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 JURISDICTION

DANIEL J. SCHMIDT

(With Appendix)

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REFERENCES

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POINT ON APPEAL

THERE IS NO CONFLICT JURISDICTION. THE PETITIONERS ARE MERELY SEEKING A SECOND APPEAL ON THE MERITS.

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STATEMENT OF THE FACTS AND CASE

After negligence was admitted, this case went to a Jury-Trial on causation and damages and the jury returned a Verdict finding no causation or damages. The trial court granted a Motion for New Trial finding that the jury could not base its Verdict on lay evidence without the defense hiring an accident reconstruction expert because the medical experts testified as to causation and injury. The First District reversed based on the trial court's erroneous conclusion of law that the jury could not reject medical expert testimony and accept lay evidence without an accident reconstruction expert.

SUMMARY OF ARGUMENT

There is no express and direct conflict; only different facts, so there is no basis for the extraordinary remedy of discretionary review.

ARGUMENT

THERE IS NO CONFLICT JURISDICTION. THE PETITIONERS ARE MERELY SEEKING A SECOND APPEAL ON THE MERITS.

Standard of Review

Because this is a request by the Petitioners for discretionary review, the Standard of Review is "express and direct conflict," which is not present. Jenkins v. State, 385

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So. 2d 1356 (Fla. 1980). There are merely different facts. The Plaintiff is simply seeking a second appeal on the merits.

No Express and Direct Conflict

The Opinion of the First District in this case is in accord with the Opinion of the Florida Supreme Court in Easkold v. Rhodes, 614 So. 2d 495 (Fla. 1993) and its progeny, which hold that a jury can accept, reject or give even undisputed expert testimony any weight it deserves, including rejecting it entirely.

The Petitioners rely on the recent Fourth District Court of Appeal case of Kuebler v. Ferris, 36 Fla. L. Weekly D1548, 2011 WL 2848624 (Fla. 4th DCA, July 22, 2011), claiming express and direct conflict, but are really attempting a second appeal on the merits, which the Florida Supreme Court has repeatedly said it will not do. A close reading of these cases makes clear that there is no express and direct conflict, only a difference of facts which is insufficient to obtain the extraordinary remedy of discretionary jurisdiction of this Court.

The Petitioners go into a discussion of the facts which are favorable to them, and additionally, they ignore the facts which are unfavorable to them. Nowhere is there a crisp discussion of

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issues of law. It is, therefore, apparent that the Petitioners are seeking a second appeal on the merits, which the Florida Supreme Court has repeatedly said it will not do.

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

As previously noted the Appellate Court's decision in Kuebler and the present case are not in express and direct conflict, but are merely based on different facts. In Kuebler, the trial court granted a new trial finding that the Verdict was contrary to the manifest weight of the evidence. The Defendant's position on appeal was based upon a different view of the facts

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than the trial court's view, which found that the evidence was "undisputed" that an injury occurred.

In the present case, Schmidt v. Van, 36 Fla. L. Weekly D1425, 2011 WL 2570774 (Fla. 1st DCA, June 30, 2011), the trial court's Order was based on erroneous rulings of law, which are not expressly set out in the opinion but which are alluded to on page 1 of the Opinion on Motion for Rehearing:

> ...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"...
>
> Schmidt, 1.

This is a crucial distinction because the trial court's Order in the present case was based on erroneous conclusions of law, and not merely a different view of the evidence as was the case in Kuebler.

Again, the Petitioners have not argued all the facts, but merely those which are favorable to them in order to create the **appearance** of express and direct conflict. The court in Kuebler took a different view of the evidence than the Defendant by stating "that the undisputed testimony of the witnesses, expert and lay, established that the Plaintiff had suffered some

injury." Kuebler, 3. The trial court in the present case expressly disregarded the lay testimony. This was not just a different view of the evidence, but a **direct legal conclusion** that the jury could not accept the lay opinion without additional expert testimony *on* "technical matters," which finding by the trial court is clearly contrary to Florida law.

The trial court's ruling was legally incorrect, not merely a different view of the evidence. The court's legal conclusion was directly contrary to this Court's holding in Easkold v. Rhodes, 614 So. 2d 495 (Fla. 1993), which was recently restated in Wald v. Grainaer, 36 Fla. L. Weekly S211, 2011 WL 1885710:

> ...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.
>
> Wald, 3.

As this Court is well aware, a Jury Verdict is clothed with a very strong presumption of correctness. Stark v. Vasguez, 168 So. 2d 140 (Fla. 1964)(noting that the appellate court does not have the opportunity to observe the witnesses while they testify

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or to judge their frankness); Broward County School Board v. Ruiz, 493 So. 2d 474 (Fla. 4th DCA 1986)(court had no authority to second guess jury in a negligence case); Grossman v. Sea Air Towers, Limited. 513 So. 2d 686 (Fla. 3rd DCA 1987)(jury verdict which finds support in the record can not be disturbed); Landrv v. Hornstein. 462 So. 2d 844 (Fla. 3rd DCA 1985)(appellate court should not reevaluate evidence and substitute its judgment for that of the jury); Thompson v. Jacobs. 314 So. 2d 797 (Fla. Is-DCA 1975) ; Vanzant v. Davies. 215 So. 2d 504 (Fla. 1st DCA 1968) ; 3 Fla. Jur. 2d, Appellate Review, § 359 (1978).

