OA 10-29-86

IN THE SUPREME COURT OF FLORIDA

SEABOARD COASTLINE RAILROAD COMPANY, now known as SEABOARD SYSTEMS RAILROAD, INC.,

Petitioner,

vs.

CURTIS ADDISON,

Respondent.

CASE NO. 68,290

FIRST DISTRICT COURT OF APPEAL NO. BF-351

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent files this Statement of the Case and Facts as the statement filed by Petitioner is written in a light liberally favorable to Petitioner and disregards many important facts.

The trial below resulted in a verdict finding Seaboard to be eighty percent (80%) at fault and the Plaintiff, Curtis Addison, to be twenty percent (20%) at fault. The verdict was rendered at the conclusion of a five-day trial in which the jury heard twenty-nine witnesses. The transcript is 1,057 pages in length.

The main issues in the trial were the speed of the train and whether Mr. Addison should have operated his vehicle in a manner such that he could have stopped to avoid the collision. Testimony showed that the Seaboard train, measuring 3,000 feet in length and weighing 6 million pounds (T 980), was traveling thirty-nine (39) miles per hour in a twenty-five (25) mile per hour zone (T 504-505). The train was running behind schedule by thirty minutes and had made up fifteen minutes of the deficit between the West Jacksonville train yard and Lake Butler, Florida. (T 370 & 980).

Prior to the collision, the engineer placed the Seaboard train in full emergency braking one hundred feet prior to impact (T 346). After impact, Mr. Addison remained in his truck which was smashed against the front of the train's engine and pushed seven hundred thirty (730) feet (T 153). Seaboard's train, therefore, traveled a total of eight hundred thirty (830) feet while in full emergency braking.

It was established during trial that the crossing was extra

hazardous due to trees and shrubbery, both in and adjacent to Seaboard's right-of-way, which obscured the vision of the train engineer and Mr. Addison (T 665). In addition to the visual obstructions, the crossing was established to be marked only by a warning sign five hundred feet (500) feet from the tracks, a painted cross on the highway and a cross-buck sign at the crossing. Photographs in evidence show that tree limbs had grown over the cross-buck sign, partly obscuring the same (see photographs in "Evidence").

Mr. Addison's testimony was that he never heard the train and did not see the train until it was too late to stop (T 212). Seaboard's primary witness, Mr. O. B. Dukes, testified that the train blew only two times, once apparently a substantial distance from the tracks and once immediately prior to impact (T 883-884). Seaboard's own regulations require that the horn be constantly blown from a distance of fifteen hundred (1500) feet and until the train crosses an intersecton (T 355). The witness who lived in the home the closest to the intersection was getting ready to go to work at the time of the collision and testified that she did not hear the train whistle and her attention was drawn to the train by the noise made by the train (T 281).

As a result of the collision, Mr. Addison was severely and permanently injured and can walk only with crutches or a cane. After numerous hospitalizations, it was determined that his injuries caused him a loss of body function and permanent impairment of forty-eight percent (48%) of his body as a whole (T 727-728) and that the impairment would probably increase in the

future (T 759-760). Mr. Addison's initial injuries included, but were not limited to, a right posterior hip dislocation out of the acetabulum socket, bilateral femural fractures of his thigh bones with an open wound fracture of the left femur, a comminuted left patella fracture, right sciatic nerve palsy causing loss of function in the right foot, three rib fractures, and a pneumothorax as a result of a rib puncturing his lung (T 692).

Prior to trial, Mr. Addison had been hospitalized for months during a total of five hospitalizations. A brief and partial reference to his treatment is required due to Petitioner's comments regarding the damages awarded him. During the first admission, Mr. Addison was treated for a right femur closed fracture. The femur was broken with a mid-shaft fracture having a butterfly fragment four to six centimeters long in the upper femur (T 694). The left femur or thigh bone had a four by five centimeter laceration with bone protruding through the skin. There were multiple fragments separated from the two primary fragments of the thigh bone (T 695). The left patellar or knee cap was severely comminuted with many fragments (T 695-696). The sciatic nerve was damaged and Mr. Addison suffered from sciatic nerve palsy on the right foot. More serious problems later developed in the right foot (T 724). The initial treatment also related to three ribs which had been fractured on the right side which fractures had caused a puncture of the lung and pneumothorax (T 697-698).

Mr. Addison's treatment during the initial hospitalization included open reduction of the right hip with incision and disec-

tion so that the hip could be placed in the socket (T 699). The incision was carried down the right thigh so that the right femur fragments could be manipulated. An intra-medullary rod was inserted through an incision in the right buttocks and driven into the medullary canal after the canals of the thigh bones had been hollowed or reamed out (T 700-701). The medullary rods are part of the evidence in the record on appeal. Due to the probability of infection, the open wound fracture of the left femur was debrided and left open. No rod was inserted at that time and the leg was placed in traction with a tibia pin being placed through the bone of the left leg (T 702). At that time a tube was also placed in Respondent's lung due to the pneumothorax (T 704). A twelve to fifteen centimeter incision was also made in the right lower leg to release skin and fascia on the right lower leg to alleviate pressure related to compartment syndrome.

At a later time during the initial hospitalization, the right thigh incision was reopened and the femur fragments were wired to the medullary rod and the femur bone as said fragments had shifted (T 706). During this entire time Respondent received periodic blood transfusions.

After he had stablized an intramedullary rod was placed in the left thigh bone or femur in the same manner as that which had been placed in the right. Such rod is also in evidence in the record on appeal. During this surgery a complete patellectomy or removal of the left knee cap was performed (T 707). The bone or tissue from the left knee cap, after its removal, was packed around the left thigh bone in order to promote healing (T

709-710). Mr. Addison was then placed in traction and a body cast (T 711). The body cast was worn for months, even after his return home and is part of the evidence in the record on appeal.

Mr. Addison continued to undergo physical therapy during his entire stay in the hospital and after he returned home. He was readmitted to the hospital with pulmonary emboli (T 715). He was thereafter released and readmitted due to breathing and lung problems (T 717). He was admitted for a fourth time for treatment of his left knee (T 718). On his fifth hospitalization the intramedullary rods were removed using a mallet and hook. Surgery was performed and the left leg was opened and the fascia which had been left separated during the original operation was closed (T 720). Mr. Addison also had arthroscopic surgery on the left knee (T 722) and continued to suffer from severe burning sensations in his right foot (T 724).

Mr. Addison will have to undergo physical therapy for the remainder of his life (T 739). Mr. Addison's disability, as a result of his impairment and loss of bodily function, is such that he cannot perform any labor (T 727-732). Dr. Jacqueline Orlando, a psychologist who had tested and treated Mr. Addison, testified that he would not be trainable for occupations outside of the manual labor force (T 586-590). It was also established that Mr. Addison suffered chronic depression as a result of his injuries, physical pain, and inability to work (T 591-594).

Despite Petitioner's counsel's attempt to frame the closing arguments as being passionate or improperly influential, the arguments were, in fact, conducted in an orderly and gentlemanly

manner. Respondent's counsel helped Seaboard's counsel move a table so that he could better exhibit evidence to the jury during the Defendant's closing argument (T 1014) and also helped Seaboard's counsel find an item of evidence during his closing argument (T 1018). A review of the closing arguments and arguments before the Judge out of the presence of the jury reveals a very cordial attitude between the attorneys. It should further be noted that counsel which has filed the brief in this court was not present at the trial of this matter which took place in Lake Butler, Florida.

Petitioner's new counsel now raises two insignificant remarks made by Respondent's attorney as being of such force as to have influenced the jury which heard five days of testimony. The two remarks should be examined closely and separately. The remarks were not made in successive comments as is implied at page 11 of Petitioner's brief. The first comment was that Respondent's counsel stated that he would not want to face having daily therapy for the rest of his life (T 1003).

Several minutes later Respondent's counsel made the other comment which is alleged by Petitioner to have been a golden rule argument which impassioned the jury. The statement was that Respondent's counsel had loaded watermelons on a truck and probably some of the jurors had (T 1004). It should be noted that Petitioner's counsel did not make an actual objection to the comment, but instead politely said "excuse me". The trial court suggested that counsel not make such argument and Respondent's counsel, of course, complied. The record reveals a very cordial

exchange and that Petitioner's counsel was not overly concerned regarding the insignificant comment.

The two comments complained of should be considered in light of the proceedings in the First District Court of Appeal. The First District Court of Appeal held that the statement regarding loading watermelons was not a golden rule argument, did not strike at the sensitive area of financial responsibility, and was not of a nature to gravely impair the calm, dispassionate consideration of the evidence. Seaboard Coastline Railroad Company v. Addison, 481 So. 2d 3, 6 (Fla. 1st DCA 1985). It is also important to note that Petitioner's trial counsel who filed Seaboard's briefs before the First District Court of Appeal did not raise counsel's remark regarding physical therapy as error in Seaboard's briefs filed before the First District Court of Appeal. Such comment has only been raised by Seaboard's appellate counsel who was not present at the trial below. (See, Appellant's Initial Brief filed before the First District Court of Appeal, p. 19).

