OA 12-6.88

IN THE SUPREME COURT

OF THE STATE OF FLORIDA

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MARGARET ROWLANDS and BRIAN ROWLANDS,

Petitioners,

v.

CASE NO. 72,291

SIGNAL CONSTRUCTION CO.,

Respondent.

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# RESPONDENT'S BRIEF ON THE MERITS

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

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## STATEMENT OF THE FACTS

Respondent, Signal Construction Company, objects to the Statement of the Facts contained in the initial brief of the Petitioners. The Statement of the Facts is both misleading and incomplete. This brief will refer to Respondent/Defendant Signal Construction Company as "Defendant," and it will refer to Petitioner/Plaintiff Margaret Rowlands as "Plaintiff."

The Defendant must correct a misimpression that may have been created by the Plaintiff's brief. Her brief attempts to make it appear that Defendant's workers were working on the sidewalk. Actually, the job was seven or eight feet from the sidewalk. (R **143**). The Defendant's truck was parked **50** to 60 feet from the sidewalk. (R **144**). Also, the Plaintiff inaccurately represents that it was company policy to post warning signs or barricades if the crew had materials on the sidewalk, citing to the record at **154-55**. (Brief at **13**). In fact., at that point in the record, it is simply established that the company puts out barricades or warning signs when it has something on **a** public sidewalk on which it is working. (R **154**). There is nothing in the record to indicate that it is company policy to place a barricade in front of a piece of rope which may have accidentally been dropped on the sidewalk. There is nothing in the record to indicate how the rope found its way

to the sidewalk. The record establishes only that the work site was not on the sidewalk. (R **143**).

The Plaintiff was riding a bicycle, following her daughter on another bicycle, when the accident occurred. (R **184**). Her attorney, in closing argument, admitted that the Plaintiff did not see the object on the sidewalk "... because her daughter was in front of her and she was not looking down at the sidewalk. She was not looking for obstructions on the sidewalk at all." (R **258**). The Plaintiff testified that she was riding along normally and that the accident occurred suddenly. (R **185**). She did not know what hit her. (R **185, 213**). She testified that she "crawled" back to the sidewalk, and then saw the cable and rope lying across the sidewalk. (R **187**). There is nothing in the record to indicate that she would not have seen the cable and rope if she had been watching where she was going.

Dr. Ertag testified about his examination of the Plaintiff. (R **419** et seq.). He testified that she was very vague about the type of injuries that occurred. (R **420**). He testified that she was under no stress, and that she was pleasant and cooperative. (R **430**). Her range of motion was essentially full in its mobility with some minimal resistance on extremes of rotation to the right. (R **430**). There was some tenderness about the right shoulder, but she had a full range of motion in the shoulders. (R **430**). There was no sign of chest wall limitation of movement.

**(R 430).** There was no tenderness where the ribs inserted into the chest wall. (R **430).** There was a normal range of motion in her legs and lumbar spine. (R **430).** There was mild tenderness over the lower lumbar spine region. (R **430).** There was no limitation of trunk rotation, although spasms were noted in the muscles along the spine. (R **430).** All of her limbs had normal strength, tone and range of motion. (R **430).** There was no numbness and no reflex change. (R **430).** Dr. Ertag testified that there were minimal objective findings in her back and neck. (R **450).** He testified that he thought that she had been injured in an accident, and that she was recovering from multiple soft tissue injuries which included a neck sprain and a low back sprain. (R **432).** He felt that she had some mild musculo-tension headaches. (R **432).** It was his opinion that she would have only minimal total impairment, if not a complete resolution of her symptoms. (R **433).** He saw no reason why there could not be a complete resolution of her symptoms. (R **433).** The examination revealed minimal findings. (R **450).**

Dr. Lowell was the Court-ordered independent medical examiner. (R **464).** Dr. Lowell testified that her examination, as far as he was concerned, was felt to be normal. (R **459).** He testified that he rather doubted that she sustained a significant injury. (R **457).** If he were

giving a disability rating, it would be nominal, if any. (R 458).

