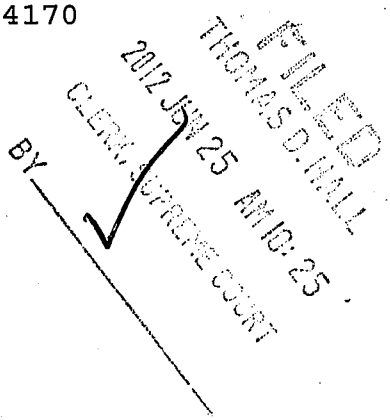
IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC11-1467

Florida Bar No. 184170



CHARLES VAN, SR., and RILLA VAN, as husband and wife,

Petitioners,

vs.

DANIEL J. SCHMIDT,

Respondent.

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

BRIEF OF RESPONDENT ON THE MERITS

DANIEL J. SCHMIDT

(With Appendix)

Law Offices of
RICHARD A. SHERMAN, P.A.
Richard A. Sherman, Sr., Esquire
James W. Sherman, Esquire
Suite 302
1777 South Andrews Avenue
Fort Lauderdale, FL 33316
(954) 525-5885 - Broward

and

Sonya Wesner, Esquire
Law Offices of
PATRICIA E. GARAGOZLO
Jacksonville, FL

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LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525-5885

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LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525-5885

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LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525-5885

POINTS ON APPEAL

I. THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL DOES NOT CONFLICT WITH KUEBLER, OR WITH BROWN AND E.R. SQUIBB AND SONS, AND IS CONSISTENT WITH THIS COURT'S HOLDINGS IN EASKOLD AND WALD.

II. THE DISTRICT COURT'S OPINION IN SCHMIDT IS CONSISTENT WITH EASKOLD, WALD, AND OTHER FLORIDA CASES WHICH HOLD THAT A JURY MAY REJECT EXPERT MEDICAL EVIDENCE FOR LAY EVIDENCE; WITH WALL, SCHOEPPL, AND BARTON, INFRA, WHICH HOLD THAT A JURY MAY INTERPRET PHOTOGRAPHIC EVIDENCE OF VEHICLE DAMAGE WITHOUT EXPERT TESTIMONY; AND JORDAN AND HERNANDEZ, INFRA, WHICH HOLD THAT A TRIAL COURT'S ORDER MUST BE SUPPORTED BY THE RECORD.

III. THE PETITIONER'S CLAIM THAT IF THIS COURT AGREES WITH THE FIRST DISTRICT THEN THE ACTION SHOULD BE REMANDED TO THE TRIAL COURT FOR FURTHER PROCEEDINGS IS BASELESS.

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525-5885

INTRODUCTION

The Respondent/Defendant, DANIEL J. SCHMIDT, will be referred to as Schmidt and/or Defendant.

The Petitioners/Plaintiffs, CHARLES VAN, SR. and RILLA VAN, will be referred to in the singular as Van and/or Plaintiff.

The Record on Appeal will be designated by the letter "R."

The Appendix to the Brief will be designated by the letter "A."

All emphasis in the Brief is that of the writer, unless otherwise indicated.

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525-5885

STATEMENT OF THE FACTS AND CASE

This case stems from a rear-end collision between the Plaintiff and Defendant, which the Plaintiff claimed caused him significant injury to his back, and which allegedly caused him to undergo a cervical spinal fusion. The Defendant did not contest liability, but believed that the accident did not cause the Plaintiff's injury. Evidence showed a history of significant pre-existing back injuries which were the actual cause of his surgery.

Specifically, the Plaintiff had a medical history which included a prior cervical fusion in 1991 and injuries from a 1998 automobile accident, in which Mr. Van was ejected from his vehicle. He was also diagnosed with emphysema and spinal degenerative disease prior to the accident.

The District Court's opinion sets out the facts adduced at trial as follows:

> Here, in addition to the medical experts, the jury heard testimony from several witnesses, including the plaintiffs, Mr. and Mrs. Van. Evidence and testimony introduced at trial portrayed the accident as a mere fender-bender. The jury examined photographs depicting the damage to the Vans' vehicle, which was described by Mr. Van as a crack or scrape on the back bumper. Mr. Van further testified that the total damage to his vehicle was estimated to be approximately $800; at the time of trial (about 2½ years after the accident) the damage to the bumper had not been repaired; and the vehicle was still being driven by Mrs. Van.
>
> Other testimony offered at trial demonstrated that Mr. Van had an extensive

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525-5885

medical history, which included a prior surgery, another automobile accident, and several significant medical diagnoses. Mr. Van testified that he had undergone a prior cervical spinal fusion surgery in 1991. Mr. Van testified that he had been in an automobile accident in 1998, in which he was ejected from the vehicle. Mr Van testified that he had a back sprain shortly before the 2007 accident. In addition, medical records were introduced at trial revealing that Mr. Van had visited a hospital in 2006, complaining of severe lower back pain; that Mr. Van had visited the hospital less than a month before the 2007 accident, complaining of the same symptoms; and that he was taking the pain medication, Lortab, at the time of the 2007 accident.

Through the testimony of the medical experts, the jury heard that Mr. Van had pre-existing degeneration of his cervical spine. On cross-examination, Mr. Van revealed a number of other medical conditions affecting his overall health. Mr. Van testified that he had been diagnosed with emphysema in the early 1970's and that he had been hospitalized four times in the year leading up to trial for breathing problems, clogged lungs, pneumonia, and cardiac surgery.

Testimony introduced at trial also demonstrated inconsistencies in Mr. Van's story on material issues in the case, placing his credibility into question. Despite Mr. Van's testimony regarding his extensive medical history and pre-existing medical conditions, and that he had not been employed since the 1970's, he nonetheless testified that before the 2007 automobile accident he was able to work around the house, do carpentry work or mechanic work, and swim, run, and play with his grandkids. Mr. Van testified that after the 2007 accident, he was unable to engage in these activities.

When Mr. Van sought medical treatment following the 2007 accident, he failed to disclose to the treating physician that he had undergone a prior cervical spinal fusion surgery or that he had been involved in an earlier automobile accident. Mr. Van

> disclosed the prior cervical spinal fusion surgery only upon inquiry by his neurosurgeon, who discovered indicia of an earlier surgery after reading the results of an MRI scan he had ordered of Mr. Van's spine. During trial, the jury observed Mr. Van wearing a neck brace. During the cross-examination of Mr. Van's neurosurgeon, the physician testified that there was no medical necessity for Mr. Van to be wearing the neck brace.
>
> Schmidt v. Van, 65 So. 3d 1105, 1109-1110 (Fla. 1st DCA 2011).

Due to the extensive credibility issues of the Plaintiff, as well as the strong impeachment of the Plaintiff's experts, and in light of the minimal damage to the vehicles and the extensive history of pre-existing medical conditions, the jury rejected the Plaintiff's claims and found that he did not suffer a permanent injury as a result of the 2007 accident.

The Plaintiff moved for a new trial arguing that the Verdict was against the manifest weight of the evidence. The trial court, without a hearing, granted the Motion for New Trial. The trial court relied upon legally erroneous law in doing so, but also stated that the Verdict was against the manifest weight of the evidence.

The court also relied four erroneous legal reasons in doing so. The relevant paragraphs are as follows:

> 3. The determination of causation in this case is not one that could be made by a lay observer, such as a bullet or knife wound. In this case, expert testimony was necessary for the jury to determine whether or not the rear-end collision had any causal

relationship to Plaintiff's spinal fusion.

* * *

While the degree of damage to the vehicles in the 2007 collision may be circumstantial evidence of lack of causation, there was no expert testimony from which non-experts could reasonably draw that conclusion. None of the doctors testified that the degree of damage to the vehicles was a factor in his opinion as to causation. There was no expert testimony regarding accident reconstruction or how such factors as speed, force, angles, strength of materials, or other such technical matters might affect causation of the injury complained of. No reasonable juror would conclude "no causation" **in the absence of such expert testimony** in light of the opinions of the three doctors (Emphasis added).

* * *

8. **In summary, the issue of causation under the facts of this case required expert testimony in order for non-expert jurors to make a valid finding.** Three credible and informed doctors--one a defense witness--testified without contradiction that Plaintiff's injury as caused at least in part on the 2007 collision. Had the jury found causation but allocated only a minor portion of the causation to the collision, a new trial would be unlikely. But, under the facts of this case, a verdict of no causation is contrary to the manifest weight of the evidence. This ruling on Plaintiff's motion for a new trial renders Plaintiffs' remaining motions moot (Emphasis added).

(Order Granting Motion for New Trial, dated July 15, 2010.)

