IN THE SUPREME COURT
STATE OF FLORIDA

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

Petitioners,

vs.

DANIEL J. SCHMIDT,

Respondent,
_____/

Sup. Ct. Case No: SC11-1467
D.C.A. Case No: 1D10-4206
L.T. Case No.: 01-08-CA-5867

PETITIONERS' INITIAL BRIEF

On Review from the District Court of Appeal,
First District, State of Florida

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PRELIMINARY STATEMENT

In this brief, the Petitioner, CHARLES VAN, SR., will be referred to as MR. VAN, the Petitioner, RILLA VAN, will be referred to as MS. VAN, and the Petitioners will be referred to collectively as the Petitioners, the Plaintiffs or the VANS. The Respondent, DANIEL J. SCHMIDT, will be referred to as the Respondent, the Defendant, the Defense or SCHMIDT. The relevant Florida District Courts of Appeal shall be referred to by their number as ("First District", "Second District", etc.) Citations to the original sixteen (16) volume record on appeal will be made to the letter "R" and the appropriate volume and page number so that volume one, page one would be cited as follows: (R-I-1)

STATEMENT OF THE CASE AND FACTS

The VANS brought the action below seeking damages against SCHMIDT for injuries resulting from an automobile collision. (R-VII, 3-4) MR. VAN sought damages for the injuries he suffered in the automobile collision. (R-VII, 3) MS. VAN sought damages for loss of consortium with her spouse, MR. VAN. (R-VII, 4)

The action proceeded to a three day jury trial. (R-IX, 278-283) At the trial, SCHMIDT did not contest liability for the subject automobile collision but disputed that the collision caused MR.VAN's injuries. (R-X, 563) The jury returned a verdict of "no causation". (R-IX, 302-303) The VANS filed a motion for new trial. (R-IX, 304-315)

The trial court granted the VANS' motion for new trial finding that the jury's verdict was against the manifest weight of the evidence. (R-X, 563-568) The only expert witnesses presented at trial were three medical doctors. Two of the medical doctors were expert witnesses called by the VANS. One of the medical doctors was an expert witness called by SCHMIDT. (R-X, 564-565) However, all three of the experts testified that MR. VAN's injuries were caused at least in part by the subject automobile collision. (R-X, 566) The trial court found that based on such expert testimony, the manifest weight of the evidence was

contrary to the jury verdict and a new trial was warranted. (R-X, 567)

The trial court's order granting new trial was appealed to the First District. The First District reversed the order granting new trial by published opinion. *Schmidt v. Van*, 65 So.3d 1105 (Fla. 1st DCA 2011)

The First District held that the trial court abused its discretion in granting new trial because the trial court failed to recognize the jury's prerogative to reject expert testimony and therefore erred in concluding that the verdict was against the manifest weight of the evidence. *Schmidt,* at 1109-1110.

On July 28, 2011, the VANS timely filed their notice to invoke the discretionary jurisdiction of this court. This court accepted jurisdiction of this matter by its order dated March 23, 2012.

SUMMARY OF THE ARGUMENT

The First District erred in failing to apply the very deferential standard of review applicable to orders granting new trial as set out by this court in *Brown v. Estate of A.P. Stuckey*, 749 So.2d 490 (Fla. 1999). *Stuckey*, required the First District to apply the abuse of discretion standard of review and to affirm the order granting new trial if, "reasonable persons could differ" as to the propriety of the grant of new trial. *Stuckey*, at 497-498.

In the Plaintiff, MR. VAN's negligence action, the jury below found that MR. VAN's injuries were not caused by the subject automobile collision. The trial court granted new trial finding that the manifest weight of the evidence was contrary to the jury's verdict. The trial court based its grant of new trial on the fact that all of the medical doctor expert witnesses (including the Defense's expert) testified that at least some of MR. VAN's injuries were the result of the subject automobile accident.

