ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1552

4th DCA Case No.: 98-04032

Florida Bar No. 184170

EUGENE FRANCIS CLARKE and PHYLLIS CLARKE, his wife,

Petitioners,

vs.

UNITED SERVICES AUTOMOBILE ASSOCIATION, a reciprocal inter-insurance exchange,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE FOURTH DISTRICT COURT OF APPEAL

BRIEF OF PETITIONERS ON JURISDICTION

EUGENE FRANCIS CLARKE and
PHYLLIS CLARKE, his wife

(With Appendix)

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TABLE OF CITATIONS

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POINT ON APPEAL

THE DECISION IN THE PRESENT CASE IS IN EXPRESS AND DIRECT CONFLICT WITH SEVERAL CASES OF THE SUPREME COURT AND OTHER COURTS, WHICH STATE THAT THE TEST AS TO WHETHER A COURT OF APPEAL SHOULD AFFIRM A JUDGMENT BY THE TRIAL COURT AFTER TRIAL ON THE MERITS, IS WHETHER THE JUDGMENT OF THE TRIAL COURT IS "SUPPORTED BY COMPETENT EVIDENCE;" THE COURT OF APPEAL DID NOT APPLY THIS TEST, BUT EXPRESSLY SUBSTITUTED ITS OWN VIEW OF THE EVIDENCE FOR THAT OF THE TRIAL COURT.

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CERTIFICATION OF TYPE

It is hereby certified that the size and type used in this Brief is 12 point Courier, a font that is not proportionately spaced.

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STATEMENT OF THE FACTS AND CASE

After a non-jury trial on the merits, the trial judge found there was coverage, and entered a Final Judgment finding coverage with 34 paragraphs of findings of fact. However, on appeal, the Court of Appeal did not apply the correct test of "whether there was competent evidence," but instead reweighed the evidence and stated that the trier of facts was wrong as to the weight of the facts, and reversed. Therefore, this decision, in which the appellate court expressly substituted its view of the facts for that of the trial court, is in express and direct conflict with several cases which are cited in this Brief; which hold that the test for affirmance after non-jury trial is whether there is competent evidence to support the fact findings and Judgment.

The facts as stated in the Opinion are that in 1988 Eugene Clarke applied for insurance with USAA. USAA not only insured military officers, but insured numerous other classes of people. A salesman of USAA took the application over the telephone and filled in certain information on the computer screen, but never obtained a written application from Mr. Clarke. The evidence was undisputed that USAA was supposed to obtain a written application and if not to cancel the policy, but nonetheless, it is undisputed that USAA never obtained a written application. Nonetheless, after paying premiums for six years, when Mr. Clarke made a UM claim, USAA filed suit for declaratory judgment seeking to void the policy ab initio alleging material misrepresentation in his application for insurance, even though there was no written application for insurance.

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The case went to non-jury trial. The trial judge heard evidence and eventually entered a Final Judgment holding that there was coverage, with 34 paragraphs of findings of fact. USAA appealed and on appeal the Court of Appeal reweighed the evidence and reversed the trial judge, contrary to Florida law, not applying the proper test for affirmance of whether there is "competent evidence to support the judgment." The court did not apply this test, but reweighed the evidence so this is in express and direct conflict with Florida law.

SUMMARY OF ARGUMENT

The decision in the present case conflicts with the cases of Conner v. Conner, infra; and Shaw v. Shaw, infra. See also, Marcoux v. Marcoux, infra; which hold after a non-jury trial, the test as to whether the findings of fact and Judgment shall be affirmed is whether there is "competent evidence" to support the fact findings and final judgment. These cases hold that after trial on the merits, the Court of Appeal is not allowed to substitute its fact finding for that of the trier of fact. The Court of Appeal, in this case, did not apply the test "whether there is competent evidence," so there is express and direct conflict. Instead, it conducted a de novo review of the trial court's fact finding and expressly disagreed with the fact findings, which is in direct conflict with the cases cited above.

Specifically, the trial court made a fact finding that certain information on the computer screen application was "glaringly apparent." However, the Court of Appeal weighed the

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evidence and ruled that this information "...was not readily apparent..." This is as clear as can be that the Court of Appeal substituted its view of the evidence for that of the trial judge.

The bottom line, in the present case, is USAA never got a written application although its procedures required it to, and therefore, there certainly was competent evidence for the trial court to enter the Final Judgment of coverage. Since it did not receive a written application, it could not avoid coverage based on alleged erroneous information taken over the phone by a salesman for USAA, so there clearly is "competent evidence" to support the Judgment. No Florida case has ever allowed coverage to be avoided for misrepresentation in an application <u>where there was no written application</u>, and therefore, there certainly was "competent evidence" to support the Judgment of the trial judge, and therefore, there is express and direct conflict.

It should also be pointed out that it is bad public policy to hold that an insurer can avoid coverage in the present situation. It certainly is contrary to Florida public policy to hold that an insurer can <u>not</u> get a written application and then avoid coverage for allegedly incorrect information given over the telephone to a salesman, when it did not follow its own procedures and receive a signed, written application.

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ARGUMENT

THE DECISION IN THE PRESENT CASE IS IN EXPRESS AND DIRECT CONFLICT WITH SEVERAL CASES OF THE SUPREME COURT AND OTHER COURTS, WHICH STATE THAT THE TEST AS TO WHETHER A COURT OF APPEAL SHOULD AFFIRM A JUDGMENT BY THE TRIAL COURT AFTER TRIAL ON THE MERITS, IS WHETHER THE JUDGMENT OF THE TRIAL COURT IS "SUPPORTED BY COMPETENT EVIDENCE;" THE COURT OF APPEAL DID NOT APPLY THIS TEST, BUT EXPRESSLY SUBSTITUTED ITS OWN VIEW OF THE EVIDENCE FOR THAT OF THE TRIAL COURT.

The Court of Appeal applied the wrong test in reversing the finding of fact after non-jury trial, since it did not apply the test of "whether the judgment was supported by competent evidence."

Florida law is clear that the only time a court of appeal should reverse a fact finding by the trial judge after trial on the merits is if it finds the judgment of the trial court is "not supported by competent evidence." The Court of Appeal, in the present case, made no finding that the decision of the trial court was not "supported by competent evidence," but simply substituted its own view of the evidence for that of the trial court.

Therefore, there is express and direct conflict between the decision in the present case and the Supreme Court's decision in Shaw v. Shaw, 334 So. 2d 13 (Fla. 1976); Conner v. Conner 439 So. 2d 887 (Fla. 1983); see also Marcoux v. Marcoux, 475 So. 2d 972 (Fla. 4th DCA 1985).

The decision of the Fourth District is in express and direct conflict with the Supreme Court's decision in Shaw v. Shaw,

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Conner and numerous other Florida cases on point, and further indicates the confusion within the Fourth District as to the correct law.

The facts were that after trial on the merits, the trial judge made a finding of fact. The Fourth District held that in reviewing a non-jury trial, the proper test is to determine whether there was evidence to support the trial judge's finding, and therefore, since there was evidence it could not reverse:

> ...So long as there is evidence to support the trial court's finding, appellate courts cannot act as new fact finders in the stead of the trial judge. *Shaw v. Shaw*, 334 So.2d 13, 16 (Fla.1976). As our supreme court points out in *Marcoux*, the error in *Conner* was that the district court acted as a *fact finder:*
>
> > If a reviewing court finds that there is competent substantial evidence in the record to support a particular award, then there is logic and justification for the result and it is unlikely that no reasonable person would adopt the view taken by the trial court. Under these circumstances, there is no abuse of discretion.
> >
> > *Marcoux*, 464 So.2d at 544.
>
> [2] In reviewing the record in light of the above, we find that the trial court, as the fact finder, had before it competent and substantial evidence upon which to base its award. Accordingly, we affirm.
>
> Marcoux, 972.

In the present case, the judge wrote an Order several pages long with 34 paragraphs of fact finding, as well as additional rulings in the Order. The Court of Appeal simply substituted its own view of the facts for that of the trial judge, in express and direct conflict with these cases.

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It should also be pointed out that although it is not directly on point, this in effect is in conflict with the Supreme Court's recent landmark decision in Brown v. Estate of A.P. Stuckey, 749 So. 2d 490 (Fla. 1999). In that case, the Florida Supreme Court clearly set out the scope of the trial judge in ruling on a motion for new trial, holding that the court of appeal should not reverse a decision as to whether a jury verdict was against the manifest weight of the evidence. The court held that the test was to determine whether no reasonable person could find a new trial should be granted, in order for the court of appeal to reverse. Stuckey makes clear the judicial philosophy of the Supreme Court, that the trial judge is present at trial, hears the evidence, observes the demeanor of the witnesses, and is the one who is supposed to determine matters of sufficiency of evidence. In the present case, the trial judge entered 34 paragraphs of fact findings, and there was no finding that there was not "competent evidence" to support them.

This decision is in conflict with the judicial philosophy of Stuckey in that the trial judge was present at the non-jury trial and heard the evidence, saw the demeanor of the witnesses, etc., and the court of appeal will not substitute its view of the evidence for that of the trial judge.

The bottom line, in the present case, is USAA never got a written application although its procedures required it to, and therefore, there certainly was competent evidence for the trial court to enter the Final Judgment of coverage. Since it did not receive a written application, it could not avoid coverage based

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on alleged erroneous information taken over the phone by a salesman for USAA, so there clearly is "competent evidence" to support the Judgment. No Florida case has ever allowed coverage to be avoided for misrepresentation in an application where there was no written application, and therefore, there certainly was "competent evidence" to support the Judgment of the trial judge, and therefore, there is express and direct conflict.