In arguing that a comment by Plaintiff's counsel was in some way improper, Seaboard has overlooked the numerous comments made by it's trial counsel in closing argument. Seaboard's counsel made solicitive comments to the jury (T 1014 and 1015), and attempted to prejudice the jury by using religious arguments with negative analogies to the Plaintiff (T 1019). Seaboard's counsel also attempted to relate the jurors to their own common experiences, as Plaintiff's counsel did in referring to watermelon labor, by arguing to the jury what they would do if they were driving a

truck as Mr. Addison had (T 1024). Seaboard's counsel also asked the jury "would you ride in a car with somebody that it took them 50 yards to decide what they were going to do". The court advised Seaboard's counsel to "watch the golden rule" (T 1030). Plaintiff's counsel did not feel that such remarks are particularly significant to jurors, but such illustrates that the insignificant remarks raised as a basis for Seaboard's appeal were more than counter-balanced by comments of Seaboard's counsel.

During closing argument, Respondent's counsel suggested amounts of damages to the jury, but also argued that the jury could also set the damages at any amount the jury felt proper (T 1009 and 1013). Respondent's counsel also suggested to the jury that losses for pain and suffering and enjoyment of life were often argued to be three times as large as lost wages (T 1012). Acceptance of this argument would render a verdict in the approximate value of that rendered by the jury in this case.

In Seaboard's brief filed herein at page 11, Seaboard states that the amount of the verdict was clearly excessive and "in and of itself suggests improper influence, passion or prejudice on the part of the jury." A fact to be noted by this Court is that Seaboard's trial counsel in filing Appellant's Reply Brief in the First District Court of Appeal (at page 10) states "Seaboard has never contended that the verdict herein was itself enough to indicate its excessiveness."

The trial judge considered Seaboard's arguments regarding damages and denied a new trial (R 208). The First District Court

of Appeal held:

> "Seaboard also challenges the amount of the verdict rendered below, alleging that the jury was improperly influenced by passion and prejudice. We note that Seaboard failed to urge this issue at oral argument, or to inform the Court of its intention that the award remain at issue. Nevertheless, we consider the award on its merits and affirm." Seaboard Coastline Railroad Company v. Addison, 481 So. 2d 3, 5 (Fla. 1st DCA 1985).

The First District Court of Appeal also stated:

> "...because the record does not reveal that the jury was influenced by passion or prejudice, and Seaboard has not demonstrated that the verdict was unsupported by the evidence, we decline to disturb it on appeal." Id. at 6.

In his instructions to the jury, the trial judge advised the jury as to the definition of negligence as recommended by Florida Standard Jury Instructions (T 1044), that there is no exact standard for measuring general damages and that such amount should be fair and just in the light of the evidence (T 1045-1046), and that the jury was not to be swayed from its performance by prejudice, sympathy or any other sentiment for or against any party (T 1047). After the verdict was returned, Seaboard's counsel requested that each member of the jury be individually polled. The jury was polled and each member asserted that the verdict was his or her verdict (T 1055-1056).

At the charge conference, Seaboard requested eleven special jury instructions. Seaboard now argues it's special instruction no. 2 regarding Florida Statute §316.1575 should have been given to the jury. The trial judge considered Seaboard's special jury instructions and found that the instructions would be confusing

to the jury (T 966), that Florida Standard Jury Instructions should be used as they adequately cover the law fairly for both parties (T 966), and that the Florida Standard Jury Instructions specifically recommended that the instruction regarding the statute in question not be given (T 966).

During the closing argument, it was clear that there was no question in the minds of the jurors, the attorneys, or the judge, with regard to the legal issues in the case and Plaintiff's counsel stated in closing argument that he agreed:

> "If you see a train coming and you know you are in danger, you have got to stop. Anybody would agree that if you do hear the train as it is approaching and it gets your attention ... you have got to stop." (T 995-996).

In its consideration of the matter, the First District Court of Appeal held:

> "With regard to Section 316.1575, this statute requires nothing more than that a motorist stop before the tracks when a train is approaching. Setting aside our belief in the jury's ability to discern that driving in front of an oncoming train evidences negligence, the comment to SJI 4.14(b) advises against giving such right-of-way charges because of the over balance created in favor of the railroad. Instructions are correctly denied when SJI recommends against them.... The trial court did not err in refusing this instruction." Seaboard Coastline Railroad Company v. Addison, 481 So. 2d 3, 5 (Fla. 1st DCA 1985).

The trial court heard all of the issues raised in Appellant's brief in a Motion for New Trial. The trial court held that all of Seaboard's arguments were without merit (R 208). Thereafter a panel of judges of the First District Court of Appeal upheld, by unanimous decision, the trial court's ruling. Seaboard then sought a rehearing and sought rehearing en banc so that its posi-

tion could be considered by all judges of the First District Court of Appeal. The First District Court of Appeal rejected both motions. Seaboard then requested this Court to take jurisdiction of the case claiming express and direct conflict with the cases of Menard v. O'Malley, 327 So. 2d 905 (Fla. 3rd DCA 1976) and City of Tamarac v. Garchar, 398 So. 2d 889 (Fla. 4th DCA 1981).

SUMMARY OF ARGUMENT

ISSUE I

Appellant asserts it was entitled to a jury instruction on Florida Statute §316.1575 (motorists to yield right-of-way to train). The real issue to be determined by the court is whether attorneys and trial judges can rely upon the Florida Standard Jury Instructions and Florida Rules of Civil Procedure.

Fla.R.Civ.P. 1.985 provides that Florida Standard Jury Instructions, and the recommendations therein, are to be relied upon when applicable. The trial judge found the standard jury instructions were adequate and that the requested special instruction of Seaboard should be rejected as Fla.Std.Jury Instr. (Civ) 4.13 and 4.14(b) recommended that such instructions regarding the reciprocal duties of motorists and trains at crossings not be given.

Florida East Coast Railway Co. v. McKinney, 227 So. 2d 99 (Fla. 1st DCA 1969) ruled that similar instructions were not required to be given as standard instructions adequately cover such issues and giving such instructions is argumentative and

contrary to the requirements and recommendations of Fla.R.Civ.P. 1.985 and Fla.Std.Jury Instr. (Civ) 4.13 and 4.14(b).

Seaboard's requested instruction dealing with Florida Statute §316.1575 has been used by the Chairman of the Supreme Court Committee on Standard Jury Instructions, Robert P. Smith, as a specific example of a statute which should not be given as an instruction. St. Louis-San Francisco Railway Company v. White, 369 So. 2d 1007, 1005 n.2 (Fla. 1st DCA 1969).

The Florida Standard Jury Instructions in Civil Cases reveals that the draftsman thereof clearly envisioned a case with the facts of the case at hand when such instructions were drafted and submitted to this court for approval. However, should Instructions 4.13 and 4.14 be argued to be inconsistent with Instruction 4.11, rules of interpretation can easily be applied. Instructions 4.13 and 4.14(b) are specific and 4.11 is general in nature. Specific matters covering a particular subject are controlling and take precedence over and supersede general matters should there be any conflict. Adams v. Culver, 111 So. 2d 665 (Fla. 1959).

If, after the above considerations, error is still asserted, the moving party must establish the error, that the error resulted in a miscarriage of justice, and that the error confused or misled the jury. Marley v. Saunders, 249 So. 2d 30 (Fla. 1971); Florida Statute §54.23.

As clearly demonstrated in the statement of facts herein and in the record on appeal, the simple issues of this case were thoroughly argued to the jury. The unanimous panel of the First

District Court of Appeal agreed with the trial judge that the jury was not confused or misled by the use of Florida Standard Jury Instructions.

ISSUE II

Seaboard argues that the verdict was excessive as the result of two comments by Plaintiff's counsel. A trial judge cannot grant a new trial for such reasons unless the record affirmatively shows the impropriety of the verdict or unless the trial judge makes an independent determination that the jury was improperly influenced. Wackenhut Corporation v. Canty, 359 So. 2d 430, 435 (Fla. 1978).

An appellate court reviewing a trial court's decision must recognize the broad discretion of the trial judge, who, because of his involvement in the entire trial process, is the best person to determine whether events occurring at trial have any effect on jurors. Cloud v. Fallis, 110 So. 2d 669 (Fla. 1959). The tests appellate courts must apply in considering whether a trial court abused it's discretion is "if reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of dicretion." Baptist Memorial Hospital, Inc. v. Bell, 384 So. 2d 145, 146 (Fla. 1980).

A jury is entitled to award any amount it finds fair and just, even if such amount is greater than Plaintiff's counsel suggests. Rudy's Glass Construction Co. vs. Robins, 427 So. 2d 1051 (Fla. 3rd DCA 1983). The size of a jury verdict does not in itself render a verdict excessive, nor does it indicate that the

jury was motivated by improper consideration. Lassiter v. International Union of Operating Engineers, 349 So. 2d 622, 627 (Fla. 1956). Ironically, Seaboard asserted before the District Court that the size of the verdict did not in itself establish excessiveness, and now takes the opposite position.

