IN THE SUPREME COURT OF FLORIDA

MARGARET ROWLANDS and BRIAN ROWLANDS Petitioners, v. SIGNAL CONSTRUCTION CO., Respondent.	)	CASE NO: 72,291

PETITIONERS' JURISDICTIONAL BRIEF

On Review from the District Court
of Appeal, Second District
State of Florida

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STATEMENT OF THE CASE AND FACTS

The Petitioners, MARGARET ROWLANDS and BRIAN ROWLANDS were the prevailing parties in a personal injury action that was tried before a Collier County jury in August, 1986. The jury returned a verdict in favor of the Petitioners and against the Respondent, SIGNAL CONSTRUCTION COMPANY. The verdict awarded damages to the Petitioners in the amount of $295,450.00 and found that Petitioner, MARGARET ROWLANDS, was ten percent comparatively negligent.

This case arose out of an incident that occurred March 21, 1984 when Petitioner, MARGARET ROWLANDS, while riding a bicycle on a sidewalk adjacent to a road in Collier County, struck some object on the sidewalk which caused her to fall into the road where she was struck by an automobile.

Respondent, SIGNAL CONSTRUCTION COMPANY was performing electrical and traffic signal work adjacent to the sidewalk and near the accident site. The SIGNAL employees were pulling interconnecting cable underground from intersectional traffic signal to intersectional traffic signal.

The disputed issue of fact is whether or not the Respondent, SIGNAL CONSTRUCTION COMPANY left its materials, cable, or rope on the sidewalk. It is undisputed that, if SIGNAL did have materials on the sidewalk, it was company policy to post

warning signs or place warning cones in the work area and that there were no warning signs or cones placed on that day.

MARGARET ROWLANDS did not see what she struck until after she crawled from the street back to the sidewalk. She testified that she then saw the rope or cable lying coiled on the sidewalk.

After the jury returned its verdict, the Respondent, SIGNAL CONSTRUCTION COMPANY filed a Motion For New Trial Or In The Alternative Motion For Remittitur. The trial judge granted the motion and reduced the Petitioner's verdict to $25,000.00. In the alternative, upon Petitioner's rejection of the remittitur, a new trial was granted on all issues. Petitioners appealed the remittitur/new trial order to the Second District Court of Appeal. On February 12, 1988 the Second District Court of Appeal rendered its opinion which in part affirmed and in part reversed the trial court's order. Petitioners' motion for rehearing was denied on March 22, 1988. In its opinion, the Second District Court of Appeal held that it was proper to utilize the device of remittitur in order to adjust the liability percentages of the litigants in comparative negligence cases. A conformed copy of the Rowlands decision is appended.

SUMMARY OF THE ARGUMENT

In this case, the Second District Court of Appeal held that in comparative negligence cases, it is proper for a trial judge to utilize the device of remittitur to adjust the jury's findings on the percentages of negligence of the parties 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 is against the manifest weight of the evidence. This holding expressly and directly conflicts with the following Florida cases:

Marson v. Dadeland Rent-A-Car, Inc.,
408 So.2d 245 (Fla. 3d DCA, 1981)

Gould v. National Bank of Florida,
421 So.2d 798 (Fla. 3d DCA, 1982)

St. Pierre v. Public Gas Co.,
423 So.2d 949 (Fla. 3d DCA, 1982)

Cooper Transportation, Inc. v. Mincey,
459 So.2d 339 (Fla. 3d DCA 1984)

Smith v. Telophase Nat. Cremation Soc., Inc.,
471 So.2d 103 (Fla. 2d DCA 1985)

Keith v. Russell T. Bundy & Associates, Inc.,
495 So.2d 1223 (Fla. 5th DCA 1986)

This line of cases stands for the rule that remittitur is proper only when the damages are excessive and remittitur cannot be used to readjust the jury's negligence findings.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the Supreme Court or another district court of appeal on the same point of law. Art. V § 3(b)(3) Fla.Const. (1980); Fla.R.App.P. 9.030(a)(2)(A)(iv)

ARGUMENT

The decision of the Second District Court of Appeals in this case expressly and directly conflicts with the decisions of the following district court of appeals:

Marson v. Dadeland Rent-A-Car, Inc.,
408 So.2d 245 (Fla. 3d DCA, 1981)

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The decision of the Second District Court of Appeal in this case will materially and substantially affect every litigant in a negligence case in the State of Florida. Negligence actions are the most numerously litigated civil disputes.

Until this case, the law in Florida regarding remittitur and new trial has been clear. In 1983, the Third District Court of Appeal specifically addressed the issue in question.

In St. Pierre, a negligence action, the jury awarded the plaintiffs $308,806.16 in damages and assessed the plaintiff's comparative negligence at 20%. The trial judge conditioned the denial of a new trial upon the plaintiff's acceptance of a remittitur of damages based upon an increase of the comparative negligence factor from 20% to 50%. Citing Akermanis v. Sea-Land Service, Inc., 688 F.2d 898, (2d Cir. 1982) the Third District Court of Appeals held:

> We share the Second Circuit's view that the same rationale which prevents additur precludes any adjustment that extends a jury's finding, even if that extension results, as it does here, in a reduced monetary judgment. 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 by remittitur. Accordingly, the order granting a new trial is
>
> Reversed.

In 1986, the Third District Court of Appeals, again, specifically addressed the remittitur/new trial issue. Keith v. Russell T. Bundy & Associates, Inc., 495 So.2d 1223 (Fla. 5th DCA 1986) was a negligence action. The jury awarded plaintiff $200,000.00 in damages and assessed her comparative negligence at zero percent. The trial court felt that the jury should have found the plaintiff to have been one-third comparatively

negligent. Consequently, the trial court granted a remittitur of one-third of the damage verdict. The appellate court held:

> A trial judge may not use the device of a new trial order conditioned on a remittitur to increase a jury's determination of the plaintiff's contributing negligence. Cooper v. Transportation, Inc. v. Mincey, 459 So.2d 339 (Fla. 3d DCA 1984), review denied, 472 So.2d 1181 (Fla. 1985); St. Pierre v. Public Gas Co., 423 So.2d 949 (Fla. 3d 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. 3d DCA 1981). The rationale behind the rule which prevents the court's 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. Ackermanis v. Sea-Land Service, Inc., 688 F.2d 898 (2d Cir. 1982), cert. denied, 461 U.S. 927, 103 S.Ct. 2087, 77 L.Ed.2d 298 (1983). See also Ashcroft v. Calder Race Course, Inc., 492 So.2d 1309 (Fla. 1986).

In Smith v. Telophase Nat. Cremation Soc., Inc., 471 So.2d 163 (Fla. 2d DCA 1985), even the Second District Court cited with approval St. Pierre and Gould when it held that remittitur could only be used to cure an excessive damage verdict and not to adjust the liability findings.

Clearly, this case (Rowlands) cannot be reconciled with St. Pierre and Keith. The Second District Court of Appeal and the Third District Court of Appeal are now squarely opposed. This Honorable Court should accept discretionary review and quash the conflicting decision of the district court below.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing jurisdictional brief has been furnished to: Gerald W. Pierce, Esq., Post Office Box 280, Fort Myers, Florida 33902 by United States Mail this 28th day of April, 1988.

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