It should further be noted that the trial judge found that the information was "glaringly apparent" on the face of the computer screen USAA had (see fourth paragraph of the decision of the Fourth District). However, in the next to the last paragraph of the Opinion, the Fourth District reviews the evidence and states that this "discrepancy was not readily apparent...." This clearly reveals that the Court of Appeal substituted its own view of the evidence, and did not apply the proper appellate burden, and did not apply the test of whether there was "competent evidence to support the Verdict."*

The trial judge further found, as reflected in the Opinion of the Fourth District, that USAA was estopped from asserting misrepresentation because it should have known of the apparent age discrepancy, and that USAA would have discovered the information if it followed its verification procedures. The court of appeal did not find that there was no competent evidence

*The Final Judgment of the trial court is attached to this Brief at (A 1-3), and it is clear from these fact findings that the court of appeal did not use the proper test as to whether there was "competent evidence" to support the Judgment, but simply reweighed the evidence and entered its own view of the evidence.

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to support this estoppel, but simply reweighed the evidence.

It should also be pointed out that it is bad public policy to hold that an insurer can avoid coverage in the present situation. Today it is very common for insurance companies to have salesmen take information over the telephone and then follow up with a signed, written application by the applicant. It certainly is contrary to Florida public policy to hold that an insurer can not get a written application and then avoid coverage for information allegedly given over the telephone to a salesman, when it did not follow its own procedures and receive a signed, written application. Therefore, the public policy expressed in the Opinion is contrary to the public policy of Florida.

The danger in allowing this Opinion to go uncorrected is that now an insurance salesman can take information over the phone, never verify or look at any of the information on its computer screens, never send a copy of the information or a written application to the insured, never ask an insured to sign an application, accept premiums for years; and then when an accident occurs, the carrier can go back and try to find some misrepresentation in the alleged oral information given over the phone to the salesman and never verified by the insured, to cancel the policy ab initio.

To date, there is no case in Florida that has found a material misrepresentation made over the phone to a salesman, never verified by the insurance company, and never signed by the insured, can form the basis of voiding a policy. More importantly, no case in Florida has required actual knowledge on

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the part of an insurance salesman in order to avoid the application of the doctrine of waiver or estoppel, when the insurer later on claims that the policy was void ab initio.

Under the Clarke decision, no one at any insurance company ever has to look at the oral information allegedly given over the phone to its salesman, before writing the insurance policy, and no one has to follow up and have an application signed by the insured, verifying that the information put into the computer by the salesman over the phone, who is likely on commission, is accurate and correct.

Furthermore, this Court has rejected the trial court's finding that the misrepresentation was "glaringly apparent" and factually decided that there was "no deliberate disregard" of information sufficient to call for an inquiry, under the Supreme Court's decision in Johnson v. Life Inc. Co. of Georgia, 52 So. 2d 813 (Fla. 1951). This new fact finding is in direct conflict with the presumptively correct fact finding of the trial court. The creation of new law and the rejection of the Supreme Court's decision in Johnson, supra, also requires review; especially where thousands of phone insurance application are taken daily by commissioned salesmen and now Clarke has held that none of this information put into the computer by a salesman has to be verified by the insurance company.

CONCLUSION

The decision of Florida Supreme Court is in conflict with Conner v. Conner, Shaw v. Shaw and Marcoux v. Marcoux, supra.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 24th day of July, 2000 to:

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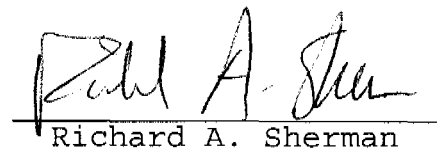
By: 
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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 2000

UNITED SERVICES AUTOMOBILE ASSOCIATION, a reciprocal inter-insurance exchange,

Appellant,

v.

EUGENE FRANCIS CLARKE, PHYLLIS CLARKE, his wife, **PATSY TRAYNOR** and **WILLIAM C. TRAYNOR**,

Appellees.

CASE NO. 4D98-4032

Opinion filed April 26, 2000

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Patricia W. Cocalis, Judge; L.T. Case Nos. 93-24925 (04) and 96-2207 (04).

J. Bowen Brown and Betsy E. Gallagher of Law Office of Gallagher & Howard, P.A., Tampa, and William F. Martin of Law Office of Peterson, Bernard, Vendenberg, Zei, Geisler & Martin, Fort Lauderdale, for appellant.

Richard A. Sherman and Rosemary B. Wilder of Law Office of Richard A. Sherman, P.A., Fort Lauderdale, and Wilton L. Strickland of Law Office of Wilton L. Strickland, Fort Lauderdale, for Appellees-Eugene Francis Clarke and Phyllis Clarke.

TAYLOR, J.

United Services Automobile Association ("USAA") seeks review of a declaratory judgment finding insurance coverage in favor of the appellees, Eugene and Phyllis Clarke.

USAA is a reciprocal inter-insurance exchange, which, in 1988, insured only active, retired and former commissioned military officers or their families.[1] Eugene Clarke applied for insurance from USAA in May 1988. He represented that he was commissioned through Officer Training School on August 1, 1955 and was discharged from the United States Air Force as a captain. Based on these representations, USAA issued an automobile insurance policy to Clarke.

In September 1989 Eugene Clarke ("Clarke") was involved in an automobile accident. He and his wife, Phyllis Clarke, sued the tortfeasors and USAA, their uninsured motorist (UM) coverage carrier. USAA authorized the Clarkes to accept the tortfeasors' policy limits of $15,000 and waived its subrogation rights.

In December 1995 USAA discovered that Clarke had never been a commissioned officer in the military. USAA filed a separate declaratory judgment action against the Clarkes seeking to void the insurance policy *ab initio* because of Clarke's material misrepresentation in his application for insurance. In defense, Clarke asserted that USAA had constructive knowledge of the misrepresentation; that USAA should have known from the "glaringly apparent" age discrepancy between his date of birth (8/4/37) and the date of commission (8/1/55) on his insurance application that he could not have been a commissioned officer. According to the information he submitted to USAA, he would have been a commissioned officer at age 17. The trial court agreed that Clarke materially misrepresented his military status, but found that USAA waived its right to rescind the policy because USAA had constructive knowledge of the misrepresentation.

The trial court also found that USAA failed to follow its internal procedures in verifying Clarke's military status; it did not receive an eligibility certificate and power of attorney from

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[1]USAA insured other specified groups under circumstances immaterial to the instant case.

Clarke and did not cancel the policy after failing to obtain these documents. The court also noted its concern that USAA did not assert misrepresentation as a defense until after it had allowed the Clarkes to accept the tortfeasors' policy limits and cut off any future recovery by the Clarkes.

Section 627.409(1), Florida Statutes (1997), provides:

> (1) Any statement or description made by or on behalf of an insured or annuitant in an application for an insurance policy or annuity contract, or in negotiations for a policy or contract, is a representation and is not a warranty. A misrepresentation, omission, concealment of fact, or incorrect statement may prevent recovery under the contract or policy only if any of the following apply:
>
> (a) The misrepresentation, omission, concealment, or statement is fraudulent or is material either to the acceptance of the risk or to the hazard assumed by the insurer.
>
> (b) If the true facts had been known to the insurer pursuant to a policy requirement or other requirement, the insurer in good faith would not have issued the policy or contract, would not have issued it at the same premium rate, would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss.

Several USAA representatives testified about USAA's underwriting policies and procedures. Based on their testimony, the trial court found that Clarke's misrepresentation concerning his military status was material. In 1988, when Clarke applied for insurance, USAA limited its membership to active, retired and former commissioned officers and their families. USAA was not open to the general public. It was a reciprocal inter-insurance exchange, in which the members insured each other and assumed only the risks associated with insuring other members who met USAA's eligibility requirements. These risks were minimized because its members shared certain desirable characteristics: they were better educated and statistically safer drivers than the general public. USAA members could be commissioned directly from civilian life, through officer candidate school, or through a military academy.

It is undisputed that Clarke was never a commissioned officer in the military and that he misrepresented his military status in obtaining insurance coverage from USAA. It is also undisputed that, but for the misrepresentation, USAA would not have issued the policy. However, the court found that USAA was estopped from asserting misrepresentation as a bar to coverage because it should have known of the misrepresentation from the apparent age discrepancy in Clarke's application. Further, USAA would have discovered the fraudulent information if it had followed its verification procedures.

In finding a waiver of Clarke's misrepresentation, the trial court cited *Johnson v. Life Inc. of Georgia*, 52 So. 2d 813 (Fla. 1951). There, the supreme court held that a life insurance company waived the right to invoke forfeiture for non-disclosure of the insured's previous medical treatment, where the insurance company's agent had actual knowledge of the insured's tubercular condition two months after the policy was issued, yet the company continued to accept premiums until the insured's death. Unlike in *Johnson*, however, in this case, no insurance agent had actual knowledge of the false information furnished by the insured and there were no circumstances which sufficiently put USAA on notice of the true facts such that it should be charged with knowledge of those facts. Here, there was no "deliberate disregard of information sufficient to excite attention and call for inquiry as to the existence of facts by reasons of which a forfeiture could be declared." *Id.* at 815. The evidence showed that USAA's information on Clarke's birth and commission dates was provided over the phone to USAA's senior sales

representative. She, in turn, input the information on different computer screens that did not display the two dates next to each other. Thus, the age discrepancy was not readily apparent and did not call attention to any situation leading to further inquiry. USAA first discovered the misrepresentation when it was conducting discovery in a civil suit initiated by Clarke years later.

We find that the facts in *Johnson* are distinguishable and decline to apply the doctrine of waiver to this case. Because the trial court made factual findings that Clarke misrepresented that he was an officer and that his military status was material in determining eligibility for USAA coverage, we find that USAA was entitled to void the policy, pursuant to subsections (a) and (b) of section 627.409, Florida Statutes.