(R, 563-568)

Additionally, the court found that:

> "No reasonable juror, when considering Plaintiff's credibility, would conclude that he would have chosen to not report cervical pain for sixteen (16) years prior to the 2007 collision in order to fabricate causation in that collision.
>
> (R, 563-568)

This finding is in contradiction to evidence presented at trial that the Plaintiff reported to the hospital in 2006 and one month before the accident in 2007, complaining of severe back pain. It also ignores the fact that the Plaintiff was taking pain medication, Lortab, at the time of the accident.

The First District Court of Appeal recognized the trial court's Opinion was based upon erroneous rules of law which were in conflict with this Honorable Court's Opinion in cases including Easkold v. Rhodes, 614 So. 2d 495 (Fla. 1993), and held that the jury was free to accept or reject the medical testimony in favor of lay evidence:

> It is well-established that a jury may reject any testimony, including testimony of experts. *See Shaw v. Puleo*, 159 So.2d 641, 644 (Fla.1964)(holding the jury is free to "accept or reject the testimony of a medical expert just as it may accept or reject that of any other expert"); *Frank v. Wyatt*, 869 So.2d 763 (Fla. 1st DCA 2004). Indeed, the Standard Jury Instruction (Civil) 601.2(b) which was appropriately read to the jury in this case, provides that the jury "may accept [expert witness] opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinion expressed, and all the other evidence in the case." However, "the jury's ability to reject [expert] testimony must be based on some reasonable basis in the

> evidnce." *Wald v. Grainger*, 64 So.3d 1201, 1205-06 (Fla.2011). Lay testimony or evidence which conflicts with the expert testimony, as well as conflicting testimony by the plaintiff may provide a reasonable basis for rejecting expert testimony. *Id.*
>
> Schmidt, 1108.
>
> * * *
>
> Based on the evidence and testimony introduced at trial and the instructions presented to it, the jury could properly reject the testimony of the medical experts who opined that Mr Van's injuries were caused at least in part by the automobile accident and conclude that Mr. Van suffered no injury as a result of the 2007 accident. By failing to recognize the jury's prerogative to reject the expert testimony on causation, particularly in light of the lay testimony which conflicted with the expert testimony, the trial court erred in concluding that the manifest weight of the evidence was contrary to the jury verdict. *See Easkold v. Rhodes*, 614 So.2d 495 (Fla.1993). Accordingly, we find that the trial court abused its discretion in granting the motion for new trial.
>
> Schmidt, 1109-1110.

Subsequently, the Fourth District Court of Appeal entered its Opinion in Kuebler v. Ferris, 65 So. 3d 1154 (Fla. 4th DCA 2011) questioning the holding of Schmidt, based upon what it perceived to be a lack deference to the trial court's ruling:

> Despite this deferential standard, some courts have held that a trial court may abuse its discretion by granting a new trial where the articulated reasons set forth in the order have no basis in the record or are based on incorrect conclusions of law. *See Schmidt v. Van*, 65 So.3d 1105 (Fla. 1st DCA 2011). For instance, in *Jordan v. Brown*, 855 So.2d 231 (Fla. 1st DCA 2003), the trial

court granted a new trial where the jury found that the admitted accident was not a legal cause of injury to the plaintiff, and the court reasoned that the evidence was "undisputed" that the plaintiff suffered an injury which was permanent in nature. Explaining that the entire case "rose and fell" on the plaintiff's testimony, and her testimony was substantially impeached, the appellate court concluded that the trial court's reasons for granting a new trial were clearly erroneous, because the evidence was not "undisputed."

In *Schmidt,* the trial court granted a new trial on the basis that the verdict finding the accident in question did not cause the plaintiff's injuries was contrary to the manifest weight of the evidence, because the all three medical expert witnesses testified that it did, including a defense witness. The trial court dismissed the plaintiff's credibility issues, because "no reasonable juror would conclude `no causation' ... in light of the opinions of the three doctors." The appellate court reversed, finding that conclusion clearly erroneous, because the jury could reject any testimony, including that of experts. The trial judge erred in failing to defer to the jury where the jury could have come to its verdict based upon the lay testimony. "By failing to recognize the jury's prerogative to reject the expert testimony on causation, particularly in light of the lay testimony which conflicted with the expert testimony, the trial court erred in concluding that the manifest weight of the evidence was contrary to the jury verdict." *Id.* at 1110.

Some of the language in these cases seems to contradict the holding of *Brown* that the appellate court should defer to the discretion of the trial court in granting a new trial, even where there is competent substantial evidence to support the jury verdict. In both *Jordan* and *Schmidt* the court seems to have concluded that because competent substantial evidence supported the jury's verdict, which the trial court disregarded, the trial court abused its

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525-5885

> discretion. We think this runs afoul of the admonition in *Brown v. Estate of Stuckey* that "[t]he 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." *Id.* at 498.
>
> Kuebler, 1157-1158.

Notably, Judge Damoorgian, in his dissenting Opinion, recognized that the First District Court of Appeal's Opinion in Schmidt was consistent with the longstanding precedent of this Court in Easkold v. Rhodes, 614 So. 2d 495 (Fla. 1993):

> I dissent for the same reason that the majority acknowledges that the "[c]ircumstantial evidence in this case also permits an inference that the plaintiff suffered no injury." Even if the defense expert testified that the plaintiff may have been in need of some temporary medical treatment after the accident, the jury was presented with other evidence that the accident did not cause the plaintiff any injuries. The majority concedes that were we to apply "the same rationale as was used in *Jordan* and *Schmidt*, we would have to find that the trial court abused its discretion." The rationale is based on a fundamental principle in our civil jury system that the jury is free to accept or reject some, all, or none of the evidence introduced at trial. *Schmidt v. Van*, 65 So.3d 1105, 1107-08 (Fla. 1st DCA 2011); *see also Corbett v. Wilson*, 48 So.3d 131, 134 (Fla. 5th DCA 2010) ("The jury is free to weigh the credibility of an expert witness, just as any other witness, and to reject such testimony, even if uncontradicted.") (citation omitted). Moreover, I do not agree with the majority that reversal in this case would run afoul of the Florida Supreme Court's opinion in *Brown v. Estate of Stuckey*, 749 So.2d 490, 497 (Fla. 1999) ("The trial judge should only intervene when the *manifest* weight of the

> evidence dictates such action.'") (emphasis in original). A trial judge's discretion is not unfettered. Where the trial judge's premise for granting a new trial was based on an incorrect conclusion of law, or where the evidence in the record does not support the trial court's determination, there is an abuse of discretion. *Schmidt*, 65 So.3d at 1107-08.
>
> The majority concedes that there was no record basis to support the trial court's conclusion that the evidence was 'undisputed' that an injury occurred. In fact, there was conflicting evidence on the issue of whether the plaintiff suffered any injury from the accident. "By failing to recognize the jury's prerogative to reject the expert testimony on causation, particularly in light of the lay testimony which conflicted with the expert testimony, the trial court erred in concluding that the manifest weight of the evidence was contrary to the jury verdict." *Id.* At 1110 (citation omitted).
>
> Kuebler, 1159-1160 (Damoorgian, J. dissenting).

The Petitioner now complains that Van v. Schmidt is in conflict with Kuebler v. Ferris, supra, and also with Brown v. Estate of A.P. Stuckey, 749 So. 2d 490 (Fla. 2000) and E.R. Squibb and Sons, Inc. v. Farnes, 697 So. 2d 825 (Fla. 1997).

SUMMARY OF ARGUMENT

It is respectfully submitted that the key issue on this Appellate Review is:

> "When an Order granting new trial contains errors of law, but also recites the mantra that the Verdict is against the manifest weight of the evidence, what is the correct standard of review, i.e. is it "*de novo,*" or "abuse of discretion."

It is submitted that since there are errors of law in the Order Granting New Trial, and it is unknown to what extent these errors of law are factored into the grant of a new trial, that the entire Order should be reviewed *de novo*.

There is obviously a reason the Florida Supreme Court has always required a trial court to write a detailed Order giving its reasons for granting a new trial, namely to make it amenable to appellate review, and this bolsters the premise that the words "against the manifest weight of the evidence" are not supposed to cure an Order which is based on incorrect law.

The First District Court of Appeal properly reversed the trial court's Order because the Order Granting New Trial contained erroneous conclusions of law, contrary to Florida law.

1. Specifically, the trial Order found that the jury could not reject uncontroverted medical testimony in favor of lay evidence such as photographs of vehicle damage showing merely a scratch.

2. The trial Order found that the jury could not reject the Plaintiff's experts' testimony, despite the severe impeachment of

the Plaintiff and his experts, and the abundance of evidence showing a complete lack of candor by the Plaintiff, in contradiction to this Court's Opinions in Rhodes v. Easkold and Wald v. Grainger.

3. The trial Order also erroneously concluded that the jury could not interpret the photographs showing minimal damage to the vehicle on the Plaintiff's injuries, and the degree of impact without the aide of expert testimony such as an accident reconstructionist. This conclusion is obviously contrary to Florida law.

