IN THE SUPREME COURT
OF THE STATE OF FLORIDA

MARGARET ROWLANDS and BRIAN ROWLANDS,

Petitioners,

vs. Case No. **72,291**

SIGNAL CONSTRUCTION COMPANY,

Respondent.

PETITIONERS' INITIAL BRIEF ON MERITS

ON PETITION FOR REVIEW FROM THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF THE STATE OF FLORIDA

SUSAN W. FOX
Florida Bar #115448
Macfarlane, Ferguson, Allison & Kelly
Post Office Box **1531**
Tampa, Florida **33601**
Telephone No. **(813) 223-2411**

and

WILLIAM A. DONOVAN, ESQUIRE
Ruby & Donovan, P.A.
2664 Airport Road South
Naples, Florida **33962-4893**
Telephone No. **(813) 774-5518**

ATTORNEYS FOR PETITIONERS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE FACTS

On March 21, 1984, Margaret Rowlands, age 38, and her daughter Samantha Rowlands were bicycling north on the public sidewalk adjacent to Goodlette Road in the downtown area of Naples, Florida. (R. 182, 184, 185, 192). Samantha Rowlands was riding in front and Margaret Rowlands was approximately one bicycle length behind her. They had ridden on that sidewalk many times before. It was always clean, well-kept and without obstructions or holes. Mrs. Rowlands felt safe on that sidewalk. (R. 184).

That day a three man crew from Signal Construction Company was working near the accident site. (R. 142, 152). Signal does electrical work and traffic signal work. (R. 131). On March 21, 1984 the Signal employees were pulling interconnecting cable. (R. 142). They had a one-ton truck parked at the site. (R. 143). At the time of the accident, the crew was behind the truck taking a break. (R. 144). Signal did not post any warning signs or cones in the work area that day (R. 147-48) although it was company policy to post warning signs if the crew had materials on a public sidewalk. (R. 154-55).

Mrs. Rowlands testified that as she was riding slowly along the sidewalk, she hit an object on the sidewalk and fell off her bicycle into the road (R. 185-86) where she was hit by an automobile. (R. 188). She did not see the object before she hit it. (R. 186). After the accident, she crawled back to the sidewalk. (R. 186). She then noticed cable and rope doubled up on the sidewalk. (R. 187).

Whether or not there was rope or cable on the sidewalk was disputed at trial. The police officer at the scene testified by deposition that the Signal employees acknowledged to him that the rope was on the sidewalk. (R. **160**). They told him that they felt that she should have seen it and been able to avoid it. (R. **160**).

The two Signal crew members who testified at the trial denied admitting to the police officer that there was rope on the sidewalk. (R. **146, 154**). Mark Roberts, one of the crew members, testified that there was not anything on the sidewalk at the time the accident occurred. (R. **154**).

After the accident, Margaret Rowlands went to the hospital. (R. **189**). Her whole body had been struck by the car and she hurt all over. (R. **188**). Mrs. Rowlands testified that at the time of the trial she was having pain in her ribs on a regular basis, especially if she tried to reach. (R. **197**). She also was suffering regularly from a sharp shooting pain in her lower right spine, pain over the shoulder, a "locking" knee, and migraine headaches. (R. **195-98**).

Dr. Francis Hussey, Mrs. Rowlands' treating physician, first saw her on April **3, 1984,** about two weeks after the accident. (R. **353**). He had been seeing her regularly for the two years prior to the taking of his videotaped deposition. (R. **191, 360**).

Dr. Hussey is a board certified neurologist, licensed to practice medicine in the State of Florida. (R. **352**). When he first saw Mrs. Rowlands, he took a history and performed a neurological examination. (R. **353**). The examination revealed a

limitation of head turning to the right and left. (R. **354).** She had a positive foramina1 compression test indicating irritation of a nerve root. (R. **354).** There was positive Adson and Allen sign indicating significant muscle spasm in the neck. (R. **354).** She had negative straight leg raising. (R. **354).** She had facet joint pain. (R. **355).** There was limitation of movement and pain in the shoulder. (R. **355).**

Dr. Hussey concluded at that time that she had a cervical radiculopathy or pinched nerve in the neck; a lumbosacral facet syndrome, which is a lower back problem; pain in the ribs and the knee; and multiple bruises and trauma to the rest of the body. (R. **356-57, 359-60).**

Later Dr. Hussey concluded that Mrs. Rowlands was also developing a form of post-traumatic arthritis in the facet joints in the neck and lower back. (R. **362).** The treatment for such a problem is anti-arthritic medication and physical therapy. (R. **362).** Dr. Hussey also prescribed an anti-depressant because Mrs. Rowlands was becoming increasingly depressed with the fact that she was constantly in pain and could not do the things she used to do. (R. **362).**

Two years after the accident, Mrs. Rowlands continued to have severe right hip and back pain, neck problems, headaches, rib pain, and pain in the knee. (R. **363-6).** Dr. Hussey testified that she would continue to have this pain and immobility for the

rest of her life and that the problem would get progressively worse. (R. 363-6). He concluded that she would be limited in her activities for the rest of her life. (R. 366).