We reverse with directions that judgment be entered in favor of USAA.

REVERSED.

FARMER and KLEIN, JJ., concur.

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.

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IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT IN AND
FOR BROWARD COUNTY, FLORIDA

CASE NO. 93-24915(04)

EUGENE FRANCIS CLARKE and
PHYLLIS CLARKE, his wife

Plaintiffs,

vs.

PATSY TRAYNER, WILLIAM C.
TRAYNER, and UNITED SERVICES
AUTOMOBILE ASSOCIATION, a
foreign corporation,

Defendants.

/

UNITED SERVICES AUTOMOBILE
ASSOCIATION, a reciprocal
inter-insurance exchange,

CASE NO. 96-2207(04)
consolidated w/ Case No.
93-24925(04)

Petitioner,

vs.

EUGENE FRANCIS CLARKE and
PHYLLIS CLARKE, his wife,

Respondents.

/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. PROPOSED FINDINGS OF FACT

1. USAA is a Reciprocal Inter Insurance Exchange.

2. As of 1988 and 1989, with limited exceptions not applicable here, USAA insured only active, retired and former military officers and their families.

3. MR. CLARKE has never been a commissioned officer in any branch of the United States Armed Forces.

4. Respondent was an Airman Basic or Buck Sergeant.

5. The positions of Airman Basic and Buck Sergeant are not commissioned positions in the United States Air Force.

6. At all times relevant, MR. CLARKE was a resident of Florida. Thus, he was not a resident of any "take all comers" states for insurance purposes.

7. MR. CLARKE was not eligible for membership in USAA.

8. In 1988 and 1989 it was not the business practice of USAA to initiate phone contact with any prospective member unless he/she already had existing insurance coverage through USAA, or whose eligibility was established.

9. Prior to 1988 and 1989, MR. CLARKE did not have insurance coverage through USAA.

10. USAA has never had a Colonel Raymond Traynor as an employee or as a member of USAA, although there was a Major Raymond Traynor who was retired and a member of USAA. Because he was retired he would not have been asked to give referrals, as Mr. Clarke alleged.

11. USAA fills a particular market niche whereby USAA insures active, retired or former military officers and their families.

12. USAA members mutually insure each other and assume only the risks associated with insuring other members based on the eligibility requirements established by USAA.

13. The result of USAA insuring only active, retired or former military officers and their families is that most of the insureds are college educated, typically of higher income level due to their present or past status as officers in the military.

14. The relative homogeneity of the members of USAA thus presents a risk contemplated by those members of the Inter-Insurance Exchange who agree to insure each other based upon the similar risks those members present to the company and to each other.

15. Accordingly, an applicant's status as an active, retired or former commissioned officer in the United States Military is material to USAA issuing insurance to that applicant.

16. MR. CLARKE would only have been eligible to become a USAA member based on his status as a former commissioned officer.

17. MR. CLARKE's military status was material to USAA.

18. Had USAA known that MR. CLARKE was not a former commissioned officer in the United States Military, he would not have been issued insurance with USAA.

19. At all times relevant to this action, MR. CLARKE knew his military rank and knew that he had never been a commissioned officer in the United States Military.

20. In 1988 and 1989 MR. CLARKE did not qualify for membership in USAA in any capacity pursuant to USAA Eligibility Guidelines.

21. In May, 1988 USAA issued EUGENE FRANCIS CLARKE and PHYLLIS CLARKE a policy of insurance.

22. From the inception of the policy, and specifically on May 4, 1988, USAA input information in its computer data base which indicated, *inter alia,* that EUGENE CLARKE was born on August 4, 1937, was commissioned through Officer Candidate Training School into the United States Air Force at age 17 on August 1, 1955, and left the military as a Captain in the United State Air Force.

23. EUGENE CLARKE received a General Discharge under Honorable Conditions from the United States Air Force in 1956, as an Airman Basic.

24. USAA placed EUGENE CLARKE in one of its insurance companies known as the Reciprocal Inter-Insurance Exchange, which insures military officers, present and former, as a general rule.

25. In September, 1989, EUGENE CLARKE, who had uninsured and underinsured motorist coverage with USAA under his policy, was in a car accident with an underinsured motorist, PATSY TRAYNER.

26. EUGENE and PHYLLIS CLARKE later filed suit against both the tortfeasors, PATSY TRAYNER and WILLIAM TRAYNER, and against USAA to recover damages under the uninsured motorist portion of the policy.

27. USAA admits it has no written application whatsoever from EUGENE FRANCIS CLARKE.

28. USAA had a set of procedures in place in 1988 which required it to obtain a written Eligibility Certificate and a

written Power of Attorney signed and returned by the insured in order to continue the policy.

29. If the Eligibility Certificate and the Power of Attorney were not returned to USAA, the procedures required follow-up letters to be sent on a thirty (30) day and sixty (60) day basis, and if no response were received, after ninety (90) days, the policy was required to be canceled for failure to return the Eligibility Certificate and the Power of Attorney.

30. The Eligibility Certificate required the insured to state and reaffirm his military status, rank, date of commission and source of commission and date of birth, in addition to other information.

31. In part, the function of the Eligibility Certificate was to clear up any miscommunication that may have occurred during the initial phone call with the insured.

32. USAA did not follow these procedures and cannot explain why its computer data base does not indicate if the Eligibility Certificate and Power of Attorney were ever sent to, received or returned by EUGENE FRANCIS CLARKE.

33. USAA had guidelines in effect in 1988 relating to determination of eligibility indicating the earliest age one could obtain a commission in the United States military was age 22 or higher.

34. During the pendency of the uninsured motorist litigation, prior to the assertion of the misrepresentation as a defense, USAA

permitted EUGENE and PHYLLIS CLARKE, as their uninsured motorist carrier, to accept the $15,000.00 in bodily injury coverage provided by the tortfeasors, PATSY and WILLIAM TRAYNER.

35. After the torfeasors were released, cutting off any future recovery by the CLARKES, USAA asserted its defense of misrepresentation and ultimately bifurcated the affirmative defense into a declaratory action, which was tried before the Court.

Although, EUGENE FRANCIS CLARKE misrepresented to USAA that he was an officer in the Air Force, he also told them that he was commissioned on August 1, 1955 through Officer Candidate Training School and that his date of birth was August 4, 1937. That would have made him a commissioned officer at age 17. This was glaringly apparent on the computer data submitted to USAA by EUGENE FRANCIS CLARKE.

"While, ordinarily, the insurer is not deemed to have waived its rights unless it is shown that it has acted with the full knowledge of the facts, the intention to waive such rights may be inferred from a deliberate disregard of information sufficient to excite attention and call for inquiry as to the existence of facts by reason of which a forfeiture could be declared." Johnson v. Life Inc. of Georgia, 52 So 2d 813,815 (Fl 1951).

Thereafter, USAA never followed it's procedures for sending out follow-up letters when it never received (or perhaps never sent) an Eligibility Certificate and Power of Attorney, to CLARKE, which was supposed to verify the information received by phone.

Based on the facts presented to this Court, USAA has not sustained the burden of proof necessary to prove its case and its Petition for Declaratory Relief is DENIED.

THEREFORE, it is ORDERED and ADJUDGED as follows:

1. That Respondents, EUGENE FRANCIS CLARKE and PHYLLIS CLARKE, at all times material hereto were insured under the USAA policy bearing Policy Number 432 94 84U 7102 2, and,

2. This Court reserves jurisdiction to assess and award attorneys' fees and to grant all other relief necessary and proper.

DONE and ORDERED in Chambers this _____ of July, 1998.

PATRICIA W. COCALIS
A TRUE COPY JUL 2 1998

PATRICIA W. COCALIS
Circuit Judge

Copies furnished to:

Alexander Clark, Esq.
William Martin, Esq.
Patrick Cusack, Esq.
Earle Lee Butler, Esq.

743.07, Florida Statutes (Ch. 73–21, Laws of Florida), provides:

"743.07 *Rights, privileges, and obligations of persons 18 years of age or older.* —

(1) The disability of nonage is hereby removed for all persons in this state who are 18 years of age or older, and they shall enjoy and suffer the rights, privileges and obligations of all persons 21 years of age or older except as otherwise excluded by the state constitution immediately preceding the effective date of this section.

(2) This section shall not prohibit any court of competent jurisdiction from requiring support for a dependent person beyond the age of 18 years; and any crippled child as defined in chapter 391 shall receive benefits under the provisions of said chapter until age 21, the provisions of this section to the contrary notwithstanding.

(3) This section shall operate prospectively and not retrospectively, and shall not affect the rights and obligations existing prior to July 1, 1973."

Section 1.01(14), Florida Statutes (Ch. 73–21, Laws of Florida), provides:

"In construing these statutes and each and every word, phrase or part hereof, where the context will permit:

(14) The word 'minor' includes any person who has not attained the age of 18 years."

Significantly, we find that the Legislature expressly stated in Chapter 73–21, Laws of Florida, the latest expression of the Legislature as to the definition of "minor," that:

"Any law inconsistent herewith is hereby repealed to the extent of such inconsistency. In editing the manuscript for the next revision of the Florida Statutes, *the statutory revision and indexing service is hereby directed to conform existing statutes to the provisions of this act.*" (emphasis supplied)

The legislative intent is clearly and plainly expressed in Chapter 73–21, Laws of Florida, specifically directing that laws containing a definition of minor inconsistent with the newly created definition of "minor" as one who has not attained the age of 21 years be repealed to the extent of inconsistency.