4. Finally, the trial Order erroneously stated that the Plaintiff had not complained of pain to his back in 16 years, despite the fact there was evidence showing he had two prior back injuries in 2006 and 2007, and was on pain medication at the time of the accident. This is a clear error of fact in the trial Order.

There is no conflict between the present case and Kuebler because there are different underlying facts. Furthermore, even the dissent in Kuebler recognizes that the jury is entitled to reject undisputed medical testimony in favor of lay evidence, which is exactly what the jury did in the present case. There is also no dispute between Brown and E.R. Squibb and Sons, because in this case the First District reversed based upon a finding that the trial court's Order contained erroneous rules of law. The holdings of Brown and E.R. Squibb and Sons set forth the test that a District Court must find that reasonable persons could not

differ as to the propriety of an Order granting of a new trial which was based solely upon a finding that the Verdict was contrary to the manifest weight of the evidence. This test, however, is ill-suited to a situation such as this, where the Order is based upon erroneous rules of law. Florida cases have held that the closer an issue comes to being legal in nature, the less deference should be afforded to the trial Order.

We cite numerous cases in which Florida District Courts have held that a party may present photographs of vehicle damage in a negligence case with or without accompanying expert testimony interpreting it, to show that the minor accident could not have caused the plaintiff's injuries. **Virtually, every juror in Florida at some time in his or her life has probably been in an automobile accident, and likely a rear-end collision; and a juror is able to rely upon his or her common sense and experience to determine whether the force of such an impact could have caused the injuries being complained of.**

As the District Court pointed out, the Standard Jury Instruction 601.1 instructs the jury that: "You may use reason and common sense to reach conclusions. You may draw reasonable inferences from the evidence." That is exactly what the jury did in the present case based upon the Plaintiff's complete lack of candor and credibility, and the photographs showing minimal damage to the vehicle, which the trial court completely ignored. Under Florida law, this determination was well within the

province of the jury.

We also cite this Court's Opinions in Easkold and Grainger, as well as many other cases, which hold that a jury may reject expert testimony in favor of contradictory lay evidence, which is exactly what occurred in the present case.

Finally, we cite numerous cases which hold that a trial court's Order Granting a Motion for New Trial based upon a finding that the Verdict is contrary to the manifest weight of the evidence must state the reasoning and must be supported by record evidence. As a collorary to this rule, where the law and evidence cited by the Order is contrary to facts established in the record, a trial court abuses its discretion in granting a new trial.

In the present case, it was clear that the trial court acted as a seventh juror with veto power and weighed the evidence by completely discounting the value of the impeachment evidence, the photos of the damage, and the extreme long-standing history of back problems, degenerative changes, and emphysema that the Plaintiff had prior to the accident.

Therefore, there is no conflict between the present case and any of the Florida Supreme Court's previous rulings. The First District Court of Appeal's Opinion should be affirmed.

There simply is no caselaw which says that when an Order granting new trial recites the mantra that "the Verdict is contrary to the manifest weight of the evidence," this makes the Order "bullet-proof" if it is based on errors of law.

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525-5885

ARGUMENT

I. THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL DOES NOT CONFLICT WITH KUEBLER, OR WITH BROWN AND E.R. SQUIBB AND SONS, AND IS CONSISTENT WITH THIS COURT'S HOLDINGS IN EASKOLD AND WALD.

Standard of Review

This is a Notice Invoking Discretionary Jurisdiction, and the Standard of Review is whether there is express and direct conflict with the holding on the face of the Opinion in the present case, and other cases. Ramirez v. McCravy, 37 So. 2d 240 (Fla. 2010).

The Law

In order to have reversal based on discretionary jurisdiction, the Petitioner needs to show that there is express and direct conflict with the facts and holding on the face of the Opinion, and the holding of other cases. In the present case, there is no certified conflict between the case under review and the other cases the Petitioner cites. The holding of the present case is based upon different facts than the holding of Kuebler.

Furthermore, the holding in the present case is consistent with Brown v. Estate of Stuckey, 749 So. 2d 490 (Fla. 2000) and E.R. Squibb and Sons, Inc. v. Farnes, 697 So. 2d 825 (Fla. 1997). Therefore, there is no conflict.

In other words, this is not a case where the First or Fourth Districts certified conflict; it is here on discretionary jurisdiction.

The jurisdiction of the Supreme Court derives from Art. 5 § 3(b)(3) of the Florida Constitution, which states that the Supreme Court:

> "May review any decision of a district court of appeal....that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law..." (Emphasis supplied).

The function of the Supreme Court in regard to conflict jurisdiction has long been to resolve conflicting points of law, and not to function as a second appeal on the merits. Ansin v. Thurston, 101 So. 2d 808 (Fla. 1958); Karlin v. City of Miami, 113 So. 2d 551 (Fla. 1959); Jenkins v. State, 385 So. 2d 1356 (Fla. 1980).

No Conflict Between Schmidt and Kuebler

The First District Court of Appeal's reversal in the present case was based upon the fact that the trial court granted a Motion for New Trial relying upon erroneous conclusions of law. Specifically, the trial judge found that the jury was legally incapable of interpreting lay evidence such as photographs depicting minimal damage to the vehicle, and whether that damage evidenced an accident that could have caused the Plaintiff's injuries, without expert testimony such as an accident reconstructionist. The Court further found that without such expert testimony, the jury could not base its Verdict on the lay evidence instead of the medical experts' testimony:

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525-5885

3. The determination of causation in this case is not one that could be made by a lay observer, such as a bullet or knife wound. In this case, expert testimony was necessary for the jury to determine whether or not the rear-end collision had any causal relationship to Plaintiff's spinal fusion.

(R, 564)

* * *

While the degree of damage to the vehicles in the 2007 collision may be circumstantial evidence of lack of causation, there was no expert testimony from which non-experts could reasonably draw that conclusion. None of the doctors testified that the degree of damage to the vehicles was a factor in his opinion as to causation. There was no expert testimony regarding accident reconstruction or how such factors as speed, force, angles, strength of materials, or other such technical matters might affect causation of the injury complained of. No reasonable juror would conclude "no causation" **in the absence of such expert testimony** in light of the opinions of the three doctors (Emphasis added).

(R, 566)

* * *

8. In summary, the issue of causation under the facts of this case required expert testimony in order for non-expert jurors to make a valid finding. Three credible and informed doctors--one a defense witness--testified without contradiction that Plaintiff's injury as caused at least in part on the 2007 collision. Had the jury found causation but allocated only a minor portion of the causation to the collision, a new trial would be unlikely. But, under the facts of this case, a verdict of no causation is contrary to the manifest weight of the evidence. This ruling on Plaintiff's motion

> for a new trial renders Plaintiffs' remaining motions moot.
>
> (R, 567).
>
> (Order Granting Motion for New Trial, dated July 15, 2010.)
>
> (R, 563-568).

This finding is clearly contrary to Florida law, and specifically this Honorable Court's holding in Easkold v. Rhodes, 614 So. 2d 495 (Fla. 1993) and Wald v. Grainger, 64 So. 3d 1201 (Fla. 2011). It is also contrary to several Florida case which hold that a jury may rely upon lay evidence and specifically photos of damage, with or without expert testimony, in reaching their verdicts. See Schoeppl v. Okolowitz, 133 So. 2d 124 (Fla. 3rd DCA 1961); Wall v. Alvarez, 742 So. 2d 440 (Fla. 4th DCA 1999); Mattek v. White, 695 So. 2d 942 (Fla. 4th DCA 1997); Traud v. Waller, 272 So. 2d 19 (Fla. 3d DCA 1973); and Tenny v. Allen, 858 So. 2d 1192 (Fla. 5th DCA 2003). Therefore, the First District Court of Appeal was compelled to reverse the trial court's Order since it was contrary to Florida law.

In contrast, the trial court's Order in Kuebler did not base its ruling upon erroneous conclusions of law, but upon its own observations as to the force and effect of the testimony which it believed supported at least some damages. The trial court's Order in Kuebler is included in the Opinion:

> Plaintiff seeks a new trial asserting that the verdict is against the manifest weight of the evidence. In support of this assertion, Plaintiff notes that the undisputed testimony of the witnesses, expert

> and lay, established that the Plaintiff had suffered some injury. The Court agrees.
>
> While permanency of any injury was very much a disputed fact, the evidence at trial established at the very least that the Plaintiff suffered a neck sprain as a result of the accident. Under such circumstances, the failure to find any loss or damage as a result of the Defendant's negligence is against the manifest weight of the evidence. *See, e.g., The Hertz Corporation v. Gleason*, 874 So.2d 1217 (Fla. 4th DCA 2004).
>
> Kuebler, 1156.

In reviewing the two trial court Orders, it is clear there is no actual conflict between Kuebler and Schmidt, but only different facts. The underlying findings of the trial court were different and distinguishable, and were the basis for the different outcomes on appeal. Therefore, it is respectfully submitted that the conflict jurisdiction was improvidently granted.

