IN THE SUPREME COURT
STATE OF FLORIDA

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

Petitioners,

vs.

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

DANIEL J. SCHMIDT,

Respondent,
_____/

PETITIONERS' JURISDICTIONAL 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. Citations shall be made to the Appendix by page number as (App. - ___)

STATEMENT OF THE CASE AND FACTS

The VANS were the Plaintiffs in the trial court and brought the action below seeking damages against SCHMIDT for injuries resulting from an automobile collision. (App. - 2) MR. VAN sought damages for the injuries he suffered in the automobile collision. (App. - 2) MS. VAN, MR. VAN's spouse, sought damages for loss of consortium.

The action before the trial court proceeded to a three day jury trial. (App. - 2) At the trial, SCHMIDT did not contest liability for the subject automobile collision but disputed that the collision caused MR.VAN's injuries. (App - 2) The jury returned a verdict of "no causation". (App. - 2) The VANS filed a motion for new trial. (App. -2)

The trial court granted the VAN's motion for new trial finding that the jury's

verdict was against the manifest weight of the evidence. (App. - 2) The only expert witnesses presented at trial were three medical doctors, one of whom testified for SCHMIDT. (App. - 3) All of the experts testified that MR. VAN's injuries were caused at least in part by the subject automobile collision. (App. - 3) The trial court found that based on the above expert testimony, the manifest weight of the evidence was contrary to the jury verdict and a new trial was warranted. (App. - 2-3)

An appeal of the order granting new trial was filed to the First District Court of Appeal. On April 15, 2011, the district court reversed the subject order. On May 2, 2011, the VANS filed a timely motion for rehearing. On June 30, 2011, the district court issued its opinion on rehearing which also reversed the order granting new trial. (App. - 1-9)

The district court held that the trial court abused its discretion in granting new trial because the trial court erroneous concluded that the jury should not have rejected the uncontroverted expert evidence of causation and returned a "no causation" verdict. (App. - 5) The district court felt that 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. (App. - 9)

On July 28, 2011, the VANS timely filed their notice to invoke the discretionary jurisdiction of this court.

SUMMARY OF THE ARGUMENT

In this case, the district court of appeal reversed the grant of new trial holding that the trial court erred in failing to recognize the jury's prerogative to reject the expert testimony. The district court's holding conflicts with the admonition of *Brown v. Estate of Stuckey*, 749 So. 2d 490, 497 (Fla.1999), 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.

The Fourth District Court of Appeals recognized that the instant case ran afoul of *Stuckey*, in *Kuebler v. Ferris,* 36 Fla. L. Weekly D1548, 2011 WL 2848624, (Fla. 4th DCA July 20, 2011) and expressly and directly declined to follow the instant case. This court is required to resolve the conflict between the instant case and *Kuebler*, *supra*.

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).

ARGUMENT

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FOURTH DISTRICT COURT IN *KUEBLER V. FERRIS*, 36 FLA. L. WEEKLY D1548, 2011 WL 2848624, (FLA. 4TH DCA JULY 20, 2011)

On June 30, 2011, the First District Court issued its opinion on rehearing which is the decision on review herein. (App. - 1) On July 20, 2011, the Fourth District Court issued its opinion in *Kuebler v. Ferris*, 36 Fla. L. Weekly D1548, 2011 WL 2848624, (Fla. 4th DCA July 20, 2011).[1] In *Kuebler*, the Fourth District Court considered the First District's opinion herein and expressly and directly rejected its reasoning.

> In *Schmidt*,[2] 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,

[1]The Fourth District Court's website shows that no motion for rehearing or any other post opinion motion has been filed, the time for any such motion has passed and the mandate was issued on August 5, 2011.

[2]The instant case.

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 D1426.

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*[3] 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*,[4] 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.

* * *

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*[5] 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

[3]The instant case.
[4]The instant case.
[5]The instant case.

> 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 4-5[6]. (Emphasis supplied)

The VANS agree with the Fourth District Court that the First District's opinion herein is contrary to this court's instructions when reviewing grants of new trial as set out in *Brown v. Estate of A.P. Stuckey*, 749 So.2d 490, 497-498 (Fla. 1999).

However, the instant case's divergence from Supreme Court precedent becomes even more clear when considering this court's opinion 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 District Court of Appeal reversed the grant of 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)

This court reversed the opinion of the District Court. 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.

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..." (App. - 9) In *Squibb, supra,* this court found that the trial court is not required to defer to the jury, even where there is conflicting expert testimony. *Squibb,* at 828. In the trial court is not required to defer to the jury's resolution of conflicting expert testimony, then it surely cannot be required to defer to the jury's resolution of conflicting expert and lay testimony.

The Fourth District Court in *Kuebler,* correctly interpreted this court's precedent in *Stuckey,* and *Sqibb,* with regards to consideration of order's granting

[6]Citation to *Kuebler,* will be to the Westlaw page number.

new trial. This court should now reaffirm *Stuckey*, and *Sqibb*, by accepting discretionary review, quashing the contrary decision of the district court below and approving the Fourth District Court's opinion in *Kuebler*.

CONCLUSION

This court has discretionary jurisdiction to review the decision below, and the court should exercise that jurisdiction to consider the merits of the Petitioners' argument.

Respectfully submitted,
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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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on August 8, 2011.

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