ORIGINAL



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' REPLY 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) References to the Respondent's Answer Brief filed in this matter will be made to the appropriate page number as follows: (Answer Brief at page ____)

## REPLY-ARGUMENT

THE TRIAL COURT IS NOT PROHIBITED FROM RE-WEIGHING THE EVIDENCE IN DISPOSING OF A MOTION FOR NEW TRIAL. RATHER, THE TRIAL COURT IS REQUIRED TO RE-WEIGH THE EVIDENCE TO DETERMINE IF THE MANIFEST WEIGHT OF THE EVIDENCE IS AGAINST THE VERDICT.

The meat of the argument raised by SCHMIDT is shown best where he states that:

> 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.

Answer Brief at page 36. (Emphasis supplied)

The above clearly shows how SCHMIDT misunderstands the function of the trial court in determining a motion for new trial. Contrary to the above, in ruling on the motion for new trial, the trial court was required to "re-weigh" the evidence itself and make its own determination as to whether the manifest weight of the evidence was against the verdict.

> [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).

*Smith v. Brown,* 525 So.2d 868, 870 (Fla. 1988) (Emphasis supplied) and quoted with approval in *Brown v. Estate of A.P. Stuckey,* 749 So.2d 490, 497 (Fla. 1999).

The trial court is given broad discretion in ruling on motion for new trial due to its superior vantage point:

> When a motion for new trial is made it is directed to the sound, broad discretion of the trial judge, who because of his contact with the trial and his observation of the behavior of those upon whose testimony the finding of fact must be based is better positioned than any other one person fully to comprehend the processes by which the ultimate decision of the triers of fact, the jurors, is reached.

*Allstate v. Manassee,* 707 So.2d 1110, 1111 (Fla. 1998)

and the trial court is to use this superior vantage to review conflicts in the evidence. *State v. Spaziano,* 692 So.2d 174, 178 (Fla. 1997) (Holding that in regards to considering motions for new trial, "We give trial courts this responsibility because the trial judge is there and has a superior vantage point to see and hear the witnesses presenting the conflicting testimony. The cold record on appeal does not give appellate judges that type of perspective.") (Emphasis supplied)

## II.

## NONE OF THE FLORIDA SUPREME COURT CASES CITED BY THE SCHMIDT REQUIRE REVERSAL AS NONE SHOW THE TRIAL COURT ABUSES HIS DISCRETION IN CONSIDERING THE MATTERS PRESENTED HERE

SCHMIDT cites several Florida Supreme Court opinions as supporting the First District's opinion herein. Each of these cases will be addressed in turn.

### *Wald v. Grainger*

In *Wald v. Grainger,* 64 So.3d 1201 (Fla. 2011), this court reviewed the First District Court's opinion reversing the grant of a directed verdict:

> Wald moved for directed verdict on the issue of permanency. Over the defendant's objection, the trial court granted the motion for directed verdict on permanency, but only as to the right thigh condition. The trial court instructed the defendant that he was free to argue to the jury that none of Wald's other injuries were permanent. The trial court instructed the jury that it was free to weigh, accept, or reject the opinions of any expert witness. However, there was no reference to permanency in the verdict form or in the jury instructions. The jury entered judgment for Wald and awarded him over $1 million in damages for his injuries.
>
> On appeal, the First District Court reversed the final judgment, finding that the trial court committed reversible error by directing a verdict as to permanency as that was a jury question. The First District explained that a jury is free to weigh the credibility of expert witnesses as it does any other witness and to reject any testimony regarding permanency, including uncontradicted testimony. The First District concluded that there was conflicting testimony as to the permanency of Wald's neck and back injuries and ambivalent testimony as to the permanency of the thigh injury, for which Wald

did not even seek damages. *Grainger v. Wald,* 982 So.2d 42 (Fla. 1st DCA 2008).

*Wald,* at 1204. (Emphasis supplied)

This court then quashed the decision of the First District in favor of the trial court's original ruling. This court found:

> For the reasons stated above, we find that the trial court properly directed a verdict for Wald on the issue of permanency and thus the First District improperly reversed the final judgment in favor of Wald entered. Accordingly, we quash the decision of the First District and remand for reinstatement of the jury verdict.

*Wald,* at 1208.

As *Wald,* does not involve a review of a trial court's grant of new trial and the extremely deferential standard of review applicable to such actions, *Wald,* is not relevant. However, if *Wald,* were relevant, the VANNS would point out that the holding of the case supports the trial court's removing the factual issue from the jury, contrary to the main thrust of SCHMIDT's argument.

