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' REPLY BRIEF ON MERITS

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

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ATTORNEYS FOR PETITIONERS

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STATEMENT OF THE FACTS

The Respondent's Statement of the Facts should be rejected since it fails to specify areas of disagreement with the facts as stated by Petitioner. The only area of disagreement referenced in Respondent's statement is an attempt to correct an alleged misimpression that the Respondent's employees were "working on the sidewalk" on which Mrs. Rowlands was travelling. The alleged factual disagreement does not exist. Petitioner recognizes that the Respondent was working on interconnecting traffic signals on Goodlette Road, near the sidewalk. A factual dispute existed at trial as to whether Signal left its rope and/or cable on the sidewalk. Respondent now concedes that its rope was on the sidewalk, but implies that it does not know how the rope got there. This is contrary to the jury's finding of liability against Respondent, which demonstrates the jury's rejection of Respondent's testimony. This testimony was also rejected by the Trial Court in its new trial order since the Trial Court inherently found Respondent negligent. Respondent could not have been found liable to any degree, or in any amount if it did not do some negligent act such as leaving its rope and/or cable on a public sidewalk without adequate warning of the hazard thereby created.

Respondent argues that its company policy regarding placement of orange cones or warning signs on public sidewalks was not applicable to the facts of this case. The following testimony of Don Lee Copeland, President of Signal Construction Company, Inc. rebuts this argument:

Q. (BY MR. RUBY) The question is, is there any particular procedure in your company to safeguard the public when your crews leave objects on the public sidewalk?

A. When we encroach the public right-of-way?

Q. Yes.

A. Yes, sir.

Q. What would that be?

A. Well, to protect the public, to insure their safety, we use cones and barricades.

Q. In other words, if you have got something on the sidewalk you would use barricades and cones to notify the public?

A. Right. In the event of pedestrian traffic we would probably just use the cones.

Q. What is a cone?

A. It is an 18-inch conal shaped object, it is fluorescent orange, and it is used to detour traffic.

Q. Why would you put those down?

A. Obviously to safeguard the public.

[R. 134].

The following testimony was elicited from Mark Roberts, one of the employees at the scene at the time of Mrs. Rowlands' accident:

Q. (BY MR. RUBY) Assuming there is something on a public sidewalk that you folks are working on, or you have objects one, or you have materials on, does your company generally put out any type of barricades or warning signs?

A. Generally, yes.

Q. Always?

A. It would depend on different things. Are you saying a public sidewalk?

Q. Yes, sir.

A. A public sidewalk being used?

Q. Yes.

A. Yes.

Q. That is always is it not?

A. Right.

If Respondent's employees left rope or cable on the public sidewalk, then warning signs should have been placed on the sidewalk. This is the plain and simple testimony of Respondent's own representatives. Their defense at trial was not that they did not have to warn the public under these circumstances, but that they had left nothing on the sidewalk to warn against.

Respondent reargues the question whether Mrs. Rowlands should have seen the rope. Again, this issue must be viewed in the light most favorable to the jury finding. The jury's allocation of 10 percent negligence to the Plaintiff and 90 percent to Defendant clearly states that Mrs. Rowlands' failure to observe the rope was far less culpable then the Defendant's act in leaving it on a public sidewalk in the first place. The jury used its common sense to find that Respondent's negligence in creating the hazard was far greater than Mrs. Rowlands' negligence in failing to be on the alert to avoid it.

Finally, Respondent presents the testimony of its two medical expert witnesses, apparently arguing that their testimony should have been given greater weight that Mrs. Rowlands' own treating physician, who assigned an 80 percent impairment rating. The jury clearly rejected the testimony of Respondent's doctors.

STATEMENT OF TEE CASE

The attorneys for both the Plaintiffs and the defense in this case commented upon the credibility of the witnesses. There were no objections to these comments, and the Trial Court's order granting a remittitur or in the alternative new trial was not addressed to any alleged harmful error arising out of these comments. Likewise, the alleged "golden rule" argument was not the subject of any objection, and is simply too nebulous to deserve comment in this forum, or to serve as the basis for a new trial.