## STATEMENT OF THE CASE

In closing argument, the Plaintiff's attorney told the jury that he had listened to all three of the medical witnesses. **(R 261).** He stated as to one of the physicians, "I would give that man no credibility whatsoever." **(R 261).** In arguing damages, he made a classic "golden rule" argument in stating:

> What is it worth to know that you are going to get a headache on a regular basis for the rest of your life?
> **(R 269).**

More significantly, in rebuttal, Plaintiff's attorney argued:

> This is a big dollars case, a very serious injury case, where his doctor--he has a doctor who testified for another carrier six months after the accident and--
> **(R 269).**

At that point, the Defendant objected based upon the fact that counsel for the Plaintiff had pointed out to the jury that an insurance carrier was involved. (R **296-97).** The Defendant's motion for mistrial was denied. **(R 297).**

The jury then retired to the jury room, and returned with a verdict in five minutes. (R 310-11). The Court pointed out that the jury had neglected to fill in the amount of damages to be awarded. (R 311). The foreman of the jury advised the Court that he thought that the calculation of damages was to be performed by the Court and not by the jury. (R 311). The jury then returned to the jury room and returned almost immediately with the verdict

form completed. (R 312). The jury found that the Defendant was guilty of negligence which was a legal cause of injury to the Plaintiff. (R 313). The jury also found that the Plaintiff was guilty of comparative negligence. (R 313). The jury found that the Plaintiff was responsible for ten percent and that the Defendant was responsible for ninety percent of the damages. (R 313). The jury determined total amount of damages in the amount of $295,450. (R 313).

The trial court's ruling granting the motion for new trial was based on two separate findings. (R 327). The Plaintiff has confused matters in her brief by quoting only parts of the Court's reasoning out of context. First, the court noted that regardless of the Plaintiff's injuries, the conscience of the Court was shocked by the liability percentages. (R 327). The Court noted that in eight years on the bench, it had never granted a new trial or a remittitur. (R 327). After thinking about this case for some time, the Court simply felt that the verdict shocked its judicial conscience. (R 327). The second basis for the new trial was the fact that the Court found that the award of almost $300,000 under the circumstances was so far out of line that it would have to be reduced. (R 327). The Court noted the fact that the jury came back without filling in the blank for the amount, which was the first time that it had ever happened in that Court's experience. (R 327). The Court felt that the comment by Plaintiff's attorney relating

to the existence of coverage may have had something to do with the excessive verdict. (R **327-28**). The Court noted that the overwhelming amount of time spent on the damages at trial compared to the liability question just totally confused the jury, and that the jury's numbers came from the Plaintiff's attorney's chart exactly. **(R 328)**.

In its motion for new trial, or in the alternative, motion for remittitur, the Defendant had requested that the Court grant a new trial based upon the manifest weight of the evidence. (R **316**). It also asserted that the verdict exceeded the maximum limits of a reasonable range within which the jury may properly have operated, and requested that a remittitur be ordered as to that portion of the verdict which the Court deemed to be excessive. (R **316**). At the hearing on the motion, the Court first made it clear that it felt that the verdict was against the manifest weight of the evidence both as to percentages of negligence and as to damages. (R **327-28**). The Court stated that it would grant the motion. (R **328**). However, speaking to Plaintiff's counsel, the Court stated that it assumed that counsel would rather see a remittitur, at least to "... give [him] a shot at accepting something rather than just an outright new trial." (R **328**). The Court stated that as it understood the process, it would simply set a number for remittitur, and that if it was not accepted, a new trial would be granted. (R **328**). Plaintiff's counsel advised the

Court that its understanding was correct. (R **328).** Counsel for the Plaintiff did not object to the procedure in any way. (R **328).**

On appeal, the Second District Court of Appeal made an independent search of the record. (Opinion at **3).** The Court stated that its search of the record convinced it that the verdict was indeed contrary to the manifest weight of the evidence. (Opinion at **3).**

## SUMMARY OF ARGUMENT

The remittitur ordered by the trial court was a gift from the trial court to the Plaintiffs. The Court was going to order a new trial, but it told counsel for the Plaintiffs that the Court assumed that the Plaintiffs would prefer the option of a remittitur. The Plaintiffs certainly did not object, and counsel for the Plaintiffs expressly agreed with the manner in which the matter was handled. The Defendant does not and has not disputed the fact that the trial court improperly used the concept of remittitur. The Defendant also believes that the dictum in the District Court's opinion regarding remittitur is incorrect. In response to the Plaintiffs' motion for rehearing before the District Court, the Defendant specifically requested that that portion of the opinion regarding remittitur be stricken.

