

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC04-_____

Lower Tribunal Case No.: 4D03-2073

MANUEL CASTRO,

Petitioner,

v.

ROGER BRAZEAU,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FOURTH DISTRICT OF FLORIDA

RESPONDENT'S JURISDICTIONAL BRIEF

KERRY C. MCGUINN, JR., ESQ.

FLORIDA BAR #982644

BURKE LOPEZ, ESQ.

FLORIDA BAR #855669

RYWANT, ALVAREZ, JONES

RUSSO & GUYTON, P.A.

109 N. Brush St., Ste. 500

Post Office Box 3283

Tampa, Florida 33601

(813) 229-7007

Attorney for Respondent,

Roger Brazeau

TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIESii

STATEMENT OF THE FACTS AND OF THE CASE 1

SUMMARY OF JURISDICTIONAL ARGUMENT3

JURISDICTIONAL ARGUMENT5

 I. The Fourth District’s Opinion Does Not Conflict With Other
 Districts on Whether a Continuance Should be Granted to
 Allow Plaintiff to Procure An Affidavit from An Expert5

 II. The Fourth District’s Opinion Does Not Conflict With Other
 Districts on Whether a Lay Witness May Give an Expert Opinion
 As to the Speed An Automobile Was Traveling6

 III. The Fourth District’s Opinion Does Not Conflict With Other
 Districts on Summary Judgment9

CONCLUSION & REQUESTED RELIEF 10

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Albers v. Dasho</u> , 355 So.2d 150 (Fla. 4 th DCA, 1978).....	8
<u>Breusch v. Prough</u> , 592 So.2d 1211 (Fla. 2 nd DCA, 1992)	10
<u>Harrison v. Consumers Mortgage Company</u> , 154 So.2d 194 (Fla. 1 st DCA, 1963)	9
<u>Reeves v. State</u> , 647 So.2d 994 (Fla. 2 nd DCA, 1994)	8
<u>Snyder v. Cheezum Dev. Corp.</u> , 373 So.2d 719, (Fla. 2 nd DCA, 1979).	4, 9
<u>Vandyk v. Southside Gun, Inc.</u> , 638 So.2d 138 (Fla. 1 st DCA, 1994).	5, 6
<u>Zwinge v. Hettinger</u> , 530 So.2d 318 (Fla. 2 nd DCA, 1988)	7, 8

STATEMENT OF THE FACTS AND OF THE CASE

The Trial Court granted a motion for summary judgment in favor of the Respondent, BRAZEAU, and the Fourth District Court of Appeal issued a written opinion affirming the summary judgment.

The Respondent, BRAZEAU, agrees that the Petitioner's Statement of Facts quotes in part the language from the opinion issued by the Fourth District Court of Appeal that is relevant in this matter. Importantly, the Fourth District Court of Appeal's opinion below includes the following additional recitation of the facts about the accident after the point where Petitioner stops quoting in his Jurisdictional Brief, as follows:

* * *However, neither Castro not his passengers saw the Brazeau vehicle before the accident. One of the passengers testified that Brazeau must have been traveling very fast because of the damage caused to Castro's vehicle's chassis in the crash.

* * * It is clear that neither witness saw the vehicle prior to Jackson's vehicle impact impacting Brazeau's vehicle. The conclusion of one passenger that Brazeau had to be speeding based upon the crash damage caused to Castro's vehicle was not competent evidence because the passenger was not qualified as an expert.

* * *Unlike Trouette, Castro did not present any evidence or expert testimony that Brazeau may have acted negligently in failing to avoid the collision with Jackson.