No Conflict Between Schmidt and Brown and E.R. Squibb and Sons

It is most respectfully submitted that jurisdiction was also improvidently granted on the basis of conflict between the present case and Brown v. Estate of Stuckey, supra, and E.R. Squibb and Sons, Inc. v. Farnes, supra, because there is no conflict.

As this Court is eminently aware, Brown and E.R. Squibb stand for the proposition that:

> 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.
>
> Brown, 497-498.

However, it has been repeatedly held under Florida law that when a trial court's Order granting a New Trial is based upon an error of law, the ruling is entitled to less deference. See Bulkmatic Transport Company v. Taylor, 860 So. 2d 436 (Fla. 1st DCA 2003) (holding that a trial court's Order granting New Trial based upon four grounds that were legal in nature were not entitled to the broad deference generally afforded to trial courts when they rule on a Motion for New Trial); Moss v. Appel, 718 So. 2d 199, 201 (Fla. 4th DCA 1998) ("The closer an issue comes to being purely legal in nature, the less discretion a trial court enjoys in ruling on a Motion for New Trial."); Heckford v. Florida Department of Corrections, 699 So. 2d 247, 250-251 (Fla. 1st DCA 1997) (trial court's Order granting a new trial based upon legal error concerning omission of evidence afforded a less deferential standard of review); Sebring Associates, Ltd. v. Aumann, 673 So. 2d 875 (Fla. 2nd DCA 1996) (holding that the trial court's discretion in granting a new trial becomes limited when the basis for the ruling is legal in

nature); Tri-pak Mach, Inc. v. Hartshorn, 644 So. 2d 118, 120-121 (Fla. 2nd DCA 1994)(applying a less deferential standard of review in evaluating the trial court's order granting a new trial based upon rulings that were legal in nature).

Here, while the trial court's stated basis for granting a new trial was that the Verdict was contrary to the manifest weight of the evidence, in actuality the finding was based upon erroneous conclusions of law: 1) that a jury cannot interpret photographic evidence showing minimal damage in determining causation without expert testimony; and 2) that the jury may not reject undisputed medical evidence for lay evidence, and credibility and impeachment evidence. Because the findings were based upon legal errors, the trial court's Order was not entitled to the same deference as an Order granting new trial, strictly or a factual basis.

Furthermore, even applying the reasonableness test (which seems ill suited to Orders containing errors of law), it is clear that no reasonable person, taking into account **all** the evidence could have found the Verdict contrary to the manifest weight of the evidence. In fact, this is the very reason that the trial court completely rejected the lay evidence of minimal damage to the vehicles. This is also the reason the court completely ignored the incredible inconsistencies in the Plaintiff's testimony such as his ability to do carpentry, housework, mechanic work, and to run, swim, and play with his grandkids, despite a nearly 40-year history of debilitating emphysema which

required hospitalization four times in the year leading up to the accident.

Furthermore, the evidence also showed that the Plaintiff had been treated in the hospital prior to the accident in 2006 and 2007 for severe back pain, was on Lortab, a pain medication, at the time of the accident. These last two facts contradict the trial court's finding that: "No reasonable juror, when considering Plaintiff's credibility, would conclude that he would have chosen to not report cervical pain for sixteen (16) years prior to the 2007 collision in order to fabricate causation in that collision" (R, 566).

Taking **all** the evidence into account, no reasonable person could have granted the Motion for New Trial where the evidence was not manifestly weighted to one side, and there was an abundance of evidence to support the Jury Verdict.

Given that neither the legal nor the factual basis for the Court's finding was correct, it cannot be said that reasonable persons could differ as to the proprietary of the Court's ruling.

Therefore, there is no conflict because the First District Court of Appeal recognized the broad discretion afforded to the trial court, but found that it made legal errors in determining that the jury could not reject the expert medical testimony in favor of photographic evidence showing minimal damage, extensive credibility evidence showing pre-existing injuries; a severe lack of candor on the part of the Plaintiff; and the substantial

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525-5885

impeachment of the Plaintiff's experts concerning his pre-existing injuries. Furthermore, since it cannot be said that reasonable persons could differ as to the propriety of the trial court's action in granting a new trial based upon erroneous law and facts, there is no conflict.

It is respectfully submitted that this Court improvidently granted conflict jurisdiction where none exists, and therefore, the appeal should be dismissed.

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SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525-5885

II. THE DISTRICT COURT'S OPINION IN SCHMIDT IS CONSISTENT WITH EASKOLD, WALD, AND OTHER FLORIDA CASES WHICH HOLD THAT A JURY MAY REJECT EXPERT MEDICAL EVIDENCE FOR LAY EVIDENCE; WITH WALL, SCHOEPPL, AND BARTON, INFRA, WHICH HOLD THAT A JURY MAY INTERPRET PHOTOGRAPHIC EVIDENCE OF VEHICLE DAMAGE WITHOUT EXPERT TESTIMONY; AND JORDAN AND HERNANDEZ, INFRA, WHICH HOLD THAT A TRIAL COURT'S ORDER MUST BE SUPPORTED BY THE RECORD.

As previously discussed, the trial court's Order made two incorrect conclusions of law: 1) that the jury could not favor such lay evidence along with severe impeachment of the Plaintiff and his experts, and a severe lack of candor by the Plaintiff in reaching a Verdict for the Defendant; and 2) that the jury could not interpret photographic evidence of the amount of damage to the car without the testimony of an expert accident reconstructionist.

The relevant paragraphs of the trial court's Order are as follows:

> 3. The determination of causation in this case is not one that could be made by a lay observer, such as a bullet or knife wound. In this case, expert testimony was necessary for the jury to determine whether or not the rear-end collision had any causal relationship to Plaintiff's spinal fusion.
>
> (R, 564)
>
> * * *
>
> **While the degree of damage to the vehicles in the 2007 collision may be circumstantial evidence of lack of causation, there was no expert testimony from which non-**

> **experts could reasonably draw that conclusion.** None of the doctors testified that the degree of damage to the vehicles was a factor in his opinion as to causation. There was no expert testimony regarding accident reconstruction or how such factors as speed, force, angles, strength of materials, or other such technical matters might affect causation of the injury complained of. No reasonable juror would conclude "no causation" **in the absence of such expert testimony** in light of the opinions of the three doctors (Emphasis added).
>
> (R, 566)
>
> * * *
>
> 8. In summary, the issue of causation under the facts of this case required expert testimony in order for non-expert jurors to make a valid finding.
>
> (Order Granting Motion for New Trial, dated July 15, 2010.)
>
> (R, 567).

These legal conclusions are undoubtedly contrary to Florida law and warrant reversal of the trial court's Order.

Trial Court's Order Contrary to Easkold and Wald Because it Found That the Jury Could not Accept Lay Evidence Over Expert Testimony

As this Court is eminently aware, the jury is free to weigh the opinion testimony of expert witnesses, and either accept, reject, or give the testimony such weight as it deserves concerning the witness's qualifications, the reasons given by the witness for the opinion expressed, and all the other evidence in the case, including lay testimony. Easkold v. Rhodes, 614 So. 2d 495, 497-498 (Fla. 1993).

Recently, in Wald v. Grainger, 64 So. 3d 1201, 1205-1206 (Fla. 2011), this Court upheld the ruling in Easkold while clarifying that the jury's rejection of such expert testimony must be based upon lay evidence, impeachment of experts, or other credibility factors:

> ...the jury's ability to reject the testimony must be based on some reasonable basis in the evidence. This can include conflicting medical evidence, evidence that impeaches the expert's testimony or calls it into question, such as the failure of the plaintiff to give the medical expert an accurate or complete medical history, conflicting lay testimony or evidence that disputes the injury claim, or the plaintiff's conflicting testimony or self-contradictory statements regarding the injury. For example, when a medical expert's opinion is predicated on an incomplete or inaccurate medical history, the jury is free to reject the expert medical testimony, even without conflicting medical testimony, if there is conflicting lay testimony.
>
> Wald, 1205-1206.