Remittitur is not a legitimate issue in this case. The remittitur was rejected by the Plaintiffs, so the only real question is whether the trial court abused its broad discretion in granting the motion for new trial. By rejecting the remittitur, the Plaintiffs rendered moot the question of the propriety of the remittitur. Instead of arguing the real issue in this proceeding, the Plaintiffs in their brief point again and again to the undisputed fact that the trial court should not have given them the option of accepting a remittitur.

As this Court stated in Smith v. Brown, 525 So.2d 868 (Fla. 1988), a trial judge can and should grant a new trial if the manifest weight of the evidence is contrary to the verdict, and, in making this decision, the trial judge must necessarily consider the credibility of the witnesses along with the weight of all the other evidence. A new trial should be ordered only when the manifest weight of the evidence dictates such action. However, when a new trial is ordered, appellate review is based upon the abuse of discretion test and not upon an independent review of the evidence for a second opinion as to whether the verdict was against the manifest weight of the evidence. In their brief, the Plaintiffs improperly request an independent review of the cold record for a third determination as to whether the verdict was contrary to the manifest weight of the evidence. They have ignored the fact that the mere showing that there was evidence in the record to support a jury verdict does not demonstrate an abuse of discretion.

Our legal system is a system of checks and balances, and the discretion afforded to a trial court judge in ruling on a motion for new trial based upon the manifest weight of the evidence is an important part of that system. The discretion does not allow the trial court to substitute its judgment for the judgment of the jurors. It simply recognizes that aberrations will occur on rare occasions, and that there must be a mechanism which corrects those

aberrations. The instant case presents one of those rare occasions where the jury verdict is an aberration. The price paid by the Plaintiffs in the instant case is that they must suffer the inconvenience of retrying the case for another day and a half before a different jury. If the Plaintiffs are correct in asserting that the original verdict was just, they should be able to obtain a similar verdict from the second jury. If they are incorrect as to the propriety of the original verdict, the aberration is removed by the new trial, a miscarriage of justice is thwarted, and the cause of justice is served.

The Plaintiffs' position is that a trial court may not grant a new trial where a jury has determined issues of comparative negligence in its verdict. The argument is based upon the claim that a trial court is forbidden to make a determination regarding the manifest weight of the evidence because the apportionment of negligence is a "pure fact issue." Obviously, juries determine only "pure fact issues." Any time a court reviews a record to make a determination as to whether the verdict is contrary to the manifest weight of the evidence, it is considering jury determinations of "pure fact issues." Juries do not determine legal issues or mixed questions of law and fact. The fact that the apportionment of negligence is a pure fact issue does not make it something more or less than any other jury issue. Contrary to the Plaintiffs' representations,

this type of situation has arisen in the past. See Russ v. Iswarin, 429 So.2d 1237 (Fla. 2d DCA 1983); Equitable Life Assurance Society of the United States v. Fairbanks, 400 So.2d 550 (Fla. 4th DCA 1981).

The only reversible error present in the instant case is seen in the District Court's mandate that the second jury be instructed that both the Plaintiff and the Defendant were to some degree negligent. The District Court misinterpreted the trial court's ruling. The trial court never determined that the finding of liability was not against the manifest weight of the evidence. The new trial should determine all issues without the limitation imposed by the Second District.

