutional jurisdiction to resolve conflicting appellate decisions. Art. V, s 3(b)(3), Fla. Const. The second revisits the role of the districts courts of appeal when reviewing a trial judge's order granting a motion for new trial. (emphasis supplied)

* * * * *

> We have stated and restated the appropriate standard for district courts on review of a trial court's motion granting a new trial. The test is whether the trial court abused its 'broad discretion.' If reasonable men could differ as to the propriety of the action taken by the trial court, then there is no abuse of discretion. See Baptist memorial Hospital, Inc. v. Bell, 384 So.2d 145 (Fla. 1980); Cloud v. Fallis, 110 So.2d 669 (Fla. 1959); Rivera v. White, 386 So.2d 1233 (Fla. 3rd DCA, 1980)"

And, finally, what may be the definitive treatment of the issue in this Court's opinion, authored by Justice Grimes, of **Smith v. Brown**, 525 So.2d 868 (Fla. 1988) in which the Fourth District Court of Appeal had certified the question: Whether the reasonable man standard, as set forth in Baptist Memorial Hospital v. Bell [384 So.2d 145 (Fla. 1980)], applies to the trial court's determination that the jury verdict was against the manifest weight of the evidence, or rather to its perception of the evidence?

This Court reviewed the standard announced in **Cloud v. Fallis**, 110 So.2d 669 (Fla. 1959) and **Baptist Memorial**, supra, where a trial judge grants a new trial because the verdict was against the manifest weight of the evidence.

> "When the 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 [citations omitted] Inasmuch as such motions are granted in the exercise of a sound, broad discretion the ruling should not be disturbed in the absence of a clear showing that it has been abused. [citations omitted]

> Thereafter, in Baptist Memorial Hospital, Inc. v. Bell, 384 So.2d 145 (Fla. 1980), we explained the standard to be applied by an appellate court in determining whether the entry of such an order constituted an abuse of discretion.
>
> In reviewing this type of discretionary act of the trial court, the appellate court should apply the reasonableness test to determine whether the trial judge abused his discretion. 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 an abuse of discretion"
>
> 525 So.2d, at page 869 through 870

This Court discerned that the Fourth District had apparently been uncertain with respect to whether a trial judge can order a new trial when the credibility of witnesses is at issue. To put to rest that concern, this Court said

> "Clearly, it is a jury function to evaluate the credibility of any given witness. Fierstos v. Cullum, 351 So.2d 370 (Fla. 2d DCA 1977). Moreover, the trial judge should refrain from acting as an additional juror. Laskey v. Smith, 239 So.2d 13 (Fla. 1970). Nevertheless, the trial judge can and should grant a new trial if the manifest weight of the evidence is contrary to the verdict. Haendel v. Paterno, 388 So.2d 235 (Fla. 5th DCA 1980). In making this decision, the trial judge must necessarily consider the credibility of the witnesses along with the weight of all of the other evidence. Ford v. Robinson, 403 So.2d 1379 (Fla. 4th DCA 1981). The trial judge should only intervene when the manifest weight of the evidence dictates such action. However, when a new trial is ordered, the abuse of discretion test becomes applicable on appellate review. The mere showing that there was evidence in the record to support the jury verdict does not demonstrate an abuse of discretion. Ford Motor Co. v. Kikis, 401 So.2d 1341 (Fla. 1981).
>
> Applying these principles to the instant case, we agree that the order granting the new trial must be sustained. While the credibility of the respondent was substantially attacked, 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."

525 So.2d, at page 870

The foregoing should be sufficient guideposts by which a reviewing court may weight the decision of the trial judge who, as here, has granted a new trial upon the ground that the verdict of the jury was against the manifest weight of the evidence. The District Court, First District, in the instant appeal seems to have wandered from that course in its review of the trial judge's order for new trial. In its decision, it simply states:

> "Our review of the record indicates that there was sufficient evidence from which a reasonable jury could have returned this verdict in favor of the plaintiffs. A full recitation of the evidence or the specific facts would serve no purpose. We, therefore, find without further comment that it was inappropriate to grant a new trial on the basis that the verdict was against the manifest weight of the evidence. See Miller v. Affleck, supra." [632 So.2d 79 (Fla. 1st DCA, 1993]

688 So.2d pages 439-440

When the Browns (Appellees there) attempted to point out the error in that court's method of review by reiterating the decisions of this court quoted above, the First District again did not seem to grasp the point. In its opinion granting the Browns' Motion for Clarification, the First District, in attempting to explain that it had indeed applied the correct standard in its earlier opinion, quotes from the decision in **Miller v. Affleck**, supra:

> "A verdict can be found to be against the manifest weight of the evidence only when it is clear, obvious,

and indisputable that the jury was wrong." (emphasis supplied)

695 So.2d, at page 797

The District Court seems to have overlooked the logical conflict between its standard and the standard dictated by this Court! If the verdict can be found to be against the manifest weight of the evidence only when it is clear, obvious and indisputable that the jury was wrong, then there would be no basis upon which "reasonable men" could differ as to the propriety of the trial court's action. Ergo, the "reasonable men" standard of the Florida Supreme Court becomes mutated to "if reasonable men could differ as to the propriety of the trial court's action", then it is not "indisputable" that the jury was wrong and the order granting new trial must be reversed.

The decision of the District Court creates confusing conflict with the pronouncements of this Court on the issue here, and should be quashed.