Counsel's two comments did not strike at the area of financial responsibility or request the jury to consider how much it would wish to receive in a similar situation and were not golden rule arguments. The First District Court of Appeal specifically found that counsel's comments could not be shown to have gravely impaired the calm and dispassionate consideration of the evidence and merits by the jury as is required by this court for reversal. Tyus v. Appalachicola Northern Railroad Company, 137 So. 2d 580, 587 (Fla. 1961). Seaboard's trial counsel did not object to one of the two comments in question and did not raise the comment as an alleged error in Seaboard's briefs filed before the First District Court of Appeal.

ISSUE III

Respondent respectfully asserts that this court should consider it's decision to accept jurisdiction of this case. The decision by the First District Court of Appeal below, Seaboard Coastline Railroad Co. v. Addison, 481 So. 2d 3 (Fla. 1st DCA 1985), does not conflict with Menard v. O'Malley, 327 So. 2d 905 (Fla. 3rd DCA 1976) or City of Tamarac v. Garchar, 398 So. 2d 889 (Fla. 4th DCA 1981). The decision in Addison would not overrule either of such cases as is required by this court for there to be conflict. Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962).

A R G U M E N T

ISSUE I

THE COURT WAS CORRECT IN USING FLORIDA STANDARD JURY INSTRUCTIONS AND IN REFUSING TO USE THE ARGUMENTATIVE SPECIAL INSTRUCTIONS SUBMITTED BY SEABOARD.

Petitioner asserts the trial court abused it's discretion or was in error in denying Seaboard's motion for new trial. One basis is the trial court refused to give a requested special jury instruction. The actual issue to be determined by this Court regarding the instruction is whether attorneys and trial judges in this State can rely upon Fla.R.Civ.Pro. 1.985 and the Florida Standard Jury Instructions approved by this Court.

In the case at hand, the trial judge refused to give Seaboard's requested special instruction relating to Florida Statute §316.1575 as the subject matter of the instruction was adequately covered by Florida Standard Jury Instructions (T 966). Seaboard, both at trial and before the First District Court of Appeal, incorrectly argued that it was entitled to have the jury instructed as to all traffic regulation statutes requested to be given as instructions including Florida Statute §316.1575.

As Seaboard now asserts that it should be entitled to a new trial because one special requested jury instruction was not given by the trial judge, consideration should be given to applicable standards and precedent regarding the giving of jury instructions.

APPLICABLE STANDARDS FOR GIVING INSTRUCTIONS

The correct standards in Florida, regarding instructions required to be given, are:

1. A party is entitled to have the jury instructed on its theory of the case, if the evidence substantially supports the theory. Menard v. O'Malley, 327 So. 2d 905, 907 (Fla. 3rd DCA 1976).

2. However, pursuant to Fla.R.Civ.P. 1.985, the Florida Standard Jury Instructions may be used to charge a jury if such instructions are adequate and it is not necessary to give every statute and instruction requested, even though applicable. Florida East Coast Railway Co. v. McKinney, 227 So. 2d 99 (Fla. 1st DCA 1969); St. Louis-San Francisco Railway Company v. White, 369 So. 2d 1007, 1015 (Fla. 1st DCA 1979).

3. Further, in cases where a requested jury instruction is not given, additional tests to be applied are:

a. Whether there was error committed by not giving the instruction.

b. Whether the error resulted in a miscarriage of justice.

c. Was the error reasonably calculated to confuse or mislead the jury, as only then can there be a miscarriage of justice. Florida Power & Light Company v. McCollum, 140 So. 2d 569 (Fla. 1962); Marley v. Saunders, 249 So. 2d 30 (Fla. 1971); Florida Statute §54.23 (harmless error statute). See,Florida East Coast Railway Co. v. Lawler, 151 So. 2d 852 (Fla. 3rd DCA 1963); Gallagher v. Federal Insurance Company, 346 So. 2d 95 (Fla. 3rd DCA 1977).

Florida's appellate courts have recognized these principles

and that it is difficult to achieve mechanical perfection in trials as technical errors almost inevitably occur. Florida courts have considered whether, under the particular facts in a case, the instructions misled the jury or prejudiced the losing party's right to a fair trial. American National Bank of Jacksonville v. Norris, 368 So. 2d 897 (Fla. 1st DCA 1979). Florida courts uniformly hold that jury instructions must be viewed as a whole in light of the evidence presented at trial. If the jury instructions cover the issues and as a whole, are proper and correct, a verdict will not be overturned. Brastrom v. Grider, 215 So. 2d 501 (Fla. 4th DCA 1968); Stiles v. Calvetto, 137 So. 2d 17 (Fla. 2nd DCA 1962); Ashland Oil, Inc. v. Pickard, 269 So. 2d 714 (Fla. 3rd DCA 1972); Southeastern General Corp. v. Gorff, 186 So. 2d 273 (Fla. 2nd DCA 1966); and Seaboard Coastline Railroad Company v. Addison, 481 So. 2d 3 (Fla. 1st DCA 1985).

In considering this case, the First District Court of Appeal applied the above standards when it stated that:

> "While a party is entitled to have a jury instructed on it's theories when substantial evidence supports them, ... , the instructions given must be considered as a whole, with the evidence, and if the law appears to have been fairly presented to the jury and it was not misled, the failure to give requested instructions is not error." Seaboard Coastline Railroad Company v. Addison, 481 So. 2d 3, 5 (Fla. 1st DCA 1985).

However, it is clear that the First District Court of Appeal held that the refusal to read the statute in question as an instruction was not error. The court held:

> "With regard to §316.1575, this statute

> requires nothing more than that a motorist stop before the tracks when a train is approaching. Setting aside our belief in the jury's ability to discern that driving in front of an oncoming train evidences negligence, the comment to SJI 4.14(b) advises against giving such right-of-way charges because of the overbalance created in favor of the railroad. Instructions are correctly denied when SJI recommends against them... The trial court did not err in refusing this instruction." Id. at 5.

USE OF STANDARD JURY INSTRUCTIONS

As Seaboard complains that standard jury instructions were used by the trial court, consideration must be given to Fla.R.Civ.P. 1.985. In 1967, the Supreme Court of Florida adopted the Florida Standard Jury Instructions. In the matter of the use by the trial court of the Standard Jury Instructions, 223 So. 2d 380 (Fla. 1970). Fla.R.Civ.P. 1.985 provides:

STANDARD JURY INSTRUCTIONS

> The forms of Florida Standard Jury Instructions published by the Florida Bar pursuant to authority of the Supreme Court may be used by the trial judges of this State in charging the jury in civil actions to the extent that the forms are applicable ....
>
> ...
>
> ...Similarly, in all circumstances in which the notes accompanying the Florida Standard Jury Instructions contain a recommendation that a certain type of instruction not to be given, the trial judge may follow the recommendation ....

In the case at hand, the trial court ruled the Florida Standard Jury Instructions were sufficient and that the theories of the case established during trial had been adequately covered (T 966).

At the trial, the court instructed the jury using Fla.Std.Jury Instr.(Civ) 4.1 which provides:

> "Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances or in failing to do something that a reasonably careful person would do under like circumstances.

Seaboard was not satisfied with this instruction and requested eleven special instructions (location in record unclear from index, but shown to be filed with "Evidence"). The special instruction requested by Seaboard and now in question provided that a vehicle approaching a railroad crossing should stop and yield the right-of-way if a train could be heard or seen.

In considering requested jury instructions, the trial court relied upon Fla.Std.Jury Instr. (Civ) 4.13and 4.14(b) (T 966):

4.13

TRAFFIC

COMMENT

> "Negligence is properly and completely defined as the failure to use that degree of care which a reasonably careful person would use under like circumstances. The committee thereof recommends that no charge be given on the following subjects:
>
> ...
>
> d. Duty to yield right of way to approaching train (see comment, 4.14b)."

Fla.Std.Jury Instr. (Civ) 4.14(b) which is referenced by 4.13 specifically deals with the reciprocal duties of trains and motorists at railroad crossings. The rule provides:

4.14(b):

> Reciprocal duties at railroad crossings (duty to yield right-of-way to approaching train.
>
> Comment on 4.14(b):
>
> "The committee recommends that no charge be given on the supposed duty of a pedestrian or motorist to 'yield the right-of-way' to an approaching train.
>
> Simply to instruct the jury that the pedestrian or motorist has a 'duty to yield the right-of-way' results in an overbalanced charge, unless the railroad's 'duties' are also stated. But the train operator's duties vary with the circumstances...moreover, to introduce the 'right-of-way' concept would seem to require that the qualifications upon the 'right' to take the 'right-of-way' be also stated....
>
> If a train has the 'right-of-way' it is not because of some statute or some privilege emanating from its license as a carrier. Rather, 'it is but a recognition of the physical nature of a railroad'...the supposed 'duty to yield the right-of-way' is simply a way of saying that a person will likely be killed and will certainly be held to have been negligent, if, in the absence of some extenuating circumstance, he walks or drives into the path of a train bearing down on the crossing." Fla.Std.Jury Instr. (Civ) 4.14(b) (emphasis added).

