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' REPLY BRIEF

* * * * * * * * *

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

Attorney for Petitioners/Defendants

TABLE OF CONTENTS

CERTIFICATE OF CITATIONS

ARGUMENT IN REBUTTAL

POINT I

THE DISTRICT COURT DID NOT APPLY THE CORRECT STANDARD OF REVIEW AS ENUNCIATED BY THIS COURT

Throughout their entire argument on this point, Respondents, while parading decisional law supporting Petitioners' contention of the correct standard to be applied in appellate review of orders of the trial court as here under consideration, make not one reference to any wording of the two opinions of the District Court wherein that court expressly acknowledged its application of that standard. That court simply concluded that such orders may be upheld only where it is clear, obvious and indisputable that the jury was wrong.

That approach conflicts with the "reasonable persons" standard announced by this court and certainly doesn't give the deference to the "favored vantage point of the trial court" recognized by this court as recently as its opinion in E.R. Squibb and Sons, Inc., et al. v. Farnes, 697 So.2d 825 (Fla. 1997) In that case this court sustained the trial court's order granting new trial, even though this court recognized that there was record evidence to support the verdict of the jury. In the instant case the District Court substituted its view of the record evidence to find abuse of discretion by the trial court requiring reversal and reinstatement of the jury verdict. Such was error.

POINT II

THE RECORD EVIDENCE TO SUPPORT THE JURY VERDICT WAS SO SUSPECT THAT REASONABLE PERSONS COULD DIFFER AS TO WHETHER A NEW TRIAL SHOULD BE GRANTED

The balance of Respondents' Answer Brief is concerned with persuading this court that the record evidence clearly and unquestionably supported the damages returned by the jury's verdict. As before the jury, Respondents, in their arguments here, rely heavily upon their Exhibit No. 13 (ROA, Volume X, page 131) to support the jury's verdict on several issues. Respondents cite that exhibit nineteen times as record "fact-proof" of statements made in their argument.

That exhibit was compiled by and was the product of young Alex Stuckey, Jr., the son of the Respondents. (Transcript, Volume II, pages 268, line 18 through page 273, line 18)

To say that the factual representations and computations contained in that exhibit were suspect is an understatement. Several of its expressions were contradicted on the record. See testimony of Mrs. Stuckey on Petitioners' case-in-chief. (Transcript, Volume IX, page 1560, through Volume X, page 1588, line 19) Considerable argument and objection was made to it being admitted into evidence because of those contradictions, as well as the lack of documentation underlying the computations being submitted to the jury. See the 52 pages of argument of counsel concerning its

admissibility. (Transcript, Volume X, page 1768, through Volume XI, page 1820, line 22) After considering the argument, the trial court made the following observations and ruling (Transcript, Volume XI, page 1820, line 23 through page 1821, line 19):

"THE COURT: The court is inclined to -- and you better flag this, Mr. Court Reporter -- to allow No. 13 to stay in evidence, but invites an instruction to the jury by defense counsel made available to plaintiff's counsel pointing out to the jury the discrepancies in evidentiary Exhibits 12 and 13 with regard to the brood mares. And also pointing out to them that No. 13 is not to be considered by them as evidence, that as to where the purse money, to whom the purse money was ultimately paid.

Of course, this must be done in a manner that the reviewing courts wouldn't find to be an invasion of the province of the jury by the trial judge. And for whatever good it might serve the court views this ruling as being quite charitable to the plaintiff.

These are matters of grave importance and they go to proper preparation for a trial. And I don't intend to scold, but it's quite a close decision. And I think there is considerable merit in the defendant's position that there's quite a change resulting in $208,000 of money between the list, the updated list and No. 13."