Dr. Hussey projected that Mrs. Rowlands would spend a dollar a day for medication for the rest of her life[1] -- Advil or another medication. (R. 368, 370). He felt that she would require 10 to 20 therapy sessions per year at a cost of $40.00 to $60.00 per visit and 2 to 7 visits to a physician per year for a similar cost. (R. 369).

Finally, Dr. Hussey stated that he felt that Margaret Rowlands' condition was causally related to the accident which occurred on March 21, 1984. (R. 369).

Two doctors testified for the defense by videotape deposition. Dr. William D. Ertag, a board certified neurologist, saw Mrs. Rowlands one time -- September 17, 1984, approximately 6 months after the accident -- and spent approximately 30 minutes examining her. (R. 417, 419, 437). She was referred to his office for an independent medical evaluation by General Accident Insurance Company. (R. 419). He had a record of only one visit to Dr. Hussey and his testimony was unclear as to whether or not he reviewed that one record. (R. 438, 441-43). He did not take any x-rays or perform an EMG. (R. 441).

Dr. Ertag's diagnosis at the time of performing his examination was that Mrs. Rowlands was recovering from multiple soft tissue injuries, a neck sprain and a low back sprain. (R.

.....

[1]Mrs. Rowlands has a life expectancy of 38.8 years. (R. 163).

432). He felt that she had "mild musculo tension headaches". (R. **432).** He foresaw only a minimal total impairment if not complete resolution of her symptoms. (R. **432).**

Dr. Harry M. Lowell, a board certified neurosurgeon, also saw Mrs. Rowland son only one occasion **--** April 22, **1986.** (R. **453-55).** His examination did not take longer than **15** minutes. (R. **460).** He stated that he "rather doubted she had sustained a significant injury". (R. **457).** His examination of her showed her to be normal. (R. **459).**

Both Mr. and Mrs. Rowlands testified that before the accident she was active in numerous sports such as swimming, cycling, jazzercise, and horseback riding. (R. **168, 194).** She also did virtually all of the housework. (R. **170-71, 194-95).** Since the accident her activities have been limited. (R. **170-71, 195).** She does exercise in the water rather than swimming. (R. **195).** When she tries to ride a bicycle, her left knee gets "locked". (R. **195).** She cannot do most of the housework because, for example, she has difficulty bending over. (R. **195-96).** She cannot do grocery shopping by herself because she cannot pick up heavy articles. (R. **196).** She cannot drive any longer because after she sits in the car for a period of time she gets a sudden pain in her back. (R. **171, 196).**

In addition, Brian Rowlands testified that their family life has been disrupted. (R. **169-73).** His wife wakes him up at night two to three times a week because she is in pain. (R. **170).** Her relationship with her daughter has been strained because her

daughter has to do almost all of the housework now. (R. **171).** The family can no longer take walks, play tennis, bicycle or swim together. (R. **172).** His wife gets frustrated and upset and complains. (R. **172).** Their former way of life has been "ruined". (R. **173).**

STATEMENT OF THE CASE

On March **22, 1985,** Rowlands filed their Complaint against Signal for damages for personal injuries suffered in the bicycle accident of March **21, 1984.** (R. **339-41).** Appellant Brian Rowlands sued for damages for loss of consortium. (R. **339-41).**

Signal filed its Answer to the Complaint and affirmatively alleged comparative negligence and collateral sources. (R. **342-43).**

The action proceeded to jury trial on August **19** and **20, 1986,** before the Honorable Ted Brousseau. (R. **1-35).** On August **20, 1986** the jury returned a verdict stating:

> WE, the jury, return the following verdict:
>
> **1.** Was there negligence on the part of the Defendant Signal Construction Co., Inc., which was a legal cause of injury to Margaret Rowlands?
>
> YES.
>
> **2.** Was there negligence on the part of the Plaintiff Margaret Rowlands which was a legal cause of injury to Margaret Rowlands?
>
> YES.
>
> 3. State the percentage of any negligence which was a legal cause of damage to Plaintiff, Margaret Rowlands, that you charge to:

Margaret Rowlands 10 percent

Signal Construction 90 percent

4. What is the total amount of any damages sustained by Plaintiffs, Margaret Rowlands and Brian Rowlands and caused by the incident in question?

