

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

MARGARET ROWLANDS and BRIAN
ROWLANDS,

Petitioners,

v.

SIGNAL CONSTRUCTION CO.,

Respondent.

FILED
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COURT
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CASE NO. 72,291

BRIEF OF RESPONDENT ON ISSUE OF JURISDICTION

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

Gerald W. Pierce
HENDERSON, FRANKLIN, STARNES & HOLT, P.A.
Attorneys for Respondent
Post Office Box 280
Fort Myers, FL 33902-0280
(813) 334-4121
Fla. Bar Atty. No. 27803

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STATEMENT OF THE FACTS AND OF THE CASE

Respondent, Signal Construction Company, disagrees with the Statement of the Case and Facts in the Petitioner's brief because it is not based on the opinion of the District Court of Appeal. It does not advise this Court of the basis of the District Court's decision.

In this negligence action, the jury returned a verdict finding the Plaintiff ten percent negligent and the Defendant ninety percent negligent, with total damages assessed at **\$295,450**. Rowlands v. Signal Construction Company, 522 So.2d 59, 60 (Fla. 2d DCA 1988). The trial court, on a motion for remittitur, found that the determination of comparative negligence and the finding as to damages were not supported by the manifest weight of the evidence. The trial court, however, determined that there was evidence which would support a finding of some degree of comparative negligence on the part of the Plaintiff and the Defendant. The Court ordered a remittitur or a new trial on all issues.

On appeal, the trial court's findings as to comparative negligence and damages were approved. The Plaintiffs argued that it was improper for the trial court to order, as an alternative to a remittitur, a new trial on all issues. The District Court agreed, and found that the trial court should have ordered a new trial only on the amount of damages and the percentages of comparative negligence of the parties.

On retrial, the trial court was directed to instruct the jury that it has been determined that both parties were to some extent negligent, and that the jury's duty would be to determine only the comparative negligence of the parties and the total damages suffered.

SUMMARY OF ARGUMENT

In order to establish conflict jurisdiction, the Petitioners have the burden of clearly showing that the District Court applied a rule of law to produce a different result in a case which involved substantially the same controlling facts as the two cases upon which they base their argument. The cases do not involve substantially the same controlling facts, and, in fact, one of the cases expressly distinguishes the instant situation. In the instant case, the trial court used remittitur to decrease a determination of damages when that determination of damages was not supported by the evidence. In the cases upon which the Petitioners rely, the trial courts use remittitur to increase a contributory negligence percentage. As noted in one of the cases, St. Pierre v. Public Gas Company, 423 So.2d 949 (Fla. 3d DCA 1982), the means by which the reduction is accomplished differ in a way that is critical to determining the lawfulness of the technique, even though both techniques have the same ultimate consequence.

ARGUMENT

THERE IS NO DIRECT AND EXPRESS CONFLICT
BETWEEN THE DECISION OF THE DISTRICT COURT
IN THIS CASE AND ANY DECISION BY ANOTHER
DISTRICT COURT OR BY THIS COURT.

Respondent initially points out that the portion of the District Court's opinion upon which the Petitioners rely to establish conflict is dictum. The trial court ordered a remittitur or a new trial. Since the remittitur was not accepted, a new trial was ordered. The District Court reviewed the order granting the new trial, and affirmed it except for a minor revision which did not involve the question of remittitur. Thus, if the remittitur was improper, as the Petitioner argues, it would make no difference as to result. If the remittitur was proper, there will be a new trial on damages and comparative negligence. If the remittitur was not proper, there will still be a new trial on damages and comparative negligence. The question of remittitur was rendered moot by the fact that the alternative order for a new trial was held to be proper.

Although the Petitioners do not explain the nature of the express and direct conflict upon which they rely for jurisdiction, it is clear from their argument that it is their position that the District Court of Appeal applied a rule of law to produce a different result in a case which involved substantially the same controlling facts as a prior case. See Quevedo v. State, 436 So.2d 87 (Fla. 1983);

Nielsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960). An examination of the cases upon which the Plaintiffs rely demonstrates that those cases do not involve the same controlling facts as the instant case. Although the Petitioners cite to six appellate decisions, including one decision by the Second District Court of Appeal, they argue only two decisions.