The District Court correctly decided that Chapter 73–21 amended the definition of "minor" as contained in Sections 768.16 to 768.27 to mean any unmarried child under the age of 18 years of age as opposed to any unmarried child under the age of 21 years of age.

Accordingly, the question posed is answered in the affirmative and the decision of the District Court is affirmed.

It is so ordered.

OVERTON, C. J., and ADKINS, BOYD and SUNDBERG, JJ., concur.

Gerald B. SHAW, Petitioner,

v.

Jean A. SHAW, Respondent.

No. 47710.

Supreme Court of Florida.

May 12, 1976.

Rehearing Denied July 16, 1976.

Husband and wife appealed from provisions of final judgment of dissolution of marriage rendered in the Circuit Court, Dade County, Rhea Pincus Grossman, J. The District Court of Appeal, 314 So.2d

205, modified trial court's amended final judgment, and husband petitioned for writ of certiorari. The Supreme Court, Sundberg, J., held that it is not function of appellate court to substitute its judgment for that of trial court through reevaluation of testimony and evidence but rather test is whether judgment of trial court is supported by competent evidence, that trial judge's conclusion that reservation of jurisdiction to entertain petitions for modification of alimony award was unnecessary was supported by the evidence and was not abuse of discretion, and that making wife solely responsible for mortgage payments, taxes and insurance on marital home, possession of which was given wife as award for child support, and requiring wife to pay one-half of all future medical and dental expenses of parties' minor children was not abuse of discretion.

Petition granted and decision of District Court of Appeal quashed with instructions.

Boyd and Hatchett, JJ., dissented.

1. Trial ⇐382

Function of trial court is to evaluate and weigh testimony and evidence based upon its observation of bearing, demeanor and credibility of witnesses appearing in the cause.

2. Appeal and Error ⇐1008.1(3), 1010.1(4)

It is not function of appellate court to substitute its judgment for that of trial court through reevaluation of testimony and evidence but rather test is whether judgment of trial court is supported by competent evidence.

3. Appeal and Error ⇐895(2)

Subject to appellate court's right to reject inherently incredible and improbable testimony or evidence, it is not prerogative of an appellate court, upon de novo consideration of the record, to substitute its judgment for that of trial court.

4. Divorce ⇐235

Chancellor is not required as matter of law to reserve jurisdiction to award periodic alimony in the future, rather it is a matter within his discretion.

5. Divorce ⇐235, 239

Where only evidence in dissolution of marriage proceeding of wife's physical problem was her own uncorroborated testimony, trial judge was in superior position to assess significance of wife's asserted physical impairment by observing wife's demeanor on stand, and wife was content to leave 8-year-old child in charge of her 16-year-old sister during nighttime periods when wife attended art classes, trial judge's conclusion that reservation of jurisdiction to entertain petitions for modification of alimony award was unnecessary was supported by the evidence and was not abuse of discretion because of alleged disability or wife's responsibility to care for minor children of parties.

6. Divorce ⇐249(6), 296

Where, although husband's 1973 tax return disclosed adjusted gross income in excess of $30,500, evidence also disclosed that husband for preceding five years realized average weekly net income of $247.25, trial judge, based on relative financial resources and earning capacity of parties in light of disposition of parties' assets, including award of possession of marital home to wife as award for child support, did not abuse her discretion in dissolution of marriage proceeding by making wife solely responsible for mortgage payments, taxes and insurance upon marital home jointly owned by parties and by requiring wife to pay for one-half of all future medical and dental expenses of parties' minor children.

Edward Schroll, Miami, for petitioner.

Milton M. Ferrell, Miami, for respondent.

SUNDBERG, Justice.

This is a petition for writ of certiorari to review a decision of the Third District Court of Appeal reported at 314 So.2d 205, which is asserted to be in conflict with *Westerman v. Shell's City, Inc.*, 265 So.2d 43 (Fla.1972), as well as similar cases which announce the proposition that an appellate court may not substitute its judgment for that of the trial court by re-evaluating the evidence in the cause.[1] Jurisdiction vests in this Court pursuant to Article V, Section 3(b)(3), Florida Constitution.

In proceedings for dissolution of marriage between petitioner-husband and respondent-wife, in which respondent was the moving party, the trial judge on July 15, 1974, entered an amended final judgment (i) finding that the marriage was irretrievably broken and thereby dissolving the bonds of marriage between the parties; (ii) finding that wife, "although she is in her 49th year and has been married 20 years and has minor children, is capable of supporting herself" and, based upon the financial affidavits of the parties, exhibits admitted into evidence, and the testimony, that the husband could not sustain both households, therefore ordering that the husband pay to the wife rehabilitation alimony in the amount of $50 per week for a period of one year commencing July 1, 1974; (iii) adjudicating that certain savings accounts of the parties belonged to both parties equally and ordering that the accounts be equalized based upon balances as of the date of the final hearing; (iv) granting custody of the two minor children of the parties to the wife with rights of visitation in the husband and ordering the husband to pay to the wife the sum of $30 per week per child until said child reaches majority, marries or becomes self-supporting; (v) granting use and occupancy of the marital home to the wife until the children move out or until she remarries or the children reach their majority provided that the wife should make all payments on the home place, including mortgage payments, taxes, insurance, utilities, and all repairs and maintenance with the stipulation that the home place together with its contents belong to the parties as tenants in common; (vi) providing that all future medical and dental expenses of the children were to be divided equally between the husband and wife; (vii) providing for transfer by the husband to the wife of title to an automobile in the possession of the wife; and (viii) reserving jurisdiction for costs and assessment, if any, of attorneys' fees, but not retaining jurisdiction for any other purposes.

The evidence at the final hearing upon which the amended final judgment is based was essentially as follows: The 49-year-old wife has a high school education, plus one year of business college. She has also attended court reporting school and has engaged in sales work for less than a year. She has had 16 years of experience in secretarial work, in addition to three years' experience as a legal secretary, plus 10 to 12 years of legal secretarial experience working intermittently for the husband.

The husband is an attorney at law practicing in Miami, Florida. Although his 1973 tax return reflects an adjusted gross income in excess of $30,500, the evidence reflected that, over the past five years, he has realized an average weekly net income of $247.25. As testified by the wife, the parties have lived modestly and "things have been tight from time to time." The home of the parties is modest and has never been fully painted. The husband drives a 1971 Volkswagen, and the wife drives a 1968 Ford. Title to the home place was held by the husband and wife as a tenancy by the entireties.

The marriage produced four children, one of whom is deceased. The oldest child is a male, 19 years of age, and is

1. See, e. g., *Pope v. O'Brien*, 213 So.2d 620 (1st D.C.A.Fla.1968); *Cole v. Cole*, 180 So. 2d 126 (1st D.C.A.Fla.1961); and *Smith v. State*, 118 So.2d 257 (2d D.C.A.Fla.1960).

self-supporting. The remaining two children are daughters, Leslie, age 16, and Julie, age 8.

The marital home was purchased entirely with funds of the husband. The present mortgage payments on the home are $85 per month. The only other assets of the parties were a savings account in the amount of $10,450 held in the name of the husband and a savings account in the sum of $4,500 held in joint name of husband and wife. At the time of commencement of the suit for dissolution of the marriage, the wife withdrew $4,300 from the joint savings account, $1,000 of which she paid to her attorney for his representation in the proceedings.

An employment expert testified at the final hearing. Based upon information related to him concerning the wife's total background, including her education, work experience, physical complaints (which were unsubstantiated by medical testimony), age and current activities, he testified that the wife is employable, that there is work available for her, and that she could earn up to $175 per week. There was also evidence adduced from the wife that on occasions after the separation she attended night art classes at which time the older daughter babysat for the younger.

In reviewing the trial court's amended final judgment in light of the record, the district court concluded that there was no abuse of discretion except (i) in failure of the trial court to reserve jurisdiction so that it might reconsider an extension of alimony in the light of changed circumstances because the wife testified that she was limited in seeking employment due to her responsibilities in caring for the children and also because of a physical problem with her arm; (ii) in adjudicating the wife solely responsible for the mortgage payments, taxes and insurance upon the marital home; and (iii) in requiring the wife to pay one-half of all future medical and dental expenses of the minor children. Accordingly, the district court of appeal modified the amended final judgment to provide for retention of jurisdiction for purposes of entertaining a petition for modification to continue the payments of alimony to her; to require that the husband be solely responsible for all future medical and dental expenses of the minor children; and to require the husband to pay the mortgage payments, taxes and insurance upon the marital home with the proviso that upon the eventual sale thereof the husband shall be entitled to a credit for one-half of such payments.