In addition, the Fourth District Court of Appeal's opinion below includes the following additional recitation of the procedural history of the case and what occurred at the trial level in regard to the issues related to the

claim that the Trial Court abused its discretion in denying the purported motion to continue the summary judgment hearing, as follows:

* * * Recognizing the deficiency of the witness testimony to provide competent evidence of negligence, the trial judge asked Castro's attorney whether he had an affidavit from an accident reconstruction expert. The attorney responded that he had thought the witness testimony was sufficient. He said that he did have an expert but had not as yet taken the expert's deposition. (This itself is curious, because usually parties do not take their own expert witness's deposition unless required to preserve the witness's testimony for trial.) The lawyer then asked for a continuance to obtain such evidence. The judge admonished Castro's attorney, telling him that the motion had been set for hearing for months, giving the attorney plenty of time to obtain the necessary proof. Explaining that the affidavits were required to be filed at least two days prior to the hearing, see Florida Rules of Civil Procedure 1.510(c), the judge refused to continue the case. Because there was no evidence to dispute the facts, the judge granted summary judgment, saying he had no choice under the circumstances.

On appeal, Castro argues that the judge erred because he did not believe he had the discretion to grant a continuance. We have read the transcript. This experienced trial judge was not working under a misapprehension of law. Instead, he noted that the lawyer had months to file an affidavit or ask for a continuance, and neither was done. He told the lawyer that he could have moved for a continuance if he had good and sufficient ground for it, but the lawyer offered no good reason for a continuance of the summary judgment proceeding after the entire matter had already been argued. The judge concluded that based upon the affidavits and depositions filed, a summary judgment was compelled. The judge understood that he had discretion regarding the request for continuance. He simply denied the request where no good cause was shown why one should be granted.

SUMMARY OF JURISDICTIONAL ARGUMENT

It is respectfully suggested that this Court should not exercise its discretion to review the decision of the Fourth District Court of Appeal pursuant to Fla.Const.Art. V, Section 3 (b) (3), since the decision of the lower court does not expressly and directly conflict with the decisions of other District Courts of Appeal on the same points of law.

First, Petitioner argues that the decision of the appellate court below conflicts with other Districts on whether a continuance should have been granted to allow the Plaintiff more time to procure an expert affidavit. In this case, the Fourth District Court of Appeal recognized that it appeared to be a tactical decision by Petitioner's counsel not to present an expert affidavit, since he expressed his view toward the end of the summary judgment hearing that he felt the witness testimony alone was sufficient to defeat summary judgment; this was not a case of an unavailable expert witness or a problem with procuring an affidavit that would necessitate a continuance, and the appeal court below found that no good and sufficient reason was shown to grant the belated request to continue the hearing.

Second, Petitioner argues that the decision below conflicts with other District Court of Appeal cases on whether a lay witness may give opinion testimony as to the speed of an automobile. The Respondent herein asserts

that this is also an incorrect view of the facts of the different cases, and in fact there is no conflict. As the appellate court below found in this case, the two witnesses to the CASTRO accident were estimating the speed of BRAZEAU not based on their actual observations of his moving vehicle. The other District Court cases stand for the proposition that a lay witness can estimate speed based on their observation of the moving vehicle; this is entirely different from a lay witnesses attempting to opine speed based on crash damage or something other than his observation.

Finally, Petitioner argues that this case conflicts with other decisions based on the well known standard of “. . . even the slightest doubt that an issue [of fact] might exist” and the “. . . possibility of any [fact] issue” annunciated in Snyder v. Cheezum Dev. Corp., 373 So.2d 719 (Fla. 2nd DCA, 1979) and its progeny. Respondent takes issue with this contention, since the Fourth District Court of Appeal below expressly held that there was no competent evidence offered that tended to show a material fact in dispute. The case law cited by Respondent below, which was also cited by the Fourth District Court of Appeal in its opinion, recognizes that a party cannot use incompetent evidence to create issues of material fact (such as a lay witness attempting to give expert testimony on crash damage to establish excessive speed). As such, there is no conflict with existing law.