Total damages of Margaret Rowlands $250,000

Total damages of Brian Rowlands $ 45,450

So say we all this 20th day of August, 1986.

Victor Chainas, Foreman. (R. 313-14).

Signal filed its Motion for New Trial or in the Alternative, Motion for Remittitur. (R. 316). On November 4, 1986, after hearing, Judge Brousseau's Order Granting Remittitur or New Trial was filed. (R. 317-30). Said Order provided in pertinent part:

1. The verdict in this cause shall be reduced to Twenty Five Thousand Dollars for Plaintiff, MARGARET ROWLANDS and BRIAN ROWLANDS and against the Defendant, SIGNAL CONSTRUCTION COMPANY, INC.

2. Plaintiffs, MARGARET ROWLANDS and BRIAN ROWLANDS shall have ten (10) days from rendition of this Order in which to file an acceptance or rejection of this remittitur.

3. If this remittitur is not accepted by Plaintiffs then this case will be tried on all issues.

4. Attached to this Order is a copy of the 'Transcript of Motion' wherein this Court specifically stated the grounds for granting Defendants' motion. Said grounds are found on pages ten (10) through twelve (12), inclusive. Said grounds are hereby incorporated, confirmed, adopted and reiterated as if specifically set forth in this Order. (R. 317-30).

On November 10, 1986 the Rowlands filed their Notice of Rejection of Remittitur. (R. 331). An appeal to the District Court of Appeal, Second District of Florida, resulted in the opinion reported as Rowlands v. Signal Construction Company, Inc., 522 So.2d 59 (Fla. 2nd DCA 1988); a copy of the opinion is contained in the Appendix to this Brief (A. 1). Petitioners requested this Court to accept jurisdiction to resolve an express and direct conflict of decisions among the district courts of appeal. This Court has accepted jurisdiction and has instructed the parties to file Briefs on the merits.

SUMMARY OF ARGUMENT

This appeal involves the propriety of the Trial Judge's order, and the Second District Court's affirmance of that order, granting Signal a new trial when the Rowlands did not accept the reduction of their net $265,905.00 verdict to $25,000.00. The Trial Court's primary reason for granting the remittitur/new trial was his belief that the percentages of comparative negligence were against the manifest weight of the evidence. The Second District Court of Appeal affirmed the Trial Court's order, except the District Court determined that on retrial the jury should be instructed that both parties were to some extent negligent and the duty of the jury would be to determine only the relative negligence and the total damages suffered.

The Petitioners submit that a remittitur or alternative new trial is not a proper means of adjusting the percentages of negligence determined by the jury. The apportioning of negligence between a plaintiff and a defendant is peculiarly within the province of the jury, and their finding should not be set aside where there is evidence of some degree of negligence on both sides.

Even if a trial court may weigh the evidence to determine whether the jury's apportionment of negligence is against the manifest weight, the Trial Judge abused his discretion in doing so in this case. There was competent substantial evidence by which reasonable people can and did conclude that the Defendant was 90% negligent and the Plaintiff only 10% at fault.

To the extent, if any, that the Trial Judge found the damages awarded to be excessive, a reversal is likewise required. Since the Trial Court's primary disagreement with the jury verdict was in the percentages of negligence, it is difficult to determine from his order the extent, if any, to which he felt the jury's determination of damages was excessive. However, since the evidence showed that the jury verdict was not excessive, the Trial Judge clearly abused his discretion in ordering a remittitur or new trial.

ARGUMENT

WHETHER THE TRIAL COURT ERRED IN ORDERING, AND THE DISTRICT COURT OF APPEAL ERRED IN AFFIRMING, THE REMITTITUR OR NEW TRIAL IN THIS CASE.