As all of the medical doctor expert witnesses who testified (including the Defense's expert), testified in favor of causation, it is beyond question that a reasonable person could have concluded that the manifest weight of the evidence was against the jury verdict. In other words, a reasonable person could have agreed with the trial court and granted new trial. Accordingly, this court should

quash the First District's opinion below for failing to follow this court's direction in *Stuckey, supra.*

Less than one month after the First District issued its opinion in the instant case, the Fourth District, in *Kuebler v. Ferris*, 65 So.3d 1154 (Fla. 4th DCA 2011), recognized that the First District had failed to follow this court's opinion in *Stuckey, supra,* and declined to follow the First District's opinion in the instant case. *Kuebler,* at 1157-1159.

JURISDICTIONAL STATEMENT

This court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of this court or another district court of appeal on the same point of law. Art. V, § 3(b)(3) Fla.Const. (1980); Fla.R.App.P. 9.030(a)(2)(A)(iv).

The opinion of the First District herein expressly and directly conflicts with this court's opinions in *Brown v. Estate of A.P. Stuckey*, 749 So.2d 490 (Fla. 1999) and *E.R. Squibb and Sons, Inc. v. Farnes,* 697 So.2d 825 (Fla. 1997) as set out herein.

Further, the opinion of the First District herein expressly and directly conflicts with the Fourth District's opinion in *Kuebler v. Ferris,* 65 So.3d 1154 (Fla. 4th DCA 2011). In *Kuebler,* the Fourth District considers the First District's opinion below, by name, and expressly and directly found that it conflicts with *Stuckey, supra*.

> In both *Jordan*[1] and *Schmidt*[2] 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 discretion. We think this runs afoul of the admonition in *Brown v. Estate of*

[1] *Jordan v. Brown,* 855 So.2d 231 (Fla. 1st DCA 2003)
[2] The instant case.

Stuckey ...

Kuebler, at 1158. (Emphasis supplied)

Then the Fourth District states that, "If we apply the same rationale as was used in *Jordan* and *Schmidt,*[3] we would have to find that the trial court abused its discretion." *Kuebler,* at 1158. By affirming the trial court's grant of new trial, *Kuebler,* at 1159, the Fourth District expressly and directly creates conflict with the First District's opinion in the instant case.

ARGUMENT

THE DECISION OF THE FIRST DISTRICT IN THE INSTANT CASE FAILS TO GIVE THE TRIAL COURT'S DECISION TO GRANT NEW TRIAL THE PROPER DEFERENCE AS REQUIRED BY THIS COURT IN *BROWN V. ESTATE OF A.P. STUCKEY*, 749 SO.2D 490 (FLA. 1999) AND *E.R. SQUIBB AND SONS, INC. V. FARNES*, 697 SO.2D 825 (FLA. 1997)

Standard of Review

The applicable standard of review for an order granting new trial is abuse of discretion. *Brown v. Estate of A.P. Stuckey*, 749 So.2d 490, 497 (Fla. 1999) ("[W]hen a new trial is ordered, the abuse of discretion test becomes applicable on appellate review.") Accordingly, a reviewing court cannot find an abuse of discretion if "reasonable persons could differ" as to the propriety of the action taken:

> 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.

Stuckey, at 497-498. (Emphasis supplied)

Argument

Orders granting new trial are required to contain the reasons they were

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[3]The instant case.

entered:

> All orders granting a new trial shall specify the specific grounds therefor. If such an order is appealed and does not state the specific grounds, the appellate court shall relinquish its jurisdiction to the trial court for entry of an order specifying the grounds for granting the new trial.

Fla.R.Civ.P. 1.530(f) (Emphasis supplied)

When reviewing a trial court's order granting new trial, the court must look to the reasons set forth in the order. *Wackenhut Corp. v. Canty,* 359 So.2d 430, 435 (Fla.1978) ("Orders granting motions for new trials should articulate reasons for so doing so that appellate courts may be able to fulfill their duty of review by determining whether judicial discretion has been abused.").

What did the Trial Court Find?