ARGUMENT

I. THE FOURTH DISTRICT'S OPINION DOES NOT CONFLICT WITH OTHER DISTRICTS ON WHETHER A CONTINUANCE SHOULD BE GRANTED TO ALLOW PLAINTIFF TO PROCURE AN AFFIDAVIT FROM AN EXPERT

First, Petitioner argues that the decision of the appellate court below conflicts with other Districts on whether a continuance should have been granted to allow the Plaintiff more time to procure an expert affidavit. Petitioner alleges conflict with Vandyk v. Southside Gun, Inc., 638 So.2d 138 (Fla. 1st DCA, 1994). In that case, the attorney served a late affidavit Id at 139. It stated that he received a call from a potential witness regarding a gun at issue Id. The attorney also stated he tried to depose the witness, but the witness refused to testify until the Supreme Court resolved an appeal regarding the criminal charges against him Id. As such, the attorney requested an extension of time and moved to continue the summary judgment hearing until he could secure an affidavit from the witness to file with the Court Id. There was also an issue as to whether the attorney had sufficient time to complete discovery before the summary judgment hearing. Id. The trial court struck the attorney's affidavit and granted the motion for summary judgment, despite the request for additional time. On appeal, the First District Court in Vandyk held that the trial court abused its discretion

when it granted the motion for summary judgment, since strict adherence with the time requirements under Rule 1.510, Florida Rules of Civil Procedure, was not warranted under the circumstances Id at 140.

There is no conflict with Vandyk or the other cases cited by Petitioner herein, and they are distinguishable. In particular, in this case, the Fourth District Court of Appeal recognized by inference that it appeared to be a tactical decision by Petitioner's counsel not to present an expert affidavit, since he expressed his view that he felt the witness testimony alone was sufficient to defeat summary judgment. There was not some technical event that occurred that prevented a party from filing record evidence that was simply ignored by the trial court in denying a motion to continue; in fact, the Fourth District opinion in this case held that there was no good reason shown. As such, the cited cases are distinguishable and there is no express and direct conflict with them as alleged by Petitioner.

II. THE FOURTH DISTRICT'S OPINION DOES NOT CONFLICT WITH OTHER DISTRICTS ON WHETHER A LAY WITNESS MAY GIVE AN EXPERT OPINION AS TO THE SPEED AN AUTOMOBILE WAS TRAVELING

Next, Petitioner contends that the decision below conflicts with other District Court of Appeal cases on whether a lay witness may give opinion testimony as to the speed an automobile was traveling (Petitioner's Jurisdictional Brief at page 5). In particular, Petitioner argues that this Court

should accept jurisdiction since the Fourth District's opinion in this case allegedly conflicts with decisions of other districts that stand for the proposition that "lay persons need not be qualified as an expert in order to express an opinion as to the speed of the vehicle." (Petitioner's Jurisdictional Brief at page 5). In support of this contention, Petitioner first cites Zwinge v. Hettinger, 530 So.2d 318 (Fla. 2nd DCA, 1988) for the proposition that ". . . the Second District held that the trial court properly allowed three eyewitnesses to testify regarding their observations and opinions concerning the speed of the vehicles involved in the accident" (Petitioner's Jurisdictional Brief at page 5).

However, review of the Zwinge case reveals that first, contrary to Petitioner's contention, the Second District in Zwinge did not reverse the trial court's "summary judgment for the Defendant" (Petitioner's Jurisdictional Brief at page 6). In fact, Zwinge involved a directed verdict and not a summary judgment. More importantly, the Second District Court of Appeal noted in Zwinge that the while the trial court was correct in disallowing the proffered witness testimony of three eyewitnesses to the accident that the first collision caused the second accident, it also properly allowed the three eyewitnesses to testify regarding their individual observations, including their opinions concerning the speed and distances of

the vehicles, and the existence of the hazard. In the case herein, CASTRO only alleged below that it was the speeding of the BRAZEAU vehicle that created a material issue of fact precluding summary judgment. The lower Court expressly noted in its opinion that **“It is clear that neither witness saw the vehicle prior to Jackson’s vehicle impacting Brazeau’s vehicle. The conclusion of one passenger that Brazeau had to be speeding based upon the crash damage caused to Castro’s vehicle was not competent evidence because the passenger was not qualified as an expert.”** As such, there is no express and direct conflict with Zwinge as Petitioner contends.