This personal injury case was tried before a jury on the issue of Signal's negligence in leaving its materials on a public sidewalk during the performance of its work without warning the public of the hazard thereby created. Signal denied leaving the cable on the sidewalk, and raised the defense of Mrs. Rowlands' comparative negligence, claiming that she should have observed the cable and been able to avoid it. The issues of Signal's negligence, and of Mrs. Rowlands' comparative negligence were submitted to the jury on admittedly proper instructions. The jury found Plaintiff Margaret Rowlands 10% negligence, and Defendant 90% negligence, and assessed Margaret Rowlands' total damages at $250,000.00. Brian Rowlands was awarded $45,450.00 on his derivative claim. The jury was polled, and each juror affirmed that this was his or her verdict. Four months later, the Trial Judge ordered a remittitur to $25,000.00, for both claims, and, in the alternative, ordered a new trial on all issues if the Plaintiffs failed to accept the remittitur. The trial judge's primary reason for ordering remittitur was the jury's apportionment of the percentages of negligence of the parties. The Court stated:

> ...I have to say it shocked the conscience of the Court when the verdict did come in. Not necessarily disputing the injuries or the doctors' testimony or even having to get into

> that aspect of it, but probably more the liability percentages there had been that would have affected their decision. (R. 488).

The trial judge also commented, based on his recollection, that all but 20 minutes of the trial time was spent on the issue of damages, and therefore that the "overwhelming" amount of time on the damages issue might have confused the jury.[2] There was no express finding that the damages awarded exceeded a reasonable range by any determinable amount, or of any improper or non-record influence on the jury.[3] There was no finding of any evidentiary or other prejudicial error in the trial.

The appeal to the Second District Court of Appeal raised the following issues: (1) The jury's verdict was not against the manifest weight of the evidence, and the jury was not influenced by considerations outside the record; (2) the Judge improperly used the device of remittitur to adjust the jury's findings of

.....

[2]The trial judge's recollection on the amount of time spent establishing liability at trial as incorrect. The Plaintiffs' first four witnesses, Don Lee Copeland, Freddie Brown, Mark Roberts, and Officer George Stansbury testified solely on the liability issues. The only Plaintiffs' witness who testified solely on damages was Dr. Hussey. Mr. and Mrs. Rowlands also testified, but their testimony addressed both the liability and damages issues. Margaret Rowlands testified extensively as to how the accident occurred, and Brian Rowlands testified, and submitted photographs, concerning the cable he observed on the sidewalk the following day at the location of the accident. Thus, Plaintiffs presented seven witnesses, four who testified solely on the liability issues, one who addressed damages only, and two who addressed both issues. The defense presented evidence only on the damages issue.

[3]The Court did note that the jury first returned a verdict assessing the percentages of liability without filling in the damages amount, and upon instruction from the Court, retired to complete the damages portion. There was no motion for a mistrial at that point, or any other contemporaneous suggestion by the Defendant that the jury's conduct demonstrated undue confusion.

liability; and (3) if the damage verdict was excessive, a new trial should have been granted only on the damages issue. The District Court, after a lengthy recitation of the facts in the light most favorable to Signal,[4] agreed with the trial judge's order, except in one minor respect. The District Court observed that the trial judge's primary basis for ordering a remittitur or new trial was his disagreement with the jury's apportionment of liability. The District Court's opinion states:

> It is obvious that the Trial Judge was convinced that the jury's determination of the comparative negligence of the parties was against the manifest weight of the evidence. Our independent search of the record convinces us likewise. (A. 3).

Nevertheless, the District Court confirmed that there was evidence from which the jury could have concluded that both parties were to some degree negligent. The one minor respect in

.....

[4]The facts recited in the District Court's opinion do not give any deference to the jury findings, and apparently are based on an independent and de novo evaluation of the record. For example, the District Court stated, "Mrs. Rowlands testified that she really did not know what happened", i.e., how the accident happened. (A. 2). The evidence actually showed that although Mrs. Rowlands did not see the cable before she hit it, she saw it immediately after the accident. There was no doubt that after the accident, Mrs. Rowlands knew she had hit the cable in the sidewalk with the wheel of her bicycle. The District Court also notes that Samantha Rowlands, the Plaintiff's daughter, did not testify, but apparently had no problem traversing the sidewalk on her bicycle just ahead of her mother. (A. 2). By this statement, the District Court of Appeal appears to be drawing an inference, inconsistent with the jury verdict, that since Samantha Rowlands was able to avoid the cable, her mother should have been able to avoid it. The inference apparently drawn by the jury was that the trailing bicyclist watches the back of the bicyclist in front of them or her, rather than the sidewalk. Clearly, a sudden stop by the leading bicycle is a more likely source of collision or accident than an unexpected obstruction in the sidewalk. In any event, the District Court's inference is inconsistent with the jury verdict and therefore improper.

which the District Court disagreed with the trial judge was that, since the jury did find both parties some degree negligent, the new trial should be on damages and the percentage of negligence, rather than on all issues as to damages and liability. The Court established the retrial procedure as follows:

> On retrial, the jury should be instructed that it has been determined that both parties were to some extent responsibly negligent in regard to the accident and the duty of the jury, on retrial, would be to determine only the relative or comparative negligence of the party and the total damages suffered by appellants. (A. 5-6).