*Weygant v. Fort Myers Lincoln Mercury, Inc.*

In *Weygant v. Fort Myers Lincoln Mercury, Inc.,* 640 So.2d 1092 (Fla. 1994) the trial court denied a motion for new trial and the denial of the motion was appealed to the Second District. The Second District Affirmed the Trial court.

> In a special verdict, the jury held that respondent was not the legal cause of Weygant's injuries. Weygant appealed to the Second

> District Court of Appeal and argued that under *Morey v. Harper,* 541 So.2d 1285 (Fla. 1st DCA), *review denied,* 551 So.2d 461 (Fla.1989), she is entitled to a new trial because the jury's finding is contrary to uncontroverted expert medical testimony. The district court affirmed the special verdict and held that in light of the conflicting lay testimony, the jury's verdict was not against the manifest weight of the evidence.

*Weygant,* at 1093.

This court then affirmed the Second District and the trial court's original ruling. *Weygant,* at 1094.

It is true that *Weygant,* refers to the right of the jury to reject expert testimony in the right circumstances:

> We reaffirm our holding in *Easkold* that a jury may reject expert medical testimony when there exists relevant conflicting lay testimony and disapprove *Morey* as being in direct conflict therewith. In the instant case, the jury was within its province to reject the medical testimony and base its verdict on lay testimony. We approve the decision of the district court.

*Weygant,* at 1094.

But this can hardly be construed as holding that the trial court abuses its discretion in granting new trial where there is conflicting testimony. To the extent *Weygant,* could be so construed, this court's later opinion in *E.R. Squibb and Sons, Inc. v. Farnes,* 697 So.2d 825 (Fla. 1997) would overrule it, as follows:

> 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)

*Easkold v. Rhodes*

In *Easkold v. Rhodes,* 614 So.2d 495 (Fla. 1993) at the conclusion of a personal injury trial, the trial court denied a motion for new trial.

> The jury found Easkold negligent, and awarded Rhodes $37,000 for past and future medical expenses and loss of earning ability. However, the jury awarded no damages for pain and suffering or loss of consortium, and specifically found that Rhodes had not sustained a permanent injury. Rhodes filed a motion for new trial, arguing that the uncontradicted medical evidence indicated that she had sustained permanent injuries as a result of the auto accident. That motion was denied by the trial court. *Id.*
>
> On appeal, the First District Court of Appeal reversed the denial of the motion for a new trial. The district court found that Rhodes had presented expert medical testimony that she had sustained permanent medical injuries as a result of the auto accident and that this medical evidence was uncontroverted because Easkold presented no medical testimony to the contrary and neither Dr. Flynn nor Dr. VerVoort testified that additional medical history would have changed his opinion. Consequently, the district court determined that the jury's verdict of no permanent injury was contrary to the manifest weight of the evidence and that Rhodes' motion for a new trial should have been granted. *Id.* at 269.

*Easkold,* at 496-497.

This court then reversed the First District. *Easkold,* at 497-498. Therefore the *Easkold,* court, like all of the other court's above found that the trial court acted within its discretion in disposing of the motion for new trial before it.

Due to the strong presumption in favor of trial court orders disposing of motion for new trial and the very deferential "abuse of discretion" standard of review," the above cases affirming trial court rulings on motion for new trial cannot be seen as precedent for reversing trial court rulings on motion for new trial, even in similar circumstances. The Fourth District has recounted this principle in *Wiggins v. Sadow,* 925 So.2d 1152 (Fla. 4th DCA 2006). In *Wiggins,* the unsuccessful plaintiff challenged the trial court's denial of a motion for new trial as follows:

> Homer Wiggins, as representative of the estate and survivors of Virginia Wiggins, appeals the jury verdict and final judgment in favor of Samuel H. Sadow, M.D. on Wiggins' claim of medical malpractice causing the death of Virginia Wiggins, his wife. He claims that the trial court abused its discretion in denying his motion for new trial based upon juror misconduct. He also contends that the verdict was against the manifest weight of the evidence. Because the issue of juror concealment was determined on issues of credibility, the court did not abuse its discretion. We also conclude that the trial court did not abuse its discretion in denying the motion for new trial based on Wiggins' challenge that the verdict was against the manifest weight of the evidence.

*Wiggins,* at 1153.