Furthermore, despite the Petitioner's argument to the contrary a trial court is not viewed with unfettered discretion to grant a new trial. This is the reason this Honorable Court in Wackenhut Corporation v. Canty. 359 So. 2d 430 (Fla. 1978) held that **trial courts are required to provide detailed Orders when they grant a new trial so that appellate review is possible:**

> 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 intelligent appellate review of such orders the reasons which produced the need for the new trial must be set forth in the order. *Stewart Bonded Warehouse Inc.* v.

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Bevis, 294 So.2d 315, 317 (Fla. 1974).

Wackenhut. 434.

See also, Jones v. Atkinson, 974 So. 2d 573 (Fla. 1st DCA 2008) (holding that the trial judge does not posses qualifiedly broad discretion when ordering a new trial); Adams v. Saavedra. 36 Fla. L. Weekly D1617, 2011 WL 3108076 (Fla. 4th DCA, July 27, 2011) (holding that an Order granting remittitur containing only "buzz words" without sufficient facts to support those characterizations was insufficient as a matter of law).

Additionally, there are numerous cases which have held that trial courts abuse their discretion by sitting as a seventh juror with veto power and reweighing the evidence. In Hernandez v. Feliciano, 890 So. 2d 401 (Fla. 5th DCA 2004), the trial court granted a new trial, and the Court of Appeal reversed, saying that the judge was usurping the function of the jury by sitting as a seventh juror with veto power:

> 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 weighed to either side. *E.G., Hillsboro Plantation, Inc. v. Plunkett,* 59 So.2d 872 (Fla. 1952)(holding that trial court abused its discretion in granting a new trial because in doing so he was weighing the sufficiency of the evidence which was a jury function)**;... (Emphasis added).
>
> Hernandez, 404.

Similarly, a case which reversed the trial judge for granting a new trial was Midtown Enterprises, Inc. v. Local Contractors, Inc., 785 So. 2d 578 (Fla. 3rd DCA 2001). The Court held that the trial court erred by weighing the credibility of the witnesses, and therefore a new trial should be granted:

> While the *Brown* decision reiterates long-standing- precedent that the trial court has broad discretion in granting a new trial when the verdict is against the manifest weight of the evidence, **the supreme court also reminds us that "[t]he role of the trial judge is not to substitute his or her own verdict for that of the jury, but to avoid what, in the judge's trained and experienced judgment, is an unjust verdict." *Id.* at 495.**
>
> **In this case, the reasons articulated by the trial court in the order refer solely to the weight of the evidence and the credibility of the witnesses.** More importantly, the oral pronouncements made by the trial court at the conclusion of extensive post-trial hearings only refer to the perceived evidentiary errors. It is only the order drafted by counsel for Local

> Contractors that articulates the reasons quoted above. In fact, during these hearings, the trial court expressed its reluctance to act as a seventh juror.
>
> **We thus find that the trial court abused its discretion in granting a new trial** on the basis that the verdict was against the manifest weight of the evidence (Emphasis added).
>
> Midtown Enterprises. 582-583.

Other recent cases which have overturned trial judges for granting a new trial, include Pones v. Moss. 884 So. 2d 230 (Fla. 2nd DCA 2 0 04) and Jones v. Goodyear Tire & Rubber Company, 871 So. 2d 899 (Fla. 3rd DCA 2004); State Farm Mutual Automobile Insurance Company v. Caboverde, 36 Fla. L. Weekly D1090, 2011 WL 1877992 (Fla. 3rd DCA, May 18, 2011)(holding where the evidence was not manifestly weighted to either side, a trial judge's decision to grant a new trial may be reversed); Morton's of Chicago/North Miami Beach, LLC v. Bermudez, 53 So. 3d 369 (Fla. 3rd DCA 2011)(holding that trial court abused its discretion in granting a motion for new trial); Ring Power Corporation v. Rosier, 36 Fla. L. Weekly D1543, 2011 WL 2752841 (Fla. 1st DCA, July 18, 2011)(holding that where a trial court grants a new trial on the basis that the Verdict was contrary to the manifest weight of the evidence, the issue is whether there is record support for the trial court's finding that the Verdict was

contrary to the manifest weight of the evidence, and the trial court abuses its discretion in granting a new trial where there is no record support for the reasons stated in its Order).

Despite what the Petitioner would have this court believe, the trial court is not imbued with unfettered discretion to grant a new trial, which is why the Florida Supreme Court has made clear the trial judge must state the reasons for granting a new trial. Such an Order is subject to reversal when the appellate court determines that the trial court has acted outside the bounds of the law, and especially when the trial judge has **misapplied the law.**

There is no conflict in the present case because the **facts are different.** The reasons stated for the new trial by the trial courts were substantially different. There is no express and direct conflict in the case and the Petitioners are simply seeking a second bite at the apple through a second appeal on the merits. As there is no direct and express conflict, the Petition should be denied.

CONCLUSION

There is no direct and express conflict. The Petitioners are simply seeking a separate appeal on the merits, which the Supreme Court has repeatedly said it will not do.

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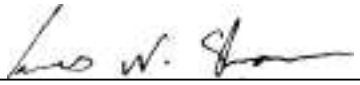
By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 2 3rd day of August , 2011 to:

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CERTIFICATION OF TYPE

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

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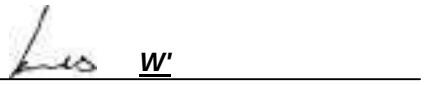
By: 
R/lchard A. Sherman, Sr.

JWS/mn

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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.

A1

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

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 uncontro verted 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 Plaintiffs 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 Stuckev, 749 So. 2d 490 (Fla. 1999). In Brown, the Florida

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. 1 st 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

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.

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. 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.