A. A Remittitur Or Alternative New Trial Is Not A Proper Means Of Adjusting The Percentages Of Negligence As Determined By The Jury.

In accepting jurisdiction in this case, this Court has apparently recognized that the decision of the Second District Court of Appeal, allowing a remittitur or new trial in this case, conflicts with decisions of other courts of appeal on this issue. The question now presented to this Court is to what extent, and by what means, a trial court may weigh the evidence to determine whether a jury's assessment of the relative degrees of fault should be set aside.

As shown in the jurisdictional statement, all of the District Courts of Appeal, prior to the Rowlands decision, were in agreement that a trial court could not use the remittitur or new trial device as a means of reassessing the jury's determination of comparative fault. The Third District Court of Appeal rendered the leading decision on this issue in St. Pierre

v. Public Gas Company, 423 So.2d 949 (Fla. 3rd DCA 1982). In that case, the jury found the plaintiff 20% negligent, but the trial judge disagreed and ordered a new trial on liability conditioned on the plaintiff remitting 50% of the amount of damages awarded by the jury. Citing Akermanis v. Sea-Land Service, Inc., 688 F.2d 898 (2nd Cir. 1982), the Third District held that a trial judge is prohibited from any adjustment that "extends a jury's finding", because the "question of apportioning the negligence between the plaintiff and the defendant is one that is peculiarly within the province of the jury and is not subject to adjustment." 423 So.2d at 951 [Emphasis in original]. See also, Cooper Transportation, Inc. v. Mincey, 459 So.2d 339 (Fla. 3rd DCA 1984). Similarly, in South Florida Beverage Corporation v. San Pedro, 499 So.2d 915 (Fla. 3rd DCA 1986), the Third District reversed a trial judge's order granting judgment for the plaintiff notwithstanding the jury verdict. The jury had found the plaintiff 52% at fault. The court stated:

> The question of apportioning negligence between the plaintiff and the defendant is peculiarly within the province of the jury. Tyus v. Apalachicola Northern Railroad, 130 So.2d 580 (Fla. 1960) (conflicting testimony on question of defendant's negligence, particularly where comparative negligence rule applies, is absolutely within province of jury). 499 So.2d at 916.

The Fourth District Court of Appeal adopted the same rule in John Sessa Bulldozing, Inc. v. Papadopoulous, 485 So.2d 1383 (Fla. 4th DCA 1986), in a case dealing with additur. In that case, the jury found the plaintiff 70% negligent, but the trial

judge ordered an additur which would have the effect of adjusting the plaintiff's negligence to only 50%, finding that any higher percentage was against the manifest weight of the evidence. Relying on St. Pierre v. Public Gas Company, supra and Cooper Transportation, Inc. v. Mincey, supra, the district court reversed. The court felt that the trial judge had invaded the province of the jury, and therefore reinstated the jury verdict.

The Fifth District Court of Appeal also reached a similar holding in Keith v. Russell T. Bundy & Associates, Inc., 495 So.2d 1223 (Fla. 5th DCA 1986). In that case, the jury found the plaintiff was not comparatively negligent, but the trial judge ordered a remittitur of one-third of the jury verdict finding that the jury should have found the plaintiff comparatively negligent to the extent of at least one-third. In the alternative, the trial judge ordered a new trial on liability. The district court reversed the remittitur stating:

> A trial judge may not use the device of a new trial order conditioned on a remittitur to increase the jury's determination of the plaintiff's comparative negligence. Cooper Transportation, Inc. v. Mincey, 459 So.2d 339 (Fla. 3rd DCA 1984), review denied, 472 So.2d 1181 (Fla. 1,985); St. Pierre v. Public Gas Company, 423 So.2d 949 (Fla. 3rd DCA 1982). A remittitur of part of the amount recovered cannot cure a verdict which is contrary to the law or not sustained by the evidence as to any issue other than the measure of damages. Marson v. Dadeland Rent-A-Car, Inc., 408 So.2d 245 (Fla. 3rd DCA 1981). The rationale behind the rule which prevents the court alteration of the jury's apportioning of negligence is that the question of apportioning is one that is peculiarly within the province of the jury. Akermanis v. Sea-Land Service, Inc., 688 F.2d 898 (2nd Cir. 1982), cert. denied, 462 U.S. 927, 103 S.Ct.