See also, Weygant v. Fort Myers Lincoln Mercury, Inc., 640 So. 2d 1092 (Fla. 1994)(reaffirming Easkold and holding that **a jury is within its province to reject uncontroverted medical testimony**, and find the defendant was not the legal cause of plaintiff's injuries in rear end collision case); see also, **Travieso v. Golden**, 643 So. 2d 1134 (Fla. 4th DCA 1994)(recognizing jury free to **reject the testimony of the doctors** with respect to the issue of permanency due to the fact that the plaintiff **may not have accurately reported her medical history or present condition);**

Rice v. Everett, 630 So. 2d 1184 (Fla. 5th DCA 1994) (holding jury could **reject expert medical testimony** that plaintiff suffered a permanent injury due to rear end accident; affirming a zero verdict for plaintiff, where permanency was based on plaintiff telling doctor of no prior history of problems; just free to reject plaintiff's witnesses); **State Farm Mutual Automobile Insurance Company v Garcia**, 621 So. 2d 475 (Fla. 4th DCA 1993) (finding error for judge to find verdict contrary to manifest weight of the evidence based on uncontradicted expert testimony after Easkold; case reversed with instructions to reinstate jury verdict); **Wynn v. Muffs**, 617 So. 2d 794 (Fla. 1st DCA 1993) (determining verdict not contrary to manifest weight of testimony because expert's testimony on causation uncontradicted; reasonable persons could differ on whether verdict against manifest weight of evidence; denial of new trial proper); **United States Fidelity & Guaranty Company v. Perez**, 622 So. 2d 486 (Fla. 3rd DCA 1993) (finding trial court erred when it failed to submit permanency to jury); Corbett v. Wilson, 48 So. 3d 131 (Fla. 5th DCA 2010).

Notably, right of the jury to weigh lay evidence more heavily than expert testimony was recognized by Judge Damoorgian in his dissent in Keubler:

> I dissent for the same reason that the majority acknowledges that the "[c]ircumstantial evidence in this case also permits an inference that the plaintiff suffered no injury." Even if the defense expert

testified that the plaintiff may have been in need of some temporary medical treatment after the accident, the jury was presented with other evidence that the accident did not cause the plaintiff any injuries. The majority concedes that were we to apply "the same rationale as was used in *Jordan* and *Schmidt*, we would have to find that the trial court abused its discretion." The rationale is based on a fundamental principle in our civil jury system that the jury is free to accept or reject some, all, or none of the evidence introduced at trial. *Schmidt v. Van*, 65 So.3d 1105, 1107-08 (Fla. 1st DCA 2011); *see also Corbett v. Wilson*, 48 So.3d 131, 134 (Fla. 5th DCA 2010) ("The jury is free to weigh the credibility of an expert witness, just as any other witness, and to reject such testimony, even if uncontradicted.") (citation omitted). Moreover, I do not agree with the majority that reversal in this case would run afoul of the Florida Supreme Court's opinion in *Brown v. Estate of Stuckey*, 749 So.2d 490, 497 (Fla. 1999) ("'The trial judge should only intervene when the *manifest* weight of the evidence dictates such action.'") (emphasis in original). A trial judge's discretion is not unfettered. Where the trial judge's premise for granting a new trial was based on an incorrect conclusion of law, or where the evidence in the record does not support the trial court's determination, there is an abuse of discretion. *Schmidt*, 65 So.3d at 1107-08.

The majority concedes that there was no record basis to support the trial court's conclusion that the evidence was 'undisputed' that an injury occurred. In fact, there was conflicting evidence on the issue of whether the plaintiff suffered any injury from the accident. "By failing to recognize the jury's prerogative to reject the expert testimony on causation, particularly in light of the lay testimony which conflicted with the expert testimony, the trial court erred in concluding that the manifest weight of the

> evidence was contrary to the jury verdict." *Id.* At 1110 (citation omitted).
>
> Kuebler, 1159-1160 (Damoorgian, J. Dissenting).

Here, the Plaintiff's case was rife with contradiction, deception, and contradictory lay evidence such as photographs depicting minimal damage. This evidence is fully set forth in the First District Court of Appeal's Opinion, which is cited in the Statement of Facts, but to briefly summarize, the Plaintiff failed to disclose to his treating physicians after the accident that he had previously undergone a cervical spinal fusion surgery and had been involved in an accident in which he was ejected from the car in 1998. The Plaintiff also testified that he had been unable to work since the 70's due to severe emphysema, and yet he testified at trial that he was able to work around the house, do carpentry and mechanic work, and most incredibly swim, run, and play with his grandchildren. Mr. Van testified that at the time of the accident he was even taking medication for pain.

The Plaintiff appeared at trial wearing a neck brace even though his own physician testified there was no medical necessity for him to be wearing one. His own physician also testified that the Plaintiff never revealed his previous back surgery until he, himself, discovered it while reading an MRI scan. The photographic evidence depicted minimal damage to the car with a minor crack or scrape on the bumper, which an estimate showed would cost $800 to repair. Additionally, the Plaintiff was

treated at the hospital in 2006 and 2007, a month before the accident for severe back pain, and was on Lortab for pain at the time of the accident. Put simply, there was an abundance of evidence for the jury to weigh and favor over the testimony of the medical experts.

Despite this Honorable Court's clear holdings in Easkold, supra, and Wald, supra, the trial court erroneously found that the jury could not reject the medical testimony, even though there was substantial lay evidence to the contrary:

> 3. The determination of causation in this case is not one that could be made by a lay observer, such as a bullet or knife wound. In this case, expert testimony was necessary for the jury to determine whether or not the rear-end collision had any causal relationship to Plaintiff's spinal fusion.
>
> * * *
>
> **While the degree of damage to the vehicles in the 2007 collision may be circumstantial evidence of lack of causation, there was no expert testimony from which non-experts could reasonably draw that conclusion.** None of the doctors testified that the degree of damage to the vehicles was a factor in his opinion as to causation. There was no expert testimony regarding accident reconstruction or how such factors as speed, force, angles, strength of materials, or other such technical matters might affect causation of the injury complained of. No reasonable juror would conclude "no causation" **in the absence of such expert testimony** in light of the opinions of the three doctors.
>
> * * *
>
> In summary, the issue of causation under the facts of this case required expert testimony

> in order for non-expert jurors to make a valid finding.

This ruling is undoubtedly contrary to Florida law, which holds that a defendant does not need to present any medical expert testimony, and that a jury may rely upon impeachment and lay evidence as the sole basis for its Verdict.

In Tenny v. Allen, 858 So. 2d 1192 (Fla. 5th DCA 2003), another case exactly on point, it was held that it was error for the trial court to set aside a Jury Verdict finding no permanency and grant a new trial on damages even though the medical testimony was uncontradicted by an opposing expert witness, where there was ample evidence including photographs showing little damage to the Plaintiff's vehicle.

In Tenny, the plaintiff was a passenger in a van which was struck by the defendant, and claimed significant neck and back injuries. The case went to trial and the jury found no permanency. The trial court set aside the Verdict and granted a new trial on damages.

The defendant appealed and the Court of Appeal noted that despite the fact that there was no contradiction of the plaintiff's injuries by a defense expert witness, there was ample lay evidence such as photographs of the accident which supported the jury's Verdict, and therefore, the trial court abused its discretion:

> Here the jury viewed photographs of the Allen van which showed little damage, and indicated a low-speed collision. The jury considered the report from the emergency room

> physician, who found Allen had no significant tenderness and a full range of motion of her neck and shoulders immediately after the accident. She could bend forward and nearly touch her toes and bend backwards without significant pain.
>
> * * *
>
> ...Although the defense did not directly impeach Allen's medical history regarding her neck injury, her lack of candor in describing her past back injuries was a factor the jury could have considered in evaluating her credibility and the reliability of Dr. Hunter's medical findings.
>
> Tenny, 1196.

Here, the First District Court of Appeal correctly recognized that this Court's Opinions in Easkold and Wald support a jury's right to reject medical expert testimony where there is contradictory lay evidence. It's Opinion is consistent with Florida law and should be upheld.

Jury May Interpret and Rely Upon Photographic Evidence of Vehicle Damage Without Expert Testimony

Under Florida law, numerous cases have held that a party is entitled to publish photographic evidence of vehicle damage to the jury, and that the jury may rely upon it and interpret it in reaching its Verdict, with or without accident reconstruction or biomechanical testimony. A case exactly on point which holds that a jury may rely upon photographic evidence depicting minimal damage to a vehicle, even without expert testimony in reaching a determination on causation, is Wall v. Alvarez, 742 So. 2d 440

(Fla. 4th DCA 1999).

In Wall, the plaintiff was allegedly injured in a minor vehicle accident. At trial, the court refused to allow the defendant to admit into evidence pictures showing minimal damage to the plaintiff's vehicle without accompanying expert testimony concerning the effect of the impact on the plaintiff's injuries. Nevertheless, the jury returned a defense Verdict and the trial court granted the plaintiff a new trial. The defendant appealed.

The Court of Appeal affirmed the new trial, but held that at the new trial, the defense should be allowed to present photographic evidence, with or without accompanying expert testimony, because the jury could interpret the evidence based upon its own common sense and experience:

> In this case, the trial court refused to allow appellant to admit into evidence pictures showing minimal damage to appellee's automobile without also introducing evidence from a biomechanical expert as to the amount of impact necessary to cause Alvarez's injuries. Photographs may be indicative of force of impact and speed of vehicles, and the jury can then be left to draw reasonable inferences. *See* *Schoeppl v. Okolowitz*, 133 So.2d 124 (Fla. 3d DCA 1961).
>
> * * *
>
> Thus, we hold that it was an abuse of discretion for the trial court to preclude the introduction of the photographs in evidence since they were directly relevant to normal injuries usually sustained in the type of accident involved in this case. Despite the fact that liability was conceded in this case, appellant should not have been denied the opportunity to introduce evidence tending to rebut Alvarez's damage claim. While the photographic evidence might have been

> prejudicial to appellees, the prejudice did not outweigh their probative value.
>
> Wall, 441-442.