The reference to "another carrier" is, at best, harmless error. The Respondent brought out the existence of insurance coverage (R. 133), as well as the existence of the PIP insurance carrier, both in the cross examination of Mrs. Rowlands' and in Dr. Ertag's testimony. (R. 228). Respondent refused the Court's offer to give a curative instruction on the reference to "another carrier". The Trial Judge did not find that this statement was harmful error or had any affect on the jury's deliberations. At

the time of the statement, he obviously felt it was not prejudicial since he denied the Respondent's motion for a mistrial.

Although the jury did fail to fill in the total damages amount on the verdict form during its first deliberations, the Trial Judge properly advised the jury, without objection, to continue its deliberations and determine the amount of damages to be awarded. (R. **311-12).** The Respondent did not move for a mistrial at that time or otherwise indicate that this misunderstanding tainted the jury's deliberations. The jury did deliberate further and determined that Margaret Rowlands' damages were **$250,000.00,** and Brian Rowlands' damages were **$45,450.00.** The jury was polled, and each juror indicated its concurrence with the verdict. The Trial Judge asked an additional clarifying question as follows:

> (THE COURT): Due to the earlier oversight, I am going to ask one additional question just so no stone is left unturned.
>
> You have got **10** percent and **90** percent, was it your intention to tell the Court that the Defendant, Signal Construction Company, Inc., was 90 percent responsible for this incident and that the Plaintiff, Margaret Rowlands, was **10** percent responsible?
>
> (The Jury as a whole nods).
>
> [R. **314-15].**

As to the Plaintiff's counsel's lack of objection to the remittitur, this Court should review the record at pages **486** and **487.** The Plaintiff's attorney argued against the remittitur, the Court then ruled that it would grant the motion for remittitur or

new trial. No further objection is necessary or permissible after the court has made a ruling, and the further discussion as to the procedure for entering the remittitur was not in any way a concurrence with the Court's ruling. The Plaintiff's objected to the remittitur order, argued against it, refused to accept the remittitur, appealed the remittitur order to the Second District Court of Appeal, and now brings it before this Court for review. To say that there was no objection to the remittitur is a gross distortion of the record.

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.

The Respondent, not Petitioners, requested the Trial Court to order a remittitur. The Respondent filed a motion for remittitur or in the alternative, new trial. The Petitioners argued vigorously against this motion, but the Trial Court ordered a remittitur to $25,000.00, and in the alternative, new trial. Given this history of the case, Respondent's characterization of the remittitur as a "gift" is unacceptable.

There was no finding by the Trial Court that the determination of Defendant's negligence and consequent liability for the accident was against the manifest weight of the evidence. The Trial Court disagreed, rather, with the percentages of negligence assessed by the jury. The Second District also

concluded that the Trial Judge "necessarily found the evidence sufficient to support a finding of some degree of comparative negligence" on the part of Respondent. (A-4).

The Petitioners' position is not properly stated by Respondent. The Petitioners' position is not that the Trial Court may not grant a new trial where a jury has determined comparative negligence in its verdict. Rather, Petitioners' position is that the Trial Court did not observe proper legal standards in setting aside the jury's determination of purely factual issues.

A determination that a jury verdict is against the manifest weight of the evidence is a question of law and not fact. The Trial Court's order of remittitur/new trial is subject to evaluation based on the standards of review established by this Court. Those standards were established in Wackenhut Corporation v. Canty, 359 So.2d 430 (Fla. 1978). In that case, the issue was the trial court's ability to order a remittitur of a punitive damage award he felt was excessive, where there was evidence in the record to support punitive damages:

> When claims for punitive damages are made, the respective provinces of the court and the jury are well defined. The court is to decide at the close of evidence whether there is a legal basis for recovery of punitive damages shown by any interpretation of the evidence favorable to the plaintiff. ...Once the court permits the issue of punitive damages to go to the jury, the jury has discretion whether or not to award punitive damages and the amount which should be awarded. Punitive damages are 'peculiarly left to the discretion of the jury...'.