## ARGUMENT

THE TRIAL COURT PROPERLY ORDERED A NEW TRIAL IN THIS CAUSE WHEN THE JURY FINDINGS AS TO LIABILITY AND DAMAGES WERE CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE; THE DISTRICT COURT OF APPEAL PROPERLY HELD THAT THE TRIAL COURT HELD THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING THE NEW TRIAL.

The brief of the Plaintiff does not accurately advise this Court of the manner in which this case has reached its present status. The trial court did not try to force the Plaintiffs to accept a remittitur. In fact, the option of accepting the remittitur was purely a gift from the trial court to the Plaintiffs. The Court determined that the jury's findings both as to liability and damages was against the manifest weight of the evidence. A reading of the transcript of the hearing on the motion for new trial shows that the first inclination of the Court was simply to enter an order granting a new trial. The Court did not follow that inclination. It suggested to Plaintiffs' counsel that the Court suspected that the Plaintiffs would prefer the option of accepting a remittitur in lieu of a new trial. There was certainly no objection to this procedure by the Plaintiffs, since the option of accepting a remittitur was nothing more or less than a gift under the circumstances. In fact, counsel for the Plaintiffs expressly agreed with the Court that the procedure was proper.

PAGE(S) MISSING

The Plaintiffs' position is that a trial court may not grant a new trial where a jury has determined issues of comparative negligence in its verdict. The argument is based upon the claim that a trial court is forbidden to make a determination as to whether a verdict is contrary to the manifest weight of the evidence because the apportionment of negligence is a "pure fact issue." The obvious response to that claim is that the jury determines only "pure fact issues." Any time a court reviews a record to make a determination as to whether a verdict is contrary to the manifest weight of the evidence, it is considering jury determinations of "pure fact issues." Juries do not determine legal issues. Juries do not determine mixed questions of law and fact. The fact that the apportionment of negligence is a pure fact issue does not make it something more or less than any other jury issue.

The thrust of the Plaintiffs' argument is that there supposedly are no Florida cases where a jury verdict on the apportionment of comparative negligence resulted in the granting of a new trial. The Defendant suggests that the Plaintiffs overlooked an opinion authored by then-Judge Grimes in Russ v. Iswarin, 429 So.2d 1237 (Fla. 2d DCA 1983). In Russ, the jury returned a verdict which found the Plaintiff eighty percent negligent and the Defendant twenty percent negligent. The trial court granted a motion for new trial based upon the claim that the verdict was not

supported by the evidence. On appeal, the Defendants argued that the trial court improperly substituted its judgment for that of the jury in granting the motion for a new trial. The District Court of Appeal rejected the Defendants' argument, and stated:

> The trial judge was in a better position than this court to evaluate the evidence. It was not an abuse of discretion to conclude that the finding of Packer's 80% negligence and an absence of damages for Mrs. Packer was against the manifest weight of the evidence. Cloud V. Fallis, 110 So.2d 669 (Fla. 1959).

429 So.2d at 1240. In Russ, the trial court and the District Court of Appeal were presented with the same type of situation that is present in the instant case. In both cases, the jury determinations regarding apportionment of negligence were not supported by the manifest weight of the evidence. In both cases, the trial courts granted the Defendants' motions for new trial. In both cases, the appellate court found that there was no abuse of discretion in granting new trials based upon the fact that the verdicts were contrary to the manifest weight of the evidence.

The Plaintiffs also overlooked Equitable Life Assurance Society of the United States v. Fairbanks, 400 So.2d 550 (Fla. 4th DCA 1981). In Fairbanks, the jury found the plaintiff to be ninety percent negligent and the defendant ten percent negligent, and it awarded damages in the amount of $5,000. The trial court granted a motion for new trial

based upon a determination that the verdict was contrary to the manifest weight of the evidence. The trial court found that justice to all parties required that both liability and damages be retried. On appeal, the District Court held that the plaintiff had failed to carry the heavy burden of demonstrating an abuse of the trial court's discretion. The Court stated that it had to lend great creedence to the trial court's superior vantage point, since the trial judge was "on the scene familiar with the temperature and pulse of the trial." 400 So.2d at 553. The Court stated that although it may not agree, it could not state that the granting of the new trial was arbitrary, fanciful or unreasonable, or that reasonable minds could not differ on the issue. Id.