The theory of the Florida Standard Jury Instructions, as confirmed in Florida East Coast Railway Co. v. McKinney, 227 So. 2d 99, 102 (Fla. 1st DCA 1969), is:

> "The committee's purpose has been to prepare instructions that express the applicable issues and the guiding legal principles briefly and in simple, understandable language, without argument, without unnecessary repetition and without reliance on negative charges. A serious commitment to that purpose seemed to the committee to require a number of changes in what appears to have been the customary manner of charging juries in negligence cases." Florida Standard Jury Instruction, pp. xviii.

The First District Court of Appeal has written the only comprehensive decision confirming the use of Florida Standard Jury Instructions and the refusal to give special instructions covered by general standard jury instructions in Florida East Coast Railway Co. v. McKinney, 227 So. 2d 99, 102 (Fla. 1st DCA 1969), cert. denied, 237 So. 2d 176 (Fla. 1970). In McKinney, trial judge Howell Melton refused to give two special jury instruction requested by the railroad which were very similar to the instruction at issue in this case. Instead, Judge Melton instructed the jury using the Florida Standard Jury Instructions on negligence. Instruction number 6 in McKinney was a general statement that drivers of vehicles approaching railroad tracks could be presumed to operate vehicles safely. Id. at 104. Instruction number 9 in McKinney, like the special instruction at issue in the case at hand, was a statement that the driver of a vehicle had to yield the right-of-way to a train, when by looking and listening, he is or should be aware of an approaching train. Id. at 104.

In McKinney, Judge Melton, like the trial judge in this case, (T 966), ruled that:

> "Although the charges in question correctly state principles of law heretofore approved by appellate court decisions in this state, such charges as framed are essentially argumentative, repetitive, and adequately covered by the general charges on negligence." Id. at 104.

The McKinney opinion agreed with Judge Melton that Florida Standard Jury Instructions were sufficient, that elaborate points and arguments of theory should be left to the attorneys during

final argument, and that trial courts should not give argumentative instructions for each side. The court reasoned in McKinney:

> "One of the unfortunate roles assumed by trial judges in the past is that of advocating both sides of the case by reading to the jury a series of argumentative charges favoring one side of the case and then, 'on the other hand' reading another series of equally argumentative charges favoring the other side of the case. It has been the committee's purpose to omit such argumentative charges and to remove all advocacy from the charge." Id. at 105, Florida Standard Jury Instructions, page xx, see also, St. Louis-San Francisco Railway Company v. White, 369 So. 2d 1007 (Fla. 1st DCA 1979).

The trial court, in the case at hand, recognized that the instructions being submitted by Seaboard were argumentative and did not add to the standard jury instructions (T 965-966).

The trial court judge also recognized that Plaintiff's attorneys had a series of special jury instructions which would be required to be given if the court had acquiesced and given the instructions requested by Seaboard regarding Florida Statute §316.1575, which is obviously the result of special interest legislation from railroad industry lobbiest's efforts. This would have resulted in argumentative charges favoring one side followed by argumentative charges "on the other hand" as Plaintiff had prepared instructions on the railroad's reciprocal duties at the crossing, on hazardous crossings, and that train speed must be commensurate with circumstances (see instructions in record thought to be with "Evidence").

With regard to the special jury instructions requested by

railroad counsel in McKinney, the court stated:

> "It is our view and we so hold that the jury instructions requested by appellant were adequately covered by the general charge, expounded principles of nonliability [are] more appropriately treated in counsel's argument to the jury rather than in the instructions to be given by the court, and no error was committed in their denial." Id. at 105. See also, St. Louis-San Francisco Railway Company v. White, 369 So. 2d 1007 (Fla. 1st DCA 1979). (emphasis added).

The First District Court of Appeal concluded the McKinney opinion with the test it held should be applied in using the recommendations in Florida Standard Jury Instructions:

> "The committee's recommendations are entitled to great respect and should be rejected only upon a clear showing that they are wholly unwarranted because of unusual circumstances which may be found to exist in a given case. Id. at 106. (emphasis added).

The record in this case reveals that there are no unusual circumstances which would have allowed the trial court to find that the recommendations of the Supreme Court Committee on Standard Jury Instructions in Civil Cases were wholly unwarranted. Seaboard has failed to establish any basis for alleging that the recommendations of the committee should not be followed.

Ironically, the statutory instruction requested by Seaboard was specifically mentioned in a First District Court of Appeal decision. In St. Louis-San Francisco Railway Company v. White, 369 So. 2d 1007, 1008 (Fla. 1st DCA 1979), it was stated that trial judges have been discouraged since 1967 from charging juries on negligence subprinciples which serve to decide legal issues confronting trial and appellate courts, but which, in jury

charges, produce interminable charge conferences, overemphasis of certain evidence or theories, confusion wrought by "on the other hand" charges and appeals, but nothing of substantial value. Id. at 1014. In White, Judge Robert P. Smith emphasized that the evidence, the arguments of counsel and the jurors common sense were more reliable in achieving fair trials than the use of the reading of complicated statutes. The statute submitted as Seaboard's special instruction, Florida Statute §316.1575, was used as an example of the sort of statute which should not be given as a jury instruction:

> "For example, charges incorporating complex statutes such as Section 316.1575, Florida Statutes, (1977), requiring driver "[o]bedience to signal indicating approach of train." tend to cancel any benefit in adhering to the committee's recommendations that the trial court not charge in common law terms on [r]eciprocal duties at railroad crossing (duty to yield right-of-way to approaching train)". Fla.Std.Jury Instr.(Civ)4.14(b) comment. Id. at 1015, n.2.

The discussion regarding Florida Statute §316.1575 in St. Louis-San Francisco Railway Company v. White, supra, was written by The Honorable Robert P. Smith, Acting Chief Judge, in a specially concurring opinion. The membership roster of the Supreme Court Committee on Standard Jury Instructions (page iii, Florida Standard Jury Instructions), indicates that Judge Smith has been a member of the Supreme Court Committee on Standard Jury Instructions in Civil Cases since 1964 and that he has been the chairman of the committee since 1978. St. Louis-San Francisco Railway Company v. White, supra, was decided while Judge Smith

was chairman of the committee. It is submitted that the interpretation of Fla.Std.Jury Instr. (Civ) 4.14(b) by Judge Smith should certainly be considered to be the correct interpretation of the application of the instruction.

SPECIFIC INTERPRETATION

While Seaboard seeks to ignore Fla. Std. Jury Instr. (Civ) 4.13 and 4.14(b), it asserts that Instruction 4.11 should be considered in this case. Fla.Std.Jury Instr. (Civ) 4.11 does speak to the violation of a traffic regulation and generally would allow a judge to read or paraphrase an applicable statute. However, Fla. Std. Jury Instr. (Civ) 4.13 specifically provides that the giving of the standard jury instruction on negligence (Fla.Std.Jury Instr. (Civ) 4.1) is the only instruction which should be given regarding vehicle-train collisions and Fla. Std. Jury Instr. (Civ) 4.14(b) specifically makes recommendations regarding instructions relating to the reciprocal duties of motorists and trains at railroad crossings. It is clear when reading Fla.Std.Jury Instr. (Civ) 4.1, 4.11, 4.13, and 4.14b that the committee appointed by the Supreme Court of Florida to draft the special jury instructions specifically visualized the circumstances of this case when the instructions were drafted and presented to the Supreme Court of Florida. The language of the comments to Fla. Std. Jury Instr. (Civ) 4.13 and 4.14b specifically covers the factual situation of the case at hand. The comment to Fla. Std. Jury Inst. (Civ) 4.14b specifically considers that there are statutes relating to the right-of-way at railroad-highway intersections and specifically provides that a train will

not have the right-of-way because of a statute.

In light of the plain language of the standard jury instructions and comments thereto discussed above, Respondent cannot conceive of how there could be any question regarding the interpretation of the standard jury instructions. However, assuming, for the point of argument, that Fla.Std.Jury Instr. (Civ) 4.13 and 4.14b did not adequately speak to the question, general rules of interpretation can be considered. Clearly Fla.Std. Jury Instr. (Civ) 4.13 and 4.14b are specific while instruction 4.11 is general in nature. Analogous situations involving statutes and contracts can be considered.