[1–5] We concur with the husband that the decision of the district court of appeal in the instant case conflicts with the principles of law enunciated in *Westerman v. Shell's City, Inc., supra.* It is clear that the function of the trial court is to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor and credibility of the witnesses appearing in the cause. It is not the function of the appellate court to substitute its judgment for that of the trial court through re-evaluation of the testimony and evidence from the record on appeal before it. The test, as pointed out in *Westerman, supra,* is whether the judgment of the trial court is supported by competent evidence. Subject to the appellate court's right to reject "inherently incredible and improbable testimony or evidence," [2] it is not the prerogative of an appellate court, upon a de novo consideration of the record, to substitute its judgment for that of the trial court. The district court in the case at bar found it to be an abuse of the trial court's discretion not to reserve jurisdiction so that the court might reconsider an extension of alimony in the light of changed circumstances. The district court of appeal "deem[ed] it prudent" to make such a

2. *Catlett v. Chestnut,* 107 Fla. 498, 146 So. 241 (1933); *Howell v. Blackburn,* 100 Fla. 114, 129 So. 341 (1930); and *World Ins. Co. v. Kincaid,* 145 So.2d 268 (1st D.C.A. Fla.1962), *cert. discharged,* 157 So.2d 517 (Fla.1963).

reservation in that the wife testified she was limited from seeking employment because of her responsibilities in caring for the children and also because of a physical problem with her arm. As indicated in *Elkins v. Elkins*, 287 So.2d 119, 120 (3d D.C.A.Fla.1973), cited by the district court of appeal, "A chancellor is not required as a matter of law to reserve jurisdiction to award periodic alimony in the future, rather it is a matter within his discretion." It appears from the record that the only evidence of the wife's physical problem was her own uncorroborated testimony. It further appears that the wife was content to leave the 8-year-old child in the charge of her 16-year-old sister during nighttime periods when she attended art classes. The trial judge was in a superior position to assess the significance of the wife's asserted physical impairment due to her ability to observe the demeanor of the wife while on the stand. She apparently concluded that neither the asserted physical disability nor responsibility to care for the minor children of the parties would be an impediment to the wife's seeking employment where there was uncontradicted testimony that such employment was available to her. Hence, her conclusion that reservation of jurisdiction to entertain petitions for modification of the alimony award was unnecessary cannot be said to be unsupported by the evidence nor an abuse of discretion. Although the appellate court concluded that it would be "prudent" in its judgment to include such a reservation of jurisdiction, it was not error for the trial court to fail to do so. *Goldfarb v. Robertson*, 82 So.2d 504, 506 (Fla.1955).

[6] With respect to mortgage payments, taxes and insurance upon the marital home and payment of future medical and dental expenses of the minor children, the record reflects that the trial judge predicated her decision upon the relative financial resources and earning capacity of the parties in light of the disposition of the parties' assets, including the marital home. The district court of appeal apparently placed substantial weight upon the fact that the husband's 1973 tax return disclosed an adjusted gross income in excess of $30,500. However, the evidence also disclosed that the husband, for the preceding five years, realized an average weekly net income of $247.25. Although the district court of appeal, and even this Court, might honestly strike the financial balance and division of assets between the parties in a different fashion, we do not deem it error or an abuse of discretion for the trial court to arrive at the result it reached.

Accordingly, the petition for writ of certiorari is granted, and the decision of the Third District Court of Appeal is quashed, with instructions to remand to the trial court for reinstatement of the amended final judgment.

It is so ordered.

OVERTON, C. J., and ROBERTS, ADKINS and ENGLAND, JJ., concur.

BOYD and HATCHETT, JJ., dissent.

J. T. CROSSLEY, Appellant,

v.

STATE of Florida, Appellee.

No. 47961.

Supreme Court of Florida.

May 28, 1976.

Rehearing Denied July 14, 1976.

Defendant was convicted in the Circuit Court, Polk County, Oliver L. Green, Jr., J., of possession of a firearm by a previously convicted felon, and he appealed. The Supreme Court, Hatchett, J., held that the statute underlying defendant's conviction was not unconstitutional because

served the cause of judicial economy and promoted the interest of all citizens in the speedy and just resolution of lawsuits.

I dissent to the majority opinion and would hold the above statute unconstitutional because it encroaches upon the rule-making authority of this Court.

Doyle Edward CONNER, Petitioner,

v.

Johnnie B. CONNER and L. Ralph Smith, Respondents.

No. 62089.

Supreme Court of Florida.

Oct. 13, 1983.

Application was filed for review of decision of the District Court of Appeal, 411 So.2d 899, which altered distribution of property in matrimonial action. The Supreme Court held that the determination that a party has been shortchanged in the distribution of property is an issue of fact and not one of law and, in making that determination, District Court of Appeal exceeded the scope of appellate review.

Reversed and remanded.

Boyd, J., filed an opinion concurring in part and dissenting in part in which Adkins, J., concurred.

Alderman, C.J., dissented and filed an opinion.

1. Divorce ⇐253(1), 286(8)

In determining that a party has been shortchanged in property distribution, court is resolving an issue of fact and not one of law and District Court of Appeal exceeded scope of appellate review in making that determination.

2. Divorce ⇐227(1)

Reasonableness of award of attorney fees in divorce action is an issue of fact to be determined by the trial court.

Gene D. Brown of Brown & Camper, Tallahassee, for petitioner.

Sidney L. Matthew of Gorman & Matthew, Tallahassee, Simon, Schindler & Tripp, Miami, and L. Ralph Smith, Jr. of Dearing & Smith, Tallahassee, for respondents.

PER CURIAM.

This cause, *Conner v. Conner*, 411 So.2d 899 (Fla. 1st DCA 1982), is before us pursuant to article V, section 3(b)(3) of the Florida Constitution as conflicting with *Shaw v. Shaw*, 334 So.2d 13 (Fla.1976). We have jurisdiction. We approve in part and quash in part the opinion of the district court.

[1] We agree with the First District's holding that the property distribution should be considered in light of this Court's opinion (issued after the decision of the trial court) in *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla.1980). Nonetheless, the determination that a party has been "shortchanged" is an issue of fact and not one of law, and in making that determination on the facts before it in the instant case, the district court exceeded the scope of appellate review. *Shaw v. Shaw*. Thus, the cause must be remanded for a further finding of fact as to what special equity, if any, the ex-wife has in property titled in the ex-husband's name as a result of her contributions to his business and political success.

[2] Consequently, the issue of attorney's fees must be revisited if any redistribution of property should materially change the parties' abilities to bear their own or the other party's attorney's fees. We note that the reasonableness of attorney's fees is also an issue of fact, to be determined by the trial court. *International Funding Corp. v. Decora Steel City, Inc.*, 317 So.2d 130 (Fla. 3d DCA 1975).

It is so ordered.

OVERTON, McDONALD, EHRLICH and SHAW, JJ., concur.

BOYD, J., concurs in part and dissents in part with an opinion, in which ADKINS, J., concurs.

ALDERMAN, C.J., dissents with an opinion.

BOYD, Justice, concurring in part and dissenting in part.

The district court of appeal created express and direct conflict with *Shaw v. Shaw*, 334 So.2d 13 (Fla.1976), when it substituted its judgment for that of the chancellor on a matter clearly falling within the area for exercise of the chancellor's sound discretion. Because the trial judge's exercise of discretion was not clearly erroneous or inequitable, it should have been affirmed.

There is no need for a remand for reconsideration in light of *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla.1980). The district court characterized that decision as a "landmark" allowing the use of lump-sum alimony as a means of effecting equitable distribution of property acquired during the marriage. If that was the import of the *Canakaris* decision then it appears to me that the circuit judge anticipated it. In addition to four years of partial support by way of rehabilitative alimony, the judge awarded permanent alimony in an amount sufficient to provide partial support and also lump-sum alimony consisting of $10,000 in cash, the husband's interest in the marital home, and satisfaction of the mortgage on the home by the husband. The former wife has also received, of course, her share of all other jointly held properties.

The circuit judge was the decision-maker in the best position to determine what would be an equitable distribution of the marital assets and the extent of the wife's contributions to the acquisition thereof, as well as the future resources, prospects, and needs of the parties. In substituting its judgment for his, the district court exceeded the proper scope of appellate review. There is nothing about the circuit court judgment that called for such disturbance by the district court.

The decision of the district court should be quashed with directions to affirm in full the trial court's decree.

ADKINS, J., concurs.

ALDERMAN, Chief Justice, dissenting.

I would deny review in this case because the decision of the district court of appeal in the present case does not expressly and directly conflict with a decision of another district court of appeal or of this Court.

THE FLORIDA BAR, Complainant,

v.

John N. MAYO, Respondent.

No. 62085.

Supreme Court of Florida.

Oct. 13, 1983.

In disciplinary proceeding, the Supreme Court held that payment for services rendered by means of check that is returned for insufficient funds is misconduct warranting suspension from practice of law for one year.

So ordered.

Ehrlich, J., concurred specially with an opinion, in which Overton and McDonald, JJ., joined.

Adkins, Acting C.J., dissented and filed opinion.

Attorney and Client ⇐58

Payment for services rendered by means of check that is returned for insufficient funds is misconduct warranting suspension from practice of law for one year. (Per Curiam with three Judges concurring

Ronald L. MARCOUX,
Appellant/Cross Appellee,

v.

Catherine M. MARCOUX,
Appellee/Cross Appellant.

No. 83-361.

District Court of Appeal of Florida, Fourth District.

Sept. 11, 1985.

Rehearing Denied Oct. 16, 1985.

On remand, 464 So.2d 542, after quashing of prior decision of the District Court of Appeal, 445 So.2d 711, in dissolution action, the District Court of Appeal, Barkett, J., held that trial court had before it competent and substantial evidence to support finding that husband's corporation was worth $300,000.

Affirmed.

Letts, J., dissented.

1. Appeal and Error ⇐1010.1(1)

So long as there is evidence to support trial court's finding, appellate courts cannot act as new fact finders instead of trial judge.

2. Divorce ⇐253(3)

Competent and substantial evidence supported finding in dissolution action that husband's corporation was worth $300,000.

Gary L. Rudolf of English, McCaughan & O'Bryan, Fort Lauderdale, for appellant/cross appellee.

William I. Zimmerman of William I. Zimmerman, P.A., Pompano Beach, for appellee/cross appellant.

BARKETT, Judge.

This case returns to us for review and reconsideration as a result of the quashing of our prior decision. *Marcoux v. Marcoux*, 464 So.2d 542 (Fla.1985). The supreme court did not consider the merits of the cause and restricted itself to correcting the view that *Conner v. Conner*, 439 So.2d 887 (Fla.1983) and *Kuvin v. Kuvin*, 442 So.2d 203 (Fla.1983), limited the scope of appellate review enunciated in *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla.1980).