In Warn Industries v. Geist, 343 So.2d 44 (Fla. 3d DCA 1977), cert. denied, 353 So.2d 680 (Fla. 1977), the jury found that the plaintiff was fifteen percent negligent, and that the defendants were sixty percent and twenty-five percent negligent. The defendants moved for a new trial, claiming that the verdict was against the manifest weight of the evidence. The trial court denied the motion for new trial, and the District Court affirmed that denial upon appeal. The District Court did not state that it could not consider the question of whether the jury's determinations were against the manifest weight of the evidence. Instead, it looked to the record and found that it contained

substantial evidence from which the jury could have found as it found. 343 So.2d at 47. Similarly, in Florida East Coast Railway Co. v. Shulman, 481 So.2d 965 (Fla. 3d DCA 1986), the defendant moved for a new trial on the ground that the verdict was against the manifest weight of the evidence after the jury awarded $100,000 in damages, reduced by fifty percent for comparative negligence. The motion was denied, and on appeal, the District Court did not state that the trial court had no authority to make a determination as to whether the apportionment of negligence was contrary to the manifest weight of the evidence. Instead, it looked at the evidence and affirmed upon the basis that it could not say that a jury of reasonable men and women could not have returned the verdict. 481 So.2d at 967. See also Fitzgerald v. Fireman's Fund Insurance Company, 506 So.2d 1092 (Fla. 3d DCA 1987)(District Court refused to overturn denial of a new trial based upon manifest weight of the evidence where there was substantial competent evidence to support the verdict); McKenzie Tank Lines, Inc. v. Empire Gas Corp., 487 So.2d 1174 (Fla. 1st DCA 1986)(jury apportioned negligence of defendant at one hundred percent and awarded damages of $109,000, trial court denied motion for new trial based upon manifest weight of the evidence, and District Court affirmed upon the basis that there was sufficient evidence to support the verdict).

The Plaintiffs' brief is based upon a misconception of the purpose of a motion for new trial which is based upon a claim that the verdict is contrary to the manifest weight of the evidence. The Defendant does not dispute that a trial court does not sit as the seventh juror. In the instant case, the trial court did not substitute its judgment for the judgment of the jury. Instead, the trial court found that the jury's determination is contrary to the manifest weight of the evidence, and it ruled that the matter must be considered anew by a different jury. The trial court is substituting the determination of the new jury for the judgment of the old jury based upon the fact that the old jury verdict would have resulted in a clear miscarriage of justice.

The law in this area has recently been clarified by this Court's opinion in Smith v. Brown, 525 So.2d 868 (Fla. 1988). The Plaintiffs did not discuss Smith v. Brown in their brief. In Smith v. Brown, this Court reviewed the responsibilities of the trial court and the appellate court when facing a motion for new trial based upon the manifest weight of the evidence. It appeared that the matter reached this Court because of uncertainty as to whether a trial court could order a new trial when the credibility of witnesses is at issue. The jury must evaluate the credibility of any given witness, and the trial judge should refrain from acting as an additional juror. However, the

trial judge can and should grant a new trial if the manifest weight of the evidence is contrary to the verdict, and in making this decision, the trial judge must necessarily consider the credibility of the witnesses along with the weight of all the other evidence. A new trial should be ordered only when the manifest weight of the evidence dictates such action. However, when a new trial is ordered, appellate review is based upon the abuse of discretion test and not upon an independent review of the evidence for a second opinion as to whether the verdict was against the manifest weight of the evidence. The mere showing that there was evidence in the record to support the verdict does not demonstrate an abuse of discretion.