CASTRO also contends that the decision below conflicts with Reeves v. State, 647 So.2d 994 (Fla. 2nd DCA, 1994), which decision followed the Fourth District’s previous holding in Albers v. Dasho, 355 So.2d 150 (Fla. 4th DCA, 1978). CASTRO quotes the holding in Albers that “even though a witness has only a brief opportunity to observe the speed of vehicle in question, his opinion as to its speed was held to be admissible, and the fact that he had only a brief time to observe the vehicle was regarded as affecting only the weight of his testimony and not its competency.” However, as was expressly held in Albers, that witness observed the vehicle (albeit for a short period of time). In this case, the Fourth District Court of Appeal did not

consider the testimony of the putative witness as creating an issue of material fact, since his opinion the BRAZEAU vehicle was speeding was admittedly based upon his assessment of the crash damage to the vehicle, and he was not a competent expert qualified to render that opinion. Thus, there is no express and direct conflict with the cited cases.

III. THE FOURTH DISTRICT'S OPINION DOES NOT CONFLICT WITH OTHER DISTRICTS ON SUMMARY JUDGMENT

Finally, Petitioner argues that this case conflicts with other decisions based on the well known standard of “. . .even the slightest doubt that an issue [of fact] might exist” and the “. . .possibility of any [fact] issue” annunciated in Snyder v. Cheezum Dev. Corp., 373 So.2d 719 (Fla. 2nd DCA) and its progeny. First, as cited by the Respondent below and the Fourth District Court of Appeal in its opinion in this case, it is well settled that the trial court may only consider competent evidence on the issue of whether the record reflects an issue of material fact. See Harrison v. Consumers Mortgage Company, 154 So.2d 194 (Fla. 1st DCA, 1963) (holding in the context of affidavits that it is well settled that evidence in connection with a summary judgment motion must be based on personal knowledge or from facts that would be admissible in evidence). Hence, disregarding the incompetent evidence by the lower court in this case did not

result in an opinion that expressly and directly conflicts with the cases cited by Petitioner.

Petitioner also cites Breusch v. Prough, 592 So.2d 1211 (Fla. 2nd DCA, 1992) for the proposition that the Court may rely on an affidavit that is not admissible evidence but that demonstrates that the opposing party could adduce some admissible evidence. However, if one reads that opinion, the Court in Breusch did not expressly state that the affidavit at issue was inadmissible or incompetent testimony. While Petitioner might infer this conclusion from the holding, Breusch does not stand for the proposition that incompetent evidence is admissible; thus, it cannot be said that this case expressly and directly conflicts with the decision of the other District Court in the Breusch case.

CONCLUSION AND RELIEF REQUESTED

There is no direct and express conflict with the cases cited by Petitioner, since the decision of the lower court does not expressly and directly conflict with the decisions of other District Courts of Appeal on the same points of law. As such, this Court should decline the Petitioner's requested discretionary review under Fla.Const.Art. V, Section 3 (b) (3).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of true and correct copy of the foregoing has been furnished by U.S. Mail to Roy D. Wasson, Esquire, Suite 450, Gables One Tower, 1320 South Dixie Highway, Miami, Florida 33146 and Jesus Cervantes, Esquire, 8550 West Flagler Street, Suite 120, Miami, Florida 33144 on this ____ day of July, 2004.

KERRY C. MCGUINN, JR., ESQ.
FLORIDA BAR #982644
BURKE LOPEZ, ESQ.
FLORIDA BAR #855669
RYWANT, ALVAREZ, JONES
RUSSO & GUYTON, P.A.
109 N. Brush St., Ste. 500
Post Office Box 3283
Tampa, Florida 33601
(813) 229-7007
Attorney for Respondent,
Roger Brazeau

CERTIFICATE OF COMPLIANCE

I hereby certify that Times New Roman, 14 point font, was used in this **Jurisdictional Brief** and it complies with the requirements of Rule 9.210.

KERRY C. MCGUINN, JR., ESQ.
FLORIDA BAR #982644
RYWANT, ALVAREZ, JONES
RUSSO & GUYTON, P.A.