[1] We have reviewed the record and the briefs of the parties. The major point of contention is the valuation placed on the husband's corporation. Accountants for both the husband and wife testified to conflicting values before the trial court ranging from $80,000 by the husband's accountant to approximately $300,000 by the wife's accountant. It is apparent from the final judgment that the court believed the wife's accountant. Accordingly, the issue here is not whether the trial court abused its discretion in fashioning a remedy based on the facts as he found them, but whether he was correct in his determination of the facts. So long as there is evidence to support the trial court's finding, appellate courts cannot act as new fact finders in the stead of the trial judge. *Shaw v. Shaw*, 334 So.2d 13, 16 (Fla.1976). As our supreme court points out in *Marcoux*, the error in *Conner* was that the district court acted as a *fact finder:*

> If a reviewing court finds that there is competent substantial evidence in the record to support a particular award, then there is logic and justification for the result and it is unlikely that no reasonable person would adopt the view taken by the trial court. Under these circumstances, there is no abuse of discretion.

Marcoux, 464 So.2d at 544.

[2] In reviewing the record in light of the above, we find that the trial court, as the fact finder, had before it competent and substantial evidence upon which to base its award. Accordingly, we affirm.

AFFIRMED.

HERSEY, C.J., concurs.

LETTS, J., dissents without opinion.

negligent and strictly liable to Ballard for selling Kaylo. It assessed compensatory damages to him in the amount of $1.8 million and determined that Owens–Corning also was liable for punitive damages. At this point, Owens–Corning immediately moved for a directed verdict on punitive damages, arguing it could not be punished for conduct outside of Florida. That motion was eventually denied by the trial court. In the punitive damage punishment phase, the plaintiff Ballard presented evidence as to the company's financial position, and Owens–Corning testified as to the small profits from Kaylo sales and the financial burdens placed on the company by a deluge of asbestos claims. The jury awarded $31 million in punitive damage claims.

Section 768.73, Florida Statutes (1995), entitled "Punitive damages; limitation" is implicated in this case. That statutory section provides in pertinent part:

> (1)(a) In any civil action based on negligence, strict liability, products liability, misconduct in commercial transactions, professional liability, or breach of warranty, and involving willful, wanton, or gross misconduct, *the judgment for the total amount of punitive damages awarded to a claimant may not exceed three times the amount of compensatory damages* awarded to each person entitled thereto by the trier of fact, except as provided in paragraph (b). However, this subsection does not apply to any class action.
>
> (b) If any award for punitive damages exceeds the limitation specified in paragraph (a), *the award is presumed to be excessive and the defendant is entitled to remittitur of the amount in excess of the limitation unless the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive in light of the facts and circumstances which were presented to the trier of fact.*

(Emphasis added.)

It may be a justiciable issue as to whether the exception in this statute applies to this award under this evidence. However, more important to me is the fact that I find this State through its judicial branch has absolutely no constitutional authority or jurisdiction to impose the penalty of punitive damages for the benefit of a nonresident of Florida for a defendant's conduct that occurred outside this state. We have no more authority to impose punitive damages in this case than we have to impose a criminal sentence for a crime that occurred in the state of Georgia.

Rupert B. BROWN, et ux., et al., Petitioners,

v.

The ESTATE OF A.P. STUCKEY, Sr., et al., Respondents.

No. 90,197.

Supreme Court of Florida.

Aug. 26, 1999.

Rehearing Denied Jan. 12, 2000.

Operators of thoroughbred horse farm sued their business partners, alleging intentional interference with business relationships, defamation, and intentional infliction of emotional distress. After the jury returned verdict for plaintiffs, the Circuit Court, Suwanee County, Royce Agner, J., granted defendants' motion for new trial. Plaintiffs appealed and the District Court of Appeal, 695 So.2d 796, reversed. The Supreme Court, Overton, Senior Justice, held that trial court did not abuse its discretion in granting new trial.

Decision of District Court of Appeals quashed and case remanded for new trial.

Pariente, J., filed a dissenting opinion in which Harding, C.J., joined.

1. New Trial ⇐72(5)

Trial judge's discretionary power to grant a new trial on the grounds that the verdict is contrary to the manifest weight of the evidence emanates from the common law principle that it is the duty of the trial judge to prevent what he or she considers to be a miscarriage of justice.

2. New Trial ⇐68.3

Role of the trial judge in ruling on motion for new trial is not to substitute his or her own verdict for that of the jury, but to avoid what, in the judge's trained and experienced judgment, is an unjust verdict.

3. New Trial ⇐65

On motion for new trial, trial judge has the responsibility to draw on his or her talents, his or her knowledge, and his or her experience to keep the search for the truth in a proper channel.

4. New Trial ⇐44(3), 69, 72(1)

Trial judge should always grant a motion for a new trial when the jury has been deceived as to the force and credibility of the evidence or has been influenced by considerations outside the record.

5. New Trial ⇐65

Trial judge's discretion permits the grant of a new trial although it is not clear, obvious, and indisputable that the jury was wrong.

6. New Trial ⇐163(1)

When a trial judge grants the motion for a new trial, he or she must articulate the reasons for the new trial in the order.

7. Appeal and Error ⇐977(3)

When reviewing the order granting a new trial, an appellate court must recognize the broad discretionary authority of the trial judge and apply the reasonableness test to determine whether the trial judge committed an abuse of discretion; if appellate court determines that reasonable persons could differ as to the propriety of the action taken by the trial court, there can be no finding of an abuse of discretion.

8. Appeal and Error ⇐977(3)

In reviewing grant of new trial, fact that there may be substantial, competent evidence in the record to support the jury verdict does not necessarily demonstrate that the trial judge abused his or her discretion.

9. New Trial ⇐72(5), 75(1)

Trial judge may order a new trial on the grounds that the verdict is inadequate or excessive, against the manifest weight of the evidence, or both.

10. New Trial ⇐75(1), 76(1), 77(2, 4)

New trial may be ordered on the grounds that the verdict is excessive or inadequate when (1) the verdict shocks the judicial conscience or (2) the jury has been unduly influenced by passion or prejudice.

11. Appeal and Error ⇐979(5)

Regardless of whether a new trial was ordered because the verdict was excessive or inadequate or was contrary to the manifest weight of the evidence, the appellate court must employ the reasonableness test to determine whether the trial judge abused his or her discretion.

12. New Trial ⇐72(9), 76(2)

Trial court did not abuse its discretion in granting defendants' motion for new trial in action for intentional interference with business relationships and defamation; trial court's order explained that award of loss of business profits of $253,500, when compared to prior earnings and best-scenario projected increases, was not sustainable by any reasonable view of evidence and that damages award was so contrary to any reasonable interpretation of evidence that trial judge was compelled to conclude that jury's findings regarding liability were similarly tainted.

Martin S. Page, Lake City, Florida, for Petitioners.

James C. Rinaman, Jr., Edward K. Cottrell, and Alan K. Ragan of Marks, Gray, Conroy & Gibbs, P.A., Jacksonville, Florida, for Respondents.

OVERTON, Senior Justice.

We have for review *Estate of Stuckey v. Brown*, 695 So.2d 796 (Fla. 1st DCA 1997), which reversed the trial judge's granting of a new trial on the grounds that the verdict was contrary to the manifest weight of the evidence. We find that the district court's decision directly conflicts with *Cloud v. Fallis*, 110 So.2d 669 (Fla. 1959), and our subsequent decisions in *Castlewood International Corp. v. LaFleur*, 322 So.2d 520 (Fla.1975); *Wackenhut Corp. v. Canty*, 359 So.2d 430 (Fla. 1978); *Baptist Memorial Hospital, Inc. v. Bell*, 384 So.2d 145 (Fla.1980); *Smith v. Brown*, 525 So.2d 868 (Fla.1988); and *E.R. Squibb & Sons, Inc. v. Farnes*, 697 So.2d 825 (Fla.1997). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const. For the reasons expressed, we conclude that the district court in this case erred in reversing the trial judge's order because it did not apply the broad discretion standard adopted in *Cloud*. Rather, the district court applied the substantial, competent evidence standard, which was rejected in *Cloud*. It is our desire in this opinion to clarify the principles that must be applied by the trial judge when considering a motion for new trial on the grounds that the verdict is contrary to the manifest weight of the evidence and the standard that must be applied by the appellate court on an appeal of the trial judge's decision to grant a new trial.

The relevant facts in this case reflect that, in 1981, Rupert and Lettie Brown entered into a partnership or joint venture agreement with Sarah and A.P. Stuckey for the operation of a thoroughbred horse farm in Suwannee County. Hostilities arose among the parties and, in 1989, the Stuckeys brought an action against the Browns for intentional interference with business relationships, defamation, and intentional infliction of emotional distress. The case went to trial and the jury returned a verdict for the Stuckeys, awarding both compensatory and punitive damages. The Browns filed a motion for a new trial, alleging that the verdict was contrary to the manifest weight of the evidence and that the jury had committed misconduct. The Browns did not file a motion for remittitur.[1] The trial judge granted the motion for new trial and explained in detail his reasons. The trial judge's order states as follows:

> This matter was before the Court upon the motion of Defendants for a new trial and, as an adjunct thereto, the Court-ordered interview of certain of the jurors after certiorari proceedings to the District Court of Appeal, First District, affirmed this Court's granting of Defendant's motion seeking such interviews.
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> The Court has heard testimony of four of the seated jurors, three of whom deliberated and returned the verdict in this cause, concerning alleged misconduct by the Foreman of the jury during the trial. Contradictions appear in their testimony and that testimony, standing alone, does not convince the Court that the Foreman/juror committed perjury during his voir dire examination, although counsel may have been misled by his answer concerning his knowledge of the attorney for the Defendants.
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> That testimony, together with that of the Defendants and the allegations of their motion for new trial filed December 21, 1994, indicates that the Foreman/juror, during the trial, may have visited the farm which was the subject of partition in this action and where much of the other counts in Plaintiff's Complaint are alleged to have arisen. How-

1. Because no such motion was made or ruled upon, the legal standards regarding the remittitur of excessive verdicts are inapplicable in this case.

ever, the testimony does not indicate that such act, if true, was used to influence the other jurors.