Florida courts recognize that special statutes covering a particular subject matter are controlling over general statutory provisions covering the same and other subjects in general terms. Adams v. Culver, 111 So. 2d 665 (Fla. 1959); Woodley Lane, Inc. v. Nolen, 147 So. 2d 569 (Fla. 2nd DCA 1962). Likewise, Florida courts have established through repeated application the rule of interpretation that specific clauses in contracts take precedence over and supersede general clauses or conflicting general terms. Raines v. Palm Beach Leisureville Community Association, 317 So. 2d 814 (Fla. 4th DCA 1975); Proser v. Berger, 132 So. 2d 439 (Fla. 3rd DCA 1961); Cypress Gardens Citrus Products, Inc. v. Bowen Bros., Inc., 223 So. 2d 776 (Fla. 2nd DCA 1969).

Therefore, considering arguendo that there is some conflict between the standard jury instructions, clearly the specific instructions and comments would supersede or take precedence over the general instructions.

CASE LAW DISCUSSION

There is no need to discuss the cases cited by Seaboard which generally state that jury instructions regarding statutes should be given in certain specific instances. It is conceded generally, that there are many instances in which statutes should be read to the jury as instructions. There are several exceptions. As pointed out by the First District Court of Appeal in the opinion below, Seaboard Coastline Railroad Company v. Addison, 481 So. 2d 3, (Fla. 1st DCA 1985), the most obvious exception is when the standard jury instructions adopted by the Supreme Court of Florida and the comments thereto recommend that a specific type of instruction not be given. Seaboard Coastline Railroad Company v. Addison, 481 So. 2d 3,5 (Fla.1st DCA 1985); see, Davis v. Lewis, 331 So. 2d 320, 324 (Fla. 1st DCA 1976); See also, Stark v. Smith, 310 So. 2d 334 (Fla. 3rd DCA 1975); Fla. R. Civ. Pro. 1.985. In considering this case, the First District Court of Appeal stated:

> "With regard to §316.1575, this statute requires nothing more than that a motorist stop before the tracks when a train is approaching. Setting aside our belief in the jury's ability to discern that driving in front of an oncoming train evidences negligence, the comment to standard jury instruction 4.14(b) advises against giving such right-of-way charges because of the over balance created in favor of the railroad. Instructions are correctly denied when SJI recommends against them." Seaboard Coastline Railroad Company v. Addison, 481 So. 2d 3, 5 (Fla. 1st DCA 1985).

In reviewing the cases cited by Seaboard for its proposition that all statutes must be read to the jury as instructions if applicable, it is clear that none of the cases involves Fla.

Std. Jury Instr. (Civ) 4.13 or 4.14b, that none of the cases involve a railroad crossing accident between an automobile and a train, that none of the instructions in question in the case deal with reciprocal duties of parties involved in an accident (but rather deal with a situation involving the violation of a duty applicable to only one party) and that many of the cases involve situations where numerous errors were committed at trial so that it was not clear as to whether a matter pertaining to an instruction constituted reversible error in and of itself. For example, Ryder Truck Rental, Inc. v. Johnson, 466 So. 2d 1240 (Fla. 1st DCA 1985), predicated reversal on numerous errors such that there was cumulative error and there was no statement in the case that the failure to give instructions requested would, by itself, constitute reversible error.

Consideration has also been given by the courts to the facts of the individual cases and to the common sense of jurors. For example, in cases cited by Petitioner, City of Tamarac v. Garchar, 398 So. 2d 889 (Fla. 4th DCA 1981) and Menard v. O'Malley, 327 So. 2d 905 (Fla. 3rd DCA 1976) the courts required certain instructions regarding statutes which provided for specific conduct to be given but did not require instructions relating to statutes which related to general matters within the common sense of jurors or which did nothing more than require the use of reasonable care to be given. In City of Tamarac, the court required an instruction on a DWI statute, but held no error was committed in the refusal to give Florida Statute §316.09 and Florida Statute §316.030 which deal with driving on divided highways and careless driving. Likewise, in Menard, the court

required an instruction on the maximum width for vehicles, but refused to require instructions on Florida Statute §316.030 (careless driving) and Florida Statute §316.183 (unlawful speed).

Another distinguishing factor under which courts' have been required to read statutes as instructions is when the violation of the statute constitutes negligence per se as opposed to possible evidence of negligence. deJesus v. Seaboard Coast Line Railroad Co., 281 So. 2d 198 (Fla. 1973). It is arguable that the statutes required to be given in City of Tamarac (DWI), Menard (width of load) and Smith v. Lumbermen's Mutual Casualty Company, 360 So. 2d 1098 (Fla. 1st DCA 1978) (width of load) were considered to be negligence per se statutes in addition to being statutes dealing with specific subject matters not within the common sense of the jurors. It is submitted, as stated in the comment to Fla. Std. Jury Instr. (Civ) 4.14b and as is recognized by the First District Court of Appeal in Seaboard Coastline Railroad Company v. Addison, 481 So. 2d 3, 5 (Fla. 1st DCA 1985), it is within the common sense of drivers that it is negligent to drive in front of an approaching train and in this case, that it is within the "jury's ability to discern that driving in front of an oncoming train evidences negligence.... ". Id. at 5.

As stated above, there is no necessity to comment on each case cited by Seaboard in which an appellate court required that a certain jury instruction be given under specific facts. Petitioner can likewise provide a string of citations for the proposition that the trial court is not required to give all requested jury instructions, whether statutory or based upon case law, and should consider the facts of the case as well as Florida Standard

Jury Instructions and the comments thereto. See, Davis v. Lewis, 331 So. 2d 320 (Fla. 1st DCA 1976); Stark v. Smith, 310 So. 2d 334 (Fla. 3rd DCA 1975); City of Tamarac v. Garchar, 398 So. 2d 889 (Fla. 4th DCA 1981); Menard v. O'Malley, 327 So. 2d 905 (Fla. 3rd DCA 1976); Brastrom v. Grider, 215 So. 2d 501 (Fla. 4th DCA 1968); Urton v. Redwing Carrier, Inc., 200 So. 2d 859 (Fla. 2nd DCA 1967); Ogletree v. Sentry Indemnity Company, 353 So. 2d 667 (Fla. 1st DCA 1978); Scantlebury v. Block, 225 So. 2d 447 (Fla. 1st DCA 1969). It should be noted in Scantlebury that a statutory jury instruction was not given by the trial judge, but the appellate court, after considering all of the instructions when taken as a whole, found that no error was committed by the trial court in refusing to give the requested instruction. Clearly there are instances where the refusal of a judge to instruct on a statute, which may be applicable to the issues, will not result in reversible error.

Petitioner's position that the jury in this case was somehow misled by the refusal of the court to give one jury instruction is unsupported by the record. The entire record reveals the theories of Seaboard were well known to the jury. In fact, Plaintiff's counsel recognized Defendant's simple theory on closing argument by agreeing that the Plaintiff would be negligent if he did not stop his vehicle when he saw or heard the train (T 995-996). The standard jury instructions given by the trial judge provided ample coverage of Defendant's theories of defense and the record will show that Seaboard's counsel argued such theories to their fullest extent (T 1014-1031).

HARMLESS ERROR

If it could still be argued in the face of the authorities cited herein that error was committed, and certainly none is conceded, such error would be harmless as the entire record establishes that the jury was not confused or misled in any way, and in fact, returned a comparative neligence verdict finding the Plaintiff to be twenty percent (20%) at fault. Florida Statute §54.23; Marley v. Saunders, 249 So. 2d 30 (Fla. 1971); Florida Power & Light Company v. McCollum, 140 So. 2d 569 (Fla. 1962).

In this case where the jurors clearly understood the issues and were not misled in any way, this court is being asked to reverse the rulings of the trial judge and the First District Court of Appeal. Such reversal would require that this court enter a ruling which would provide that trial lawyers and trial judges cannot rely upon Fla. R. Civ. Pro. 1.985 and the Florida Standard Jury Instructions adopted by this court.

ISSUE II

THE TRIAL COURT'S DETERMINATION THAT THE VERDICT WAS NOT EXCESSIVE OR THE RESULT OF IMPROPER INFLUENCES WAS SUPPORTED BY THE RECORD AND CORRECT.

The trial judge heard Seaboard's motions for new trial based upon these claims of excessive verdict and improper influences and denied said motion as being without merit (R 208). Seaboard asserts that the trial court judge abused his discretion in not granting a new trial. The First District Court of Appeal ruled on these issues in Seaboard Coastline Railroad Company v. Addison, 481 So. 2d 3, 5 (Fla. 1st DCA 1985) and held:

> "Seaboard also challenges the amount of the verdict rendered below, alleging that the jury was improperly influenced by passion and prejudice. We note that Seaboard failed to urge this issue at oral argument, or to inform the Court of its intention that the

> award remain at issue. Nevertheless, we consider the award on its merits and affirm. Id. at 5. (emphasis added).
>
> ...
>
> Seaboard does not urge, nor has it demonstrated, that the verdict was unsupported by the evidence. Rather it argues that certain trial events, perhaps innocuous when standing alone, had a 'cumulative effect' of prejudicing the jury. Id. at 5
>
> ...
>
> ...because the record does not reveal that the jury was influenced by passion or prejudice and Seaboard has not demonstrated that the verdict was unsupported by the evidence, we decline to disturb it on appeal." Id. at 6.