Similarly, in Schoeppl v. Okolowitz, 133 So. 2d 124 (Fla. 3rd DCA 1961), it was likewise held that a jury should be allowed to interpret and rely upon photographs of vehicle damage in determining whether the accident could have cause the plaintiff's claimed injuries.

In Schoeppl, the plaintiff in a rear-end collision received a Summary Judgment as to liability and the case proceeded to a trial on damages. After an unfavorable Jury Verdict, the defendant appealed and the Court of Appeal reversed on an issue not relevant to the present case.

However, in reversing the Court addressed the trial court's exclusion of photographic evidence of vehicle damage and held that photos are evidence of damages ordinarily sustained from such accidents. Notably, the Court did not require expert testimony as a prerequisite of admitting the photos:

> Another aspect of the trial is the basis for appellants' second point. The court sustained objections to certain photographs and testimony offered by the defendants upon the ground that they had no relevancy to the issue of damages. The defendants proffered the evidence which they claimed was proper to prove the lack of damaging force in the collision. The photographs were of the car in which the plaintiff, Grace Okolowitz, was riding and purported to show the physical condition of the rear of the car immediately after the accident. If admitted, these photographs would have tended to prove that there was minimal damage to the automobile

> from the impact of defendants' car. The proffered testimony was by Charlotte Schoeppl as to the type of car she was driving, the speed of her car at the time of the impact and her observation of the lack of a sign of physical damage to either car after the collision. If admitted this testimony would have tended to prove the degree of force of the impact. It is agreed that the trial judge acted upon the basis of the rule in *Barton v. Miami Transit Company*, Fla. 1949, 42 So.2d 849, discussed below.
>
> Schoeppl, 125-126.

Other cases have held that it is error to exclude photographs of damage to vehicles, without setting forth a requirement that they be accompanied by expert testimony. See, Barton v. Miami Transit Co., 42 So. 2d 849 (Fla. 1949); Traud v. Waller, 272 So. 2d 19 (Fla. 3rd DCA 1973).

In the present case, the jury was free to rely upon photographs of the accident depicting minimal damage to the vehicle in reaching its Verdict that the accident did not cause the Plaintiff's injuries. As the First District's Opinion in Schmidt recognizes, Jury Instruction 601.1 indicates that the jury is free to rely upon common sense and to draw reasonable inferences from the evidence in reaching its Verdict:

> **601.1 Weighing the Evidence**
>
> ...In reaching your verdict, you must think about and weigh the testimony and any documents, photographs, or other material that has been received in evidence. You may also consider any facts that were admitted or agreed to by the lawyers. Your job is to determine what the facts are. **You may use reason and common sense to reach conclusions. You may draw reasonable inferences from the**

> **evidence.** But you should not guess about things that were not covered here. And, you must always apply the law as I have explained it to you (Emphasis added).

The photographs depicting minimal damage to the vehicles are ones that could be interpreted through common sense and experience, since it is likely that every juror in the courtroom has been in some sort of accident, (and likely a rear-end collision) and can use his or her common sense and experience to decide whether the claims of injury are consistent with his or her life's experiences. Furthermore, there are hundreds if not thousands of minor rear-end collisions in the State of Florida every year, and the Petitioner has not cited a single case which holds that photographic evidence in a rear-end collision requires the interpretation of expert testimony before the jury can rely upon it.

It was clearly an erroneous conclusion of law by the trial court to find that "no reasonable juror would conclude 'no causation' in the absence" of expert testimony regarding accident reconstruction or "how such factors as speed, force, angles, strength, or materials, or other such technical matters might affect causation of the injury complained of." The jury was free to interpret the lay evidence using its common sense and experience, and to determine as it did that the accident could not have caused the substantial injuries the Plaintiff was claiming, and to reach a Verdict for the Defendant. The trial court's Order was contrary to Florida law, and was properly

reversed by the First District Court of Appeal.

Trial Court's Order Finding Verdict Contrary to Manifest Weight of the Evidence Must be Supported by the Record

By rejecting the lay evidence, the trial court abused its discretion in finding that the Verdict was contrary to the manifest weight of the evidence. Furthermore, by erroneously concluding that the Plaintiff had not made any complaints of injury for 16 years, and that "no reasonable person, when considering the Plaintiff's credibility, would conclude that he would have chosen not to report his injury for 16 years to fabricate causation" completely ignores evidence that the Plaintiff did, in fact, report cervical pain prior to the accident, including in 2006 and 2007. Because the trial court ignored evidence in finding the Verdict was against the manifest weight of the evidence, and apparently re-weighed the evidence by completely discounting the weight of the lay evidence, the First District Court of Appeal correctly held that the trial court abused its discretion.

A case relied upon by the First District Court of Appeal, which holds that a trial court abuses its discretion by making findings which have no record basis when granting a new trial based upon the grounds that the Verdict is contrary to the manifest weight of the evidence, is Jordan v. Brown, 855 So. 2d 231 (Fla. 1st DCA 2003). In Jordan, the Plaintiff was employed as a home health aide and while on a job at a patient's home was accosted on by an aggressive dog, which caused her to fall and

allegedly sustain injuries. The defendant admitted liability but denied injury, and the case went to trial.

At trial, the reports and records of the physicians who examined her for complaints of pain were introduced, which showed that none of them found any objective basis for her subjective complaints of pain. The plaintiff introduced testimony of a chiropractor and a physical rehabilitation doctor who opined that she did suffer an injury. There was also surveillance evidence showing she was fully ambulatory and impeachment testimony showing a lack of candor by the Plaintiff and her economist. The jury found no causation or injury, and the plaintiff moved for a new trial.

The trial court granted a new trial based upon a finding that the Verdict was contrary to the manifest weight of the evidence, and in doing so found that there was uncontroverted testimony that the plaintiff was injured and incurred medical bills as a result of the fall. The trial court also found that there was no controversy over the fact that the plaintiff was permanently injured as a result of the dog's conduct.

The Court of Appeal recognized that there was no record basis to support the trial court's reasoning that this evidence was uncontroverted and undisputed given the lack of candor, the medical records, and surveillance video, and reversed, holding that the trial court's finding of uncontroverted and undisputed evidence was not supported by the record:

> ...For the reasons explained above, we conclude that the trial court's finding that

> there was no controversy over the fact that Mrs. Brown was permanently injured has no support in the record and is clearly erroneous. Further, because it is clear from the record that the issue of whether plaintiff was injured in the fall was highly controverted, the trial court's finding that "[t]here was uncontroverted testimony that plaintiff was injured" is similary clearly erroneous. Accordingly, we find that the trial court abused its discretion under the *Brown* test, *Brown*, 749 So.2d at 496-98; *see also Borino v. Publix Supermarkets, Inc.*, 825 So.2d 424, 426-27 (Fla. 4th DCA 2002); *Department of Transportation v. Rosario*, 782 So.2d 927 (Fla. 2d DCA 2001); *Bailey v. Sympson*, 148 So.2d 729, 731 (Fla. 3d DCA 1963).
>
> Jordan, 234.

Similarly, in Hernandez v. Feliciano, 890 So. 2d 401 (Fla. 5th DCA 2004), it was held that the trial court's Order granting a new trial based upon the finding that the Verdict was contrary to the manifest weight of the evidence was an abuse of discretion, where the trial Order did not address the conflicting nature of evidence presented at trial.

In Hernandez, the plaintiff was allegedly injured in a rear-end collision on a rainy afternoon. The defendant claimed that he was unable to avoid colliding with the plaintiff's vehicle because the plaintiff had turned abruptly into his path without signaling. The jury rejected the plaintiff's claims for personal injury resulting from the accident, and the trial court granted a new trial, finding that the Verdict was contrary to the manifest weight of the evidence.