> Since the degree of punishment to be inflicted on the defendant is peculiarly within the province of the jury, courts will hold punitive damages excessive only in unusual circumstances. 359 So.2d 435-36. (Citations omitted).

The court therefore held that before a remittitur or new trial order may be entered, "the record must affirmatively show the impropriety of the verdict or there must be an independent determination that the jury was influenced by considerations outside the record." Id. at 436-37. The court determined that the trial judge in that case acted as a seventh juror with veto power, and therefore had improperly invaded the province of the jury by entering the remittitur/new trial order.

The assessment of comparative fault, like the assessment of punitive damages, is peculiarly within the province of the jury. Akermanis v. Sea-Land Service, Inc., 688 F.2d 898 (2nd Cir. 1982); St. Pierre v. Public Gas Company, 423 So.2d 949 (Fla. 3rd DCA 1982); Tyus v. Apalachicola Northern Railroad, 130 So.2d 580 (Fla. 1960). Therefore, given the sufficiency of the evidence to support some degree of negligence against Respondent, the Trial Court clearly invaded the province of the jury by setting aside the verdict because it felt the percentages of negligence assessed were improper. The opinion of the Second District conflicts with the above cited cases, and other cases cited in our Initial Brief, insofar as it finds that

> [R]emittitur 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 effect of the Trial Court remittitur order was to reverse the jury's assessment of 90 percent negligence against Respondent and 10 percent against Petitioners, to make Petitioners 90 percent responsibly negligent, and Respondent only 10 percent negligent. It is the Petitioners' position that in doing so the Trial Court invaded the province of the jury, but if this Court determines that the Trial Court may adjust the percentages of liability by way of remittitur, this Court should resolve the current conflict in the district courts, and establish the legal standard for making such an adjustment.

Respondent relies upon Russ v. Iswarin, 429 So.2d 1237 (Fla. 2nd DCA 1983) as providing support for the Trial Court's order, and the Second District opinion in this case. The facts of that case are entirely distinguishable from the instant case, but even if that case provides support for the result below, it only adds to the conflict among the District Courts of Appeal and to the confusion surrounding this legal issue. The other case relied upon by Respondent, Equitable Life Assurance Society of the United States v. Fairbanks, 400 So.2d 550 (Fla. 4th DCA 1981), demonstrates only a proper trial court order finding that the jury was influenced by matters outside the record, and therefore presents no support for the result in this case.

Petitioners do not question the discretionary authority of the Trial Judge in entertaining a motion for new trial. However, as shown in Wackenhut v. Canty, supra, the Trial Court's superior vantage point does not give him unbridled discretion or insulate him from appellate review. The new trial order must meet the legal standards established by this Court, and those standards have been quite high when the Trial Court interferes with matters peculiarly within the province of the jury. This is not to say that the standards for review of a remittitur/new trial order are without confusion, see e.g., Montgomery Ward & Co., Inc. v. Pope, ___ So.2d **13** FLW **2189** (Fla. 3rd DCA, Case No. **87-1537,** Sept. **20, 1988).** **As** Chief Judge Schwartz observed, Smith v. Brown, **525** So.2d **868** (Fla. **1988),** relied upon by Respondent, has added to rather than alleviated the confusion among the District Courts. The instant case provides an appropriate opportunity to establish the respective provinces of the court and the jury in comparative negligence cases.

CONCLUSION

Petitioners request this Court to reverse the Order of the Second District Court of Appeal which affirmed the Trial Court's remittitur or new trial order, and to reinstate the jury verdict below.

Respectfully submitted,

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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 18th day of November, 1988.

ATTORNEY