In St. Pierre v. Public Gas Company, 423 So.2d 949 (Fla. 3d DCA 1983), the jury returned a verdict finding the plaintiff twenty percent negligent and assessing damages at \$308,806.16. On the defendant's motion for remittitur, the trial court recognized that the total damages were not excessive. Nonetheless, the trial court conditioned the denial of a new trial on the plaintiff's acceptance of a remittitur of damages based on an increase of the comparative negligence factor from twenty percent to fifty percent. The Court held that remittitur may not be used to adjust the jury's finding in respect to the extent to which a plaintiff's own negligence contributed to his injury. The Court recognized a fundamental difference between the use of remittitur to decrease a determination of damages and its use to increase a contributory negligence percentage. Although both actions would have the same ultimate consequence of reducing the amount of the judgment that the plaintiff is invited to accept as the price of avoiding a new trial, the means by which the reduction is accomplished

differ in a way that is critical to determining the lawfulness of the technique. The question of apportioning the negligence between the Plaintiff and the Defendant is one that is peculiarly within the providence of the jury and is not subject to adjustment by remittitur. The Court also noted that the evidence clearly supported the jury's finding, and that it would reverse the order below on the separate ground that the trial court abused its discretion in granting a new trial. The order granting a new trial was reversed.

The differences between the controlling facts in St. Pierre and in the instant case are quite apparent. In St. Pierre, the trial court and the District Court recognized that the damages awarded by the jury were not excessive. In the instant case, the trial court and the District Court both recognized that the damages were excessive. In St. Pierre, the trial court was held to have abused its discretion in granting a new trial, since the evidence clearly supported the jury's finding. In the instant case, the District Court held that the granting of a new trial was proper. Most importantly, in St. Pierre, the trial court attempted to use the concept of remittitur in order to alter the jury's determination of the relative comparative negligence of the parties. As noted by the Court in St. Pierre, there is a fundamental difference between using remittitur to decrease a determination of damages and its

use to increase a contributory negligence percentage. In the instant case, remittitur was used to decrease a determination of damages where the damages award shocked the judicial conscience and was against the manifest weight of the evidence. The District Court in St. Pierre actually distinguished the instant situation by pointing out that reducing the verdict to decrease an improper damages award is correct, while using it to increase a contributory negligence percentage is incorrect. The instant case presents the former situation, while the St. Pierre court was faced with the latter situation. There is no conflict between the instant case and St. Pierre.

The Petitioners also rely upon Keith v. Russell T. Bundy & Associates, Inc., 495 So.2d 1223 (Fla. 5th DCA 1986) (Petitioners incorrectly indicate in their brief that the Keith decision was rendered by the Third District Court of Appeal). In Keith, the jury returned a verdict finding no comparative negligence and \$200,000 in damages. The trial court ordered a remittitur which reduced the damages award by one-third because the trial court felt that the jury should have found that the plaintiff was at least one-third comparatively negligent. As in St. Pierre, the District Court held that remittitur could not be used to increase a jury's determination of the plaintiff's comparative negligence. The remittitur of part of a recovery cannot cure a verdict which is contrary to the law,

and the apportionment of negligence is within the providence of the jury. The Court found that it was clear error for the trial court to reduce the verdict based upon the finding that the plaintiff should have been found negligent. As with St. Pierre, Keith is distinguishable because the trial court in the instant case did not attempt to apportion the negligence of the parties. In Keith, there was no indication that the damages award was excessive, while the concept of remittitur was utilized in the instant case for the purpose of reducing a damages award which was clearly excessive. Again, there is no conflict between the decisions.

An examination of the remainder of the Keith decision demonstrates the fact that the ruling of the trial court in the instant case regarding remittitur was rendered moot based upon the unquestionably proper order granting a new trial. In Keith, the Court went on to determine whether the alternative relief of a new trial was proper, and the Court found that there was no abuse of discretion in finding that the jury's determination was contrary to the evidence. Although the Court stated that it was affirming the granting of a new trial and reversing as to remittitur, it is clear that the reversal as to remittitur was rendered moot. Regardless of the Court's ruling on the question of

CONCLUSION

The Petitioners have not carried their burden of clearly establishing that the District Court applied a rule of law to produce a different result in a case which involves substantially the same controlling facts as the two cases upon which they rely. Respondent, Signal Construction Company, requests that review be denied.

Respectfully submitted,

HENDERSON, FRANKLIN, STARNES & HOLT, P.A.
Attorneys for Respondent
Post Office **Box 280**
Fort Myers, FL 33902-0280
(813) 334-4121
Fla. Bar Atty. No. 227803

By


Gerald W. Pierce

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to WILLIAM A. DONOVAN, ESQUIRE, 2664 Airport Road South, Naples, Florida, 33962, by regular United States Mail this 19th day of May, 1988.


Gerald W. Pierce

remittitur, the granting of a new trial was proper, and a reversal of the remittitur would have no effect upon the plaintiffs.