POINT II

APPLYING THE FOREGOING PRINCIPLES TO THE RECORD IN THE INSTANT CASE, NO ABUSE OF DISCRETION IS SHOWN IN THE TRIAL COURT'S ORDER GRANTING NEW TRIAL AND IT MUST BE SUSTAINED.

As required by this court, the trial judge set forth in his order reasons which led him to conclude the verdict was contrary to the manifest weight of the evidence. **Wackenhut Corp. v. Canty**, 359 So.2d 430 (Fla. 1978). Petitioners do not perceive that it is their burden to cite to the record those discrepancies in the proofs which support each of the findings made by the trial judge in his order. However, that court's first announced reason for his ruling serves well to illustrate the reasonableness of his conclusion that the verdict was contrary to the manifest weight of the evidence, requiring the granting of a new trial. He stated:

> "On Plaintiffs' claim for intentional interference with business relationship, the compensatory damages awarded the Estate of A. P. Stuckey for loss of business profits from 1989 to October, 1994, (date of his death) of $253,500.00 is an example of an award which, when compared to prior earnings and "best-scenario" projected increases in the absence of such interference, simply is not sustainable by any reasonable view of the evidence. In like manner, the Court cannot reconcile the award to Mrs. Stuckey (widow of Mr. Stuckey and his joint partner in their business up to his death) of $130,500.00 on that same claim where the evidence was silent as to her personal expected profits in the business, absent the efforts of her husband." (ROA, Volume IV, page 49, lines 3 through 13)

That claim of Plaintiffs/Respondents had been limited to their loss of profits, experienced in their horse business and

occasioned by the alleged interference of Defendants/ Petitioners, only for the time period of March, 1989 (the time of dissolution of the partnership and onset of interference) through October, 1994 (date of the death of Mr. Stuckey), some five and one-half years. The combined total loss of profits awarded on that claim are $384,000.00, or an average per-year loss of $69,818.18 ($384,000.00 divided by 5.5 years).

The hard evidence before the jury on the profits experience by Plaintiffs, for the years most recent to the period for which losses were claimed, did not support such finding. Plaintiffs' tax return for 1987 (Defendants' Exhibit 21) showed gross earnings from the farm of $129,276.62, deductible farm expenses of $135,187.90, for a deficit farm income of minus $5,911.36. Even adding back in the depreciation reported at $6,475.98, results in net farm income of $564.62.

By their 1988 tax return (Defendants' Exhibit 22), Plaintiffs report farm income of $193,572.00, deductible farm expense of $179,924.37, for a net farm income of $13,647.63.

The Plaintiff, Mrs. Sarah Stuckey, testified that the average net income from the horse farm business operated by her and her husband, up until 1988, had been $20,000.00 to $25,000.00, and that she and her husband had projected that over the next five to six years thereafter they should come to "be able to realistically bank between $35,000.00 to $40,000.00 a year net". (Transcript, Volume V, page 895,

lines 1 through 21) Even assuming the accuracy of her projection, and assuming that for the first year, 1989, the maximum thus projected was achieved, the resulting loss would be $220,000.00 for the five and one-half year period, not $384,000.00, or an additional $162,000.00 as awarded by the verdict.

And, of course, Mrs. Stuckey's projection and the jury's award ignore the fact that during that time period, 1989 through 1994, the Stuckeys were operating their business under a court order which limited their business operation to only a portion of the farm land and improvements (ROA, Volume I, page 11 through 12), not the entire farm that they had used before the suit.

Even on the question of the terms of the partnership between the two families, there was little third party evidence presented by the Stuckeys to support their contention that it included the Browns thoroughbreds as of 1981. However, there was much presented by the Browns to refute that contention. (Wilson Vitter, Transcript, Volume VI, page 1022 and 1034; Bill Pierce, Transcript, Volume VII, page 1126, line 1 through page 1127, line 5)

A horse breeder of much experience to whom mares from the farm were sent for breeding, many times transported by the Stuckeys, was always informed that they were the Browns' horses (Clayton O'Quinn, Transcript, Volume VIII, page 1341 through 1389). Also, a horse "identifier" who, during the

"partnership years" was called to the farm to prepare the identification material necessary to obtain the registration of new born horses with The Jockey Club (the official organization for registering blood lines of thoroughbred horses), testified that neither Mr. Stuckey nor his son ever indicated an ownership interest in the foals, and she was always given to understand that they (the foals) were owned by the Browns. (Kathryn Todd Smith, Transcript, Volume IX, page 1410 through page 1462.)

Based upon his considered view of the weight and credibility of all of the evidence, from his perspective as the trial judge who saw and heard the totality of the case submitted in support of Plaintiffs' claims, the trial court found that the verdict on this action was contrary to the manifest weight of the evidence, requiring the granting of a new trial. Considering the record and the analysis above, could reasonable men differ as to the propriety of the trial court's act in doing so? No reported case is found in which the record more forcefully answers "yes", and the order of the trial court should be reinstated.

CONCLUSION

This Court should enter its order quashing the decision of the District Court of Appeal and directing a reinstatement of the order granting a new trial.

MARTIN S. PAGE
228 East Duval Street
Lake City, Florida 32055
(904) 752-0920
Florida Bar No. 0060736
Attorney for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by mail delivery, this 13th day of November, 1997, to JAMES C. RINAMAN, ESQUIRE, Post Office Box 447, Jacksonville, Florida 32201.

MARTIN S. PAGE
228 East Duval Street
Lake City, Florida 32055
(904) 752-0920
Florida Bar No. 0060736
Attorney for Petitioners