Despite the rulings of the trial court and the First District Court of Appeal, Petitioner continues to assert unsupported statements regarding the verdict and alleged improper influences. It is therefore necessary to consider the applicable standards for the review of jury verdicts and trial court decisions regarding motions for new trial.

STANDARDS FOR REVIEW

Where it is argued that sympathy or other improper influences affected a jury's decision, a verdict is clothed with a presumption of regularity which appellate courts cannot disturb if there was evidence from which a jury could properly have rendered such verdict. Bowser v. Harder, 98 So. 2d 752 (Fla. 2nd DCA 1957); Industrial Waste Service, Inc. v. Henderson, 305 So. 2d 42 (Fla. 3rd DCA 1974). Earlier cases determined that juries are vested with sound discretion to render verdicts in personal injury cases and that their decisions cannot be subjected to mathematical review. Seaboard Coastline Railroad Company v. McKelvey, 270 So. 2d 705, 706 (Fla. 1972); Braddock v. Seaboard Air Line Company, 80 So. 2d 662 (Fla. 1955).

Seaboard cites two cases as authority that the trial court abused it's discretion. The cases are not similar to the case at hand in any respect. Pullum v. Regency Contractors, Inc., 473 So. 2d 824 (Fla. 1st DCA 1985), dealt with a dispute between a landowner and a building contractor involving theories of breach of contract and lost profits. However, the court in Pullum stated that a trial court enjoyed a broad discretion in considering whether to grant a motion for new trial, that the discretion would not be disturbed on appeal absent a showing of abuse of that discretion, that the trial court was to determine whether the verdict was against the manifest weight of the evidence or was influenced by considerations outside of the record and that the appellate court was to become involved only where failure of the trial court to grant a new trial was an abuse of discretion.

Food Fair Stores, Inc. v. Morgan, 338 So. 2d 89 (Fla. 2nd DCA 1976) is also clearly distinguishable. In Food Fair, a large award was made to a man who had been in a fight with Food Fair employees. The injured plaintiff had incurred minor medical expenses, but the court found no evidence of needed future medical expenses, no proof of lost earnings, and no proof of any diminished earning capacity. The court reviewed the entire record and specifically found that the award by the jury included punitive damages in addition to compensatory damages. The court found that the issue of punitive damages was not before the court and therefore that the award was grossly excessive because it included the award of punitive damages.

It is not necessary to rely upon such non-applicable cases

for authority regarding these issues. This court has rendered numerous decisions regarding the discretion of trial courts and the role of appellate courts in determining whether a trial court has abused its discretion. In Wackenhut Corporation v. Canty, 359 So. 2d 430 (Fla. 1978), it was established that a trial judge could not reverse a jury's verdict based upon unproven allegations by losing counsel or based upon the court's own feelings regarding the case:

> "The record must affirmatively show the impropriety of the verdict or there must be an independent determination by the trial judge that the jury was influenced by considerations outside the record.
>
> In other words, the trial judge does not sit as a seventh juror with veto power. His setting aside a verdict must be supported by the record as in Cloud v. Fallis, Fla. 1959, 110 S. 2d 669, or by findings reasonably amendable to judicial review. Not every verdict which raises a judicial eyebrow should shock the judicial conscious.
>
> In its movement toward constancy of principle the law must permit a reasonable latitude of inconsistency of result in the performance of juries. The trial judge's review of that performance is likewise sustainable within a broad range provided that the record of findings of influence outside it support his determination." Id. at 435.

The standards cited above were well known to Trial Judge John J. Crews in this case and after hearing Seaboard's motion for new trial (R 201), he entered an order finding that the motion of Seaboard was without merit and, accordingly, said motion was denied (R 208).

As the trial judge determined that the verdict was properly rendered, consideration must be given to the tests to be applied by this Court in reviewing the trial judge's order denying

Seaboard's motion for new trial.

TESTS REGARDING TRIAL COURT'S DISCRETION

In Cloud v. Fallis, 110 So. 2d 669 (Fla. 1959), the Supreme Court of Florida stated the law on the subject:

> "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...." Id. at 673.

Cloud was reaffirmed in Baptist Memorial Hospital, Inc. v. Bell, 384 So. 2d 145 (Fla. 1980), in which the court established the reasonableness test which is to be applied in Florida in reviewing trial court decisions regarding motions for new trial:

> "The discretionary power to grant or deny a motion for new trial is given to the trial judge because of his direct and superior vantage point.
> ...
> ...
> In reviewing this type of discretionary act of the trial court, the appellate court should apply the reasonableness test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. Canakaris v. Canakaris, 382 So. 2d 1197, (Fla. 1980). As we stated in Cloud, the ruling should not be disturbed in the absence of a clear showing that it has been abused ....". Id. at 145.

The record in this case will show that the trial court judge, The Honorable John J. Crews, was not presented with any affirmative showing of an impropriety in the verdict and that no evidence or argument was presented to establish a basis for an independent determination that the jury was influenced by con-

siderations outside of the record. Accordingly, the decision of the trial court judge must be affirmed by this court unless it could be said that reasonable men could not differ as to the propriety of the action taken by the trial court judge and that all reasonable men would agree that there was a clear showing that the judge had abused his discretion.

At this point the trial judge's decision has been reviewed by the First District Court of Appeal and that court, by unanimous decision, has determined that the trial court's ruling denying Seaboard's motion for new trial was appropriate. The decision of the District Court panel would seem to conclusively resolve the issues regarding the verdict and alleged improper influence as the District Court panel's decision must be held to be a determination that reasonable men have approved the action taken by the trial court in denying the motion for new trial.

ERROR ALLEGED BY SEABOARD

Seaboard's brief sets forth two matters which are alleged to be proof of the cause for the verdict rendered. The first is that the amount of the verdict is excessive and "in and of itself suggests improper influence, passion or prejudice on the part of the jury" (Petitioner, Seaboard's, Initial Brief on the merits p. 11). The second is that Plaintiff's attorney made two "golden rule" comments during closing argument.

Various facts should be established regarding these matters before legal argument is made. First, while Seaboard now argues that the amount of the verdict "in and of itself suggests improper influence", Seaboard took the opposite position before the First District Court of Appeal. In Appellant's Reply Brief

filed before the First District Court of Appeal, page 10, Seaboard's counsel states: "Seaboard has never contended that the verdict herein was itself enough to indicate its excessiveness." It is important for the court to be aware of the conflicting positions taken by Seaboard at each level of these proceedings. These conflicts most likely can be attributed to the fact that Seaboard's counsel before this court is not the same firm which represented Seaboard at trial and which actively represented Seaboard before the district court.

CONSIDERATIONS REGARDING VERDICT

Seaboard makes the unsupported allegation that the verdict is excessive and more than was requested by plaintiff's counsel. The closing argument indicates that plaintiff's counsel suggested that many attorneys would argue that losses for pain, suffering, enjoyment of life, and other such damages should be three times as large as awards for lost earnings (T 1012). Acceptance of this argument would render a verdict of the approximate value as that actually rendered.

Plaintiff's counsel also argued that a determination of damages is up to the jury and that the jury can use any figure it wants in making such an award (T 1009 & 1013). Of course, jury instructions given by the court made it clear that the determination of the value of damages was left to the jury. The jury was instructed as to the matters to be considered in setting damages and that there was no exact standard for measuring such damages, that the amount should be determined by the jury and should be fair and just in the light of the evidence (T 1045-1046).

In making a claim that the damages were excessive, Seaboard has the burden of proof and is required to plead and prove the basis for its assertions. In General Rent-A-Car, Inc. v. Dahlman, 310 So. 2d 415, 416 (Fla. 3rd DCA 1975), the court stated:

> "Appellants, contending that the verdict is excessive, have the burden of establishing that the verdict is wholly unsupported by the evidence or is the result of passion, prejudice, or other improper motive. Moreover, the fact that a damage award may appear rather large under the circumstances does not in itself render it excessive nor does it indicate that the jury was motivated by improper consideration in arriving at the award."

Other Florida cases are consistent with Dahlman. In Allred v. Chitten Pool Supply, Inc., 298 So. 2d 361, 365, (Fla. 1974), the court stated that: "The fact that a damage award is large does not in itself render it excessive nor does it indicate that the jury was motivated by improper considerations in arriving at the award." Lassiter v. International Union of Operating Engineers, 349 So. 2d 622, 617 (Fla. 1976), indicated that for a trial judge to find damages to be excessive they would have to be beyond all measure, unreasonable and outrageous. See, Johns-Manville Sales Corp. v. Jansens, 463 So. 2d 242 (Fla. 1st DCA 1984); Steinaur v. Sarpy Company, 353 N.W. 2d 715, (Neb. 1984); Blevins v. Cessna Aircraft Company, 728 F. 2d 1576 (10th Cir. 1984); Murray v. Fairbanks Morse, 610 F. 2d 149 (3rd Cir. 1979).