The Court of Appeal reversed, holding that the trial court

erroneously omitted conflicting evidence and only cited the evidence supporting its conclusion:

> In the instant case, the trial court did not find that the jury was improperly influenced by considerations outside the record. Instead, it apparently found that the jury had been deceived as to the force and credibility of the evidence by ruling that the manifest weight of the evidence shows that Hernandez was negligent. But the trial court's order does not address the conflicting nature of the evidence presented at trial. Absent from the trial court's findings is Hernandez's adamant denial that she cut-off Feliciano, that Hernandez testified to being squarely within the far right lane of Orange Blossom Trail for what she estimated to be 100 paces or least one minute prior to the collision impact from behind. Hernandez further testified that she was already turning into the driveway of the shopping center when Feliciano rear-ended her. It is undisputed that the front right of Feliciano's car impacted with the rear left bumper of Hernandez's car and that Hernandez's car was pushed all the way into the driveway by the impact. This evidence could have indicated to the jury that Feliciano could have avoided the accident had she been paying proper attention.
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> * * *
>
> Although the trial court expressly found Hernandez to be "very honest," it ultimately found Feliciano to be more credible on the issue of liability. Liability, however, is the primary issue the jury was charged with determining and the trial court abused its discretion in reaching a decision on that essential issue based upon what, at most, was conflicting evidence. In doing so, the court merely substituted its own verdict for that of the jury's. Review of the record does not support the trial court's order because the evidence was not manifestly weighted to either side.
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> Hernandez, 403-404.

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525-5885

Here, the trial court's finding was clearly not supported by the Record evidence. Not only does the trial court's Order contain legal errors, but factual misstatements as well. Again, the Order found that "no reasonable juror, when considering the Plaintiff's credibility, would conclude that he would have chosen to not report cervical pain for sixteen (16) years prior to the 2007 collision in order to fabricate causation in this collision." (R, 566) However, the court completely ignored the fact that the Plaintiff "had visited a hospital in 2006, complaining of severe lower back pain; that Mr. Van had visited the hospital less than a month before the 2007 accident, complaining of the same symptoms; and that he was taking pain medication, Lortab, at the time of the 2007 accident." Schmidt, 1109.

Furthermore, the court clearly reweighed the evidence by completely discounting the value of the photos of the damage, and the lack of credibility and candor of the Plaintiff and his experts. Therefore, it is clear that the trial court acted outside of the bounds of Florida law.

This Honorable Court has repeatedly made clear that a **trial court should not sit as a seventh juror with veto power** and then award a New Trial based on that **reevaluation of the evidence.** As the Supreme Court said in Wackenhut Corp. v. Canty, 359 So. 2d 430, 434, 435 (Fla. 1978):

> Certainly a trial court is in a better position than an appellate court to pass on

> the ultimate correctness of a jury's verdict Pyms v. Meranda, 98 So.2d 341, 343 (Fla. 1957), but superior vantage point does not give a trial judge unbridled discretion to order a new trial. Consequently to facilitate appellate review of such orders the reasons which produced the need for the new trial must be set forth in the order. [citation omitted]
>
> * * *
>
> Although an order for new trial need not incant language to the effect that the verdict is against the manifest weight of the evidence or was influenced by considerations outside the record, the order must give reasons which will support one of these two conclusions so that it will be susceptible of appellate review...

In the present case, the trial court sat as a seventh juror and said that the jury had to find that the accident caused the Plaintiff's injuries. The court completely discounted or ignored undisputed evidence of severe pre-existing conditions, including degeneration, the prior fusion, and a 30-year history of emphysema and smoking. The Plaintiff's credibility was severely hampered in this case. He had suffered from emphysema for over 40 years, and yet claimed that he had been able to run around with his grandchildren, go to the beach, and walk through the park without problems prior to the accident. Also there was evidence that the Plaintiff had been wearing a neck brace at trial, even though the doctors said it was not necessary, which the jury could have perceived and factored into his credibility as well.

Clearly, the trial court acted outside of the bounds of

Florida law when it completely rejected the lay evidence supporting the Jury's Verdict, and found that the jury could not base its Verdict on lay evidence when there was undisputed medical testimony.

The First District Court of Appeal's ruling reversing the trial court's Order granting New Trial was undoubtedly correct on the merits.

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525-5885

III. THE PETITIONER'S CLAIM THAT IF THIS COURT AGREES WITH THE FIRST DISTRICT THEN THE ACTION SHOULD BE REMANDED TO THE TRIAL COURT FOR FURTHER PROCEEDINGS IS BASELESS.

The Appellant's claim that this Honorable Court should remand to the trial court so that the trial court can "apply the correct legal standard," is without merit. The trial court's Order clearly recounts the factual and legal basis for its ruling. If this Court agrees that the ruling was based upon a legal error, that the jury could, in fact, reject undisputed medical testimony for lay evidence and interpret the damage photos without the aid of expert testimony, then the sole basis for rejecting the court's finding that the Verdict was contrary to the manifest weight of the evidence is taken away. Therefore, there is no need for the case to be reconsidered by the trial court since the outcome is already clear.

The Petitioner is merely hoping for a "second bite at the apple" so that upon remand, the trial court would correct the legal basis of its finding, but still find that the Verdict was against the manifest weight of the evidence even though it clearly was not. The Petitioner is not entitled to a "second bite at the apple." This case has been litigated long enough.

The Petitioner's request should be denied.

CONCLUSION

There is no conflict jurisdiction. The First District Court of Appeal's Opinion is consistent with Brown v. Estate of Stuckey; E.R. Squibb and Sons, Inc. v. Farnes; Easkold v. Rhodes; and Wald v. Grainger.

Law Offices of
RICHARD A. SHERMAN, P.A.
Richard A. Sherman, Sr., Esquire
James W. Sherman, Esquire
Suite 302
1777 South Andrews Avenue
Fort Lauderdale, FL 33316
PH: (954) 525-5885 - Broward
FAX: (954) 764-7807

and

Sonya Wesner, Esquire
Law Offices of
PATRICIA E. GARAGOZLO
Jacksonville, FL

By: _____
Richard A. Sherman, Sr.

Email: rsherman@appealsherman.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 19th day of June, 2012 to:

T. Bradley McRae, Esquire
McRAE & McRAE
318 East Duval Street
Lake City, FL 32055

Sonya Wesner, Esquire
Law Offices of PATRICIA E. GARAGOZLO
7406 Fullerton Street, Suite 206
Jacksonville, FL 32256

Edwin B. Browning, Jr., Esquire
George T. Reeves, Esquire
DAVIS, SCHNITKER, REEVES & BROWNING, P.A.
Post Office Drawer 652
Madison, FL 32341

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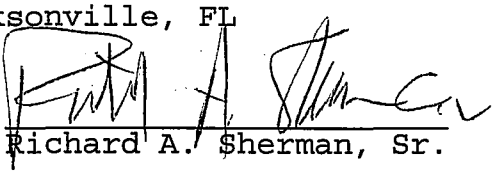
Law Offices of
RICHARD A. SHERMAN, P.A.
Richard A. Sherman, Sr., Esquire
James W. Sherman, Esquire
Suite 302
1777 South Andrews Avenue
Fort Lauderdale, FL 33316
PH: (954) 525-5885 - Broward
FAX: (954) 764-7807

and

Sonya Wesner, Esquire
Law Offices of
PATRICIA E. GARAGOZLO
Jacksonville, FL

By: 
Richard A. Sherman, Sr.

Email: rsherman@appealsherman.com

JWS/mn

INDEX TO RESPONDENT'S APPENDIX

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

DANIEL J. SCHMIDT,

Appellant,

v. CASE NO. 1D10-4206

CHARLES VAN, SR., and
RILLA VAN, as husband and
wife,

Appellee.

_____/

Opinion filed June 30, 2011.

An appeal from the Circuit Court for Alachua County.
Peter K. Sieg, Judge.

Richard A. Sherman, Sr. and James W. Sherman of Law Office of Richard A. Sherman, P.A., Fort Lauderdale; and Jennifer R. Cassady of Law Offices of Patricia E. Garagozlo, Jacksonville, for Appellant.

George T. Reeves of Davis, Schnitker, Reeves & Browning, P.A., Madison; and T. Bradley McRae of McRae, McRae & Haire, Lake City, for Appellee.

ON MOTION FOR REHEARING

ROWE, J.

We grant the appellees' motion for rehearing, withdraw our prior opinion, and substitute the following opinion.

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Daniel Schmidt, the defendant in a personal injury suit filed by Charles and Rilla Van, appeals a final order determining that the jury verdict in his favor was against the manifest weight of the evidence and awarding the Vans a new trial. Because we conclude that the trial court abused its discretion, we reverse and remand for the trial court to reinstate the jury verdict.

Facts and Procedural History

The Vans brought suit against Mr. Schmidt, seeking recovery for personal injuries allegedly sustained in an October 2007 automobile accident, requiring Mr. Van to undergo a cervical spinal fusion surgery in September 2009. Mr. Schmidt did not contest his liability for causing the automobile accident, but instead argued that the accident was not the cause of Mr. Van's injury or need for medical treatment. Mr. Schmidt's defense centered on the minor nature of the automobile accident, Mr. Van's medical history which included a prior cervical spinal fusion surgery in 1991, a 1998 automobile accident in which Mr. Van was ejected from the vehicle, and diagnoses of emphysema and spinal degenerative disease.