2087, 77 L.Ed.2d 298 (1983). See also, Ashcroft v. Caulder Race Course, Inc., 492 So.2d 1309 (Fla. 1986).

> In the instant case, it was clearly error for the trial judge to reduce the verdict by one-third based on his determination that the plaintiff should have been found negligent. The remittitur must be reversed. 495 So.2d 1225.

The Second District Court of Appeal had also indicated agreement with this rule in Smith v. Telophase National Cremation Society, Inc., 471 So.2d 163, 166 (Fla. 2nd DCA 1985) stating:

> A remittitur should be ordered... only as a remedy for excessive damages and not where the trial judge questions the finding of liability.

The court relied upon the Third District's decision in St. Pierre v. Public Gas Co., supra. In the instant case (Rowlands), the Second District apparently recognized that its decision was inconsistent with Smith v. Telophase, stating:

> Smith v. Telophase and the cases cited therein did not involve the issues of comparative negligence. We would, therefore, in comparative negligence cases, refine the holding in Smith v. Telophase. We adhere to the rule that remittitur should be ordered only where liability is clearly established.
>
> However, in comparative negligence cases, remittitur may also be proper where the trial judge concludes that the finding of some negligence on the part of both parties is not against the manifest weight of the evidence, but the determination of each party's percentage of comparative negligence and/or the total amount of damages is against the manifest weight of the evidence. (A. 5).

The Second District was incorrect, of course, in stating that the cases cited in Smith v. Telophase did not concern the issue of comparative negligence. As shown above, St. Pierre v. Public Gas Co. disapproved the use of remittitur to readjust the jury's apportionment of comparative fault. In Rowlands, however, the Second District has clearly held that remittitur is proper when the trial judge concludes that the jury's determination of the percentages of comparative negligence is against the manifest weight of the evidence, even where there is adequate evidence of some negligence on the part of both parties. The prior cases were in agreement that where there is evidence of some degree of negligence by both plaintiff and defendant, the apportionment of fault is solely and absolutely a jury function. In the face of substantial evidence of fault on both sides, a trial court has not been permitted to find that the jury's assessment of the percentages of relative fault is against the manifest weight of the evidence. By definition, in these cases, both parties are to some degree at fault. The degree is a pure jury question.

Only in cases where there was no evidence of comparative negligence have the courts overturned a jury finding as to the plaintiff's comparative negligence. For example, in Coulter v. American Bakeries Company, ___ So.2d ___, 13 FLW 2032 (Fla. 1st DCA, Case No. **87-1574**, Aug. 30, **1988),** the First District Court of Appeal reversed a jury finding of **80%** comparative negligence against the plaintiff where there was no evidence tending to prove comparative negligence. The court held that the issue

should not have been submitted to the jury in the absence of any evidence. Similarly, where the evidence establishes that a plaintiff was to some degree negligent, a jury verdict of zero comparative negligence has been reversed. State, Department of Corrections v. Romero, 524 So.2d 1032 (Fla. 5th DCA 1988). But when both parties are somewhat at fault, it is a pure factual jury issue as to the degree, and the trial judge should not be permitted to substitute his own judgment.

This Court has held:

> ...[T]he trial judge does not sit as a seventh juror with veto power. His setting aside a verdict must be supported by the record... or by findings reasonably amenable to judicial review. Not every verdict which raises a judicial eyebrow should shock the judicial conscience. Lasky v. Smith, 239 So.2d 13 (Fla. 1970).

This statement was cited with approval in this Court's leading case on the remittitur/new trial issue, Ashcroft v. Caulder Race Course, Inc., 492 So.2d 1309 (Fla. 1986). Ashcroft considered a body of earlier case law and established the following criteria for remittitur/new trial orders:

> 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. 492 So.2d at 1309.

In that case, the jury entered a verdict of $10,000,000, which the trial judge remitted to $5,000,000. This Court held:

> The trial judge's broad discretion is exercised in the context of determining whether a jury's verdict is against the manifest weight of the evidence or was influenced by consideration of matters

> outside the record. We agree with petitioner that the trial judge abused his discretion in ordering remittitur and granting a new trial as an alternative. There is nothing in the remittitur order suggesting there was any impropriety in the jury's verdict. There are no reasons given to support the notion that the verdict was against the manifest weight of the evidence or that the jury was influenced by matters outside the record. Instead, the judge appears to have simply reached different conclusions than the jury on whether the petitioner was negligent and on the amount of damages to be awarded. The trial court's discretion, while broad, is not unbridled. 492 So.2d 313-14. (Emphasis added).