A review of the Plaintiffs' brief discloses that the Plaintiffs have not considered the proper standard for review of an order granting a new trial based upon the manifest weight of the evidence. Except in the final sentence in the Argument portion of their brief, the Plaintiffs never even assert that the trial court abused its broad discretion. Instead, they request this Court to make an independent review of the record and to make an independent determination as to whether the verdict was against the manifest weight of the evidence. The Plaintiffs have failed to recognize the fact that the mere showing that there was evidence in the record to support a jury verdict does not demonstrate an abuse of discretion. The Plaintiffs

also failed to acknowledge the fact that they were able to persuade the District Court to make an independent review of the evidence to determine whether the verdict was contrary to the manifest weight of the evidence. They failed to point out this fact because the independent review by the Second District Court of Appeal resulted in the conclusion that the verdict was indeed against the manifest weight of the evidence.

The discretionary authority of a trial judge in considering a motion for new trial does not allow him to enter a judgment for one or the other litigant or to deny a litigant a proper jury trial; it only allows the Court to grant another trial in order to correct mistakes or to avoid the problem that resulted in a miscarriage of justice with the first jury. Sosa v. Knight-Ridder Newspapers, Inc., 435 So.2d 821, 825 (Fla. 1983). In Sosa, this Court emphasized the fact that the trial judge is on the scene and can see, hear and observe all the participants in the trial. 435 So.2d at 825. The general rule is that a trial court's discretion to grant a new trial is of such firmness that it will not be disturbed except on a clear showing of abuse. Id. As this reasoning applies to the instant case, the trial court did not enter a judgment in favor of the Defendant based upon its view of the evidence. Instead, it simply granted a new trial in front of a new jury in order

to correct the miscarriage of justice which would have resulted from the jury verdict.

The opinion in Sosa cited with approval and quoted from the concurring opinion of Justice Overton in Castlewood International Corp. v. LaFleur, 322 So.2d 520 (Fla. 1975). In that concurring opinion, Justice Overton examined in detail the nature of this discretion afforded to a trial court in considering a motion for new trial. The reason for the discretionary power granted to the trial court is the fact that he is on the scene and can see, hear and observe all the participants in the trial. 322 So.2d at 523. The trial judge has a superior vantage point as compared to appellate judges who can review only a cold transcript. Where a trial court applies a rule of law such as ruling on a motion for a directed verdict, the appellate court may substitute its judgment for the judgment of the trial judge because the trial judge is not exercising its discretion. However, where the act of the trial judge is discretionary, the test of reviewability is entirely different. The granting of a new trial is a matter resting in the sound discretion of the trial judge, and his action thereon is not reviewable upon appeal except in the most exceptional circumstances. 322 So.2d at 524. Discretion is abused when the judicial action is arbitrary, fanciful or unreasonable. In other words, discretion is abused only where no reasonable man could take the view adopted by the trial

court. If reasonable men could differ as to the propriety of the action taken by the trial court, it cannot be said that the trial court abused its discretion. The essence of this Court's decision in Smith v. Brown, supra, is also found in that concurring opinion in Castlewood International.

Our legal system is a system of checks and balances, and the discretion afforded to a trial court judge in ruling on a motion for new trial based upon the manifest weight of the evidence is an important part of that system. That discretion does not allow the trial court to substitute its judgment for the judgment of the jurors. It does not deny any party the right to a jury trial. It simply recognizes that aberrations will occur on rare occasions, and that there must be a mechanism which corrects those aberrations. The instant case presents one of those rare occasions where the jury verdict is an aberration. The price paid by the Plaintiffs in the instant case is not that they cannot recover damages: instead, they must simply suffer the inconvenience of retrying the case for another day and a half before a different jury. If the Plaintiffs are correct in asserting that the original verdict was just, they should be able to obtain a similar verdict from the second jury. If they are incorrect as to the propriety of the original verdict, the aberration is removed by the new trial, a

miscarriage of justice is thwarted, and the cause of justice is served.

The trial court in this case did not grant the motion lightly. In fact, in eight years on the bench, Judge Brousseau stated that he had never granted a motion for new trial or for remittitur. Yet the circumstances of this case were sufficiently egregious for the Court to overturn the verdict on two grounds. The trial court found that the jury's verdict on the question of liability "shocked the judicial conscience" sufficient to warrant a new trial. It also implicitly found that the amount of damages was so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly have operated. See Bould V. Touchette, 349 So.2d 1181 (Fla. 1977).