In the instant case the trial court granted new trial by written order, (R-X, 563-568) and in such written order the trial court found as follows:

A. MR. VAN [Plaintiff] and SCHMIDT [Defendant] had an automobile collision on October 21, 2007. (R-X, 563)

B. SCHMIDT [Defendant] admitted liability due to his rear-ending MR. VAN's [Plaintiff] vehicle while SCHMIDT [Defendant] was driving under the influence. (R-X, 563)

C. MR. VAN [Plaintiff] claimed damages to his spine due to the subject automobile collision. (R-X, 563)

D. MR. VAN [Plaintiff] had a history of problems with his spine

predating the subject automobile collision. (R-X, 563)

Therefore the question for the jury was whether MR. VAN's damages were caused by (1) the subject automobile collision, (2) MR. VAN's previous back problems, or (3) some combination of the two. The jury found that SCHMIDT had not caused any of MR. VAN's damages. (R-IX, 302)

The trial court found that all of the expert testimony presented at trial was contrary to the jury verdict. The trial court recounted that all three of the expert medical doctors (two called by MR. VAN and one called by SCHMIDT) who testified at trial, testified that MR. VAN's damages were at least partially caused by the subject automobile collision. (R-X, 564-565) "They all agreed that Plaintiff's injury and resulting surgery was caused, at least in part, as a result of the 2007 collision." (R-X, 566) The trial court then found the jury verdict was against the manifest weight of the evidence:

> 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 was against the manifest weight of the evidence.

(R-X, 567)

and granted new trial. (R-X, 567)

What should the Trial Court Consider when Ruling on a Motion for New Trial?

Trial courts are given the power to grant new trials to avoid unjust verdicts:

> 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.

Stuckey, at 495.

This court has held that when considering a motion for new trial, a trial court must consider the credibility of the witnesses along with the weight of all of the other evidence:

> [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).

Smith v. Brown, 525 So.2d 868, 870 (Fla. 1988) (Emphasis supplied) and quoted with approval in *Stuckey*, at 497.

The trial court is not required to deny the motion for new trial because the jury verdict is supported by evidence in the record or because it is not clear, obvious and indisputable that the jury was wrong. This is most clearly shown as follows:

> 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.” ...

> 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.

Stuckey, at 497-498.

What test is applied by Appellate Court's to Review Orders Granting New Trial?

In reviewing order granting new trial whether Appellate courts are required to defer to the trial court if reasonable persons could differ as to the propriety of the action taken by the trial court in granting 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 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.

Stuckey, at 497-498. (Emphasis supplied); *See also*, *Trujillo v. Uniroyal Tire Co.*, 753 So.2d 1256, 1257 (Fla. 2000) (Quoting *Estate of A.P. Stuckey*, *supra*, and holding "[T]rial judge's discretion permits the grant of a new trial although it is not "clear, obvious, and indisputable that the jury was wrong."); *Ricks v. Loyola*, 822 So.2d 502, 506 (Fla. 2002) (Quoting and reaffirming the above referenced portions of *Estate of A.P. Stuckey*, *supra*,)

How Did the First District Err?

The First District erred in failing to give the trial court's order granting new

trial the proper deference.

The First District found that:

> 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.
>
> * * *
>
> 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.

Schmidt v. Van, 65 So.3d 1105, 1109-1110 (Fla. 1st DCA 2011) (Emphasis supplied)

The First District's ruling was error because the trial court is not required to defer to the jury when considering a motion for new trial. The proper standard is clearly shown in *E.R. Squibb and Sons, Inc. v. Farnes,* 697 So.2d 825 (Fla. 1997). In *Squibb,* the trial court granted new trial finding that the jury's verdict was against the manifest weight of the evidence. *Squibb,* at 826. The Third District, using language very similar to the First District in this case, reversed the trial

court's order granting new trial holding:

> Where, as in the instant case, each party had an expert witness testify at trial regarding causation, it is for the jury to resolve and weigh the conflicting testimony. Trial court judges do not have the discretion to substitute their judgment for that of the jury in regard to the conflicting testimony of expert medical witnesses.

Farnes v. E.R. Squibb & Sons, Inc., 667 So.2d 1004, 1005 (Fla. 3d DCA 1996) quoted by this court in *E.R. Squibb and Sons, Inc. v. Farnes,* 697 So.2d 825, 826 (Fla. 1997) (Emphasis supplied)

This court reversed the Third District's opinion in *Squibb*. This court recounted the various expert testimony presented in support of and against the jury's verdict and then held:

> Our review of the record shows that although there was an evidentiary basis for the jury verdict, there also was extensive evidentiary support for the trial court's ruling. ... Based on the foregoing, "we are unable to say, after viewing the evidence as a whole, that reasonable [persons] could not have concluded that the verdict ... was against the manifest weight of the evidence." *(Citations omitted)* In short, reasonable persons could agree with the trial court.