A special instruction was given to the jury concerning that exhibit. (Transcript, Volume XII, page 2122, line 17, through page 2123, line 1) [1]

Relying entirely upon that exhibit and the computations of Mr. Stuckey, Jr., the Respondents state that from 1982, the first full year of operation, through 1988, the Respondents' separate horse training business grew over 1,000 percent and that in 1988, the business grew 43 percent in one year. Other computations and statements regarding the profitability of their separation horse training revenues are referenced to the same exhibit 13. (See Respondents' Answer Brief pages 23 through 24)

Respondents imply by footnote 4 (Respondents' Answer Brief, page 23) that the validity of that exhibit was in some way substantiated by their accountant, Donald Foreman. However, on cross-examination by Petitioners, Mr. Foreman stated that he simply verified the mathematics of the computations therein, but had no knowledge of the factual

---

[1] To correct the somewhat garbled transcription of that instruction as reported by the court reporter, Petitioners' file reflects the instruction to have been given as follows:

> "The Court, over the objection of the Defendants, has admitted into evidence the Plaintiffs' Exhibit 13, which purports to contain summaries of horse days, expenses, and earnings. It is pointed out, however, the exhibit does contain discrepancies in which is claimed to be partnership horses and does not show who received the earnings of the horses shown therein. These are matters for you to weigh in considering the exhibit No. 13.

bases of the matters therein stated. (Transcript, Volume III, page 393, line 13 through page 396, line 17) He also testified that, although he had prepared the tax returns for the Respondents since 1981, the Respondents never told him they had a 50/50 partnership with the Petitioners. (Transcript Volume III, page 407, lines 22 through 24)

As stated in Petitioners' Initial Brief, the tax returns for the corresponding taxable years of Respondents refute the inflated profitability of their business represented by Exhibit 13. Respondents attempt to sidestep the accuracy of what they reported for tax purposes by citing to this court **Trailer Ranch, Inc. v. Levine**, 523 So.2d 629 (Fla. 4th DCA, 1988) for the proposition that "...tax returns are not probative of income or 'profit' of [a] business." What the Fourth District Court was there discussing was whether individual tax returns of persons operating their business as a corporation constituted proof of profits in a suit seeking loss of profits in that corporate business. That court stated:

> Appellees argue that lost profits are established by documentary evidence including tax returns. The only tax returns in the record are three personal income tax returns, for the years 1980, 1981 and 1982. Shown on those returns are certain dividends from the operating company. As a general rule, the fact that a corporation pays a dividend, even a subchapter S corporation with pass-through income received by a shareholder, does not necessarily mathematically relate to the amount of real profit the business made during the year. This is particularly true here where there are outstanding liabilities, both secured and unsecured. Tax returns are

not probative of income or "profit" of the business under such circumstances.

The suspect Exhibit 13 also forms the much of the proof basis for Respondents' "sweat equity" argument for their non-cash contributions to the farm acquisition and improvements. (See pages 34 and 35 of Respondents' Answer Brief)

Finally, with regard to Respondents' justification of an award of $50,000 compensatory and $10,000 punitive damages for alleged defamation to the deceased Mr. Stuckey, contrary to Respondents' position, there was never any argument, finding or instruction that the alleged defamatory actions constituted defamation per se, so as to entitle him (his estate) to a conclusive presumption of damage. The only evidence of injury were the comments of the Respondents, themselves, of feeling embarrassed, having their feelings hurt and their reputations harmed. All other evidence went to harm to business, intertwined with the claim for loss of profits from malicious interference with business relationships.

However, Respondents apparently contend that the jury would be free to speculate on the amount of damages suffered as a result of defamation, citing to this court's words in **Miami Hearld Pub.Co. v. Brown**, 66 So.2d 679 (Fla. 1953), to the effect:

> "[W]e are fully aware of the inaccuracy in fixing general damages for injury to reputation, feelings and the like because the jury must, from the very nature of these elements engage in speculation"

It would have served Respondents well, and made clearer the trial court's apparent view when granting new trial on that cause of action, if Respondents had read this court's words in **Miami Hearld** that immediately follow the above quoted statement, to-wit:

> "But we do say that an award of substantial compensatory damages must be based on proof, ---" (Id. at page 681, emphasis supplied)

CONCLUSION

The District Court of Appeal applied the incorrect standard of appellate it is review of the order of the trial court granting a new trial upon his findings which led him to conclude the verdict was contrary to the manifest weight of the evidence. Applying the correct standard of review to the record before the court it must be said that reasonable persons could disagree with the propriety of the trial judge's act and, therefore, there was no abuse of his discretion. Therefore his order should be upheld by quashing the holding of the District Court.

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 22nd day of December 1997, to JAMES C. RINAMAN, JR., 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