Even in cases where trial judges have felt verdicts were excessive, appeals courts have established a standard for consideration of claims of excessiveness. In Gulf Life Insurance Company v. McCabe, 362 So. 2d 846 (Fla. 1st DCA 1978), the court

dealt with a case involving a large verdict rendered as a result of a fractured jawbone. The trial court stated that it felt the verdict was grossly excessive and should be reduced but that it was unaware of any standard to measure excessiveness, and it was not proven to him that any prejudice, passion, or improper motive led to the verdict. Id. at 848. The court held:

> "We believe the trial court was correct in denying the motion for new trial. Although the trial court was of the opinion that a remittitur should be required, he was correct in implying that the amount of the excess must clearly appear from the record...therefore, the trial judge was correct in interpreting Bould, if not Wackenhut, to mean the excessiveness must be measured with a degree of exactness.
>
> ...
>
> In tort cases damages are to be measured by the jury's discretion. The court should never declare a verdict excessive merely because it is above the amount which the court itself considers the jury should have allowed. Other cases including Wackenhut Corporation v. Canty, discussed above and Sanders v. Nabisco, Inc., 359 So. 2d 46 (Fla. 1st DCA 1978), also require that alleged excessiveness be readily ascertainable and affirmatively show the impropriety of the verdict." Id. at 848.

With regard to Seaboard's assertion that the jury awarded a larger verdict than was requested, it is clear that a jury is the decision maker with regard to the amount of damages and can award damages, for example, in twice the amount requested by plaintiff's counsel. In Rudy's Glass Construction Company v. Robins, 427 So. 2d 1051 (Fla. 3rd DCA 1983), a jury had rendered a verdict for plaintiff in exactly twice the amount requested by plaintiff's counsel. When the verdict was attacked on appeal by the defendant, the court ruled:

> "...a jury may properly award damages equal to or in excess of those requested by counsel in closing argument. Lopez v. Cohen, 406 So.

> 2d 1253 (Fla. 4th DCA 1981). The magnitude of a damage award, without more, is not indication that the jury was motivated by improper considerations in arriving at the award." Id. at 1053 (emphasis added).

Rudy's Glass cites to the Fourth District Court of Appeal opinion of Lopez v. Cohen as being in agreement. The court in Lopez stated that: "In Braddock v. Seaboard Air Line Railroad Company, 80 So. 2d 662 (Fla. 1955), it was held that a jury might properly award damages equal to or in excess of those requested by counsel in closing argument." Lopez at 1256.

Seaboard has not established under any standard discussed above that the verdict in question was excessive. It has been firmly established by the Supreme Court of Florida and the district courts of this State that a jury can award damages equal to or in excess of those requested by counsel in closing argument.

ALLEGED GOLDEN RULE COMMENTS

As the verdict cannot be argued in and of itself to establish improper influence, passion or prejudice on the part of a jury, Seaboard is left with the argument that two comments made by Plaintiff's counsel during closing argument were prejudicial golden rule arguments which impassioned the jury. The first comment was to the effect that plaintiff's counsel would not want to undergo physical therapy for the remainder of his life (T 1003). This comment was separated by several minutes from the second comment which was that plaintiff's counsel had loaded watermelons on trucks and that probably some of the jurors had (T 1004). Seaboard's Initial Brief on the Merits at pages 11 and 12 sets forth the comments and implies that the comments were made successively. This is incorrect. Seaboard's counsel did not object

to the first comment and the record reflects that Seaboard's counsel only stated "excuse me, Your Honor" (T 1005) with regard to the second. The record would reveal that the argument to the jury was carried out in a calm and gentlemanly manner.

It is significant to note that Seaboard's counsel did not allege that the first comment, regarding physical therapy, was a prejudicial golden rule argument in its briefs filed before the First District Court of Appeal. If Seaboard's trial counsel did not feel that the remark was a prejudicial golden rule argument, it is difficult to conceive how Seaboard's new counsel, who was not present at trial, would have a better vantage point than Seaboard's trial counsel and the trial judge.

FAILURE TO OBJECT

Nevertheless, Seaboard's entire argument regarding damages can be based only upon the second comment. Seaboard is limited to attacking the verdict by arguing this one point as the law, as is set forth above, is clear that the verdict in and of itself cannot establish improper influence and Seaboard cannot argue the comment regarding physical therapy to be error as no objection was made to such comment by Seaboard's trial counsel.

It is well established by Florida courts that counsel for a party cannot allow a comment to be made without objection and then raise that comment as an error on appeal. This is especially true when the comment is as insignificant and innocuous as was the comment regarding attending physical therapy. Wasden v. Seaboard Coast Line Railroad Co., 474 So. 2d 825 (Fla. 2nd DCA 1985); Tieso v. Metropolitan Dade County, 426 So. 2d 1156, (Fla. 3rd DCA 1983); Tyus v. Apalachicola Northern Railroad

Company, 130 So. 2d 580 (Fla. 1961); and Ward v. Orange Memorial Hospital Association, Inc., 193 So. 2d 492, (Fla. 4th DCA 1966).

The courts of this State have also recognized and assume that silence from experienced counsel is a judgment play predicated on the attorney's concept of how the trial is proceeding. "As such the failure to object constitutes intentional trial tactics, mistakes of which are not to be corrected on appeal simply because they backfire....". Nelson v. Reliance Insurance Company, 368 So. 2d 361 (Fla. 4th DCA 1978).

THE GOLDEN RULE

Seaboard, having not objected to the comment regarding physical therapy, is left with arguing plaintiff's counsel's remark regarding loading watermelons was a violation of the golden rule and resulted in improper passion and prejudice on the part of the jury. The First District Court of Appeal, in considering whether the trial judge abused its discretion in not granting a new trial due to the comment regarding loading watermelons held:

> "Finally, Seaboard points to an alleged 'golden rule' argument by Addison's counsel in closing argument, citing his remark that, prior to the accident, Addison had been able to do certain labor, as the jurors themselves did. A golden rule argument urges the jurors to place themselves in a plaintiff's position or to allow recovery as they would want were they the plaintiff...To be inpermissible, the argument must strike at that sensitive area of financial responsibility and hypothetically requests the jury to consider how much it would wish to receive in a similar situation ...The statement cited by Seaboard does not meet this standard, nor is it of a nature to 'gravely impair the calm, dispassionate consideration of the evidence'." Seaboard Coastline Railroad Company v. Addison, 481 So. 2d 3, 6 (Fla. 1st DCA 1985).

This insignificant event which Seaboard attempts to charac-

terize as reversible error was simply a comment plaintiff's counsel made during closing argument in attempting to relate jurors, by their own common experiences, to the disability of the plaintiff. This was no different than arguing to a jury that we all understand the physical effort required to walk up stairs or that we all have driven automobiles and know that we should operate them more carefully if it is raining. Such examples are commonly used by attorneys for both plaintiffs and defendants to relate jurors to their own common experiences in understanding issues at trial. In this case it was being argued that the plaintiff, before the accident, could lift hay bales and load watermelons on a truck. Plaintiff's counsel then simply commented that he had loaded watermelons on trucks and probably some of the jurors had (T 1004). Although no specific objection was made, the court suggested that such comment not be made.

The fleeting comment made by plaintiff's counsel does not constitute a violation of the "golden rule". A golden rule argument is one made to jurors to urge then to place themselves in the position of a litigant or to allow such recovery as they would wish if in the same position. The golden rule argument has been summarized as "how much would you like to pay or receive if you were in the shoes of this defendant or plaintiff?" Stewart v. Cook, 218 So. 2d 491, 493 (Fla. 4th DCA 1969). See also, Bullock v. Branch, 130 So. 2d 74 (Fla. 1st DCA 1961); Ward v. Orange Memorial Hospital Association, Inc., 193 So. 2d 492 (Fla. 4th DCA 1966).

A statement made to a jury, even if it violated the golden rule, in order to justify a new trial, would have to be such as

to have "gravely impaired the calm and dispassionate consideration of the evidence and the merits by the jury". Tyus v. Apalachicola Northern Railroad Company, 130 So. 2d 580, 587 (Fla. 1961). Further, many cases have pointed out that violations of the golden rule, if truly committed, do not justify a reversal and new trial unless they are flagrant and prejudicial. For example, in Americana of Bal Harbour, Inc. v. Kiester, 245 So. 2d 121 (Fla. 3rd DCA 1971), trial counsel had said in the closing argument that jurors, in considering plaintiff's future pain and suffering, should "treat it like you would treat your own husband or wife or son." Id. at 123. The court held that such statement was not of such quality as to justify reversal.

In considering alleged improper statements made to juries during closing argument, appellate courts, except in the most flagrant cases, have affirmed the trial court judge's decisions denying new trials stating:

> "...the able trial judge, who was in the courtroom through the trial, and therefore in a better position than this court to determine the effect of such conduct upon the jury, denied a motion for new trial and we are unable to conclude that counsel's conduct and remarks "in its collective impact" so gravely impaired dispassionate consideration as to deny defendants a fair trial. Byrd v. Felder, 197 So. 2d 554, 555 (Fla. 3rd DCA 1967); Tyus v. Apalachicola Northern Railroad Company, 137 So. 2d 580, 587 (Fla. 1961)".