What their testimony does clearly indicate is that the jurors on this case either deliberately ignored or did not appreciate the instructions of this Court repeatedly given them over the course of this two week trial that they *were not* to discuss the case among themselves during recesses and that they *were not* to form or express *any* opinion about that case until the case had been given over to them for their deliberations and verdict. The Court finds from the more credible testimony received from the interviewed jurors that such discussions were an on-going circumstance during the course of the trial.

The trial of this multi-count and complex action consumed approximately two weeks. The witnesses were numerous, the exhibits literally covered volumes and the objections of counsel to various evidentiary matters were dependably recurring events. The Court has heard argument of counsel concerning the motion of Defendants for a new trial. The Court has also reviewed the specific findings and awards set forth in the verdict rendered by the jury.

Comparing all of the foregoing facets of this case and the evidence submitted, to the verdict rendered, this Court is compelled to conclude that the verdict is the product of a jury which was either (a) deceived as to the force and credibility of the evidence, or (b) influenced by considerations outside the record; i.e., bias, prejudice; or (c) both.

The Court finds that, under the facts of this case which has been in litigation since early 1989, the damages awarded are contrary to the manifest weight of the evidence and the instructions of law given the jury to guide it in its deliberations.

On Plaintiff's 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.

On the claim for the Estate of A.P. Stuckey for damages for defamation (limited in time from 1989 through early October, 1994), the jury awarded $50,000.00 as compensation. However, no reasonable evidence was adduced to support such award other than that concerning "loss of business" which was indistinguishably intertwined with the claim for interference with business. There was not evidence as to loss or suffering resulting from defamation for that period of time that would reasonably equate to $50,000.00 and the award can be seen by this Court only as one meant to punish rather than to fairly compensate as instructed by this Court.

The Court similarly views the jury's award on the claims for intentional infliction of emotional distress. The evidence on such claim was inseparable from that on the two claims discussed above. This Court finds that clearly the jury either misperceived the evidence or was improperly and unlawfully motivated in awarding such sums for a non-continuing tort. To the same effect was the jury's allocation of equity in the partition of lands of 65% in favor of Plaintiffs where the evidence reflected that the cash funds used to purchase the land and construct much of the improvements thereon flowed from the pockets of the Defendants.

> These considerations have led the Court to the conclusion that justice requires the motion of Defendants for new trial be granted. Because of the scope of the excessiveness of the damages when compared to reasonable inferences from the weight of the evidence, the Court cannot but conclude that the jury's findings as to the issues of liability and special interrogatory were similarly tainted, requiring that new trial be granted as to all issues. Defendants have stated additional grounds in support of their motion for new trial, but in light of the result stated above, the Court has found it unnecessary to consider them at this time. They may be considered upon proper objection during the retrial of this cause.

The Stuckeys appealed the order granting the new trial and the First District Court of Appeal reversed. The district court rendered two opinions. In its first opinion, the district court stated:

> 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.

Estate of Stuckey v. Brown, 688 So.2d 438, 439–40 (Fla. 1st DCA 1997)(emphasis added). Recognizing that it applied an incorrect standard in determining whether the trial judge erred in ordering a new trial, the district court issued a second opinion, which reads:

> In *Miller v. Affleck*, 632 So.2d 79 (Fla. 1st DCA 1993), we recognized the natural tension which exists between applying the abuse of discretion standard and restricting the trial court from usurping a jury's fact-finding responsibility by becoming a seventh juror with veto power. In *Miller*, we announced 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:
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> > The general standard of review of an order granting a new trial is whether the trial court has abused its discretion. *Smith v. Brown*, 525 So.2d 868 (Fla.1988). If an abuse of discretion has occurred, however, the appellate court will reverse the order granting a new trial. *Lee v. Southern Bell Tel. and Tel. Co.*, 561 So.2d 373 (Fla. 1st DCA 1990). 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. *Florida First Nat'l Bank of Jacksonville v. Dent*, 404 So.2d 1123 (Fla. 1st DCA), *dismissed*, 411 So.2d 381 (Fla.1981). *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. Lee, supra* at 380, citing *Crown Cork & Seal Co., Inc. v. Vroom*, 480 So.2d 108 (Fla. 2d DCA 1985).
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> *Id.* at 80.

Estate of Stuckey v. Brown, 695 So.2d 796, 797 (Fla. 1st DCA 1997)(emphasis added). The district court's decision that a trial judge may grant a motion for new trial "only when it is clear, obvious, and indisputable that the jury was wrong" is in express and direct conflict with this Court's decisions in *Cloud* and its progeny that afford a trial judge broad discretion in ruling on a motion for new trial. As explained below, the quoted principle originated in a district court of appeal decision applying the substantial, competent evidence standard that was issued prior to this Court's rejection of that standard in *Cloud*.

Purpose of Granting New Trial Because the Verdict is Contrary to the Manifest Weight of the Evidence

Prior to this Court's decision in *Cloud*, Florida appellate courts applied two doc-

trines when reviewing an order for a new trial based on the verdict being contrary to the manifest weight of the evidence. The first was the substantial, competent evidence doctrine. Under this doctrine, trial judges were directed to grant a motion for a new trial only when the verdict was not supported by substantial, competent evidence. Appellate courts would review the record and reverse the order if, in their view, there was substantial, competent evidence in support of the jury's verdict. The second was the broad discretion doctrine. Under this doctrine, the trial judge was credited with having a superior vantage point at trial and given the responsibility of determining if the verdict was unjust. Consequently, the trial judge was given broad discretion to grant a new trial if he or she concluded that the verdict was contrary to the manifest weight of the evidence. In *Cloud*, this Court resolved the conflict by approving the broad discretion doctrine and rejecting the substantial, competent evidence doctrine.

[1, 2] The trial judge's discretionary power to grant a new trial on the grounds that the verdict is contrary to the manifest weight of the evidence is the only check against a jury that has reached an unjust decision on the facts. This discretionary power emanates from the common law principle that it is the duty of the trial judge to prevent what he or she considers to be a miscarriage of justice. *See Aetna Cas. & Sur. Co. v. Yeatts*, 122 F.2d 350 (4th Cir.1941). The role of the trial judge is not to substitute his or her own verdict for that of the jury, but to avoid what, in the judge's trained and experienced judgment, is an unjust verdict. Thus, the trial judge does not have broad discretion to enter a judgment for a litigant or to deny a litigant a jury trial. As our cases illustrate, this discretionary authority of a trial judge to order a new trial when the verdict is contrary to the manifest weight of the evidence has been applied to the benefit of both plaintiffs and defendants who have been victimized by unjust verdicts.

The Law in Florida

This Court's seminal decision in *Cloud v. Fallis*, 110 So.2d 669 (Fla.1959), governs the broad discretion of a trial judge to grant a new trial when the verdict is contrary to the manifest weight of the evidence. In *Cloud*, the plaintiff sought to recover damages for his child's death, allegedly caused by the defendant's negligent operation of his car. The defendant pleaded that the parents were negligent in allowing the child to play in the street. The jury returned a verdict for the defendant. The plaintiff moved for a new trial, and the trial judge granted the motion, finding that the verdict of the jury was contrary to the manifest weight of the evidence. The trial judge noted in his order that at the time of the accident the defendant was traveling at an excessive speed through an area known by the defendant to have many children in it and that the jury had held the child's parents to a greater degree of responsibility for the care of the child than the law required. On appeal, the district court noted that some appellate courts applied the broad discretion doctrine and other appellate courts applied the substantial, competent evidence doctrine. The district court opted to follow the broad discretion doctrine and it affirmed the trial court's order of a new trial. The district court's decision was appealed and this Court determined that the issue was whether "the so-called 'broad discretion' rule or the so-called 'substantial, competent evidence' rule should be applied" in this state. *Cloud*, 110 So.2d at 671. This Court upheld the district court's decision, stating, "*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* . . . ." *Id.* at 672 (emphasis added). The *Cloud* Court explained the trial judge's duty in considering a motion for a new trial based on the verdict being against the manifest weight of the evidence:

> When a motion for new trial is made it is directed to the sound, broad discretion of the trial judge, who because of his contact with the trial and his observation of the behavior of those upon whose testimony the finding of fact must be based 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.
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> 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.*

Id. at 673 (citations omitted)(emphasis added). Regarding the review of orders granting new trial on these grounds, this Court stated that "[i]nasmuch 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." *Id.* This Court also explained that the party challenging the order granting a new trial

> cannot content himself simply to submit the record and expect the order to be upset if the reviewing body finds, in cold type without the benefit of any of the circumstances known to the trial judge, and never to be known to the appellate court, that there appears to be some "substantial competent evidence" supporting the verdict.

Id.