The court remanded the case with instructions to reinstate the jury verdict. Implicitly, this Court found that a trial judge's disagreement with a jury finding of comparative negligence is not a proper basis for ordering a remittitur.

The comparative negligence rule adopted by this Court in the landmark case of Hoffman v. Jones, 280 So.2d 431 (Fla. 1972) was stated as follows:

> (1) To allow a jury to apportion fault as it ~~sees~~ ~~fit~~ between negligent parties whose negligence was part of the legal and proximate cause of any loss or injury;
>
> (2) To apportion the total damages resulting from the loss or injury according to the proportionate fault of each party. 287 So.2d at 439. (Emphasis added).

The conclusion therefore must be that, once some evidence of negligence by both parties is presented, the jury verdict as to each party's responsibility is conclusive as this is a pure factual issue. A trial judge may not reweigh the evidence to arrive at different degrees of fault. If he were permitted to do

so, he would be in effect sitting as a seventh juror with veto power. The constitutional right to a jury trial would be substantially impaired.

Even if the trial court is allowed to weigh the parties' comparative fault to determine whether a jury's apportionment of degrees of fault is against the manifest weight of the evidence, the trial court's decision in this case was incorrect. The evidence before the jury on the liability issue was in dispute. Signal Construction denied the Rowlands' contention that Signal was negligent. The primary factual issue in dispute was whether Signal Construction did or did not leave its materials (cable or rope) on the public sidewalk. If it did, then it violated its own safety standards by not placing warning signs, devices, safety cones, or barricades in the area to warn the public using the sidewalk. The President of Signal Construction testified that the company's safety procedures when working on a public sidewalk or a right-of-way were "to protect the public, to insure their safety, we use cones and barricades". (R. 134). Florescent orange cones were generally used to detour public traffic around the work site. (R. 134). These cones and other devices were on the truck at the site but were not in use. (R. 148). The employees of Signal Construction testified that they did not leave their materials on the sidewalk at the time of this accident. Margaret Rowlands and the police officer who investigated this scene provided contrary testimony. This disputed fact was submitted to the jury. If Signal did not leave

its materials on the sidewalk, then it was not negligent and the cause of Mrs. Rowlands' accident is not known. But the jury clearly believed that Signal did leave its materials on the sidewalk, and that this negligence caused Mrs. Rowlands' accident.

The evidence at trial to support the jury's finding that Signal was negligent is not only competent and substantial, but overwhelming. Margaret Rowlands testified that after she hit an object on the sidewalk, fell, was struck by a car, and crawled back to the curb, she saw cable and rope doubled up on the sidewalk. (R. **187).** The police officer supported her testimony. On the day after the accident, Brian Rowlands went to the scene and photographed Signals' cable and rope on the sidewalk. (R. **173-74).** These photographs were admitted into evidence. (R. **175).**

Based on the evidence at trial, reasonable people could conclude and by their verdict did conclude that Signal failed to use reasonable care under the circumstances and that it was **90%** responsible for Mrs. Rowlands' accident. Under the conflicting evidence the negligence issue was a classic jury question. It was for the finder of fact to determine which testimony was more credible. Helman v. Seaboard Coast Line Railroad Company, **349** So.2d **1187** (Fla. **1977).**

If a trial court is to be permitted to reweigh the evidence as to the percentages of fault set by the jury, this Court should establish the standards for such an examination. Ordinarily, the

assessment of relative degrees of fault is a pure jury function, not to be upset by the trial judge by remittitur or otherwise. This Court should resolve this issue by so declaring, and eliminate the current conflict among the districts as to the use of the remittitur device to adjust jury findings of comparative fault. By any reasonable standard, however, this jury's findings are supported by the evidence and should be affirmed.

B. The Total Damages Awarded By The Jury In This Case Were Not Excessive Or Otherwise Improper.

The trial judge's order granting the remittitur or new trial, and incorporated findings (A. 16-18), clearly express the Court's concern with the percentages of liability, rather than the amount of damages. The Second District Court of Appeal likewise predicated its decision primarily on the liability issue. The concern over the amount of damages therefore appears to be only an outgrowth of assumption that the jury assessed too much of the liability against the Defendant. For this reason alone, the order requiring a remittitur or new trial on damages should be reversed.

In personal injury cases, the assessment of damages is always a discretionary jury function.