The trial court found that the jury's decision on the question of liability shocked the judicial conscience. The jury found that the Defendant was ninety percent negligent and that the Plaintiff was ten percent negligent. In this case, the Plaintiff was riding her bicycle, and she admittedly was not watching where she was going. It appears to be her position that she was riding so close to the rider ahead that she could not look down. She has not claimed that the obstruction was invisible or hidden in any way. In fact, the rope or rope/cable was clearly visible. The Plaintiff's daughter had no problem riding over them or

avoiding them. The daughter apparently did not consider the hazard sufficiently dangerous to warrant a warning to her mother. Immediately behind the daughter, the Plaintiff was riding her ten speed bicycle, and she was paying no attention whatsoever to the surface of the sidewalk. She simply assumed that since there had never been obstructions on the sidewalk in the past, there would never be any obstructions. Yet, the sidewalk was immediately adjacent to a well-traveled street. Bottles and cans doubtessly are thrown upon the sidewalk from passing vehicles. Debris doubtessly blows off passing trucks on occasion. These facts are simple and universally known.

The finding by the jury that the Plaintiff was only ten percent responsible for the accident is nothing less than outrageous. It was a reflection of the attitude that no one is responsible for his own actions, It is a reflection of the attitude that a person can go through life ignoring his own safety, and simply sue innocent bystanders if and when an accident occurs. The primary, if not the sole, proximate cause of the accident is manifest. The Plaintiff was operating her bicycle and she was not watching where she was going. If she had seen the clearly visible object/objects, she would have avoided them just as her daughter avoided them. A finding that she was only ten percent responsible for her own disregard for her personal safety under the circumstances properly shocked the judicial conscience, and

prompted the new trial order. If reasonable men could differ as to the propriety of the trial court's actions, there was no abuse of discretion. In the instant case, the trial court properly found that the jury's verdict was manifestly unjust. The District Court has determined that the trial court did not abuse its discretion. The Plaintiff will have another opportunity to prove her case before another jury.

In their brief, the Plaintiffs mistakenly represent that the trial court was concerned solely with the percentages of liability rather than the amount of damages in granting the motion for new trial. (Brief at 22). To the contrary, the Court discussed the excessiveness of the damages more than it discussed the apportionment of negligence. (R 488-89).

The trial court over the years has seen many soft tissue injury cases. It was well acquainted with what juries find in southwest Florida in such cases. It also was quite familiar with the Plaintiff's treating physician, Dr. Hussey and with Dr. Hussey's credibility. In this case, the trial court found that almost $300,000 was so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may have operated. The Court was particularly concerned with the fact that the Plaintiff's attorney advised the jury in closing argument that an insurance carrier was the real party in interest.

The Court may also have been concerned with the attorney's blatant golden rule arguments. The Court also noted the fact that the jury came back without filling in the blank for the amount of damages and the fact that the jury had misunderstood the instructions to the extent that it thought that the Court would "calculate" the damages.

Trial courts are given the discretion to award new trials in cases such as this case. Based upon years of experience ,the trial court recognized that this verdict was an aberration, and that it far exceeded the range within which the jury could reasonably have returned a verdict. The Plaintiff will have an opportunity to argue her damages before a new jury, and that jury's determination hopefully will not be an aberration.

## CONCLUSION

The trial court did not abuse its broad discretion in determining that the jury verdict was against the manifest weight of the evidence both as to liability and as to damages. The trial court's error in giving the Plaintiffs the remittitur option was both invited and harmless. The trial court did not make a determination that the jury verdict finding liability was not against the manifest weight of the evidence. The District Court improperly determined that the new trial should be limited to damages and apportionment of comparative negligence. Respondent/Defendant Signal Construction Company requests that the decision of the District Court be affirmed, except those portions of the opinion regarding remittitur and regarding limiting the new trial to damages and apportionment of negligence should be stricken.

Respectfully submitted,

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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 27th day of October, 1988.

Gerald W. Pierce