Squibb, at 827-828. (Emphasis supplied)

In the instant case, the First District reversed the grant of new trial reasoning that the trial court erred "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..." *Schmidt,* at 1110. In *Squibb, supra*, this

court found that the trial court is not required to defer to the jury's resolution of conflicting expert testimony. *Squibb,* at 828. If the trial court is not required to defer to the jury's choice of one expert over another, then it surely cannot be required to defer to the jury's choice of lay testimony over the testimony of three experts.

The First District's error was caused by its failure to recognize the difference between the standard of review applied to jury verdicts with the standard of review applied to orders granting new trial. This failure to recognize the difference is shown where the First District states in its opinion:

> 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).

Schmidt, at 1108.

Such statement of law is not correct in the context of the instant case. A more accurate statement of the law would be, "Appellate courts may not reverse jury verdicts because the jury rejected any particular testimony, including the testimony of experts." Another would be "Appellate courts may not reverse jury verdicts because the jury rejected the testimony of a medical expert."

Significantly, review of the jury verdict was not before the First District.

Rather the subject of the appeal is the trial court's order granting new trial. In reviewing an order granting new trial, the presumption is in favor of the order granting new trial and against the jury verdict:

> [T]he trial judge can and should grant a new trial if the manifest weight of the evidence is contrary to the verdict. ... 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.
>
> * * *
>
> 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." ... 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.
>
> * * *
>
> 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.

Stuckey, at 497-498. (Emphasis supplied)

Kuebler v. Ferris

Less than one month after the First District issued its opinion in the instant case, the Fourth District issued its opinion in *Kuebler v. Ferris,* 65 So.3d 1154 (Fla. 4th DCA 2011). In *Kuebler,* the Fourth District considered the First District's

opinion herein and expressly rejected its reasoning and stated:

> In *Schmidt*,[4] 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 [*sic*] 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*[5] 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 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.
>
> If we apply the same rationale as was used in *Jordan* and *Schmidt*, we would have to find that the trial court abused its discretion. In this case, the trial court granted a new trial on the ground that it was "undisputed" that all of the expert and lay testimony showed Ferris suffered at least a neck strain as a result of the accident.

[4]The instant case.

[5]*Jordan v. Brown*, 855 So.2d 231 (Fla. 1st DCA 2003)

* * *

> Because there is no record basis to show that the evidence was "undisputed" that an injury occurred, and the trial court did not consider the credibility of the plaintiff in its assessment, we could find that the trial court abused its discretion, just as the courts did in *Schmidt* and *Jordan.* It is most likely the result we would prefer, as the trial court should defer to the jury on issues of the weight to be given to expert testimony. Nevertheless, *Brown* teaches that the trial judge may grant a new trial although it is not "clear, obvious, and indisputable that the jury was wrong." *Brown* further explains the very limited authority of the appellate court in reviewing the broad discretion granted to the trial court, and we think reasonable persons could differ as to the propriety of the action by the trial court, particularly where the defense counsel in closing argument admitted that the accident caused at least some injury. We therefore must affirm the trial court's order of a new trial.

Kuebler, at 1157-1159. (Emphasis supplied)

The Fourth District in *Kuebler* correctly held that the First District's opinion herein is contrary to this court's instructions when reviewing grants of new trial as set out in *Stuckey,* at 497-498. This court should approve the Fourth District's opinion in *Kuebler,* and quash the First District's opinion in the instant case.

II.

ALTERNATIVELY, SHOULD THIS COURT AGREE WITH THE FIRST DISTRICT THAT THE TRIAL COURT APPLIED THE INCORRECT LAW, THEN THIS ACTION SHOULD BE REMANDED TO THE TRIAL COURT FOR FURTHER PROCEEDINGS UNDER THE CORRECT LEGAL STANDARD

The First District attempted to justify its opinion reversing the order granting new trial by asserting that the trial court's premise for granting the new trial was legally improper.