The plaintiff asserted that certain cases where affirming the trial court's grant of new trial under similar facts mandated reversing the trial court in this case. The *Wiggins,* court rejected this argument holding:

> Wiggins cites *Fisher v. Smithson,* 839 So.2d 788 (Fla. 4th DCA 2003), and *Gonzalez v. Ravirifici,* 745 So.2d 1145 (Fla. 3d DCA 1999), as authority for his position that a new trial should have been granted, but in each of those cases the appellate court affirmed an order of the trial court *granting* a new trial. In both cases, the appellate court determined that the granting of a new trial was not an abuse of discretion. If the trial court in this case had granted a new trial, we may very well have determined that it was not an abuse of discretion. *See Brown,* 749 So.2d 490. Nevertheless, where a review of the record shows that reasonable persons can disagree on the court's conclusion that there was disputed evidence as to the issue of negligence, we will not reverse.

*Wiggins,* at 1156. (Emphasis supplied)

*Wackenhut Corp v. Cantey*

SCHMIDT has only cited one case from this court, (and the undersigned is aware of no other from this court) where this court supported the reversal of an order on a motion for new trial. In *Wackenhut Corp v. Cantey,* 359 So.2d 430 (Fla. 1978) the trial judge granted new trial finding that the punitive damages awarded were clearly excessive. *Wackenhut,* at 432. The Third District reversed the grant of new trial. *Wackenhut,* at 432-433.

This court discharged certiorari (which had the effect of affirming the Third

District) this court quoted the trial court's entire order granting new trial which did not cite to any portion of the record or to any evidence to explain why the motion for new trial should be granted. *Wackenhut,* at 432. This court then found:

> [T]he order in this case does not point to the record for support of the trial court's determination that $50,000 of the $180,000 punitive damage award was proper but the excess was not.

*Wackenhut,* at 434.

> 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. *See, Thompson v. Williams,* 253 So.2d 897 (Fla. 3d DCA 1971). 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.
>
> Since the order for new trial is deficient because it does not contain reference to the record in support of its conclusion that remittitur of the punitive damage award is necessary to cure the excessiveness of the punitive damage verdict (its basis for requiring new trial), we have made an independent review of the record in search of support of that conclusion. We find none.

*Wackenhut,* at 435.

Thus, in *Wackenhut, supra,* the one case where this court supported the reversal of a trial court's order granting new trial, the order granting new trial did not contain any citations to the record and this court's independent review of the

record revealed no supporting facts. The VANNS believe that *Wackenhut, supra* shows an "abuse of discretion" as contemplated by *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)

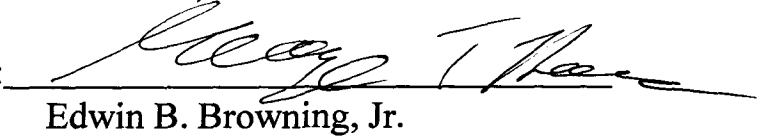
Of course in the instant case, where the trial court granted new trial due to the fact that the manifest weight of the evidence was against the jury's finding of no causation (R-X, 567) recited all of the evidence in support of causation (R-X, 563-568) and specifically referenced the testimony of three expert medical doctors in support of causation (R-X, 566) the trial court herein cannot be said to have similarly abused his discretion.

## 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,
DAVIS, SCHNITKER, REEVES
& BROWNING, P.A.

By: 

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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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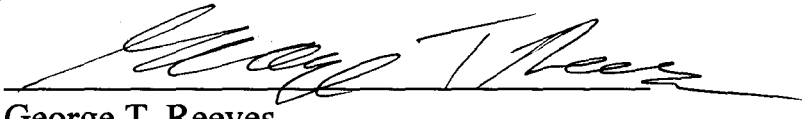
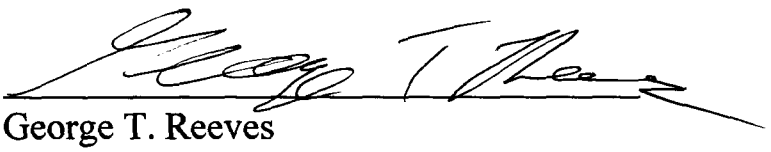
by regular U.S. mail on July 23, 2012.



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).



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July 24, 2012

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FILED
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2012 JUL 26 AM 10: 39
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BY _____

Re: *Van vs. Schmidt*

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| Sup. Ct. Case No. | SC11-1467 |
| 1st DCA Case No. | 1D10-4206 |
| L.t. Case No. | 01-08-CA-5867 |
| Our File No. | 14455 |

Dear Clerk Hall:

You will please find enclosed an original and seven (7) copies of Petitioner's Reply Brief, which I will thank you to file.

Thank you very much and if you have any question, please do not hesitate to contact me.

Sincerely,
Davis, Schnitker, Reeves & Browning, P.A.
/s/ *George T. Reeves*
(Electronically signed to avoid delay)

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Enclosures