> 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. The verdict should not be disturbed unless it is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate. Bould v. Touchette, 349

> So.2d 1181, 1184-85 (Fla. 1977), quoted with approval in Ashcroft v. Caulder Race Course, Inc., supra at 1314.

Personal injury cases present intangible elements of damages, not subject to a fixed monetary calculation. The trial judge properly instructed the jury to award Mrs. Rowlands the following elements of damage described by Florida Standard Jury Instruction 6.2a:

> Any bodily injury sustained by Margaret Rowlands and any resulting pain and suffering, disability, disfigurement, mental anguish and loss of capacity for the enjoyment of life experienced in the past or to be experienced in the future. There is not exact standard for measuring such damage. The amount should be fair and just in light of the evidence.

In Sproule v. Nelson, 81 So.2d 478, 481, 76 A.L.R.2d 1066 (Fla. 1955), this Court recognized that there is "an element of speculation in most personal injury verdicts", but held that this is a matter for jury discretion. The court may review the jury's discretion but not the amount awarded unless clearly arbitrary, because determination of the amount of such damages is peculiarly within the province of the jury. Id. Pain and suffering have no market price and are not capable of being exactly and accurately determined. Daniel v. Weis, 385 So.2d 661, 664 (Fla. 3rd DCA 1980).

In this case, Mrs. Rowlands' past medical expenses had exhausted her available personal injury protection benefits. The evidence supported a finding of future medical expenses of

$77,018.00.[5] The Trial Court's remittitur to **$25,000.00** was **$52,000.00** less than the future medicals alone. In addition to the medical expenses, Dr. Hussey testified that Mrs. Rowlands has a very significant impairment in loss of bodily functions due to a pinched nerve in the neck, lumbosacral facet syndrome, which is a low back problem, post traumatic arthritis, and a variety of other medical disabilities. These injuries cause her significant pain and will progressively worsen for the remainder of her life. (R. **363-66).**

In the present case the jury awarded the Rowlands **$295,450.00** in total damages, which, when reduced by the 10% comparative negligence finding, would result in a final judgment for Rowlands in the amount of **$265,905.00.** Reasonable people could and did by their verdict conclude that the Rowlands were significantly damaged. This verdict was not so inordinately large as to exceed the maximum limit of a reasonable range within which the jury may operate. Therefore the Trial Court abused his discretion in reducing the award.

---

[5]Dr. Hussey testified that Mrs. Rowlands would incur $1.00 per day for medication for the rest of her life (R. **368,** 370), would require 10 to **20** physical therapy sessions per year at a cost of **$40.00** to $60.00 per visit, and between two and seven visits to a physician per year, at a similar cost. (R. **369).** Based on Mrs. Rowlands' life expectancy of **38.8** years (R. 163), future medical expenses may be calculated as follows: $1.00 per day for medication equals **$14,162.00; 20** therapy sessions per year at **$60.00** equals **$46,560.00;** and seven doctor visits per year at **$60.00** each equals **$16,296.00.**

CONCLUSION

This case presents a vitally important issue, not only because of the existing conflict among the district courts of appeal, but also because this Court's decision will materially and substantially affect every litigant in a negligence action in the State of Florida. Negligence actions are the most numerous civil disputes, and comparative negligence is now a defense in a majority of these cases.

This Court should hold that a trial judge may not set aside a jury's apportionment of the relative degrees of fault of the parties absent an independent determination that the jury was influenced by considerations outside the record. A remittitur and alternative new trial is not an appropriate vehicle for adjusting a jury's determination of comparative fault.

If this Court determines that a trial judge may, under specific circumstances, weigh the evidence to determine whether the jury's apportionment of relative fault is against the manifest weight, the Court should announce appropriate standards for future guidance.

Finally, the result in this case must be reversed. Neither the jury's assessment of the percentages of comparative negligence nor the damages awarded are against the manifest weight of the evidence. This case should be remanded for reinstatement of the jury verdict.

Respectfully submitted.

SUSAN W. FOX
Florida Bar #115448
Macfarlane, Ferguson, Allison & Kelly
Post Office Box **1531**
Tampa, Florida **33601**
Telephone No. **(813) 223-2411**

and

WILLIAM A. DONOVAN, ESQUIRE
Ruby & Donovan, P.A.
2664 Airport Road South
Naples, Florida **33962-4893**
Telephone No. **(813) 774-5518**

ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by regular U.S. mail to GERALD W. PIERCE, ESQUIRE, Henderson, Franklin, et al., Post Office Box **280**, Fort Myers, Florida **33902-0280**, this 3rd day of October, **1988**.

ATTORNEY