The district court in the present case applied the principle of the substantial, competent evidence doctrine set forth in *Grand Assembly of Lily White Security Benefit Ass'n v. New Amsterdam Casualty Co.*, 102 So.2d 842 (Fla. 2d DCA 1958). This case was decided by the Second District Court of Appeal eleven months prior to this Court's decision in *Cloud.* In *Grand Assembly,* the district court, in attempting to define "manifest weight of the evidence," determined that "manifest means clearly evident, clear, plain, indisputable." 102 So.2d at 846 (quoting *Schneiderman v. Interstate Transit Lines,* 331 Ill.App. 143, 72 N.E.2d 705, 706 (1947), *aff'd,* 401 Ill. 172, 81 N.E.2d 861 (1948)). The district court in *Grand Assembly* applied this definition to its review of the order granting a new trial and concluded that "there is substantial competent evidence to support the verdict so that it should stand and that the trial court should not substitute its conclusions based on the evidence for the views and conclusions of the jury." *Id.*

This Court has consistently followed the principles set forth in *Cloud.* In *Castlewood International Corp. v. LaFleur,* 322 So.2d 520, 522 (Fla.1975), we reiterated that a grant of a new trial is of such firmness that it should not be disturbed except upon a clear showing of abuse. This Court also stated that an appellant seeking to overturn such a ruling has a heavy burden and any abuse of discretion by the trial court must be clear from the record.

In *Wackenhut Corp. v. Canty,* 359 So.2d 430 (Fla.1978), the jury awarded the plaintiff compensatory and punitive damages. The trial judge found the punitive damage award to be so grossly excessive as to shock the judicial conscience and ordered a new trial as to damages in lieu of a remittitur that had been rejected by the plaintiff. The order did not contain a finding that the verdict was contrary to the manifest weight of the evidence. The order also did not explain what about the verdict shocked the judge's conscience. On appeal, the district court reversed, finding substantial, competent evidence to support the jury's verdict. On review, this Court found that the district court's decision clearly conflicted with *Cloud* and its rejection of the substantial, competent evidence rule. This

Court noted that, to facilitate intelligent review, the order must contain reasons that produce the need for a new trial and also must either demonstrate the impropriety of the verdict or show that the jury was influenced by considerations outside the record. Because the order in *Wackenhut Corp.* did not explain why the verdict was excessive, this Court upheld the district court's decision.

In *Baptist Memorial Hospital, Inc. v. Bell*, 384 So.2d 145 (Fla.1980), a verdict was returned in favor of the plaintiff and the trial judge granted a motion for a new trial, expressly finding that the verdict was grossly excessive and contrary to the manifest weight of the evidence. The district court of appeal reversed, concluding that the verdict was neither excessive nor contrary to the manifest weight of the evidence. This Court quashed the district court decision because it failed to properly apply the broad discretion rule granted to trial courts in *Cloud*. We emphasized that, in reviewing the trial court's order, "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." *Id.* at 146.

In *Smith v. Broum*, 525 So.2d 868 (Fla. 1988), we emphasized that the reasonableness standard applied to the trial court's determination that a jury verdict was against the manifest weight of the evidence. Justice Grimes, writing for the Court, succinctly explained the roles of the trial and appellate courts:

> [T]he 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.

Id. at 870.

In *E.R. Squibb and Sons, Inc. v. Farnes*, 697 So.2d 825 (Fla.1997), we recently repeated that the abuse of discretion standard and the reasonableness test apply to the review of an order for new trial. We noted that, "although there was an evidentiary basis for the jury verdict, there also was extensive evidentiary support for the trial court's ruling," and concluded that "reasonable persons could agree with the trial court." *Id.* at 827–28.

[3–6] To summarize, this Court has repeatedly held that the trial judge has broad discretion in ruling on a motion for a new trial on the grounds that the verdict is contrary to the manifest weight of the evidence. A trial judge has the responsibility to draw "on his [or her] talents, his [or her] knowledge, and his [or her] experience to keep the search for the truth in a proper channel," and the trial judge should always grant a motion for a new trial when "the jury has been deceived as to the force and credibility of the evidence or has been influenced by considerations outside the record." *Cloud*, 110 So.2d at 673. The trial judge's discretion permits the grant of a new trial although it is not "clear, obvious, and indisputable that the jury was wrong." When a trial judge grants the motion for a new trial, he or she must articulate the reasons for the new trial in the order.

[7, 8] When reviewing the order granting a new trial, an appellate court must

recognize the broad discretionary authority of the trial judge and apply the reasonableness test to determine whether the trial judge committed an abuse of discretion. If an appellate court determines that reasonable persons could differ as to the propriety of the action taken by the trial court, there can be no finding of an abuse of discretion. The fact that there may be substantial, competent evidence in the record to support the jury verdict does not necessarily demonstrate that the trial judge abused his or her discretion.

[9] A trial judge may order a new trial on the grounds that the verdict is inadequate or excessive, against the manifest weight of the evidence, or both. In *Cloud*, the new trial was ordered because the verdict was contrary to the manifest weight of the evidence. In *Wackenhut*, the new trial was ordered because the trial judge found the punitive damages award to be excessive and the plaintiff rejected a remittitur. In *Baptist Memorial Hospital*, the new trial was based on the verdict being excessive and contrary to the manifest weight of the evidence.

[10, 11] Regarding inadequate or excessive verdicts, this ground is a corollary of the ground asserting that the verdict is contrary to the manifest weight of the evidence. A new trial may be ordered on the grounds that the verdict is excessive or inadequate when (1) the verdict shocks the judicial conscience or (2) the jury has been unduly influenced by passion or prejudice. The procedure under section 768.74, Florida Statutes (1997), for remittitur and additur apply only upon the proper motion of a party. Regardless of whether a new trial was ordered because the verdict was excessive or inadequate or was contrary to the manifest weight of the evidence, the appellate court must employ the reasonableness test to determine whether the trial judge abused his or her discretion.

The Instant Case

[12] In the instant case, the Browns filed a motion for new trial. The Browns did not file a motion for remittitur. The trial judge granted the motion for a new trial and set forth in the order his reasons for finding the jury award to be both excessive and contrary to the manifest weight of the evidence. For example, the order explains that the award of loss of business profits in the amount of $253,500, when compared to prior earnings and the best-scenario projected increases, was not sustainable by any reasonable view of the evidence. The order also explains that the damages award was so contrary to any reasonable interpretation of the evidence that the trial judge was compelled to conclude that the jury's findings regarding liability were similarly tainted. The trial judge recognized the requirement to find that the jury was deceived as to the force and credibility of the evidence or influenced by considerations outside the record. The district court determined that the trial judge abused his discretion, finding that it was not clear, obvious, and indisputable that the jury was wrong. In so holding, the district court failed to recognize the trial judge's broad discretion in ruling on the motion for a new trial, failed to apply the reasonableness test in determining whether the trial judge abused his discretion, and actually applied a principle that is used in the substantial, competent evidence doctrine.

Upon reviewing the record, we find that the trial judge acted within his broad discretion in granting the motion for a new trial. Regarding the jury award for loss of business profits, the record reveals that the partnership earned very limited profits during the applicable five-and-one-half-year period. The Stuckeys' tax returns reflect that in 1987 there was a net partnership deficit of $5,911.36 and in 1988 there was a net partnership profit of $13,647.63. Contrary to these tax returns, Mrs. Stuckey testified that the average net income from the partnership was $20,000 to $25,000 until 1988, and that she and her husband had projected annual net profits over the next five to six years to be be-

tween $35,000 and $40,000. Even assuming Mrs. Stuckey's projection to be accurate, the maximum resulting loss would be $220,000 for the five-and-one-half-year period. The jury, however, returned a loss of $384,000. Without going into detail as to the other items of damage, it is clear from this order that the trial judge was not acting as a seventh juror in this case but that the judge believed the jury had been deceived as to the force and credibility of the evidence. This case involves complex issues and circumstances, and the trial judge was better positioned than any other person to comprehend the processes by which the ultimate decision of the jury was reached. As noted in *Cloud*, many of these are circumstances that can be known only by the trial judge and do not appear in the cold record on appeal. Accordingly, while reasonable persons might differ, we find that the action of the trial judge was not unreasonable and the grant of a new trial should have been affirmed.

We quash the decision of the First District Court of Appeal and direct that this case be remanded to the trial court for a new trial. We also disapprove *Miller v. Affleck*, 632 So.2d 79, 80 (Fla. 1st DCA 1993); *Lee v. Southern Bell Telephone & Telegraph Co.*, 561 So.2d 373, 380 (Fla. 1st DCA 1990); and *Crown Cork & Seal Co. v. Vroom*, 480 So.2d 108, 110 (Fla. 2d DCA 1985), cited by the district court below, to the extent they hold that a trial judge may grant a motion for new trial only when it is "clear, obvious, and indisputable that the jury was wrong."

It is so ordered.

SHAW, WELLS and ANSTEAD, JJ., concur.

PARIENTE, J., dissents with an opinion, in which HARDING, C.J., concurs.

PARIENTE, J., dissenting.

I would affirm the First District's decision in *Estate of Stuckey v. Brown*, 695 So.2d 796 (Fla. 1st DCA 1997), for two reasons. First, there is no conflict with *Cloud v. Fallis*, 110 So.2d 669 (Fla.1959). *Cloud v. Fallis* and its progeny address the appellate standard of review as an abuse of discretion, but do not elaborate on the trial court's standard for determining what constitutes manifest weight of the evidence. The issue decided by the First District is what constitutes "manifest weight of the evidence" to entitle the trial court to set aside a jury verdict.

Second, in my opinion, the trial court abused its discretion in granting a new trial. The trial court's order does not explain how the jury was deceived about the force of the evidence. There is also no basis to support the trial court's statement in the order that the damages awarded by the jury were duplicative. It appears that the trial court simply disagreed with the jury's assessment of damages and did no more than impermissibly sit as a seventh juror, thereby usurping the jury's fact-finding function.

HARDING, C.J., concurs.

Larry WHITE, Petitioner,

v.

Harry K. SINGLETARY, Jr., etc., Respondent.

No. 93,252.

Supreme Court of Florida.

Sept. 2, 1999.

Application for Review of the Decision of the District Court of Appeal—Certified Direct Conflict of Decisions Third District—Case No. 98-288.