> [T]he 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.

Schmidt, at 1109.

The First District then remanded the action for "the trial court to enter judgment on the jury verdict." *Schmidt*, at 1110.

The VANS dispute that the trial court erred. However, to the extent there was legal error, it was in the trial court assessing what should have been done by the jury rather than engaging in its own independent review of the evidence as required by *Stuckey*. *Stuckey*, provides that:

> [T]he 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's discretion permits the grant of a new trial although it is not "clear, obvious, and indisputable that the jury was wrong." ... 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.

Stuckey, at 497-498. (Emphasis supplied)

Should this court agree with the First District that the trial court erred in assessing what the jury should have done rather than engaging in its own independent review of the evidence, the First District would still have erred by failing to remand the action for reconsideration in light of the correct legal standard. If the First District was right, then the trial court should apply the correct legal standard and conduct its own independent review of the evidence to determine if the manifest weight of the evidence is against the jury verdict:

> [W]hen a trial court applies the incorrect legal standard, we reverse and remand for a new hearing at which the trial court must reconsider its decision in light of the proper legal standard.

Thompson v. Douds, 852 So.2d 299, 305 (Fla. 2d DCA 2003), *rev. den.*, 871 So.2d 872 (Fla. 2004); *See also, Ultimate Makeover Salon & Spa, Inc. v. DiFrancesco*, 41 So.3d 335, 338 (Fla. 4th DCA 2010) ("When a trial court misconstrues the

scope of its discretion ... the proper remedy is to remand the cause to the trial court for further proceedings."); *State Farm Fire and Cas. Co. v. Levine,* 837 So.2d 363, 366 (Fla. 2002) (Remanding for reconsideration of a motion for new trial finding, "The lack of a developed record on the issue, the confusion regarding prejudice as an element of the *De La Rosa* test, and the primary focus being upon the time element rather than the substance, all militate in favor of remanding the case to the trial court for further consideration of the proper principles.")

III.

SHOULD THIS COURT REVERSE THE FIRST DISTRICT HEREIN IT SHOULD ALSO REVERSE THE FIRST DISTRICT'S DENIAL OF THE VAN'S MOTION FOR APPELLATE ATTORNEY'S FEES FOR THE PROCEEDINGS BEFORE THE FIRST DISTRICT.

The VANS made a motion for appellate attorneys fees before the First District. In such motion[6], the VANS asserted that they had served a proposal for settlement at trial and that if the VANS prevailed before the First District and were awarded a judgment in excess of 125% of the amount of the proposal on remand that they would be entitled to attorneys fees for such appeal. *See, Frosti v. Creel,* 979 So.2d 912, 917 (Fla. 2008) ("The right to attorney fees pursuant to section 768.79 applies to fees incurred on appeal.")

As the First District ruled against the VANS below, the First District, of course, denied the VANS' motion for appellate attorneys fees. Should the VANS prevail before this court and this court reverse the ruling of the First District below, the VANS' position below would be vindicated and the VANS would in fact be the "prevailing party" before the First District.

Therefore should the VANS prevail before this court, this court should reverse the denial of the motion for appellate attorneys fees filed before the First District and direct the First District to enter its order allowing the trial court to

award attorneys fees for this appeal to either of the VANS who recovers a judgment in excess of 125% of the proposal for settlement made by the same.

[6]Like the similar motion for appellate attorneys fees filed in this court.

CONCLUSION

The First District's opinion below should be quashed with directions for the First District to affirm the trial court's order granting new trial and grant the VANS' motion for appellate attorneys fees provided that the VANS recover a judgment more than 125% of their proposals for settlement.

In the alternative, if this court agrees with the reasoning of the First District that the trial court applied the incorrect law, then the portion of the First District's opinion directing entry of judgment on the jury verdict should be quashed and the First District should be directed to remand this case to the trial court for reconsideration of the VAN's motion for new trial under the proper legal standard.

Respectfully submitted,
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& BROWNING, P.A.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to the following:

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by regular U.S. mail on May 14, 2012.

George T. Reeves

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Fla.R.App.P. 9.210(a)(2).

George T. Reeves