After a three-day trial, the jury returned a verdict in favor of Mr. Schmidt, finding that Mr. Van had not suffered an injury as a result of the 2007 accident. Thereafter, the Vans filed a motion for a new trial and the trial court granted the motion. The trial court concluded that the jury's verdict finding no causation was contrary to the manifest weight of the evidence in light of the testimony of the

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three expert medical witnesses, one of whom was a defense witness, who each opined that Mr. Van's injury and resulting surgery was caused at least in part by the 2007 accident. While acknowledging Mr. Schmidt's arguments and the evidence offered in support thereof, the trial court disregarded all lay testimony bearing on causation of Mr. Van's injuries. The court expressly concluded that in the absence of expert testimony regarding accident reconstruction or other "technical matters" affecting causation for the injury, "[n]o reasonable juror would conclude 'no causation' . . . in light of the opinions of the three doctors." With regard to Mr. Van's credibility, the court found, "[h]is credibility had little, if any, weight on the issue of causation in light of the uncontroverted opinions of the three informed and credible doctors." With regard to Mr. Van's pre-existing spinal degeneration, the court again found the expert testimony to outweigh other evidence: "No reasonable juror would conclude that degeneration, to the exclusion of the collision, was the cause of Plaintiff's injury in light of the testimony of the three doctors."

Analysis

A trial court's decision to grant a new trial on the grounds that the verdict is contrary to the manifest weight of the evidence is reviewed for abuse of discretion. Brown v. Estate of Stuckey, 749 So. 2d 490 (Fla. 1999). In Brown, the Florida

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Supreme Court explained the highly deferential standard of review an appellate court must apply when reviewing an order granting a new trial:

> When reviewing the order granting a new trial, an appellate court must recognize the broad discretionary authority of the trial judge and apply a 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.

Id. at 497-98; see also Trujillo v. Uniroyal Tire Co., 753 So. 2d 1256 (Fla. 2000).

However, a reviewing court may find that the trial court abused its discretion in determining that the manifest weight of the evidence was contrary to the verdict and granting a new trial in two circumstances: (1) where the evidence in the record does not support the trial court's determination; or (2) where the trial court's determination rests on an incorrect conclusion of law. See Jordan v. Brown, 855 So. 2d 231, 234 (Fla. 1st DCA 2003) (reversing order granting new trial where "no record basis" supported the reasons set forth in the trial court's order); Corbett v. Wilson, 48 So. 3d 131, 133 (Fla. 5th DCA 2010) (reversing order granting new trial where determination was based on improper legal premise).

In Corbett, the Fifth District reversed a trial court's order granting a new trial holding that reversal was necessary because the trial court's premise for granting the new trial was legally improper:

> [W]e are nevertheless bound to reverse because the legal premises on which the trial court proceeded to find the verdict to be against the

manifest weight of the evidence were erroneous.

Id. at 133. In this case, as in Corbett, the trial court's determination that the jury verdict was against the manifest weight of the evidence was premised on an erroneous conclusion of law. Specifically, the court concluded that based on the evidence introduced through the testimony of the expert witnesses relative to causation, the jury could not determine that the 2007 accident caused no injury to Mr. Van, despite conflicting lay testimony and evidence introduced at trial. This was error.

It is well-established that a jury may reject any testimony, including testimony of experts. See Shaw v. Puleo, 159 So. 2d 641, 644 (Fla. 1964)(holding the jury is free to "accept or reject the testimony of a medical expert just as it may accept or reject that of any other expert"); Frank v. Wyatt, 869 So. 2d 763 (Fla. 1st DCA 2004). Indeed, the Standard Jury Instruction (Civil) 601.2(b), which was appropriately read to the jury in this case, provides that the jury "may accept [expert witness] opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinion expressed, and all the other evidence in the case." However, "the jury's ability to reject [expert] testimony must be based on some reasonable basis in the evidence." Wald v. Grainger, 36 Fla. L. Weekly S211, S213 (Fla. May 20, 2011). Lay testimony or

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evidence which conflicts with the expert testimony, as well as conflicting testimony by the plaintiff may provide a reasonable basis for rejecting expert testimony. Id.

The expert testimony in this case conflicted with much of the lay testimony presented to the jury. In such cases, where expert testimony conflicts with lay testimony, the trial court should defer to the jury to weigh the evidence. Easkold v. Rhodes, 614 So. 2d 495 (Fla. 1993). In Easkold, a personal injury case arising from an automobile accident, the supreme court recognized the role of the jury as the fact-finder in civil cases and found that it is within the jury's authority to weigh the credibility of expert testimony against conflicting lay testimony: "[E]ven though the facts testified to by [the medical experts] were not within the ordinary experience of the members of the jury, the jury was still free to determine their credibility and to decide the weight to be ascribed to them in the face of conflicting lay evidence." Id. at 498 (quoting Shaw v. Puleo, 159 So. 2d 641, 644 (Fla.1964)). In Easkold, where there was uncontradicted expert testimony of permanent injuries, the supreme court held that a jury could reject the expert testimony in regard to the victim's injuries in view of lay testimony or other facts in evidence, such as that the victim had not accurately reported her medical history to the testifying physicians. Id. at 497.

Here, in addition to the medical experts, the jury heard testimony from

several witnesses, including the plaintiffs, Mr. and Mrs. Van. Evidence and testimony introduced at trial portrayed the accident as a mere fender-bender. The jury examined photographs depicting the damage to the Vans' vehicle, which was described by Mr. Van as a crack or scrape on the back bumper. Mr. Van further testified that the total damage to his vehicle was estimated to be approximately $800; at the time of trial (about 2 1/2 years after the accident) the damage to the bumper had not been repaired; and the vehicle was still being driven by Mrs. Van.

Other testimony offered at trial demonstrated that Mr. Van had an extensive medical history, which included a prior surgery, another automobile accident, and several significant medical diagnoses. Mr. Van testified that he had undergone a prior cervical spinal fusion surgery in 1991. Mr. Van testified that he had been in an automobile accident in 1998, in which he was ejected from the vehicle. Mr. Van testified that he had a back sprain shortly before the 2007 accident. In addition, medical records were introduced at trial revealing that Mr. Van had visited a hospital in 2006, complaining of severe lower back pain; that Mr. Van had visited the hospital less than a month before the 2007 accident, complaining of the same symptoms; and that he was taking the pain medication, Lortab, at the time of the 2007 accident.

Through the testimony of the medical experts, the jury heard that Mr. Van had pre-existing degeneration of his cervical spine. On cross-examination, Mr.

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Van revealed a number of other medical conditions affecting his overall health. Mr. Van testified that he had been diagnosed with emphysema in the early 1970's and that he had been hospitalized four times in the year leading up to trial for breathing problems, clogged lungs, pneumonia, and cardiac surgery.

Testimony introduced at trial also demonstrated inconsistencies in Mr. Van's story on material issues in the case, placing his credibility into question. Despite Mr. Van's testimony regarding his extensive medical history and pre-existing medical conditions, and that he had not been employed since the 1970's, he nonetheless testified that before the 2007 automobile accident he was able to work around the house, do carpentry work or mechanic work, and swim, run, and play with his grandkids. Mr. Van testified that after the 2007 accident, he was unable to engage in these activities.

When Mr. Van sought medical treatment following the 2007 accident, he failed to disclose to the treating physician that he had undergone a prior cervical spinal fusion surgery or that he had been involved in an earlier automobile accident. Mr. Van disclosed the prior cervical spinal fusion surgery only upon inquiry by his neurosurgeon, who discovered indicia of an earlier surgery after reading the results of an MRI scan he had ordered of Mr. Van's spine. During trial, the jury observed Mr. Van wearing a neck brace. During the cross-examination of Mr. Van's neurosurgeon, the physician testified that there was no

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medical necessity for Mr. Van to be wearing the neck brace. In light of this testimony, the jury was entitled to judge Mr. Van's credibility and accept or reject his testimony on all issues. See Chomont v. Ward, 103 So. 2d 635 (Fla. 1958); Roach v. CSX Transportation, Inc., 598 So. 2d 246, 250 (Fla. 1st DCA 1992).

Based on the evidence and testimony introduced at trial and the instructions presented to it, the jury could properly reject the testimony of the medical experts who opined that Mr. Van's injuries were caused at least in part by the automobile accident and conclude that Mr. Van suffered no injury as a result of the 2007 accident. By failing to recognize the jury's prerogative to reject the expert testimony on causation, particularly in light of the lay testimony which conflicted with the expert testimony, the trial court erred in concluding that the manifest weight of the evidence was contrary to the jury verdict. See Easkold v. Rhodes, 614 So. 2d 495 (Fla. 1993). Accordingly, we find that the trial court abused its discretion in granting the motion for new trial.

We REVERSE and REMAND for the trial court to enter judgment on the jury verdict.

WOLF and THOMAS, JJ., CONCUR.

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