The comment made by plaintiff's counsel was not a violation of the so called "golden rule". Any effect the insignificant statement might have had on the jury was considered by the trial judge when Seaboard's motion for a new trial was denied.

Florida cases, including those cited by Seaboard in it's brief,

clearly indicate that statements made to a jury should be considered on a case by case basis and that the trial judge is in the superior position to determine the jury's reaction to various comments. Appellate courts uniformly have confirmed trial court decisions with such comments as "This court certainly could not conjure up from the record the perceptions of the trial judge at that instant. We therefore yield to his superior vantage point to evaluate the comment and its potentionally harmful impact." Tri-County Truss Company v. Leonard, 467 So. 2d 370 (Fla. 4th DCA 1985).

The three cases cited by Seaboard with regard to golden rule arguments support Respondent's position. In Bullock v. Branch, 137 So. 2d 74, 76 (Fla. 1st DCA 1961), the quote cited at page 12 of Seaboard's brief makes it clear that golden rule arguments are those arguments which relate to the sensitive area of financial responsibility and hypothetically request the juror to consider how much he or she would want to receive if he or she had such injuries.

Petitioner's quote from Klein v. Herring, 347 So. 2d 681 (Fla. 3rd DCA 1977) is out of context. In Klein, several improper comments were made and those mentioned in the case were only examples. Additionally, plaintiff's attorney had, in effect, advised the jury that the insurance policy at issue would cover the amount of damages the plaintiff sought to recover. The case involved cumulative error.

Petitioner states that a single comment was ruled reversible error in National Car Rental System, Inc. v. Bostic, 423 So. 2d 915 (Fla. 3rd DCA 1982). It is clear in the decision that

Plaintiff's attorney had made several improper arguments including comments that executives at Travelers, none of whom were in the courtroom, were sitting in their ivory towers puffing cigars in their multi-million dollar buildings daring the plaintiff to sue them. The decision indicates that this conduct was bordering upon reversable error, but that when the comment was made regarding "would you wear the shoe if it was on the other foot", counsel had stepped across the line.

Petitioner makes one final comment in it's brief suggesting some analogy to the case of Harbor Insurance Co. vs. Miller, 487 So. 2d 46 (Fla. 3rd DCA 1986). In the case, the court found the defendant was entitled to a new trial and that the verdict was excessive because of prejudicial conduct which "was in fact so extensive that it's influence pervaded the trial to the point that it was impossible for the appellant to receive a fair trial". Id. at 47. In the case a thirteen year old child had been killed. The mother had become so upset during her testimony that the trial had to be recessed and a football jersey was admitted into evidence after the mother had testifed she wore it to feel close to her son.

Cases too numerous to include can be cited giving examples of comments made to juries which are not considered to be golden rule arguments or are not considered to be so prejudicial so as to justify finding that a trial judge has abused his discretion for denying a motion for new trial. These cases indicate the importance of the trial court's opinion in determining juror reaction to comments. See, Americana of Bal Harbour, Inc. v. Kiester, 245 So. 2d 121 (Fla. 3rd DCA 1971); Bew v. Williams,

373 So. 2d 446 (Fla. 2nd DCA 1979); City of Belle Glade v. Means, 374 So. 2d 1110 (Fla. 4th DCA 1979); Ward v. Orange Memorial Hospital Association, Inc., 193 So. 2d 492 (Fla. 4th DCA 1966); Kelley v. Mutnich, 11 FLW 290, 4th DCA Fla. (February 7, 1986) Case No. 84-1648.

As stated earlier, the comment now complained of regarding loading watermelons which is argued to be passionate and inflammatory is revealed by the record to have been considered otherwise by Seaboard's counsel. If the comment had been significant, counsel would have and should have moved the court to instruct the jury to disregard the argument and moved for a mistrial. Gatlin v. Jacobs Construction Co., 218 So. 2d 188 (Fla. 4th DCA 1969).

The arguments of Petitioner are unsupported by the record and the laws of this State. The jury, in its discretion, determined plaintiff's damages and determined that plaintiff was twenty percent (20%) responsible for such losses and defendant was eighty percent (80%) responsible. The defendant, in its motion for new trial and on this appeal, has not affirmatively established any impropriety from the record. The trial court judge considered all of appellant's arguments regarding jury influence and found them to be of no merit. No new theory or argument has been raised on this appeal which was not considered by the trial judge. Therefore, it cannot be said that the trial court judge abused his discretion in denying Seaboard's motion for new trial. "If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion." Baptist

Memorial Hospital, Inc. v. Bell, 384 So. 2d 145 (Fla. 1980).

ISSUE III

THERE IS NO BASIS FOR THE EXERCISE OF CONFLICT JURISDICTION.

JURISDICTIONAL QUESTION

Respondent respectfully asserts that this court should consider it's decision to accept jurisdiction of this case. The record on appeal will satisfy any unanswered questions the court might have had when considering whether to request briefs on the merits. It is respectfully submitted that the First District Court of Appeal decision of Seaboard Coastline Railroad Company v. Addison, 481 So. 2d 3 (Fla. 1st DCA 1985) does not conflict with Menard v. O'Malley, 327 So. 2d 905 (Fla. 3rd DCA 1976) or City of Tamarac v. Garchar, 398 So. 2d 889, (Fla. 4th DCA 1981).

Conflict jurisdiction is limited to those cases presenting real and embarrassing conflict. Ansin v. Thurston, 101 So. 2d 808, 811 (Fla. 1958). The ultimate test is whether the decision in question would overrule the decisions allegedly in conflict. Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962).

In Seaboard Coastline Railroad Company v. Addison, 481 So. 2d 3, (Fla. 1st DCA 1985), the court determined that the trial court had not been incorrect in denying jury instructions relating to the operation of vehicles at railroad crossings. The trial court relied upon Florida Standard Jury Instructions 4.13, 4.14(b) and Fla.R.Civ.P. 1.985. There is no reference or ruling with regard to such jury instructions or rule of procedure in the two decisions which were alleged to be in conflict.

Addison is a railroad collision case in which the district court ruled in favor of the plaintiff based upon the recommendations made by the Supreme Court Committee on Standard Jury Instructions and in which the First District Court of Appeal also determined that, under the facts of the case, the jury was not misled. It was clear to the jury that the judge and attorneys agreed that it would be negligent for Mr. Addison to drive his vehicle in front of an oncoming train. Pursuant to the recommendations of the Supreme Court Committee on Standard Jury Instructions, the attorneys for the parties fully argued this issue to the jury and Mr. Addison was found to be twenty percent (20%) at fault for failing to avoid the collision.

Neither City of Tamarac nor Menard dealt with a railroad-vehicle collision and neither case made any specific ruling regarding the use of Florida Standard Jury Instructions which Addison contradicted and specifically do not consider Florida Standard Jury Instructions 4.13 and 4.14(b) and Fla.R.Civ.P. 1.985. Those two decisions clearly indicated that a judge should review the facts of the case in determining the instructions to be given. Although certain statutory instructions were held to have been properly given or required under the facts of the cases, there were requested statutory jury instructions in both cases which were not required to be given.

Respondent respectfully urges the Court to determine that it lacks jurisdiction of this action. Seaboard Coastline Railroad Company v. Addison, 481 So. 2d 3 (Fla. 1st DCA 1985) does not overrule the decisions of City of Tamarac v. Garchar, 398 So. 2d 889 (Fla. 4th DCA 1981) and Menard v. O'Malley, 327 So. 2d 905 (Fla. 3rd DCA 1976).

CONCLUSION

Seaboard's appeal attacks the integrity and stability of a trial system which is based upon orderly, consistent and reliable procedures. Attorneys and trial judges must be allowed to rely upon Florida's Rules of Civil Procedure and the Florida Standard Jury Instructions. Petitioner's attack on the verdict alleging golden rule violations remains unproven.

This case was tried before a very able and experienced trial judge whom the record will reflect kept absolute control over his courtroom and the conduct of this trial. After having sat through the trial, the judge heard Seaboard's motion for new trial and found the same to be without merit.

This court should consider whether it should exercise it's jurisdiction as the record now before the court will reflect a lack of conflict. However, should the court rule on the merits, the order denying a new trial and judgment entered by the trial court should be affirmed.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by U. S. Mail, DuBOSE AUSLEY, ESQUIRE and WILLIAM M. SMITH, ESQUIRE, Post Office Box 391, Tallahassee, Florida, 32302 and WILLIAM R. SWAIN, ESQUIRE, 630 American Heritage Life Building, Jacksonville, Florida 32202, Attorneys for Seaboard Coastline Railroad Company, this 20 day of August, 1986.

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